

*Political Legitimacy and the Duty to Obey the Law*¹

PATRICK DURNING
St. George's School
Newport, RI
USA 02840

A growing number of political and legal theorists deny that there is a widespread duty to obey the law.² This has lent a sense of urgency to recent disagreements about whether a state's legitimacy depends upon its 'subjects' having a duty to obey the law. On one side of the disagreement, John Simmons, Robert Paul Wolff, David Copp, Hannah Pitkin, Leslie Green, George Klosko, and Joseph Raz hold that a state could only be legitimate if the vast majority of its subjects have a duty to obey the law.³ On the other side, M.B.E. Smith, Jeffrey Reiman, Kent Greenawalt,

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- 1 I thank David Estlund, James Drier, Dan Brock and two anonymous reviewers for comments on previous drafts of this paper.
 - 2 Among those who argue against a duty to obey the law are the following: Robert Paul Wolff, *In Defense of Anarchism* (New York: Harper & Row 1976); A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press 1979); Joseph Raz, *The Morality of Freedom* (New York: Oxford University Press 1986); Joel Feinberg, 'Civil Disobedience in the Modern World,' in *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton University Press 1992); Donald Regan, 'Law's Halo,' *Social Philosophy and Policy* (1986); M.B.E. Smith, 'Is There a Prima Facie Obligation to Obey the Law?' *Yale Law Journal* 82 (1973); Leslie Green, *The Authority of the State* (New York: Oxford University Press 1988); David Lyons, 'Need, Necessity and Political Obligation,' *Virginia Law Review* (1981); and A.D. Woodzey, *Law and Disobedience* (London: Duckworth 1979).
 - 3 Wolff, *In Defense of Anarchism*; Simmons, *Moral Principles and Political Obligations*; A. John Simmons, 'Justification and Legitimacy,' *Ethics* 109 (1999) 739-71; A. John Simmons, 'Philosophical Anarchism,' in *For and Against the State*, J.T. Sanders and J. Narveson, eds. (Lanham, MD: Rowman and Littlefield 1996). David Copp; 'The Idea of a Legitimate State,' *Philosophy and Public Affairs* 28 (1999) 3-45; Hannah Pitkin,

Christopher Morris, Rolf Sartorius, Jeremy Waldron, Christopher Wellman, William Edmundson and Allen Buchanan claim that a state could be legitimate even if its subjects lacked a duty to obey the law.⁴

This disagreement contains two separate disputes. One is a linguistic dispute about the meaning of 'legitimacy,' or about what it means to call something a 'legitimate state.' The other is a substantive dispute about whether the various aspects of legitimacy are linked together. Since discussing the linguistic dispute will help us examine the substantive dispute, let us consider it first.

I see the linguistic issue this way. A legitimate state has the rights commonly attributed to states. In particular, it has those rights that set the state apart from all other groups in that society and that set state officials apart from ordinary citizens. The disputants seem to agree about this, but they disagree about which Hohfeldian rights (liberty-rights, claim-rights, immunities and powers) a state must have to be considered legitimate.⁵ Some claim that, to be legitimate, a state needs only a liberty-right to act as a state. For instance, Wellman, Smith and Reiman assert that a state is legitimate as long as it is permissible for that state to issue commands and enforce them.⁶ Others believe that a legitimate state

'Obligation and Consent, II' in *Readings in Social and Political Philosophy*, Stewart, ed. (New York: Oxford University Press 1986); Leslie Green, *The Authority of the State*; Joseph Raz, 'The Obligation to Obey: Revision and Tradition' in *The Duty to Obey the Law*, W.A. Edmundson, ed. (Lanham, MD: Rowman & Littlefield 1999); George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, MD: Rowman & Littlefield 1992).

- 4 Smith, 'Is There a Prima Facie Obligation to Obey the Law?'; Jeffrey Reiman, *In Defense of Political Philosophy* (New York: Harper & Row 1972); Kent Greenawalt, 'Legitimate Authority and the Duty to Obey,' in *The Duty to Obey the Law*, W.A. Edmundson, ed. (Lanham, MD: Rowman & Littlefield 1999); Christopher Morris, *An Essay on the Modern State* (New York: Cambridge University Press 1998); Rolf Sartorius, 'Political Authority and Political Obligation,' in *The Duty to Obey the Law*, W.A. Edmundson, ed. (Lanham, MD: Rowman & Littlefield 1999); Jeremy Waldron, 'Theoretical Foundations of Liberalism,' in his *Liberal Rights: Collected Papers 1981-1991* (New York: Cambridge University Press 1993); Christopher H. Wellman, 'Liberalism, Samaritanism, and Political Legitimacy,' *Philosophy and Public Affairs* 25 (1996) 211-37; William Edmundson, *Three Anarchical Fallacies* (New York: Cambridge University Press 1998); Allen Buchanan 'Political Legitimacy and Democracy,' *Ethics* 112 (2002) 689-719.
- 5 Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions* (New Haven: Yale University Press 1919). Although Hohfeld presents an analysis of the different kinds of legal rights, one can apply his categories roughly to moral rights.
- 6 Wellman, 'Liberalism, Samaritanism, and Political Legitimacy,' 211-12; Smith, 'Is There a Prima Facie Obligation to Obey the Law?' 99-100; Reiman, *In Defense of*

must have a claim-right to exercise its powers. This would mean that individuals and other states have a duty not to interfere with the state as it promulgates its laws and enforces them. Still others insist that a legitimate state has a right to its status in the sense of an immunity from having it taken away. They therefore say that a legitimate state has the right not to have its power undermined or usurped. Finally, many believe that the rights of a legitimate state include something close to what Hohfeld termed a 'power': the ability to alter the rights and duties of others. In this case, they assert that a legitimate state has the right to make binding laws, laws that the people residing in their territory have a duty to obey.

I see no basis for claiming that only some of these rights matter for legitimacy, since they all concern the peculiar moral status that many states are claimed to have. I therefore think that both sides in this dispute are partly correct and partly incorrect. Those who claim that a state is illegitimate if its residents lack a duty to obey the law are right that the lack of a duty to obey the law has a bearing upon the state's legitimacy. Many people have claimed that there is a duty to obey the law (and many more have claimed that we would have a duty to obey the agents of an ideal state). This seems sufficient to make the issue of whether people have a duty to obey the laws of a certain state an issue of legitimacy. An individual is not guilty of linguistic error or confusion if he declares that states whose citizens lack a duty to obey the law are not fully legitimate. He would be declaring that the state lacks a moral standing that many states are claimed to have or are thought capable of having. On the other hand, the dissenters correctly insist that if those residing in a state did not have a duty to obey the law, but the state had some of the rights peculiar to states, it could rightly be called legitimate (or, at least, 'partially legitimate').⁷

The second dispute concerns what I will call 'the inseparability thesis': that a state whose subjects lack a duty to obey the law, cannot be legitimate in any respect.⁸ This dispute is far weightier, because the

Political Philosophy, 25. Others (such as Allen Buchanan) claim that it must be permissible for the state to try to establish some kind of monopoly on the use of force.

7 I do not mean to rule out the possibility that theorists may be justified in offering new stipulative definitions of 'legitimacy,' but we should see them for what they are and evaluate them according to their usefulness, rather than whether they capture the proper definition of legitimacy. I provide some reflections on how to evaluate our terminology at the end of this paper.

8 I thank David Estlund for suggesting this term.

inseparability thesis has significant inferential power. By invoking it, philosophical anarchists move from the claim that few people have a duty to obey the law to the conclusion that no state has a special right to command or coerce its subjects.⁹ Conversely, people who are convinced that their state is legitimate in some respect invoke the inseparability thesis to reject any arguments purporting to show that there is no duty to obey the law.

Given the significant conclusions that individuals might reach, and have reached, by appealing to the inseparability thesis, the burden of proof stands squarely on those who support it. Some have taken up this challenge, while others have suggested ways of doing so. My goal in this paper is to set out the arguments they have made and to flesh out the arguments that they have suggested and then to demonstrate that these arguments do not give us reason to accept the inseparability thesis.¹⁰

I Arguments for the Inseparability Thesis

For many people, the argument for the inseparability thesis that probably leaps to mind most quickly involves an appeal to the principle that

9 Wolff, *In Defense of Anarchism*; Simmons, *Moral Principles and Political Obligations*, 'Philosophical Anarchism,' *On the Edge of Anarchy* (Princeton: Princeton University Press 1993), 260-9, and 'Justification and Legitimacy.'

10 In addition to the two disputes I set forth here, there is one minor skirmish that I will not address. Some theorists assume that state is legitimate if it has a liberty-right to do all the things that states must do in order to be states, but then argue about whether a state could have the liberty to do all of these things if it did not have a right to be obeyed. Specifically, some theorists argue that in addition to issuing commands and backing them with force, all states claim that people have a duty to obey their laws. These theorists then insist that a state may not claim this unless its 'subjects' have a duty to obey the law. While I do not find arguments for either premise of this argument convincing, I set this issue aside here, because relatively little rests upon it. If the proponents of the inseparability thesis were right about this point, it would only mean that states whose citizens lack a duty to obey the laws are not fully legitimate (a position I already accept), because they may not permissibly claim that individuals have a duty to obey their laws. It would not show that states whose citizens lack a duty to obey the law do anything wrong by issuing commands backed by force. Nor would it rule out the possibility that such states have rights to make commands and enforce them that go beyond what any ordinary citizen (or any other group in society) has. (See Raz, *The Morality of Freedom*, 25-7; Green, *The Authority of the State*, 75; Philip Soper, 'Legal Theory and the Claim of Authority' in *The Duty to Obey the Law*, W.A. Edmundson, ed. (Lanham, MD: Rowman & Littlefield 1999); and Edmundson, *Three Anarchical Fallacies*.)

one may only force people to do things that they have a duty to do.¹¹ Someone appealing to this principle might suppose that a state could not have the right to enforce its laws if its residents had no duty to obey them, since it would then be forcing people to do what they had no duty to do.

There are two problems with this argument. First, even if the principle were correct, it would not forbid states whose subjects lack a duty to obey the law from enforcing their laws. To lack a duty to obey the law is to lack a duty to do what the law requires, *because* the law requires it. It does not mean that you are free to do the things that the law forbids. It only means that the law's forbidding or requiring something is not a morally relevant reason to do it or not to do it. Even if you do not have a duty to obey the law, the laws might still direct you to do many of the things that you have a duty to do. If the laws and individuals' duties happen to match, then, even if it were true that people may only be forced to do what they have a duty to do, a state could be justified in forcing people to obey its laws.

(An amended principle claiming that you may only use force against someone if that person has a duty to obey you is implausible. You may tell someone not to kill another person and try to compel him not to do so, even though your telling him not to kill would not be a morally significant reason for him to refrain from doing so.)

The second problem is that the original principle is mistaken. One reason is that whether someone is justified in issuing commands backed by force and whether someone has a duty to follow those commands depends upon the subjective conditions of the respective agents, such as the information (or misinformation) that each has. For example, a government could permissibly quarantine everyone within an area where a deadly disease is running rampant, even if some particular residents know — what the governors and police do not know and cannot readily determine — that they are not carriers and so pose no threat to others. In this case the individuals who know that they are not carriers might have no duty to submit to the quarantine, even though the police would be justified in ordering them to stay put and forcing them to do so.

Furthermore, in order to prevent the grave harms that would result from the cumulative effect of many individually insignificant actions, a government might be justified in compelling people to follow certain rules. For example, the government might be justified in compelling people to reduce air pollution. Considerations of fairness and ease of

11 As George Klosko does in *The Principle of Fairness and Political Obligation*, 38, 45.

administration might justify its doing so by demanding that everyone install pollution control devices in their cars. Nevertheless, while each individual might have a duty to limit the pollution he causes, he might not need to do precisely what the government requires. For example, it might be that an individual could do his fair share to cut pollution by cutting his driving by two-thirds rather than by installing the anti-pollution device on his car. The government might be justified in enforcing its rule all the same.¹²

Perhaps because of such difficulties, few people argue for the inseparability thesis by arguing that you may only force people to act in ways that they have a duty to act. Instead, they argue that a mere right to make commands and use force would not distinguish a state from its subjects. For instance, Robert Paul Wolff argues that if to be a 'political authority' were 'to have the right to make commands and to use coercion to discourage noncompliance with them,' then everyone would be a political authority, because each person has the right to order burglars to leave his home and to back such orders with the threat of force.¹³ Similarly, Joseph Raz argues that having political authority requires more than having permission to use coercion, because, if this were the sole criterion, your neighbor would be a political authority over you provided that he could permissibly threaten to burn rubbish near your property in order to prevent you from growing tall trees.¹⁴

In making such points, Raz and Wolff appeal to the idea that a legitimate state is a state with a special moral status. This is an important element of legitimacy and is central to what many people mean by claiming that states whose subjects lack a duty to obey the law are not legitimate.¹⁵ For instance, philosophical anarchists argue that, since there is no duty to obey the law, there are no legitimate states, but they do not call for us to smash our state, undermine the legal system, or refuse all cooperation with state officials. Indeed, John Simmons argues that we often have good reason to support the state and to do what the laws

12 In these examples, I do not mean to insist that there is no duty to obey pollution control laws. I only mean to point out that if we thought that there was no duty to obey them, it would still be an open question whether the state could permissibly enforce them. This is enough to show that we do not accept Klosko's proposed principle.

13 *In Defense of Anarchism*, 95-6

14 *The Morality of Freedom*, 24

15 It might be best to think of them as arguing that such states are non-legitimate, rather than that they are illegitimate.

require.¹⁶ What the philosophical anarchists claim is that states have no *special* right to use force and that the fact that a particular decree was made by a state with certain characteristics gives us no special reason to comply with it. According to philosophical anarchists, for states to be legitimate, they would have to have some special rights, but in fact nothing distinguishes the rights of the state from the rights of the 'subjects,' or the duties that 'subjects' have with respect to state officials from the duties they have towards other individuals.

Thus, in denying that any existing states are legitimate, John Simmons does not deny that states may sometimes be entitled to make demands of the residents of a territory. What he says is that '[s]tates are not entitled to demand from unwilling inhabitants anything that one person may not demand from another independent of states.'¹⁷ Similarly, Robert Paul Wolff declares that to show a state is legitimate, we must show that individuals living in that state must make a different sort of moral calculation from someone in the state of nature (or, what is the same thing, from someone living in an illegitimate state).¹⁸ Since Wolff believes there is no difference between the sorts of things that count as moral reasons for someone in the state of nature and someone living under a state, he declares that '[p]olitical philosophy, as the study of that legitimate political authority which distinguishes civil society from the state of nature, is dead.'¹⁹

Since Raz and Wolff hold the inseparability thesis and argue that state officials would not have any rights that ordinary citizens lack merely by having permission to issue commands backed by force, we might take them to be arguing that the only distinctive status a state could have a right to be obeyed. If this is their argument for the inseparability thesis, it falls short. A state could have special rights to issue commands backed by force even if everyone had some kind of right to do this. For instance, they might have rights to issue commands backed by force about a broader scope of things (or for a broader group of reasons) than other groups and individuals. Thus, a state might have the sole right to announce and enforce zoning regulations, to exercise eminent domain over individuals' property, or to force individuals to contribute financial support to its operations. Even if private individuals could permissibly

16 Among the places Simmons asserts this are *Moral Principles and Political Obligations*, Chapter 8 and *On the Edge of Anarchy*, 260-8.

17 'Justification and Legitimacy,' 754

18 *In Defense of Anarchism*, 83-113

19 *In Defense of Anarchism*, 110

issue commands backed by force about any matter that a state could, one could still distinguish the state by saying that, in a legitimate state, state officials have a pre-emptive right to use force and make regulations.²⁰ For instance, we might hold that individuals have the right to restrain dangerous persons or to organize traffic when officials of the state are not doing so, but that when officials of the state take up the task, others have a duty to leave the commanding and use of force to the officials' discretion. Thus, agents of the state might have an exclusive right to pull over motorists and fine them for speeding provided these agents keep the highways reasonably safe. Any of these possibilities would give a state special moral status without giving its subjects a duty to obey the law, so those wishing to defend the inseparability thesis must rule them out.

II John Simmons and the Argument from Voluntarism

John Simmons argues for the inseparability thesis through an appeal to political voluntarism. Simmons defines 'legitimacy' as follows:

A state's (or government's) legitimacy is the complex moral right it possesses to be the exclusive imposer of binding duties on its subjects, to have its subjects comply with these duties and to use coercion to enforce the duties. Accordingly, state legitimacy is the logical correlate of various obligations, including subjects' political obligations.²¹

Although Simmons supposes that a state could have these rights with respect to some individuals and not others, he declares that, with respect to each individual, a state has either all of these rights or it has none of them. Simmons asserts, 'the state is, of course, either fully legitimate or fully illegitimate with respect to each individual under its rule.'²²

As a political voluntarist, Simmons believes that an individual could only become bound to obey a government — and that a state could only have a special right to compel him — if that individual did something to

20 John Simmons suggests that a legitimate state's right to use force might be best understood in this way. He argues that in Locke's theory a legitimate state has 'the right to act first in preserving its citizens and promoting their good,' but that citizens retain a right to act for themselves when the state fails (*On the Edge of Anarchy*, 67-8).

21 'Justification and Legitimacy,' 746

22 'Justification and Legitimacy,' 746

bind himself to the government and bestowed such rights upon it. More particularly, Simmons asserts,

we only have an obligation to obey the state's directives, and the state only has an exclusive moral right to direct, be obeyed by, and coerce us if either (a) we have directly interacted with the state in some way that grounds a special moral relationship of that sort, or if (b) accepting membership in a state is the only way we can fulfill one of our other moral obligations or duties.²³

Simmons rules out (b), since he thinks that people rarely, if ever, need to join a state in order to fulfill their other obligations.²⁴ With regard to (a), Simmons supposes that someone could make a state legitimate over himself only by accepting benefits from it in conditions where the principle of fair play applies, or by consenting to make the state legitimate over him. Since Simmons argues that few people accept the benefits of the state (as opposed to simply receiving these benefits) and that other conditions for applying the principle of fair play do not hold, he supposes that a state will be legitimate with respect to an individual only if he previously agreed to give it authority over him.²⁵

Given these elements of his account, Simmons's argument for the inseparability thesis should have two parts. First, he should show that a state can only have a special right to issue commands and enforce them against an individual, if that individual has agreed to give the state such power. Second, he should show that any individual who gives the state the right to compel him to follow its commands also agrees to obey those commands.

Simmons has not done enough to demonstrate either claim. Consider the second step first (that someone who agrees to give the state a right to compel him must also agree to obey it). In a section of *On the Edge of Anarchy*, entitled 'The Content of Lockean Consent,' Simmons endorses the following account of what someone consents to when he joins civil society, calling it not only the correct interpretation of Locke, but the correct position, period, for someone who is (as Simmons is) a political voluntarist (59-68). Here is Simmons's account:

In the most general terms, each person's consent must surrender to political society "all the power necessary to the ends for which they unite into society" (II, 99), that

23 'Justification and Legitimacy,' 768-9

24 'Justification and Legitimacy,' 766-8

25 *Moral Principles and Political Obligation*, Chapter 5: 'The Duty of Fair Play: Twenty-Five Years Later' in *Justification and Legitimacy*

is, "as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the society shall require" (II, 130). Each surrenders these rights and undertakes an obligation to respect the exercise of these rights by their new holders. More specifically, Locke suggests that each person gives up two different kinds of rights on entering civil society. The natural executive right each "wholly gives up" (II, 130), transferring this right to one "common judge" over all the members (who also judges in "federative" matters between members and non-members). This right, then, when ultimately exercised by government, becomes its executive and federative powers (II, 144-8) — that is, its right to interpret the law and direct the community's use of force. Second, each relinquishes a portion of the right of self-government — that right made up from the "liberty of innocent delights" and the right "to do whatsoever he thinks fit for the preservation of himself and others within the permission of the law of nature" (II, 128). The right of innocent delights is retained, while the rest is given up only as "far forth as the preservation of himself and the rest of society shall require" (II, 129).²⁶

Unfortunately, while Simmons claims that this position is correct, he only argues that it is the best interpretation of Locke. That is, he argues that individuals must give up the rights he lists if governments are to have the powers that Locke ascribes to them. For instance, Locke considers legitimate states to have an exclusive right to punish individuals for violating the law and Simmons argues that a state could not have this exclusive right, unless its subjects gave up their right to judge that others have violated the law of nature and their right to punish such violations. Similarly, Simmons argues that subjects must give up some of their rights of self-government if Locke is to be correct that states have rights that go beyond a right to enforce the law of nature, such as the rights to impose taxes, regulate economic institutions, and determine how common property may be used.²⁷

Assuming, for the moment, that states can only gain the rights that make up legitimacy if individuals voluntarily transfer them, the inseparability thesis could be falsified in several ways. First, the inseparability thesis would be false if people could give up their right to punish violations of the law of nature without giving up their right of self-government. This would give the state the sole right to punish violations of the law of nature without its subjects having a duty to obey its laws (or a duty to accept its interpretation of the law of nature). Secondly, even if individuals had to give up some of their rights of self-government, the inseparability thesis would be false if an individual could give up his right not to have his options limited by coercively enforced general rules

26 *On the Edge of Anarchy*, 61-2. Numbers in parentheses refer to passages from John Locke's *Two Treatises of Government* (II = Second Treatise, # = paragraph number).

27 *On the Edge of Anarchy*, 63

that go beyond the law of nature, without giving up his right to act as he thinks best for his own and others' preservation in those coercive circumstances. This would give the state a special right to make and enforce laws that go beyond the laws of nature without its subjects having a duty to obey them.

Simmons does not consider either possibility, so we must hypothesize for ourselves why he might reject them. Simmons's reasoning might be that individuals consent to the powers of the state rather than negotiating their own agreements with it, and that we must therefore consider individuals to have only the option of either parting with the entire cluster of rights that the state (or one's fellow residents) requests they give up or giving up none. If this were right then we would need to determine which rights the state demands that individuals transfer to it. Simmons sets forth his own standard for determining this in the passage quoted above. There, Simmons asserts that an individual who joins civil society must give up 'as much of his natural liberty in providing for himself, as the good, prosperity, and safety of the society shall require.' So, Simmons believes that individuals who consent to become a part of a civil society give up whatever rights are necessary for the good, prosperity, and safety of their fellow citizens, but no rights that go beyond this.

Unfortunately for Simmons, accepting this standard does not commit us to the inseparability thesis. After all, Simmons himself argues that while states may be necessary for some functions, such as, (1) to resolve Hobbesian 'Prisoners' Dilemmas,' or (2) to ensure that the natural law is enforced impartially and effectively, or (3) to provide freedom and ensure justice, there is no reason to think that states need universal obedience to accomplish these tasks.²⁸ If this is so, then 'the good, prosperity and safety of society' does not require that states have the right to be obeyed, even though it might require that there be a single body with a right to issue general commands backed by force. This, in turn, suggests that individuals consenting to a state's authority might only be consenting to its having a special right to use force against them. So, even if we assume that individuals must agree to transfer their rights to the government in order for it to have any special rights against them, we have no reason to think that anyone who gives the state a special right to use force also gives it a right to his obedience.

28 'Justification and Legitimacy,' 766-7. Simmons does not whole-heartedly endorse the claim that states are necessary for such tasks. He much more reservedly says that he is 'not fully convinced' that these problems can only be solved by states.

Simmons also fails to support the first premise of this argument by failing to provide convincing arguments for political voluntarism. We have not been shown that a state could only have a special right to enforce the law against an individual if that individual does something that transfers this right. Behind Simmons' political voluntarism lies the following Lockean view of our moral situation: Each individual starts life with the same cluster of rights and duties. Which rights and duties an individual has later in life depends solely upon which rights she has voluntarily transferred to others or received from them, which property rights she has created through her own labor, and whether she has forfeited any of her rights by violating the natural law (for example, by stealing or by killing an innocent person). The Lockean theorist tries to discern what our original, natural rights are by imagining what it would be permissible for people to do in primitive and fairly non-social conditions on the assumption that each has the same rights.

In opposition to this picture, one might think that which rights and duties a person has depends upon her circumstances and is not always determined by her own choices. One might then think that the existence of a *de facto* state with certain good qualities (for instance, that it possesses a democratic constitution and tends to pass just laws and provide efficient services) could give an agent of such a state certain special rights and duties.

Simmons himself actually acknowledges that the simple Lockean picture is not strictly correct. He believes that in some cases individuals gain or lose rights to things depending on circumstances beyond their control. For instance, Simmons believes that everyone has a right to what he needs to survive and a right to exercise a significant degree of self-government. So Simmons believes that if a natural disaster flooded someone's land leaving him propertyless, then, if it were the only reasonable chance he had of surviving, that individual would suddenly have a right to take others' surplus property without their permission (and these people would have a duty to give it to him).²⁹ He would have a right to use certain things that he lacked just before the disaster, even though neither he nor the propertied individuals brought that disaster about.

Since Simmons does not deny that circumstances beyond an individual's control can affect what rights and duties he has, Simmons must argue that, for instance, being an official of a government which has certain good qualities and which exercises *de facto* control over a territory

29 *The Lockean Theory of Rights*, 278-306

could not give that official a special right to use force or issue commands when acting in accordance with the state's constitution. Although in his recent 'Justification and Legitimacy' Simmons argues quite persuasively that we may not simply assume that a state with good qualities has a right to enforce its laws or to be obeyed by those under its control, if Simmons wishes to establish the inseparability thesis he must do much more. He must show that a state's having such qualities *could not* give it a special right to issue laws and enforce them.

III The Inseparability Thesis and Interference

A final argument concerns a more limited version of the inseparability thesis. Instead of arguing that a state may not have *any* aspects of legitimacy unless its subjects have a duty to obey the law, the argument claims that there are certain aspects of legitimacy that a state can have only if its subjects have a duty to obey the law. This argument is made in response to several theorists who claim that the inseparability thesis is false. They claim that ordinary citizens could have a duty not to interfere with state officials' efforts to make laws and enforce them, even if they did not have a duty to obey the law. For instance, William Edmundson declares, 'There may be no general, even *prima facie*, duty to obey the laws of a state, not even those of a just state; but there is a general *prima facie* duty not to interfere with the administration of the laws of a just state.'³⁰ Kent Greenawalt more tentatively asserts that while the idea that 'the governed should not interfere with the exercise of force by those with authority' is not 'quite at the core' of the concept of legitimacy, 'imagining a concession of legitimacy which did not include [it] is difficult.'³¹ Finally, Christopher Morris describes legitimate states as states with the right to rule ('a right to make laws and enforce them with sanctions') and he suggests that 'for most people this right to rule, will correlate with an obligation to refrain from interfering with the state's actions.'³² Since each of these authors also claims that a state may be legitimate even if its citizens do not have a duty to obey its laws, they must believe that a right against non-interference does not entail a right to be obeyed.

30 *Three Anarchical Fallacies*, 48 (italics removed). Edmundson argues for this position on 48-61.

31 'Legitimate Authority and the Duty to Obey,' 181, 185

32 *An Essay on the Modern State*, 213, 216

In response, Thomas Christiano charges that a right to non-interference entails a right to be obeyed, because not interfering with the state involves complying with the law.³³ As Christiano sees it, the state's primary activity is the 'legal organization of society' and individuals' failure to comply with the law interferes with this task. He explains his point by comparing the state both to an umpire in baseball and to a film director. The umpire's activity is to call a game: to determine which pitches are strikes and balls and when a player is safe, out, or has scored a run. If a player does nothing to prevent the umpire from watching the pitches and shouting 'Ball!' or 'Strike!' but refuses to leave the batter's box after having been called out, he interferes with the umpire's calling of the game. Similarly, if the actors and camera crew working on a film let the director make all the commands he wants, but do not comply with them, they interfere with his direction of the film. Indeed, if the players do not heed the umpire's calls and the actors and camera crew ignore the director, then the 'umpire' is not really calling the game and the 'director' is not really directing the film.

In the same way, Christiano charges, if the state announces that individuals are to comply with certain rules and they do not, then the state is not legally organizing society. Indeed, if few people heed the government's demands, then its directives are not truly laws and the 'government' is not really a government. Christiano concludes that while any particular act of non-compliance may not be sufficient to undermine or remove the legal system, each such action constitutes interference with the state's activity of organizing society.

On this interpretation of the state's activities, Christiano is correct. One cannot have a duty not to interfere with the government's legal organization of society without having a duty to obey the law. Nevertheless, his argument has limited significance, because all of the work is done by the first assumption. If one proved that governments have a right to organize society in the way that a director has a right to direct a film, it would follow immediately that those being organized have a duty to comply with the laws. We would not need to appeal to any additional duty of non-interference. The duty to comply would follow from the right to organize (which would be a right in the sense of a Hohfeldian power).

If, on the other hand, one first argued that state officials had a right to issue commands backed by force, and then argued for a duty of non-interference — a duty not to interfere with their *attempts* to regulate society

33 Thomas Christiano, 'Justice and Disagreement,' *Ethics* 110 (1999) 165-87

— then we would have no clear connection between the duty of non-interference and a duty to obey the law. This duty not to interfere with the state's attempts to organize society seems closer to what the other theorists were advocating, and it is a right that one might advocate even if one became persuaded that there was no duty to obey the law.³⁴

IV Conclusion

I have shown that no argument yet provided or suggested supports the inseparability thesis: the claim that states whose residents lack a duty to obey the law cannot have any of the rights of legitimacy. Of course, I have not shown that any state lacks a right to be obeyed and yet has a special right to use force and issue commands. For all I have said, it may be that no state is legitimate in any respect or that many states have both a right to be obeyed and a special right to issue commands backed by force. It might even be true that all of the aspects of legitimacy are inseparable.

While the inseparability thesis may be true, we are not justified in assuming that it is. Such assumptions may lead us to make unwarranted inferences and blind us to possibilities that could better describe the moral status of states and the individuals within them. Indeed, we should be cautious about many of the assumptions that people make in trying to discern what ordinary individuals and government officials may or must do across a great variety of regimes in a diverse range of

34 Such a duty of non-interference would give individuals a duty not to use force (and, perhaps, not use deceit) to prevent state officials from making, promulgating or enforcing the laws. For instance, someone could have a duty not to attack officers coming to arrest him and a duty not to impede their progress in attempting to apprehend others, while not having a duty to do what the law requires or even to stop when the police say 'stop.' Similarly, one could have a duty not to lie to detectives or judges, without having a duty to tell them anything or to show up for court dates. Finally, one could have a duty not to interfere with attempts to promulgate the laws (for instance, by mis-reporting them in newspapers, tearing down posters announcing the laws or sabotaging web-sites explaining them) without having a duty to obey these laws.

One may worry that there is no real distinction between not interfering with the state and obeying the laws, because all states have laws against interference. The distinction here is that the *reason* one would have to refrain from interfering is not that the law forbids such interference, but that it is wrong *as an act of interference*. What would make it wrong for someone to interfere with the police, would be that it is an act of interference and not that it is an act that violates the law. I thank a reviewer for pressing me to clarify this distinction.

circumstances. An implicit assumption of much political theory is that there is a certain set of characteristics such that, if a state possesses it, then its officials always act permissibly when applying the laws, its subjects all have a duty to obey the laws and support the state, and foreigners all have a duty not to interfere with how the state conducts its internal business. In contrast, if the state does not have this set of characteristics, then the fact that a particular law or regulation or court sentence or treaty was passed in accordance with the constitution has no significance. I doubt that there is any such set of characteristics, and I suspect that if there is such a set of characteristics, no actual state has ever possessed them.

Not only am I hesitant to assume that all of the rights of legitimacy go together, I am hesitant to suppose that the 'individual' rights of legitimacy have the sort of unity that they are assumed to have. There might be no one 'right to use coercion' such that all states either have it or have no special right to use coercion. Instead, different states might have a right to issue commands regarding different matters, and they might have such rights against some segments of their population and not others. Similarly, there might not be a uniform right to be obeyed which all states either have or lack, but different governments might have authority over different ranges of matters. For instance, one government might have authority to regulate fishing and another not, even though each has a right to punish people for murder according to its own laws and court systems. Indeed, within one government the qualities of administrative departments (and the rules establishing them) might vary widely, so that, for instance, officials might permissibly implement (and individuals might have a duty to comply with) whatever regulations the Department of Welfare devises in accordance with its mandate, while the fact that a rule was established by the Department of Occupational Safety might have no moral weight, even though both departments were established in accordance with constitutional procedures.³⁵ Finally, the moral importance of the law (e.g. the sorts of considerations that an act's being legally required would trump) might vary from state to state. For instance, if the duty to obey the law depends on the democratic credentials of a government, then the moral importance of

35 Some relevant considerations might be the following: whether a department has procedures that provide for participation from individuals or corporations who will be most directly affected by the regulations and whether a department's process of generating regulations makes it take into consideration important substantive principles, or whether its procedures effectively block it from considering such principles.

something's being against the law could vary with how democratic a state is.

These all seem like live possibilities to me, so I think we should beware of assuming a simplicity that needs to be proven. As John Simmons counsels in his recent 'Justification and Legitimacy,' we need to be clear about what conclusions our arguments entitle us to and not assume that in proving one thing, we have proven many others.³⁶ We also need to beware of using terminology or describing the tasks of political philosophy in ways that implicitly exclude options that we have not ruled out by argument.

Received: September 2001

Revised: July 2002

Revised: February 2003

36 Simmons points out that we cannot simply argue that certain kinds of state are beneficial, on balance, and then assume that we have proven that there is a duty to obey them.

