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## Political obligation as a moral necessity

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## CHAPTER 2 THE CONCEPTUAL SEPARATION OF POLITICAL OBLIGATION AND POLITICAL LEGITIMACY

### 1. INTRODUCTION

Political obligation is widely conceived as conceptually intertwined with legitimacy or legitimate authority. However, some authors, whom I would like to call “integrationists,” in contrast with “separatists,” may differ on how the two concepts are linked. Some believe that the two concepts are two sides of a coin, so if we can justify political obligation, the legitimacy of a state is justified as an indirect conclusion of political obligation. Moreover, if we believe that political obligation is a *moral* obligation to obey and support a state, then the state has *moral* legitimacy over its citizens. Others believe that political obligation is a necessary but not a sufficient condition for legitimacy: thus, the latter entails the former. To get a firm grip on legitimacy, we need further arguments in addition to the justification of a general political obligation.

Both the integrationist and the separatist conceptions rest upon the correlation of political obligation and political legitimacy. In general, legitimacy is believed to hinge on the justification of political obligation. Or, we might say that the gist of this correlation is that the justification of legitimacy is a result of the justification of political obligation. The correlation of these two concepts exists under the general the correlation of two more fundamental concepts: right and obligation. Since the legal scholar Wesley Hohfeld first introduced his conceptual analysis or typology of rights, four basic components of the typology—claim, power, privilege, and immunity—have been accepted and applied broadly in analyses of specific rights in legal, political, and moral philosophy.<sup>1</sup> Each of the four elements has a “jural correlative” according to Hohfeld:

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<sup>1</sup> Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions: As Applied in Juridical Reasoning and Other Legal Essays*, edited by Walter Wheeler Cook, Yale University Press 1919, p. 36.

- a. If a person A has a *claim*, then some other person B has a *duty*;
- b. If a person A has a *privilege (or a liberty-right)*, then some other person B has a *no-claim*;
- c. If a person A has a *power*, then some other person B has a *liability*;
- d. If a person A has an *immunity*, then some other person B has a *disability*.

Integrationists define political legitimacy as a claim-right to rule over citizens. Hence, a duty or an obligation of obedience is the political obligation that correlates conceptually with this claim-right.<sup>2</sup> Thus, we might conjecture that the Hohfeldian framework of right underlies the correlation between legitimacy and political obligation:

*The integration thesis:* political obligation is the correlative of legitimacy as a claim-right to rule.

However, in order to arrive at the integration thesis, we would need to justify at least three sub-theses, and I will present them in ascending order of demandingness, since the second sub-thesis is a specification of the first one, and the third sub-thesis is a specification of the first (and, by transitivity, of the first). I would like to organize the argument of this chapter according to the three increasing degrees of demandingness that comes with increasing specificity:

### 1. *Typology*

*The Hohfeldian typology thesis* states that we should accept the Hohfeldian typology of right. Thus, if we were to define legitimacy in terms of any of the four kinds of right, we would correspondingly have to define political obligation in terms of its conceptual correlative.

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<sup>2</sup> E.g., Raz defines political obligation as a claim-right. See note 7 of this chapter.

## 2. *Claim Right*

*The claim-right thesis* refers to the proposition that we should define legitimacy as a claim-right, instead of a power, privilege, or immunity. Thus, the correlative of legitimacy should be an obligation.

*Claim Right* rests upon *Typology*, but it does not stipulate the specific content of the two poles of the correlation, which calls for the third argument:

## 3. *Content*

*The content thesis* states that the content of the two terms of the correlation between legitimacy and political obligation should be, specifically, the claim-right *to rule* and the obligation *to obey*, respectively.

Only if all three theses hold can we justify the integration thesis. Unfortunately, each of the three has encountered objections, and it is the difficulty of upholding all three of these arguments that leads another camp of theorists—the separatists—to maintain the separability of political obligation and legitimacy. However, it is noteworthy that separatists do not necessarily reject the Hohfeldian typology of right. This means that it is possible for them to uphold the general correlation between claim-rights and obligations, while denying the specific correlation between legitimacy and political obligation in particular. Hence, we might come up with two versions of *the separation thesis*:<sup>3</sup>

*Strong separation thesis*: legitimacy and political obligation are separable because the Hohfeldian typology is invalid.

Thus, for strong separatists, the main target is to rebut *Typology* and, as a corollary, the other two sub-theses as well. On the other hand, there is a weak version of the separation thesis:

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<sup>3</sup> For instance, Kent Greenawalt, Rolf Sartorius, and Robert Ladenson adhere to this thesis, albeit for an entirely different purpose than in my defense of it. See note 15 of this chapter.

*Weak separation thesis:* legitimacy and political obligation are separable because legitimacy is not a claim right and political obligation is not an obligation

Therefore, if either *Claim Right* or *Content* can be discarded, the weak separation thesis is justified.

In this chapter I will argue for the weak separation thesis based on a denial of *Content*. Even if legitimacy could be defined as a claim-right and entail a correlative obligation, this does not imply that there is a *moral* obligation of obedience. Therefore, in order to justify political obligation or legitimacy, we should directly concentrate on the exact concept, instead of attempting to justify the one by way of the other. Section 2 explores how the most notorious skeptics of political obligation and legitimacy—political anarchists and philosophical anarchists—employ the integration thesis to reject legitimacy by negating political obligation. This section also briefly investigates a potentially obvious response to the integration thesis: attacking *Typology* to dispose of this way of discussing legitimacy and political obligation altogether (that is, by arguing for the separation thesis). Sections 3 and 4 canvass two forms of the weak separation thesis: Section 3 deals with rebuttals of *Claim Right*, or arguments denying that legitimacy can be couched in claim-rights. Instead, they try to tie legitimacy to (one of) the other three Hohfeldian rights—powers, privileges, and immunities—to avoid that that legitimacy correlates to an obligation. Section 4 examines the arguments against *Content*, according to which even if legitimacy can be categorized as a kind of claim-right, this does not necessarily make its correlative obligation a moral obligation of obedience, i.e. political obligation. It could be some other kind of obligation rather than political obligation. Ultimately, I contend that the justification for political obligation should be anchored to a directly normative and substantive argument concerning the source or moral principle generating such a moral obligation, and this should also be the main focus of justifying legitimacy.

## 2. PHILOSOPHICAL ANARCHISM AND THE INTEGRATION THESIS

Legitimacy is normally conceived as legitimate political authority or de jure authority (as contrasted with de facto authority).<sup>4</sup> A person might possess de facto authority due to violence, physical power, or tradition without appealing to moral justification. For example, a political ruler like an emperor or a duke may have de facto authority due to lineage. For a state or government, however, in order to duly enact laws or settle disputes through proper adjudication, a de facto authority must be morally justified as legitimate or de jure, and this is where legitimacy makes a state's directive to pay taxes different from the robber's command to surrender one's property.

Although all forms of anarchism claim that states are illegitimate, philosophical anarchism, which concentrates on the *moral* judgment against states, claims that no state is *morally* legitimate. If this claim were true, people would not be bound by a general obligation of obedience, as no state could legitimately claim people's obedience.

Philosophical anarchism can be divided into different versions according to different points of contention. First, the *a priori* version maintains the impossibility of a legitimate state, whereas the *a posteriori* version merely claims that no *existing* states are legitimate, without denying the possibility of a legitimate state. Second, there are differences of degree. Weak philosophical anarchism claims that no general political obligation exists, but that we might have good moral or practical reasons to comply with the law and support our government, whereas strong philosophical anarchism stresses a moral obligation to actively oppose the state, in addition to the denial of political obligation.<sup>5</sup> The view that "no state is legitimate"

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<sup>4</sup> I use "legitimacy" and "legitimate authority" interchangeably. Unless noted, "legitimacy" refers to political legitimacy and authority rather than a general concept of moral legitimacy. Simmons is an exception to this use—he distinguishes between authority and legitimacy. By "authority," he refers to a state's moral defensibility. A political authority would be justified if it is morally better to have a state than it is to not have one. However, political authority is merely a necessary, not a sufficient condition for political legitimacy, which can only arise from people's actual consent. See A. John Simmons, "Justification and Legitimacy," in his *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press 2001, p. 125 and 137.

<sup>5</sup> See A. John Simmons, "Philosophical Anarchism," in his *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press 2001, pp. 104-7.

might seem radical, because people in fact live under different political frameworks such as states, governments, and legal systems, while in leading their lives they are always treating legal rules as reasons for action. Yet this anarchical claim does sound appealing, especially considering that almost every state owes its existence and emergence to some combination of events including “a share of force or fraud.”<sup>6</sup> Moreover, John Simmons, for example, endorses a version of a posteriori and weak philosophical anarchism in which no drastic change or opposition against states is required. Simmons’s version of anarchism, thus, does not deny the possibility of a state possessing legitimacy, but only advocates that no existing states so far have had the perfect legitimacy which requires citizens’ voluntary consent. Under his conception of anarchism, we are not generally obligated to obey the law, but we still have good practical reasons to follow those directives, so we are not under a moral obligation to rebel against reasonably just states either. Hence, a rebuttal merely focusing on how radical anarchism has to be would not effectively undermine Simmons’s anarchical stance and his refutation of political obligation.

We shall closely scrutinize how philosophical anarchism hinges on the correlation of right and obligation and deploys the integration thesis to resist both political obligation and legitimacy at the same time. The integration thesis is a prevalent assumption of theories that intend to lay a foundation for the legitimacy of a state. For instance, Raz—who argues for a state’s claim of legitimacy—emphasizes the dependence of authority as a right to rule on a general obligation to obey, since “[i]f there is no general obligation to obey, then the law does not have general authority, for to have authority is to have a right to rule those who are subject to it. And a right to rule entails a duty to obey.”<sup>7</sup> And on the other hand Simmons, who is

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<sup>6</sup> David Copp, “The Idea of a Legitimate State,” *Philosophy & Public Affairs*, Vol. 28, No. 1 (1999): 31.

<sup>7</sup> Raz’s theory of political obligation is rather interesting as he distinguishes the concept of “political obligation” from “a general obligation to obey the law.” Where he believes a political obligation is entailed by the idea of de jure authority, the entailed obligation is not specifically an obligation to obey the law, which stipulates the exact content as obedience. Moreover, he contends that there is no general obligation to obey the law because it applies merely to those who practically respect the law. I will



probably the most sophisticated philosophical anarchist, explicitly states that the correlation of legitimacy and political obligation is connected to the fundamental correlation of right and obligation. He defines legitimacy as follows:

Legitimacy ... is the exclusive *moral right* of an institution to impose on some group of persons binding duties, to be obeyed by those persons, and to enforce those duties coercively. Legitimacy is thus the logical correlate of the (defeasible) individual obligation to comply with the lawfully imposed duties that flow from the legitimate institution's processes.<sup>8</sup>

Or, in an earlier argument where he does not make such a rigorous distinction between authority and legitimacy (conceived in terms of consent), Simmons expounds how he is driven to anarchism by the integration thesis, as the problem of legitimacy "has been tied to the problem of political obligation; for if no government is legitimate which does not have de jure political authority, and if having such authority consists in having the right to command and be obeyed, then only where a citizen has political obligations will his government be legitimate with respect to him."<sup>9</sup>

Simmons's primary concern in *Moral Principles and Political Obligations* is to argue against major approaches to political obligation such as consent theories and theories based on the principle of fairness or on natural duty. Furthermore, by denying all those approaches aiming to justify a general

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discuss the position of Raz in Chapter 6, but it should be noted at this stage that the content of the correlative obligation does make a difference in the justification for political obligation or legitimacy. "The Obligation to Obey: Revision and Tradition," in his *Ethics in the Public Domain*, Oxford University Press 1994, p. 341.

<sup>8</sup> A. John Simmons, "Justification and Legitimacy," in his *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press 2001, p. 155. Emphasis added. Robert Paul Wolff also takes the integration thesis for granted in his definition that "[a]uthority is the right to command, and correlatively, the right to be obeyed." R. P. Wolff, *In Defense of Anarchism*, New York: Harper & Row 1970, p. 4.

<sup>9</sup> A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press 1979, pp. 195-6.

political obligation, as well as by endorsing the correlation between political obligation and legitimacy, Simmons believes that he is entitled to accept the conclusion that “governments do not normally have the right to be obeyed by their citizens,”<sup>10</sup> or to use the anarchists’ slogan, governments are illegitimate. The integration thesis actually bridges the denial of political obligation and the endorsement of anarchism. Either because no theory has provided a sufficiently general ground for political obligation applying to most citizens of a state, or because such a ground cannot account for the particular subjection of a citizen to her state, from an *a posteriori* point of view there is no general political obligation. Hence, no state genuinely possesses legitimacy as a right to rule or a claim to be obeyed.

Simmons’s argument appears to be flawed because even if the general correlation of obligation and right can be maintained, it does not follow that the specific correlation between political obligation and a right to rule can be. However, it seems that Simmons believes that such a specific correlation can be taken for granted, as the argument provided for the integration thesis is that political obligation and a right of government to command “have traditionally been supposed to be logical correlates,”<sup>11</sup> whereas he offers no further argument to explain why this traditional supposition describes the correct relationship between the two terms. This amounts to overlooking *Claim Right* and *Content* altogether, which we will come to in the following sections. For now, we can see that anarchists need to reject *all* approaches to justifying political obligation, and only if they succeed in doing this can they reach the conclusion of philosophical anarchism.

Three strategies can be deployed to defend political obligation against philosophical anarchism, corresponding to its three pivotal claims, i.e. no political obligation conclusively, legitimacy as a claim-right and the integration thesis. First, we can provide a *direct* justification for political obligation to invalidate Simmons’s *a posteriori* conclusion on both political obligation and legitimacy. I believe this is the most forceful and productive

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<sup>10</sup> A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press 1979, pp. 195-7.

<sup>11</sup> A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press 1979, p. 195.

way to combat anarchism, since developing a counter-example to anarchism is more promising than refuting all the possibilities of political obligation. Therefore, we might regard all accounts of political obligation—including the moral necessity thesis that I defend in the next chapter—as endorsing the first strategy to respond to the skeptics. Second, we could prove that the argument for philosophical anarchism contains significant flaws. For instance, with regard to R.P. Wolff’s anarchism, it might be argued that a so-called “duty for autonomy” cannot be justified and that the tension between autonomy and authority is not inevitable as claimed.<sup>12</sup> Or, as Christopher Wellman has argued, the boundary between philosophical anarchism and political anarchism is difficult to maintain:

The crucial point is that if a state is nonconsensually coercive despite having no special rights over us, then it seems appropriate to conclude that, other things being equal, we have moral reasons to actively resist the state. And this last conclusion, of course, is *political*—not merely philosophical—anarchism.<sup>13</sup>

If philosophical anarchism cannot be prevented from sliding into political anarchism, it will not be able to circumvent the criticism of radicalness and hence from being exposed to all the criticisms of political anarchism. The third way to refute anarchism is by accepting the separation thesis in order to detach the problem of political obligation from legitimacy. This would mean that if we do not succeed in justifying a general political obligation, this still does not necessarily call legitimacy into question. Also, this strategy cuts both ways, since if anarchism’s attack on legitimacy is successful, political obligation is shielded from that attack.

As noted before, the integration thesis consists of three steps or sub-theses. In this section, I will start by addressing the rejection of *Typology*,

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<sup>12</sup> See Scott Shapiro, “Authority,” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro, Oxford University Press 2002, pp. 387-8.

<sup>13</sup> Christopher Wellman, “Samaritanism and the Duty to Obey the Law,” in Christopher Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* Cambridge University Press 2005, p. 27.

implying a separation of legitimacy and political obligation by negating the fundamental correlation of right and obligation.

*Typology* states that when we explore legitimacy in terms of any of the four kinds of right, we also commit ourselves to its correlative. It seems that if we are to renounce the integration thesis by rejecting the Hohfeldian framework of right, we could either develop a conception of legitimacy that does not involve the concept of right, or argue against the conceptual linkage of right and obligation.

Robert Ladenson famously attacks the correlation of right and obligation at this level by establishing a new type of right—"justification-rights"—with "an *altogether different conceptual structure* from claim-rights" which "accordingly differ from them [i.e. claim rights] in neither presupposing any institutional background nor correlating with duties."<sup>14</sup> Therefore, idea of a justification-right is a rejection of the integration thesis at the highest level, as it denies the conceptual entailment of right and obligation. This denial is rooted in the idea that this new sort of right is not tied to any form of claim. Moreover, the core of it is merely a justification of people's doing certain things, such as the justification-right to self-defense that will be mentioned later, so no correlating obligations are involved. The discovery of this novel type of right is so enormously consequential that there have been several well-known attempts to salvage legitimacy or authority from anarchism's refutation of political obligation by cutting the link between legitimacy and political obligation on the basis of Ladenson's justification-right.

For example, Kent Greenawalt and Rolf Sartorius follow Ladenson in defining political authority as a sort of justification-right, claiming that it entails no correlating political obligation. Thus, the failure to justify political obligation does not affect the justifiability of legitimacy. In addition to denying a correlation of right and obligation, they offer additional arguments, mainly from the standpoint of voluntarism of moral obligation, to support the idea that political obligation is neither sufficient nor necessary

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<sup>14</sup> Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy & Public Affairs*, Vol. 9, No. 2 (1980): 138, emphasis added.

for legitimacy.<sup>15</sup> Still, I will concentrate on Ladenson's construction of a justification-right, since without it the foundation of Sartorius's and Greenawalt's separation arguments would collapse.

I regard two points about Ladenson's justification-right as especially noteworthy: First, is justification-right really a sort of right? Alternatively, does justification-right really represent an entirely new "conceptual structure" as Ladenson contends, or does it still fall somewhere under the four Hohfeldian components of rights? I shall argue that, Ladenson's justification-right unfortunately does not satisfy the conditions for being a conceptual structure of right. The second point issues from this negative conclusion. If legitimacy as a "justification-right" to rule discards the typology of right altogether, the plausibility of legitimacy as the justification-right to rule does not affect the justification of political obligation, because, not being a right, its status has no impact on the justification of political obligation.

Ladenson believes that the notion of governmental authority contains two basic parts. First, to have such authority is to have governmental *power*, which means that the exercise of such power is effectively uncontested. Second, a plausible conception of governmental authority must incorporate the notion of the *right* to rule, and this right is not a valid claim in Joel Feinberg's terms.<sup>16</sup> Rather, it is a justification-right. To assert a claim-right is

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<sup>15</sup> Kent Greenawalt, *Conflicts of Law and Morality*, Oxford University Press 1987, p. 54; Rolf Sartorius, "Political Authority and Political Obligation," *Virginia Law Review*, Vol. 67, No. 1 (1981): 5. Besides Greenawalt and Sartorius, Leslie Green believes that William Edmundson similarly rejects the correlation of right and obligation on the basis of Ladenson's justification-right. However, this is a misinterpretation, since what Edmundson genuinely denies is that the *content* of the correlative obligation of legitimacy is obedience. Thus, he still develops his conception of legitimacy under the Hohfeldian framework, while rejecting the content argument that we will come to in Section 4. Leslie Green, "Legal Obligation and Authority," *The Stanford Encyclopedia of Philosophy* (Winter 2012 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2012/entries/legal-obligation/>>.

<sup>16</sup> Robert Ladenson, "In Defense of a Hobbesian Conception of Law," *Philosophy & Public Affairs*, Vol. 9, No. 2 (1980): 137; Ladenson draws the distinction between claim-right and justification-right using Feinberg's terms. However, Feinberg rejects the idea that a right is to be conceived as a *justified* claim, the use of which he regards as

to demand something or other against other individuals, and this kind of right entails correlative duties to actions by others. Thus, a claim-right essentially rests upon a second-personal authority to address such a demand on certain actions of other persons.<sup>17</sup> In contrast, to assert a justification-right, one merely responds to demands for a justification of his or her behavior, while no claim against others is involved. Ladenson offers the right of self-defense as an instance of justification-right: although the performance of self-defense might hurt an attacker or violate certain moral and legal rules, the so-called “justification-right to self-defense” is justified “in virtue of the presence of justificatory considerations.”<sup>18</sup> “The right to self-defense” should be conceived as a justification-right in that, in exercising such a right, we do not address a demand on particular persons but invoke it as a response to the demand for justification for our actions undertaken to defend ourselves. But when it comes to legitimacy or governmental authority, what kinds of action in particular require responding to the demand for justification? Ladenson follows Kantians, and in particular Rawls, arguing that legitimacy is invoked as a justification for coercive acts that would otherwise be immoral.<sup>19</sup> Thus, if justification-rights, as Ladenson claims, had a conceptual structure different from that of claim-rights, the concept of right would not entail that of obligation. Particularly, legitimacy as a justification-right to exert coercion would not conceptually correlate to a general obligation. As a result, anarchists’ rejection of political obligation, would not necessarily undermine legitimacy, as Greenawalt and Sartorius

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“confusing”. Instead, a right should be conceived as a *valid* claim, as he contends: “I prefer to characterize rights as valid claims rather than justified ones, because I suspect that justification is rather too broad a qualification. ‘Validity,’ as I understand it, is justification of a peculiar and narrow kind, namely justification within a system of rules.” Joel Feinberg, “The Nature and Value of Rights,” *The Journal of Value Inquiry* Vol. 4, No. 4 (1970): 253; 255.

<sup>17</sup> See Stephen Darwall, *The Second-Person Standpoint: Morality, Respect, and Accountability*, Harvard University Press 2006, pp. 18-20.

<sup>18</sup> See Robert Ladenson, “In Defense of a Hobbesian Conception of Law,” *Philosophy & Public Affairs*, Vol. 9, No. 2 (1980): 137-9.

<sup>19</sup> See Robert Ladenson, “In Defense of a Hobbesian Conception of Law,” *Philosophy & Public Affairs*, Vol. 9, No. 2 (1980): 139.

contend.

Nevertheless, I believe that Ladenson's justification-right either does not have a different conceptual structure, remaining within the Hohfeldian typology, or abandons the framework of right altogether, since couching legitimacy in the idea of justified coercion amounts to dropping the idea of a right to rule. Moreover, the conception of legitimacy merely as justified coercion might be too narrow to include all aspects of a state's legitimate enforcement of its authority, for instance, to promote the welfare of its citizens, to lead or advise a better way of action or life, and so forth. Therefore, I contend that the attempt to reject the integration thesis by endorsing a strong version of the separation thesis so far fails. We are thus led to find answers in a weaker version of the thesis: remaining in the Hohfeldian framework while rejecting the specific correlation of legitimacy and political obligation.

To begin with, the two basic elements of legitimacy that Ladenson provides—a governmental power and a justification-right—make up a hybrid conception, because it rests legitimacy on a power and a right. However, what is not clear is how Ladenson intends to accommodate this power and this right or how the relationship between the two elements of legitimacy should be understood. According to Stephen Perry, for instance, legitimate authority is defined as a moral *power* to change someone else's normative situation, the Hohfeldian correlative to which is liability rather than obligation.<sup>20</sup> It might be that if we conceive governmental power as a moral power or normative power, it would render trivial the justification-right in (matters of) legitimacy. Hence, it is more plausible if we interpret governmental power and justification-right in accordance with the distinction between de facto authority and justified authority. Moreover, it seems that Ladenson would agree on this interpretation as he stresses the effectiveness of the exercise of coercion while discussing governmental power. What genuinely matters for the justification of legitimacy, then, is the plausibility of justification-right, for the governmental power merely refers

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<sup>20</sup> Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, p. 4.

to a de facto power.

However, a justification-right still cannot ground legitimacy as a right to rule; at the very least, it falls short of offering a way out of the Hohfeldian framework. This is because Ladenson's construction of the justification-right or the instances he refers to as a justification-right still *can be* accounted for in Hohfeldian terms. Again, take the right to self-defense as an example. If a robber B threatens a person A with a knife at his throat, and A happens to be legally carrying a gun, Ladenson would say that A has the right to shoot B because he has a justification for shooting B to defend himself. Nevertheless, this does not require a completely different framework of right, as Ladenson promises, as we might also conceive A's right to shoot B as a Hohfeldian privilege or liberty. A has the liberty to shoot B because A does not have a duty not to do so, and B does not have a claim to demand A not do so. Under normal circumstances, a person should not shoot other people or cause any harm to others. But in our case, because B's behavior endangers A's physical safety and property, A has *moral* permission or a liberty to do what he needs to do to guarantee his own safety. This is also why he should not respond in a way disproportional to the risk he is running. Thus, if B is pickpocketing or snatching A's belongings, A would not have a liberty to shoot B to death, because he does have a duty not to do so unless it is necessary.

In sum, Ladenson's idea of a justification-right cannot be regarded as a rebuttal of the Hohfeldian conceptual structure. It is merely a rejection of the definition of legitimacy as a *claim-right* specifically. Therefore, he, either develops a conception of legitimacy that can do without the idea of a right to rule and defines it as a justification for governmental coercion; or he employs other elements of Hohfeld's typology. The latter alternative shifts the argument from an objection to *Typology* to an objection to *Claim Right*, which we will discuss in the next section.

But what if by "justification-right," Ladenson means to escape the idea of right altogether and to explain legitimacy as a justified action of a government? This strategy puts aside the correlation problem, and whether there is an obligation to obey would no longer be relevant to the justification of legitimacy. Defining legitimacy in terms of justified coercion is a widely accepted approach, especially among Kantians. John Rawls argues that



legitimacy is essentially a problem of a justifiable exercise of political power that is coercive in nature.<sup>21</sup> Additionally, Ronald Dworkin insists that a conception of law must explain “how what it takes to be law provides a general justification for the exercise of coercive power by the state,” by which he directly links a conception of law to the problem of the moral authority of law to justified coercion. If a state is morally justified in coercing the inhabitants living within its territory, the political authority it possesses will have moral legitimacy. A legitimate law in a derivative sense of legitimacy refers to the law that the state would be permitted to enforce coercively.<sup>22</sup> The justification of legitimacy rests on the conditions under which coercion could be justified, which is why the main arguments focus on the moral properties of the state that justify its coercive enforcement. Consequently, whether there is a general political obligation does not conceptually connect with the concept of legitimacy. Reasons for the people involved to obey the command of the state are merely desires to avoid punishment.<sup>23</sup> Because of the relatively weak requirement of the justification, this conception is believed to be a thin version of legitimacy. But what is the difference between the Kantian conception of legitimacy and Ladenson’s Hobbesian conception? I contend that it lies in the fact that Kantians’ conception of legitimacy still appeals to the idea of obligation, while Ladenson’s conception abandons any such claim. However, abandoning this claim puts Ladenson’s conception on shaky grounds when it comes to trying to explain why his is a conception of legitimacy.

By contrast, Dworkin—who holds the Kantian conception of legitimacy—also maintains that justifying force and coercion is the center of legitimacy. Hence, the problems of legitimacy and political obligation are not two sides of the same coin, as the correlation between right and obligation would imply. However, the conceptual separability is not tantamount to the denial of *any* normative connection between legitimacy and a state’s capacity

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<sup>21</sup> John Rawls, *Political Liberalism*, Columbia University Press 1993, pp. 136-7, 393.

<sup>22</sup> David Estlund, *Democratic Authority: A Philosophical Framework*, Princeton University Press 2008, p. 41.

<sup>23</sup> See also Thomas Christiano “Authority,” *The Stanford Encyclopedia of Philosophy* (Spring 2013 Edition), Edward N. Zalta (ed.), URL = <http://plato.stanford.edu/archives/spr2013/entries/authority/>.

to impose obligations. Actually, Dworkin stresses that “no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations.”<sup>24</sup> Accordingly, the justification for legitimacy involves the determination of the conditions under which a state’s constitutional structure and practices are such that “its citizens have a general obligation to obey political decisions that purport to impose duties on them.”<sup>25</sup> We may say that for Dworkin, for whom political obligation is based on a communal duty, the problem of legitimacy concerns the question of what sort of state can maintain fraternity among the members of a community on order to merit obedience.

But why does abandoning the appeal to obligation make Ladenson’s conception question-begging? Remember that I distinguished two parts of Ladenson’s legitimacy: a governmental power to coerce and a justification for (the exercise of this power of) coercion. The governmental power is not a normative power; rather, it is an empirical power, together with the acquiescence of its subjects. Nevertheless, even if I am justified in locking up a suspect, I do not necessarily have any authority over this person. Here I follow Raz, believing that the exercise of coercive or any sort of power is not an exercise of authority unless “it includes an appeal for compliance by the person(s) subject to the authority.”<sup>26</sup> The appeal invokes a duty of obedience, but it is not necessarily entailed by the concept of legitimacy. Without such an appeal to an obligation and a claim of obedience, Ladenson’s explanation of legitimate authority is merely a conception of justified *de facto* authority that cannot be conceived “except by reference to that of legitimate authority,”<sup>27</sup> and such a justified *de facto* authority cannot merely refer to an ability (to exercise control) over other people. Therefore, both Kantians’ and Ladenson’s conceptions of legitimacy resort to the idea of justified coercion exerted by states and governments, but only the latter suffers from its vulnerability in providing a conception of legitimacy to the extent that constructing legitimacy is a normative enterprise. As to those

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<sup>24</sup> Ronald Dworkin, *Law’s Empire*, Harvard University Press 1986, p. 191.

<sup>25</sup> Ronald Dworkin, *Law’s Empire*, Harvard University Press 1986, p. 191.

<sup>26</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press 1986, pp. 25-6.

<sup>27</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press 1986, p. 27.

Kantians mentioned above, their conceptions of legitimacy remain normative and will not be vulnerable in this way. On the contrary, Ladenson's conception of legitimacy remains empirical, in which case the exercise of legitimate power still can be free of moral justification. And such an empirical conception is counter-intuitive.

The argument in this section about the attempt to refute the fundamental correlation of right and obligation shows that no attempt canvassed so far has convincingly succeeded in doing so. Although anarchism essentially rests its rejection of legitimacy via the rejection of political obligation on such an integration thesis, it is neither necessary nor promising for us to renounce the Hohfeldian conceptual structure altogether, since what the integration thesis upholds is the *particular* correlation of legitimacy to political obligation. Moreover, we could invoke a weak version of the separation thesis to combat anarchism, namely by objecting to either *Claim Right* or *Content*.

### 3. AGAINST *CLAIM-RIGHT*

From this section onwards, I will canvass the two approaches to a weaker version of the separation thesis. In this section, I will address the approach that seeks to rebut *Claim Right*. As noted above, *Claim Right* not only defines legitimacy as a Hohfeldian right but also specifies it as a claim-right. Inasmuch as *Claim Right* is one of the necessary conditions of the integration thesis, we could detach legitimacy from an obligation to obey by refuting legitimacy as a claim right in particular, without denying the whole Hohfeldian typology of right. This means that a conception of legitimacy could be couched as a power, privilege, or immunity, with liability, no-claim, or disability, respectively as their correlatives. If legitimacy should be conceived as one of these kinds of right, the correlating obligation would not be conceptually entailed. As a consequence, the attack on political obligation would not necessarily lead to any version of anarchism. Since, moreover, the converse is also true, any doubts cast on a state's legitimacy could not spread to political obligation.

The most common approach to invalidate *Claim Right* is to construe the legitimacy of a state in terms of normative power over its people. By contrast, the concepts of privilege and immunity are rarely employed. The

reason for this seems obvious, for it would not reflect our prevailing understanding of the state and politics.<sup>28</sup> If a state's right to levy taxes were a Hohfeldian privilege, the state would not have a duty not to levy taxes, and the citizens would have no claim against the taxes imposed. However, levying taxes cannot merely be a liberty or privilege since every citizen does have a claim on his/her legitimate property. It has to be either a state-held claim-right that is stronger than the citizens' claim on their own property or some sort of power entailing liabilities on the part of citizens. Moreover, a state's authority in punishing criminals cannot be like a person's liberty or permission to choose any seat in a library, inasmuch as there is not much discretion for a state to decide whether to administer punishment. Thus, legitimacy as a privilege or immunity appears unacceptably weak given the practice of the authority of states. It seems that we need a stronger ground for legitimacy.

For this reason, I would like to focus on whether legitimacy can be conceived as a sort of power-right. Intuitively, a power to alter citizens' rights and obligations seems able to avoid the drawbacks of a privilege or immunity approach. Apart from defining legitimacy uniquely as a power-right, David Copp explores the possibility of basing legitimacy on a plurality of Hohfeldian rights. If either of these approaches can be proven sound in grounding legitimacy, we should endorse a separation thesis of legitimacy and political obligation: on that scenario, legitimacy would not be a claim-right and, consequently, political obligation would not follow. As a result, legitimacy (although not as a claim-right) and political obligation would have to be conceived as two independent concepts. Hence, the right methodology for justifying should consist in directly targeting either of the two.

Moreover, the separation thesis would also allow us to undermine the anarchists' destructive work, because even if no state were legitimate, as they claim, political obligation would remain intact. Unless anarchists were successful in conclusively refuting all approaches to political obligation, their *a posteriori* standpoint of negating political obligation would not be tenable.

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<sup>28</sup> This is also Raz's criticism of Ladenson's "justification-right." See Joseph Raz, *The Morality of Freedom*, Oxford University Press 1986, pp. 26-7.

Undermining the force of anarchists' skepticism is crucial for reestablishing political obligation, since it is believed that the anarchist critique has made it necessary to rebuild political obligation by salvaging pieces from the wreckage or coming up with materials completely different from the ones destroyed by Simmons.<sup>29</sup> In this section, we will see how political obligation can be protected from anarchism's attacks and why Wellman's picture of justifying political obligation is overly pessimistic.

### 3.1 *The Power Approach*

According to Hohfeld, A's having a *power* over B is opposed to A's having a disability, and correlates to B's having a *liability* with respect to A. So, saying that a parent has the parental power to ask her child to go to bed at ten p.m. is identical to saying that the child has a liability to follow his mother's order. Furthermore, liability is the opposite of immunity. Therefore, we might also say the child does not possess an *immunity* to his mother's order. A Hohfeldian power is believed to be a "meta-right", which means that it is capable of altering the status of other elements of the Hohfeldian typology.<sup>30</sup> If A is the owner of a house, the lawn of which gives B a shortcut to go to work, then A has the power-right to give B the privilege or permission to obtain access to her property. A's power is exercised by altering B's privilege, which shows why a power is a "meta-right". Thus, in the context of political authority, if a state has the ability to affect every citizen's claims, privileges, powers, and immunities, then it has a power-ability over its citizens. The question, then, concerns the content of the power that a state possesses.

In addition, we should ask what is the correlating liability. Also, we may ask how to demarcate the boundary of such a power and a claim-right and, correspondingly, how to distinguish liability from obligation. A power does not have a duty or obligation as a correlative. So if the authority of a state

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<sup>29</sup> Christopher Wellman, "Toward a Liberal Theory of Political Obligation," *Ethics*, Vol. 111, No. 4 (2001): 750-1.

<sup>30</sup> See F. M. Kamm, "Rights," in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, edited by Jules L. Coleman, Kenneth Einar Himma, and Scott J. Shapiro, Oxford University Press 2002, p. 479.

can be justifiably conceived as a sort of normative power, we could infer from this the separability of legitimacy and political obligation. However, under this definition of legitimacy, how are we to locate and construe political obligation, which falls out of the whole picture of the conceptual analysis of legitimacy? I will scrutinize Arthur Isak Applbaum's and Stephen Perry's arguments for the power approach to legitimacy in this section to determine if they can plausibly answer this question and be justified in endorsing the separation thesis by refuting *Claim Right*. I contend that the power approach does offer the possibility of separating obligation and legitimacy, but that in order to justify political obligation, we still need normative or substantive arguments in addition to the conceptual analysis.

In an article titled "Legitimacy without the Duty to Obey," Applbaum champions the power-liability correlation in interpreting legitimacy, and, as the title explicitly states, his main purpose is to divest legitimacy of the duty of obedience. According to his definition, a legitimate authority has the moral power "to author legal, institutional, or conventional rights and duties, powers, and liabilities, and create social facts and mechanisms of coordination that change the legal, institutional, and conventional situation or status of subjects."<sup>31</sup>

Such a moral power can change the moral status of its subjects by virtue of imposing a moral liability on the subject with respect to the command of the legitimate authority. This means that legal, institutional, or conventional rights and duties are altered. The corresponding moral liability to power, according to Applbaum, refers to "the justified loss of moral

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<sup>31</sup> Arthur Isak Applbaum, "Legitimacy without the Duty to Obey," *Philosophy & Public Affairs*, Vol. 38, No. 3 (2010): 221. Applbaum argues that the elements to be altered by moral legitimacy as a kind of power are *nonmoral* prescriptions and social facts. For this reason, this moral power cannot create a moral duty or right. However, in the following description of legitimacy as a moral power, Applbaum's argument seems inconsistent, as he offers an example in which by A's decree (who has the moral legitimacy over B and C), C might gain a *moral privilege* not previously held to act against B's interests. It is unclear to me why C can gain a moral privilege instead of an institutional or legal one. See Arthur Isak Applbaum, "Legitimacy without the Duty to Obey," *Philosophy & Public Affairs*, Vol. 38, No. 3 (2010): 222.

claims” relative to other subjects or the holder of the power.<sup>32</sup> To distinguish such a moral liability from a moral duty, Applbaum specifies that the justified loss of moral claims should be understood as a loss of immunity, which is the opposite of liability.

Let me simplify the model of power-based legitimacy by linking it specifically to the case of political legitimacy. If state A has legitimate authority over its citizens, A has the normative power to change their moral status by granting or forfeiting advantages such as legal rights, permissions, immunities, and so forth, and imposing on them or exempting them from, for instance, legal duties and responsibilities. What the citizens have surrendered is a moral immunity against the loss of legal advantages, the imposition of the disadvantages, and the enforcement necessary to ensure the exercise of the power. The surrender of such an immunity constitutes the moral liability that changes the citizens’ normative status.

A salient feature of the power-liability model of legitimacy, compared to the right-obligation model, is that it is capable of warding off a conceptual inconsistency. It is plausible that most people break the law from time to time, particularly petty legal rules that we intentionally ignore. For instance, many people occasionally drive slightly faster than the speed limit on a highway or join the flood of pedestrians in Manhattan to cross the streets before the crosswalk sign permits them to do so. I suppose two points could be taken for granted: first, a legitimate state can make mistakes while enacting laws that rule and guide us extensively, especially in the public sphere; second, we should guard ourselves against rule-fetishism, or the conviction that we have a moral duty to strictly comply with all the legal rules of our state. However, if we conceive of legitimate authority as a right to rule, corresponding to a moral obligation to obey, we have to deny the state’s legitimacy so long as we act against some legal rules and deny we have a moral obligation to follow, at times, silly rules. Applbaum believes that if a person denies that he is under a moral obligation to not violate the most innocuous legal rule while he at the same time does not deny the state’s legitimacy, he would be conceptually inconsistent. It is self-contradictory to

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<sup>32</sup> Arthur Isak Applbaum, “Legitimacy without the Duty to Obey,” *Philosophy & Public Affairs*, Vol. 38, No. 3 (2010): 222.

say that there is a legitimate state in force and at the same time deny a moral obligation to obey all of its directives if these two aspects refer to the same concept. Applbaum presents a case to illuminate why the power approach can circumvent this conceptual inconsistency.

*Motorist and the long red light.* In view of the high rate of traffic accidents in the downtown area, a town council decides to replace every stop sign with a traffic light and a “No Turn on Red” sign. A motorist turns right at a sparsely traveled intersection when the light has just turned red, indicating a long period of waiting. She is familiar with the area, and sure about the zero risk the turn would cause. But a police officer stops her and writes her a ticket, which she accepts without resentment.<sup>33</sup>

The motorist violates a legal rule, which is poorly designed yet not morally wrong. Although she denies a moral obligation to stop at the red light, she recognizes the moral liability to cede her privilege to turn right and to accept the fine as a result of disobeying the traffic rule. Since legitimacy is construed as a moral power to change the normative status of citizens, the motorist can consistently claim that she is not bound by a moral obligation toward the law, while holding that the town has the moral power to impose a legal obligation on her not to turn right and a moral liability to punish her for the disobedience. Additionally, it is the correlation of legitimacy to a moral liability instead of a moral obligation, as in Raz’s conception of legitimacy, that is responsible for the inconsistency. So far, it seems that with the power-liability correlation, Applbaum has offered a sound approach to the separation of legitimacy and political obligation in Hohfeldian terms. However, it seems to me that the Razian or the claim-right approach does not necessarily suffer from Applbaum’s inconsistency. This is, because the Applbaum’s imputation rests on two questionable equations: (1) a denial of a general moral obligation of obedience is equal to the rejection of the legitimacy of a state, and (2) a denial of a moral obligation to obey a

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<sup>33</sup> Arthur Isak Applbaum, “Legitimacy without the Duty to Obey,” *Philosophy & Public Affairs*, Vol. 38, No. 3 (2010): 230-1.



particular law is equal to a denial of the moral obligation to obey the law *as a whole*. (1) stands for the right-obligation correlation; however, because (2) is unfounded, Applbaum's imputation loses its force. I contend that even if a person rejects the notion that she has a moral obligation not to turn right at an intersection (or, for that matter, to obey many other legal rules), she does not necessarily thereby reject a moral obligation to obey the law *as a whole*. In contemplating legitimacy and political obligation, the most directly pertinent and appropriate way is to conceive them as systems and explore whether a state and a legal system as an integrated body of institutions has the justified moral standing to guide people's behaviors, to coerce them to do something, and to punish them. Correspondingly, political obligation should be conceived as a moral obligation with regard to the law as an integrated body rather than an aggregate consisting of a great number of individual legal rules and principles. Otherwise, it would be better to speak of the moral obligation to obey *laws* or every single law instead of the problem of political obligation or the moral obligation to obey *the law*. That, however, is a substantively different problem, and equating them is committing the fallacy of composition.

To clarify the point that political obligation is a moral obligation to obey the law rather than to obey all the laws *cumulatively*, we need to distinguish between the law as a whole and the law as the set of all particular laws. Firstly, the law as a whole or an integrated legal system should have a coherent identification, which is usually prescribed by the moral property of the law as a social institution in consideration of the end or role it serves in people's collective life. For instance, the law could be conceived as the social institution that maintains social cooperation, guides people's actions, helps people to better conform to their practical reasons, or helps them discharge other moral obligations. The identification of the law as a whole need not rest upon a singular end or value, and it could perfectly well exist as a combination of various considerations in social life. However, the problem concerning whether people are morally obligated to obey a particular law concerns the moral property of that single legal rule, which could be irrelevant to the purpose of the law as a whole. It can help to illustrate this point with an example that is used as a counter-example to political obligation: it is claimed that we are not under a moral obligation to obey

those morally neutral laws such as trivial traffic laws compared with laws that pertain to morally wrong actions. That is, skeptics believe that even though we are morally obligated to obey the law to not kill, we do not commit a moral wrong if we drive marginally faster than the speed limit on a highway, and hence we do not have a moral obligation to obey the law. This is a typical example of this logical fallacy: only if the claim of political obligation were the claim that we are under moral obligations to obey *all the laws* could the denial of the moral obligation to obey one specific law be a valid counter-example. However, this is not the problem associated with political obligation. Rather, it is a consideration of what would happen if there were no general subjection to an integrated legal system, and what sort of moral wrongs we would commit, that motivates our search for a justification for such a general moral obligation. Therefore, a case in which the prescribed action should not be considered a moral requirement because of the lack of a moral property does not have the argumentative force to refute the moral obligation toward the law as a whole, which is a different moral consideration.

Secondly, political obligation in terms of obedience to all laws cannot be taken seriously, since the types of legal norms are not homogeneous. It is obvious that in any legal system there exist laws that are not directives at all, so we might say that not all laws are “obey-able.” However, those laws that are not supposed to be obeyed by people are still necessary for the existence and maintenance of an integrated legal system, such as laws that draw the jurisdiction or hierarchy within a legitimate authority. This point cannot pose a threat to political obligation toward the law as a whole, because even though certain laws are not directly linked to the end that the legal system serves, they are an integrated part of the law. Therefore, we should bear this distinction in mind and not conflate the two separate problems of political obligation and moral obligations to obey laws. This will be a significant point for us in responding to Raz’s criticism in Chapter 6 as well.

Perry expresses the same concern by advocating the method of what he calls “top-down justification” for securing political obligation. According to this method we would begin “with the fact that we are dealing with a *system* of directives and then ask which moral property or properties of the system, considered as a whole, might give rise to an obligation to obey each

of its directives regardless of their individual moral content.”<sup>34</sup> In contrast, a “bottom-up justification” starts with individual directives of the legal system. If a moral obligation to obey an individual directive can be affirmed in every case, an aggregative conclusion about a moral obligation toward the legal system as a whole can be confirmed.<sup>35</sup> Let me use taxation as an example to illustrate why the bottom-up justification is incorrect. When liberals and libertarians dispute the legitimacy of taxation, the point of contention is whether taxation as an institution can be a form of morally justified redistribution or is instead to be rejected as a governmental violation of citizens’ freedom of property. Hence, the dispute concerns a “top-down justification” of the institution of taxation as a whole and the exploration of its relation to basic values such as freedom, equality, and so forth. I believe it is extremely difficult to justify or reject taxation with a case-by-case method to see whether income tax, real estate tax, inheritance tax, and all other kinds of tax can be reconciled with various basic values, and then come to a conclusion regarding the legitimacy of taxation. Thus, if proponents of the claim-right approach have not endorsed the bottom-up justification, they can avoid conceptual inconsistency, as they do not have to admit that a moral obligation to obey the law is equivalent to a moral obligation to obey all the directives of a legal system. Even though we often reject a moral obligation to obey particular laws, such as the motorist’s turning right on red, there is a gap between the disobedience of particular laws and a moral obligation toward the institution of law as a whole. The only way to bridge the gap is to regard disobeying the law as a whole in an aggregative sense of disobeying particular laws. However, for this method to be plausible, we would have to define the threshold beyond which the aggregated disobedience of particular laws turns into a rejection of the law as a whole. Moreover, even if there were such a threshold, a denial of the motorist’s moral obligation to follow an individual traffic regulation could not be conceived as a denial of legitimacy and political obligation.

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<sup>34</sup> Stephen Perry, “Law and Obligation,” *The American Journal of Jurisprudence*, Vol. 50 (2005): 270.

<sup>35</sup> Stephen Perry, “Law and Obligation,” *The American Journal of Jurisprudence*, Vol. 50 (2005): 270.

Although Applbaum's argument against the claim-right approach turns out to be flawed, this does not mean embedding legitimacy in moral power, corresponding to a moral liability, is not a promising path to the separation thesis. One of the questions that need to be answered is how political obligation can be accommodated by the power-based legitimacy approach, given the fact that obligation is not a correlative of a Hohfeldian power. We may find some inspiration in Perry's construction of legitimacy and political obligation within the power approach.

Unlike Applbaum, Perry stresses that the fundamental power underlying legitimate authority is the moral power to impose obligations, with as a correlative the general liability of people to "have their normative status affected by their government."<sup>36</sup> Armored with this power-liability correlation, Perry also argues against the claim that moral obligation is necessary for the *existence* of a legitimate authority. Yet he complicates his argument by insisting that the *exercise* of a legitimate authority is fundamentally consists in the imposition of genuine duties. Hence, Perry believes that legitimate political authority entails the existence of a general obligation to obey the law, although the existence of a general obligation to obey the law by itself does not entail legitimate political authority.<sup>37</sup> This latter inference he calls the "reverse entailment problem," which he employs to undermine Raz's service conception of authority. However, it does not hold. It seems contradictory for Perry to argue that the existence of legitimate political authority does not entail a moral obligation to obey the law, while at the same time claiming that the exercise of legitimacy as a moral power entails a moral obligation to obey the law. I think his use of the term "entailment" actually refers to two different kinds of relation: First, as it concerns the *conceptual* analysis of legitimacy as a moral power, what it entails is a moral liability to be subjected to the duties imposed. The second

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<sup>36</sup> Stephen Perry, "Law and Obligation," *The American Journal of Jurisprudence*, Vol. 50 (2005): 271; Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, p. 3.

<sup>37</sup> Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, pp. 3-4; p. 34.

entailment then refers to a *substantive or normative* relationship, namely that for political authority to exercise its moral power to impose genuine duties on citizens, these citizens have to incur a general obligation to obey the law. We might say that the second entailment stems from a fundamental concern about the effectiveness of law.<sup>38</sup> Consequently, political obligation is not conceptually entailed by legitimacy, but rather is normatively required by it for the sake of a state's efficacy in imposing duties that are likely to be fulfilled. Even if, conceptually speaking, political obligation is detached from the concept of legitimacy, this does not mean that the two ideas are utterly irrelevant to each other, since such an obligation is necessary for the *practice* of legitimate authority.

At this stage, I would like to set aside the problem whether Perry is right about political obligation being a necessary condition for legitimacy but not *vice versa*; Instead, I would like to endorse his proposal to take political obligation and legitimacy as two normatively distinct projects, enabling us to

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<sup>38</sup> Perry has provided arguments for both the conceptual analysis and the substantive theory of authority. The former is based on what he names "the value-based conception," and the latter is based on "the task-efficacy view." The value-based conception is as follows: "Legitimate moral authority can only exist if there is something sufficiently good or valuable about one person being able intentionally to change the normative situation of another person." Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, p. 26. The task-efficacy view, well known from Elizabeth Anscombe and John Finnis, will be canvassed in the next chapter. Here it is pertinent to note that Perry believes that the effectiveness of the authority marks the difference of Raz's and John Finnis's conceptions of authority. While Raz believes that effectiveness is extrinsic to legitimate political authority, Finnis contends that it is fundamental to the obligation of obedience and political authority. Perry sides with Finnis on this point. For instance, he takes it that "Finnis regards effectiveness as a—indeed, the—defining feature of legitimate political authority, whereas Raz believes that it is an extrinsic factor which, as a practical and empirical matter, will almost inevitably figure in most substantive theories of political authority, but that it is not an element of the very concept of such authority." Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, p. 37; Stephen Perry, "Law and Obligation," *The American Journal of Jurisprudence*, Vol. 50 (2005): 288-95.

justify our target concept—political obligation—directly. Leslie Green, a skeptic of political obligation, suspects that the power-liability analysis turns out to be of secondary, merely logical importance. At the same time, he emphasizes the primacy of the substantive argument, as “whether the right to rule and the duty to obey are simply logical correlates depends on substantive questions of political theory, and not on the analysis of concepts.”<sup>39</sup> What really matters for the two terms of the correlation is the relative priority of the state on the one side and citizens on the other: this relative priority decides whether the nature of a theory is right- or duty-based.<sup>40</sup>

Since the relationship of political obligation and legitimacy is of a normative rather than a logical nature, Perry contends that we should “begin our analysis of the related problems of political authority and political obligation by focusing *directly* on the existence conditions for the appropriate kind of moral power, rather than on conditions that will justify the supposedly mediating conclusion that there exists a (general) moral obligation to obey the law.”<sup>41</sup>

I think the direct method is the most practical and fruitful for dealing with political authority and political obligation. The major reason for the direct method is the wide disagreement about whether the concept of political authority is a claim, a power, or merely justified coercion. The same is also true for the problem of political obligation: witness the controversies about the moral or non-moral nature of the obligation and the stringency of the requirement of obedience. If we are not sure about either of the two sides of the Hohfeldian correlation, the only plausible way to cope with the

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<sup>39</sup> Leslie Green, *The Authority of the State*, Oxford University Press 1988, pp. 235-6.

<sup>40</sup> Leslie Green, *The Authority of the State*, Oxford University Press 1988, pp. 236-7. Moreover, I think Applbaum would agree on this point, because in the motorist case, the recognition that the motorist ought to pay the fine would follow from “a substantive moral argument, rather than a conceptual analysis, of what minimal respect for legitimate law requires.” Arthur Isak Applbaum, “Legitimacy without the Duty to Obey,” *Philosophy & Public Affairs*, Vol. 38, No. 3 (2010): 231-2.

<sup>41</sup> Stephen Perry, “Political Authority and Political Obligation,” in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, p. 4; 25.

problem is to focus directly on the concept to be justified, independent of whatever Hohfeldian correlate. We may follow Perry in taking Raz's service conception of authority as an instance to show why the analysis of political obligation should be conceived as an independent project, without, however, abandoning all connection with the problem of legitimacy.

Roughly speaking, Raz argues that the normal way to establish A's authority over B is by showing that B is "likely better to comply with reasons which apply to him if he accepts the directives of the alleged authority as authoritatively binding and tries to follow them," instead of following the reasons applying to B directly.<sup>42</sup> This is the renowned "normal justification thesis", which is at the core of his service conception of authority. However, Perry believes that Raz runs into the "reverse-entailment" problem, conceiving legitimate authority as entailed by political obligation. The latter concept actually requires a substantive justification that cannot be entailed by the normal justification thesis. This point also shows that political obligation should be justified directly (as should legitimate authority), which can be illustrated in the following case.

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<sup>42</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press 1986, p. 53. Raz's conception of authority consists of three theses: First, the pre-emptive thesis states that "the fact that an authority requires performance of an action is a reason for its performance which is not to be added to all other relevant reasons when assessing what to do, but should exclude and take the place of some of them" [p. 46]. Second, the dependence thesis states that "all authoritative directives should be based on reasons which already independently apply to the subjects of the directives and are relevant to their action in the circumstances covered by the directive" [p. 47]. The third thesis is the normal justification thesis, the official definition of which is as follows: "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 which 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" [p. 53]. The second and third theses constitute the service conception of authority, as the aim of a legitimate authority is to serve people in helping them to better conform to reasons that apply to them independently. The service conception, according to Raz, is "a normative doctrine about the conditions under which authority is legitimate and the manner in which authorities should conduct themselves" [p. 63].

*The toxic substance transportation case:* Adam is in the business of transporting toxic substances, and since a governmental agency in fact has better expertise in ensuring the safety of others during such transportation, Adam will better conform to the background reason—the concern of safety—if he follows the directives (as legal requirements) of the agency. According to Raz’s normal justification thesis, the agency has legitimate authority over Adam.<sup>43</sup>

There is a fundamental presupposition in this case, namely the concern of the safety of others. Without such a premise, the normal justification thesis cannot establish the authority of the agency. Thus the reason for Adam to follow the agency’s directives depends on a preexisting reason—do not cause harm to others—which is a moral and categorical reason by nature. It is because of this preexisting reason that Adam incurs a moral obligation to follow the directive of the agency. Likewise, anyone who is engaged in such an activity has a moral obligation to obey the agency’s directive as long as the duty not to harm others is conceived as a categorical background reason. As to an obligation to obey the law as a whole, what we would need is to find an analogous categorical background reason for us to obey the law as a whole.<sup>44</sup> Perry pushes the argument beyond the separation of the justifications for political obligation and legitimacy. He objects that Raz’s normal justification thesis includes a reverse entailment, which renders his conception of authority unreliable. As we have noted in the toxic substance case, there is a moral obligation to obey the directive of the agency, and Raz reaches the ultimate conclusion—that the agency has legitimate authority—from the intermediate conclusion, i.e. that Adam has a moral obligation to obey the directive. In other words, Perry believes that Raz’s conception of legitimate authority entails an argument for political obligation, which is the reverse

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<sup>43</sup> See Stephen Perry, “Political Authority and Political Obligation,” in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, pp. 44-6.

<sup>44</sup> The identification of such a general categorical background reason is the substantive argument for political obligation, which will be the main concern of Chapter 3.



entailment.<sup>45</sup>

Nevertheless, in the toxics transportation case, such a moral obligation, or the normal justification thesis, is insufficient to establish a legitimate authority. Suppose we replace the governmental agency and its commands or directives with a friend named Bob, who has a PhD in chemistry, and his well-meaning advice. Bob has expert knowledge of how to prevent a toxic substance from harming anybody during its transportation, and Adam would better conform to his background concern of safety if he follows Bob's advice. Does this establish Bob's legitimate authority over Adam, or does the advice obligate Adam as a result of the normal justification thesis?<sup>46</sup> I think Perry is right in denying that it does. Even if Bob is in a position to offer Adam serious advice, he does not have practical authority to impose any obligations upon Adam. As a result, the method of justifying legitimacy as a corollary of political obligation is called into question. Therefore, we should discard the method of justifying political obligation as an implication of justified legitimacy and vice versa. To avoid an unsound argument, the best way to embark on either of the two enterprises of justification is a direct normative justification for each concept independent of the other.

In summary, the approach of couching legitimacy in the idea of a moral power to change the normative status of citizens by (among other things) imposing duties has offered us a promising path to support the separation thesis. We need not deny the connection between the two concepts in all forms. Rather, in the next chapter, I would like to propose that any credible justification of legitimacy must offer certain conditions that a state must meet to merit political obligation. More specifically, for a state to

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<sup>45</sup> Stephen Perry, "Political Authority and Political Obligation," in *Oxford Studies in Philosophy of Law: Volume 2*, edited by Leslie Green and Brian Leiter, Oxford University Press 2013, pp. 44-8.

<sup>46</sup> Stephen Darwall makes a similar objection to Raz's normal justification thesis, contending that this thesis fails to create preemptive reasons for action. See Stephen Darwall, "Authority and Reasons: Exclusionary and Second-Personal," *Ethics*, Vol. 120, No. 2 (2010): 267-78. Jonathan Quong also argues that it is because of pre-existing moral duties in similar cases that the normal justification thesis can give rise to a moral obligation to follow the directive of a legitimate authority. See Jonathan Quong, *Liberalism Without Perfection*, Oxford University Press 2011, pp. 115-6.

be legitimate, it has to possess certain features in order to accord with people's ultimate goals in accepting political obligation. If so, the connection would be normative rather than conceptual.

### 3.2 *The Plural Components Approach*

The power-liability approach explores the possibility of working out a Hohfeldian idea of legitimacy within the Hohfeldian typology while opposing *Claim Right*. But as noted, we might also reject the integration thesis by positing a plural Hohfeldian basis for legitimacy. This would be a hybrid conception of legitimacy combining several Hohfeldian rights, i.e. what David Copp refers to as a “cluster of Hohfeldian advantages.”<sup>47</sup> Here I will succinctly assess the merits of this way of assailing the integration thesis. I can afford to be brief, because, as we will see, even if legitimacy could be explained by a cluster of claim, power, privilege, and immunity, the part that genuinely relates to the moral obligation to obey has to fall under a single Hohfeldian right—most likely a claim or a power. Therefore, the previous investigation of legitimacy as a claim or a power, as we shall see in the case of Copp's argument.

In Copp's analysis, the cluster of Hohfeldian advantages constituting the legitimacy of a state has five aspects, covering all four Hohfeldian rights. First, a legitimate state has the *privilege* to enact and enforce laws that apply to the residents of its territory, and there should be moral limits for laws to be enacted. In other words, it is not morally free for a state to enact any law. Second, a legitimate state would have the *power* to impose upon its residents a pro tanto duty to act in a certain way simply because acting in this way is required by an enacted law. Such a law either falls within the spectrum of the state's privilege to enact laws or is morally innocent at least. These two aspects concentrate on the way a state's legitimacy relates to its residents or domestic affairs. However, Copp believes that legitimacy should not be confined to the domestic point of view. There is an external or international aspect involving three Hohfeldian rights. The third Hohfeldian right a legitimate state would have is a *privilege* relating to border-control, so that it

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<sup>47</sup> David Copp, “The Idea of a Legitimate State,” *Philosophy & Public Affairs*, Vol. 28, No. 1 (1999): 18.

can permit or refuse nonresidents' and noncitizens' claim to have access to its territory. Fourth, a legitimate state would have a *claim* against other states' interference with its internal affairs. Fifth, a legitimate state would have *immunity* to any of these rights being violated by actions of any other state or person.<sup>48</sup> Without any of the above five aspects, the conception of legitimacy would be incomplete.

The plural conception does give us a comprehensive outline of what Hohfeldian rights a legitimate state should have. Nevertheless, I doubt that it genuinely provides an original perspective to discuss the relationship of citizens and a state or makes a substantial difference to the justification of legitimacy and political obligation compared with a conception based on a single Hohfeldian right. Two distinctions would help to clarify this point. Firstly, we might follow Allen Buchanan's distinction between internal political legitimacy and what he calls "recognitional legitimacy" or "international legitimacy"; hence his conception involves not only the traditional aspect of political legitimacy as it concerns the requirement of justice but also the international aspect of the conditions under which a state can be justifiably recognized by other states.<sup>49</sup> Copp's last three components—a privilege of border-control, a claim against interference, and immunity to the loss of right—basically address the international aspect of legitimacy. Only the first and second components deal with traditional political legitimacy, regarding the tension between individuals' freedom, autonomy, equality, etc. and a state's authority over them. We can say these two components—a privilege to enact laws and a power to impose duties—constitute political legitimacy as traditionally conceived.

This distinction between internal and external dimensions of legitimacy leads us to another distinction: the normative justification of legitimacy and the practice of legitimacy. The former might be interpreted as relating to the issue whether a state has legitimate authority over individuals to prescribe certain actions and enforce their performance. The practice of legitimacy, on

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<sup>48</sup> See David Copp, "The Idea of a Legitimate State," *Philosophy & Public Affairs*, Vol. 28, No. 1 (1999): 18-29.

<sup>49</sup> See Allen Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, Oxford University Press 2004, pp. 266-8.

the other hand, involves not only its justification but also the conditions for external legitimacy to assure the effectiveness of legitimacy. Thus, when it comes to the problem of political obligation in particular, mainly concerning the internal dimension of legitimacy, Copp's five elements of legitimacy can be reduced to the power to put residents under a *pro tanto* duty that actually functions. Such a power involves the internal relationship of a state to its citizens or residents, and it is this element that relates to the *justification* of political obligation. In other words, the question of whether or not citizens have the moral obligation to obey the law essentially boils down to the moral power to put them under a duty. Thus, the focal point for the problem of political obligation in Copp's plural conception of legitimacy falls under the element of power. This brings the argument back to the discussion of Applbaum's and Perry's power approach.<sup>50</sup>

To conclude the core argument of this section, given the acceptance of the Hohfeldian scheme of rights, I argue that the separation thesis can be endorsed, because we need not subscribe to *Claim Right* which is a necessary requirement for the integration of legitimacy and political obligation. The Hohfeldian scheme allows us to conceive of legitimacy in terms of other rights, such as, particularly, a moral power to impose duties. In the next section, I will argue that even if integrationists were justified in maintaining *Typology* and *Claim Right*, there would be another gap for them to fill: the *content* of each term of the correlation of legitimacy and political obligation.

#### 4. AGAINST CONTENT

For the sake of the argument of this section, we presume the correctness of both Hohfeld's correlations and the definition of legitimacy as a right to rule in the sense of a claim-right. Therefore, legitimacy entails a moral obligation. For the integrationists' claim to be sound, they still have to

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<sup>50</sup> Buchanan also couches legitimacy in the idea of political power, as he states: "[A]n entity has political legitimacy if and only if it is morally justified in wielding political power, where to wield political power is to attempt to exercise a monopoly, within a jurisdiction, in the making, application, and enforcement of laws." Allen Buchanan, "Political Legitimacy and Democracy," *Ethics*, Vol. 112, No. 4 (2002): 689-90.

deal with the remaining concern about the nature of this moral obligation. This is where *Content* asserts itself.

As defined before, *Content* states that the relationship of legitimacy and political obligation should be understood in terms of the right-obligation correlation. The content of the terms of the correlation are determined specifically as the claim right to rule and the moral obligation to obey. It is important to note that one of the two terms, namely legitimacy, gets established first. According to *Typology* and *Claim Right* legitimacy should be defined as a claim-right to rule, which correlates to an obligation. Therefore, *Content*, by specifying the exact nature of the corresponding obligation, is required to integrate legitimacy and political obligation. Unfortunately, it seems that the prevailing attitude is to take *Content* for granted. For instance, Raz states that “it is *common* to regard authority [...] as correlated with an obligation to obey.”<sup>51</sup> As far as I know, Simmons explicitly supports such an argument without articulating his reason for doing so, since he merely asserts that legitimacy or authority is “viewed”<sup>52</sup> or “traditionally supposed”<sup>53</sup> to be correlated to the moral obligation to obey. However, these expressions invite questions such as: can we take a “common” or “traditional” supposition to be on par with an *argument* needed for a justification to stand? I do not think such a supposition is capable of explaining *Content* if no further argument could be supplied. But there seems to be an obvious way to address the content issue, which Simmons appears to have in mind accepting the “traditionally supposed” correlation.<sup>54</sup> If legitimacy as a right to rule can be reduced to a state’s moral claim to be obeyed, the content of the corresponding moral obligation can only relate to the fact of the subject’s obedience. However, I believe this strategy not just oversimplifies legitimacy, but renders it empty. In view of our everyday understanding, legitimacy would have to shed light upon content such as the enactment of rules, the

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<sup>51</sup> Joseph Raz, *The Morality of Freedom*, Oxford University Press 1986, p. 23, emphasis added.

<sup>52</sup> A. John Simmons, “Philosophical Anarchism,” in his *Justification and Legitimacy: Essays on Rights and Obligations*, Cambridge University Press 2001, p. 106.

<sup>53</sup> A. John Simmons, *Moral Principles and Political Obligations*, Princeton University Press 1979, p. 195.

<sup>54</sup> See note 11.

imposition of obligations, and coercion, which constitute the abstract conception of the right to rule. Thus, the reduction of legitimacy to a merely formal claim to be obeyed cannot provide us an adequate specification of this concept, and we need to probe deeper to determine the content of the obligation that is the correlative to a right to rule.

At this point, it is worth noting that David Lyons stresses the importance of content for the right-obligation correlation. Lyons contends that the conceptual relationship between right and obligation is not similar to that holding between other paired concepts such as father-son, right-left; if “A is to the left of B,” it conceptually follows that “B is to the right of A.” However, the correlation between right and obligation is more complex than this, since rights and duties “not only connect ordered pairs of persons; they also have contents.”<sup>55</sup> Even if “A has a claim-right against B,” whether “B has a duty to A” depends on “*what* it is that A has a right to and *what* it is that B has a duty or obligation to do,”<sup>56</sup> That is to say, whether there is mutual entailment depends on the content of the right and the obligation. In a simple contractual right-obligation case in which B owes A one hundred dollars, the content of the right of A and the obligation of B is relatively apparent; A has a claim against B to return the defined amount of money, and thus is the content of B’s obligation. But in the case of legitimacy and political obligation, the content of the two terms is far from obvious. For now, we have assumed the content of legitimacy to be the claim-right to rule over the citizens of a state, and if the *only* candidate for the correlating obligation is supposed to be a moral obligation to obey (which would assure the validity of the integration thesis), integrationists would have to offer a sufficiently strong argument for this. Because of this strong requirement, I

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<sup>55</sup> David Lyons, “The Correlativity of Rights and Duties,” *Noûs*, Vol. 4, No. 1 (1970): 47.

<sup>56</sup> David Lyons, “The Correlativity of Rights and Duties,” *Noûs*, Vol. 4, No. 1 (1970): 47. Lyons’s point is at least two-fold: First, whether right and obligation in particular cases correlate to each other rests upon their content; second, Lyons makes the more general and ambitious statement that rights and duties do not generally correlate, since certain actions are simply not allowed for us to undertake, regardless of whether there are people holding rights. David Lyons, “The Correlativity of Rights and Duties,” *Noûs*, Vol. 4, No. 1 (1970): 53-4.

believe that the integration thesis still remains highly questionable, even if we assume the soundness of *Typology* and *Claim Right* as the premises for *Content*.

At first glance, even if a state's legitimacy is a right to rule over its citizens through legislation, adjudication, and administration, the nature of the correlative obligation of citizens remains unclear. Other options besides an obligation to obey the law as the potential correlative cannot be immediately ruled out, for example a moral obligation to support the government, a moral obligation not to interfere with the government's exercise of its authority, or perhaps a moral obligation to acquiesce to specific demands addressed to individuals. Unless integrationists are justified in dismissing all these possibilities, the obligation of obedience at the least cannot be conceived as the sole possible correlative of legitimacy.

William Edmundson proposes a challenge to the integration thesis by arguing specifically against *Content*. He implies that even if the Hohfeldian typology is correct and legitimacy is some sort of claim-right, the corresponding obligation is not simply an obligation of obedience; instead, it is a general moral obligation not to interfere with the administration of the laws of a just state.<sup>57</sup> His major purpose in refuting the integration thesis is to salvage the idea of legitimate authority of states from the difficulties faced by the justification of a general obligation to obey the law. Thus, if a general obligation to not interfere with the administration of a state's laws can be justified, the state has legitimate authority to rule over its citizens *without* a justified general obligation to obey the law on their part.

According to Edmundson, we should distinguish between an ideal authority and a legitimate authority. While being an ideal authority entails "*claiming to create* in one's subject a duty of obedience," being a legitimate authority does not require a state to *actually impose* such a duty of obedience on its citizens.<sup>58</sup> Only if a legitimate authority actually imposes such a duty

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<sup>57</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, p. 48. See also William Edmundson, "Legitimate Authority without Political Obligation," *Law and Philosophy*, Vol. 17 (1998): 43-60.

<sup>58</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, pp. 38-9.

would a duty of obedience be necessary for legitimacy. Edmundson believes that a duty of obedience is an unnecessarily over-demanding condition for legitimacy that promotes philosophical anarchism. By contrast, for a state to possess legitimate authority, a weaker corresponding duty should be sufficient. This is what he calls the “modest legitimacy thesis” which he describes as follows: “Being a legitimate authority entails that one’s authoritative directives create in one’s subjects an enforceable duty not to interfere with their forceful administration.”<sup>59</sup>

Although the criteria for a legitimate authority are not as demanding as those for an ideal authority, this does not mean that legitimate authority is entirely disconnected from ideal authority. Preferably, our conception of legitimate authority has some relation to ideal authority. On this point, Edmundson contends that while being an ideal authority involves *truly* claiming to create a duty of obedience, being a legitimate authority entails merely *sincerely* claiming to create such a duty.<sup>60</sup> Thus, if a state on the one hand sincerely claims to create a duty of obedience, and, on the other hand, it actually creates a duty of non-interference with its administration, the state has legitimate authority to rule. Edmundson’s reason for supposing that legitimacy requires merely sincerely claiming a duty of obedience lies in an analogy between epistemic authority and practical authority. He argues that if epistemic authority refers to someone who “*truly* knows how the world works,” a counter-intuitive result is that Aristotle, Copernicus, Newton, or perhaps Einstein cannot be considered as authorities because their theories inevitably turn out to be false at certain points of history. The more plausible view is that if they sincerely claim their views to be true and those views were sufficiently well-founded in the scientific understanding of the time in which they held such views, they should still *legitimately* be regarded as epistemic authorities. This would fit our intuitions.<sup>61</sup> Legitimate political

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<sup>59</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, p. 42.

<sup>60</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, pp. 44-7.

<sup>61</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, pp. 44-7. I agree with David Lefkowitz that Edmundson is misled by the similarity of epistemic authority and practical authority.



authority, as a sort of practical authority, similarly does not necessarily truly claim to create in its subjects a duty to obey; such a claim would be sufficiently legitimate if it is sincere. With the standard of ideal political authority together with the standard of legitimate political authority and its requirement of sincerity, Edmundson has completed his theory of why legitimacy is something that a state not only claims to have but is able to actually possess.

One of Edmundson's arguments is directly pertinent to this section: that *Content* fails insofar as the correlative obligation of legitimacy is a duty not to interfere with the administration of laws (which I shall for the sake of convenience refer to as a "duty of non-interference"). For this argument to be sound, Edmundson must address what distinguishes the duty to obey the law from the duty of non-interference in order to show that the refutation of the former duty would not be applicable to the latter. To see the difference, we have to examine Edmundson's argument against the general duty of obedience, according to which the most salient reason to reject the duty to obey is that such a duty cannot be reconciled with the feature of content-independence. It seems obvious that if an action of  $\varphi$ -ing is prescribed by a law, the reason for a person to  $\varphi$  is simply because it is prescribed by the law, irrespective of the pros and cons of  $\varphi$ -ing. Or we can say that the law of  $\varphi$ -ing is a valid reason for us to do so, independently of the content of the law.<sup>62</sup> Thus, Edmundson argues that the duty to obey the

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Edmundson misconstrues that a legitimate authority should make true statements, but Lefkowitz believes that what pertain to political authority should be justified statements. See David Lefkowitz, "Legitimate Political Authority and the Duty of Those Subject to It: A Critique of Edmundson," *Law and Philosophy*, Vol. 23 (2004): 408.

<sup>62</sup> The term "content-independence" was first introduced by Herbert Hart into the philosophy of law, meaning that a command or a legal reason for certain actions is supposed to function as a reason independent of "the nature or the character of the actions to be done." However, the scope of the law as a content-independent reason for actions is applicable merely to judges and other officials rather than generally to all citizens; Hart argues that the law as a content-independent and preemptory reason should be recognized by "the Courts of an effective legal system as constituting a reason for action of a special kind." See H. L. A. Hart, "Commands and Authoritative Legal Reasons," in *Essays on Bentham: Studies in Jurisprudence and Political Theory*, Oxford

law is content-independent, meaning that its “existence and weight should be determinable without reference to the character and consequences of the

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University Press 1982, p. 243, 254. Raz, Wolff, Simmons, and Green conceive of content-independence in a different and broader sense, as generally applicable to all the subjects of a legal system, describing a feature of political obligation such that people must obey the law simply *because it is the law*. For instance, Raz states that “[a]n obligation to obey the law entails a reason to do that which the law requires. But the converse does not hold. [...] The obligation to obey the law implies that the reason to do that which is required by law is the very fact that *it is so required*. At the very least this should be part of the reason to obey.” Joseph Raz, “The Obligation to Obey the Law,” in his *The Authority of Law (Second Edition)*, Oxford University Press 2009, pp. 233-4, emphases added. As Wolff argues, “Obedience is not a matter of doing what someone tells you to do. It is a matter of doing what he tells you to do *because he tells you to do it*.” R. P. Wolff, *In Defense of Anarchism*, New York: Harper & Row 1970, p. 9. Simmons also espouses such a claim out of the concern of content-independence: “Obedience essentially concerns the source of a rule or command, *not its content*. [...] A moral duty to obey the law would be a duty to do as the law requires *because it is required by valid law* (or because of what its being valid law implies), a duty to obey the law as such, not to do as it requires just insofar as it happens to overlap with independent moral duties.” A. John Simmons “The Duty to Obey and Our Natural Moral Duties,” in Christopher Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* Cambridge University Press 2005, p. 95, emphases added. Green offers a definition similar to Edmundson’s, as “[t]he core idea is that the fact that some action is legally required must itself count in the practical reasoning of the citizens, *independently of the nature and merits of that action*.” Leslie Green, *The Authority of the State*, Oxford University Press 1988, p. 256. I think the shift in scope from Hart’s “judge and officials only” to other scholars’ “the subject of the law generally” is problematic. Roughly speaking, Hart’s core idea is that the law is a content-independent reason for judges to make judgments; this does not amount to saying that political obligation per se should be content-independent. If the expression of “we should obey the law simply because it is the law” stands for the content-independence of *political obligation* as a reason, it is not accurate inasmuch as it seems to me that “simply because it is the law” is the content of political obligation as a reason. Moreover, the enterprise of justifying political obligation concerns whether “simply because it is the law” can be a valid conclusive reason for us to action. In addition, Paul Markwick challenges content-independence in terms of its incapacity to offer a complete reason instead of a partial one. See Paul Markwick, “Law and Content-Independent Reasons,” *Oxford Journal of Legal Studies*, Vol. 20, No.4 (2000): 584-6.

actions available to the actor at the time she acts.”<sup>63</sup> However, the feature of content-independence, which the duty to obey should be capable of accommodating, would have absurd consequences. We would have reasons of equal weight to obey the law proscribing murder and the law proscribing stopping at a red light in a desert where no one is around. This is absurd because the duty not to murder should carry more weight than the duty not to jaywalk. However, if the duty to obey the law has to be content-independent, it seems that these duties should be equally forceful. Thus, content-independence puts defenders of the duty to obey in a dilemma: either they have to accord a different weight to the duty not to murder and the duty not to jaywalk (which would contradict the nature of law as an authoritative reason for action for citizens); or, they have to concede that there is no general duty to obey the law.

Nevertheless, this dilemma poses no threat to Edmundson’s espousal of the duty of non-interference. If there is a red light in the desert where no one is around, deciding whether to stop at the red light concerns the notion of the duty to obey the law that Edmundson has rejected. However, if a police officer is standing at the same spot asking a person to stop, this involves the duty of non-interference, which, as Edmundson believes, is a general duty, conceptually correlated to legitimacy. The content-independence dilemma undermining the duty to obey cannot have an impact on the duty of non-interference. Although the duty to obey the laws forbidding murder and jaywalking cannot be plausibly seen as having equal weight, the respective duties “of the murderer and of the jaywalker to submit peaceably to lawful arrest are of equal weight.”<sup>64</sup> Thus, there is a general duty not to interfere with the administration of particular laws, or a general duty not to interfere with particular “administrative prerogatives.” Further, is a duty whose existence and weight can be determined without reference to the content of the laws that are administered. As long as a police officer, a judge, or another authority figure is issuing a lawful

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<sup>63</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, p. 52.

<sup>64</sup> William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, pp. 51-2.

administrative order, whatever its content, the subject has a duty not to interfere.<sup>65</sup>

My intention in discussing Edmundson's duty of non-inference as the correlative of legitimacy as a claim-right, is to emphasize the point that without flawless arguments for all three parts—the Hohfeldian typology (*Typology*), legitimacy defined as a claim (*Claim Right*) and the content of the correlative obligation (*Content*)—the integrationist thesis cannot stand. Moreover, Edmundson's theory demonstrates the possibility of embracing the separation thesis by denying *Content*—that is, the content of legitimacy as a claim-right could be something other than the traditional duty to obey. Without a stronger argument for a duty to obey the law as the exclusive possibility for the content of the correlative to legitimacy, the integration thesis cannot be justifiably endorsed, and philosophical anarchism is on thin ice.<sup>66</sup>

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<sup>65</sup> So if a police officer tells me not to kill a person and not to turn right on red, it seems that Edmundson would say that the obligations to obey both prerogatives have the same weight.

<sup>66</sup> I cannot expand my criticism of Edmundson's argument here, since it does not tie in with the purpose of this chapter. But except for the doubt regarding his view of the identical basic structure of theoretical and practical reason as mentioned before, I believe his argument against the duty to obey or political obligation is fundamentally misplaced, since Edmundson completely misconstrues the problem of the moral obligation to obey *the law* as a moral obligation to obey *laws*. This is clear in the way he defines legitimacy: "[a] state is legitimate only if it claims to impose on its subjects a general, at least *prima facie*, duty to obey its *laws* and its subjects have a general *prima facie* duty not to interfere with their enforcement." See William Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority*, Cambridge University Press 1998, p. 48. It is a typical mistake to approach the problem of political obligation with the "bottom-up justification," but we have seen that the appropriate method for the problem is a "top-down justification." Specific cases showing that a moral obligation to obey some laws can be absurd cannot suffice to refute a general obligation to obey the law as a whole. My purpose is merely to demonstrate how strong an argument justifying the integration thesis needs to be by introducing Edmundson's argument as one of many other potential alternative options for the obligation corresponding to legitimacy.

## 5. CONCLUSION

As I argued at the beginning of this chapter, for the integration thesis of political legitimacy and political obligation to be justified, all three arguments—the Hohfeldian typology argument, the claim-right argument, and the content argument—constituting the thesis should be well-grounded. After closely scrutinizing each of the three arguments, we found that each faces substantial challenges, some of which are problematic for the integration thesis. For example, we might recall how a power-right can provide us a framework that elides any conceptual link between legitimacy and political obligation. Another significant difficulty for the integrationists is that they face an impractically high burden of justification in terms of the uniqueness of the two terms of the correlation, since both need to be confirmed. Such a justification would have to exclude all other possible interpretations of legitimacy and of its correlative obligation. This is unduly demanding.

Therefore, I conclude that theories of both legitimacy and of political obligation should discard the integration thesis and embrace a separation thesis, which states that the two concepts are not only conceptually distinguishable but also calling for independent justifications, even though they may be normatively related. The separation thesis has implications for the appropriate method for handling the problems of legitimacy and political obligation. As noted in Section 3, the most appropriate and fruitful way to approach these problems is to provide a normative justification for them, addressing questions such as why a state is legitimated to guide the behavior of its subjects and why it has the capacity to coerce. Moreover, should the criteria for a state's legitimacy including a democratic process? Or should it possess the capacity of fulfilling certain functions such as the pursuit of the common good, the protection of liberty and equality, and the maintenance of social cooperation? As for the problem of political obligation, the most crucial question should be why a state and the legal system have such a significant impact on our moral lives, especially in the public sphere, that we should incur a general obligation to obey the law and support the government. What conditions must a state or government meet to deserve its subjects' duty of obedience? Those normative arguments have direct force in justifying political obligation and legitimacy, and should be

conceived as the more suitable method than a conceptual analysis that proceeds by indirect routes.

One question remains to be answered. If political obligation is justified, and if we decide not to discard the Hohfeldian scheme then such an obligation still has a correlative claim-right that calls for elaboration. Moreover, if such a correlative claim were something that a state possesses, then why would not it overlap with legitimacy as a claim to rule? This view conceives political obligation as a vertical relationship that is owed by subjects to their state and government. However, political obligation could also be seen as a moral obligation obtaining horizontally among subjects. As I will show in the next chapter, it should be seen in that way. For instance, if legitimacy is a power-right to impose duties, and citizens have a political obligation to fellow citizens, then citizens possess the correlative right to claim from them a similar submission and obedience to the law. This explanation seems to be sound even in some of the most extreme cases offered to reject political obligation. For example, even if you come upon a red light in an unfamiliar remote street you want to cross, it may occur to you that you should wait for it to turn green if you see another person doing the same; otherwise, the person may blame you for disobeying the law. Or, take an intersection of a busy street in Manhattan as another example. If the flood of pedestrians does not wait for the interval between the red light for vehicles to stop and the white light for them to cross, you can be justified in joining them to cross on red, since everyone has reasonably waived his or her claim of obedience due to the poor design of the traffic lights compared with the flexibility of human beings. This relates to the art of legislation, which is another topic. The suggestion of a horizontal political obligation cannot be endorsed until I have provided a normative justification for a general obligation to obey the law and explained why the law or a “political condition” as what I will explain in the next chapter is valuable for our moral lives. The answers to these questions have important implications for those to whom we such an obligation. In the next chapter, I will argue that a state, the law, or a political condition is necessary for us to lead morally acceptable lives together and discharge our moral obligations. Since political obligation is essentially reciprocal or second-personal in nature, it can only be conceived as a moral obligation owed by individuals to other individuals.