A Limited Political Obligation

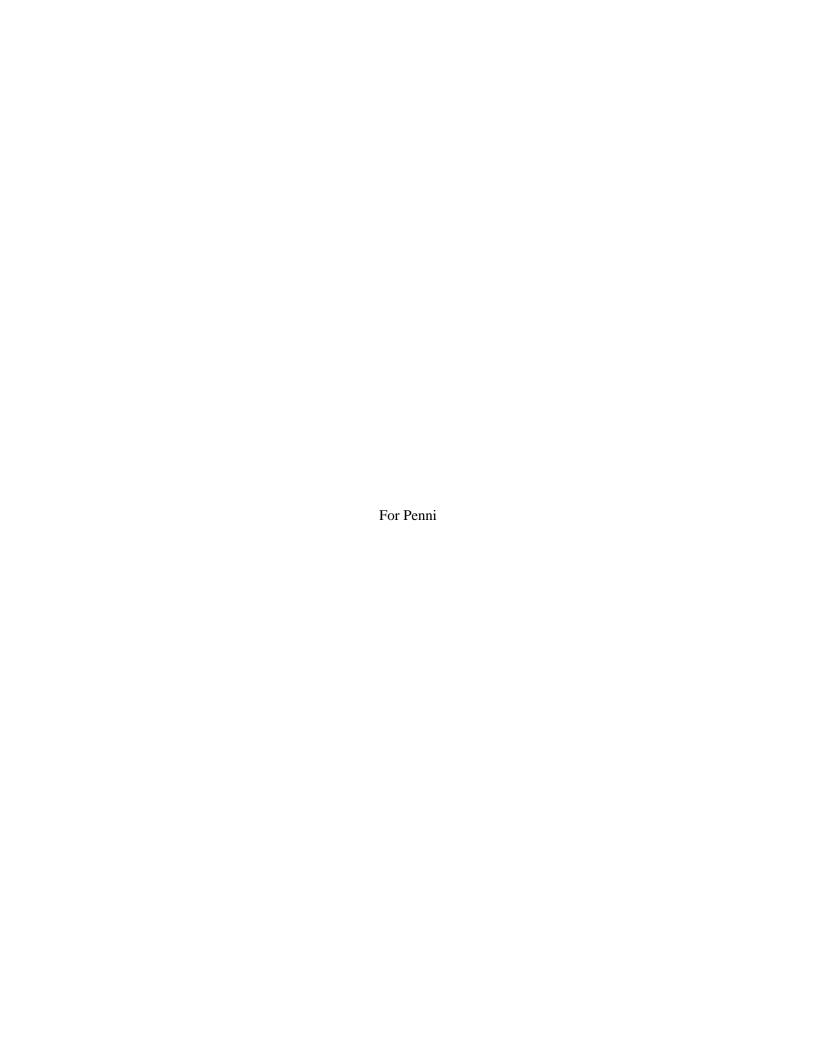
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Introduction

This project is about political obligation. More accurately, it is about the duty to obey the law along with its implications for and relations to other rights and duties that exist between states and their subjects. A natural response to such a project is, "After over two millenia of debate on the topic in all its variety of forms, haven't we said enough about political obligation?" In short, the answer is "No, we have not." But understanding that we have not said enough about it is insufficient for understanding where there is more to say.

I begin with the observation that the question whether we have said enough about political obligation is equally as likely followed by one of two further questions. Some may ask, "Hasn't it been shown that all our traditional moral bases fail to support any actual political obligation to one's own state?" While others will complain, "Shouldn't we at some point look to those bases that have survived decades (or millennia!) of scrutiny as at least plausible supports for political obligation and ignore lingering skeptical doubts about it?" The fact that such questions may be asked is of merely empirical significance, but the labyrinth of philosophical concepts and arguments from which they are born offers us a source for renewed, continuing and revisionary discussion about political obligation.

So why is political obligation important? I give three reasons that motivate my project in particular with the belief that there are numerous other compelling reasons for exploring the broader topic. First, though common sense intuitions about the authority of political entities are of limited importance in establishing that there is such authority, they still cry out for explanation. It appears that most citizens view the commands of their states as authoritative in a morally effective way (in addition to the fact that political entities speak and act as if they are entitled to obedience). In other words, in some

¹ Among many others, see Simmons (1981; 2001); Buchanan (2002); Raz (1986)

² Examples are too numerous to cite. For example, though, Mark Murphy writes, "Critics of consent theory could reject [my] claims...But while these claims are controversial, they are not implausible." (342)

very loose sense, subjects (and their states) believe that they ought to do what the state commands. Even if, after philosophical reflection, we determine that there is no political obligation (or no interesting one), we should talk about the various ways in which the intuitive view goes wrong. It may be that there is a kernel of truth in what citizens say about their state, even if it is easily misunderstood or misrepresented. In addition, even if common sense intuitions are of limited importance in establishing the existence of legitimate authority, they cannot be completely discounted in contexts where one's individual moral duties are affected by the likely actions of great masses of people who may share the intuition. This is particularly true in coordination problems or prisoner's dilemmas where the rationality or permissibility of action is dependent on the expected actions of others.³ If people are likely to act in accordance with their beliefs, then others' beliefs about the state are morally important for us.

Second, there is a tendency in the literature to speak as if the political obligation of subjects is coextensive with the *de facto* political power of their state. In other words, political obligation, much like the factual range of commands given by contemporary political entities is robust because it is comprehensive (i.e., covering a wide range of human activity), general (i.e., binding on all or most subjects), universal (i.e., binding for all or most of the law), and content-independent (i.e., binding because it is commanded and, within limits, regardless of its content). Recent literature has begun to explore the possibility of a separation of the commands of the state from the subjects' obligation to obey it. However, there remains much fertile ground worth exploring about the nature of the rights of the state and the corresponding duties of subjects. In addition to straightforward analysis of how we might conceive of "authority" on less traditional models, it is worthwhile to take a step back and assess the implications of our new understanding. In what ways has the traditional discussion about political obligation been misleading? If political obligation is more complicated than our robust traditional conceptions, is it too unwieldy to be of any use to common subjects? How do our duties to obey interact

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³ There is, of course, extensive discussion about such issues in response to Raz. I deal with some of these later.

⁴ Virtually any analysis of political obligation, for or against, will contain references to some or all of these in as necessary conditions of an adequate account of political obligation.

⁵ See for instance, Smith (1999); Buchanan (2002); Huemer (2012); Edmundson (1998)

with our other moral duties, especially if there is a possibility of conflict? None of these questions is easy to answer, but to even begin to formulate answers requires productive discussions of more complex versions of political obligation.

Finally, traditional moral bases still have a lot of mileage left, even if only through more "creative" uses of them. If we grant that skeptical (often anarchist) criticisms of traditional models of political obligation succeed in their demolition of such theories, we may still find it worthwhile to pick up the pieces instead of wiping the table clean. On the assumption of such failure, we must still acknowledge that, though the tools on which traditional models were built have failed to bring the extensive political obligation we expected, the tools may be able to bring us something of interest. They may even be able to bring us *much* of interest that we would otherwise neglect in the face of disappointment over our original projects. Thus, I claim that we have a lot to work with, even if the traditional *uses* of the moral tools at play in discussions of political obligations are worn out and ineffective.

1. Background: The Traditional Discussion

I pick out two threads in traditional discussions of political obligation—consent and natural duty—which offer versions of voluntaristic and nonvoluntaristic sources of obligation respectively. I do this for two reasons. First, these moral sources of obligation have shaped and inspired defense and criticism that influences a great number of political theories⁶. Indeed, the incredibly influential tradition of social contract theory brings these features out in ways that place them at the forefront of discussions of political obligation. They are easily among the most important types of purported moral sources of political authority. There are, of course, a great number of other moral sources for political authority and obligation. I do not neglect these entirely, but, for various reasons, my discussion of them may be limited.

 $^{\rm 6}$ For example, contrast, among many others, Stilz (2009) and Simmons (2005).

This brings us to the second reason I have chosen to characterize the traditional discussion in relation to these two moral sources. The focus of my project is an attempt to understand the ways in which we might navigate our way past the biggest problems for theories based on these two moral sources. As such, it is inescapably focused on the reasons why consent and natural duty have been seen to fail as sources of political obligation. It is to these reasons for failure that we must now turn.

Consent theory has a long and rich history. Most often philosophers in this vein appeal to features of consent that are utilized in the work of John Locke. Some take his ideas about tacit consent and further articulate or improve upon his description of its role as the foundation of political authority. Others begin with his description of natural rights in a state of nature and show the need for such authority over us as established by our consent. Still others have stretched the notion of consent to be hypothetical in that, though it does not actually occur, the circumstances are such that either it would have occurred were choices offered to reasonable choosers or else we can reasonably act as though it had occurred due to presumed self-interest or duty. None of these attempts have yet escaped a fundamental problem.

The problem is that consent, if it generates political obligation at all, does so with very limited application over the population of subjects under the state. In other words, consent-based political obligation is not general. This problem arises because, according to the most damaging criticisms, very few subjects have given *express* consent to the state and even the most compelling models of *tacit* consent fail to capture the relationships between most subjects and their states. Thus, even though consent is often viewed as an effective way in which people can be morally bound to obey their states, most people are not so bound simply because they do not consent. I take the problem of generality to be the fundamental problem for consent-based theories of political obligation.

⁷ Otsuka(2003)

⁸ Nozick (1974)

⁹ Rawls (1999); Estlund (2008)

¹⁰ Simmons (1981) is still widely acknowledged as having given one of the most scathing critiques of consent.

Natural duty comes in many forms. Most natural duty theorists understand duties in a very broad sense—not, for example, as an indication of their correlation to rights in the natural rights tradition. Most often natural duties are those that we could identify before or without the establishment of the state. ¹¹ There need be no deep metaphysical basis for these duties. They are those to which we might appeal in our everyday interactions with others, even if in some cases they are not apparent or are disputed. Given the nature of natural duty, these accounts can come in a wide variety of forms. We might have a duty to support just institutions or to act justly, we might have a duty to aid those who are vulnerable, or we may have a duty to offer guarantees that we will not interfere with the rights of others. ¹² In any of these cases a broad natural duty supposedly entails a duty to obey the law.

However, natural duty accounts suffer from problems of a very different nature from consent. They are best characterized in A. John Simmons as three distinct but related problems. First is what Simmons calls the Particularity Problem. He claims that none of the bonds created by natural duty accounts "would be a political obligation in the right sense, for none of the principles under which these bonds fall is 'particularized.' By this I mean that under these principles an individual may be bound by one moral bond to many different governments." The problem is that even if natural duty accounts can show that there is some moral requirement toward just states or those that serve some other moral purpose, there is no way to tie these moral requirements to the duty holder's own state. I might have a duty to support just states, but this does not entail a duty to support my just state. But the duty to obey the law is supposed to be a straightforward duty to comply with my state's commands over me. There seems to be no morally relevant respect to which the state's claims to authority over me indicate an actual authority over me. Thus, morally speaking, we are left with quite a few options in terms of what state morally binds us. Perhaps all just states bind us or only those we choose to support.

¹¹ The most notable exception to this conception is found in recent Kantian literature (Stilz (2009) and Ripstein (2009)). Though on some understandings, their views can be characterized as natural duty accounts, they deny this.

¹² And, of course there is much more. Among them are gratitude and respect as well. Some (cf. Simmons (2005)) take utilitarian models to be natural duty accounts.

¹³ Simmons (1981), 31

This is most clearly seen in relation to certain Kantian views, such as those defended by John Rawls and Jeremy Waldron. Both appeal to the fact that some moral or legal principles apply only to particular classes of people. We ought to promote justice by promoting the political institutions that apply to us in this way. According to Waldron, for example, the range of a moral principle that governs political matters is defined according to a Kantian principle by the proximity of threat that individuals pose to those around them. I ought to comply with the states directives as uniquely applying to a range-limited class of individuals, including myself. However, Simmons reminds us that proximity of threat does not align well with political boundaries. If I live close to the border of Canada, then I probably pose more of a threat to those Canadians in the next town than to those Americans who reside on any of the Hawaiian Islands. Thus, on the basis of natural duties of range-limited application, I might owe obedience to multiple or foreign governments.

A second problem is the Boundary Problem. Simmons describes this as the problem of providing an argument that draws the "boundaries" of political obligation, political authority, and territorial sovereignty in the correct place.¹⁴ The authority of the state should cover all and only those who are plausibly its subjects. The heart of his objection to certain natural duty accounts is that they are "functionalist" or "structuralist" in nature. A functionalist/structuralist account is any account "that grounds the state's legitimacy in its successful performance of its morally mandated functions, or that grounds its legitimacy in the structure of its basic institutions." 15 More importantly, according to Simmons, functionalist/structuralist accounts ignore considerations of history that, he believes, affect the rights of the states regardless of their effectiveness in fulfilling any function or having the right structure. The most obvious instance of this is in cases of illegitimate invasion of a territory by an aggressive state. The problem is just that, once the state has invaded, the justifiability of its invasion or the fact that it has wronged anyone in doing so has no bearing on whether the aggressive state has authority over its newly conquered territory. It has authority as long as it performs its morally mandated functions.

¹⁴ (2013), 4 ¹⁵ Ibid. 1

Finally, natural duty suffers from what I will call the Derivability Problem, which Simmons levels at natural duty accounts, though he does not give it an explicit formulation. The problem is just that, even if we grant that from natural duties we can derive more specific duties in relation to the state, these more specific duties fall short of a duty to obey the law. For example, G.E.M Anscombe promotes a natural duty theory from necessity. She claims that obedience is necessary for the effective accomplishment of the state's morally required tasks. Thus, since the state needs obedience to perform its tasks, we are obligated to give it our obedience. The problem with this kind of view is that the state can easily garner a sufficient level of obedience by making threats of coercion over its people. If this is true, it is highly unlikely that any one particular individual's disobedience will affect the state's ability to accomplish its tasks. I will develop the Derivability Problem further in Chapter 4.

There are many purported sources of political obligation beyond what I have given here (e.g., communitarian, fair play, utilitarian, etc.). Some I will give greater treatment, such as the moral duty of fair play. But the groundwork has been laid to understand the major problems that have arisen for the sources of political obligation that are of central concern in this project. Insofar as some of the other sources (e.g., fair play) come in to the discussion, they will be understood to escape or fall victim to these traditional criticisms to which the most influential theories of political obligation are susceptible.

Part 1: New Theories

It is no surprise that in the face of incorrigible problems for accounts that rely on traditional moral sources of political obligation, there have arisen new and creative uses of these moral sources (often in concepts that combine features of different moral sources) as well as interesting alternatives that stand in some relation to them. The first half of this project is devoted to addressing some of these new accounts of political obligation. My goal is two-fold—to criticize these accounts as susceptible to new or enduring

problems and to glean from them lessons about how and to what extent we are capable of using the tools they use.

First is a view that explicitly combines the two strains of morality that I highlighted above. David Estlund uses consent and natural duty together (in what is essentially a natural duty account that uses the moral mechanisms of consent) in the form of what he calls "normative consent." This concept is both common in moral experience and a natural extension of some more traditional models of political obligation. The idea is that there are some instances, bolstered by analogy to common moral experience, where a person might be *morally required to consent* to an arrangement. It is easiest to imagine cases of normative consent where one is obligated to consent to some arrangement based on past consent to a more general arrangement. I might consent to a scheme of mutual lawn tool lending with my neighbors. When I do this, I take on an obligation to consent to some further arrangement. I may, for example, discharge my duty by agreeing to lend my next door neighbor my hedge trimmer next Saturday morning.

Do cases of normative consent arise without my prior consent to a more general scheme? Might I be required to consent to an arrangement because a simple natural duty requires me to do so? David Estlund believes so, and he argues that the existence of a democratic government provides just the kind of natural duty that requires our consent to obey its commands. I argue in Chapter 1 that normative consent is unsuccessful in establishing political obligation. I acknowledge that cases of normative consent may arise in many moral contexts, but these are not analogous to the political environment.

Despite its failure, normative consent brings out interesting questions about the tension between voluntary action and requirement. The appeal to normative consent is Estlund's way of capturing the general (i.e., applying to all or most) nature of natural duty requirements (which, recall, is the chief deficiency of consent), and the particularized moral bond of consent (which is one of the chief

¹⁶ See Murphy (1999)

deficiencies of natural duty). We might wonder, then, if there are other sources of moral obligation that straddle the fence between voluntary action and requirement.

Fair play is just such a source. Traditionally, from H.L.A. Hart and John Rawls, it is conceived as a type of duty that requires everyone who benefits from cooperative schemes (which may include political organizations), in fairness to those who contributed to that scheme, to contribute their fair share. 17 Though there is a long and well-documented debate over fair play, I am interested in the extent to which contemporary developments of the original idea rely on voluntary action or requirement. For example, George Klosko cites the importance of the benefit received from a cooperative scheme as the primary reason for our obligation to contribute our fair shares at least for cooperative schemes that are political in nature. Certain presumptive benefits generate an obligation out of fairness from any who receive them. Do the benefits generate obligations because we morally ought to produce them (for ourselves or others)? If so, it looks like such an account relies heavily on *moral requirement* just as in a natural duty account. Do the benefits generate obligations because we can be presumed to want them (e.g., because it is rational to approve of the scheme)? If so, then fair play appears to rely heavily on voluntary action in the form of acceptance, consent, or some form of participation in the scheme. Is there a possible line between voluntary action and moral requirement for fair play? This is the central question of Chapter 2. I conclude that the most promising route for fair play is to understand it as a kind of natural duty account, but one that has not been developed adequately to date. I explore this idea further in Chapter 4.

If it is difficult to combine consent and natural duty or to use in tandem the voluntary action and moral requirement that figures centrally into these concepts, perhaps it is best to look for an alternative route—a way of making use of natural duty or consent by different means. This is what some recent Kantian theorists have done in attempting to establish political obligation through the mechanism of a "third liberal value" that functions like natural duty, but does so only within the structure of the state. 18

¹⁷ Hart (1958) and Rawls (1964) ¹⁸ Stilz (2009) and Ripstein (2009)

The idea is that exercise and protection of our right to freedom from domination by others necessitates fully specifiable and protected property rights (along with some other "acquired" rights). But such property rights are impossible without the state to make them determinate and enforceable. Thus, according to these Kantians, the right to private property is specifiable in form, but only provisional in a condition without the state. In order to respect each other's rights to freedom from domination, we have to enter into a condition with them where property rights are made conclusive by "filling out" their details and protecting them through enforcement.

In Chapter 3, I argue that the recent Kantian views in question rest on an implausible moral basis. While the notion of property rights as merely "provisional" entails that the right is indeterminate and unenforceable through coercion without the state, Kant himself conceived of rights as entitlements to coerce. The tension between calling property rights provisional and maintaining that they are still rights without the state creates deep problems for these views. The biggest problem is simply that they cannot retain the claim that the state is morally necessary for the exercise and protection of the right to freedom from domination. In consequence, the very basis of the state's authority is undermined and these Kantians are left with nothing.

Are we left to wipe the table clean of all the vestiges of past accounts of political obligation? Should we stand with anarchists who doubted our ability to form adequate accounts of political obligation even in the face of the new and interesting models presented in Chapters 1, 2 and 3? Shall we say, as some do, that "The single most compelling conclusion to be drawn from the recent normative literature on political authority is that virtually no government possesses it..." or is there still more to say? It is my contention that the failures of the accounts discussed in Chapters 1, 2 and 3 are instructive. It will not work to combine natural duty and consent into one moral ideal. Nor will it help to consider fair play as a weakly voluntary basis of political obligation. In contrast to Kantian "provisional" rights, it is better to think of property rights (and other rights) as preinstitutionally full. However, perhaps we need to rethink

¹⁹ Buchanan (2002), 240

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our conception of authority and examine to what extent traditional bases can give us *something* in the way of political obligation. With the tools gained from a look at recent accounts of political obligation, I develop my own account.

Part 2: A Limited Political Obligation

In Chapter 4 I will argue for a limited political obligation based on what I call natural duty fairness—which is a development of a neglected idea I highlight in Chapter 2. It should be noticed that even in this most basic formulation, I will have few allies regarding the conclusion of the argument, even if I have allies at various points along the way. For example, it will be easy for many anarchists to agree with my conclusions about traditional moral bases—e.g., consent, natural duty, communitarian obligation, fairness, and others. I argue that the future of these supposed sources is bleak. In that sense, then, we *have* said enough about many supposed sources of political obligation. On the other hand, others will find it easier to agree that these traditional moral bases still have much to offer us. Even if we grant that skeptical doubts are enough to call into question the ability of traditional moral bases to support the most comprehensive, universal or general political obligation, we still have much to discuss in terms of what they *can* support. In that sense, we *have not* said enough about political obligation.

I extend fairness as a restriction on action in fulfillment of natural duty. The driving force is natural duty—the idea that there are pre-institutional moral requirements that must be fulfilled. I call my account a natural duty fairness account because I use natural duty in conjunction with fairness to specify the extent and nature of the duties of political subjects. It is a natural duty account because it takes the initial step to be the existence of moral requirements to solve problems that would occur without the state (i.e., in a state of nature). Fundamental to the entire account is that such duties exist pre-institutionally (contrary to the Kantian views in Chapter 3). It is a fairness account because, like traditional fair play accounts, the duty is specified primarily through contributions of one's fair share in fulfilling the natural

duty in question. It is a two-step fairness account. It uses fairness in the creation of the state to solve problems that would occur in its absence and it uses fairness to show the need for obedience to the law after such a state is created.

The fundamental problems for which natural duty fairness prescribes an adequate solution are those that motivated Joseph Raz's description of the state as a giver of exclusionary reasons for action—namely, coordination problems, moral error and prisoner's dilemmas. My view does not ascribe such a power to the state, but recognizes the moral force of the empirical facts represented by these fundamental problems. The state is necessary to create solutions to the problems and those solutions entail a full set of rights in the state over certain areas of human activity, including the right to obedience with its correlative duty on the part of subjects to obey.

Chapter 5 is a defense of my view in light of certain temptations and perceived deficiencies that might result from its being an account of *limited* political obligation. The account is limited insofar as there are certain laws that we are not morally obliged to obey. It is tempting to perceive this as a problem that must be overcome. I assess multiple attempts from theorists who use multiple moral sources to create a more robust political obligation to fill in gaps left by moral bases that do not by themselves generate robust political obligation. These "pluralist" accounts of political obligation have been advanced through the years, but there is very little analysis of their prospects for success. Though I am in principle not opposed to pluralist accounts of robust political obligation where they are in fact successful, I argue that success is elusive and it is more promising to stick to a limited account like mine.

This means, however, that we will have to adapt some of those features that have served as necessary conditions for an adequate account of political obligation. In particular, one may doubt my account's ability to maintain any sense of content-independence. As articulated by Raz, "A reason is content-independent if there is no direct connection between the reason and the action for which it is a

reason."²⁰ This means that it should not matter (within bounds) what the state commands, since it is the state's authority to impose duty without reference to the content of its demands that generates a requirement to act. On my view, only certain laws are morally binding, and the distinction between those laws which we ought to obey and those we are permitted to disobey depends in part on the content of the law (i.e., whether it solves coordination problems, moral error problems or prisoner's dilemmas). I claim that my view still retains a powerful sense of content-independence insofar as, within the range of acceptable solutions to the problems in question, the state could have commanded any number of acceptable things and we are obligated to obey those commands no matter the content of the commands (within the acceptable range).

Finally, I end in Chapter 6 with a response to the Particularity Problem and the Boundary Problem.²¹ I claim that the duty to obey the law is particularized to that state that issues coordination (and other) problem solving directives for you. Recognition of the state's authority over you occurs by convention. That state has legitimate authority over you which issues commands that solve the right kinds of problems and is seen by the majority in your surrounding area as the proper authority for such regulation. I also claim that my view escapes the Boundary Problem for two reasons. First, an explanation of the moral basis of political obligation need not constitute a solely sufficient condition for authority. There may be other moral restrictions on states that can disqualify them as rights holders even if they serve the purpose on the basis of which you would (normally) otherwise be obligated to obey. Second, certain conditions disqualify fairness as a moral constraint. The most salient historical injustice to which Simmons appeals in the Boundary Problem is unjustified invasion. His claim, again, is that views like mine might be committed to saying that even if a state unjustly invades another territory, it has legitimate authority over its new subjects so long as it fulfills its morally mandated function. I claim that the conditions of invasion disqualify fairness as a moral consideration, and therefore, we have no obligation to obey such states.

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²⁰ (1986), 35. His view is influenced by Leslie Green (1988).

²¹ I deal with the Derivability Problem in Chapter 4.

Part 1:

New Theories of Political Obligation

Chapter 1: Against Normative Consent

Consent to the state offers a clear basis for a duty to obey the law. It is difficult to deny that when informed and responsible people agree to the terms of an arrangement they are then bound to fulfill the requirements embodied in it. Yet, the chief problem recognized by the most widely cited consent theorists of the past and present (e.g. Locke, Nozick, Otsuka) is how to understand citizens, most of whom have not given *express* consent to the state, as having consented at all. Despite its moral force, consent cannot serve as the basis of an adequate theory of political obligation if very few citizens have given their consent to the state (i.e., if political obligation is not "general").

There are two ways to make consent-based political obligation general. Most traditional accounts weaken the conditions of consent (via "tacit" consent) to fit the behavior of the majority of citizens to make it look as if most citizens have consented. Tacit consent takes our residence within state boundaries, failure to leave the territory, voting, surrender of judgment to political authority, choice of one of a plurality of mini-states, or other behaviors short of express consent to constitute our willing consent to political authority. But these look either like descriptions of behavior that are radically insufficient for consent² or aspirations for future consent-based political arrangements that do not currently exist. While

¹ Socrates famously declared his duty to Athens because of his continued residence despite his opportunities to leave. Since then, Locke famously offered a similar account of tacit consent and many more have offered creative amendments to the idea. For example, Plamenatz (1968), Murphy (1999), Otsuka (2003), Steinberger (2004), and Gilbert (2006).

² Criticism goes at least as far back as Hume's argument against Locke, where he claims that such conditions for consent would render a man's refusal to jump off a boat to his likely death as consent to the captain who kidnapped him and dragged him aboard while he slept. See Hume (1994)

³ Beran (1987), Murphy (1999) & Otsuka (2003) imagine conditions where consent would be the basis of political obligation, though Beran's account requires *express* consent.

consent accounts offer what would be a clear moral basis for the duty to obey the law, it looks as if no duty by consent exists in the current political environment.⁴

Yet, consent is not so easily defeated. Another way to solve the problem of limited application is to pair consent with a moral notion that already has widespread application. In the face of difficulties for traditional consent, a new and subtle concept has emerged. This is best described by David Estlund as "normative consent," which combines natural duty—traditionally any universal and pre-institutional moral requirement—and consent in the idea that we can be *morally required* to consent to an arrangement. Though normative consent is new to the philosophical literature on political obligation, it appeals to common moral experiences that most of us can imagine. For instance, if someone in need of quick medical attention requires the use of my car, I may be required to consent to the use of it. The analogy to the state offers a promising basis for political obligation. Once we have a duty to consent to any arrangement, it is argued, we are bound to its terms even if we have not *in fact* consented to it. Normative consent remedies the problem—failure of generality—that plagues traditional consent accounts by utilizing natural duty's universal application while retaining consent's moral force over those to whom it applies. It is appealing for these reasons and for the fact that it is easily utilized by those coming from both consent and natural duty perspectives. So a new hope has arisen for consent theories of political obligation.

I argue, however, that normative consent fails to produce a duty to obey the law. In the following I offer a brief description of normative consent in David Estlund. I will then grant that cases of normative consent occur in our everyday moral experience, but will argue that no such cases are analogous to the political environment. I first claim that there are no clear cases of normative consent unless there is a moral reason that generates it. It is implausible to believe that I *ought* to consent to anything unless I can

⁴ I leave room, of course, for the possibility of future states with consent as a clear indicator of duties to the state. Even with this possibility, though, given that these accounts do not make sense of widespread intuitions on the part of citizens and political theorists alike that we *currently* have a duty to obey, it seems unlikely that consent captures the moral foundation for such a duty even if it becomes a reality in the future.

point to something morally significant about the arrangement to which I must consent.⁵ What this means is that there must be at minimum a moral reason that grounds my duty to consent to an arrangement (even if the reason is just that my consent supports the continued existence or the establishment of an arrangement).

I then argue that normative consent faces a dilemma. If the content of the moral reason that grounds my duty to consent (e.g. I ought not to harm others) is identical to the terms to which I ought to consent (e.g. I ought to consent to an arrangement whereby I agree not to harm others), then the duty to consent is superfluous and there must already be a duty to do what would result from my consent. However, if, as is true of typical cases of normative consent, the content of the moral reason for normative consent (e.g. I ought periodically to lend my neighbor yard tools) is not identical to the terms to which I consent (e.g. I consent to the arrangement whereby my neighbor is allowed use of my hedge trimmer at 10 am on Saturday), then there is always a choice in how I fulfill my duty of normative consent. In the case of political obligation, this means that either consent is superfluous and I already have a duty to obey the law (in which case it ought to be shown why I have such a duty) or the choice in fulfilling normative consent allows me to consent to arrangements that do not entail a duty to obey the law. The inevitable conclusion is that, despite its long and respected history, we ought to shut the door for good on consent as a source of political obligation in current political environments.

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⁵ This is consistent with what proponents of normative consent take as the reasons why normative consent is present. For example, Estlund takes normative consent to be present in jury situations because it is only by widespread consent that such systems are effective. Thus, it is the effectiveness of the system that grounds normative consent.

1. The Introduction of Normative Consent: David Estlund

David Estlund begins with the widely held belief that under certain conditions consent can be nullified.⁶ I may give my consent under duress or without full knowledge of that to which I am consenting and in both cases my consent is nullified. But, wonders Estlund, why should we assume consent can be nullified but non-consent cannot? He asserts that there are conditions where one's non-consent can be nullified—namely, when one is morally required to consent (i.e. when there is *normative consent* involved).⁷

Estlund agrees with the libertarian view that no one is born under genuine authority, but only in the sense that freedom is the default position—that without moral reasons to prove otherwise, the assumption is that there is no authority over anyone. He disagrees with the libertarian that consent is the only way to come under authority. It is conceivable that one could be under authority by natural duty, for example. Under typical cases of the nullification of *consent*, the moral effects of some features of the consent situation render the consenter's moral position as if he *had not* consented at all. Estlund believes that we should talk about the nullification of *non-consent* in a parallel way. The nullification of *non-consent* is when the moral effect of some features of the non-consenting situation render the non-

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⁶ At least, it is either nullified or never really was given.

⁷ The idea that one ought to consent to an arrangement is not entirely new in the literature on political obligation. Mark Murphy suggests something like this and claims it would be a necessary step for the success of accounts like that found in Jeremy Waldron's "Special Ties and Natural Duties" (1993).

Were it within the scope of this essay I would also argue that, from the consent side, Michael Otsuka needs something like normative consent to get his account off the ground. His tacit consent is the result of two principles working in tandem—the Kantian duty to offer a guarantee of security to those in close proximity and a reconceived "enough and as good" proviso from Locke. The reconceived proviso includes the provision of land ownership for those who come of age in a society. Tacit consent requires one to choose either life in proximity to others *along with* the moral duty to obey the state or life away from others under no such authority.

Yet, this is not a direct result of the requirements of each principle by itself. According to one principle, everyone must be provided with the opportunity to own land whose location is initially unspecified. By itself, this principle puts no limitation on where one can own land. On the other hand, Otsuka's treatment of the Kantian duty is as if we can fulfill it only by consenting to an authority. But why should we think such consent actually occurs just because we choose to own land in close proximity to others? We are first entitled to land ownership, which may include land in close proximity to others. Consequently, if we own land in close proximity to others, then we *ought to consent* to a political authority to offer guarantees of security to our neighbors. Fulfilling the Kantian duty need have nothing to do with my initial right to own land.

⁸ This is contrary to other possible interpretations that suggest either that there is no authority without consent or that descriptive inequality is the only basis of authority.

consenter's moral position as if he *had* consented. The moral conditions necessary for nullifying non-consent are not given by Estlund, but we will look at some examples later that intuitively suggest that there may be such conditions.

The authority of the state is established in a way directly analogous to the authority of a jury trial system. The jury trial system has the authority to require punishment or exoneration, but this by itself does not capture the kind of authority that binds citizens to the state. Following Raz "authority" for Estlund involves not just the right of the state to command and enforce, but the duty of citizens to obey. The jury trial system gets its authority because it is a morally preferable system that can only function with the consent of those under its judicial reach. According to Estlund, the jury system is the only system that will generate no disagreement from all "qualified" or "reasonable" points of view. However, it can only work under the moral requirement that those within its reach do not carry out justice on their own (antivigilante principle). Thus, each must "accept" the judgments of the jury.

The analogy to political society is clear. Democracy has the same epistemic advantages of a jury trial system. The antivigilante principle entails the duty to obey the law because it is necessary that individuals not only be put under an adequate system of criminal justice, but also that they promise to obey that criminal justice system. The commitment (or consent) on the part of individuals to the justice system above and beyond mere deterrence by coercion is morally valuable. Estlund shows the value of such commitment by analogy to everyday moral examples. According to these examples, the promise to do something (consent for Estlund) may be morally valuable beyond the habits, desires or moral duties

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⁹ Estlund's view is peculiar in two respects. First, he acts as though when one is bound by normative consent, if he does not in fact consent, we can still treat him *as if* he consented. Thus, because he is *required* to consent, it is as if he *did* consent. Second, one might doubt that non-consent can be nullified based on the fact that the nullification of some acts are possible only because they nullify *moral acts*. Non-consent, though, is no moral act, since it is usually seen as the position one is in before acting at all. One can see the difficulty in talking about one's "situation" or "circumstance" of non-consent. The circumstance of consent is usually relatively specific, but the circumstance of non-consent seems to be the circumstance of failing to act. Perhaps one ought to act, but why is one's failure to do so seen as something that can be nullified? In any case, normative consent is still a clear idea without its claims to the nullity of non-consent.

¹⁰ Though he does not accept a Rawlsian model of political justice, Estlund is clearly influenced by Rawlsian overlapping consensus from reasonable points of view.

that make it likely that you will do it anyway. A promise offers assurance to the rest of society that you will carry out your duty and puts moral weight on you to act in accordance with the judgments even when you could get away with disobedience. Thus, the promise to obey the law is morally valuable beyond the factors (fear? patriotism? gratitude?) that make it likely that you will in fact comply with it. Normative consent is an essential part of Estlund's argument in favor of democracy. It is because democratic political systems need consent beyond the likelihood that its citizens will in fact comply with its directives that there is a duty to consent to the state.

2. Normative Consent

It is odd to say that one's having a duty to consent results in one's being morally in the condition of having consented. What if people do not fulfill their duty to consent? Do they still have a duty to act exactly as they would have if they had consented? Why not say instead, then, simply that from the very beginning they had a duty to act as they would if they were to consent (whether or not they do so)? After all, I must do all kinds of things that I would be required to do if I had consented to them. If I promised you I would not kill you for pleasure, then I would have a duty not to kill you for pleasure. However, I already have a duty to act as I would if I had consented not to kill you for pleasure because I have a very straightforward *natural* duty not to kill you for pleasure. So, it is silly to think that I have a duty to *consent* to such an arrangement. What is the point of requiring consent at all? The initial goal for normative consent theorists, then, is to think about what kinds of required consent situations might be different from this. When might we be required to consent in a way that does not seem morally superfluous as in the case above?

One essential feature of consent is that it changes the moral landscape around us. When we consent to an arrangement we take on duties and/or rights or we place on others duties and/or rights. If I consent to trade my goods for your goods, I am taking on the duty not to prohibit your free action with

respect to the goods that were mine just a moment before. You have a correlative right to free action regarding those goods. I also take on rights with respect to what was yours just a moment before and you have the duty not to interfere with my freedom. It may be that only one of us benefits from a consent situation, but there is often a correlation between rights and duties.¹¹

Typically, we think of consent as a necessary condition for the moral landscape to be changed in the way that results from it. Thus, for a simple case of goods exchange, I cannot be considered to have a duty to refrain from using what was mine just a second ago unless I have done something to change the rights of ownership between the two of us. It is entirely up to me whether I engage in this kind of activity and so my (and your) willingness to exchange is the deciding factor in where our rights and duties fall. So, the idea of a *duty* to consent is certainly foreign to the typical case of consent. That does not mean it cannot exist, though.

The reason typical cases of consent cannot involve any sort of duty is plain to see. Duty is a moral *requirement*. On the other hand, consent must be *voluntary* and voluntariness involves some kind of choice. Notice, for example the difference between willing allowance of something and consent to it. I may have a duty to allow you to use something of mine. Perhaps you are starving and wish to eat some of my abundant food stores. It may be that, were I given the choice, I would not consent to your going in and taking some of my food. However, you do take some of my food. I may be really frustrated by it, but knowing I have a duty to provide for the hungry, I do not inhibit you from taking it. Do I consent to your taking it in this situation? We can imagine consent occurring (e.g. I post a note giving you permission to take some of my food), but it does not seem to occur here.¹²

¹¹ Much of what I say will have implications for many situations of consent, but it is beyond the scope of this paper to address these implications.

¹² For a more general and deeper discussion of these issues, see Murphy on agent-dependent and agent-independent moral requirements. His discussion, though broader in scope, fails to explore the conditions under which one might be required to consent. He merely argues that there exist some conditions where a more general agent-independent moral requirement (what I have considered a natural duty) might require one to consent.

What kind of choice is involved in consent? It seems to me there are only two kinds of moral choice in consent, only one of which is consistent with a duty to consent. Consent, remember, is a way of changing the moral landscape by imposing duties or granting rights. It seems to me that you can consent in situations where you have a choice in (a) accepting or rejecting a proposed arrangement that is set before you or (b) using your discretion to endorse a particular way of accomplishing a morally required goal. Imagine that a neighbor wants to use a lawn tool of mine. According to (a), I may have a choice about whether to enter into a single agreement with this neighbor in order for him to use a tool for some specified purpose, time, etc. In that case, my duties are strictly dependent on my agreement to the arrangement or not. If I choose not to consent, then my rights and duties remain the same and my neighbor is left without the right to my tools. (a) is the straightforward kind of consent (express and tacit) that is used in traditional accounts of political obligation. As we have seen, though, this kind of choice in consent cannot result in a duty to obey for most members of contemporary society.

The reason (a) does not describe the kind of choice that is typically involved in *normative consent* is that, since consent is typically seen as a *voluntary* activity, we require an explanation for why consenting to a political arrangement is morally *required*. Here we can agree with Estlund that political freedom is the "default" position and that without moral reasons to the contrary, we are assumed to be free of political obligation. Thus, a moral duty to consent (i.e. normative consent) must be derived in some way from some other moral requirement. Asserting a moral duty to consent without offering a moral basis for it is no different than just asserting without explanation that we ought to consent, thereby assuming we have a duty to obey.¹³ If this is all we are doing, then we may dispense with philosophical argumentation about it.

It seems, then, that normative consent involves a choice in (b) using your discretion to endorse a particular way of accomplishing a morally required goal. Imagine, according to (b), that I have made a

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¹³ Indeed, it seems Estlund is attempting to base such a duty in the epistemic virtues of democracy. But the duty ought to be there to support the duty to consent. Otherwise, we simply have a duty to consent to the state without any explanation.

previous agreement with my neighbors to let each of them use one of my lawn tools once a month (and this is a reciprocal arrangement so that I have the same right with respect to their tools). I have taken a moral duty on myself to let my neighbors use my tools. It may be that according to the conditions of this agreement, no neighbor can make a demand of any other neighbor for the use of a *specific* tool. With respect to the neighbor seeking the use of my tools, then, I have a choice. I must consent to the use of one of my tools (imagine we agreed on a date and time for each use). In this example, there are two phases of consent. I first consented to the broad arrangement and then consented to the use of a tool of my choosing. In the first case, my choice was, according to (a), in whether or not to agree to the arrangement. In the second case, my choice was, according to (b), in what kind of arrangement I choose to fulfill my obligations according to the original agreement. Thus, in the second phase I had a moral duty to consent (normative consent) to the use of one of my tools.

Notice, though, that if, in the original agreement, all the details of use (e.g. time, date, person, duration, etc.) were specified, no consent of mine would be necessary. I need not consent to your use of my tools after my previous consent specified the time, place and all other conditions of its use. The implausibility of an additional requirement to consent is illustrated if you imagine the second case of consent occurring within minutes of the first. We have a neighborhood meeting where I agree to Fred's use of my hedge-trimmer for an hour immediately after the meeting is adjourned. Minutes later the meeting is adjourned. Does Fred have the right to my hedge-trimmer without my further consent? If not, then, must I consent again to Fred's use of my tools once we reach my house? When we move back to the tool shed? When I place the tool before him? When exactly does consent sufficiently grant the right to my neighbor and impose the duty on me?

It seems clear that whenever a second case of consent is required, there is a new choice situation to be resolved. The choice situation above arises only because the original agreement with my neighbors failed to specify exactly how the duty imposed on me must be fulfilled. Based on the typical case of consent we can formulate a preliminary principle.

C1. Wherever there is normative consent (i.e. where one has a duty to consent), the content of the moral requirement from which it is derived cannot be identical to the content of the consent.

If the content of my moral requirement specified exactly when and how a specific person had the right to use one of my tools, then my consent to the use of that tool on the occasion of proper use is not necessary. According to this principle, it does not make any difference whether the moral requirement to consent is based on my previous consent or some independent moral consideration (e.g. natural duty). In many cases of moral requirement, it seems possible for consent to be required in order to fulfill them.

Is C1 correct? Assume it is, for the moment and it will help us to see why normative consent faces a dilemma. On the model above, consent can be required on multiple levels, depending on the specification of duties imposed at each level. If I have a duty to give aid to others, then perhaps I can fulfill this duty by consenting to an arrangement whereby all participants give aid as a society of aid givers. The conditions of membership in this association of aid givers do not specify exactly how and when I fulfill my duty to give aid. Instead, I have options. I may choose to give money to an aid agency for members, I may aid a certain number of members per year, I may volunteer to work the dangerous jobs of the aid agency that are funded by fellow members, etc. Each of these requires consent. I have no duty to do any of these things in particular, but I have a duty to choose and do one of them. Suppose I pick the third option—to work a job at the aid agency. Perhaps the aid agency does not specify what job I must work in order to fulfill this option. So now I must consent to a specific job in the agency. Once I have consented, I am required to act in accordance with all the stipulated duties of that job. Whatever the original agreement has not specified leaves open new areas of choice for me. Some of these choices may involve giving consent. In any case where every choice requires my consent, then I have a moral duty to consent but to just one among many things.

On the other hand, however, if the original agreement (or other preexisting duties) specifies exactly what I must do, then consent is morally superfluous. I may still give it, but it is not a necessary

condition of my being under the duty. If consent is not necessary, then it cannot be required. This is important for normative consent. Normative consent specifies a duty to consent, meaning consent must be the only way to fulfill a moral requirement. According to the discussion above, a duty to consent cannot be based on a duty that already corresponds exactly with what consent would require me to do. For any typical consent involves the freedom to choose in some way. Therefore, if normative consent requires me to consent to obey the government's laws (i.e. to consent to its authority), then it cannot be based on a natural duty to obey the government's laws (i.e. the fact that the government *already has* authority over me). Recall the example from the beginning of this section. If I am morally required to refrain from killing you, then I cannot be morally required to consent to refrain from killing you. Such a requirement has to be based on something, but it cannot be based on the only duty that seems relevant to such consent—namely, the duty to refrain from killing you.

Now we have a dilemma regarding political obligation. Most philosophers do not believe that the duty to obey the law is so basic or intuitive that we need not offer any argument for its existence. As a result of this, either normative consent (the duty to consent) is based on a natural duty that would generate the duty to obey the law anyway, in which case consent is morally superfluous or normative consent is based on a less specified duty, in which case there is sufficient choice so that obedience to the law is only one of many ways to fulfill the duty. The former horn of the dilemma would additionally require an explanation for how the natural duty generates the duty to obey the law. Estlund simply cannot motivate normative consent. Though it serves as the connection between a mere duty to allow political bodies to command/enforce and the duty to obey the law, he cannot show that normative consent is plausible for political obligation. There are some responses available for Estlund, however, and so we must address them before we completely reject normative consent.

3. Objections and Estlund's Examples

If it seems at first unlikely that normative consent exists for political obligation, perhaps clear cases in other moral contexts will cause us to rethink our position. There are many examples to choose from in Estlund, but they can be criticized from three points of view. The "consent" in question for each example is just (a) a promise that does not function like actual consent; (b) consent that involves a clear choice in the fulfillment of a more general duty; or (c) consent that at most grants a right to others, but does not impose a new duty on the consenter. These examples may cause us to doubt the adequacy of C1 for *all* cases of required consent (though it is still useful for typical cases), but they will still fall far short of increasing the plausibility of normative consent as a source of the duty to obey the law.

Four examples Estlund gives involve something like a promise over and above one's previous moral duty. ¹⁴ The most compelling one involves Joe, who has a duty to promise to obey a flight attendant during an emergency on a plane because if he does not the rescue of many may be hindered. In this case and others like it, whether there is a preexisting duty to motivate the normative consent or not, the consent offers a promise to take some action. Notice, though, that while some promises are like consent, others are not. One way to see the difference is that promises sometimes offer guarantees of what we are already required to do. In other words, they may do nothing more than strengthen the force of a preexisting duty. For example, when someone doubts my intention to pay on a lost bet, my promise merely builds confidence that I intend to do so. I claim that "consent" in the present case does nothing more than this. Assuming Joe has a duty at all (otherwise he has no duty to consent among other things), the duty must be to act in ways that best resolve the emergency situation. If this is done by giving authority to the flight attendant, then Joe has a prior duty to obey her as an authority. The promise cannot possibly establish a duty to obey unless he already has a duty to obey. If Joe's duty is merely to refrain from interfering with

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¹⁴ Indeed, Estlund views consent generally as something like a promise.

the flight attendant, then he need not promise anything to fulfill his duty, even if promising to obey is consistent with his non-interference.¹⁵

Another set of examples Estlund offers involve cases where there is genuine consent involved, but it looks like the consent is given from a range of choices not specified from the original duty. These come in two forms. First, you may make a promise or have a duty that applies into the future for some duration of time. For instance, you may have a duty (from a previous promise or as a condition of marriage) to consent to sex when your partner initiates it. Second, you may have a duty to consent to the use of your property in reciprocation for your borrowing an item from someone else. If you have recently borrowed a roommate's car, for example, you ought to consent to his use of yours when he needs it (barring outweighing moral conditions).

The duty in the case of marriage is dubious. Nobody believes that, without qualification, one must always consent to sex when her partner initiates it. As soon as we think there is some variation on when and where such initiation is morally appropriate, consent becomes necessary. But it is necessary not because one has a duty to consent every time, but because it is unclear what such a duty to be sexually available (if there is any such duty at all) specifies. Do you have a duty to consent to sex in an elevator? Probably not. It is doubtful that any "promise" or other duty could possibly specify all the conditions for the duty to have sex. Thus, consent constitutes the fulfillment of a more general duty to be "available" for sex, if there is such a duty at all.¹⁶

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¹⁵ The other cases Estlund uses do not help. In the second case, a friend plans to make a special Sunday dinner and wants you to promise to come despite the fact that you usually do so anyway. Thirdly, parents give their daughter a school loan and wish for her to promise to pay it back. Finally, doctors take a version of the Hippocratic oath at the beginning of their careers as doctors. The Sunday dinner example is puzzling. It appears quite obvious to me, at least, that your friend's desire to have you for dinner on Sunday imposes no obligation at all to consent to it. The other two cases are no more effective even if they do involve a duty. The daughter has a duty to pay back her school loan. Her promise neither bestows additional rights on her parents nor imposes additional duties on her. Her parents have a right to repayment regardless. She has a duty to repay regardless. Likewise, doctors have prior duties to help the sick in various ways. Taking an oath neither imposes duties on them nor grants rights to potential patients. None of these cases involve a duty to promise what we do not already have a duty to do. Thus, consent cannot be required and these cannot be the kinds of cases that strengthen our intuitions about normative consent to political authority.

¹⁶ As another example, you have a duty to consent to your roommate's playing of his music on occasion through the course of your residence together. It is difficult to imagine there is a duty on any particular occasion to consent to

If, as in the other case, my roommate has lent me his car, I owe him a duty of gratitude. This may involve a range of choices for me, such as driving him myself or hiring a taxi for him. Do I have a duty to lend him my car? If I did, it would be very similar to the case of sex. Surely I have no duty to lend him my car under all conditions. There must be some choice in the matter. It must be that I have a duty to lend him my car at some point according to my preferences (just as his loaning his car probably accorded with his preferences). Either my consent is the fulfillment of a more general duty or there is no duty at all. Thus, these types of cases cannot strengthen the intuition about normative consent to political authority either.

There is one last case that brings in new complexities to normative consent. Does consent sometimes grant a right to others? If it is possible to separate duties from rights, then it may be so. The final example we consider is one where you ought to let another person touch you (e.g., for comfort in times of grief), either from your previous promise or because it will do him a whole lot of good. The case of letting someone touch you because of a previous promise is less interesting. Your promise would either specify exactly when and how he can touch you, in which case you need not consent, or it would not, in which case your consent is adding additional requirements in terms of how, when and under what conditions he can touch you. But what if you have a natural duty to allow someone to touch you? It may be that by consenting you actually grant him a right to touch you where he had none before.

It is unclear what exactly is going on here. Most likely, he already has a right to touch you, but he does not know it. As a general rule, people are prohibited from touching others in various ways unless

your playing music. I may have a duty to consent on some occasion or other, but not on this particular occasion. So, what if I have used up all my chances of non-consent? It is the last day before we move out and you still have not gotten permission to play your music. Well, in that case I have probably already failed to fulfill my duty. But even so, I still have no duty to consent in that particular instance. I will fail to fulfill my duty if I fail to consent in this case, but I still have no duty to consent in this case. One can deny my claim that I have no duty to consent to your music playing on the last day, yet it is still easy to see the disanalogy to the case of political obligation. Normative consent involves consent to the authority of another over me at all times. There is no choice to begin with for me in fulfilling my duty. The example just given involves consent on particular occasions over a period of time. Thus, there is no assumption that one act of consent covers them all. However, the duty to obey the law would be a single act of consent that establishes my duty for the rest of my life (so long as certain conditions hold). I cannot appeal to my having used up all my chances of non-consent. I also am not expected to consent in every obedience situation.

there are socially accepted norms for doing so. Given such norms, it may be extremely difficult for the other to know he has a right to touch you. ¹⁷ Perhaps all you are doing is showing the other that, unbeknownst to him, he has a right to touch you. You may reject this claim, though, and it does not help the case for normative consent. Even if you are genuinely granting a right to him, this is not like the case of political obligation. In consenting to political authority, you are supposed to be granting a right (i.e. to your obedience) *and* taking on a duty (i.e. to obey). Thus, even if we do grant rights to others by consent (which I doubt), we cannot use consent as a basis for the duty to obey the law. This is the last type of example Estlund employs and the last hope for any analogy from moral experience to normative consent in political obligation.

The case for normative consent to political authority is not good. It could be that we ought to promise to obey the law as in the case of Joe and the flight attendant. As we saw from this case, however, such a promise does nothing to change the moral landscape unless there is not a duty to consent. The promise, in this case, offers a guarantee that I will act to fulfill my preexisting duty. However, such a guarantee is only necessary and required in cases where I have a duty to do just what I promise to do, and where there is no such duty I may or may not promise, but it is my choice.

Perhaps the duty to obey is more like our second group of cases. Like the duties to consent to sex or the use of my car, consent to obey the law when it is merely one way to satisfy a more general duty toward my government will not generate a widespread duty to obey the law. I will have no duty to consent to authority, so it will be entirely up to me whether I am bound to it.

Finally, it may be that a duty to consent to authority is like those cases that look like I am granting others the right to act, as in the case of allowing one to touch me. If this is true, however, this only occurs in cases where I already have a duty that correlates to the right. Even if I were granting a right

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¹⁷ Or does he? It is difficult to imagine that someone's touching you is so morally valuable that you have a duty to allow it. Perhaps it is like a case where someone is starving and you have a duty to give him food. But if he is close enough to starving in that case, then he has a right to your food and he can know it pretty straightforwardly. You may object to his taking it, but he may have had a right to it in the first place.

to touch me (which I doubt) the duty to allow the person to touch me was already there. For the duty to obey, I can only be required to grant the right to my obedience if I already have a duty to obey (if this situation is even possible). Perhaps my granting the right through consent adds additional moral weight to my duty. However, this is not the primary reason why I have the duty to obey. There must be a preexisting duty in order to support this.

4. Conclusion

Normative consent to political authority is not an adequate basis for the duty to obey the law. If simple consent (express or tacit) will not be capable of generating a widespread duty to obey, then the argument in this essay should give substantial reason to believe that any account that uses consent to establish a duty to obey the law is bound to fail. The only way to get consent to cover all members of society is to make it forced. However, morally forced consent is impossible for the duty to obey. Either normative consent will require consent among a range of possibilities only one of which is consent to obey the law, or normative consent will be based on a prior duty to obey the law, in which case consent is morally superfluous and cannot be required to *establish* a duty to obey (even if it is required for some other reason). Consent would be one of the clearest examples of a basis of political authority, but it still lacks generality.

Though normative consent fails, it involves an interesting interaction between voluntary action and moral requirement. Normative consent brings features of both into one concept. Were it not a failed attempt to ground political obligation, it would hold promise to remedy the lack of generality that affects traditional consent and the particularity problem that affects natural duty. Thus, it is worth exploring other attempts to support political authority that might use elements of voluntary action and moral requirement to escape the problems that affect consent and natural duty. For this reason, we turn to fair play below.

Chapter 2: What is Fair Play?

In the middle of the last century, H.L.A. Hart and John Rawls articulated a powerful, yet undeveloped source of moral and political obligation—the duty of fair play. This type of duty requires everyone who benefits from cooperative schemes (which may include political organizations), in fairness to those who contributed to that scheme, to contribute their fair share. Fair play duties offer solutions to problems faced by other sources of political obligation, such as consent and natural duty. While it seems unlikely that very many citizens give their consent to the state, the level of participation required to generate a fair play duty is minimal and it offers a description of duty generating circumstances that apply widely to the citizens of any state. While natural duties are abstract, pre-institutional moral requirements that do not tie the citizens to their particular state, fair play duties tie citizens to specific communities as cooperative associations. Fair play constitutes a fresh alternative to the worn out sources of political obligation of past centuries.

In response to Hart and Rawls, Robert Nozick offered an aggressive critique of fair play duties by arguing that the only way to have a true duty from fair play is if it is ultimately based on one's *consent* to the cooperative scheme that produced the benefit received.⁴ To illustrate his point, Nozick employed thought experiments where people may benefit from a cooperative scheme and yet they do not have a clear duty from fair play to contribute to it. The lack of fair play duty in these cases is, according to Nozick, a result of the lack of consent by the beneficiary.

¹ Hart (1955); Rawls (1964 & 1971)

² For example, acceptance or mere receipt of benefits.

³ This is supposed to offer a remedy to two problems from natural duty accounts of political obligation. First, natural duty accounts have great difficulty particularizing their obligations to a specific governing body. See Simmons... Second, natural duty accounts tend to ignore the communal nature of political associations by focusing entirely on the justness of the institutions.

⁴ Nozick (1974)

Yet, many have defended fair play duties against these objections. The two principal defenses show a disanalogy between Nozick's counterexamples and real cases of fair play duty either by (a) pointing to the relative lack of importance of the benefits produced by the cooperative schemes in Nozick's examples or (b) showing how pure public goods can entail obligations without the kind of consent Nozick claims is necessary.⁵ Thus, it is widely argued that, because of one or the other of these responses, fair play duty is not susceptible to the objections Nozick leveled against it. The result is that fair play duty has for decades been considered a source of moral duty that represents a strong alternative to traditional sources of political obligation and is firmly set in the minds of many political theorists today.⁶

In this essay, I will explore the basis of fair play obligations in order to understand its nature as a source of political obligation. I will argue that fair play must be understood as arising either from voluntary consent, acceptance or participation or from natural duty. On a voluntaristic assumption, I argue against each of the two major objections to Nozick's examples. Defenders of fair play will have to answer the question of whether it is one's being a member in the scheme that generates fair play duties or whether one has fair play duties to act as a member would independently of his membership. The former is either implausible or will fail to have wide application. The latter relies on moral considerations other than voluntary action. Thus, the importance of the benefits received is not morally relevant to political obligation from fair play.

Finally, I explore some possibilities for fair play as a non-voluntaristic (e.g., natural duty) account of political obligation. I claim that the idea has some promise and that it makes contact with some traditionally natural duty accounts. However, fairness in natural duty will have to be developed further to

⁵ These are given by Arneson (1982) and Klosko (1992) respectively.

⁶ Among those who embrace it are Arneson (1982), Christie (1991), DeLue (1989), Hoskins (2011), Greenawalt (1989), Kavka (1986), Klosko (1987 & 1992), Lefkowitz (2004), Dagger (1985), Pevnick (2006), Rehfeld (2005) seems sympathetic. There is also recent literature that assumes the existence of fair play as a moral consideration and attempts to use it as a basis for punishment—see for example Dagger (1993 &2008), Hoskins (2011), Stichter (2010). Among those who see it as a source of moral duty but *not* a source of political obligation are Simmons (2001) and Carr (2002).

entail the duty to obey the law. I leave this development for Chapter 4, where I endorse what I will call a "natural duty fairness" account of political obligation.

1. Fair Play vs. Natural Duty Fairness

What is a fair play duty? Fairness generally is found in many moral contexts, but only some of these contexts involve cooperative schemes. Furthermore, only some contexts involving cooperative schemes entail genuine duties of fair play. Fair play duties are those that are generated over a person because he benefits from a cooperative scheme. Thus, a genuine fair play duty must be generated by the cooperative scheme itself over a person and based on his relationship to it.

In contrast to this, we can imagine general fairness considerations giving us reason to *create* or *sustain* a cooperative scheme. Sometimes morally necessary goals can only be attained through cooperation. It may be that fairness requires all duty holders to contribute their fair share in attaining the goal. In this way, fairness can necessitate our cooperation with others. But the fulfillment of this duty from fairness results in the *creation* of a cooperative scheme, which means the duty is not from fair play, at least according to traditional accounts. For the cooperative scheme itself plays no part in generating the duty and fairness is a moral consideration in this type of case before any cooperative scheme exists.

It seems, then, that there is a distinction regarding fairness in morality between what I will label "fair play" duties and a much broader category (which can probably be divided further in useful ways) of general duties from "natural duty fairness." This distinction was identified by Chaim Gans, but has been largely neglected since his assessment of it. Consider "fair play" to be a special case of fairness generally that arises only with the presence of a cooperative scheme and a relation to those who benefit from it. But

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⁷ This distinction could easily apply to the work of Hart and Rawls who both understood the importance of fairness as a separate moral consideration from fair play duty.

"natural duty fairness" refers to moral considerations of fairness that *need not* qualify as traditional duties of "fair play."

- Fair Play: One is required to act in fairness by contributing his fair share because he has benefitted from a cooperative scheme that meets the right conditions (e.g., it is just, it has rules, etc.).
- Natural Duty Fairness: One is required to act in fairness as a moral constraint regardless of the existence of any agreement or cooperative arrangement (e.g. equal treatment, contributing a fair share toward a morally valuable goal, distributing benefits according to morally relevant features, proceeding according to rules to which all agree (or would agree), etc.)⁸

One can have duties from the first category, second category or both in combination. I describe duties in the second category as natural duties, but I mean this in a very broad sense, not, for example, as an indication of their correlation to rights in the natural rights tradition. Natural duty fairness can generate duties pre-institutionally and may or may not have any relation at all with cooperative schemes. Fair play, on the other hand, is a separate category of moral duty. It can only arise after the establishment of cooperative schemes, however loosely or rigidly one defines them. Thus, there are no fair play duties as I have described them in a world without cooperative schemes and it is because of one's relation to a cooperative scheme that he has fair play duties.

Fairness in either of the two senses described above acts as a constraint on action or omission. In the most typical cases, fairness constrains the way we distribute goods, the way we participate in rule governed activities, the way we produce goods and (as in fair play) how we benefit from goods production. It may constrain activities where we are charged with great responsibility or where we are merely passive recipients. In any of these cases, fairness is a moral consideration that indicates how we

⁸ Cf. Wellman (2005); Buchanan (2002); Gans (1992).

⁹ Indeed, were it not for the fact that the only reason fairness is a consideration in "fair play" duties is because they arise from or within cooperative schemes fair play could be categorized as a natural duty as well. They are like natural duties if it were our natural condition to be genuine members of cooperative schemes. But, though they function similarly, "natural duty fairness" is different just because it is a consideration preinstitutionally.

ought to act, thereby generating duties that constrain permissible action. A difference, however, is that, in natural duty fairness, fairness acts as a constraint because of natural duty and not any voluntary action. Sometimes, I might be obliged to distribute goods (e.g., to my children) in a way that is fair. This is through no voluntary action of mine; it is simply a moral requirement to do something in a fair manner. On the other hand, it is still an open question whether, for fair play, fairness acts as a moral constraint due only to voluntary action or sometimes to something else. For example, consent to a scheme is voluntary action that makes fairness a constraint on action. Does this apply equally to the case of political obligation? Ought we contribute a fair share in support of our government as a political "cooperative scheme" by obedience to the law?

2. Fair Play as a Voluntaristic Account

So what does it take for a cooperative scheme to generate fair play duties? According to Hart and Rawls, so long as they meet certain basic requirements, that we benefit from them is sufficient. While Nozick's counterexamples to fair play duty satisfy this criterion, they involve morally unimportant goods. His oft cited example describes a neighborhood association that produces public entertainment via a PA system. The good produced is not necessary for a minimally good life and so it seems frivolous to conclude that receipt of it would impose any substantial duties on its recipients.

One might believe, then, that the moral requirements on beneficiaries would change if the moral importance of the benefits increased sufficiently. The driving intuition behind this sort of position is that, if there is anything morally relevant at all about the benefits received, then the importance of those benefits may matter a great deal. Those benefits that are of the utmost importance will bind their recipients to the cooperative scheme that produced them in a way that benefits of little importance do not. The important goods in question are always open, meaning they cannot be avoided by those for whom

¹⁰ Nozick (1974)

they are available (e.g. security within a certain community, public health measures, etc.). If they were not open, then one's accepting them would be voluntary and the importance of the benefits would be irrelevant, since the basis for obligation would be in one's voluntary acceptance of the benefits.

George Klosko has been particularly influential on fair play in recent decades, earning a number of sympathizers as well as detractors.¹¹ He counts those benefits that are "presumptively beneficial," much like Rawls's primary goods would be, as goods the receipt of which can bind one to the cooperative scheme that produced them. Presumptively beneficial goods are those that every person is presumed to want. Once one is bound to the cooperative scheme that produced the presumptive benefits then he has a fair play duty to obey the rules/expectations of that scheme even if at times it only aids the scheme in producing "discretionary" goods—those that are beneficial, but not necessary for a person's well-being. I will refer frequently to three examples that Klosko takes to be typical cases of fair play.

- 1. Person A lives in X, which is surrounded by hostile territories intent on massacring the X-ites. The people of X institute measures for their protection, including compulsory military service, mandatory service in military reserves, provisions for rapid mobilization, etc. If A does not comply, he is a free rider. He has an obligation to comply.
- 2. Territory Y has severe air pollution, caused by widespread automobile use. Y-ites come together to establish driving restrictions. Person B might wish not to comply, but then he would be a free rider.
- 3. Territory Z is heavily dependent on its irrigation system for its agriculture. There is a drought and there will not be enough water to support the agriculture unless general water consumption in Z is dramatically reduced. Z-ites establish restrictions on water use.

¹¹ It should be noted that Klosko's views have changed over the years. I focus only on those places where he defends fair play as a single source for a (more or less) robust level of political obligation, meaning it applies to all or most citizens for all or most of the law. Thus, though some of his ideas can be (and are in his work) combined with others in a "pluralist" account of political obligation, I leave those considerations to the side right now and deal with them later in Chapter 5. Among those who sympathize with the central idea behind Klosko's view are Kavka (1986), Christie (1990), DeLue (1989) and Lefkowitz (2004). Among his opponents are Simmons (2001) and Carr (2002 & 2004).

Person C might wish not to comply with such restrictions, but then he would be a free rider. 12

As illustrated by these examples, when people cooperate to produce a presumptive good, morality demands "similar acquiescence" from all who benefit, even if they had no involvement in the cooperative scheme at the outset. Klosko acknowledges the possibility that the moral costs of acquiescence to the cooperative scheme might be so great that one no longer has a fair play duty. However, the burden of proof is on beneficiaries to show this high moral cost.

The question we must address is whether those, like Klosko, who find the importance of a benefit morally relevant can show that there is a genuine fair play duty that requires the beneficiary to contribute according to the rules/expectations of the cooperative scheme. One cannot fulfill a fair play duty by contributing a fair share that is not specified by and does not mimic the roles of others in the cooperative scheme. This is so for at least two reasons. First, the primary goal of fair play theory has been to serve as an account of political obligation, one that morally binds citizens to the laws of their state. Appealing to a duty that allows fulfillment by other means will result in failure to bind individuals to the same type of activity (i.e. political roles). Citizens may act in any number of ways that do not involve, for example, obedience to the law. Second, without widespread compliance with general rules/expectations, we have missed the essential nature of fair play duties. The point of the duties, and the way they differ from other kinds of duties, is that they require shared behaviors that define sufficient levels of one's contribution according to the cooperative scheme. These behaviors are set within the scheme itself.

Essentially, then, what fair play proponents are advocating is that people who have duties of fair play are morally required to participate in a cooperative scheme in a certain way—by fulfilling their share of the burdens of the scheme just as any member would. The mere receipt of presumptively beneficial goods obligates one to act in accordance with a standard of fair contribution that is set by the scheme

¹² Klosko (1992)

¹³ Rawls (1971), 112

¹⁴ See Simmons (2001)

itself. Thus, we know that Klosko's fair play duty holders will act as members of the scheme would if they are to fulfill their duty according to it.

Yet, there are still some very important questions left unanswered. How does membership figure into fair play accounts that emphasize the importance of the benefit received? Do fairness considerations in fair play generate a duty without regard for one's status in the cooperative scheme or is it only because of one's status as a member in the cooperative scheme that we have a duty? Is one morally required to act like (take on the burdens of) a member of the scheme in the first place (and by so acting it seems he would become a full member) or is the mere receipt of presumptive benefits sufficient to classify him as a member of the scheme where status as a member then obligates him to other members in it? We will look at each of these possibilities in turn. Most importantly, we must focus on the degree to which these interpretations rely on voluntary action to generate the fair play duty.

2.1 We Are Already Members: Some Voluntaristic Approaches

The clearest case of a duty of fair play is when we are already members of the cooperative scheme. As members, we ought to do our fair share out of fairness for others in the cooperative scheme because we have equal standing as they within the cooperative scheme. There are two ways in which a fair play duty arises simply because we are already members of a cooperative scheme. First, it may be that the receipt of important benefits is conceived as a weak form of participation in the scheme which is sufficient to classify the beneficiaries as members of the scheme. Then, as members, we ought to contribute our fair share. Second, there may be cases where we ought to work to produce a presumptive good, but the only way to contribute anything is to become a member in a specific cooperative scheme or one among a set of cooperative schemes. The result is that we *ought* to become members of the scheme by traditional voluntary methods—either by "acceptance" of benefits or consent to the scheme—and our

being required to become members is sufficient to entail the duty to contribute our fair share. I will deal with each of these possibilities in turn.

What if, just by receiving presumptive goods we actually become members in a cooperative scheme? Normally, to be a member, we would have to accept the goods voluntarily or consent to the scheme, but not on this view. Since the benefits received are important, the conditions for classification as a member are changed. We need not ask whether a person agrees with the scheme that produced the benefit, for his mere receipt of it makes him a member. Once anyone is a member of a cooperative scheme, of course, he will have fair play duties to contribute his fair share to it. Thus, because of the importance of the benefits we receive, we have fair play duties to contribute to the cooperative scheme that produced them. In the case of political obligation, we are morally required to obey the laws of the political scheme from which we benefit.

This is a workable model if you accept an implausible assumption. On this view we must assume that the moral importance of a benefit somehow affects the conditions of participation, since participation by receipt of presumptive goods is what entails membership. How does this work? Normally, we take voluntary action, such as consent, to be a non-moral fact that sometimes entails moral obligation. The conditions for what constitutes consent may change according to the moral significance of that to which we are consenting. For example, perhaps we consider the conditions for consent stricter if we are consenting to death, slavery or other extreme arrangements. However, even if the sufficient conditions for consent change depending on the moral importance of the consequences of such consent, we never believe in cases where one has consented merely by "going about his business." The case of participation that entails membership in a cooperative scheme is no different. While it is possible that the extreme benefits or burdens of a scheme change the conditions of participation sufficient for membership, such conditions cannot include mere passive receipt of imposed open benefits no matter how important they may be. If it were otherwise, talk of one's being a member of the cooperative scheme is morally superfluous. Instead, as outlined above, we would need an explanation for why we are bound by mere

receipt of benefits, regardless of our membership. If there is some reason to regard the importance of benefits to have an effect on participation, no such reason is given by fair play theorists. The implausibility of changing the criteria for participation in a scheme necessitates an explanation. It is difficult to see what fair play theorists could say in response and so I will leave it there.¹⁵

The other possibility is that we are morally required to become members of the scheme by participation. This idea has a certain likeness to David Estlund's normative consent. One can become a member only by voluntarily or willingly receiving the benefits produced by it—by "accepting" them or consenting to the scheme that produced them. Again, once we do become members then we have a fair play duty to contribute our fair share. Thus, because we receive presumptive benefits from a cooperative scheme, we will have a fair play duty to contribute our fair share to it.

The most significant problem with this kind of view is that the duty of fair play is not the result of one's having a duty to become a member of a cooperative scheme. It is instead the result of one's voluntary action in becoming a member of a cooperative scheme. Thus, this view has the same flaw as any voluntaristic account of political obligation—it does not cover those who refrain from taking voluntary action. Even if we are required to become members by traditional means—"acceptance" of benefits or consent—few people may actually fulfill this moral duty. ¹⁶ If a person does not fulfill the moral duty to become a member in a cooperative scheme, then he cannot be considered a member. If the

¹⁵ The foregoing idea looks even worse from another perspective. If a benefit's being very important may relax our criteria for participation, might its being relatively unimportant strengthen our criteria for participation? If because a benefit is morally important the mere receipt of it is sufficient for our classification as participants, then why not say that because a benefit is unimportant, we are not participants even when we consent to the scheme that produced it or when we voluntarily take the benefit and acknowledge the value of the scheme that produced it? What criteria would we use? Is there any action we could take to become participants in a scheme when the benefits produced by it are of extremely little importance?

¹⁶ Regarding political cooperative schemes we can just follow A. John Simmons in saying that most people have not and will not do so.

basis of the fair play duty to contribute to the scheme is merely his status as a member, then the failure to take on that status results in the lack of any fair play duty to contribute to the scheme.¹⁷

Might we believe that the existence of a duty to take voluntary action binds one to the duties that would result from such voluntary action? More generally, are there odd cases where one fails to fulfill a first-level moral requirement, but is still required to accomplish what second-level requirements would result from his fulfilling the first-level requirement? This kind of case seems possible, but only when there is an additional independent first-level requirement that results in the same second-level requirements. There is sometimes moral overdetermination at play and that is when we might be required to act even when our initial reasons for doing so become irrelevant. But it is impossible that one has a second-level duty, which is entailed only by the consequences of fulfillment of a specific first-level duty, even when the first-level duty is left unfulfilled. Thus, it cannot be that a requirement to become members of a cooperative scheme by traditional means by itself (without consideration of our actually fulfilling such a requirement) results in our duty to contribute our fair share. ¹⁸

We have been through all the possibilities for fair play duties based on the importance of the benefits received from a cooperative scheme. The duty calls for those who hold it to contribute their fair share as defined by the cooperative scheme itself. Thus, anyone who fulfills the duty will act exactly as a participant would. The question, then, is whether we should take the duty to arise independently of our status as members or because of our status as members. If it arises independently, it can only be the result

¹⁷ Again, Estlund's normative consent is a good analogy. One of the less plausible aspects of his view (not mentioned in Chapter 1) is that he believes a requirement to consent entails that all the duties and rights that would emerge in the advent of consent falls on the agent *even if he has not consented*. It may be the case that we have a right to act as if he had consented, but even then it is odd to talk as if he had a duty to do what he never consented to do. If that is the case, consent does not seem to be doing any work in the analysis of the situation.

¹⁸ Even if there were cases where one ought to do what would be entailed by a duty even when it goes unfulfilled, these do not apply to the case of political obligation. For if the purpose of participating in a scheme is just to work for the production of a presumptive good, then the real duty is just to work for the production of a presumptive good. We would have this duty even if we failed to participate in a cooperative scheme, but it would be a natural duty (maybe sometimes a duty from fairness) and not a duty of fair play. And as we have seen, natural duty will not specify one's contribution as defined by the scheme itself. Thus, an account of political obligation that is based on such a duty will be inadequate.

of natural duty fairness through the requirement to produce a presumptive good, gratitude or compensation, none of which entails the duty to act in specific ways as defined by the cooperative scheme and none of which captures the essence of the duty of fair play. On the other hand, if the duty arises because of our status as members, then either we must make a false assumption about the conditions of participation or most people do not in fact have a fair play duty. This brings up substantial questions about the nature of membership and voluntary acceptance of benefits. A. John Simmons provides a framework through which we might understand exactly what is required for a voluntary action to bring fair play duties. I explore and critique this model in anticipation of another strategy, fair play as a non-voluntaristic duty.

3. Fair Play by Participation Short of Consent

There is still the possibility that fair play is grounded in a type of participation that is weaker than consent, but strong enough to support a fair play duty. Ever since Rawls, many have held that some kind of participation is necessary for fair play duties. A. John Simmons criticizes Nozick by introducing "acceptance" of benefits, which is a weaker form of voluntaristic participation than consent.²⁰ In the following, I look at Simmons' account of acceptance and argue (on different grounds than he gives) that it is not sufficient for duties of fair play.²¹ In fact, many cases of acceptance do entail duties to contribute, but these duties are not fair play duties and instead involve alternative moral considerations to motivate them.

¹⁹ Of course, failing to capture the essence of fair play is not, by itself, a problem. However, it does mean that traditional fair play will not serve as an adequate explanation for the duty and the account must be developed further.

²⁰ Almost no one challenges this view. The fair play theorists discussed above do not deny that, if there is this level of participation, then he who participates is bound by a duty of fair play. The lack of resistance on this point may be due to the fact that Simmons proceeds to show that no such participation typically occurs within political society. Thus, for many there is no reason to deny Simmons' claim, since it would not help their case to do so.

²¹ If it is puzzling why I would use Simmons' model even though he rejects political obligation, the reasons why are simple. Recent fair play theorists have implicitly relied on some similar notion of acceptance (or other participation short of consent) to show that most citizens do accept the benefits of the state (contrary to Simmons' claims) even if they are self-deceiving or negligent by thinking that they do not. See Klosko (2013) and Renzo (2013)

For Simmons, acceptance requires (a) having tried to get (and succeeded in getting) the benefit, or (b) having taken the benefit willingly and knowingly. In the case of political obligation, since the benefits produced by political society are open (or public) goods, they cannot be accepted according to (a). But that need not concern us here. The question is whether either (a) or (b) is enough for us to consider the recipients of benefits as "participants" in the scheme, at least to the degree that they are morally bound to contribute to it. Though acceptance is weaker than consent, it still has voluntaristic features. The agent may act willingly to get the benefits and at the very least must psychologically approve of the benefits and the system whereby it was produced.

Simmons rejects the fair play account of political obligation, but he does so because he believes most citizens will either fail to take the benefits of the state willingly or fail to regard the benefits as the products of a cooperative scheme.²² He acknowledges that "problems remain" with the idea of acceptance as participation, but his point is merely to show that even if such participation is enough to ground a fair play duty, it does not do so in the case of political obligation. ²³ In the end, Simmons is too generous to fair play accounts when he accepts the existence of some type of (nonpolitical) fair play duty by participation short of consent. There is no such duty.

The case for participation by (a) is stronger than that for participation by (b). Among the reasons for this is that (a) involves intuitively more egregious offenses (as the beneficiary is usually aware that he is avoiding the costs of the others), they are clearer cases of voluntary receipt of benefits and the schemes involved are most often not imposed on the beneficiary. It is not surprising, then, that Simmons' chief example of a fair play duty by participation short of consent involves participation by (a). I focus on (a) cases in the following, since it is much easier to show participation in those cases than it is in participation according to (b). If we find that the participation is not enough, even in (a) cases, then it is likely not enough in (b) cases. In the example, we imagine a neighborhood with a dirty water problem.

²² Greenawalt (1989) also rejects fair play for political obligation because of lack of participation. ²³ Simmons (2001), 20

A neighborhood meeting is called, at which a majority votes to dig a public well near the center of the neighborhood, to be paid for and maintained by the members of the neighborhood. Some of the members clearly give their consent to the proposed scheme. Others, who vote against the proposal, do not. Jones, in particular, announces angrily that he wants to have nothing to do with the scheme and that he will certainly not pledge his support...Jones begins to be envious of his neighbors, who go to the well daily. So he goes to the well every night and, knowing that the water will never be missed, takes some home with him for the next day. It seems clear to me that Jones is a perfect example of a 'free-rider.' And it also seems clear that, having accepted benefits from the scheme...he has an obligation to do his part within it.²⁴

Simmons concludes that there are cases such as this where a person has an obligation to do his part in a cooperative scheme even though he has not consented to it. What motivates this obligation, according to Simmons, is fair play. But is it really? If we can plausibly account for the obligation in cases like that above, then perhaps they are not really cases of fair play. If they are not really cases of fair play, then the only plausible cases of fair play are those initiated by the consent of the participants in the cooperative scheme.

There ought to be a clear way to tell if someone is a participant or not. Simmons reminds us that clearly identifying the "participants" or "members" in the scheme is essential if we are to understand who has duties of fair play within it. But it is just on this point that "acceptance" is inadequate. Imagine that the example above is adapted so that there is no possibility for fair play to ground a duty over Jones. It is easiest to do so by simply taking out the existence of any sort of cooperative scheme.

Imagine that instead of the neighborhood taking the initiative to create clean water, it is just Jones' neighbor, Smith. Smith is tired of drinking dirty water and has been given permission to dig a well for the enjoyment of whomever he wishes on public property adjacent to his house. He proposes to Jones

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²⁴ Ibid. 17. Another good example is in Greenawalt. A neighborhood cooperates for the maintenance of a tennis court by agreeing that everyone who plays on it should pay 50 cents per hour. The Monroes use the court when no one else is around, but refuse to pay. They must compensate their neighbors for illegitimate use of the court.

that they work together to dig the well and the two of them can enjoy the water together. Jones, as he is wont to do, angrily rejects the proposal and leaves the work to Smith. If Smith digs his well and drinks clean water from it every day, is Jones culpable in any different way for sneaking out at night to get some for himself than he was in the case with the cooperative scheme? Is there any reason to believe that his guilt is not the result of the same types of considerations that implicated him in the case above?²⁵

If the intuition is the same, that Jones ought to compensate Smith just as he would the members of the cooperative scheme in the case above, then in this case it cannot be fair play that motivates the obligation. For if it were fair play, then it would at the very least have to involve some kind of cooperative scheme. Furthermore, it is implausible to believe that the cases, exactly alike in all respects except for the presence of a cooperative scheme, come out with the same conclusion but for completely different moral reasons. No doubt it is possible for this to occur, but we would have to have reason to believe the cooperative scheme presents unique moral considerations and that the reasons present in the case without the cooperative scheme are either not present or are not the actual reasons for the obligation in the case with the cooperative scheme. This is a tall task that I believe cannot be met.

The above discussion does not come to a denial that there are some fairness considerations in both the cases provided. However, if fairness places a duty on Jones, it is not from fair play. It is at most a duty from natural duty fairness. Perhaps it is unfair to ever use the product of labor without contributing a portion for ourselves. Perhaps it is disrespectful of autonomous agents to benefit from their labor without acknowledging it with some productive action of our own. Perhaps it is a case of unequal treatment to take advantage of those who work for the goods they enjoy. Yet, any of these possibilities can occur without the existence of a cooperative scheme. In the presence of a cooperative scheme, all we have to do

²⁵ It has been suggested to me that the difference between the cases is just that where there is no cooperative scheme, Jones is morally in the wrong simply because he commits theft. In the other case, though, it is more difficult to attribute his wrongdoing to theft, since there is a very loose sense in which the people of the community "own" the well. While I am still skeptical of such an analysis, I realize why someone might view it that way. My conclusions here are fairly weak anyway, and we can default to the argument below.

is imagine these moral considerations quantified by the number of members in the scheme. The simpler explanation for our moral intuitions excludes a duty of fair play.

There is a danger of going too far. Have I now given reason to believe that there is *never* a duty from fair play? After all, what is the difference between one who "accepts" the benefits of a scheme without contributing his fair share and one who consents to the scheme and benefits without contributing his fair share? There is a difference between these cases and it is clearly found in the difference between "insiders" and "outsiders" (e.g. "members" and "nonmembers"; "participants" and "nonparticipants"). My claim is that "acceptance" of benefits is not a clear indicator of one's status in a cooperative scheme. Instead, one is an "insider" based on our expectations about his moral entitlements and restrictions.

Jones takes water without contributing to the scheme that produced it. His illicit use of the well is then found out. Let us assume for the sake of argument that Jones does have a duty to contribute to the scheme because of his illicit use of the well. Is this duty the result of fair play on the basis of his being an "insider" in the scheme? The best way to consider this is to think of what forms the basis of a clear "outsider" status. What makes an outsider an outsider is the understanding that he is not normally entitled to the benefits of the scheme. We also do not expect that the outsider will do any work to contribute to the scheme (though he might and yet he still may not be entitled to the benefits as an insider would be). Being an insider in a cooperative scheme must involve your giving an adequate level of cooperation. But, what does this mean?

Does the taking of benefits immediately make one an insider? If we consider our moral expectations, then the answer is clearly "no." I suspect that in a case like the Jones case, even after he contributes the share demanded of him, most people would still likely ask the question whether he intends to join the cooperative scheme. ²⁶ This can get complicated, but the simplest case is where contributions are continually necessary—in maintenance of the well for example. Even after he has sufficiently

²⁶ Or whether his contributing his fair share is an indication of his joining it.

contributed for the proportion of benefits he received up to the date that he was caught, it is an open question whether he will continue to contribute and enjoy the benefits or whether he will again try to take them without contributing his fair share.

Cases where all the effort has already been given are more difficult, but the question of status still arises. We can conceive of a situation where a person is caught and compensation is demanded of him, but where he is still not an insider in the scheme even after contributing. In such cases, it seems up to the insiders to determine whether his compensating them is sufficient for his continued enjoyment of the benefits. It may be that they require a smaller contribution than any insiders had to give, but continue to deny him access to the benefits. It may also be that, though he ought to compensate the insiders, they relieve him of any burden and demand that he discontinue his enjoyment of the benefits.

From this discussion it is clear what we would expect of insiders in the cooperative scheme and what consequently makes one an outsider.

Insider—Anyone who is morally entitled to enjoyment of the benefits of the scheme and is also obligated to contribute his fair share.

Outsider—Anyone who is not morally entitled to enjoyment of the benefits of the scheme or not obligated to contribute his fair share.

Thus, according to our model, Jones is not a participant in the scheme just because he has taken the benefits for himself. He was not entitled to those benefits even if he is obligated to contribute his fair share. As we mentioned above, even after he contributes his fair share to the scheme, it is an open question if he is entitled to further benefits or obligated to contribute from that point on.

At this point someone might object. Our criteria outlines clearly who is an insider and who is not. However, there are times when we do not know whether a person is entitled or obligated in the relevant ways. Do we assume such people are insiders or outsiders? I think the answer to this has become clear

through our intuitions in these cases. As I mentioned, most of us would still ask, even after a fair share has been contributed, whether one who illicitly took the benefits in the first place is willing to change his behavior and act as a cooperating member of the scheme in the future. If we get no answer, we should treat the situation like any other case of voluntaristic obligation (e.g. consent). In consent, we do not consider the person to have consented until we get some clear indication that they have done so. Similarly, unless we know very clearly that a person is going to be a member of the scheme, we should assume he is not. This means that wherever it is appropriate to ask whether someone is an "insider" in the scheme even when we have all the information about his involvement (e.g. receipt of benefits), then that person must be regarded as an "outsider."

4. Fair Play as a Non-Voluntaristic Account

Richard Arneson provides an interesting non-voluntaristic model of fair play in direct response to some of the criticisms we have discussed. Arneson claims that the level of participation in cooperative schemes is in some circumstances irrelevant to one's duties with respect to it. This only occurs for certain types of goods. I will give a brief explanation of his view and then turn to assess the prospects for both Klosko and Arneson as non-voluntaristic models of fair play.

Certain goods are public and the nature of those goods provide unique conditions for obligations in those who benefit from them. There are three features of public goods for Arneson (with corresponding examples of goods that possess the features).

- Jointness: a unit of the good consumed by one person leaves nonetheless available for others.
 (e.g., TV broadcast signal receivable by any TV set, when TV sets are common)
- Non-excludability (collective good): if anyone is consuming the good it is unfeasible to
 prevent anyone else from consuming the good. (e.g., scrambled TV signal receivable only by
 TV sets that have an unscrambling devise)

3. Pure Public Good: All members of the group must consume the same quantity of the good. (e.g., national defense for those residing in a geographically unified nation)

Feature (3) entails features (2) and (1), feature (2) entails feature (1), and feature (1) is independent of the others. There are two conditions under which these features may obligate recipients of benefits in many cases. When the good is characterized according to (2), then voluntary consent is often sufficient for obligations of fair play. However, when the good is characterized according to (3), then obligation is often generated by mere receipt of benefits.

The reason (3) entails obligation in the way it does is because it is impossible for anyone who happens to receive it to voluntarily reject it. No matter what, if one is in close enough proximity to a national defense scheme, one cannot help but receive the good. When a person cannot receive the good in this way, Arneson claims that he also cannot accept it. Thus, voluntary acceptance is irrelevant to the obligations associated with pure public goods. With some additional qualifications, Arneson gives us a revised principle of fairness:

...where a scheme of cooperation is established that supplies a collective benefit that is worth its cost to each recipient, where the burdens of cooperation are fairly divided, where it is unfeasible to attract voluntary compliance to the scheme via supplementary private benefits, and where the collective benefit is either voluntarily accepted or such that voluntary acceptance of it is impossible, those who contribute their assigned fair share of the costs of the scheme have a right, against the remaining beneficiaries, that they should also pay their fair share. (623)

With this in hand, we should assess the possibility of fair play as a non-voluntaristic source of political obligation. Basing fair play on something other than voluntary action eliminates the problems we have so far discussed.

4.1 Morally Required Action That Mimics Membership: Non-Voluntaristic Approaches

It may be that fair play demands that we act as a member normally would in the cooperative scheme—taking on our fair share of the burden. But why would the importance of a benefit or its nature as a pure public good require us to participate in a cooperative scheme even though we are not members to begin with? The duty to contribute one's fair share cannot possibly come simply from the structure of the cooperative scheme and one's relation to it. If that were the case, there would be nothing wrong with Nozick's counterexamples to fair play, since only the structure of the scheme would be of any relevance, not the importance or pure public nature of benefits.

I claim that Arneson's view depends on the importance of benefits in ways that he does not acknowledge. I begin by moving again to Simmons' response to fair play. First, Simmons claims that there is a way to accept pure public goods, despite what Arneson claims. Just because one cannot avoid receipt of the goods in question does not mean that one has accepted them. And we can think of an easy way in which people accept goods that they could otherwise not avoid. They approve of them internally. He points out that "there is something deeply unconvincing about the claim that I *owe* my neighbors reciprocation for essential goods that they, in effect, *forced* me to take from them..." (36) There must be some way to indicate participation in the scheme that is sufficient to be obligated by it. "Surely in such a case, only if I *prefer* benefitting from the cooperative scheme to benefitting from self-provision (or to doing without) could I be accused of unfairly taking advantage of my neighbors when I refuse to do my part in the scheme." (36) I think this reason is enough to cause serious doubt about whether pure public goods can generate obligations without any internal approval.

However, even without this point I claim that Arneson overemphasizes the nature of the goods, when in fact it makes more sense for him to have focused on the importance of the goods. In this respect, I think he ought to acknowledge some similarities to Klosko's view.²⁷ Arneson's defense of his view

²⁷ I will still speak as though a person can "opt out" of the cooperative scheme. This is not because Arneson believes it, but he does concede that certain internal judgments against the worth of the schemes can be effective for

focuses on three of Simmons' claims, one of which I will emphasize here. Simmons claims that to be obligated by receipt of benefits, we cannot think it is not worth the price we must pay for it. But, Arneson claims in response, some people have unreasonable beliefs about what is "fair." To cite an example, he reminds us that someone may wish not to participate in the scheme because he believes that "it is unfair that the ratio of benefits to costs flowing from cooperation should be the same for whites and blacks." (632) In this case, the person's preference indicates a misrepresentation of moral reality. It is fair that the ratio of benefits to costs is the same for whites and blacks.

But why does Arneson emphasize mistaken beliefs about moral reality? The restriction posed by Simmons pertains to pure self-interest as much as to morally correct assessments of fairness within the scheme. It is, of course, easy to see where a bigoted recipient of benefits goes wrong, but the question remains whether his preferences are disqualified just because they are bigoted. I need not make correct judgments about what is morally fair within the context of a cooperative scheme (even if I do need to make correct judgments about descriptive facts) to know that it is not worth my participating in it according to my preferences. If someone chooses against a scheme for reasons that are morally repugnant, why should we believe the reasons are ineffective for opting out unless he "ought" not to have such views and he "ought" not to opt out in consequence? Acceptance of a scheme, if it is about anything at all, is about preferences, whether morally acceptable or not. So if Arneson is willing to concede that assessments of cost and benefit have an effect on the degree to which a scheme can obligate us, those should hold weight so long as they do not rest on errors about descriptive fact.

Since for many cases of benefit from cooperative action preferences matter to the moral obligations of the recipients we should ask under what conditions false judgments about the moral fairness of the scheme should matter. It surely does not matter in cases of voluntary membership in schemes. So, even if the goods are pure public goods, it is difficult to see why that would affect the status

restricting the conditions under which it is morally binding. Thus, I can speak of someone "opting out" even if that just means they internally reject the overall worth of the scheme, whether or not this constitutes a real rejection of it. of false moral judgments. The easiest answer is simply that false moral judgments fail to disqualify membership in schemes when the schemes promote goods that are morally important in some way.

In reality, we need not rely on Arneson's example. Even if we concede that some judgments about the worth of the scheme are ineffective, others are not. For example, if the good is relatively unimportant and I would much prefer not to have it at the cost set by the scheme, then why should I contribute a fair share? Perhaps I believe the goods should or could be bought at a much lower price, even if I admit that the benefits outweigh the costs in the current scheme. It is morally important not only whether the benefits outweigh the costs, but, as Simmons mentions, whether they are in my estimation worth the costs. The exceptions to this might be goods, such as national defense, for which one's preferences are irrelevant.²⁸ The only way such preferences become irrelevant is if we *ought* to do what it takes to produce the good (and even then they are only sometimes irrelevant). This is why I believe Arneson is also committed to the importance of a benefit as the determining factor in whether we are obligated to participate in the scheme that produces it. Though there are many differences, it seems Arneson must agree with Klosko on at least this point.

So, there must be some moral significance to the importance of the benefit received. We can view this as a future-looking problem or retrospective problem. The most straightforward way to think about the future-looking problem is in cases where we ought to contribute toward the production of a morally valuable or necessary good that does not at present exist or may not continue to exist without effort.²⁹ Fairness may generate a fair play duty in these cases because we all share the burden to produce/sustain the good equally and we would be taking advantage of others if we let them do all the work to produce the good. Some of Klosko's own examples from above capture this idea nicely. In case (2) the

²⁸ Perhaps in cases like these Arneson just means to emphasize that there is a morally objective sense in which benefits can be worth the costs. Even so, the point remains. Such an objective measure of worth is only important if we morally ought to care about the goods being produced.

²⁹ As some suggest (cf. Rehfield (2005) or Lefkowitz (2004)), it looks like Klosko is stuck with the burden of showing that we are morally required to provide ourselves with certain necessary goods. It seems he must say more than just that they are presumptive in the way that everyone would want them; he must also say that everyone ought to try to get them.

presumptively beneficial good is clean air, while in case (3) it is access to water. In either case there are multiple possibilities for how I could contribute toward the production of these goods. Imagine that there are not yet any cooperative schemes in existence in these situations. We may still say that we ought to contribute some amount of effort towards producing the goods.

Yet, I can do this in various ways. For example, I could simply restrict my driving or prohibit others from driving unnecessary mileage. Neither of these need be specified by a cooperative scheme over and above simple fairness considerations (as in natural duty fairness). There are many ways to contribute to a solution in both of the above cases and it is not clear why the presence of a cooperative scheme makes any moral difference. My only obligation in the cases above is to make sure that I contribute my fair share of effort in *some* way so that our collective efforts ensure the production of the presumptive good. This can happen with or without the existence of a cooperative scheme.

To illustrate, imagine two solutions to the problem of saving water in Klosko's third example. According to solution (a), the understanding naturally arises that the occupants of each house in the territory will have to restrict their water usage in equal portions. No individual or group explicitly articulated rules for this solution, but the practice developed through widespread understanding that saving water was a necessary effort. The neighboring territory, however, operates according to solution (b), which involves a cooperative scheme. In the scheme there is a set of administrators who determine the extent of water restriction that each occupant ought to contribute. In payment for the work of administration, however, the administrators, who are themselves occupants, are exempted from restricting their water usage, which means everyone else must pick up the slack. These administrators may be appointed for life, elected to terms or any manner of procedure. It is easy to see in either of these two cases that the extent and kind of work required from residents is set at different levels, even though the same goal is achieved by each solution. According to (a) fairness generally sets adequate levels of contribution, while according to (b) fairness from within the cooperative scheme sets adequate levels of contribution.

The reason we have a choice in how we fulfill the duty to produce a presumptive good is that any of the possibilities for contributing one's fair share in the cases above are determined by the natural duty to produce the good itself. This natural duty may result in the *creation* of a cooperative scheme for the efficient production of the good. However, it is not the cooperative scheme itself that produces any fair play duty and there is no indication, even if I ought to aid in the creation of a cooperative scheme that I must also participate in it thereafter. Instead, fairness specifies exactly how much one must contribute according to a range of possible modes of contribution in order to fulfill his duty to promote the good to be produced. The amount of effort may vary with the method of contribution and the method of contribution seems to be the choice of the duty holder. So, fairness in producing/sustaining a morally necessary good need have nothing to do with cooperative schemes.³⁰

There is a retrospective way in which the importance of a benefit can affect one's moral requirements as well. Imagine Klosko's three cases above, but where the goods (e.g. security, clean air and water) have already been produced for us. It may seem unfair that we should benefit from efforts that have been given without ourselves giving something back. If a good is important, then one might be bound by a debt of gratitude to those who produced it. However, as Klosko himself acknowledges, gratitude is incapable of specifying the fair share one ought to contribute according to the cooperative

³⁰ Craig Carr (2002 &2004) criticizes Klosko on an example I have not used in this essay. In the example, a man chooses not to contribute to snow removal from a walkway both he and his neighbor need to access essentials for survival. According to Carr, it does not matter what kind of benefit is received because fair play duties have little to do with receipt of benefits. Instead, he claims that fair play duties arise from staying true to the goal of the enterprise in which one participates. His fair play duty is an attempt to avoid cheating and one cannot cheat at something for which one is not a participant and, for this reason, Carr denies the moral relevance of any kind of benefit at all, including presumptive benefits, for fair play duties. Carr interprets Klosko's example as a case where one has a duty to contribute not out of fairness, but because of some other moral consideration, such as the duty to protect or care for one's family.

This cannot be correct. Surely it is unfair to allow someone to do all the work toward the production of a good that all parties must produce, even if he has other moral reasons to do so and even if those other moral reasons specify his part better than fairness considerations. However, the real problem is just that the fairness that is present in Klosko's example is not a moral source for a fair play duty. Instead, it is a moral source for a duty from fairness. He ought not to take advantage of the other's effort, whether there is an agreement between them or not, whether there exists a cooperative scheme or not. But, if anything, this is a moral reason to create a scheme between them, not a case where a cooperative scheme has given moral reasons to contribute a fair share.

scheme.³¹ Gratitude has little to do with fair play except insofar as contributing to a cooperative scheme according to its rules is just one way to show gratitude.³² As with natural duty fairness, gratitude also does not specify exactly what one ought to do. If a good is provided, then it is up to the beneficiary (to some extent) how he fulfills his duty of gratitude. He may throw parties for the members of the cooperative scheme, contribute funds to their institutions, or any number of things.

Another retrospective way to view the problem is that out of fairness we owe compensation, not gratitude, to those who have provided goods for us. Again, this retrospective view seeks an answer about how we must act once a good is produced for us. This view may at least have something to do with fairness, but not fair play specifically. Perhaps it is simply unfair that some should work and others should not. On the other hand, it also seems unfair that some should impose on others the conditions of receiving such a benefit (where that benefit was not voluntarily accepted), especially in cases where a person could have provided himself the benefit by efforts he chose for himself. It is not enough that the benefit was provided. There must be some level of acceptability with the beneficiary in cases where the provision of a good is *imposed*.³³ Compensation cannot involve a level of repayment that is set according to the cooperative scheme. If that were the case, even when a person believes the scheme is not worth it and the participants of the scheme are "suckers" for agreeing to it, he still must pay the same as they do.

Compensation also may specify a different level of payment than a fair share according to the cooperative scheme. Imagine a scheme that defines specified shares of effort according to different roles within it. Compensation may require a beneficiary to contribute according to any of a wide variety of standards. This means two things. First, it is difficult to assign fair shares to those who are not members with specified roles in the scheme. Second, because of this difficulty, non-member status may require compensation to be formulated by fairness outside of fair play in terms, for example, of what level of

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³¹ Klosko (1998)

³² See Greenawalt (1989)

³³ This argument is rough and less rigorous but similar to Simmons's criticisms of Klosko.

contribution would be required by fairness without the existence of a cooperative scheme. Either way, it appears we are no longer dealing with fair play as opposed to natural duty fairness.

The conclusion, then, is that for fair play it cannot be the case that one is required to act as a member would without regard to his status in relation to the cooperative scheme. For one, this in no way involves the imposition of a fair play duty by the cooperative scheme. Second, none of the ways that the importance of the benefit matters morally will specify exactly how one must produce it. There will always be options or the options will be specified by duties from fairness generally (as in natural duty fairness) and not according to rules/expectations as set within the cooperative scheme itself.

5. Conclusion

My aim here is not to reject fairness accounts altogether. Indeed, I will develop natural duty fairness in Chapter 4. However, it should be clear that other versions of fair play fail to entail political obligation. Voluntaristic fair play seems to be in a more difficult position. While it is possible to think of ways in which natural duty might entail further obligations (it is, afterall, a source of deep moral complexity), the prospects for voluntary acts supplying a duty to obey the law on a large scale are bleak. What other kind of voluntary action could bring such an obligation?

On the other hand, the importance of benefits is still interesting. We can perhaps show at least that fairness entails a duty to create and sustain cooperative schemes that produce certain kinds of morally valuable goods. Perhaps there is a way to move beyond this to show that in some cases the *moral* nature of the goods in question calls for a deeper duty—one that would necessitate our obedience to the law in fairness to our fellow subjects. That remains to be seen. First, we will look at another kind of natural duty account in recent Kantian arguments for political authority.

Chapter 3: Kantian "Provisional" Rights

Kantian political theories have enjoyed a firm and respected place in political philosophy. The variety in which they come is evidence of the depth and richness of the resources available in Kant's moral and political work. However, many "Kantian" theories of the necessity of the state and the moral foundations of political obligation have been only loosely associated with Kant's actual work. In contrast to Kant, some Kantians have endorsed a view of the state that sees its value as fundamentally "instrumental" in nature (cf. Rawls), taking it to be valuable only insofar as it *empirically* promotes or protects a deeper moral value (e.g., the protection of rights or establishment of egalitarian justice). Thus, the plausibility of the claim that the state is justified or that we have obligations to it depends on the plausibility of empirical claims about its ability to accomplish certain tasks and the necessity of our compliance and support of it. For example, in Rawlsian political theory, the state is ultimately necessary for the establishment of justice over a community of people with equal dignity. Rawls' view, while inspired by Kant on the basis of the equal standing of individuals as the primary moral source of political authority, ignores many of what some may view as Kant's less palatable claims. Others are willing to embrace more of Kant's central claims (e.g., Waldron's acceptance of the Kantian duty "to enter a right condition with others in close proximity"), but still leave significant portions of his political theory as the subject of Kantian exegesis.

However, in the last decade theorists have begun embracing fuller accounts of Kantian justifications of the state in order to avoid problems to which past Kantian theories were susceptible (e.g., the "particularity" problem, the "boundary" problem, etc.). These "new" Kantians attempt to find space

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¹ Ripstein (11)

² Kant (Metaphysics of Morals (MM), 6:307); Waldron (1993)

between the two most commonly cited bases for authority and political obligation—natural duty and consent. They offer a "third way" between these.³ The promise is that we need not justify the state by voluntary acts described by consent, or by duties that rest on easily identifiable moral requirements from simple interpersonal interactions. These new Kantian accounts depart sharply from the 20th century "instrumentalist" views of the state and embrace some (though not all) of Kant's neglected conclusions. The best and most complete such accounts are offered by Anna Stilz and Arthur Ripstein. Since they are similar both in which of Kant's central claims they accept and in how they use these claims to support political authority, I focus almost exclusively on them in the following. Where relevant claims are made by Kantians of a different stripe, they are identified.

Stilz and Ripstein begin from the innate right of all to independence from external domination. They follow Kant's reasoning about the necessity of the state from the "provisional" nature of property rights (and other acquired rights) and its importance for the protection and exercise of the right to independence. These views do not hold the value of the state to be merely instrumental because the justification of the state rests on non-empirical premises. It is not that the state protects property rights better than they would be protected in a state of nature; property rights cannot exist as *full* or *conclusive* rights at all in a state of nature. Thus, the very idea of the right to independence and its reliance on property rights gives the state authority and grounds our duty to obey it.

Although these recent Kantian views solve some of the enduring problems that have affected Kantians of the past and also remain closer to Kant's own political philosophy, there is a tension involved in the idea of property as a "provisional" right. It is said that it is a right, but one that cannot be enforced through coercion.⁴ Yet, rights are, by definition according to Kant, entitlements to coerce.⁵ In the following, I explore this tension and highlight some of the difficulties of various attempts to explain it without thereby losing the internal consistency necessary for an adequate account of authority and

³ Stilz (21)

⁴ Ripstein (165); Kant (MM, 6:257)

⁵ Kant (MM, 6:231; 233); Ripstein (30)

political obligation. In the end, I recommend a "full" rights model in the spirit of Locke and others in opposition to the Kantian model.

1. The New (Old) Kantian Argument

Kant's political philosophy begins with the innate right to independence (freedom). Independence is different from the similar principle of autonomy in that it pertains only to external control over one's actions without reference to intentions or good will.⁶ For example, one can fail to be *autonomous* on an island alone, but cannot fail to be *independent* in such circumstances. Independence, then, is the absence of domination from others by coercive action. Such coercion is defined by our ability to be project pursuers or to be free to exercise our "purposiveness."

It is important to understand what makes independence an "innate" right. According to Stilz and Ripstein, the right to independence is the only right that is preinstitutional or "full" in a state of nature (hereafter, SN). The non-existence of the state does not affect the existence or strength of the right at all. What this means is that, not only the form, but the substance of the right is determinate and publicly knowable before any state has come to legislate it or enforce it. Given that this is *the only* innate right, it is different from other rights in important ways.

The other kinds of right that Kant describes are what he calls "acquired" rights. These are rights to property, contract, and those related to status (e.g., familial, vocational, etc.). I am concerned mainly with property rights in the following, since these are the acquired rights that Stilz and Ripstein use to support the moral authority of the state. The right to property, as an acquired right, is not "full" in a SN. While a right to property is morally necessary, it is unenforceable and indeterminate—it is what Kant

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⁶ Kant (MM, 6:230; 237-238)

⁷ Ripstein (91)

⁸ Kant (MM, 6:237-238); Stilz (39-40); Ripstein (58)

⁹ Kant (MM, 6:247)

calls a "provisional" right. ¹⁰ As such, in a SN it is identifiable only by its form, not by its content or status as enforceable. This means that in order to be a full right, the right to property can only be given content by and enforced by the state. ¹¹

So far, though, we may still ask why we should care if the state can make the right to property full. Why not leave it "provisional" if it suits our interests to leave it so? The answer is that it is morally necessary as an extension of the one innate right to independence (freedom). Even if a "full" right to property did not suit our interests—even if we did not consent to the establishment of it—we would still be under the authority of the state that makes property a "full" right. This is because, according to Stilz and Ripstein, the right to property is morally necessary in order to exercise and protect our right to independence.¹²

The moral necessity of the right to property can best be understood in terms of the contrast between empirical possession and intelligible (or noumenal) possession. Empirical possession is possession of any object that is physically under my control. Such an object is mine because to remove it from my possession would require the kind of physical coercion that violates my right to independence. Thus, I have empirical possession of anything in my hands, under my body, on my body, etc. In contrast, intelligible possession is that which we commonly think of when we think about things we own. I can leave an object for great lengths of time without losing my rights over it according to intelligible possession. Even if I am not at home, I have a right against others from their use of it without my permission or their taking possession of it for themselves. Thus, I have intelligible possession of anything over which I have rights that remain intact even when I am not in empirical possession of it.

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¹⁰ Kant (MM, 6:257)

¹¹ Some claim that Kant believes the right can never be conclusive or full in imperfect political models like contemporary states. While it may be possible to achieve conclusive property rights, on this view the state as it exists today is insufficient to establish them. Ellis

¹² Stilz (39); Ripstein (146)

¹³ Kant (MM, 6:250; 245)

¹⁴ Kant (MM, 6:245-246)

As Stilz explains, empirical possession is not enough to secure independence. In order to be independent—to exercise our "purposiveness"—we have to be able to use physical objects without threat from anyone that they will take possession of it or otherwise treat it as an object on which they are free to act. This requires a public and enforceable model of intelligible possession.¹⁵ Yet, without the state, my acquisition of any object is a unilateral act that is supposed to impose moral constraints on all who may have otherwise used the object. Since we know that the right to property is merely provisional in a SN, then we must have the state to establish by an omnilateral act (according to a general will) the structures required for intelligible possession.¹⁶ Only the state can turn property rights from provisional into full rights.

In sum, we have an obligation to enter a rightful condition in relation to those around us. The only way for us to enter this condition is to protect our innate right to independence by making property rights "full" and enforceable. In doing so we offer a guarantee to those in close proximity that we will respect their rights to property without putting ourselves at risk of violations of our rights to property. This model is similar to other natural duty justifications of the state because it relies on duties we have irrespective of the state—namely, to refrain from dominating others and to enter a rightful condition. However, it is different from other natural duty justifications of the state because the duties in question do not correlate with easy to identify and fully established rights from our basic interactions with other individuals. These rights are rather "filled out" by the state once it establishes norms that are reinforced by an omnilateral will.

The result of the Kantian argument from "provisional" property rights as characterized in Stilz and Ripstein is that we have a duty not only to enter a state, but to obey it as well. Since all have a right to be in a rightful condition with those in close proximity and the only way to do so is to enter a state that both defines the content of acquired rights such as property but also enforces them, then all have a duty to

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¹⁵ Stilz (21-22)

¹⁶ Kant (MM, 6:255-256); Stilz (45-47); Ripstein (90). Stilz develops the idea of a general will through the work of Rousseau.

place over themselves a state that accomplishes these tasks. Everyone also has a duty to obey it, since it is authoritative in defining the boundaries of property rights and is the main mechanism of enforcement of those rights. Even though the justification of the state in general is inextricably tied to the duty to obey it, I will focus mostly on the duty to obey the state in the following. The question is whether the argument provided by the Kantians in question entails the duty to obey the laws of the state without invoking concepts that are too difficult to incorporate into a single coherent moral framework. I claim it does not.

2. The Tension: What is a "Provisional" Right?

There is no clear definition in Stilz or Ripstein about what it means for a right to be "provisional." However, we do know some things about it from their mention and use of the concept. I will proceed by mentioning those features that seem important and then highlighting the tension with some of the features of rights as provisional.

Only acquired rights are provisional. There is one right that we have in "full" or "conclusive" form just by our birth. This is the right to independence from external coercive restriction. However, every other right is acquired, and so cannot be considered full or conclusive. For example, we take on rights of contract by some act that changes the moral landscape around us as it would naturally appear at our very birth. From birth, all have a duty to refrain from coercing me without my permission. But it is only by acting in the context of a promise or contract that I give others a right to act coercively in other specific ways. Thus, my promise or contract changes the rights of others and myself. Similarly, owning property involves the act of taking for oneself an object of the world that is as yet unowned and thereby imposing duties on others not to interfere with my use of it, even when it is not in my physical possession.

The reason acquired rights are "acquired" is that they only appear after some morally effective action has been performed.¹⁷

What this means is that provisional rights have a coherent form in a SN, but do not have content. Property rights can be understood without the state, but cannot have the kind of content necessary to become full or conclusive. We could never justifiably act to acquire property rights, enforce them, or settle disputes about them without the state as an impartial and unified structure within which these things take place. Thus, though we understand how provisional rights could be rights, we cannot make them determinate without an omnilateral will (or general will) to make them stable without a civil condition.¹⁸

One might easily get the impression that this is merely a practical problem. We might just need an impartial coercive entity to help us settle disputes and then we have solved our problem. Yet, a moment of reflection reminds us that this could be done in a wide variety of ways, one of which is through simple convention without establishing any state. But this is not how the Kantian argument in question goes. Provisional rights are provisional even if there is no actual disagreement between persons in a SN about their application. The upshot is that provisional rights cannot be conclusive or full in a SN primarily because they are unenforceable. It is on this point that we see a tension in the Kantian argument. What does it mean for a right to be unenforceable?

Rights are necessarily enforceable according to Stilz and Ripstein.²⁰ A natural implication of this, then, would be that provisional rights are not really rights at all. One reason why Kantians might want to avoid admitting this is that, if there are no provisional rights, then the moral necessity of making them full seems less plausible. The state serves the purpose of making such rights determinate and enforcing them, not bringing them into existence. It would be odd if the state was morally necessary because it was

¹⁷ Kant (MM, 6:255); Ripstein (58); Stilz (45)

¹⁸ Kantians sometimes speak as though this is essentially a regress problem. Even if conventions arose that made property rights stable in a SN, they would be based on nothing more than a contract between individuals in the SN. But contracts are themselves merely provisional in a SN, and so cannot be taken to produce conclusive rights either. Thus, there is no way to make property rights full in a SN. I am indebted to A. John Simmons for this point.

¹⁹ Stilz (47); Ripstein (159)

²⁰ Stilz (41); Ripstein (146)

required for making new rights. If there is no right for the state to protect, then the state gets its legitimacy from protecting rights that only exist once the state is established. We may as well prevent the establishment of the state so that such rights do not appear in the first place. If there is no moral necessity for the state, then we are not morally required to bring it about, enter it or follow its commands.

Of course, this is too quick. As mentioned above, Kant claims that the provisional right to property must be made full or conclusive because it is necessary for the protection and fulfillment of the presinstitutionally established and conclusive right to independence. Independence, claims Stilz and Ripstein, requires my use of external objects without threat of your interference. Kant also says that whatever end is rational to will, so are any means necessary for it. 21 There is a property right because we ought to be able to acquire property in order to exercise our right to independence, since it is a necessary means to exercising our right to independence. However, since rights are by definition enforceable, and property rights in a SN are unenforceable, it appears there are no property rights, provisional or otherwise.

Strangely enough, defenders of these Kantian arguments see no problem in the tension between the apparent lack and existence of property rights in a SN. In fact, they cite the strange status of property rights as the unique ("third way") source of authority and political obligation. 22 Now we must explore some of the ways in which we might interpret such arguments to solve the puzzle that is before us. The most natural place to start is in the enforceability of rights, since the lack of this quality is what might call into question the existence of a provisional right to property.

²¹ Kant (Groundwork for the Metaphysics of Morals (G), 4:417) ²² Stilz (21); (86)

3. Enforceability

3.1 The Practical Enforceability Problem

There are two ways in which Stilz and Ripstein speak about the enforceability problem for rights in a SN. One way is in the lack of any "guarantee" from others that they will not violate such rights. ²³ I will refer to this as the Practical Enforceability Problem. While this idea is not completely separable from the *indeterminacy* (which is central to the second understanding of the enforceability problem below) of provisional rights, Practical Enforceability picks out a problem that occurs independently of indeterminacy. ²⁴ The central idea here is that in respecting another's claim to rights I submit myself to the control of his or her will. In respecting others' property rights with no guarantee that they will do the same for mine, I allow them to treat me as a mere means and to violate my right to independence by being free to take my possessions in conflict with the rules that they endorse to govern their own possessions. ²⁵

Kant asserts that it does not matter whether others actually attempt to take my "possessions" since I can assume that because they have not offered me a guarantee to treat me in kind, they are a continual threat.²⁶ Thus, I can take preemptive action in order to prevent violations of my right of private property (according to my model of perceived property rights). On the other hand, Ripstein also claims that it is immoral to act in defense of one's (perceived) property rights when it violates another's right to independence (further discussion below). He claims that we are not entitled to act before *or* after another's violation of my (perceived) intelligible possession of an object, since such possession is impossible in a SN. While this looks like an inconsistency, there might be a way to resolve it. For example, perhaps we are only entitled to defend our property rights up to the point where any further

²³ Stilz (52); Ripstein (162)

For example, one reason there is no guarantee is that there may be no uniform standard of the content of such rights. Even so, as we will see the right are practically unenforceable whether they have a uniform standard or not.

²⁵ Kant (MM, 6:236); Ripstein (162)

²⁶ Kant (MM, 6:307)

action would violate another's right to independence. Whatever the case, I leave this worry aside in order to explore the deeper problem of the nature of provisional rights.

One thing that recent Kantians have said is that enforceability is a problem *even if* there was no dispute about who owned what. Ripstein, for example states that even in situations where there is no controversy about what belongs to whom, "...without public enforcement, people lack the assurance that others will refrain from interfering with their property and, as a result, have no obligation to refrain from interfering with the property of others." (159) Similarly, Stilz claims that even if one interpretation of justice in a state of nature were objectively correct, "...as long as we remain in a state of nature, even this true view of right must remain unrealized, since each person, being an equally authoritative judge, has a right to enforce his or her own interpretation of justice..." (47) Imagine, as we are now stipulating, that the enforceability problem is really about Practical Enforceability. If we cannot live without the state because our rights, though possibly determinate, are not enforceable against those who might violate them even when their content is agreed upon or determinate, then this problem is not unique to provisional rights. We would have the same problem with our innate right to independence. It should be fairly obvious that even though our right to independence is determinate (it begins and ends with the extension of our physical bodies), without a state no one has offered us any "guarantee" or "assurance" that they will not violate it any more than they have offered assurance with respect to property rights.²⁷

Indeed, it has been suggested that Practical Enforceability applies in the same way to the innate right to independence.²⁸ This can be seen in the fact that the main problem is just in one's submitting one's will to another for his or her use as a mere means. It seems possible to do this whether the right is determinate or not. So, while indeterminacy can serve as an additional way in which Practical

The language of a guarantee with respect to the other reading of the enforceability problem—Moral Enforceability—creates some problems. While it is true that if the right is indeterminate, there will be no guarantee from others that they will not violate my property rights (as I perceive them). However, the Kantians in question act as though the guarantee problem is a problem even when there is no dispute about who owns what. They must be referring to a problem that is independent of a right's indeterminacy then. (Stilz,47) (Ripstein,159)

²⁸ "...and second, a state is required to *enforce* all our rights—both rights to bodily inviolability and rights to property—in a way that does not subject some persons to domination by others." (Stilz, 35)

Enforceability is a problem for certain rights, rights need not be indeterminate for it to be a problem. So, until we have better reasons to think otherwise, we should assume, as Stilz does, that enforceability is equally a problem for provisional rights and the innate right to independence.

The trouble with this view, however, is that if read according to Practical Enforceability, lack of enforceability would render rights to property and to independence as *both* provisional. It appears that the Kantians in question use a lack of enforceability as a sufficient condition for a right's status as "provisional." For example, Ripstein explains that "...nobody is entitled to enforce any acquired rights they (suppose themselves to) have. As a result, all rights to external objects in a state of nature are merely *provisional*, because they are titles to coerce that nobody is entitled to enforce coercively." (165) But since Practical Enforceability applies in the same way to acquired rights and the innate right to independence, we cannot retain the "conclusive" nature of the innate right to independence. Even if Stilz or Ripstein attempted to deny this point, it is unclear on what basis they would do so. The Practical Enforceability Problem is a problem just because others do not offer any guarantee that they will not violate my rights. If this can be the case even when such rights are determinate (or even just agreed upon), then it can be the case for any kind of right in a SN.

This brings further difficulties as well. If the right to independence is provisional like the right to property, then the state is no longer morally necessary. Recall that Stilz and Ripstein claim that the moral necessity of the state is based on the necessity of making provisional rights full *for the purpose* of being able to exercise one's right to independence. But if independence is also a provisional right, then the state is unnecessary since there is no deeper or more fundamental right for whose purpose independence must be made full. Otherwise, it remains to be shown why it is morally necessary that provisional rights (in this case both property *and* independence) be made full for their own sakes.

There is another (in my opinion, more plausible) non-Kantian way to understand the Practical Enforceability Problem with different conclusions. If the right to property and the right to independence

are equally unenforceable without the state, the state is still morally necessary on some level. This would be true, for example, if unenforceability did not diminish the status of rights and they *both* remained "full" or "conclusive" in a SN. In this scenario, the state is still necessary, but for the protection of conclusive rights against violation, not for making provisional rights full or conclusive.

Stilz and Ripstein, of course, will not accept this conclusion, since such a concession would put them squarely into agreement with a more or less Lockean rights and duties model and the Kantian view would lose its status as a "third way" between consent theory and natural duty. For example, Ripstein speaks of theories that make no direct reference to institutions or law, such as "Lockean 'natural rights' theories that claim that persons have fully formed moral rights in a state of nature, and that the only legitimate purpose of legal institutions is to solve problems of self-preference or insufficient knowledge in the application of those rights to particular." (8) Locke's theory of property acquisition does not entail that everyone knows the proper boundaries of property ownership. So, if enforceability is impossible only because of epistemic limitation, as it would be in a case where there is a true interpretation of justice, then the Kantian view is similar to other natural duty accounts like Locke's, except with the vice of failing to give even a meager attempt to delineate any clear boundaries for property rights. In addition, such a move would make the Kantian view susceptible to all the problems that have faced more straightforward natural duty accounts of authority and political obligation. Later, I will claim that the broadly Lockean model is a better option anyway. For now, though, we leave this avenue to explore something else.

Before we explore further, we should pause to remember in what ways the Practical Enforceability Problem is practical. It is so for two primary reasons—epistemic limitation about the objective content of rights and the prevention of deliberate rights violations. We may be in fact wrong about our property rights even if there is a morally objective standard of acquisition and transfer. In this case, though the rights are present, we cannot be considered experts on what they are or how to apply

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²⁹ I am not here claiming that Locke defended a natural duty account of political obligation, only that many natural duty accounts of political obligation take as their most fundamental basis the existence of "Lockean" style full rights and duties. Simply put, I am echoing Ripstein's claim that they are fully formed in a SN for Locke.

³⁰ See Wellman and Simmons (2005) for a good discussion of these problems.

them. In addition, even if an objective standard were clear, we cannot always prevent people from violating it. There will always be vulnerable people and it may be morally necessary for us to provide ways to help them by establishing a state. Neither of these reasons are ones that a Kantian can give on a model of rights as indeterminate, however. Thus, we move on to the other way of understanding the enforceability problem.

3.2 The Moral Enforceability Problem

Another way of talking about the enforceability problem is in the idea that property rights (and any other provisional rights) are unenforceable because indeterminate. On this view, the right to property is unenforceable because I cannot protect it from those who would violate such a right without thereby unjustifiably coercing them and violating their rights to independence. The argument is something like the following. Because property rights are indeterminate, there are no indications when someone has intelligible ownership over an object (even if they sometimes have empirical ownership when they are in physical possession of it). Thus, as long as I am not holding it, wearing it, standing on it or otherwise making it impossible for others to use it without thereby imposing on my physical body, then they do me no wrong in taking it. They are just using an object that has no definite claim over it by anyone.³¹

This means that if I were to try to enforce my right to it based on, what is from my perception, my intelligible possession of it, I would be clearly violating the other person's right to independence by physically coercing him or her in taking what is determinately no person's intelligible possession. Thus, all I am morally permitted to do is wait until this person gives up empirical possession of it (physically leaves it) and then take it back for myself. Then the cycle repeats itself for the other person. He or she cannot take it back without violating my right to independence unless I physically give it up. On such a

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³¹ Kant (MM, 6:246)

view, then, the right to property is unenforceable because there is no morally permissible way to enforce it. Henceforth, I will call this the Moral Enforceability Problem.

Moral Enforceability rests on the idea that there is no objective standard for property rights. The very idea that we are not morally permitted to defend our rights entails that we do not have them in any determinate form.³² The reason I cannot coerce you in defense of my perceived intelligible possession over objects is simply that I in fact have no intelligible possession over objects.³³ But Moral Enforceability as a source for the moral necessity of the state is confusing. Kant is essentially telling us that we ought to create objective standards for rights that would otherwise not have any. 34 This prompts the obvious question, "What kind of right exists that has no objective content?"

If property rights are really indeterminate, then Kant claims we ought to make them determinate through the establishment of the state.³⁵ This is not because of anything special about property rights themselves (or other provisional rights); it is because property rights are morally necessary for the full exercise of the right to independence. As Stilz explains, "I am externally free only when I can do something to further my projects. And this means that I must be able to actually take up some means to my ends without fear of your interference with my acts." (39) Understanding the necessity of full property rights for the exercise of the right to independence requires an understanding of how property rights are indeterminate without the state.

Stilz and Ripstein claim that indeterminate rights have no clear boundaries or no content.³⁶ In other words, it is impossible for us to know how to act according to indeterminate rights because such

³² Ripstein (165)

³³ Ripstein (165)

³⁴ It is only on the basis of the indeterminacy and unenforceability of provisional rights that we ought to enter a rightful condition in the state. Kant (6:307)

³⁵ Kant (MM, 6:307)

³⁶ Stilz (21 & 47); Ripstein (168-176)

rights do not prescribe specific enough actions.³⁷ We cannot know how to exercise the rights we might have over objects because property rights are not "filled out" as they would be in a civil condition.³⁸

Indeterminate rights also have merely subjective standards. If one thinks there is a standard for an indeterminate right, there is nothing preventing anyone else from endorsing a different standard for the right. The important point is that each of these perspectives is equally valid. As Stilz reminds us, Kant claims that the problem of anyone justly acquiring rights in a SN is rooted in the basic "right to do what seems right and good to him and not to be dependent upon another's opinion about this." (46) This is in part because of the moral equality of individuals as judges of right and wrong. "And because each person is an equally authoritative judge, it is therefore impossible—in a state of nature—to put him under an obligation of justice that he himself does not recognize." (46) Thus, there is not just disagreement between individuals (which is equally true of a Lockean conception with sufficient epistemic limitation); there is also disagreement with no possible objectively correct party.

If we ignore Practical Enforceability issues (due entirely to epistemic limitation and the need to prevent potential rights violations), we should be able to act within our *determinate* rights very easily without being in danger of violating anyone else's rights. So long as no one is preventing us from exercising them, there should be no dispute about their boundaries or prescriptions. This means that our innate right to independence should be fairly easy for us to exercise so long as there is no one there to violate it. So why do Kantians claim that property rights are necessary for the exercise of our right to independence?

On this point Stilz and Ripstein have been less clear. For example, Kant himself claims that "freedom deprives itself the use of its choice regarding objects of choice by putting usable objects beyond the possibility of being used." (MM, 6:246) This gives us reason to believe that usable objects must be possible to use, but we still have no reason to think that this cannot be done either without any property

³⁷ Ripstein (168-176) ³⁸ Stilz (21)

rights or with property rights that are determinate. Lest we get caught up in Kantian terminology and lose the main point, I offer a brief sketch of the problem.

Determinate rights have clear boundaries (even if people are ignorant of them). They are also based on an objective standard (whether or not people are always correct about that standard). People who have determinate rights, then, should be completely free (morally) to exercise them within the bounds of that right. This means that any external limitation on the exercise of such a right—any attempt by others to prevent or restrict action within the bounds of the right—constitutes a violation of that right. As such, the innate right to independence can have no external limitation on its exercise except when such limitations on it are violations of it (unjustified restrictions on it). This implies that the right to property cannot possibly be morally necessary for the full exercise of the right to independence because such exercise is perfectly possible without property rights.

If it were the case that property rights were morally necessary for the full exercise of the right to independence, then this could only be true either because property rights are a constituent part of the right to independence or the boundaries of the right to independence are not as clear as the Kantians in question have let on. In the former case the right to independence is not determinate because property rights are not determinate and property rights are part of the right to independence. In the latter case, the right to independence is not determinate because its boundaries are not defined (in the same way and because of the lack of determinacy in property rights). Thus, we are left to conclude that the right to independence is merely provisional, because it is unenforceable according to the Moral Enforceability Problem in the same way as property rights in a SN. This may cause us to doubt the moral necessity of the state, since the right to independence turns out merely provisional.

Perhaps in order to save the claim that property rights are necessary for the exercise of our right to independence, these Kantians will admit that the boundaries around our one innate right are not so clear

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³⁹ Stilz (22 & 35); Ripstein (171)

Enforceability problem that we are now entertaining, the reason *property* rights are unenforceable is because there is no morally permissible way to defend them. If you take my possessions from me when I am not in physical control of them, then I am wrong to try to take them back if it requires coercion of your physical body in any way. But the only reason it is impermissible for me to coerce you in defense of my property is because there are no set boundaries for property rights and therefore it cannot be said that anyone really has any intelligible claim to the object. By analogy, then, if the right to independence is unclear or has undefined boundaries (again, this is not a point about epistemic limitation), there is no way to make intelligible claims about it. It will be unclear what acts violate the right to independence and what acts do not violate it. When it is unclear, then there is an analogous Moral Enforceability Problem about the right to independence. We cannot defend ourselves from violations of the right to independence because there is no objective standard about it and such defenses will inevitably involve coercion against others.

Perhaps Stilz or Ripstein will object at this point. The way I have described it, we are not permitted to defend against perceived violations of our right to independence, but this cannot be quite right. The Moral Enforceability problem is a real problem for property rights just because, given that there is a determinate right to independence, we can see how it can be violated by defenses of property. When there is an underlying determinate right, things can be permissible or impermissible. However, once we question the status of the right to independence, there is no such thing as permissibility or impermissibility (for public right) because there is no deeper right to which we can appeal. We do not violate anyone's right in defending perceived violations of an *indeterminate* right to independence, because there is no conclusive right left to violate.

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⁴⁰ Recall Kant's belief that it is an act of aggression to defend my property rights if they are not in my physical possession, since objects of choice are no one's possession until acquired according to a general will. (MM, 6:246)

At this point we should remember that the primary motivation for calling property rights "provisional" on a Moral Enforceability interpretation of the enforceability problem is that such rights are ultimately indeterminate (this would not be the case under the Practical Enforceability interpretation, since on that view it is an open question whether the rights are determinate or not). So, the motivation is the same, and these Kantians are left having to admit that the one innate right to independence is actually provisional in the same way as the right to property. Even if they claimed that the right to independence does not suffer from the truest version of the Moral Enforceability problem, the conflict is still there.

Admitting that the right to independence is indeterminate is to give up the entire Kantian project for Stilz and Ripstein. The reason is that if the right to independence were indeterminate, then the state would not be morally necessary. Recall that the reason the state is morally necessary is just because it makes provisional property rights full or conclusive and property rights are necessary for the exercise of the only full right of independence. However, if indeterminacy affects the degree to which a right is full or conclusive, then the right to independence is not full or conclusive. If the right to independence is not full or conclusive, then there is no other, more fundamental right for which it is necessary that it be made full or conclusive. Thus, there is no moral need for the state.

If this is all true, then the state loses its source of justification. Of course, we may still appeal to Practical Enforceability as a basis for the state, but our conclusions are much more conservative than those that would result from the claims of Stilz and Ripstein. For example, with only Practical Enforceability as the moral source for the state, we cannot claim that there is any obligation to obey the state. This is because admitting that Practical Enforceability is the only source for the justification of the state is to put the Kantian view squarely into the realm of other straightforwardly natural duty accounts of

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⁴¹ Both Stilz (Chapter 4) and Ripstein (Chapter 6) imply or assert a general and universal obligation to obey the state, as well as the state's right to command and coerce.

political obligation (e.g., those that rely on more or less "Lockean" natural rights and duties). The problems with these are well-known.⁴²

In addition, though, we should notice that the primary source for a duty to obey the law is in the way that the state makes provisional rights determinate. A lack of enforceability may result in a duty to support the state in its endeavor to enforce rights, but it is the indeterminacy of rights that gives the state power to impose moral duty on its subjects to obey its commands. It is only because property rights are made determinate by the state that we have to follow the commands issued by the state in relation to its boundaries and application. If we take on Practical Enforceability as the only problem for which the state is morally necessary we lose the moral basis for a duty to obey the law.

I leave it open that there is a possible way to interpret Kant in order to avoid some of these difficulties. I have significant doubts about the value of such a project, but perhaps it can be done. My arguments to this point have given good reason to be skeptical about the recent Kantian views that we have discussed.

4. The Implications

The Practical and Moral Enforceability Problems are separable. It may be that provisional rights are unenforceable for both reasons. Indeed, the way Kant and the Kantians under scrutiny here speak about provisional rights, it often seems as if they mean to ascribe both problems to provisional rights.⁴³ It is important that we realize that the problems do not disappear even if there are multiple reasons for believing that provisional rights are unenforceable. There is, of course, any combination of enforceability problem for right. It is possible for Kantians to say that conclusive rights are susceptible to either or both interpretations of the enforceability problem. They may say the same or different about provisional rights.

See Wellman & Simmons (2005)

⁴³ Kant (MM, 6:256); Stilz (52): Ripstein (162 & 165)

The discussion above, however, should make it clear that there are only so many options available to Kantians who wish to remain true to the central tenets of Kant's view (as Stilz and Ripstein do), regardless of what they intend to say about rights. I attempt to lay these out and understand where that leaves us.

Conclusive rights can be susceptible to the Practical Enforceability Problem. However, if they are, then Practical Enforceability cannot be a problem that makes rights provisional. Otherwise, conclusive rights would be provisional, not conclusive. On the other hand, conclusive rights cannot be susceptible to the Moral Enforceability Problem. This is so because Moral Enforceability rests on the limitations of rights that are not determinate. Thus, in order for Moral Enforceability to be a real problem for conclusive rights, they must be indeterminate. However, one feature that Kant (and Stilz and Ripstein after him) seemed to think is necessary for a conclusive right is that they are determinate.⁴⁴

On the other hand, provisional rights can be susceptible to the Practical Enforceability Problem as well. Yet, we have already discovered that the Practical Enforceability Problem cannot be what makes a right provisional. Provisional rights probably are susceptible to the Moral Enforceability Problem. In fact, this seems to be the only feature—based on the indeterminate nature of provisional rights—that separates them from conclusive rights. After all, it is only in the state's making the rights determinate and enforceable that Kant claims they become conclusive. 45

The only option available to Kantians, then is one where conclusive rights are susceptible to the Practical Enforceability Problem, while provisional rights are susceptible to one or both of the Practical and Moral Enforceability Problems. I have argued in the previous section that any combination has undesirable results for Kantians—namely, that the state is not morally necessary. To be morally necessary, there would have to be some way in which we cannot exercise our rights to independence

⁴⁴ Kant (MM, 6:266); Stilz (22); Ripstein (168-176)

⁴⁵ Kant (MM, 6:256-257)

outside of a state. At this point, it is necessary to take a short step back and attempt to understand why the Kantian might say that we cannot exercise our rights to independence outside of a state.

There is something dissatisfying about the idea that independence is conclusive and yet it only entails our entitlement to use objects in the world when they are actually in our physical possession. Imagine trying to be free of the control of others when every time you turn your back, what you had intended to use for your purposes is now under the physical control of someone else. Imagine having to wait patiently while others desperately hold on to objects they wish not to relinquish to the next opportunistic neighbor. Obviously in such a situation not much would get accomplished. People would not be able to set long-term goals and construct sophisticated shelters or even use what they built through long hours of toil and hardship. This is a bleak reality.

Perhaps there is something in the idea of the Kantian appeal to the projects and pursuits that are intrinsic to our exercise of independence. According to Ripstein, "if someone interferes with your property, he thereby interferes with your purposiveness." (91) It seems that any robust concept of independence as Kant conceived it includes a broader level of control on the objects of the world around us. His arguments are more successful in showing that such a level of control ought to be possible with a robust notion of the right to independence. 46 It is possible insofar as we ought to be able to own parts of the world with an equal level of freedom to those around us. We ought to be able to have "shares" of the world in order to carry out our purposes and projects.

Kant's idea that property rights are necessary for the full exercise of our right to independence is reliant on the principle that if something is rational to will as an end, then it is rational to will any necessary means to it.⁴⁷ If this is true, then it should be rational to will whatever property ownership is necessary for the right to independence. However, instead of asserting a complicated network of

46 Kant (MM, 6:255-256) 47 Kant (G, 4:417)

provisional rights to explain this, perhaps it is more fruitful to assert full property rights in a SN. To assert this, of course, is to deny the claims of the Kantian views above.

It would be a mistake to move from the difficulty of articulating the correct theory of property rights to believing that there are none or that they are somehow less conclusive in a SN. Lockean style full rights can be held even if all our theories are so far unsatisfying. Ripstein's appeal to purposiveness is natural and appropriate given our limitations without property rights. However, this seems to me exactly why we should think there are property rights in a SN. We may still need the state for reasons of Practical Enforceability (and other reasons), but this is perfectly consistent with a model of rights that sees property rights as conclusive without the state. Given that we ought to be able to exercise our right to independence, we ought to be able to exercise rights over property.

The depth of this problem for Kantians is highlighted in passages from Stilz about the difference between Kant and A. John Simmons, whom she identifies as a modern Lockean in this regard. As she points out, both Kant and Simmons agree that independence requires rights of property in external things. 48 The difference between them, claims Stilz, is that, contrary to Simmons, Kant does not see the authoritative and coercive legal order put in place by the state as a kind of second-best remedy for achieving a distribution of freedom that might have been achieved through our interpersonal behavior.⁴⁹ Whether or not calling the state a "second-best" remedy does Lockean theories justice, there is an important difference between these and the Kantian theories above. On a Lockean theory, the state is a remedy insofar as it aids us in accomplishing moral duties that arise from the basic interactions we have with others in a SN. If we cannot fulfill all of our duties outside of state (because of epistemic limitation, intentional rights violations, etc.), then the state is necessary to aid us in that project.

In contrast, especially given the preceding discussion about the enforceability problem, there does not seem to be any good reason for Kantians to believe that independence requires rights of property

⁴⁹ (54)

⁴⁸ (37)

unless the reason is just that cited by Lockeans. For example, the only non-Lockean reason to which Stilz or Ripstein can appeal is in the state as a solution to the Moral Enforceability Problem. However, it should be (morally) very easy for us to refrain from violating the (conclusive) rights of others in a SN. Stilz and Ripstein cannot simply cite epistemic limitations about the boundaries of the right as the source of the state's justification. The difference between their Kantian views and a Lockean view is that, while for the Lockean the state is necessary to aid us in acting according to determinate rights of property, they believe the state is necessary to determine rights of property. However, these rights appear to be unnecessary for the exercise of our right to independence. The best way to think of property rights in a SN is as conclusive.

5. Objections

There is another possible understanding of the state as morally necessary in connection with property rights. I have argued that the status of property rights as "provisional" makes recent Kantian accounts susceptible to many difficulties that must be overcome in order to take seriously their claims to offer a source for the justification of the authority of the state and political obligation. However, a Kantian of a different stripe may accept our criticism here and proceed to deny that it is because of our inability to exercise our rights to independence that property rights must be made full or conclusive and that the state is morally necessary. Instead, one could assert that the innate right to independence is conclusive, that property rights are provisional, and that there are independent reasons for supposing that we ought to make property rights conclusive.

Guyer points out, for example, that Kant believed it to be part of human nature that we will make claims to property rights in a SN.⁵⁰ As he writes,

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⁵⁰ I am not claiming that Guyer would accept the criticisms in this piece, only that he points to a feature of Kant's arguments that might allow someone to do so without denying the need to make property rights conclusive.

But, since the psychological and physical conditions of our existence are such that we inevitably will attempt to claim property rights in circumstances where that will bring us into conflict with others, we also have a *duty* to claim such rights with an eye to the civil condition and in turn to bring about that civil condition. (63)

He believes that Kant intended to rely on the fact that, historically, property must be acquired in a SN without a juridical system to define or enforce it. If this is so, then our theorizing about a hypothetical SN includes a condition whereby we simply do make conflicting claims about property. On this view, property rights *claims* are already in existence for Kant when we are thinking about whether the property rights ought to be made conclusive through the establishment of the state.

If we are inevitably making conflicting property rights claims in a SN just by our nature, then perhaps the state is necessary to mitigate the harms that would arise because of such conflicts. Since we will be asserting rights to things when those rights are indeterminate and unenforceable, and since we will not stop doing so in a SN, then we ought to create a system to make the claims consistent and thereby establish rules for our freedom with respect to objects outside the boundaries of our physical bodies. Now the state is morally necessary but its necessity is not dependent on our failure to be able to exercise our right to independence in a SN.

I will admit that, if such claims to property rights in a SN are inevitable, then the state may be morally necessary. However, if this is the case, then it is morally necessary for completely different reasons than those Stilz and Riptsein cite. There are two reasons why acceptance of this argument would require one to give up some of Kant's central claims.

How would such an argument go? People in a SN make property rights claims even though property rights are indeterminate. Thus, the claims they make are claims that cannot be enforced by coercing others in violation of their rights to independence. But, if people are willing to make such claims

in a SN, they will likely want to back them up with force. The result is that many claims to property in a SN will be backed up by subsequent violations of someone's right to independence.

The first reason this argument should be unacceptable for those who wish to affirm Kant's central claims is that it relies only on necessity from violations of the innate right to independence and has little bearing on the right to property. It may be that specifying a right to property would solve the problems described by conflicting property rights claims in a SN. However, a coercive system that granted no property rights at all would be equally effective as long as it prevented violations of the right to independence. The problem is just that the mitigation of conflicts of illicit property rights claims does not entail the need for conclusive property rights. It can be fixed very simply by any imposed uniform standard of conduct, whether it includes property rights or not. So, the Kantian would lose the connection between property rights and the right to independence such that there is no need at all for property rights.

Second, by dropping the clear connection between the right to independence and property rights, the Kantian argument would lose its foundation for a political obligation that is general (i.e., applies to all or most subjects). The reason for this is that it is only the universal natural duties associated with the universal right of independence that entail a duty to obey the laws of the state for all. If the state is founded on violations from some against others, then it is binding only for those whose conduct it was meant to restrict—namely, rights violators. So, for those who never would make any property rights claims or those who would make such claims but refrain from defending them with force, the state is not a morally binding entity. They would have violated no rights in a SN and so they should not be forced to submit to a structure that was never intended to restrict them anyway. If appeal is made to the ignorance we have about who would make rights claims or enforce them, it is fairly easy to tell. For example, the weak and vulnerable in society, even if they made rights claims, would probably find it disadvantageous to attempt to enforce them against a multitude of stronger people.

But the point stands regardless. One reason the Kantian arguments of Stilz and Ripstein have been appealing is that they take a natural duty and tie it to a duty that is only full within certain kinds of institutions. All that appeal is lost once the tie between these is abandoned. Thus, these Kantian positions are left in the same space as other natural duty accounts, or at least those that appeal to necessity as the basis for the state's authority and our political obligation.

6. A Final Word

What is really at stake in this? I have not shown that there is no way to support the authority of the state and political obligation. What I have shown is that the most powerful Kantian basis for these relies on a dubious concept of provisional rights in a state of nature. This has multiple implications.

First, there is no "third way." There are natural duty accounts and consent accounts. ⁵¹ There is no way to make rights "provisional" so that they are tied to the moral necessity of the state. Whether we have property rights preinstitutionally or not, we ought to think about them as full rights. We may have such rights and be completely ignorant of their boundaries, we may have some sense for their boundaries or we may not have the rights at all. It is natural to turn, then to other models of rights in a SN. A broadly Lockean model seems more promising. By this I do not mean that we ought to accept a labor mixing argument for property rights acquisition, but we can think of property rights as they would be in a SN, even if those in a SN do not themselves know much about them.

Second, the failure of these Kantian models may cause us to abandon accounts of political obligation that give us a robust duty to obey the law. One reason it initially appears that Stilz and Ripstein provide such a unique and powerful basis for political authority is that they utilize neglected concepts in Kant's political philosophy that make it different in subtle and interesting ways from many other accounts

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⁵¹ Of course, there are certainly many more interesting categories that serve as possible sources for authority and political obligation. My aim here is to speak to the Kantian dialectic as presented by those who endorse his views.

of political authority. However, it may be that more straightforward natural duty or consent accounts are the best models we have, and if these give us only partial bases for the duty to obey the law, then perhaps we ought to accept our predicament. We might ask ourselves anyway how plausible it is that all or most citizens have duties to obey all or most laws without reference to the content of those laws. Are there ways to understand political obligation without taking it as an unmitigated and powerful duty? Perhaps we have more to learn from natural duty or consent on this point. While some would prefer to abandon political obligation over accepting a partial model, there may be some benefit to exploring the complexities of a partial duty.⁵² Most of us already believe there are limits on what the state can legitimately command and what we have a duty to obey. How much greater a step is required to attempt to describe all and only those cases of requirement in the law that are morally binding?

Finally, Kantians have a burden to explain the ways in which they intend for the concepts that are central to Kant's political philosophy to work together without taking all of the implausible metaphysical claims he asserts. Do we abandon most of it, like Kantians of the 20th century or is there a way to take on more of his system without relying too heavily on troubling concepts such as provisional right? Kant's work is rich enough to bear a wide variety of fruit, but it is always necessary to assess the extent to which use of Kantian concepts will require one to take on some of his deeper assumptions. In the case of provisional rights, we are left wondering exactly how they are supposed to exist in a SN without doing damage to the notion of full or conclusive rights such as the right to independence. Kantians would do well to explore further the extent to which they ought to endorse such concepts when they might require deeper commitments that are less palatable.

I have offered a challenge to recent Kantian political theorists who believe they can support the authority of the state and political obligation by the concept of "provisional" rights. Such rights are provisional because they are unenforceable. Yet, rights are, by definition for Kant, entitlements to coerce. This presents a deeper problem than some Kantians let on, which means that they have the burden of

⁵² Cf. Buchanan (2002)

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showing exactly how a provisional right to property is supposed to serve as a moral source for the necessity of the state without causing difficulties for our understanding of non-provisional rights such as the right to independence. My claim is that they cannot offer any explanation that will solve the problems within their system. It is more beneficial, then to turn to more traditional notions of natural duty as a source for the state's authority and for political obligation. I leave it to the Kantians to explain a way around this.

Part 2: A Limited Political Obligation

Chapter 4: A Limited Political Obligation

We have encountered many problems with less traditional accounts of political obligation that rely on voluntaristic and/or non-voluntaristic moral sources. I have highlighted the failure of new consent accounts that take on elements of natural duty in the idea of normative consent. I have shown that fair play accounts can be interpreted as voluntaristic or non-voluntaristic and that the voluntaristic versions fail to show the proper participation in cooperative schemes to give us an adequate account of political obligation. Finally, I have addressed some of the most plausible recent natural duty accounts in the form of Kantian bases for the authority of the state. Their flaws require substantive answers that cannot be explained away with appeals to "provisional" rights. While there is much more work to be done against contemporary arguments for political obligation, I hope I have cast some doubt on what is currently available in the literature.

What hope is there for political obligation? We have encountered new problems for new solutions regarding the duty to obey the law and we are left with little foundation to understand our duties toward the state. Our failure to find an adequate means of capturing reasons for belief in the full authority of the state should cause us to reflect on whether we are being deceived by our own biases or by traditional assertions of moral power of the state over its subjects. Recent anarchist literature points to the ease with which people believe in the veracity of perceived moral authority. Perhaps we are all being duped by the grandiose and ceremonious actions of political entities into thinking that their de facto power reflects a de *jure* authority.

¹ Huemer (2012)

There is reason to be skeptical of political entities. However, the issue of their moral authority is not all or nothing. Perhaps we have been wrong in attributing an extensive level of moral right to the state. Even so, that does not mean there is *no* moral right in the state. Nor does it mean there is no *extensive* moral right over *certain* arenas of human life. The discussion between political theorists who assert full authority to the state and anarchists who assert no authority² can distract from a more detailed discussion about the nature and extent of the state's authority over separable parts of human activity. It is time that we look more deeply into the nature of the state's authority based on more straightforward implications of its moral basis.

In this essay, I provide an account of limited political obligation, which escapes a significant problem that plagues many traditional natural duty accounts—the Derivability Problem. My account is limited because the duty to obey the law is non-universal (applying only to some of the law) and non-comprehensive (applying only to some areas of human activity). While some areas of human activity the state has a right to command, to coerce, against interference, and to the obedience of its subjects, in other areas of human activity, the state's rights are more limited. Full authority is limited to certain moral categories that correspond to certain activities. Weak or partial authority applies to other areas of activity. Thus, my account is one of limited political obligation in these two senses.

My account is also, in a way, a hybrid account.³ Some hybrid accounts seek to ground full state authority over different areas of human activity through various independent moral bases (see Chapter 5 for further discussion of "pluralism" about political obligation). Mine is hybrid in that it seeks to ground limited authority in the state through multiple moral bases that work together to entail a moral result. The driving force is natural duty—the idea that there are pre-institutional moral requirements that must be fulfilled. I call my account a natural duty fairness account. This is because I use fairness in conjunction with natural duty to specify the extent and nature of the duties of political subjects. It is a natural duty

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² Not all claim either full authority or none at all. (cf. Buchanon (2002); Raz (1986); Edmundson (1998); Smith (1999))

³ Though, in contrast to some views discussed in Chapter 5, it cannot properly be called "pluralistic" except in an attenuated sense.

account because it takes the initial step to be the existence of moral requirements to solve problems that would occur without the state (i.e., in a state of nature). Fundamental to the entire account is that such duties exist pre-institutionally. It is a fairness account because, like fair play accounts of the past and present, the duty is specified primarily through contributions of one's fair share in fulfilling the natural duty in question. It is a two-step fairness account. It uses fairness in the creation of the state to solve problems that would occur in its absence and it uses fairness to show the need for obedience to the law after such a state is created.

The fundamental problems for which natural duty fairness prescribes an adequate solution are those that motivated Joseph Raz's description of the state as a giver of exclusionary reasons for action—namely, coordination problems, prisoner's dilemmas, and moral error.⁴ The following view does not ascribe such a power to states, but recognizes the moral force of the empirical facts represented by these fundamental problems. The state is necessary to create solutions to the problems and those solutions entail a full set of rights in the state over certain areas of human activity, including the right to obedience with its correlative duty on the part of subjects to obey.

The moral considerations I use in the following work in tandem to provide an account of political obligation that entails the duty to obey some classes of laws. This accords well with our considered judgments about political obligation as even proponents of a more robust authority acknowledge its limits in certain areas (e.g., with regard to unjust laws). In addition, it is much more plausible that the majority of subjects interact with the law in such a way that there are still some cases where there is no requirement to obey, even if there is a requirement in a lot of other cases. In the end, although my view has some counterintuitive results, I claim that these results offer greater insight into our relationships to the state and our corresponding moral bonds to it. Before we move into a full discussion, it is necessary to lay the foundation for some of the concepts I will use in the following.

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⁴ In fact, the view presented here is consistent with different views about the nature of the reasons provided by the state. While I suspect they are not exclusionary reasons the way Raz describes, an argument in support of this claim is well beyond the scope of this project. Also, many philosophers use coordination problems in particular to motivate solutions in the state. (cf. Klosko; Alexander; Green)

1. The Derivability Problem for Existing Natural Duty Accounts

One type of natural duty account uses moral necessity to ground obligations to the state. The idea behind it is that the state is entitled to (i.e., has a right to) anything that it needs to fulfill its necessary task(s). A. John Simmons has pointed out that claims of necessity, if they are to be intelligible, must have an end toward which an action is necessary. We cannot make sense of claims like, "Obedience to the law is necessary," unless there is something for which it is necessary. According to Anscombe, for instance, obedience to the law is necessary for the completion of the central task(s) of the state. Anscombe believes she can derive a moral duty to obey the law by the necessity of obedience to it.

Contrary to Anscombe's assertions, the *duty* of obedience is not generated as long as a sufficient level of actual obedience is elicited from the people by alternative means. In other words, it is not necessary that you or I or anyone else in particular obeys the law, only that a sufficient number of people obey the law. And a sufficient level of obedience is easily elicited through threats of coercion. So there is a problem: that so long as necessity entails anything less than a certain action (e.g., any particular individual's obedience), that action is not required. This is what I call the Derivability Problem. ⁷ Since the duty to obey must be derived from some other moral considerations (i.e., natural duties for natural duty accounts), it is imperative that those moral considerations fully entail the duty to obey the law as a necessary (if not singular) means of fulfilling it. If it merely entails the duty to obey the law as one among many possible ways we can fulfill our deeper moral duties, then we have not captured a duty to obey the law that is applicable to a wide enough population (since wherever there are moral options available, some will choose to fulfill their duty in ways other than through obedience). It will be helpful, therefore, to recall some of the natural duty accounts we discussed in the Introduction and explore the nature of the Derivability Problem and some potential solutions to it.

⁵ Wellman and Simmons (2005)

⁶ I recognize that some (e.g., Edmundson) do not believe the state coerces in the ways traditionally believed. Whether the consequences of disobedience are properly described as "coercion" is irrelevant to my point here. The idea is just that there are sufficient reasons to consider the weight of self-interest for many to generate enough obedience that a duty to obey is superfluous.

⁷ This criticism is latent, though not so named, in Simmons' treatment of natural duty accounts.

Some natural duty accounts appeal directly to potential harms done in a state of nature (SN) and see the value in the state to be the way in which it punishes for harms done or prevents the harms from occurring. For example, Christopher Wellman points to the dangers imposed on some by rights-violators in any (contemporary?) environment without the state. Given that some will violate rights, according to Wellman, we ought to have structures in place that will punish the rights violations or prevent them from occurring. Similarly, some Kantians (including Kant himself) point to the need to offer guarantees that we will not commit any rights violations, specifically in relation to property rights. As was discussed in the previous chapter, property rights are merely "provisional" until we enter a political structure that, among other things, counteracts our tendencies to violate the rights of others.

So the goal on these accounts is to remedy a situation that occurs in a SN—either each person's potential for violation of property rights or some person's actual violation of rights. But each of these problems is solved by the mere existence of the state for Wellman or our membership within a state for Kant. As long as the state's threat of coercion is enough to either limit the harms done without it or serve as a guarantee for anyone within it, then the problems are solved. No *duty* to obey on top of the actual level of obedience garnered by threats of coercion will do anything to promote the solution. Indeed, it is consistent with Wellman's view that there is no restriction on our own behavior at all as long as we are not the rights violators who create the need for the state.⁸ Though a Kantian view requires more of us, it does not require obedience in the way Kantians have claimed.

Other natural duty accounts ignore SN hypotheticals and point instead to the benefits the state provides. For Rawls, the state provides a framework for justice, which includes the production of primary goods. Thus, it is extremely important that just states continue to thrive, and we have a duty to support just states for this very reason. However, this allows for any of a wide variety of activities in support of just states. Perhaps in some cases, I can provide much more support for the state without obedience to the

⁸ Of course there may or may not be a way to know who is a rights violator in a state of nature. If there is a way to know it by our current behavior, then some might argue that it is clear who is a rights violator and who is not. I will not address any such issues here.

law (if I give it large sums of money, for example). Thus, the duty to support just states in no way obligates me to obey the law (let alone the law of *my* state, as we have seen with the Particularity Problem in the *Introduction*).

Anscombe similarly ignores the SN hypothetical by citing the state's task(s) as the source of our duties towards it. The need for obedience for the necessary task(s) of the state entails a duty to obey on the part of the citizens. But as we noted above, states can tolerate quite a bit of disobedience. It is puzzling to claim that the obedience of any person in particular is necessary for the state's fulfillment of its task(s). At best we are required to obey the law for some percentage of our actions that make up our fair share of the total obedience required for the state's completion of its task(s). Even then, though, it is not clear which laws we can disobey and when or where we can disobey them.

Finally, we reach fair play (or fairness), which ignores appeals to the SN much like Rawlsian and necessity based accounts. I have already argued that fair play (or fairness) accounts, whether based on the importance of goods a cooperative scheme produces or their nature as public goods, cannot succeed if they are conceived as voluntaristic accounts. If anyone can opt in or out of the benefit, then one is not obligated to compensate for unwilling receipt of it. I have also claimed, though, that fairness can be conceived as part of a natural duty account.

For example, George Klosko cites the benefits received as the basis for a duty of fair play. It is in part because these benefits are "presumptive" that we can count on a fair share of contribution from all who receive them. A voluntaristic version of fair play assumes that to some extent all people would want such benefits. This means either that they would want them if asked or that they would want them if rational. However, without participation in the scheme (the political arrangement) that produces the good in the form of something like consent or at least inner approval, it is unclear why we would think anyone has such a duty. Simmons again offers significant insight on this. As he argues, there are situations where we might think people are obligated according to fair play because of participation short of consent. The

"participation" on such a view can be as insignificant as an inner approval of the scheme in the form of an affirmative belief in the all-things-considered positive value of participation in it. As he points out, though, in the political realm no such participation is present for many or most of society. Many people never even consider the costs and benefits of living in such a society. I have already mentioned other reasons to reject this kind of view, so we can move to a natural duty version of fair play—what I have called in Chapter 2 "natural duty fairness."

Perhaps there are certain goods that are of significant *moral* importance and of such great moral importance that we *ought* to produce them. If the requirement falls on all of us equally (or at least substantially) to produce them, then we have a way in which fairness can play a part in a natural duty account of political obligation. We ought to produce a good, the good can only be produced by our collective effort and there is the real danger of the existence of "free riders"—those who ignore the element of fairness that comes with our duty to produce the good. One might think that part of the effort required is to obey the law. Thus, we would have a duty to obey the law. There is promise in this idea, but it must be developed further.

For example, here again we face the Derivability Problem. If we are morally required to produce certain goods, then the requirement is fulfilled as soon as they are produced. The goods from the state are produced without the duty to obey the law. As long as we do our fair share *in creating or sustaining the system that produces the good* then nothing more is required of us. So long as we have done our part in the first step of creating the state, all we have left to worry about is doing our part in sustaining it. For example, if the good is security, then so long as we do what we were already required to do by morality, namely refrain from harming others, then we can let the state do its work without paying any attention to the laws. While we must make sure that there is not an unmanageable amount of disobedience, this is easily accomplished by our simple noninterference. It may be that we are required to contribute some

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⁹ Gans (1992) cites this kind of natural duty application of fairness.

amount of monetary support as well, but that just means we fulfill the entirety of our duties to the state simply by refraining from significant interference and paying (some portion of) our taxes.

In some ways, the duty of fair play is different from other accounts. One way is in the idea that the content of the duty and the effort required to fulfill it does not diminish or disappear once the end for which the duty is necessary is accomplished. For example, imagine you are part of some cooperative scheme, voluntary or otherwise, that requires membership dues. As a member, you ought to pay them even if everyone else pays before you and their dues alone are sufficient for the effective functioning of the scheme. The only reason you ought to pay in these cases is that it would be unfair for you to get out of paying your fair share, since everyone else already contributed. Similarly, in some cases there is no harm done by a few members occasionally violating the rules of a scheme (e.g., cars with only a single passenger driving in the carpool lane), but it is forbidden by the duty of fair play to take it upon yourself to be the one to violate those rules. This is significant in two ways that I will discuss in the next section. First, it enables us to see in what ways natural duty fairness might fail to entail a duty to obey the law. Second, it gives us insight into what exactly it would take for natural duty fairness to entail the duty to obey the law. I discuss these in turn below.

2. Natural Duty Fairness, Its Failure and Its Promise

Derivation of specific duties from more general ones occurs differently depending on the duty. If we have a general or vague duty, then the nature of that duty combined with the constraints of the world would specify the content of our opportunities to fulfill it. Certain actions are required as specific acts to fulfill a more general duty

Since, on a natural duty account, the duty to obey the law is derived from a more foundational duty, obedience must be necessary for the fulfillment of the foundational duty. This means that it must either be the only option for fulfilling the more general duty or at least one of the necessary conditions of

fulfilling the more general duty. Now fairness enters into accounts of the duty to obey as a moral consideration that governs the fulfillment of a duty to produce certain goods. If we conceive of a goods producing fair play account as a natural duty account, then fairness only enters in as a determining factor for the level and nature of participation one must give *in order to produce the good*. To some extent, though, many other natural duty accounts function in this way. For example, Wellman works from a similar perspective in using the state as the solution to problems involving harms done to others in society. He explicitly cites fairness in that we all have an equal duty to help those who might be harmed by establishing and sustaining the state. Similarly, some Kantians use this idea in the moral requirement of all to ensure that everyone has access to just institutions or that freedom for all is protected through an institution that gives them non-provisional property rights. It is easy to see that some element of fairness through the equality of persons is present in these types of accounts.

The problem with natural duty fairness accounts that would use fairness in the production of a good is that the duty to *produce* them serves as the only place where fairness specifies the content of the required acts. Thus, whatever it takes to achieve the production of the good is *all* that is necessary for fulfillment of the duty. Again, this means our contribution stops at paying taxes and refraining from treasonous acts. Any required participation (obedience) in the scheme beyond that must be brought in by some further moral consideration which also entails fairness as a constraint on action.

Perhaps an analogy is useful to pull out the full extent of the failure of fair play accounts. Pretend that I have a duty to contribute to the clean-up of the local lake. It has been polluted by immoral littering and dumping of harmful substances. I have a duty to clean it up because (a) it is necessary to alleviate the suffering of the poor who bathe in it; (b) I have to offer some kind of guarantee that I will not pollute it; or (c) its being clean is of benefit to me, since my family often swims in it. Some of these might be a stretch, but grant that I have such a duty. Imagine the best or only way to accomplish this goal is if we

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^{10 (2005, 30-34)}

¹¹ See Buchanan (2002) for the first point and Stilz (2009) for the second.

impose a system of penalties for those who pollute, hire workers to clean up what pollution is already there and come up with rules backed by penalty for the proper prevention of accidental or purposeful pollution. Do I have a duty to comply with penalties if I pollute the lake? Well, I certainly have a duty not to pollute it. I suppose if I do pollute it, though, we might ask what right the community has to punish me. But surely I ought to have to pay some penalty for it. Do I have a duty to help pay for the workers? It seems on any of the three bases, I probably should pay my fair share. Finally, do I have a duty to obey the rules set over me by the community? Only insofar as they restrict my behavior in accordance with the duty not to pollute the lake. But many rules may have nothing to do with restricting my behavior, especially if I am perfectly capable of restricting my own behavior so as not to pollute the lake. Imagine, for example, that there is a rule prohibiting the dumping of any liquids near the lake until such liquids are cleared as safe. However, I often use lake water to clean off my back porch. If I have any left, am I obligated to clear the extra water as "safe" before I dump it back in the lake? This seems a rather unnecessary restriction on my behavior. Perhaps another rule restricts all late evening activities in the lake because it is more difficult to monitor activities and prevent pollution as it gets dark. Does that mean I have a duty to refrain from swimming with my kids as the light begins to fade? What if I live in a secluded part of the lake where no one will notice?

In the example, one may believe I do have a duty to obey these rules for the purpose of discouraging disobedience from others. Perhaps my activities are just influential enough to disrupt the system and make it ineffective or noticeably less effective. Still, this is not a reason to obey the rules *because* they are the rules of the scheme I have set up. And this is where natural duty versions of fair play accounts might fail. Even if I have a duty to impose some system on others, even if it is impossible to stay out from under it, there is no reason to believe the system has anything to do with reforming *my* behavior. If I am already (or would be) a non-polluter of the lake, then no system of rules is necessary for me to refrain from polluting it. In addition, any benefit I receive from the system is a result of restricting others' behavior, not mine. Thus, though I have a duty to refrain from polluting activities, this duty was present

before the system of rules was imposed and the system of rules has no authority over me as a result. Thus, the duty not to pollute the lake does not entail a duty to obey the system of rules set over me.

So the main problem with natural duty versions of fair play accounts so far is that they show why we might be required to create a system, not to abide by it. There is no indication that the rules created are supposed to apply to me in any morally significant way. Keep in mind, I am not claiming that all things considered I will not or should not abide by the rules. I may often want to obey even if only to avoid getting caught. The question is whether I abide by them for the right reason—because they are rules that have some moral authority over me. Now we can move to the case of political obligation.

If the good that the state provides is, for example, security against harms by others, then there is no sense in which the rules imposed by law are supposed to apply to anyone who has not violated or is not going to violate the rights of others in the relevant ways. Any other benefits the state provides may be purely optional. Where they are not optional, then we ought to do our part in producing them. But once we have created a self-sustaining system to produce them, we are done. We have a duty to produce some good and the problem is just that the production of this good does not necessitate the duty of obedience to the law. While this is a clear problem for natural duty versions of fair play accounts, it also creates a formula for a clear solution.

If there is some way in which the creation of a good is connected to restricting *my* behavior, then I have a greater duty to participate in the scheme. If the end of the duty is the ultimate restriction of *my* acts, then it will naturally entail a duty that will involve my obedience to some rules. But think about how implausible a basis for restricting my behavior we have seen in various accounts. Fair play typically involves a good production. Production, however, has little to do with restricting my behavior at any moment after the good (or a system that produces the good) is produced. On the other hand, we have the Kantian "guarantee" that I won't violate another's rights. But what kind of a guarantee can a duty to obey offer? If I am not in the habit of harming others, then I have already offered a better guarantee than any

state structure can give.¹² Generalized, then, creation of the good must be connected to restricting *every individual's* behavior, or at least the majority of the population over which the state has control. This, I think, can be done in a surprisingly simple way, though it entails a more limited duty to obey the law than has been previously claimed.

3. A Limited Duty to Obey the Law

3.1 State of Nature, Coercion, and the Restriction of Behavior

I will use a SN hypothetical where there are masses of people in close proximity without any political authority. ¹³ I do not use it because it has happened at any point in history. I also do not use it because it represents anything like the actual origins of the state. The primary reason SN hypotheticals are helpful is because the discussion of the present topic is centered on the moral implications of the very existence of the state. Thus, the most effective way to talk about the state's moral value is to imagine life without it. I also imagine contemporary life, not life in the past. Perhaps the state is not morally justified in its existence under certain conditions. This seems likely to me. However, what we are concerned about is whether the state is justified under modern conditions. Given the population of the world, the advances in technology that we have made and many other features of contemporary life, it is helpful to discuss the benefits of the state. Thus, I will start there and move forward fairly quickly.

Michael Huemer rightly points out that the legitimacy of the state is a comparative issue.¹⁴ In other words, in determining whether the state is justified, it is most important to determine it in

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 $^{^{12}}$ Of course, as we discussed in Chapter 3, the offer of a "guarantee" can be taken in a much different way than I am using it here.

¹³ This is fuller than a Lockean state of nature in that it requires many people without a state where he imagines any two people to be in a state of nature with respect to each other when there is not a morally legitimate common political authority over them both.

¹⁴ (2012) Chapter 9

comparison with its only rival, anarchy. What Huemer fails to address, however, is that the comparison can be complicated and moral advantage can change across different modes of comparison. For example, do we compare the benefits of the state to those in a small state of anarchy that borders many larger states? Do the bordering states respect the sovereignty of the small state of anarchy? Are there aggressive states that would attempt to conquer the anarchist territory? Huemer imagines a state of anarchy developing in the middle of larger Western liberal states that respect its sovereignty. But this does not get at the most fundamental issues. In such a situation, security from external threats is provided by sympathetic states, not by the anarchist territory itself. Thus, he really only answers the question of internal threats. Even here, though, there is always the chance that surrounding states will find it morally obligatory to prevent rights violations from occurring on a mass scale within the anarchist territory. There are also incredible economic benefits to living in a territory that is surrounded by relatively stable economic systems.

It seems much more effective, then, to imagine anarchy ¹⁶ in a world with no states but with the common features of our modern world. To simplify, we can imagine a much smaller world in order to account for the appropriate scarcity of resources that we would face in our world without states. However, it is useful to imagine cases on a localized scale since states are often seen to present solutions to problems within communities that are interactive to some degree. So, we want a conceptually manageable society with no common ruler and no outside states to influence events within the territory (whatever rough boundaries we want to define).

Coercion complicates our understanding of moral duty within the state. This is partly because it is (at least perceived as) sufficiently effective for the purposes it is meant to serve. Since it is seen to be effective, it is seen as the solution to a lot of problems. Any form of deviation from a norm can be fixed (to some degree) through threats of coercion. This means both that the mere presence of coercion is often

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¹⁶ Of course, here I just mean life without the state, not the moral illegitimacy of the state or general chaos or civil war.

a solution to problems that we would have been morally required to solve without it, and that we will often be tempted to mistake moral motivations for prudential motivations on reflection over our condition within a coercive system. The ignorant phrase, "It's a free country," in support of one's morally offensive or impermissible behavior is a direct result of perceived moral freedom in the absence of legal restriction. But, of course, anyone sensible enough to begin disentangling the moral from the legal will realize the dangers of relying too much on the effectiveness of coercion in solving real moral problems.

We do talk meaningfully about having a moral duty not to harm others *in addition* to our legal duty. The easiest cases to imagine in this respect, however, are those that involve moral reasons that have no clear connection to the system of threats that backs up the law. They would be moral reasons with or without such a coercive system. But some moral considerations might be closely tied or inseparable from institutions that solve moral problems. So, the easiest way to disentangle our duties from the prudential reasons that guide our behavior within a coercive system is to imagine that system without coercion. If there are moral reasons for us to obey the law, they should be separable from the coercion that gives us additional prudential reasons to do so. Thus, at various times in the following, I will attempt to explicate the functionality of fairness as it operates outside systems of coercion.

Finally, what I will be looking for is an understanding of our situation under a political system that entails the restriction of each individual's behavior even if the system were not coercive. This means that the commands it issues are morally authoritative in a way that binds each subject to its rules and regulations. I claim that this can only be done through fairness, but first we must understand what kinds of problems give rise to solutions that entail duties of fairness and how we act fairly in fulfilling those duties.

3.2 The Basis for the Limited Duty

If natural duty fairness cites alone the necessity of bringing about some good, then it is no different from other natural duty accounts that use fairness to allocate the required effort in producing it. All of these accounts are capable of using fairness in a one stage morally binding political formation process. But once the political system is established in the first stage, the duty is discharged. My account is a two stage account where the same kind of fairness considerations govern the creation of a political system, but where there is an additional element of fairness that relates directly to how we ought to act once such a system is created.

Earlier, I gave an example of a community around a polluted lake. In it I suggested that one may not have any duty to obey the authorities that determine the rules for the prevention of pollution. This is because such rules were not intended to restrict your behavior in any way so long as you are not one of the polluting residents. It was meant to restrict those who would act immorally even when morality gives us fairly clear guidance about how we should act. In this case, fairness is not a consideration except insofar as you ought to do your fair share in preventing others (who would act immorally) from polluting the lake. Thus, you ought to do your fair share in creating a solution. However, if your behavior contrary to the rules of the system has no effect (or even little) on its efficient operation, then there is no fairness consideration that should compel you to comply. In fact, if fairness is an issue at all, it was unfair for polluters to impose on you a moral duty to create the system against pollution in the first place. Thus, fairness dictates a part in creating the authority, but the authority has no moral power over those for whom it was not necessary in the first place. The analogy is clear. For those who would not violate the rights of others without the state (and there is no reason to suspect that we cannot determine who falls under this category based on current behavior) there is no morally binding authority that limits their behavior.

One way to recognize that the duty to create an authority to regulate lake pollution falls short of entailing our duty to obey it is if we realize the creation of the authority was primarily for the purpose of imposing a system of *coercive threats* on those who would have polluted the lake without such threats. In this case, it is difficult to imagine any system doing its job without involving coercion. An authority on lake pollution that cannot impose sanctions on those who pollute is not a very effective means of stopping intentional pollution. In this case, fairness is a moral consideration insofar as it indicates the level and nature of contribution required toward creating a coercive authority.

Contrast my earlier example of lake pollution with an adapted version of the case where the goal is slightly different. Pretend all residents on the lake have boats. They all take their boats out on regular occasions. However, it is now learned that the level of boating is polluting the lake because of oil and gas that leaks into the water. Are residents in this situation morally culpable for the pollution in the lake? More importantly, what role does fairness play in the solution for this type of example?

In this case, fairness indicates that you at least ought to do your fair share in creating a solution to the problem. But now, the problem is not the same as it was in the first lake pollution case. There, the problem was the presence of intentional pollution and the solution was coercive threat to stop such behavior. Here, however, there need be no intentional pollution of the lake, and thus coercive threats are not the primary solution to the problem (even if we need coercive threat on top of the primary solution to make sure everyone abides by it). The solution in this case is to adapt everyone's behavior to a system of rules that eliminates or significantly mitigates the unintentional pollution of the lake. Thus, all boaters ought to obey the rules set out by the solution generating authority (more on how this relates to political authority later). In cases like this, it can be misleading to pay too much attention to (a) the results of coercive threats in an authority and (b) the need to *create* and *sustain* a solution to the problem. We must focus on the element of fairness at play here to understand why.

While there are many things we could say about fairness generally, I limit the discussion to some minimal key points. First, fairness entails a restriction of or requirement for behavior that is defined by the goals of some (required or otherwise permissible) action. If there are five pieces of pizza for four people, then a fair distribution entails that everyone gets four and a quarter pieces or that everyone gets four and the fifth is thrown away or that everyone gets zero pieces. Not all of these are optimal or efficient, but they are all fair. Second, fairness restricts or requires actions even if the goals of the action could be met without everyone's uniform action. This occurs because many systems are not perfectly efficient. In the case above, if everyone is entitled to one piece of pizza, then I cannot take more than one even though there is an extra piece. I can only take what is my fair share. Now this raises a puzzle.

Even if it is *unfair* that I take the extra piece of pizza, is it *morally impermissible* for me to do so? In other words, is fairness a *moral* constraint in this instance?¹⁷ Well, it probably depends. If I ought to follow the scheme of distribution that gives each person title to one piece and only one piece, then it is impermissible for me to take the extra piece. But how do I know when I ought to follow the scheme? It may be that the scheme was imposed on me by a tyrant whose fetish for the universal consumption of only whole pieces of pizza motivated him to inefficient distribution. It may be that we all agreed to the distribution. In the former case, I am inclined to say that I need not allow the extra piece to go to waste. In the latter case, it seems I must abide by the rules of the scheme. We might be tempted to say that in the former case, fairness is not a moral constraint on my behavior because it is a scheme imposed on me without my consent. In the latter case, then, fairness is a moral constraint because I did consent. This would make fairness a simple consequence of consent. However, moral experience is not so simple.

There are a lot of cases where consent (or other voluntary participation, as with voluntaristic fair play) will make fairness a constraint on our action. However, there are clearly cases where fairness constrains our action without consent. Natural duty can often give rise to such cases. For example, my

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¹⁷ Or perhaps we cannot talk about fairness except under the assumption that it is a *moral* constraint. Thus, to say that some distribution is unfair, but that morality is indifferent to its unfairness, is incoherent. This view is consistent with all I am saying, though the language must be adapted. We would say, instead, that even if the distribution were unfair when fairness is a moral constraint, we must still ask whether it is a moral constraint.

duty to care for my children often entails distributing goods, such as food, fairly (e.g., equally) between them. When we encounter fairness as a possible constraint, we should immediately wonder what the duty is from which fairness constrains our action. In the case of stopping intentional wrongs, such as in the original lake pollution example, the goal of our (fair shares of) action is to create a mechanism that stops such wrongs. A coercive authority is enough to do that. However, in the second lake pollution case, the coercive nature of the authority is irrelevant to our immediate goal. The goal is to create a system whereby all residents adapt their behavior according to a scheme that reduces the amount of collective pollution in the lake. Here is a case where focus on the coercive nature of a solution distracts from the main point. Despite the fact that a coercive system might do the job of eliciting cooperative behavior, the most important goal is to set a standard for such behavior, even if the system that set it was not coercive.

We also must attempt to understand our obligations to a solution providing system by looking at the relationship between its creation and its subsequent function. There are two questions we should ask regarding these two important tasks. First, what scheme or system should be chosen to solve the problem? Second, how do I act fairly in relation to the solution? Failure to separate these questions has obscured some important issues in discussions of fairness in relation to natural duties. These are separate questions, though there is often a relationship between them. The most important implication for our purposes of considering these questions separately is that one might have duties of fairness to comply with schemes even if they are not the most efficient or the ones that "should" have been chosen (i.e., even sometimes when the answer to the first question results in a poor solution or a solution is *originally* arrived at through illegitimate means). Political obligation is just such a case.

So, in the second lake pollution case, I have two questions before me. What scheme or system should be chosen to limit the pollution that results from widespread boating? How should we act (e.g., ought we act fairly) once a scheme has been established? The answer to the second question might differ dramatically depending on the answer to the first. If a tyrant establishes control over the lake and institutes an inefficient scheme, then we may not be required to go along with it. If we consent to the

scheme, then we ought to obey its directives. But what if the scheme is simply there? What if it is the product of ages of contribution from masses of very different people? What if it is impossible to point to any particular person as the source of any injustice or illegitimacy in the establishment or creation of the scheme? In other words, what if the boating authority has always just been there?¹⁸

I suspect we would treat such a case as we would any other situation where we are constrained by external factors. If we had to decide how to distribute four pieces of pizza among four people, there is only one option that is both fair and corresponds to the goals (i.e., maximum pizza consumption for all) motivating the need for the distribution: everyone gets one slice. Similarly, if you want to make a purchase at a retail store, you have to wait in line. It would be unfair for you to cut in front of anyone, even if you think a more efficient policy would be better, such as those with very few items being moved to the front. Or, finally, it is only fair that you stay in a lane of traffic during rush hour, even if it would not harm anyone to cut over to the emergency lane and bypass the waiting traffic. All of these cases appeal to systems or schemes, whose creation was in no way subject to your choice or control, but who were not imposed on you by any identifiable individuals (at least not any against whom you can make some claim). In addition, these cases involve fairness as a moral constraint. Because the question of which scheme we ought to choose does not arise for these, it is easier to see how fairness plays a role in your compliance with the schemes that in fact exist.

We can say a couple of things about fairness that are relevant to this discussion. First, it is a moral constraint whenever collective action is required. Second, in order to entail fair compliance with rules, the collective action on which fairness applies must be one that is designed to restrict the behavior of all or potentially all those who are practically covered by the rules. In some cases those covered are those who want to participate in the scheme (e.g., the pizza, retail store, and driving examples above), while in other cases those covered might be required to participate (e.g., the second lake pollution case). However, there

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¹⁸ Of course, no political authority has really always just been there. But that is not the real issue. The point is just that its origins are complicated enough that from the perspective of subjects it has "always just been there."

are exceptions. When one can meaningfully answer the question of what scheme or system ought to be created to solve a problem (e.g., when one could actually engage in a choosing process for it), then one is not obliged to follow a solution that is subsequently imposed in an illegitimate way or by illegitimate means. On the other hand, when one cannot meaningfully answer the question of what scheme or system ought to be created to solve a problem (e.g., because a system is already in place), then one is not obliged to follow a solution that results in greater moral cost than if the system had not been created at all. This is one of the most important purposes of SN hypothesizing. We imagine the morally salient problems that arise without the state and compare them in moral weight to the costs of life in a state.

It should be clear that most just political institutions are not characterized by either of the exceptions just described. Typically, it cannot be asked in any meaningful way what scheme or system ought to be created, since many political societies are established from complex historical processes. So, when the solution to the problem is sufficiently morally beneficial, and when it is already in place, fairness applies as a constraint on our actions in relation to it. Whether or not fairness entails that we ought to comply with the rules or commands that are part of the solution depends on the initial moral goals it serves to achieve (though not always those goals it was in fact created to achieve). If its rules achieve the effective restriction of the behavior (of all or most of those to whom they apply) which was morally necessary to restrict, then we ought to conform our behavior to it out of an obligation to participate in the scheme and to a degree that is fair to all others within it. This follows whether or not the solution bestows on anyone the power to coerce.

Thus, in the second lake pollution case, it is not permissible to boat on the lake in excess of the allotted time because it is unfair to the others. Why is it unfair in this case but not the other? Because in the first case there is no purpose in the authority restricting *your* behavior in particular. In this case, there is a purpose in restricting your behavior along with everyone else's, since you are a participant in the pre-

¹⁹ There are some interesting possible contemporary counterexamples to this—most notably Scottish inclusion in the United Kingdom. Was the decision process that resulted in Scotland remaining a part of the U.K. legitimate? I make no attempt to answer such questions, since they are well beyond the scope of this project.

regulated lake polluting system. To be clear, fairness requires complete obedience to the rules of the authority. It is acknowledged that boating is permissible as long as everyone restricts their behavior to some degree. So, only some restriction on your personal freedom is necessary. But full compliance is necessary, since the authority does not restrict everyone's behavior completely, only to a degree sufficient to preserve the cleanliness of the lake without imposing too much on the freedom of those restricted. Of course, if the lake pollution authority were created by illegitimate means, then one might be exempted from participating in it. Once one is exempted from participating in it, fairness is no longer a constraint on your behavior. But in the political case, and so we should stipulate in the second boating case as well, the question of what scheme should be created is not one we can answer in any meaningful way.

Now we turn to the types of problems arising in a SN that require solutions for the purpose of restricting the behavior of all or most in society. Though I pick out only three types, it should be clear that these problems can arise in all kinds of activity, rendering much of the state's regulations to fall under the category of solutions to the relevant kinds of problems. There are straightforward coordination problems relating to the common activities of anyone in daily life (as well as prisoner's dilemmas that entail required knowledge of the behavior of others). There are also problems relating to moral error in the administration of justice in determining rights violations or other moral wrongs and in taking appropriate action thereafter. Finally, there are problems relating to the creation and sustenance of the state. I will treat each of these in turn.

4. Coordination in Common Activities

In a SN as I have conceived it, there will arise what has been called "coordination problems". These can range from the merely inconvenient to the deadly. While there is much literature on coordination problems and conventions that serve as solutions, the discussion here is rather limited. For example, David Lewis mentions that solutions may naturally arise when a coordination equilibrium is

reached by the mutual expectation of action by participants.²⁰ The expectation is rational when there is what he calls "common knowledge". Common knowledge is the knowledge that others will act according to the rules of the solution. But I am unconcerned with whether such solutions are always worthy of the title "convention" and I am unconcerned with whether conventions require common knowledge. It can at least be said that solutions to coordination problems that require action that works against the all-things-considered self-interest of the agents will not arise naturally. In other words, when a solution to a problem requires that individuals act against their self-interests, they will not have good reason to suppose other individuals will act against their self-interests. There will be no common knowledge.

Some coordination problems are moral in nature. They are problems that we are morally required to solve through some coordinated action. Note how these situations aim at "goods" that are both similar and different from the goods fair play theories have cited. First, they are goods not because they are presumptive, in that everyone can be presumed to want them. Any value they have is primarily *moral* value.²¹ This means we have to consider situations in which people may not want to contribute to the provision of the good in question. On the other hand, these goods (i.e., the solutions) will be governed by fairness. Thus, it will be everyone's equal duty to ensure that such goods are produced. This means that the level and content of contribution does not diminish once the end is achieved.

Why should we think we have a duty to obey? It is important to imagine what kinds of coordination problems would exist without the authority of the state as a solution to them. Imagine the following three scenarios.

1. Person A is stuck on a cliff with a group of people. No one can find a way off and all will have to await rescue. The space is so tight, however, that if A moves the wrong way, his/her movements may result in someone falling off the cliff. The problem, though, is that A is unaware exactly

²⁰ Lewis (1969) 52-60

²¹ Though a fair play theorist might claim that presumptive benefits have moral value as well, they are inextricably tied to the value for each individual in terms of securing his or her own benefit. The goods with which I am concerned are morally valuable for a person regardless of whether they benefit him or her.

which movements will cause harm to others especially because A does not know how others will move. The only way to ensure that no one is knocked off is for A to restrict his/her behavior by placing someone at an elevated level who can see the movements of the entire group and dictate exactly who can move in what ways at what times.

- 2. There is one well in a fairly large community. There is enough water in the well for everyone to live on. However, there is no easy way to access the well except through a hole that allows two or three people to draw a limited amount of water at any given time with some difficulty. There is always a steady line of people waiting to draw water from the well. Imagine person A lives right next to the well. Person B lives quite far from the well. A can survive adequately by drawing water, making some use of it and getting back in line. However, by the time B carries the water back to his/her domicile, makes the necessary uses of it for his/her survival and makes the trip back for more water, he/she has a long wait to get the water necessary to continue his/her survival. B keeps slowly losing ground on his/her hunger and thirst until he/she lacks the energy to walk back to the well. B dies.
- 3. There are finite resources such that an equal split between all inhabitants of an area will have 1.5 times what they need to survive. However, over time some of them have children. Those who have children do not have enough resources to raise them, but they would have enough if everyone pitched in and gave them some of their own resources.

I acknowledge that none of these except the third one are real life scenarios and even the third is overly simplified. The point, though, is to emphasize some features of these scenarios that are different from those cited by fair play theorists.

The most important feature of these scenarios is that the moral problems to be solved are in part present because of the action or inaction of potentially all of the individuals in the community. In case 1, it is my movements that might force someone off the cliff. In case 2, it is my getting in line to get water that causes the line to be longer and the distant residents to fail to get enough water. Finally, in case 3 it is

my hoarding of excess resources that in part results in the deaths of the other resource holders' children. Thus, each individual is a potential contribution to the cause. The reason this is important is not because we know who would cause what amount of harm. It is important because there is no particular feature that will tell us who would contribute in the ways described and who would not. We cannot point to the fact that we consistently refrain from violating others' rights as evidence that we would not contribute to these kinds of harms in a SN. It is merely our place within the workings of a stateless society that causes us to contribute to the harm of others and, thus, we are all morally bound to act in accordance with a solution for these types of harms.

Another important feature of the scenarios is that they involve problems that will be exacerbated by greater scarcity and larger populations. This makes a significant moral difference. The early social contract theorists who entertained the idea of a state of nature would not have had to consider such volatile situations where one person's actions or the collective actions of great numbers had such a powerful effect on others and the world. Thus, the cases described above can be considered hypotheticals that also serve as metaphors for the vast number of conflicts that emerge as populations grow and resources become scarce. Thus, there are more issues in contemporary life than what many earlier political theorists encountered and, as a result, a greater need for solutions. This, as we will see in the next section, is incredibly important for our analysis of the moral basis of the state. My claim is that these cases are instructive and there are certain features of moral coordination problems with unintentional harms that bring out the basis of a duty to obey the law. It will be a two stage duty that incorporates principles of fairness and natural duty.

There are many activities in which we would normally engage that require some sort of coordination to prevent morally bad outcomes. Especially with the amount of people in the world and the concentrations within relatively small areas, it is difficult to imagine life without the state that does not involve various harms done to individuals, unintentional as they may be. I will try to highlight some ways

of thinking about these potential problems in terms of some subcategories within the category of common activities.

First, there may be many cases of scarcity that cause us to take too much for the sufficient distribution of goods for all. I argued in Chapter 3 that a (more or less Lockean) conception of pre-institutional property rights is preferable to the Kantian conception of "provisional" property rights. It is difficult to deny that people would control material resources in a SN in ways that are similar to contemporary property rights. In a contemporary world with so many people, it is imperative that we understand just how such control affects others around us. Indeed, the case of the well, while far-fetched as an actual occurrence offers a good analogy to the case of many resources available for use today. Oil is a good example as well as food, land, water and other natural resources. All of these are potentially owned resources that are necessary for the well-being of everyone, whose lack of regulation can cause many to suffer.

Not all problems caused by scarcity are related to property ownership. For example, forests are necessary for all humanity to survive, even if no one owns them or "consumes" them as they would the resources mentioned above. But deforestation can affect all of humanity. There are many ecological issues that are affected by the unrestricted behavior of any potential inhabitant of the world. Perhaps some of these only affect certain people in certain environments. This may be true, but that does not change the moral burden on everyone. Thus, there is a definable set of laws that relates directly to problems associated with scarcity in a SN.

Some laws are specifically designed to ensure that we do not collectively or individually deplete, destroy or hoard the finite resources that are necessary for survival or minimally decent life. Thus, laws that regulate pollutants (e.g., vehicle or factory), laws that limit consumption or destruction of resources such as fishing and hunting laws or oil consumption, laws that regulate resource allocation for minimal

standards of living, and many more are part of this category. Any law that corresponds to a prevention of harms due to common use limitation in response to scarcity falls under this first category.

Leaving scarcity, there are other activities that create harm in a SN. A second category of coordination problems involves those that collectively create harms or morally undesirable consequences, though the individual alone does not pose a threat to anyone in particular. We need solutions to coordination problems that will serve as restrictions on activities that collectively create harms or morally undesirable consequences, though the individual alone does not pose a threat to anyone in particular. For example, some restrictions on the use of motor vehicles fall under this category. People ought to drive on one side of the road or the other. Which side is arbitrary unless it somehow dramatically affects the safety of drivers. However, the law decides one way or another and fixes the path according to which we can avoid doing moral harm to others. Notice that for such laws, it does not matter what the law says as long as it is codified and promulgated to offer a solution to the coordination problem that would exist without the state. There are other motor vehicle laws that involve less arbitrary decisions by an authority (though they may not be completely non-arbitrary). Speed limits offer a standard of safety that is in part determined by the actual likelihood of injuries suffered under certain driving conditions. Even if the rules around speed limits are not perfectly appropriate, they provide a safety standard that remedies the problem of individuals using their own (often poor) judgment on such matters.

A third category of activities are those that individually create harms or morally undesirable consequences, though the individual may be non-negligibly ignorant of the harms or undesirable consequences. For example, as building projects develop over time, new technologies emerge and it may not be apparent to builders which technologies are safe in which capacities. Thus, misuse of certain materials or devices can lead to great harm, but builders may not be negligent in their ignorance of the potential harms.

The corresponding laws for these activities are those that regulate activities that individually create harms or morally undesirable consequences, though the individual is non-negligibly ignorant of the harms or undesirable consequences. Part of the purpose of an authority is the regulate behavior according to known safety measures. These safety measures can be discovered through government experts or locally discovered features of the materials. The government serves two purposes in this regard. It standardizes use so that individuals (builders or otherwise) know what to expect and it disseminates information according to codified law that professionals may not have otherwise learned without a standard regulating system.

The important point to remember is that all of the categories of law above correspond to the activities of anyone in principle. Thus, it is unimportant what kinds of activities are yours in a SN, since there is no feature of you that precludes our consideration of your participation in them. The common activities all include some element of contribution toward some harm. Just by participating in a common activities with no regulation is enough for you to be a contributor and, therefore, culpable to a certain degree.

Finally, we should realize that, as a class of problems, those arising from failure to coordinate activity can be the result of many factors. In some cases, it is impossible to know what would solve the problem without some person or persons overseeing the process of solving it. The success of coordination solutions sometimes depends on what exactly we can expect from others. Our limitation in these cases is just an epistemic deficiency in specific relation to coordination problems (further discussion of epistemic limitation in relation to moral error below). Because we do not know what others will do, we cannot know how to act in coordination with them. Another source of these problems arises when we know how to act but we do not know that others will in fact act accordingly. We may realize that there is a simple solution to a problem, but may fail to act according to it because we will be severely harmed if we do so and others do not. In this type of situation, it is often morally preferable for me to take care of those over whom I am responsible (e.g., my family members) even if at the expense of others who suffer from

inefficiencies of our uncoordinated behavior. Finally, there are many cases where we simply need to be made aware of the problems that occur. We only have so much insight and without a centralized system of obtaining information, it will be difficult to understand exactly what I must do to help solve problems of which I am ignorant.

5. Epistemic Limitation and Moral Response

Some of the examples discussed above fall under multiple categories of activity. Obviously, then, there is overlap between these categories that is sometimes apparent and sometimes not. Here I am concerned with types of activities the morally bad consequences of which a person is non-negligently ignorant. Thus, building codes fall under this category as well as the other cases I discussed. What I am interested in here are epistemic limitations that pertain to moral assessments of or responses to wrongdoing. People can be mistaken about a great many moral realities, even on their best efforts to be sincere and make wise decisions. The idea is that without the state, there is still a need for appraisal, punishment, compensation and impartial judgment in relation to perceived harms that occur between people. These are the main focus of this section. Most of what I say will not be new, except insofar as I use my model to show the ways in which solutions to these problems entail a duty to obey the law.

With no single entity in place to protect the rights of individuals in a SN, moral matters related to wrongs done are very complicated. First, there are biased or false appraisals of moral wrongs. Disputes about morality are widespread and complex. There are disputes about both whether an act is morally wrong and also to what extent an act is morally wrong. The scary thing about life outside the state is that every manner of implausible moral opinion has as much say as any other, depending on influence, majority opinion, power and a wide variety of other factors. Most importantly, though, are those cases where opinion is divided. When there is no agreement on the wrongness of a particular action, it is

difficult to know what to do about it. Who prevails in reaction to the act? Is it allowable in the future? How do we treat people who commit the act?

I am not here claiming that an authority has epistemically privileged access to moral truth. It is not on the basis of expertise that the state gets its authority. However, disagreement that is allowed to grow into responsive action is troubling. This is so mostly because there is no expectation on disputed norms for what one is permitted to do. At least in the case of a political authority, the standard can be promulgated via the law. If this happens, perhaps the state outlaws activity that is morally permissible. Even so, one ought to follow it because it is disputed whether the activity is morally permissible. In the face of disagreement, there is a moral imperative to establish a social standard according to which expectations can conform. All this says nothing, of course, about our reactions (e.g., punishment or compensation) to the action as of yet. However, it is because of our potential reactions that disagreements over moral appraisal must be resolved (even if one must follow the standard in the face of their own continued disagreement with it). I will make it clearer why we have an equal duty to follow these standards as we discuss further problems below.

When it is determined (by some common standard) that a wrong has occurred, there will also arise disputes about what kind of compensation or punishment is appropriate. Since even with a common standard some will not agree, there might be resistance and so coercion is needed as a threat to support compensation in particular. So both punishment and compensation involve the use of force. The problem is that punishment and demands for compensation cannot be equally applied to all in society unless there is an impartial judge to apply it. There are two potential problems. First, there is a potential for escalation due to disagreements over perceived wrongs. Second, there is a potential for oppression by the powerful over the weak. The important point here for both of these cases (and what separates my justification from other, similar justifications) is that either of these things can happen without the agent's knowledge. It is impossible to objectively assess one's own moral position when self-interest is involved (or even many

²² Contrast with Raz's conception of our greater likelihood of acting on relevant reasons by obeying the law.

times when self-interest is not involved). This is a feature we all share as human beings. Thus, everyone in society has the potential for harm-doing. In addition, it does not matter if a person is really passive and unwilling to punish others for wrongdoing. Harms may be done to that person and someone will attempt to punish. The fact that everyone could be in potential disagreement is what creates the problem and that is why everyone ought to submit to a system of relatively equal punishment and compensation.

We already dealt with the state's minimal right to coerce above. Some problems, such as the prevention of harm by others creates a duty for us to impose a system of coercion on them. However, we have not said anything about how that system applies to us in a morally relevant sense when the coercion of the state falls on us for actions we took that we do not believe are morally wrong. The state's standard of conduct is authoritative for us in that it provides solutions to moral wrongs, in some of which we are complicit. We ought also to follow its decisions as authoritative for us because the decisions offer a standard that constitutes a solution for problems of punishment and compensation. As above, the state may not give the most morally appropriate punishments or demand the most morally appropriate compensation. That is not a problem for my view. Again, this will become clear as we talk about impartial judgment.

As has probably become clear, in both appraisal of action and also punishment and compensation, the most important feature is the possibility of impartial judgment with equal treatment. To remedy the great harms that would occur without the state is to have a system that assesses action based on a system of expected norms that are clear to all and that punishes and compensates according to a system of defined acceptable conduct and punitive or compensatory measures. There is a principle underlying all this that I take as a premise for the foregoing argument. The government may set a standard of conduct that is not completely morally accurate. It may also impose punishments or demand compensatory action that are not completely morally appropriate. The principle latent in this discussion is that having a common standard that is roughly equal for conduct is morally better than having some get exactly what is due to them while others suffer. And such inequality will surely occur when there is disagreement

between individuals or groups. Thus, there must be one entity that hands down such standards. This requires the state and binds any who would be involved in a system of inequality without it—namely, everyone.

6. Intentional Rights Violations and Support of the State

Above I mentioned that the state may earn the right to coerce and the right of noninterference from its ability to prevent intentional rights violations. However, the question was, why do we have any duty to support our state because of this? According to what Simmons calls the Particularity Problem, this may give us reason to support just states, but it does not tell us which ones. This is a real problem for some natural duty accounts, but I take a different strategy here. While I deal with the Particularity Problem more fully in Chapter 6, I describe part of the solution here because it pertains directly to the very basis for certain kinds of obedience to law.

Why should I be concerned with the support of any particular state? Because it solves coordination problems that directly pertain to *my* potential activities. The foregoing showed that I have a duty to obey certain classes of laws because the giver of those laws serves a purpose that is morally necessary. It is on the basis of these duties that I have a further duty to obey laws that correspond to the sustenance of the state.

Moral coordination problems in a SN are everyone's moral obligation to solve. The state offers the solution to these problems. Therefore, I ought to obey the laws that protect the state from collapse and that enable it to carry out its work. Thus, I ought to pay taxes, I ought to refrain from acts of treason and I ought to do whatever else is necessary to sustain the system established for its existence and proper functioning. So, while other natural duty accounts focus on the need for support of states because they are just, my focus is on support of a particular state because it solves problems to which my potential activities contribute.

I have highlighted three areas of law that we have a duty to obey. These three areas are only vaguely defined above, so there is still plenty to explain regarding the nature of our duty to obey the law. A complete analysis of those laws that we ought to obey is impossible within the scope of this work. My argument here is intended to serve as a basis from which we might make such an analysis. However it works in the practical details is worth exploring, but my aims are more conservative. I will first briefly discuss those areas of law that we do not have a duty to obey. Second, I will pick out some features of the duty to obey that will mark off my account from others.

7. Defining the Scope and Nature of the Duty

We have a duty to obey (a) laws that serve as commands of a coordination-problem solution (e.g., traffic laws, business transactions, building codes, terms of contract); (b) laws that command acts in compliance with judgments pertaining to punishment, compensation, restitution, and fault (e.g., compliance with court rulings); and (c) laws that command acts in contribution to the state's stability and continued existence (e.g., taxes, treason). What is not covered by these categories?

We do not have a duty to obey laws that command otherwise morally required activity unless such activity also corresponds to the solution of the right kind of problem in a SN. More precisely, we do not have a duty to act according to laws that command morally required activity *because* they are commanded by law. We have a duty to act according to these laws *because* their content describes activity that is already required of us. Another way to understand this is that in cases where the law commands (or forbids) what we are already morally required (or forbidden) to do, the law gives us no reason to act in that way. It is superfluous, unless, as I said, acting in accordance with morality accidentally corresponds to the action required from the solution to a coordination problem.

It is an interesting question exactly how much of the law this includes. Perhaps for much of the criminal law that we follow, we do so out of a duty to act in certain morally required ways, not because the criminal law has any authority over us. But even here, there are often directives given that restrict action in ways that are relevant to problems in a SN. It may be obvious that I should not murder or assault those around me, but under what conditions and according to what methods can I defend myself? Perhaps parts of the law clearly follow an unproblematic aspect of interpersonal morality. I suspect that this is true. There may also be some laws within the criminal law that will be authoritative over us because they have only to do with restricting behavior to prevent the kinds of SN problems I have described (e.g., some of those covering *mala prohibita* crimes), but this is because the legal category of criminal law does not exactly correlate with our moral categories of requirement and permissible action.

We also have no duty to obey those laws that only serve the generation of morally unnecessary ("discretionary") goods.²³ It is harder to see what kinds of laws these might be, but I offer a couple of examples. First, for laws pertaining to the beautification of an area, when they involve some restriction on my behavior, I have no moral duty to comply. Pretend, for example that the state has sanctioned the placement of a sculpture in the square and it happens to be directly in my path. Ought I heed the warnings of an official who forbids me to walk within the work zone where they are placing the sculpture? Not for reasons of obedience to the law. I may have other reasons to comply, such as out of respect for the sculptor or for the safety of the workers. However, it appears to me that I have no reason to comply with any directives by state officials in such a case. The state also engages in projects to enhance the convenience of life within its territories. Often in these cases, it is not morally necessary that society have these conveniences. If the state is building roads where people travel sufficiently well on the dirt, then it is not necessary for me to comply with the law. One can imagine that such projects, again, will involve restrictions of my behavior. However, if my behavior does not harm anyone and does not involve violations of rules that serve as solutions to the problems described above, then I have no duty to obey.

²³ See Klosko (2005) among others for discussions about these kinds of goods.

Beyond the two areas of law I have just described, it is difficult to say whether there will be any other areas of law for which we will be exempt from moral obligation. What should be clear, though, is that both the categories of law that we ought to obey and those that we need not obey are fairly extensive. There are a lot of restrictions on our behavior that serve as solutions for the kinds of SN problems that form the basis of our duty to obey. However, there are also quite a lot of laws that pertain only to restriction on our behavior that correlate directly to moral restriction. There are also quite a lot of activities by the state that pertain only to the production of discretionary goods. These are simply the ways in which, on my account, political obligation is limited.

7.1 A Perfect Solution?

It should be apparent that any solution to the kinds of coordination problems I have cited does not have to be perfect. In fact, there is a very minimal standard of effectiveness it must meet. Recall my discussion at the beginning of this paper about how the legitimacy of the state is a comparative issue. The state is only legitimate if it is on the whole morally better than life without it. Again, this must be life in a stateless world, not one where a society can reap the benefits of surrounding states with protective tendencies and regulated stable economies. More specifically, life with the state must be better in the sense that coordination problems are solved in a way that is not greater in moral cost than leaving them unsolved would be. For the individual, that means life with the state must be better because SN problems to which her actions contribute are solved. Since we cannot answer the question of what scheme should be implemented, fairness restricts our behavior even though the scheme is not one we would have chosen. Perhaps for individuals who were factually subjected to modern states in their very infancy, the state is not authoritative and they have no duty from fairness to obey its laws. However, for most citizens of sufficiently just modern states, there is a natural duty of fairness to obey and support their state.

The state's legitimacy and the duty to obey is in some sense generated by a calculus that is similar to proportionality in other moral contexts.²⁴ One can think of the decision to form and sustain a political system as a result of the positive moral weight of doing so versus maintaining the status quo or introducing some other solution. Of course, one such solution is offered by anarchists who believe the problems can be resolved through private organizations and not a coercive political system.

Among other problems, sustaining the kinds of solutions necessary through private organizations has one significant flaw that has gone without adequate treatment. As mentioned above, we cannot reasonably expect others to act in accordance with a solution to any coordination problem so long as that solution requires action that is contrary to their self-interest. Any moral coordination problem as I have described them in this chapter requires for a solution action that is contrary to the self-interest of the community members. Much of the literature on fair play and consent focus on the benefit to individuals and their actual or hypothetical agreement or involvement with the source of the benefit. My solution focuses on the moral nature of the problems and the individual's potential contribution to them. Thus, we cannot expect private organizations to ultimately do anything to benefit those who cannot or will not pay for their services. Thus, there has to be an impartial and universal source of the solution to the coordination (and other SN) problems.

7.2 Naturally Arising Solutions and the Separation of the Rights of the State

David Lewis correctly points out that some solutions to coordination problems can arise naturally. They can do so from habit or norms or even socially articulated rules. What I have attempted to show above is that not all coordination problems can be solved in this way. So, a natural question is, why are we required to obey solutions to problems that could have naturally arisen even if the state now offers the solution? Imagine two societies. Society A decides to create a coercive system for the maintenance of

²⁴ I am referring mostly to Just War Theory, but the idea of proportionality can be applicable in many moral contexts.

clean lake water. However, it also decides to impose a rule of driving cars on the right side of the road to prevent accidents. Society B is identical with respect to clean lake water, but there develops a naturally arising convention of people driving on the right side of the road. In Society A, the solution to car accidents is provided by the authoritative coercive system, while in Society B, the solution naturally arises. Why should we think that the coercive system in A has any authority over anyone regarding driving restrictions, even if it does have authority with respect to maintaining clean water?

The main reason that A has authority over the driving habits of its inhabitants is that it does in fact provide a solution to a coordination problem by regulating the behavior that would cause the problem. In B, the coercive system never involves itself in the affairs of the driving public. If a naturally arising solution to the car accident problem could not have arisen naturally, then B would have had to create the solution. In this case the solution arises naturally. However, once a political authority begins to regulate some types of activities based on its provision of a solution to coordination problems, it can become the authority on other coordination problems, even if the solutions to those could arise naturally. The ability of states to do this does not depend on their first having offered solutions to problems that do not have possible naturally arising solutions. So long as the state has authority from the right kinds of solutions, it can have authority on many others. So, how do we know what solutions give the state authority? For any realm of activity that the state regulates, we have a duty to obey its regulations as long as such regulations offer solutions to SN problems. Again, it does not matter if the solutions the state endorses are less than perfect. So long as they offer something that constitutes a morally preferable state of existence, then they are an authority.

Part of the reason the state gains authority even in cases where the solution could have arisen naturally is that it in fact becomes the source of common knowledge and thereby obtains the common sense notion of authority that citizens ascribe to it. As an example of solutions that do not require the state, consider those in which the solution does not require action that works against self-interest. I probably do not care which side of the road I must drive on as long as you are not driving on the same

side in the opposite direction. Thus, the state is not necessary for the solution of this coordination problem because the solution will probably easily arise without it. However, once the state does begin to regulate the activity, its word is binding. A case in point is Sweden's change in driving laws in 1967, commonly known as H Day. For multiple reasons the Swedish government instituted new traffic laws that required people to drive on the right hand side of the road instead of the left. The change was opposed by many, but once it was decided that the change would occur, the driving habits of the Swedish effectively changed with the law. Thus, even though the habit could have arisen without the state and even though there was already a habit that constituted a solution to any lack in coordination of driving, the change in Swedish law transformed the behavior of the people it governed. In the same way, a state could begin to regulate behavior that it did not previously regulate and expect similar results. Thus, the state can have real moral authority as the provider of solutions for many different kinds of coordination problems simply because it gains the power to command over these areas because of its perceived authority in the eyes of its subjects.

The effect of this feature of the state is that its realm of authority applies to almost all laws that do not govern behavior that was already morally impermissible or those that are merely for the production of discretionary goods. Most laws serve the purpose of coordinating activities for the greater moral good of preventing the kinds of harms or moral wrongs that would occur without it. Given this effect of a large portion of the laws of many states, the duty to obey applies to a significant portion of the law. However, it is interesting how this changes our conception of authority.

Many accounts of political obligation take "authority" to include extensive rights of the state and corresponding duties for those within its borders. This is another area where the present account differs from many others. On my view, the rights of the state to command and coerce, against interference and to obedience can all come apart in principle, though the ways in which they can come apart vary in practice. This may seem counterintuitive at first, but I claim that it is a natural interpretation of our considered judgments about political obligation.

I have spelled out the areas of the law over which the state has full authority—including the moral right to command, coerce, against interference, and to obedience. For example, for laws that require action that is in accord with a solution to a moral coordination problem, the state has full authority. For other laws, such as those that require action that was already morally required, the state merely has a right to command, to coerce, and against interference. Thus, not in all cases does the right to command entail the duty to obey. I will discuss in the next chapter why I believe this is a virtue of the account.

Is it possible for a state to have the right to your obedience even when it does not have the right to command and coerce? Simply put, it cannot because the right to command and coerce is a necessary condition for its right to obedience. This requires a little explanation. There are two moral bases for the right to command and coerce. First, it can do so in order to prevent intentional rights violations between persons. Second, it can do so in order to solve coordination problems and problems of moral error. To assess the permissibility of state action, we need only ask whether it is an acceptable preventative measure against moral harms or whether it is consistent with a solution to the relevant SN problems. Governing both of these principles is that the state must be on balance less morally costly than life in a state of anarchy (according to the features I stipulated above). Where the state loses the right to command and coerce is in cases where it violates rights to the point where it is greater in moral cost than life without it. This disqualifies it from having the right to command and coerce. It also disqualifies it from having the right to our obedience, since it is morally costly. There is one other case in which the state can fail to have the right to command and coerce—where it has power over a territory that it has just invaded. In this case, it may be that the state functions in a just way and regulates behavior to solve the right kinds of SN problems, but it still has no right to our obedience. I will explain why this is the case in Chapter 6.

7.3 Razian Preemptive Reasons

The adept reader will have recognized that my view shares certain elements in common with some other views. Joseph Raz is one of very few philosophers who is content with the idea that state authority is limited in many of the same ways I have described. He also begins with the very same problems for which the state offers solutions on my account. On the other hand, there are many differences between his view and mine. I will focus on one that explains the need for the kind of justification I have given.

Raz believes that the law gives us preemptive reasons to act in accordance with it. They are preemptive because they are second level reasons that exclude all other first level reasons (within a defined range) from our deliberative process. In other words, when I obey the law, I am choosing to place in the judgment of the state all the reasons that I would otherwise have for acting as well as the task of weighing those reasons appropriately for a final conclusion. According to the *normal justification thesis*,

...the normal way to establish that a person has authority over another person involves showing that the alleged subject is likely better to comply with reasons that apply to him (other than the alleged authoritative directives) if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them, rather than by trying to follow the reasons which apply to him directly. (1986, 53)

So, on his view the state has authority if we have a better chance of complying with reasons that apply to us than we would by following our own judgments.

Raz's critics have pointed out that there are many ways in which we can interpret his analysis of the law as providing preemptive reasons (those that exclude first order reasons from consideration). Is it an epistemic principle? Is it merely an "indicator-rule" that serves as an epistemic shortcut to greater reliability in determining permissible or morally required conduct?²⁵ Does the law change the balance of first order reasons so that we can act as if first order reasons against following it do not exist? Or, is it just that preemptive reasons are those that ought to motivate us to act to the exclusion of the first order reasons they preempt?²⁶ We need not find definitive answers to these questions in order to recognize a problem.

The debate around the way the law functions as reason-providing, while interesting and important, is tangential to the main arguments here.²⁷ Notice that even if one of the interpretations above is correct regarding the nature of the reasons that law provides, we still have to talk about why it provides any individual in particular with reasons for action at all. Further, we must explain why such reasons are distinctively *moral* in nature. As a matter of fact, some (or even most) moral principles act as exclusionary reasons for many first-order *prudential* reasons. But if this is all we can take from Raz's account, it is entirely uninteresting for political obligation. We must figure out what principles give us moral reasons and then make decisions about their relative weight or the range of first order reasons they exclude.

This can be more properly understood with an example. Raz appeals to coordination problems as a source for the authority of the state. He writes, "It is true that once a co-ordinating convention is established every person has reason to adhere to it, a reason which is independent of the existence of the authority, a reason deriving entirely from the existence of useful convention." (50) However, against this Larry Alexander writes that, "Our obligations may correspond to what the law requires because the law can affect our obligations. But this does not justify the assertion of any obligation to obey the law...[Though] we do have an obligation to establish and support well-designed systems of legal coercion..." (19) Both of these views touch on issues I have laid out in this chapter. Alexander claims that Raz does not provide any indication for why his analysis supports a duty to obey the law, even if, as he

²⁵ Donald Regan (1989)

²⁶ These last two possibilities are suggested by Michael Moore (1989).

While I find Moore's analysis the most persuasive, I offer no support of it here.

notes, we ought to support the creation of the kinds of state generated conventions that we need.²⁸ The laws might give us a location for conventions that we need to solve various problems. They might even give us reasons why we might be morally required to create or sustain the state to establish and sustain such conventions. However, they do not provide any account of why we ought morally to obey them.

In addition, what Raz and Alexander say about conventions is perfectly general. We might say the same things about conventions that best promote the self-interest of all who fall under their rules as we would about those that best promote morally desirable outcomes by restricting all who fall under their rules. It is extremely important that we understand exactly what kind of reasons we possess to create, sustain and follow such conventions. As the discussion in this chapter has proceeded, it may be that we ought to create solutions to coordination problems that require our fair share in doing so. But we have seen that this does not, by itself, give us moral reasons to obey it. To do that, it must explain exactly why morality demands more than just some contribution toward the scheme's continued existence. One of the chief concerns of fairness in relation to obedience is in offering an explanation for why one should not act as a "free-rider." In contrast to Raz, many coordination solving conventions produce benefits that I may receive while contributing nothing toward the burdens of the majority who follow it. It may be in my best interest to feed off the work of the majority. This is only a problem if it can be shown why I (morally) should not do this. This is exactly why I offer a fairness-based moral reason to comply in this chapter. We ought to follow the scheme not because it gives us a better chance of complying with reasons that apply to us, but because compliance is the only fair distribution of the burdens of a scheme in which we have a duty to participate. While I sympathize with Alexander's criticisms of Raz's view, I offer the kind of moral basis necessary to avoid his conclusion that there is no political obligation.

All of this points to a singular conclusion. Raz does not give us an explanation for why we have a *moral* reason to obey the law. Because Raz's analysis of authority does not discriminate between the

²⁸ Our obligations may correspond to what the law requires because the law can affect our obligations. But this does not justify the assertion of any obligation to obey the law." (19)

kinds of reasons we might have for action, a person, group or institution can have legitimate authority if they are successful in guiding us to act on prudential reasons just as much as moral reasons. The state has legitimate authority for me whether its laws help me act in morally good ways or in ways that will make me lots of money. There is no priority between these.

Is this a real problem for Raz? Perhaps we could amend his view with a supplementary restriction on those reasons for which the state has distinctively moral authority. All we need to say is just that legitimate authority is only present where the law gives us a better chance of acting on those *moral* reasons that apply to us. Well, if we do this, then we need an account of what constitutes the kind of moral reason that will give the state legitimate authority—a reason on which the state will better enable us to act morally. But this is just a call to articulate the moral basis for the legitimate authority of the state and this is what philosophers have been arguing about for decades! In short, then, the problem with Raz's account of the obligation to obey the law is that there is no account. His view explains the way that reasons sometimes function in relation to the commands of a legitimate moral authority, but he does not explain on what basis he who commands *is* a legitimate moral authority.

8. Robin Hood, the Expert and Excessive Taxation

It may be that under two possible conditions, a person can act in disobedience without in any way compromising the system within which the coordination problems are solved. This can occur in two ways. First, one might act contrary to the law in ways that bring morally preferable states of affairs. This person metaphorically robs from the rich and gives to the poor for the purpose of bettering the least well off by failing to comply in ways everyone else is required to do. We will call the agent in this case Robin Hood. A second case is one in which a person can disobey without compromising the coordination solution system because she has a heightened level of expertise on the restricted behavior. This person

knows that she can get away with action and the system would preserve the moral end that it was intended to preserve. I will discuss each of these in turn.

Robin Hood steals from the rich to give to the poor. The example is uninteresting if it is true to the original story and Robin Hood steals from an unjust government. One qualification on the duty to obey for most accounts is that the state must be sufficiently just. For my account, I imagine this to be a comparative issue. The state must be morally better than a SN. So, really we are talking about a revised case of Robin Hood. This person lives in a state that is just and which entails the duty to obey the law. This means it is morally better than a SN and it solves moral coordination problems that are related to the restriction of the behavior of all citizens. However, Robin Hood knows he could make things even better morally by stealing occasionally from the rich in society and giving the stolen goods to the poor. Thus, the objection goes, there are cases where there really is no duty to obey the law so long as there are better means of achieving moral ends. The duty to obey the law is not general, then, because it only applies to those who cannot make improvements on the political system.

I respond to this criticism first by taking no stance on characters like Robin Hood. If there are moral considerations that outweigh the duty to obey the law and give reasons to disobey, then perhaps in some cases it is morally permissible to do so. First, though, that does not mean there is no duty to obey the law that applies to all or most, even to Robin Hood. It may be that in his particular case he is not required to obey because, all things considered, he morally ought not to obey, but he still has a defeasible duty to obey. Second, it is unlikely that such characters often have permission to act in disobedience to the law. They are required to act in accordance with the state's laws because the laws constitute solutions to coordination problems. However, there is no prohibition from acting above and beyond that duty. Acts that are really helpful for bringing about morally desirable ends are often those that require obedience to the law and extra effort that is not inconsistent with the law. This means that in many cases, Robin Hood will restrict his behavior according to the law and may take extra effort to work toward greater moral ends as well. What he is not entitled to do is act according to a solution that would be better if everyone did so.

Such solutions have no basis in reality and cannot serve as adequate for bringing about the morally required ends. Finally, it may be that there is something morally valuable about the ends Robin Hood seeks to produce. However, states of affairs are not all that matters in morality. Thus, it may be that Robin Hood has a duty to obey the law and that he must follow the duty even if he can disobey and bring about other morally desirable ends. Of course, if the ends in question are the same ends that are involved in the coordination solutions of the state, it will be extremely unlikely that a greater end can be produced by one man's action. They are after all solutions to *coordination* problems, not problems of individual action.

Now we must address the Expert. Perhaps someone knows that she can act in ways that will not harm anyone or constitute any moral wrong, even if everyone else's action must be restricted. This will not work in cases of shared contribution like the pollution of lakes or the overfishing of populations of fish. However, the case of driving is instructive. Perhaps the expert is a professional stunt driver. She knows that she can drive under conditions much less restricted than the current system of law and she will not injure anyone on the road. There are three reasons why she is still not allowed to disobey (except under rare moral conditions). First, even if she knows she can drive with more freedom than is allowed by law, she does not know the extent of the freedom she can exercise without hurting anyone. No one knows exactly where their limits lie and to trust each to his judgment is to allow spheres of driving freedom to inflate to the inevitable commitment of harms. The point is not that the law is present to prevent harms done equally by all, but to prevent harms done by the collective uncoordinated action of all. Thus, it is not the actual driving skill of those involved that is at stake, but the existence of uncoordinated drivers together in dangerous conditions. Second, it may be that the Expert knows what level of driving she can exercise without injuring anyone directly. However, she does not know the driving skill of the other drivers on the road. Thus, there is no way to know what other drivers will do when they are confronted with a person of superior abilities like her on the road. Perhaps they will become scared and veer off the road when she approaches at high speeds. Other drivers, with their inflated perceptions of their driving abilities, will likely believe that Expert is reckless or dangerous. Thus, they will act in ways that are

reckless or dangerous. Finally, Expert has a duty to obey out of fairness, not because she can safely break the rules *once conventions on driving have been established*. It does not matter how good of a driver you are, without conventions on driving, there will be accidents. Expert may very well recognize that she could break the rules of the convention without harming anyone, but the point is that she could not do so except under conditions of ordered behavior. Thus, she ought to obey the law because it represents a solution to problems that would arise with driving in a SN.

Lastly, we turn to excessive taxation. In most states, citizens are taxed to excessive degrees. I will admit at the outset that there is a degree of taxation that is unjust and may disqualify a particular state as sufficiently just to entail the duty to obey. However, it is not simply the level of taxation that is important, but also the purposes for which the taxes are used. In the most extreme case, the state uses taxes for the purpose of supporting only projects that provide beneficial (or "discretionary"), but not necessary ends. In these cases the taxation is clearly unjustified on my account and the result is that there is no duty to obey the laws surrounding taxation. There is a more troubling question for my account, though. Most states tax for a mixture of purposes. Some of the money goes toward the sustenance of a protective force or police force for the purpose of preventing direct intentional harms, some of it goes toward solutions to coordination problems and some of it goes toward beneficial but unnecessary projects. Of course, some of it may even go toward counterproductive or harmful projects. Why should we have to pay excessive taxes at all? Why is our duty not just to pay some proportion of our taxes? Why must we take the state's word for what is necessary taxation?

These are tough questions, but there is a way to answer them from the nature of the account as it has been articulated so far. Just as in the case of the Expert, there is no need for the solution to coordination problems to be perfect. Likewise, there is no need for the resources used to fix coordination problems to be perfectly efficient. All have a duty to support the state equally. The duty to support the state comes from its ability to create solutions to moral coordination problems. Some will be forced by law to support it with the taxes demanded by the state. It is unfair for some to shoulder the state's burdens

while others escape it.²⁹ Thus, from fairness again, you ought to pay your taxes. It is still possible for the state to tax its citizens highly enough with little enough efficiency that there is no longer a burden. Again, though, determining this point will be a function of the justice of the state and its status as morally preferable to a SN. So long as it meets these requirements, we have a duty to pay our taxes.

²⁹ Of course, the immediate question is what constitutes a fair share. This is a difficult question to answer, but again the most important thing is that there is a fair share specified by a single entity.

Chapter 5: Pluralism and Authority

I have given an account of limited political obligation, but there are some loose ends to tie up. For instance, there are benefits to endorsing *full* political obligation corresponding to *full* authority in the state. For one, the class of laws which we ought to obey is easily identifiable—we ought to obey all of them that are issued by the authority over us. It also justifies the state in both its claims to authority and its actions. Claims about the authority of any law are veridical under a model of full authority. It goes without saying, then, that the right of the state extends over whatever realm of human behavior it regulates. Perhaps there are some restrictions on the state's action, such as a limitation to issues of justice, but it is a lot easier to conceive of state power with a theoretically robust notion of its political authority than with the limited view I offer.

In addition to lacking the benefits of full political obligation, limited political obligation might be seen to have various problems. For one, our considered judgments may support the belief that the duty to obey the law is not complicated. At least, it is a duty that is accessible to common citizens of any country. Few who consider themselves to have a duty to obey the law mean by saying so that they have a duty to obey x, y, and z particular laws to the exclusion of others. Thus, at the outset, a limited political obligation has a strike against it. In addition, our concept of authority seems to have close connections to notions of the status of lawgivers. We think that we ought to obey the law because it is issued from an entity that has the status to make morally effective commands. Such a status more easily entails broad ranging rights in the state as opposed to the more limited ones I have described. After all, if the political

¹ I should acknowledge here that there is no comprehensive empirical data showing what exactly people believe about political obligation. Leslie Green raises doubts about our ability to say what exactly is in the common consciousness of members of society based on what people say.

entity has the moral right to obedience for one law, what prevents them from having the right for all others?

This chapter has two parts. First, given the theoretical benefits of full authority and the failure of monistic bases (i.e., those that utilize a single moral source) for political obligation, some theorists may be (and have been) tempted to develop an account of *full* authority based on a plurality of moral bases. Such pluralists about political obligation may endorse one of four theses. The state may have full political authority through (a) strong moral bases that ground its rights over different subsections of the law; (b) strong moral bases that ground its full rights over different subgroups of its people; (c) weak moral bases that together constitute a strong basis for the duty to obey the law; or (d) moral bases serve different functions in supporting a duty to obey the law. In all cases the goal is to show how the state has full authority grounded in multiple moral considerations. I will address the first three pluralist possibilities first, showing them to be misguided and prone to failure, though I do not deny that a more sophisticated account may emerge in the future. The final possibility requires greater treatment as it has similarities to my view. I will address this version through the work of Chaim Gans. There are important ways in which my account is both similar and different from his and so I will point to these in an explanation for why his account is unsuccessful.

Second, I will address the looming question of authority for my view. In what sense does the state have authority in an account of limited political obligation? What features are we looking for in an adequate account of political authority? I will point to some features that are widely held to be necessary conditions for political authority. Of these, two in particular pose a problem for limited political obligation. Comprehensiveness claims that the authority of the state ought to extend over a wide range of human activities. The implication for the rights of the state is that it can make laws that restrict a large portion of our lives. I claim that comprehensiveness pertains only to the right to command and coerce (what some have called the state's "legitimacy") and not to the duty to obey the law (which gives the state

full "authority"). Thus, limited political obligation is not inconsistent with the comprehensive rights of the state.

Content-independence is another necessary condition for an adequate account of political authority. It states that the duty to obey the law (where we have it) is such that we ought to obey the law regardless of the content of the law. In other words, we ought to do what the law says because it is what the law says, not because what the law says is in accord with what we would normally have to do or would want to do anyway. It is tempting to believe that, since we are to obey the law because it is the law and not because of moral significance of the actions it demands of us, content-independence must apply to *all* actual laws issued by the state. I argue, however, that content-independence is intelligible as long as we can specify what categories of law we are bound to follow. With respect to those categories, then, we will have a content-independent duty to obey the law. On my account of limited political obligation, those categories are specifiable and so my account retains the sense of content-independence that we really want from a duty to obey the law.

In conclusion, my account does not suffer from some of the failures associated with pluralistic accounts of political obligation. It also retains the necessary features of any adequate account of political authority. There are many ways in which our thinking about political authority will change on a view like mine, but these changes are good.

1. Pluralism about Political Obligation

If we can generate partial authority in the state through a single moral basis, then why not look for other bases to generate full (or fuller) authority in the state? Some theorists have suggested ways of doing this and their work must be addressed here. It should be noted at the outset that I am not opposed to pluralistic models where they actually accomplish what theorists claim they accomplish. Much of my argument below will serve to show that pluralist accounts do not accomplish what their proponents claim

they accomplish (i.e., full, broad ranging authority in the state). I leave open, then, the possibility that someone could build a greater pluralistic account than those I address here.

There are generally four ways to construct a pluralist account of political obligation. None of these is mutually exclusive, and, in fact, there are some subtle combinations of them in the literature. Nevertheless, it is helpful to treat them in separation for simplicity's sake. The following are possibilities for a pluralist approach to political obligation.

- 1. Partial Law Approach: There are different strong bases (those that entail a duty to obey) that cover different *parts of the law* which we are required to obey. (Each basis lacks *universality*.)
- 2. Partial Population Approach: There are different strong bases (those that entail a duty to obey) that cover different *members or groups of the population* within the intended reach of the law. (Each basis lacks *generality*.)
- 3. Partial Justification Approach: There are different weak bases (understood according to each version below) that in combination constitute a strong basis for the duty to obey the law.
 - a. *epistemic version*: Different bases that provide weak evidence (i.e., insufficient for justified belief) for the existence of a duty to obey the law together constitute strong evidence (i.e., sufficient for justified belief) for existence of the duty to obey the law.
 - b. *moral version*: Different bases that provide weak moral force/reasons (i.e., insufficient to ground a moral requirement) to obey the law together constitute a basis for the full duty to obey the law (i.e., the duty for all/most subjects to obey all/most laws).
- 4. Multiple Function Approach: There are different moral considerations whose functions complement each other to form a basis for the full duty to obey the law (i.e., the duty for all/most subjects to obey all/most laws).²

² Wolff (1995) explicitly identifies the Partial Law Approach, the Partial Population Approach and the Multiple Function approach. However, he does not develop the last of these in any detail and he also fails to recognize what I have called the Partial Justification Approach. He also describes four other approaches, though these all involve rejections of one or more assumptions I have taken for granted in the models I am discussing here. Thus, his project

I will explain below how each of these pluralist positions is represented in the literature on political obligation. Then I will show the ways in which different advocates have failed to support full authority and in some cases create problems for political obligation. For simplicity, whenever I use the word "full" in reference to political authority, legitimacy or political obligation, I mean just that the relevant rights of the state cover all/most of the law for all/most subjects of the state.

Both the Partial Law Approach and Partial Population Approach are more promising than the Partial Justification Approach, so I will address the latter first. Each version of the Partial Justification Approach has its own problems and must be dealt with individually. The moral version of the Partial Justification Approach to a pluralist account of political obligation says that moral considerations can individually provide a weak basis for a duty to obey the law, but together provide a strong basis for the duty to obey the law. There are at least two ways to think about how a "weak" basis can contribute toward the ultimate moral requirement to obey the law on the moral version of the approach.

First, moral bases for the duty to obey the law may each provide some reason for obedience, the weight of which falls short of moral requirement, but are sufficient for moral requirement when taken together. Kent Greenawalt describes this phenomenon as a case where certain moral considerations render an action (e.g., obedience to the law) supererogatory—having moral value without being required—in most cases, but may be enough to make it required in others. For example, regarding utilitarian bases for the duty to obey the law he writes, "...the category of 'ought' or 'must,' is dubious; however, the consequences of disobedience might occasionally push within that category [of required action] a choice that is already on the border on other grounds." While utilitarian considerations are often insufficient to ground a duty to obey the law, they may be sufficient in conjunction with other moral reasons.

is substantially different from the aims of this work, since my goal is not to challenge the presuppositions of what I call accounts of "full" political obligation, but rather to show that the available models are unlikely to succeed in their own aims. Wolff endorses what he calls the "Multiple Plurality Model" which explicitly denies the need for bases that support a universal and general duty to obey the law. ³ 116

What could Greenawalt mean in saying the consequences can "push" a choice into the category of moral requirement? Even if we think it is at all possible for consequences to have this power (which I do not on most readings), there are still only two possibilities for the duty to obey the law. Either the relevant consequences are the result only of the action itself or they are in part the result of the action's being legally prohibited/commanded.

In the former case, the actions can be assessed by looking at their consequences whether or not they are legally prohibited/commanded. For example, if I make a written promise to act in some way, then my acting so or not will have certain consequences. The idea is that these are the relevant consequences whether going back on my written word is legally prohibited or not. Immediately a problem arises. Do such consequences have any bearing on the duty to obey the law, specifically? If it is not the action's status as legally required that causes the morally undesirable consequences, then the relevant consequences bear on our moral requirements with no reference at all to the action's status in the legal system. For example, it is obvious that even if there were no duty to obey the law we would have a duty to refrain from murder based on the consequences (among other things). However, this fails to give us any reason to obey the laws as law, beyond simply doing our moral duty. If the only way consequences can push a legally mandated action into the category of moral requirement is in the way that they can push any other action into the category of moral requirement, then it is inapt to say consequences have any bearing on our moral duties in relation to the law. Consequences do not "push" borderline cases into the category of moral requirement insofar as they are legally required, they only do so insofar as they have the right features as individual actions in unique situations (or types of actions for rule consequentialism).

Perhaps for a pluralist, this is just a numbers game. We get some coverage of the law through utilitarian considerations even if those same considerations mandate action that has no connection to the law at all. As long as we have a duty to act in accordance with some laws, and as long as we have other moral bases to generate a duty to act in accordance with all others, we have a duty to obey the law. But

this really sidesteps the point. Imagine that, by the consequences, we ought to act in accordance with certain laws that make up 30% of the law in totality. Perhaps then we will find other sources of morality to tell us why we should obey the rest. Even if we did this, my claim is that the utilitarian considerations discussed so far make no contribution to *the duty to obey the law*. For there is nothing unique about the law that legally prescribed actions possess to bring a duty to obey it. We ought simply to do what the consequences morally require of us. In other words, if we have to obey all or most laws from multiple moral sources in this way, it is a result of moral accident, not of any special feature of the law. Of course, this objection renders the approach merely unsatisfying and someone could bite the bullet on this issue. It remains to be seen, however, that there really are moral bases to make up the rest of the 70% of the law. I address this problem later.

Another interpretation does not suffer from the problem above. This interpretation states that an action's being *required by law* brings unique consequences worth moral consideration.⁴ The most common example (indeed, it is difficult to find any other unique consequences in favor of a duty to obey the law) is that the influence of one's disobedience affects the efficacy of the law. It may be argued that when any individual disobeys the law on a regular basis, it has some effect on whether or how others will obey it. As Greenawalt himself admits, however, it is implausible to think anyone's actions will have an effect sufficient to warrant any consequentialist concerns about the efficacy of law. Or rather, if anyone in particular can have such an effect, most people do not. It seems the level of obedience elicited from the self-interest of subjects who do not want to face punishment is likely sufficient for the efficient functioning of the state. Would the state function more efficiently without any disobedience? Possibly, but a significantly lower level of widespread disobedience is not realistic for contemporary life in a political society and any individual's changing their mind about the duty to obey is not going to affect this reality substantially.

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⁴ Gans (1992), for example, explicitly depends on these types of consequences to support a "non-universal" duty to obey the law. 76-78

So, in the case of the duty to obey the law, it is false that the consequences can render normally supererogatory behavior required as part of a duty to obey the law when combined with other moral considerations. Greenawalt mentions another way in which the moral version of the Partial Justification Approach might work, this time in relation to natural duty and utilizing a different idea of how a moral basis for the duty to obey the law is "weak." He writes, "Suppose, on the one hand, someone said that all he meant by the general duty to obey was a moral duty of however slight strength in favor of obedience, one that might give way in many cases to very slight, including selfish, reasons to disobey." (185) This by itself offers no reason to believe the strength of the duty has anything to do with its wide application, which is one problem pluralism seeks to solve. But Greenawalt does not stop there. If the duty is conceived as weak, even though it is general, "one might very well concede a general duty to obey all laws, the concession amounting to little more than that basic ideas of reciprocation provide some rather vague reason for obeying the law." (185) In contrast, he claims, most who conceive of the duty to obey the law as a strong duty will find more reason to question its existence or wide application.

It is not clear how this works into Greenawalt's overall pluralistic account of the duty to obey the law. When taken together with the consequentialist considerations discussed above, for example, a pluralist account would be ill-conceived. If consequentialist considerations push choices that are "on the border" of moral requirement into that category, it seems likely that the duty would have little strength in the same way natural duty provides a duty of little strength. Yet, if we get a duty of whatever strength with wide application from a natural duty consideration of "basic ideas of reciprocation," then the consequentialist considerations are ineffective and superfluous, since consequences cannot "push" any actions into the category of moral requirement if they are already there due to natural duty considerations. If we have a wide duty to obey the law, it is difficult to see what the consequences will accomplish unless they change duties with little strength into stronger duties.

This brings us to a deeper problem with both the utilitarian and natural duty bases of the duty to obey the law. It seems Greenawalt would have us believe that different bases (e.g., natural duty, consent,

fairness, necessity, etc.) can serve as multiple sources of widely applying (weak or strong) duties to obey the law. Perhaps together, then, they generate a strong duty to obey. This sounds like a promising route to take, since each basis of the duty provides an additional reason for us to fulfill it, making it less likely to be overridden or outweighed by other moral considerations. It is only promising, however, if we have other widely applying bases for a duty to obey the law. Greenawalt's treatment of other traditional accounts of the duty to obey the law shows that no such bases are available. In fact, where other bases supply any reason to obey the law at all, they are less general than the "vague," widely applying duty from "ideas of reciprocation." Thus, the moral version of the Partial Justification Approach is unsuccessful unless we have multiple bases for a widely applying (general and universal) duty to obey the law. These will be extremely difficult to find, and Greenawalt has not gotten us any closer to them.

Now we can address briefly the epistemic version of the Partial Justification Approach. Much of what Greenawalt says about moral justification can be interpreted through an epistemic lens as well. In fact, his coupling of the vagueness of reciprocation as a basis for the duty to obey with the duty's lack of strength suggests that he might believe that as the strength of justification for belief in a duty diminishes, so does the strength of duty (and resultant moral blameworthiness). Such a perspective is only relevant if (a) people's opinions have some effect on moral reality as it applies to them or (b) some of the elements of the discussion provide pieces of evidence that should affect a reasonable person's belief system. Though I do not attribute any such view to Greenawalt, the latter interpretation reflects the epistemic version of the Partial Justification Approach that is our present concern.

Two claims will show why this approach is ineffective. First, in order for weak evidence to contribute to the justification of a belief in the existence of a duty to obey the law, the purported bases of the duty must be evidence. Second, if a moral consideration entails only duties that are clearly short of the duty to obey the law, then they do not constitute evidence for belief that there is a duty to obey the law. Given the discussion up to this point, it is easy to see that the type of evidence provided by political theorists in favor of the duty to obey the law is not evidence that offers "weak" support for it. Typically,

the discussion has been between those who support full political authority, which includes a strong duty to obey, and those who deny any duty to obey the law at all. Neither side has taken the position that a basis constitutes merely weak epistemic support and the dispute is rightfully focused on whether these bases entail the duty to obey at all, not the degree of strength of a clearly established duty to obey. Theorists may be wrong about their evidence, but the point is that strength of evidence is completely separate from strength of moral requirement and the evidence is not compelling. Anarchists point to the clear failure of the moral considerations to provide any evidence for the duty to obey the law. They do this by showing that the supposed moral bases for the duty to obey the law constitute no evidence at all, not just weaker evidence. One such example to which I have pointed is that found in the Derivability Problem.⁵ If a moral consideration simply fails to entail a duty to obey, then its power as evidence is not weakened, it is eliminated. Thus, Greenawalt's reference to a "vague" moral basis for a duty of little strength offers little help. Now we are ready to move on to the other approaches to pluralistic bases for political obligation.

The Partial Law Approach and Partial Population Approach share easily identifiable similarities. In both cases moral considerations provide a straightforward basis for obedience to the law, but lack a certain kind of coverage—universality (i.e., the duty to obey all law) or generality (i.e., all individuals having the duty to obey the law). Where the Partial Justification Approach sought to use multiple general and universal bases to create a strong duty, both of these use multiple bases that lack either generality or universality to cover entire populations or bodies of law. It may be the case that some moral bases lack universality and generality. These, then, require supplementary moral bases to fill in gaps in population and law to establish full political obligation (i.e., the duty of all/most subjects to obey all/most law).

Greenawalt points both to sources that bring a universal non-general duty and to those that bring a general non-universal duty. The problem is that these sources do not fit very well together in a pluralist account of political obligation. He notes that some individuals may take on the duty to obey the law

⁵ Again, see Simmons (2005) or refer to the discussion in Chapter 4.

through different types of consent. For example, those who voluntarily assume certain official positions (that may or may not require an oath), those who take certain kinds of pledges, or those with voluntary attitudes of practical respect (cf., Raz).⁶ On the other hand, while he thinks there is a sense in which fair play covers a significant portion of the population, some may be exempt, such as those who believe the law is partially illegitimate, those who take on a greater burden through non-compliance (e.g., through civil disobedience), or those who are given a greater share of the burden than what is fair. In principle, there is nothing wrong with citing different sources to cover different portions of the population. However, in application this tactic often creates many difficulties.

For one, it does not provide a traditional kind of duty to obey the law, which seems to be what pluralists are attempting to provide. This is mostly because different moral bases will provide different duties to different portions of the population. For example, if one has a duty to obey from fair play, it is not clear that the duty is universal. Even if it covers more of the population than other sources (e.g., consent), it does not cover as much of the law. As Greenawalt admits, fair play does not apply to all laws in cases where a substantial amount of people disobey, when some laws make the state partially illegitimate, or when noncompliance will fulfill a fair share (which is wider reaching, in my opinion, than he admits). In contrast, consent could in some cases generate a duty to obey almost all laws. What we have, then, is a strange conglomeration of duties to obey that vary in strength (with some having no duty at all) and scope (with some being required to obey only a very specific set of laws). While this does not mean there is no duty to obey the law, it is more accurate to describe it as multiple duties to obey various portions of the law that are different for each individual or specifiable group. One begins to wonder on such an account, what it means to talk about a duty to obey the law. Typically, what we are looking for is a duty that is represented in the general (or at least typical) population of political subjects. On this point, Greenawalt's account is unpalatable.

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⁶ Greenawalt (1989) 74-77

⁷ Ibid. 137-140; He also claims that natural duty provides a basis for the duty to obey the law, but only laws that relate directly to the purposes of the state.

⁸ Greenawalt consistently excludes unjust laws or (in some cases) laws issued from unjust regimes.

However, there is a bigger problem for the Partial Law Approach and Partial Population Approach to political obligation. In Greenawalt's case, he fails to provide any reason for us to believe that any of the individual moral considerations in question actually entail a duty to obey at all. Fair play, for example, would support a partial law and partial population duty to obey the law *if it supports a duty to obey at all*. However, it does not and this problem affects other pluralists as well.

Chaim Gans and George Klosko also mention the possibility of versions of Partial Law or Partial Population pluralist accounts of the duty to obey the law. Klosko, for example, entertains the possibility that different moral considerations may serve as bases for different portions of the population or different portions of the law. He writes, "Receipt of other public goods—for example, law and order, environmental protection, public health—could well provide [a subject] with reasons to obey the laws in regard to their provision, while considerations other than receipt of benefits could justify obligation on other grounds—for example, from natural duties of justice or considerations of membership." Though Klosko defends a fairly general duty of fair play (and is skeptical toward those who claim not to desire the presumptive benefits that generate it), he admits the possibility that for some individuals or according to some laws the fair play duty may not apply. In these cases, pluralism does the trick. However, he does not give any account of natural duty or membership to support generality. He does cite Christiano and Horton as examples of natural duty and associative accounts in support of his pluralism. However, if these accounts work, they work in their own right, and then it is puzzling why we should care about fair play at all, except as an overdetermining reason to obey the law for certain classes of people or for certain laws.

Klosko also defends a pluralistic account according to the Partial Law approach in a little more detail. He explains that fairness "is able to ground general obligations to support state provision of central public goods, but this of course encompasses only limited government functions." (2005, 102) This means fairness does not cover "discretionary" goods (those that are not indespensible). He also uses a

⁹ (2013) 12

¹⁰ See Christiano (2008) and Horton (2010)

natural duty principle that he calls the duty of mutual aid. The duty of mutual aid is a natural duty associated with Christopher Wellman's principle of samaritanism. The duty of mutual aid requires us to support social welfare programs sponsored by the state because we have a duty to aid others in need of basic goods. A third principle is the "common good" principle. This principle states that once a political authority provides non-discretionary (presumptive) goods and offers aid to those in need, we are bound to it in such a way that our political organization creates a community of which we are a part. Once we are part of a community, we have an obligation to do our fair share in supporting projects of the state that promote the common good of the community.

There are problems with this tactic. As mentioned in Chapter 4, Wellman's principle of samaritanism fails to entail a duty to obey the law. In addition, Klosko admits that the common good principle fails to entail the duty to obey the law without the other two principles (fairness and mutual aid) creating a defined community of morally bound members. But associative accounts have gone to great lengths attempting to show such a community as a morally binding entity. Thus, Klosko's account is susceptible to any criticisms that apply to his fair play account in addition to those that apply to the other two accounts. We will see more of this problem later.

Even if we were to grant that the mutual aid and common good principles ground an extension of political obligation from fair play, it does not ground an extension of the duty to obey specifically. He cites in various places the need to "support" charitable government programs and programs that produce discretionary goods. However, supporting such programs need have nothing to do with obeying the law, and in fact most of the support for such programs will be attained through the collection of taxes. These principles do not fill in the gaps left by fair play for the duty to obey the law, even if they help fill in some of the wider duties associated with political obligation.

Gans takes a more straightforward strategy. For him, moral bases support a duty to obey the law for everyone (i.e., they are general), but not for all laws. The laws that are not covered, however, are

unimportant in his view. "They [the moral bases] succeed in supplying foundations for a universal duty [or *general*] as regards its subjects; a duty which applies to *everyone*. They do not, however, succeed in supplying foundations for it as a universal duty in the sense that the reasons supporting it are always present." (89) Both the consequences of disobedience in the form of its effect on the efficiency of law and the duty to promote just institutions are the bases for a general duty to obey the law. However, if one is at a stop light in the middle of the night with no one around, no such considerations apply.

Gans claims that, though the practical implications of his view make it similar to philosophical anarchist views, it is misleading to say as they do that there is no duty to obey the law. So, it may be helpful just to mention the ways in which his view is different. He asserts (a) that the consequences of disobedience in the form of decreased efficacy of the law are sufficient to ground a general duty to obey that does not apply in clear cases where one's actions will not influence anyone's behavior and (b) that the duty to support just states is sufficient to ground a duty to obey the law once we understand its "application" to us.

We have already discussed the implausibility of each of these claims. The consequences of disobedience are unlikely to have the kind of effect that Gans needs for it to produce any duty to obey the law. Regarding the duty to support just states, Gans reduces it to the same central claim that I have argued causes consequentialism to fail to entail a duty to obey. As he writes, "The duty to support just institutions may only be translated into a duty to obey the law due to the fact that disobedience may cause undesirable consequences for the institution of law." (1992, 80) So, just as with the other pluralists, Gans must do more to show that the individual moral considerations he cites accomplish anything in the generation of a duty to obey the law.

Again, I make no claims suggesting that there is anything wrong with pluralistic accounts, so long as they retain the features of the duty to obey that are of central concern for political theorists and they accomplish the task of establishing the duty to obey in whatever capacities they claim. So far, though, no

accounts have met either of these requirements. Gans' pluralism is more complex than what is stated above, however, so we now turn to his version of the fourth kind of pluralism—the Multiple Function Approach. Before we do so, a summary of the problems for the Partial Law and Partial Population approaches will help us understand the shortcomings of his view.

Each of these approaches could possibly work for a pluralist view *if the multiple bases provide* coverage in the same way. For example, if fair play provides a universal (all laws) duty to obey, then the other bases that work with it should also provide a universal duty to obey in order to fill the gaps in population without creating gaps in the law. On the other hand, if fair play provides a general (all subjects) duty to obey some laws, then the other bases that work with it should also provide a general duty to obey some laws in order to fill gaps in the law without creating gaps in the population. If some bases are general and some are universal, then there will always be a gap. Either some of the law will not be required or some people will not have a duty. The second problem with these accounts is that they make no specific improvements on any of the individual bases that they use to support a duty to obey the law. Without improvement, and based on the failure of such bases in the past century, it is doubtful that their use together makes any difference to political obligation.

Chaim Gans, however, uses different sources of political obligation differently. He claims that their different features can complement each other to create a duty to obey the law. For example, he explains that if the duty to support just institutions "were the only grounds of this duty [to obey the law], we would lack a full explanation for the fact that the duty to obey is mainly a citizen's duty to his or her own country. However, the duty to obey has additional grounds." (1992, 83) He then cites fair play as a source of one's ties to his own country, since the benefits a person receives are provided by his or her community's efforts. He describes how exactly a full account of political obligation arises from four sources, three of which—the duty to support just institutions, fair play, and consequentialist considerations—I have described above and one of which—communal or associative obligations—I have not yet mentioned.

"It turns out that a single complex combining all four arguments supplies the firmest and most successful basis for political obligation. The argument from consequences, the argument for fairness and the argument based on the duty to support just institutions, clarify just why obeying the law is the central component of this obligation's substance. The argument from fairness and, to a larger extent, the argument for communal obligations, clarify just why this duty is mainly a unique and intimate duty owed by citizens to the specific communities of which they are members. The argument from consequences and the argument from the duty to support just institutions demonstrate why it is not only such a duty." (1992, 83)

In other words, Gans sees two sources of natural duty together with fairness generating a duty to obey the law. Then fairness along with communal obligations localizes the duty to a specific community. This unique and insightful strategy sounds like a promising answer to some of the problems faced by accounts of political obligation outside of a pluralism of moral bases. However, there are problems with Gans' formulation of the Multiple Function Approach that cannot be overcome without significant modifications to it. These modifications are just the kind that are present in my account of political obligation.

The Multiple Function Approach is effective when there are multiple moral considerations that complement each other to establish and specify the duty to obey the law. It is not effective when multiple moral considerations that individually establish and individually specify our duties are simply conjoined to remedy problems left by each. There are two reasons for this. First, with the latter method, each basis stands or falls on its own. Second, those that establish a duty need have nothing to do with those that specify the community to which we are morally bound.

Gans uses features from different moral considerations to build a more sophisticated account of political obligation. However, he does this only after he has assessed each moral consideration as a foundation for a stand-alone source of the duty to obey the law. This means that each account must be

given further development to be successful or it must be shown how attempts to use them have given us the tools to support a duty to obey. For example, Gans uses Rawls' duty to support just institutions. However, he offers nothing beyond what Rawls describes except an unclear reference to how there might be ways to specify exactly which laws "apply" to us—a problem that Rawlsian political obligation has struggled to overcome. Of course, communal obligations and fairness are supposed to give us a reason to suppose application is specifiable in a morally significant way. However, if Rawls' duty is not sufficient to explain our duty to obey our laws and communal obligations and fairness are not sufficient to explain our duty to obey our laws, why should we not reject all of the above instead of believing they can somehow remedy their problems together? It would be different if these were moral considerations that do not offer any basis individually for a duty to obey the law, but instead somehow work together. However, Gans does not show how they do this.

Even if these things are supposed to work together in some way, though, we encounter the second problem. Imagine that communal obligation or fairness gives us a reason to think we have some kind of duties toward a specific community and that supporting just states, avoiding bad consequences or fairness requires obedience to just laws. There is still no reason to think that any of these have anything to do with the others. Even if we ignore the persistent problem that communities have little to do with political boundaries, there is no reason to think that because I have some duties to my community on the one hand and a duty to support just states on the other, that I have a *duty to obey* the laws of *my state* when these two are combined. It may be that from fairness or communal obligation, I ought to spend time or money toward benefitting those around me and from the duty to support just states, I ought to obey just laws.¹¹

None of this results in a necessary duty to obey the laws of my state.

A perceptive reader may have noticed, however, that fairness is the one exception in these combination procedures. Fairness, according to Gans, both establishes a duty to obey and ties the

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¹¹ What Simmons calls the Particularity Problem shows just why we cannot infer a duty to obey the laws of our state even if there is some duty to obey just laws.

obedience to an individual's own country. But this retreat to fairness displays exactly what is wrong with Gans' account. Let's imagine that his account of fairness serves both of the functions he claims. In that case, we can dispense with pluralism, because fairness is sufficient to serve as a source of the universal and general duty to obey the law of one's own country. In addition, it still has no connection to any of the other moral bases Gans utilizes. As I have argued in Chapter 2, however, traditional fairness does not provide an account of fairness that serves as an adequate basis for the duty to obey the law, and so he possesses neither a successful monistic account of political obligation from fairness nor a principled pluralistic account from many sources.

Of all the pluralist approaches to political obligation, the last—Multiple Function Approach—is closest to my view. Now we can see very clearly how my view differs from views like Gans' and why it cannot properly be called a pluralist view. I use natural duty and fairness in tandem to support a limited duty to obey the law. However, I simultaneously maintain that neither fairness nor natural duty are on their own enough to produce a duty to obey the law. It is only when we consider our natural duties in conjunction with a requirement of fairness in fulfilling them that we achieve a fully specified account of the duty to obey the law. So, while my account is not pluralist in the same way, it does use multiple moral considerations in a way that is not susceptible to the problems I have highlighted for pluralist accounts. It does not stand or fall with any of the moral considerations taken as stand-alone accounts of political obligation and it shows exactly how natural duty and fairness are related.

However, I also make no effort to support full authority the way some other theorists do. I have developed my view as an explicitly limited one that captures well our intuitions about political obligation. We are now at the point where my account of limited political obligation must be tested against the most central features of political authority to see whether it stands as an adequate account of the state's relation to its subjects. To this difficult task I now turn.

2. Political Authority and Limited Political Obligation

Political philosophy is centered on the concepts of authority, legitimacy and political obligation. I follow some authors who define authority as just the conjunction of the other two concepts. ¹² Legitimacy is the right of states to rule (which includes a right to command, coerce and against interference). Political obligation is the duty on the part of citizens to obey (with the correlative right of the state to be obeyed). Some political theorists claim that questions about legitimacy can be separated from those about political obligation.¹³ This may be due in part to the fact that among contemporary theorists there is recent prevailing skepticism about full political obligation alongside an enduring belief in political legitimacy.

In the following, I briefly describe some of the central features of political authority and assess their application to the individual rights and duties bound up in the concept of political authority. All these features together are easily accommodated by full authority with extensive rights of the state. The result of the state's lacking full authority is that the rights associated with that concept are separable and worthy of independent treatment. Because these rights are separable, the central features of political authority can be given a novel analysis in light of the specific rights of the state associated with each. Some central features of political authority will correspond to very specific rights in the state, so that any other rights of the state need be completely unrestricted by or unrelated to such features.

I begin with a feature that many theorists take to be essential for the concept of political authority—comprehensiveness. Comprehensiveness is the idea that the proper scope of political authority covers a wide range of human activities. It is usually combined with content-independence—the obligation of subjects to obey law without reference to its content—to produce a broad and deep scope for political authority. While nobody takes comprehensiveness to involve all areas of human activity (such as religious practice or private family life), it covers most or many areas of human activity. I attack this feature by showing that, while it makes sense in descriptions of legitimacy, comprehensiveness is

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¹² I don't pretend that there is anything close to agreement on how to define any of these concepts. I merely stipulate the way in which I will use them.

¹³ Huemer (2012), among others.

confused and misleading when it comes to political obligation. I will show that considerations from comprehensiveness that define the scope of legitimacy are irrelevant to defining the scope of political obligation. Thus, comprehensiveness is not essential to the concept of political obligation, even if it is essential to the concept of legitimacy (and therefore political authority). The scope of the right of the state to impose law does not match the scope of the duty to obey the law. As a result, political obligation is not comprehensive.

While comprehensiveness is irrelevant to defining the scope of political obligation, contentindependence is inseparable from political obligation. I have mentioned, along with many other theorists,
that the duty to obey the law is a duty to do what the law says because the law says it. This means it must
bear moral weight regardless of what it says we must do. This is almost always taken to have limits,
however, and so I will explain how on my view political obligation maintains a coherent sense of contentindependence without extending to all the laws issued by the state. In the end, my account of limited
obligation captures just what we want from the central features of political authority, while supporting my
claim that the rights of the state are separable and independent of each other.

3. Central Features of Political Authority

While theorists cite numerous features they take to be essential for any adequate description of political authority, some are more widely cited than others. To avoid an extensive list, I point to five features that most theorists believe are central to the idea of political authority. After some brief statements about a couple of these, I then focus on two for political obligation—comprehensiveness and content-independence.

Political authority, which includes all the rights mentioned above, covers a lot of area in the domains of human activity both in theory and practice. This is why many see the rights of the state to command and coerce, for example, as inextricably tied to the right of the state to obedience from its

subjects. However, a breakdown of the features of this authority helps us see that such rights and duties relate differently to the features of political authority. The following is a short list of these features.

- 1. Generality—The state's authority covers all (or most) people within its political boundaries.
- 2. Universality—The state's authority covers all of its legally codified commands.
- 3. Supremacy—The state's authority is not governed by any greater authority and is not in competition with any other authority.
- 4. Comprehensiveness—The state's authority covers a wide range of human activity.
- 5. Content-independence—The state's authority supports its commands regardless of the content of those commands.

These are the five features with which I will concern the remainder of the discussion of political authority.

Before I address comprehensiveness and content-independence, I will briefly discuss the other three.

We can take any of these features and assess their relation to the individual rights of the state. Generality is a feature that describes the extent to which the rights of the state relate to populations of individuals. If the state has a right to coerce, command and against interference (i.e., if it is legitimate) then it has this right over all who are within its territory. While it is an interesting question whether this applies equally to the duty to obey the law, I will not make it much of a concern here. My view entails that the duty to obey applies to all along with state legitimacy. Thus, all the rights of the state include this feature.

Universality is a different story. While I have claimed that the rights associated with legitimacy apply to all the law (i.e., the state has a right to command all or most that it has commanded), my view explicitly denies that subjects have the duty to obey all of the law. I have already defended this deviation from traditional political authority in Chapter 4, so I will not pursue it further here. However, the discussion of comprehensiveness and content-independence is relevant to this feature as well, so I will mention it briefly later.

Supremacy applies only to the rights associated with legitimacy. The rights of the state to command and coerce entail at least that no one stop them, and an even greater authority would have the power to do so. In addition, the right against interference suggests more directly that the state is the supreme authority over those it governs. On the other hand, it might not make sense to talk about supremacy in relation to the state's right to obedience from its subjects. Does it mean that the state is the primary giver of moral requirement on its subjects? Does it mean that no considerations outside the moral weight of the law can impose moral requirement in opposition to the law? Does it mean that no law in opposition or competition with the state's commands can impose moral duty? While any of these are natural interpretations of supremacy for the duty to obey the law (if there is any natural sense at all to talk about supremacy for the duty to obey), they do not pose any significant problem for my view. The first two would be clearly false in the case of the duty to obey. Even on full authority for the state, its influence affects only a small part of our moral lives. All the private interactions with others that the state does not regulate are a testament to its limited influence in morality. The second is also false, since most who support full political obligation recognize that the duty to obey is defeasible like many other duties. They can be overridden or outweighed by other moral considerations.

The third interpretation—no law in opposition or competition with the state's commands can impose moral duty—is more interesting than the others. However, there is nothing about this feature that makes it a problem for my view and not others. Though authority is limited on my view, the state has supremacy for all the rights it has. Thus, there is only one law, on my view, that creates a duty to obey it and so only that law can be seen as a supreme moral authority over that area. If anyone complains that supremacy should be a feature of the duty to obey for all laws, then they are simply denying my claim that the state has limited authority, not that the state has supremacy. Now we turn to comprehensiveness and content-independence.

Both comprehensiveness and content-independence make intuitive sense for political authority. In practice they capture the breadth and depth of actual legislation. As Rawls writes, states "inevitably apply

to us since we are born into them and they regulate the full scope of our activity..." (1999, 343-4) States as a matter of fact command over a wide range of human activities and expect compliance regardless of the content of these commands. The expected compliance goes hand in hand with the coercive sanctions that accompany them. ¹⁴ In addition, it is difficult to imagine that the state is legitimate (has the right to rule) if it does not have a right to impose the majority of its commands over its people. Since many take at least some governments to be legitimate, and all governments do impose commands over a wide-range of human activity and expect compliance whatever their content, comprehensiveness and content-independence seem to be central parts of political authority.

The foregoing considerations appeal only to our *intuitive* sense of political authority, but are there good theoretical reasons to suggest that both legitimacy and political obligation include as necessary conditions both comprehensiveness and content-independence? To assess their place in an adequate conception of political authority, we must look at each in its relation to the various rights of the state that are associated with it. When we do this, it will become apparent that comprehensiveness is really only significant in reference to the rights associated with legitimacy, while content-independence is necessary for an adequate conception of political obligation.

3.1 Comprehensiveness and Authority: Reasons for Re-Assessment

So long as most philosophical discussions of state power focus on the existence of its full political authority, there is no need to look in depth at the relationship of the state's central features to its particular rights. Since traditionally many have believed that the legitimate state is also one with the right to obedience to *all* its laws, we need not wonder whether any particular feature of political authority is possessed by legitimate states. So long as these states exist with a right to do what they do, we might think, we can attribute to it everything we normally associate with full political authority. However,

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¹⁴ Though some deny that the state is really coercive in the way most suggest. (cf. Edmundson (1998))

political philosophy is ever changing and traditional accounts of political authority have faced enough criticism to be called into widespread doubt.

For example, it is easy to see how two of the most prominent historical accounts of political authority supply full authority to the state. First, there is the religious framework that associates political authority with that given to a person or group directly from God. On such a model, if God owns or governs all things, then his directing humanity to obey certain people, groups or structures is not just rights granting to the state, but duty imposing to individuals. God, imposes moral duty all the time and it is therefore no mystery how his imposition of moral duty can bind individuals to a particular political entity. Historically, then, conceptions of our obligations in relation to a state that is established by God may entail all the rights of full authority—the right to command, to coerce, against interference and to obedience.

So, what if God is not the primary source of political authority? Who can grant full authority in a way similar to religious accounts of political authority? Without God, there is still an agent that can give full authority over the individual to the state—namely, the individual. Though it is often conceded that God is not the source of state authority, we still own ourselves, and with the exception of some, ¹⁵ most believe we have the power to impose political authority over ourselves. This can easily be done through voluntary consent. Consent theorists often suggest that consent to the state just involves agreement to its full authority, which includes political obligation.

While I do not suggest that these two political accounts are as simple as I have portrayed them or that they represent a comprehensive description of political philosophy before the twentieth century, their dominance in history cannot be understated. But a lot has changed in political philosophy. One cannot simply cite divine or consent based authority without encountering heavy resistance. Yet, it is puzzling that some political philosophers still hold without deep reflection that conceptions of *full authority* are the

¹⁵ Cf. Wolff (1998)

most important ones, even though we have come to doubt the most plausible sources of full authority.¹⁶ Now that we encounter so many varieties of political accounts, we ought to examine the need to retain traditional conceptions of political authority.¹⁷

One of the most prominent sources of political authority that has emerged in the past century is natural duty. Some argue that natural duty gives us a reason to support the state because it brings about morally necessary consequences or because it enables individuals to protect their rights to equal liberty. ¹⁸ The ability of a state to protect these rights requires its entitlement to rule over most or many areas of human activity and with whatever content it deems necessary. ¹⁹ This is purely the result of the necessity of carrying out its tasks and the resources it needs to do so.

However, as we have seen in the preceding chapters, natural duty does not easily entail some of the rights that are fixtures of traditional accounts of political authority. The duty to obey the law is particularly troublesome for these accounts. So, now we have the opportunity to go back to the central features of political authority and re-assess their relation to the particular rights of the state.

The theoretical and intuitive reasons for supposing that comprehensiveness is a central feature of legitimacy simply do not apply to political obligation. Ambiguity on this point can be seen in a number of places in philosophical literature. For example, George Klosko remarks that, "All the Western democracies, the governments that we are most likely to regard as *legitimate*, take on wide-ranging responsibilities." (2005, 11) He then goes on to point out the areas of human activity over which these responsibilities range, such as law and order, economy, social welfare, education, and cultural life. However, he writes this only in reference to the legitimacy of the state. Regarding political obligation, he

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¹⁶ Of course, there are notable exceptions. Here again I make a very general claim that is too simple to be taken as a very helpful analysis of the state of contemporary political philosophy.

We must acknowledge a great debt, however, to those who have already challenged traditional notions (among others, Buchanan (2002); Edmundson (1998); Reiman (1972); Smith (1999))

¹⁸ Rawls (1971); Buchanan (2002); Stilz (2009); Ripstein (2009)

¹⁹ This latter consideration may seem dubious, but it can most vividly be seen in situations of coordination. As Kantian theorists have claimed, property rights can only be articulated with a state dictated equal standard for all. This standard changes property rights from mere provisional rights to full rights. Even on a Lockean account of rights, the state must be able to set rules for coordination for the prevention of harms done even unintentionally.

writes that, "...at the present time no theory of obligation is able to generate 'comprehensive' political obligations, moral requirements to obey all laws." (2005, 53) Is comprehensiveness about what areas of human activity morally binding laws cover or is it about the extent of laws to which subjects are morally bound? Michael Huemer, in a recent defense of political anarchism, describes principles "implicit in the ordinary conception of the *authority* [legitimacy and political obligation] of the government." (2012, 12, my emphasis) He writes, "The state is entitled to regulate a broad range of human activities, and individuals must obey the state's directives within that broad sphere." (2012, 12) Although this is clearly meant to explain comprehensiveness in both legitimacy and political obligation, once he turns to illustrating comprehensiveness, he writes, "But modern states typically *regulate and are taken to be entitled to regulate* such matters as the terms of employment contracts, the trading of financial securities, medical procedures..." (2012, 13, my emphasis) His language suggests that the examples cover the entitlement of the state to rule, which pertains only to legitimacy and not to political obligation.

I am not here claiming that Klosko or Huemer intentionally equivocate on comprehensiveness in political obligation, but there does seem to be a more natural fit between comprehensiveness and legitimacy given the points above. This may explain the ease of describing legitimacy with this feature at the expense of giving a full account of comprehensiveness and political obligation. While states may not legitimately impose unjust commands, they may impose commands that require acts which we would not normally be required to do, acts we are already required to do, and acts that no one else can require us to do. It is important given the preceding considerations to explore the nature of comprehensiveness further.

Political obligation defines our moral requirements toward the state. While law does typically regulate activities across a broad range, it is still an open question whether and to what degree these laws are morally binding on us. If it happened to be the case that we are bound to follow only specific kinds of laws and those laws apply only to one or a few areas of human activity, this should not be of major concern. For the range of human activities is irrelevant to the moral bindingness of laws as laws. In the following, I offer an argument to show that this is the case.

Imagine we had to articulate exactly what comprehensiveness means for legitimacy. It would have to describe on some level the scope of the rights of the state and it would indicate that such a scope is broad. Again, to avoid complicated ancillary discussions about the nature of the categories over which we would define the broad scope of the state's right, imagine that such categories exist in a non-problematic way. Something like the following would capture what we mean by saying a *legitimate* state has a comprehensive right.

L1) States have the right to impose law over a wide range of human activity.

Add to this that the state also has a right to impose whatever laws it chooses (as long as they are not unjust) over that wide range of human activity and you have the breadth and depth features that comprehensiveness and content-independence describe. But what would such a principle look like for political obligation?

Let's attempt to formulate a principle as consistent with L1 as we can manage for political obligation, instead of legitimacy.

PO1) Subjects have a moral obligation to obey laws that apply to a wide range of human activity.

This seems like the truest rendering of an analogous principle for political obligation. Yet, it is clearly inadequate. A moment's reflection reveals why. Imagine what I will call a *de facto* limited state, S. It is not limited in any way by the scope of its right to impose law, but only in the actual exercise of that right. For S, we can stipulate that it takes its sole concern to be the protection of consumer interests against corporate injustice. Thus, its actual imposition of law is significantly narrower than its right to impose it. Does this in any way affect the truth of L1 above? No. S still has a right to impose law over a wide range of human activity, but it has chosen not to do so.

What about PO1? Presumably, subjects of S have a moral obligation to obey the laws of S, no more and no less. The subjects of S, then, have a moral obligation to obey laws that apply to a *limited*

range of human activity. Thus, PO1 is false for subjects, like those in S, under a legitimate, but *de facto* limited state. Further, we would say this even while we assert that the subjects of S have *full* political obligation (i.e., duty to obey all/most of the law). If comprehensiveness is a necessary condition of political obligation, then there should be no cases of genuine authority where legitimacy is comprehensive but political obligation is not. The case above clearly shows that there can be such a case even with full political obligation. The inevitable conclusion, then, is that according to PO1, comprehensiveness is not a necessary condition of political obligation.

Perhaps this is too quick. There is surely something appealing about the idea of comprehensiveness that is not captured by PO1. The idea is not that we have an obligation to obey laws that *in fact* cover a wide range of human activities, but that *could* cover a wide range of human activities. According to this idea, we can formulate a new principle as follows.

PO2) We have a moral obligation to obey laws that apply to a wide range of human activity if the laws of our state actually apply to a wide range of human activity.

This principle seems a much more likely candidate for truth regarding political obligation. However, if this is the only way to capture the truth of political obligation in relation to the breadth of laws, we capture it at the expense of any meaningful breadth of obligation.

The relevant change between PO1 and PO2 is the inclusion of an "actual laws" clause. Thus, it seems the relevant feature is that of the actual imposition of laws over subjects. We are here faced with a slightly different, but related problem. If our principle of comprehensiveness (PO2) does not ensure any real breadth to the obligation, then in what sense is it a principle of comprehensiveness? It is at best a principle of variable breadth and so does not guarantee anything close to what we get in the breadth requirement for legitimacy (L1). Thus, PO2 is not accurately characterized as comprehensiveness and the breadth of political obligation does not match the breadth of legitimacy.

What I have shown so far is merely that comprehensiveness (or any requirement for wide breadth) is irrelevant for political obligation. What this means is just that political obligation is dependent on the actual imposition of law, not on the extent of the right to impose law. It is consistent with this to believe that we ought to obey all that the legitimate state actually imposes on us. Thus, while comprehensiveness is irrelevant to political obligation, it turns out that our actual political obligations do tend to be very broad in scope.

Once we realize that comprehensiveness is irrelevant to the scope of political obligation even when the state has this feature with regard to its legitimacy, we must ask ourselves why the scope of legitimacy has any effect on political obligation or what sort of effect it has on political obligation. Once we notice that PO2 does nothing to improve on PO1, perhaps the scope of *actual* legislation is really not as important as we thought to defining the scope of our political obligations.

All of this does nothing, of course, to show that actual law is not relevant to defining the scope of the duty to obey the law. This relates to the feature of universality that is supposed to be a central part of political authority. From the present analysis, we can see that comprehensiveness relates directly to the scope of *the right* of the state to impose law, while universality relates only to the scope of the duty on the part of citizens to obey *the actual law*. There are three reasons to suggest that the irrelevance of comprehensiveness in relation to political obligation affects the relevance of universality to the scope of political obligation.

First, because of the traditional conceptions of authority, widespread use has led us to couple the rights of the state to impose law over wide areas of human activity with a universal duty to obey the law that is imposed. However, I have now given good reason to suggest that our conceptions of authority ought to diverge from tradition. While it would be naïve to believe they do not relate in important ways (e.g., when we believe the state has full authority, we will naturally assume both that it has the right to

impose wide ranging laws and that we have to obey them), but we no longer have to think that all features of full authority are so interconnected that they are inseparable.

Second, in many cases the duty to obey the law serves no moral purpose. I mentioned in Chapter 4 that we have no duty to obey laws that command actions that are already otherwise morally required. Where they are present, some sources of political obligation, such as the religious and consent accounts described earlier, can give us reason to follow all of the law. If they command action that is already morally required, then such actions are morally overdetermined. This is not a conceptual problem or inconsistency, but it does indicate that the duty to obey the law in such cases is superfluous and unnecessary. Thus, if an account of political obligation denies any moral weight to such a class of laws, it is not theoretically or practically troubling.

Finally, I believe I have shown good reason in the preceding chapters why we should believe the duty to obey the law is not universal (i.e., it does not apply to all actual laws). Failures from both voluntaristic and non-voluntaristic accounts of full political authority via a lack of sufficient support for full political obligation leave us with the option of denying any political obligation or accepting only a limited political obligation. Limited political obligation does not cause us to jettison much of our commitments to political authority, and so I recommend that we look to limited political obligation as the answer.

3.2 Content-Independence and Authority

I claim that when we say that we have a duty to obey the law *because it is the law*, all we really mean is that the duty to obey the law should have the feature of content-independence based on the moral authority of the lawmaker. The only feature of law as law that makes it distinct from other moral considerations is that it is issued from a particular source of moral authority. It does not matter how a group or individual gains this moral authority so long as the lawmaker has this authority. The moral

authority of the state may be wide ranging or limited, but it must have authority over some area of human activity in order for our duty to obey its commands to be considered content-independent. But really this is all we are asking for in an account of political authority.

Many have written on content-independence as a requirement for an adequate account of political obligation. Content-independence is an intelligible concept so long as it ranges over a definable type or category of commands. The duty to obey the law is content-independent if the requirement for action is in a sense "detached" from the features of the action apart from its being legally mandated. The requirement is detached from the action because the action could have been different and the duty would remain unaffected. For example, a law that tells me I ought to drive on the right side of the road is no more or less morally binding than a law that would tell me to drive on the left side of the road (if that is in fact what the law said). In this case the actions required for the fulfillment of the duty are different, but the duty remains equally binding and otherwise unchanged. This is exactly the sense in which I ought to obey the law because it is the law. What we mean is just that there is something special about the law such that we ought to obey it not because of the particular actions it requires, but because of its status as a command issued by a moral authority.

There is a strong sense and a weak sense of content-independence regarding the duty to obey the law.²¹ The strong sense says that we have a duty to obey (the specifiable range or type of) laws no matter what they require. The weak sense says that we have a duty to obey (the specifiable range or type of) laws even if they had required different action within the range of morally acceptability (in most cases this means the actions are arbitrarily chosen from a set of actions that are morally acceptable for legal

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²⁰ In particular, Leslie Green (1988) offers a strong case for the presence of content-independence in any case of legitimate authority. For discussions, see Christiano (2008); Rawls (1963); Raz (1986); Huemer (2012); Hart (1958); Klosko (2011); and Soper (1999). A more in-depth discussion is given by Gur (2011). On his view, I support weak content-independence (the only kind relevant for this discussion) over a range of laws.

²¹ This is a slightly different distinction between "weak" and "strong" content-independence than that made by Gur (2011). Thus, what I say about strong and weak content-independence is not intended to explain or refute his view. Using the language of weak and strong is simply a useful way to understand the kinds of content-independence that I mention.

requirement). The strong sense gives complete freedom to the state, while the weak sense gives freedom over a wide, but restricted range of possible commands.

In the literature, very few philosophers endorse anything close to the strong view, mostly because of considerations that make the very restrictions found in the weak view attractive. We do not believe the state has the right to command morally deplorable action on the part of its citizens. We also believe that the commands ought to have something to do with the state's purpose (though according to some theorists not all commands ought to in all circumstances). Once we realize that the state has to be restricted in its freedom and its right to obedience, it is easy to see that the strong view is untenable. Even a legitimate state can turn evil given enough time and the right conditions. If that is true, strong content-independence gives it the freedom to do so and leaves us without any reason to say that it has become illegitimate or that we have no reason to obey it.

However, it should be noted that there are multiple ways to interpret weak content-independence as I have articulated it and probably ways to describe other weak forms of content-independence. While I am willing to entertain various conceptions of weak content-independence, the point is just that strong content-independence cannot be what we mean by it as a central feature of political authority. Once we realize this, we assess accounts of political obligation based on their effectiveness at retaining a meaningful sense of content-independence. My view is that this can be done in an account of limited political obligation.

How do we define the categories over which laws may be content-independent? There are many ways of doing this. One way defines the categories as specific areas of human activity. It might be, for example, that the state has a right to command and we have an obligation to obey any laws regulating behavior associated with the exchange of goods or services. However, even in that area of human activity, the authority of the state is restricted to the range of actions that are not morally deplorable and probably also to the range of actions that relate to the state's purpose in preventing various harms or injustices

between people. We would object to laws that prohibit equal treatment in serving or selling to people of different races or require that all service and goods meet the highest standards of a healthy lifestyle. In the former case, the action is morally wrong, while in the latter case, it is inappropriate for the purpose of legal regulation. Not everyone will agree that there is no duty to obey laws that require morally deplorable action or, especially, laws that do not relate to the purpose of the state. My point here is not evidence against such views, but to show that it is acceptable to limit content-independence in the way I have described.

The categories over which law is content-independent must have some orientation to the moral status of the actions required by laws as well as to the purpose of the state in legislation. Another, more promising way to understand content-independence defines the categories of law according to the moral status of the actions prescribed by the commands and the purpose of the state. On this model, so long as commands prescribe action that fits within certain categories of moral status and remain true to the state's purpose, we should see them as binding regardless of their content. As a constraint, all laws requiring action that is morally wrong would not be allowed according to content-independence, whereas all laws requiring action that is morally permissible, but not otherwise required, presumably would be allowed according to content-independence.

Now we must look further into how these categories might be defined according to my view. There are at least three categories of moral status that we can apply to action or omission. Traditionally, they are required, neutral, or prohibited.²² We have already eliminated prohibited action as a possibility (at least in most cases). I argued in Chapter 4 and a little bit here that there is no obligation to obey laws that require action that is already morally required. Thus, content-independence only typically applies to the category of morally neutral actions. It may be that there are further restrictions that are identifiable by simple or complex relations to our moral experience, but we need not explore all the details here.

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²² Of course, there are now many views that include more categories.

We can add that content-independence is present in any category of law that pertains to or is necessary for the fulfillment of the state's purpose. As I formulated it in Chapter 4, content-independence applies to (a) laws that require acts that do not fulfill a duty directly by their content but by their role as commands of a problem-solving authority. (e.g., traffic laws, business transactions, building codes, terms of contract); (b) laws that command acts that comply with judgments pertaining to punishment, compensation, restitution, and fault. (e.g., compliance with court rulings); (c) laws that command acts that contribute to the state's stability and continued existence (e.g., taxes, treason).

On my model we retain a meaningful sense of content-independence that is essential to political obligation. The law ought to be obeyed because it is the law regardless of its content as long as we have a category of law over which this is true. We have these categories simply by the specification of the purposes for which the state is justified in issuing commands and the resultant categories of law those purposes entail. The heart of content-independence is not changed because the categories over which it applies are less than we may have thought. A ready example of this is the category of laws that require acts of coordination for the prevention of harm to others. There are quite a few laws (e.g. driving laws) that appropriately fall under this kind of description. If this description does not capture content-independence completely, that does not mean the relevant categories do not exist. As long as we have such a specifiable category, we retain our intuitive notions of content-independence.

The state may serve its purposes in many of a wide range of morally acceptable ways. We may drive on the right side of the road or the left side. We may be required to pay taxes that are just barely enough to keep the state a viable coercive threat to wrongdoers or that are enough to make it a thriving force for justice. We may be required to make contracts in writing or in any other identifiable manner. Whatever the case, the laws set forth by the state are both morally binding and also such that they could have been different. This is the sense in which the law is content-independent.

Chapter 6: The Particularity Problem and the Boundary Problem

Though I have developed an account of limited political obligation and supported its unorthodox implications, there remains the need to defend it against some of the most significant possible objections it may face. Since my account is a natural duty account, I will address two problems—the particularity problem and the boundary problem—that have prevented other natural duty accounts from succeeding in their aims to this point. Both problems come from A. John Simmons, so it is with his work that I will be primarily concerned in the following essay.

The particularity problem has persevered through over three decades of attempts to overcome it. Despite the wide variety of natural duty accounts that have been proposed since its introduction, it remains both effective and widely applicable. The central idea is that even if natural duty accounts can show that there is some moral requirement toward just states or those that serve some other moral purpose, there is no way to tie these moral requirements to the duty holder's own state. In other words, I might have a duty to support just states, but this does not entail a duty to support *my* just state. But the duty to obey the law is supposed to be a straightforward duty to comply with *my* state's commands over me. There seems to be no morally relevant respect to which the state's claims to authority over me indicate an actual authority over me. Thus, morally speaking, we are left with quite a few options in terms of what state morally binds us. Perhaps all just states bind us or only those we choose to support.

I offer some solutions to this problem for my account of limited political obligation. We have a duty to obey the law because the laws of our state restrict *our* behavior according to necessary solutions to coordination problems. Because I am concerned with the idea that the state is meant to restrict the behavior of even those individuals who would not normally violate rights or commit harms on others, the

state binds individuals that are actually placed under its law. Thus, there is only one state to which we owe obedience—that which claims authority over us.

The boundary problem demands that any adequate account of political authority draw the boundaries of authority around all and only those that we would normally think fall under a particular state's authority. Related to this requirement is Simmons' plausible claim that historical considerations ought to have some bearing on the existence and nature of a state's authority. If, for example, a state invaded a territory yesterday, it cannot gain authority over the people within that territory merely by fulfilling a function effectively or having the right kinds (e.g., just) of institutional structures. Natural duty accounts tend to ignore these historical considerations and this poses a real problem for their conceptions of political authority.

I argue that, while Simmons is correct that historical considerations are relevant to the existence and nature of authority, there is nothing preventing natural duty accounts like mine from taking those into account. It may be that only functional or structural considerations explain the existence of political obligations, but other considerations (e.g., historical considerations) can disqualify states from having authority. I also point out that a similar phenomenon characterizes our normal moral experiences.

With answers to the particularity problem and the boundary problem, I offer a way to understand political obligation from natural duty which is not susceptible to the major objections faced by other natural duty accounts. Thus, I establish a meaningful account of political obligation that stands in the face of the most difficult criticisms.

1. The Particularity Problem

Natural duty accounts of political obligation attempt to derive a duty to obey the law from a more general pre-institutional duty. There are a wide variety of duties that theorists have attempted to use as a

basis for political obligation. What keeps them from producing a duty to obey the law is that they bind individuals to "just" states, democratic procedures, states that protect the vulnerable from harm, but, unfortunately, not to their own states (or at least not primarily to their own states). It will be helpful to see just how this occurs.

Simmons' earliest formulation of the particularity problem is found in his discussion of the failure of natural duty accounts to meet the "particularity requirement." None of the bonds created by natural duty accounts "would be a political obligation in the right sense, for none of the principles under which these bonds fall is 'particularized.' By this I mean that under these principles an individual may be bound by one moral bond to many different governments." (1981, 31) Elsewhere he illustrates how some specific accounts of political obligation are susceptible to this criticism. I will mention a couple of them.

Jeremy Waldron, for example, attempts to answer the particularity problem¹ by appealing to the nature of certain moral principles as "range-limited." This means that some moral principles apply only to particular classes of people. His example is a principle of fairness among the class of children in a single family unit. As a parent, he is obligated to treat his children with fairness, but in many circumstances he is obligated to do this toward only his children and not those in neighboring households or other locations. In politics, this is more complicated, but the same principle applies. The range of a moral principle that governs political matters is defined according to a Kantian principle by the proximity of threat that individuals pose to those around them. I ought to be limited in my behavior towards those in my community (those who are in close proximity to me), since I pose a threat to them in particular. My behavior is restricted by the state, which means I ought to comply with its directives as uniquely applying to a range-limited class of individuals, including myself.

Simmons objects, however, that even if we could think of moral principles in this way, the threat posed by individuals against each other is not plausibly connected to the ranges of individuals covered by

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¹ As he calls it the "special allegiance objection".

the state's actual reach of power. I may be more of a threat to those just across the border in Canada or Mexico than those in Hawaii, for example. In addition, with advances in technology and ease of global interaction, I may be just as much a threat to those on the other side of the world. Thus, there seems to be no moral significance to the actual political boundaries that define states. If there is no moral significance to the ranges defined by actual political boundaries, then there are no range-limited moral principles that correspond to the directives of contemporary states. This means that the Kantian duty of justice on which Waldron relies does not generate more specific duties to obey the laws of any particular state, including what many people would consider *my own* state.

Christopher Wellman also attempts to deal with the particularity problem. He does so by pointing to the moral requirement on all of us to give our fair share of aid to the vulnerable. In many situations of aid, one is confronted face-to-face with those in need of help. So it is in the political context as well. Without the state many people would be vulnerable to various kinds of harm or injustice. We ought to do our fair share in the state's task of protecting the vulnerable and we ought to do it in relation to those who we think would normally require it of us in particular, namely, those who are nearby (just like those in face-to-face emergency situations).

Simmons resists this by pointing out two sorts of positive duties we can have. Charity requires the alleviation of suffering or need and is typically owed to no one in particular. It often involves each of us doing our part to solve a problem that is ongoing. In contrast, duties of rescue require immediate assistance for the prevention of harm (i.e., in emergency situations) and are often owed to some person in particular. If political obligation is like charity, then the particularity problem persists, since a duty of charity can be discharged at the discretion of the duty-holder. One can alleviate suffering in any way he or she prefers. Most of Wellman's examples, claims Simmons, appeal to situations of rescue, but these are very different from the situation of living in the state. Political obligation would be one we have over long periods of time (not as an "emergency") and are owed to no one in particular (they are not owed to those "face-to-face"), meaning we can fulfill our duty just as easily to those on the other side of the world under

a different government as we can to those on the other side of the country under the same government. Thus, even if we grant Wellman's positive "Samaritan" duty, it is one of charity and can be fulfilled by actions that support any state that protects any vulnerable population, not necessarily our own.

The preceding has been a discussion of natural duty, and while I will explain the promise of my natural duty fairness account below, it is first beneficial to see why traditional voluntaristic accounts of fair play escape the particularity problem. Voluntaristic fair play, for example, fixes our obligations according to the benefits we are supposed to receive from the workings of a political cooperative scheme.² These benefits are almost always provided by a scheme defined by participants that occupy the territory in which we live. So, it is easy to see why any obligations we have are localized to that cooperative scheme, which almost always involves the political institutions that already claim authority over us.³ The obligation to participate in the scheme is not brought on by beneficiaries opting in to it as they would in a clear case of consent. There must be some kind of voluntary acceptance, such as an inward appreciation for the overall worth of the benefits, but the obligation remains one that is associated with the scheme within which beneficiaries are already placed.

Natural duty typically has no such mechanism to tie subjects to "their" state. As I discussed in Chapter 4, though we may have a duty to do our part in creating and sustaining a political institution that remedies problems in a state of nature, if those problems are not tied to any of our behaviors in a state of nature, then there is no reason for us to create and sustain "our" political institutions. In fact, there may be greater harms done on the other side of the world, creating a greater need for political institutions very far

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² It is possible to challenge this ideal with the empirical fact that many do not receive the supposed benefit the state is supposed to provide. Even in such a case, though, one can see how fair play would avoid the particularity problem if the members did receive the benefits.

³ It is difficult to imagine a case where the scheme that provides benefits is not one that is associated with the territory in which you reside. Perhaps an international authority provides such benefits, but as soon as we believe it authority in at least some areas related to the benefits takes precedence over the local authority, then it seems it does cover the territory in which you reside. These questions are difficult, but I will assume they are mostly untroubling for voluntaristic fair play accounts. To the extent that they are troubling, we have that much more reason not to base obligation on simple receipt of benefits.

from our place of residence. In this case, there is no reason to believe we should not do our fair share in creating and sustaining political institutions that have no application to us whatsoever.

So, how is my natural duty fairness account different from other natural duty accounts? The same elements that establish a duty to obey the law beyond a just a duty to support just states also establish a duty to obey the law of *my state*. One purpose of the state is to solve coordination problems that would occur in its absence. These coordination problems involve all individuals who engage in the relevant activities, whether they often fulfill their pre-institutional moral duties or not. Since such problems exist, the role of the state in correcting them is to restrict our behavior, not only those who intentionally violate the rights of others. Thus, one purpose of the law is to act as an authority over us for the purpose of correcting problems that would result partially from our own behavior.

So, why is the duty to obey the law particularized on my account? I am only required to obey the law that is issued from an entity that restricts *my behavior*. If it does not restrict my behavior, then it does not apply to me in the right way. Thus, I have a duty to obey the law that covers my actions, which is exactly that issued by the state that claims authority over me. The state that coerces me is the same that restricts my behavior according to the coordination problems I have described. Furthermore, I am required to obey this authority. Since my duties do not rest on my receipt of benefits that I may or may not want, my consent or voluntary acceptance is completely unnecessary. I ought to obey the law that applies to me whether I want to or not and whether or not I think it is all-things-considered in my self-interest.

What I have done in an account of natural duty fairness is take the benefits of a fair play account alongside that of natural duty without bringing in the problems they each face alone. Traditional fair play, for example, particularizes the obligation to obey by resting it on a function that the state serves *in relation to me*. However, such obligation only arises with voluntary acceptance. Natural duty, on the other hand, provides *a general duty* that ties moral requirement to political entities. However, there is no reason

to believe we owe anything to our particular political entity. In contrast to these traditional accounts, my account of natural duty fairness provides *a general duty* that ties moral requirement to a political entity that serves a function *in relation to me*. Because they work together (and not as independently established bases for political obligation like some pluralist accounts described in Chapter 5), natural duty and fairness on my account are not susceptible to the traditional objections to either of them. In this case, that means it escapes the particularity problem. Subjects have a duty to obey the law of a state that restricts their behavior in the right ways (provided that they meet the necessary conditions of justice I outline below), and this is clearly the state in whose territory they actually reside. Natural duty fairness escapes the particularity problem.

There are still looming questions. Are we really bound to obey a state that is arbitrarily established over us? What right does any state have to impose restrictions on our behavior in accordance with the law? The first question is easy for the natural duty fairness account to answer. Essentially, the account is what has been called "functionalist" in nature, in that the state has its authority because of the function it serves. Thus, we have a duty to obey the law whether it is arbitrarily established over us or not. The second question is more difficult. In some sense, all states are arbitrarily established over those it rules. States are not typically "appointed" to any group and its boundaries are not drawn according to clear and morally respectable principles. Should this bother us? These features of the modern state bring out a host of additional questions to be answered. Many of these questions relate to what has been called "the boundary problem." Thus, I move directly to addressing the boundary problem now. It should be noted, though, that the two problems in this essay are intimately connected in political theory, so we cannot leave the particularity problem completely behind.

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⁴ Simmons (2013)

2. The Boundary Problem

The boundary problem is described by Simmons as the problem of providing an argument that draws the "boundaries" of political obligation, political authority, and territorial sovereignty in the correct place.⁵ The authority of the state should cover all and only those who are plausibly its subjects. For example, on any adequate account of political obligation, most naturalized citizens of Canada should not end up under the political authority of the United States. In addition, our theory should not permit arbitrary and unjust actions by aggressor states to simply change the composition of its morally bound subject population—for example, by invading another state's territory. But identifying the boundaries of political obligation, political authority, and territorial sovereignty each carry unique questions.

2.1 The Heart of the Problem

Simmons' criticism is leveled primarily at arguments given by Kantians and those who ground political obligation in democratic processes. The heart of his objection to these views is that they are "functionalist" or "structuralist" in nature. A functionalist/structuralist account is any account "that grounds the state's legitimacy in its successful performance of its morally mandated functions, or that grounds its legitimacy in the structure of its basic institutions." More importantly, according to Simmons, functionalist/structuralist accounts ignore considerations of history that, he believes, affect the rights of the states regardless of their effectiveness in fulfilling any function or having the right structure. For example, on functionalist/structuralist accounts, an invading country that successfully conquers and controls a piece of foreign land establishes its authority over the conquered people so long as it accomplishes the appropriate functions or retains the right institutional structures. But, Simmons reminds us, we are unlikely to believe an (unjustly) invading country can establish authority over people it just

⁵ Ibid. 4

⁶ Ibid. 1

conquered.⁷ I share this intuition with Simmons, but claim that my functionalist/structuralist account is not committed to a complete disregard for those historical considerations that ought to affect the moral rights of the state.⁸

Simmons gives an example that is meant to illustrate the absurdity of functionalist/structuralist models of political authority. He imagines that the United States extends its border South into Mexico. After stated objections by the Mexican government and some "international mourning" it looks as if the United States has effectively taken this plot of land and fairly administers justice over it. He asks,

How should we understand the moral position of these newly minted U.S. citizens? Are they bound to support and comply with the basic institutions of the United States, just as we take native-born U.S. citizens to be – at least if we suppose (as I shall, for the sake of argument) that the basic legal, political, and economic structure of the U.S. is reasonably just, that its government and laws have been settled on in an acceptably democratic fashion, and so on? And how should we understand U.S. rights with respect to its new territories?

There are several issues related to these questions involving the rights of the state and the duties of individuals. But these issues can be resolved on an account like mine without introducing complications that make the view seem implausible. We can see how this works if we understand just what it means to take historical considerations into account.

There is a significant difference between asking how historical considerations (with variables on time, severity, context, etc.) affect the authority of the state and asking how the state historically got its authority in the first place. The latter question is much more difficult for functionalist/structuralist accounts to answer, but I do not consider this a defect. An account that relies on the actual occurrence of some morally effective act (e.g., voluntaristic accounts) will be able to say more about how a state could

⁷ At least in cases where the previous ruling authority was at least as or more just than the conquering authority.

⁸ Other accounts can probably share at least one of my points, but I leave that to their proponents to address.

⁹ Ibid. 21

theoretically gain authority through historical acts, such as consent or voluntary receipt of benefits. However, as we know, there are no states in the world that actually received such voluntary commitment from their subjects. The very feature that makes it possible to base authority on historical acts makes it impossible for any presently existing states to have such authority. In any case it is difficult to understand how a state gains its authority through the historical process of its establishment. Historical questions of this sort are difficult to answer for any account of political authority. However, this difficulty does not give us reason to reject authority (unless we have good reasons why the difficulty of understanding its historical origins should cause us to think it has no authority) and it does not give us reason to ignore other kinds of historical considerations. We can still ask whether a state that we might think otherwise has political authority loses it once it commits historical acts of injustice.

So, it turns out to be a virtue of functionalist/structuralist accounts is that they find meaningful ways to discuss political authority without appeal to potentially limitless complexities that arise out of any state's historical emergence. Yet, we are still left with the other historical question. How do historical considerations affect the authority of the state? I do not claim to be able to answer this question in any detail, so the discussion below is simply a response to criticisms associated with the lack of historical sensitivity in functionalist/structuralist accounts.

Let us examine exactly what is entailed by our concession that historical considerations can make a difference in the state's rights over a population. In making such a concession, are we committed to the idea that history must have some important role in our argument for the moral foundations of the state's legitimacy or our political obligation to it? Very clearly we are not. There are reasons to believe that even if an entity satisfies the necessary conditions that explain its authority, it can still fall short of authority by failing to satisfy any of the numerous necessary conditions of its authority that *do not* factor heavily into any explanation of its authority. We can think of this from at least two perspectives. First, necessary conditions that do not explain authority may still be limiting conditions on authority. In this case, there are moral considerations (functional/structural in the present discussion) that entail the authority of the

state. However, there are other moral considerations that, while if they are met they do not entail authority in the state, if they are not met they entail a lack of authority in the state. There are many environments where these types of moral considerations affect the moral rights of individuals, and so it is not hard to imagine something similar occurring in the state. To use a non-moral example, refraining from committing a felony is not sufficient for anyone to get a job as a school principal. It also does not contribute much to any explanation for why any individual is qualified to act as principal. However, one's commission of a felony is certainly enough to disqualify an otherwise qualified candidate for such a position. This occurs in the establishment of moral rights as well. For example, perhaps I believe in Lockean property rights as established by labor mixing based on the self-ownership of the laborer. One might ask why, if I meet the Lockean description of property acquisition but intend to use my property to harm others, I am no longer entitled to such property. In addition, though I cite labor mixing as the main basis for my ownership of property, I cannot expect that someone else's property will transfer over to me whenever I labor on it. It is not a weakness of Lockean property rights (whatever other weaknesses it might have) that it disqualifies property rights based on moral considerations that do not directly factor into the basis or explanation of such rights. It seems that this may occur in conjunction with many different moral rights. So, in many cases, there are moral constraints on one's rights that may not contribute anything as an explanation for why you have such rights and may not be directly tied to the actual explanation for why you have such rights.

In the political case, while I argue that the basis of the state's authority is its ability to solve coordination problems and prevent direct intentional harms, there are many other moral considerations that can eliminate the state's authority that may or may not pertain directly to either of these functions. Some of these considerations relate in some degree to the basis of authority that I have cited, but others do not. For example, the state cannot create more harm than would exist without it. I mentioned in Chapter 4 that political authority on natural duty grounds is in some sense comparative—between life within the state and life without a state. If life without a state is morally better than life within it, then the state has

no authority. In addition, the state cannot harm people within its boundaries. It is very tricky to determine exactly how much harm can be done before the state loses its authority entirely, but either way its harm toward others clearly affects its authority in some way. Both of these are easy to justify on my account, since the entire point of the state's existence is to solve problems that create harm. In addition, it is to do this in a way that does not make life worse than it would be without the state. So, there are at least some cases of historical injustice that affect the authority of the state in ways that relate directly to its function and basis for authority.

Another way to look at moral considerations that affect the authority of the state is to see them as entailments of the authority of the state. For example, a state should not violate the rights of other states. If a state has the right to non-interference, then it is wrong for other states to violate that right by invading. In this case, it may be that the state has violated the rights of both the inhabitants of the invaded land and the state that previously claimed authority over it. Citizens' rights may also be violated by an invading state. If the invasion of some state causes enough injury to individuals, damage to way of life or even just a significant amount of inefficiency in the administration of justice for a long enough time, then the people have been wronged according to the same deep moral considerations that entail the authority of the state (e.g., the prevention of harm or the solution of moral coordination problems). Such wrongs should not go without restitution.

So there are two ways in which moral considerations that do not contribute to an explanation for why the state has the rights it has can still affect its authority. If neither of these ways captures the full complexities of history, it remains to be shown why this is a problem. If there are reasons why we should believe a state loses its authority because of its unjust historical acts, then it need not pertain to the moral considerations that give the state authority so long as it does not contradict them. There may be all kinds of reasons why the state ought not to do what it does, and the degree to which it acts unjustly is the degree to which its moral worth will be lessened. It is another question with a complicated answer at just what

point it loses its authority. But this is just a difficulty in understanding moral reality, not a defect of political theories like mine.

Before we turn to some objections, there is one final and important reason why my account in particular can escape the boundary problem—because of its reliance on fairness. Fairness arises as a moral constraint only under certain conditions. As I noted in Chapter 4, when faced with problems in a SN, we can ask two questions. First, "What scheme or system should be chosen to solve the problem?" Second, "How do I act fairly in relation to the solution?" I argued that, when we can meaningfully answer the first question, it often affects our answer to the second question. In fact, unjust denial of a fair decision process for the first question (e.g., the tyrant in the pizza scheme) often disqualifies fairness as a moral constraint in answer to the second question. In most political contexts, there is no meaningful way to ask the first question, because political systems are well-established and slow to change. Thus, we have to answer the second question as if the state over us is simply a fact of reality, much like any other convention.

However, in precisely the cases of historical injustice that Simmons mentions, the actions of aggressor states provide the possibility of asking the first question. The reason is that, despite the fact that the aggressor state will not likely stop to ask for consent or even democratic vote on what scheme ought to be chosen, it could have done so. Invasion and abduction are cases of dramatic shifts in power that could not have occurred in a normal political context. Because the aggressor state defeats all the legal and social mechanisms that perpetuated the power of the existing state, that aggressor state could have offered up an opportunity to the conquered people. When they do not offer this opportunity to the people, they act in unjust imposition on them by simply instituting whatever scheme they choose. This disqualifies fairness as a moral consideration for the reasons described in Chapter 4.

¹⁰ Simmons (2007) mentions the relevance of consent in these situations, since there really does seem to be something morally wrong with taking such action without the consent of the "victims". Perhaps consent is morally necessary in those situations. Notice the difference, however, between that and cases of established systems of law that are designed to continue to exist and run according to self-perpetuating mechanisms. This kind of "political inertia" is not present where dramatic shifts in power occur.

2.2 Further Objections

Much of the discussion above pertains to the rights of the state to command, coerce and to non-interference—those associated with legitimacy. However, the boundary problem is also pointed at the right to obedience as an element of political obligation. So, why do individuals have a duty to obey the law? There are ways in which the particularity problem and the boundary problem may come together in answer to this question. When we conceive of the reasons to support the rights associated with state legitimacy as the same as those that support political obligation, it is easy to see how an answer to the particularity problem will provide an answer to the boundary problem as well. In giving an answer to why any individuals will have a duty to obey a particular state, we will find a relatively clear answer to the identity of the population (the boundaries) over which the state has rights. On the other hand, difficulties in answering either problem may lead to difficulties in answering the other. So, we must understand how these two problems interact in my account of limited political obligation.

We can begin to understand why different accounts might be unsuccessful against the boundary problem if we look at a couple of points Simmons directs at details of the Kantian account in particular. Many Kantian accounts begin with the assumption that we ought to enter and support states that will bring rights into full existence. One aim of entering the state is to offer a guarantee that we will not violate the rights defined by the state. There is something unique about that state's connection to me in the sense that I need it to exist over me as a constraint on my behavior. In this way the Kantian account is similar to my own.

However, now we ought to go back to the question and ask why it is puzzling that the state should have this unique connection to me. From the state's perspective, there is no reason it should be tied to me in any meaningful sense except that it happens to claim authority over me (and I claim it has such authority). There are two ways to describe the puzzlement we might feel over this claim to authority.

¹¹ Exceptions are those more loosely associated with Kant, such as Rawls or Buchanan.

First, as a historical claim, how did *this* state earn the right to govern *this* plot of land and *these* people in the first place? Second, is it completely arbitrary that one state governs one territory and another governs some other territory? How important are these questions?

The first question is not just about history, but about historical origins. As I have said, there is no problem with discussing history in relation to political authority, but historical origins are complex and problematic for most states (though there are a number of exceptions to this). There is an easy analogue in conventions. Conventions arise in all kinds of ways, some more respectable than others. When asking whether it is a good convention or whether it does an adequate job or even whether it can be modified to be more efficient, we are completely unconcerned about whether it arose in a morally acceptable way. Something similar may be true about political authority. What makes my account of political obligation somewhat different from conventions is that it involves an agent with authority in a way that does not exist in regular cases of convention. Does this create a problem?

There are a couple of ways to take the historical origins question as it relates to political authority. Are we asking how particular agents of the state gained their authority or are we asking how the political system itself gained its authority? If the latter, there is often no answer to the question except that somehow, whether morally acceptable or not, it arose over this particular territory. If the former, there are all kinds of possibilities, but most are probably the result of a well-established method within the state for selecting individuals for the positions. As long as there is nothing sufficiently morally wrong to disqualify appointed officials, then we should consider them to have authority because they were appointed according to a well-established political system that meets the (functional) requirements for authority. If anyone is still suspicious and wants to know how a functional account can address historical injustice or a lack of historical basis, see the discussion above. We need not ignore historical considerations even if we ignore questions (in many cases) about historical origins.

We still must answer the second question from above. Is it completely arbitrary that a particular state governs one territory and another governs another territory? The answer is obviously "yes." The complex historical development of systems covering territories that cut through continuous natural landscapes, cultures and peoples by synthetic geometrical lines involves all kinds of decisions that could easily have been made differently. Sometimes these decisions are not arbitrary, but morally bad. The most striking examples are those involving the separation of peoples by political boundaries that severely affects their ways of life and interaction (e.g., Kurdistan). I take it that there are complex moral questions about these situations *even if* we conceded that states often have authority over their territories. For this reason I am not concerned here with moral issues relating to genuinely harmful political lines. But I have admitted that, even without substantial harm done by some existing political boundaries, the identities and natures of authoritative political entities that exist within them are, to a large extent and in almost all cases, arbitrary. The next question is why we should believe this is a problem.

There are many circumstances in which moral duty causes us to be bound to particular (in some sense arbitrary) individuals or objects. Imagine, for example, that I have a duty to rescue in an emergency situation. Someone nearby has been seriously injured by falling on the street. There is no one around who can help and so I must take this person to the hospital or he will die. At the same time, I notice that there are multiple cars running and unlocked. Any of them will get us to the hospital in time to save this person's life and all owners have given me permission to use them. Does it matter which car I choose? Probably not. So long as all of them are adequate choices for the fulfillment of my duty, I can choose any I wish. In addition, once I have chosen the car I wish to drive and have begun to carry out my duty, there are added restrictions on my behavior. Depending on whether other cars are available during the drive, how long it would take to transfer the victim to another car and whether another car will provide any advantage over the one I am currently in, I may be bound to that particular car in a way that I am not bound to other cars. Yet, I could have been bound to any of the other adequate cars in my initial decision.

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¹² I am open to the possibility that some territorial lines are not arbitrary in this way. Perhaps the most likely cases are island nations.

In addition, there is nothing "special" about the car in itself, whether because of its previous ties to me or its designation as a "rescue" car by the community that binds me to it.

The point of this example is not to show a strong analogy to the political entity to which I am bound. The point is just to show that it should not surprise us that there is some arbitrariness to those entities to which we are morally bound. There seems to be no reason why I am not sometimes bound to agents in the same way I can be bound to objects, such as in the car example. A natural duty theorist should be perfectly willing to admit that the state's value and our moral connection to it are purely instrumental. There is nothing to prevent some other political entity to have gained the same authority in another possible world. The state has authority because of the function it serves in the same way that other agents or objects bind us because of the function they serve.

None of this precludes us from using historical considerations to assess the authority of the state. It also does not constitute a discussion of the full nature of our ties to our state. Many feel a sense of patriotism, loyalty, commitment and the like toward their state. There are relevant differences between the state and other agents or objects, such as the car, that make sense of these ties and feelings. I am not neglecting them because my account is antithetical to them. But when we are asking about political obligation and authority, we ought to focus on just those things that relate directly to them. This is what I have done here.

Still there are some remaining questions. I do not believe these pose much of a problem for my account or other natural duty accounts, so it will be helpful to discuss why this is the case. It might be asked why the state has a right to coercively limit our options in fulfilling our duty to enter and support a state (e.g., by restricting movement across borders or preventing the creation of new states) or what authority it has over those who are wronged by it or why it is allowed to draw boundaries in the way that it has drawn them. All of these questions are posed toward states that are already established (in most cases) and in which we already reside. To use the car analogy, we are already driving. Given that we are

born into these states and that the political processes are in place, our duties change and we may be bound to the state in which we reside whether we would have preferred another in its place. When the Kantian states that we ought to enter just institutions, she does not imagine an actual case of choosing such institutions. The morally binding feature of this requirement is our action's production of a morally required outcome—in this case the restriction of our action by a political entity over us. It makes no difference how the outcome is achieved—through state x or state y. We are acting according to the fulfillment of our duties on the very day we are born into some particular state.

Why is this important? The arbitrariness we have been discussing for functionalist accounts can actually be seen as a virtue of those accounts so long as they do not entail a neglect of certain relevant historical considerations. It is important to wonder about whether the state ought to prevent free movement or the creation of new states or whether it retains its authority over those it wrongs or whether the boundaries of state authority are drawn according to considerations that match perfectly well with its actual rights. All of these and other problems may affect the scope or existence of the state's authority. However, the arbitrariness of its boundaries, nature and origins (as understood in the sense that they could all have been different) do not by themselves affect the scope or existence of the state's authority. Thus, while many factors can diminish or eliminate authority, these are questions we must answer under the presumption that there is such authority and it is defined by, in one sense, arbitrary features of its *de facto* rule.

¹³ One can imagine, for example, a state that overreaches in the population it claims as subjects. However, political processes and common understanding will often sort out whether such claims are veridical or not. These are important practical matters, but are well beyond the scope of this essay.

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