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POLITICAL OBLIGATION WITHOUT COMPREHENSIVENESS

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Abstract. Philosophical anarchists deny state legitimacy because they reject traditional accounts of political obligation and any possible alternatives. Their arguments have been powerful enough to create a vacuum where a presumption of a far-reaching moral requirement to obey the state once resided. Many "statists" have attempted to rework traditional bases for political obligation, uncover neglected ones, or create new ones altogether. Of these, defenders of a "weak" legitimacy might agree with philosophical anarchists that there is no political obligation, but deny that legitimacy without political obligation is conceptually or morally problematic. Thus, they may agree with statists that there are, in fact, legitimate states while agreeing with philosophical anarchist that legitimate states do not have a right to our obedience. But there is still a puzzle before us left by centuries of work associating the legitimacy of the state with its right to our obedience. Surely there is something important enough about the state's right to impose and enforce law that entails some obligation in us to obey it, right? One possible solution to this puzzle is to hold "strong" legitimacy, such that political obligation *is* a necessary condition for it, together with "weak" political obligation, such that our requirements to obey are limited or attenuated in a principled fashion. I attempt to sketch such a possibility below. I do this by rejecting a basic assumption held by anarchists and statists in discussions of political obligation and legitimacy.

Keywords: political obligation; duty to obey the law; comprehensiveness; content-independence; philosophical anarchism; legitimacy.

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In the last four decades the discussion of legitimacy and political obligation (i.e., the moral duty to obey the law) has taken surprising twists and turns. On the assumption that political obligation is a necessary condition for it, philosophical anarchists deny state legitimacy because they reject traditional accounts of political obligation and any possible alternatives.[2] Their arguments have been powerful enough to create a vacuum where a presumption of a far-reaching moral requirement to obey the state once resided. Many "statists" have attempted to rework traditional bases for political obligation, uncover neglected ones, or create new ones altogether. Most recently, some who are less optimistic about our chances of creating a workable account of political obligation reject the orthodox assumption that it is a necessary condition for legitimacy.[3] Defenders of this "weak" legitimacy might agree with philosophical anarchists that there is no political obligation, but deny that legitimacy without political obligation is conceptually or morally problematic. Thus, they may agree with statists that there are, in fact, legitimate states.

Where does this leave us? Defenders of weak legitimacy have shown us that there are other, previously underexplored options on the table. They claim that some of these options are surprisingly consistent with our considered judgments on the topic. But there is still a puzzle before us, left by centuries of work associating the legitimacy of the state with its right to our obedience. Surely there is something important enough about the state's right to impose and enforce law that entails some obligation in us to obey it, right? Even if we concede that a right to coerce does not by itself entail an obligation to obey, does that mean it never does?

There may be other ways to conceive of legitimacy and political obligation that remain underappreciated. One such possibility is to hold "strong" legitimacy, such that political obligation is a necessary condition

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2 Most notably A. John Simmons.

3 Cf. Applbaum, Arthur. 2010. "Legitimacy without the Duty to Obey". *Philosophy and Public Affairs* 38: 215-239; Zhu, Jiafeng. 2017. "Farewell to Political Obligation: In Defense of a Permissive Conception of Legitimacy". *Pacific Philosophical Quarterly*, 98:449-469.

for legitimacy, together with "weak" political obligation, such that our requirements to obey are limited or attenuated in a principled fashion. I attempt to sketch such a possibility below via the rejection of a basic assumption in discussions of political obligation and legitimacy.

The assumption is one that virtually all participants in the voluminous literature on political obligation hold—that political obligation, as a necessary condition for legitimacy, must be comprehensive (i.e., subjects have a duty to obey all or most of the law). First, I disambiguate comprehensiveness from two other features of legitimacy—generality and what I will call "wide scope," thereby giving a short description of their roles as features of legitimacy and/or political obligation. Secondly, I entertain and reject the possibility that content-independence, another accepted necessary condition of political obligation, entails comprehensiveness. I argue that content-independence is easily misconstrued as implicitly defining the range of commands that ought to be obeyed (usually, all or most of the law), but that it is instead a characteristic of the reasons for our obedience to the law whatever the range of laws that are covered by those reasons. To support this, I show that political obligation without comprehensiveness is consistent with two types of recent content-independence accounts. There is nothing conceptually preventing one's obligations from being content-independent for some subset of legal commands and we may have a content-independent duty to obey the law even if it fails the criterion of comprehensiveness. Finally, I argue that there is nothing preventing us from acknowledging that political obligation is a necessary condition of legitimacy, but that comprehensiveness is not a necessary condition of political obligation.

The application of this result is significant. It shows that statists have conceded too much in assuming they must account for a comprehensive duty to obey in order to defend legitimacy, that philosophical anarchists have more work to do in order to show that there are no legitimate states, and that those who endorse weak legitimacy are overlooking an alternative that may by its ability to cohere with widespread intuitions about political obligation be a more attractive

option. In addition, this view retains intuitively plausible features of political obligation.

1. Generality, Wide Scope, and Comprehensiveness

"There is a duty for all (or most subjects) to obey all (or most) laws because they are laws." This statement is packed with meaning. As a result, the concepts entailed by it are easily conflated and arguments may subsequently be misguided without proper disambiguation. For the most part in the twentieth and twenty-first century literature on political legitimacy, it is common to point explicitly to generality, the idea that all or most subjects of a state have a duty to obey the law, as a necessary condition of political obligation. As A. John Simmons writes in his early critical work on the subject, "But a wider criterion of success [in an account of political obligation] requires […] that it be reasonably general in its application, that is, that it entail that most (or at least many) citizens in most (or many) states are politically bound." He then claims that, "it is clear that most of those who have advanced accounts of political obligation have regarded generality […] as the primary criterion of success."[4] He notes that, in addition to the term "general" some have used terms like "generic" or "universal" to describe the extent of the population over which the duty to obey the law applies.

In contrast, the assumption that political obligation entails that one ought to obey all of the law is typically not explicitly mentioned. Reflecting the lack of terminological consistency in the literature on political obligation, this feature has been called both "comprehensiveness"[5] and, puzzlingly, "generality."[6] Following George Klosko, I refer to the obligation to obey all of the law as

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4 Simmons, A. John. 1979. *Moral Principles and Political Obligations*. Princeton: Princeton University Press.

5 Klosko, George. 2005. *Political Obligations.* New York: Oxford University Press.

6 Valentini, Laura. 2018. "The Content-Independence of Political Obligation: What it is and How to Test It", *Legal Theory*, 24:135-157.

comprehensiveness.[7] Take one example of the assumption of comprehensiveness in the work of Christopher Wellman. He frequently refers to the duty to obey the "legal commands" or the "law" of one's state. For the most part, however, he leaves the semantic range of these terms undefined. Yet, an attempt at clarification is not terribly difficult. Wellman also makes it clear that there are some laws which one has no duty to obey—namely, "unjust" laws. Despite this, his language indicates that the justice of laws is something like an enabling condition before the law provides reasons for our action rather than a claim about one's duty to obey resting on the content of the law. I will discuss arguments related to this idea in more detail below, but for now it is sufficient to note that he cites the duty to obey the law within the justice restrictions without thereby encountering much resistance in the literature. On the other hand, though, within the sphere of "just" laws, it is very clear that he intends our duty to obey to cover all (or at least most) of those imposed by the state. As he explains,

> Now, because most of us typically disagree with at least some of our state's laws, clearly we would prefer to be able to choose which laws to obey or perhaps to offer our support in some fashion that has nothing to do with obedience to these rules. But since few of us could reserve this discretion for ourselves only against a backdrop of general compliance in which others are denied this discretion, clearly it would be wrong to unfairly make an exception for ourselves.[8]

When he refers to our being "able to choose," his point is that we would like to be able to make moral judgments about the law, not simply judgments of prudence or convenience. Not only does he suggest, conceptually, that the duty to obey should cover all just laws, but he offers a very quick justification for this assumption. The puzzle before us at the moment is not whether his justification is adequate, but rather why so few

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7 (2005)

8 Wellman, C. H., & Simmons, A. J. 2005. *Is There a Duty to Obey the Law?* New York: Cambridge University Press, p. 45.

authors seem interested in offering any fuller account of it.[9] This is especially important considering how often it is assumed.

George Klosko is one of few commentators who handles comprehensiveness explicitly in his work. Perhaps this is so because he attempts to find multiple moral sources for the duty to obey the law in what he calls a multiple principle (MP) theory of political obligation. On this view, he can acknowledge that traditional attempts to find a single source for the duty to obey the law fail due to lack of generality or comprehensiveness, but when multiple sources are used, we may discover grounds for a general and comprehensive duty to obey the law. Klosko appears open to the idea that political obligation does not entail a comprehensive duty to obey the law, but he does not explicitly endorse the view and goes to great lengths to show he has achieved comprehensiveness in his own theory. He writes that his MP theory "is general and particular, establishes obligations that are limited in force, and is able to cover the entire range of state services."[10] Though MP theory might depart from traditional theories insofar as subjects must think about the content of particular laws to understand why they ought to obey, they need not think about the content of the laws to understand that they ought to obey (or that there is a presumption in favor of obedience). For whatever reason, Klosko and others find it important to establish a comprehensive political obligation. Whether there is good reason for this is the central question of this essay, but for now, it is sufficient to note that generality and comprehensiveness are logically distinct and separable concepts. Thus, in our assessment of comprehensiveness, we can leave questions about generality aside.

Another source of potential confusion is that between comprehensiveness and what I will call "wide scope"—that the state's rights of legitimacy pertain to the regulation of a broad range of human activities. Before we move on it is important to note the versatility of generality in contrast to wide scope. Generality is a feature of political

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9 George Klosko is a notable exception here. I treat his comments on the subject in subsequent sections.

10 P. 247 (my emphasis)

obligation as well as the full set of state rights typically associated with legitimacy, such as the right to establish and enforce law. The state has a right to impose law over all its subjects and all its subjects ought to obey them. However, I argue below that the theoretical and intuitive reasons for supposing that wide scope must be present in a successful account of the rights of legitimacy simply do not apply to political obligation.

Ambiguity on its role can be seen in a number of places in philosophical literature. For example, Michael Huemer uses the term "comprehensiveness" to describe the principle that, "The state is entitled to regulate a broad range of human activities, and individuals must obey the state's directives within that broad sphere."[11] He is actually citing two principles here. The first is wide scope and the second is comprehensiveness (again, following the most plausible interpretation of Klosko's usage). Although what he says about the wide scope is meant to explain a feature in the rights of legitimacy and political obligation, once he turns to illustrating it, this is not the case. He writes, "But modern states typically regulate and are taken to be entitled to regulate such matters as the terms of employment contracts, the trading of financial securities, medical procedures…"[12] His language suggests that the examples cover the entitlement of the state to rule (e.g., "regulate"), which pertains to features of legitimacy (e.g., the right to command and coerce, to imposes law, etc.), but not necessarily to political obligation.

If we are tempted to criticize Huemer's unorthodox usage of the word "comprehensive," it would be wise to hesitate. First, it is not clear why the term is not a more appropriate indicator for the scope of permissible state action instead of the extent of the laws we must obey. Permissible state action typically covers a wider range of activities than actual state laws we must obey (assuming that most states do not impose law over all the human activities they are entitled to regulate). Secondly, commentators do not always make it clear that they are distinguishing comprehensiveness from the scope of permissible state action. George

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[11] Huemer, Michael. 2012. *The Problem of Political Authority*. New York: Palgrave Macmillan, p. 12.

[12] *Ibid*. (my emphasis)

Klosko remarks that, "…at the present time no theory of obligation is able to generate 'comprehensive' political obligations, moral requirements to obey all laws."[13] But his language is at least ambiguous on the subject. As quoted above he describes his MP theory as, "able to cover the entire range of state services."[14] Is he concerned more with the range of services the state may provide or with the extent of the law that MP theory entails we ought to obey? I am not here claiming that Klosko or Huemer intentionally equivocate on comprehensiveness, but ambiguity in their language may have something to do with the fact that while wide scope is an important part of discussions of state legitimacy, it does not seem to have a natural relevance to political obligation in particular. But, to show that this is the case requires some argument.

Imagine we had to articulate exactly what wide scope means for rights of legitimacy excluding any consideration of political obligation. It would have to describe on some level the extent of the rights of the state and it would indicate that the scope of the rights is broad. To avoid complicated ancillary discussions about the nature of the categories over which we would define the broad scope of the state's right, imagine that such categories exist in a non-problematic way. Something like the following would capture what we mean by saying a legitimate state has a wide scope of permissible state action relating, for example, to the state's right to impose law.

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

This is simple enough, but what would a principle of wide scope look like for political obligation? Let's attempt to formulate a principle as consistent with (L1) as we can manage for political obligation.

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

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13 (2005)

14 *Ibid*. p. 247

This is inadequate in expressing wide scope, and a moment's reflection reveals why. Imagine what I will call a de facto limited state, S. It is not limited in any way by the scope of its right to impose law, but only in the actual exercise of that right. For example, we can stipulate that it takes as its sole concern the protection of consumer interests against corporate injustice. Thus, its actual imposition of law is significantly narrower than its right to impose it. Does this in any way affect the truth of (L1) above? No. S still has a right to impose law over a wide range of human activity, but it has chosen not to do so.

What about (PO1)? Presumably, subjects of S have a moral obligation to obey the laws of S, no more and no less. The subjects of S, then, have a moral obligation to obey laws that apply to a limited range of human activity. Thus, (PO1) is false for subjects, like those in S, under a legitimate, but de facto limited state. Further, we would say this even while we assert that the subjects of S have comprehensive political obligation (i.e., duty to obey all (or most) of the law). If wide scope is a necessary condition of political obligation (not just the right to impose law, among others), then there should be no cases of legitimacy where the right to impose law has wide scope but political obligation does not. The case above clearly shows that there can be such a case even with comprehensive political obligation. Thus, according to (PO1), wide scope is not a necessary condition of political obligation.

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

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

If this is the only way to capture the truth of political obligation in relation to the breadth of laws, we capture it at the expense of any meaningful breadth of obligation.

The relevant change between (PO1) and (PO2) is the inclusion of an "actual laws" clause. Thus, it seems the relevant feature is again that of the actual imposition of laws over subjects, not the range of human activities over which a state is permitted to impose law. We are here faced with a slightly different, but related problem. If our principle of wide scope (PO2) does not ensure any real breadth to the obligation (even if it ensures the possibility of breadth), then in what sense is it a principle of wide scope? It is at best a principle of variable breadth and so does not guarantee anything close to what we get in the breadth requirement for legitimacy rights like the right to impose law as in (L1). Thus, (PO2) is not accurately characterized as a wide scope requirement and the breadth of political obligation does not match the breadth of the right to impose law. Instead, the more we tweak the principle, the more we drift toward comprehensiveness. If political obligation is comprehensive, then (PO2) is redundant. For, it is entailed by the conjunction of the principles of wide scope and comprehensiveness. If we ought to obey all the law actually imposed by the state and the state has a right to impose over a wide range of human activity, then we ought to obey laws that apply to a wide range of human activity whenever the laws actually apply to a wide range of human activity.

What I have shown so far is that wide scope (or any requirement for wide breadth in human activity) is irrelevant for political obligation. But now that we have separated wide scope in legitimacy from comprehensiveness in political obligation, we are still left to evaluate the importance of the latter. Why should we intuitively or theoretically think comprehensiveness is a necessary condition for political obligation?

2. Content-Independence and Comprehensiveness

A much more likely candidate for an entailment relationship is from content-independence to comprehensiveness. Many have written on content-independence as a requirement for an adequate account of

political obligation.[15] While there is no consensus on its definition, we can see similarities from the work of many philosophers.[16] Leslie Green writes that content-independent reasons are such that "…their force does not depend on the nature or merits of the action they require,"[17] while Joseph Raz writes that, "there is no direct connection between the reason and the action for which it is a reason."[18] Huemer characterizes content-independence as those cases where "authority is not tied to the specific content of its laws."[19] Whatever your preferred definition, as one author puts it, "virtually everyone who writes about political or legal obligation, critics and defenders alike, takes these to be content-independent obligations."[20]

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15 Most cite Hart, H.L.A. 1982. *Essays on Bentham*. Oxford: Oxford University Press, as the earliest mention of the idea. Green, Leslie. 1988. *The Authority of the State.* Oxford: Clarendon Press, offers a strong case for the presence of content-independence in any case of legitimate authority. For discussions, see Christiano, Thomas. 2008. *The Constitution of Equality: Democratic Authority and its Limits*. Oxford: Oxford University Press; Rawls, John. 1964. "Legal Obligation and the Duty of Fair Play". *In Law and Philosophy*, ed. S. Hook. New York: New York University Press; Raz, Joseph. 1986. *The Morality of Freedom.* Oxford: Clarendon Press; (Huemer 2012); Hart, H.L.A. 1958. "Legal and Moral Obligation". In *Essays in Moral Philosophy*, ed. A. I. Melden. Seattle: University of Washington Press; Klosko, George. 2011. "Are Political Obligations Content-Independent?", *Political Theory*, 39:498-523; (Valentini 2018); Sciaraffa, Stefan. 2009. "On Content-Independent Reasons: It's Not in the Name". *Law and Philosophy,* 28:233-260; Markwick, Peter. 2000. "Law and Content-Independent Reasons". *Oxford Journal of Legal Studies*, 20:579-596; and Soper, Philip. 1999. "Legal Theory and the Claim of Authority". In *The Duty to Obey the Law,* ed. W. Edmundson, 213-242. Lanham : Rowman and Littlefield. Also see Gur, Noam. 2011. "Are Legal Rules Content-Independent Reasons?". *Problema* 5:175-210. On his view, I support weak content-independence (the only kind relevant for this discussion) over a range of laws.

16 I have tried to keep my examples simple here. For a more technical model of content-independence, see Markwick (2000): "If ϕ-ing's F-ness is a reason to ϕ, this reason is content-independent if and only if, for any other act-type ψ, there would be reason to ψ if F were a property of ψ-ing."

17 (2004)

18 (1986)

19 (2012)

20 Dagger, Richard. 2018. Playing Fair: Political Obligations and Problems of Punishment. Oxford: Oxford University Press, p. 129.

It is easier to see why writers might either conflate content-independence and comprehensiveness or argue for an entailment relation between them. The statement that political obligation involves the duty to obey the law because it is the law (or qua law) leaves the impression that the duty applies to everything within the category of law. Here again, Klosko's MP theory is instructive. He seems to infer from the fact that we need multiple principles to establish a comprehensive duty to obey the law that this duty is content dependent. If one ought to obey a law for the content-independent reason that it is the law, then there cannot be other moral considerations limiting the category within which law is the content-independent reason for obedience. Following this, if there are no other moral considerations limiting the category within which law is the primary reason for obedience, then law as a reason for obedience will apply to all the law (it must be comprehensive).

Klosko is willing to concede that there may be content-independence even if the state is limited in some ways. For example, states cannot impose just any laws they please, and thus, there would be no duty to obey those outside the scope of the state's authority. However, he writes that, "Within even a limited sphere, government may have the ability to make laws that are [content-independent] CI, that bind only because they are laws. The fact that government cannot make laws on all subjects does not limit its ability to make CI laws in the areas it controls. However, I believe the very notion of limited powers tells against such an analysis."[21] According to Klosko, because states must justify each law they impose and there is no single justification for all the laws states are entitled to impose, the political obligation of subjects will be content dependent.

More recently, Richard Dagger rejects Klosko's resort to content dependent political obligation, but holds the same assumption about the relationship between content-independence and comprehensiveness. In his explanation of Klosko's view he writes, "Moral force will pass through most laws, however, with one or more of three principles—fairness,

[21] (2011, p. 507)

mutual aid, or the common good—supplying the moral content and accounting for political obligations that together prove to be comprehensive. But there is no way to justify content-independent obligations to obey the law as such."[22] In other words, if there is no single justificatory principle that makes political obligation comprehensive, then it will be content dependent.

If our reason for acting in accordance with a command is that it is legal, then we might easily assume that we must obey any command that has that feature. However, this assumption is unfounded. Below, I use two recent accounts of content-independence to show that it does not entail comprehensiveness. I use these particular accounts because (a) they represent two very different ways we might characterize the concept, and (b) the theory I use to represent the dominant approach to content-independence is relatively restrictive in its assessment of which theories satisfy the requirements. In showing that political obligation without comprehensiveness can satisfy content-independence even on the most restrictive account, we can be more confident that political obligation without comprehensiveness is not conceptually problematic.

i. Content-Based Content-Independence

Despite the variety of potential definitions of content-independence, there are two categories in the literature—intention-based (the minority view) and content-based (the majority view).[23] To begin with the former, Laura Valentini has recently argued that once we clarify some conceptual difficulties in content-independence we may develop a test for it, which, surprisingly, shows that many accounts of political obligation purporting to satisfy it do not.[24] First, though, she explains that content-independence is consistent with content-sensitivity. Content-sensitivity indicates that

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22 (2018, p. 130)

23 It might seem odd to even entertain a concept of content-independence that is not content-based. However, Sciaraffa explains this as an unfortunate misnomer for content-independence. Thus, the idea political theorists cite as a necessary condition of political authority is not really about the content at all.

24 Valentini (2018)

the political obligation is "conditional on the content of legal commands meeting certain standards of moral acceptability."[25] This is similar to Wellman's requirement for laws to be just that we covered in section 1. Thus, reasons can still be contend-independent even if they are constrained by broad considerations of justice and even though they do not exclude our judgment of other moral factors. Her test for determining content-independence is as follows.

> "Content-independence test (CIT): Take a set of legal commands and assume that they satisfy property P, proposed by a particular theory purporting to vindicate political obligation. Then, do (A) or (B).
>
> Holding everything else constant, take one (or more) of those commands—e.g., the command to ϕ—and change its content to ϕ^*, where ϕ^*-ing does not violate the constraints of content-sensitivity (i.e., it is not morally impermissible). If the relevant property P is no longer satisfied by the modified command(s), we will know that P fails to establish a content-independent obligation to obey the law because it is the law.
>
> Holding everything else constant, imagine a new legal directive to ϕ^* is introduced, where ϕ^*-ing does not violate the constraints of content-sensitivity (i.e., it is not morally impermissible). If the new directive does not satisfy property P, we will know that P fails to establish a content-independent obligation to obey the law because it is the law."[26]

In other words, P establishes a content-independent obligation if, whenever we switch out a law that currently satisfies P for one that has new content or whenever we introduce new laws, the law with new content or the new law also satisfies P.

Assuming Valentini's test is an accurate measure of content-independence, let us evaluate her assessment of its status in at least one account of political obligation. She rejects the "instrumentalist" view of Joseph Raz that identifies P as "intending to be guided by the authority's directives makes one better conform to reasons that apply to one anyway" (2018). For this reason, the state offers exclusionary reasons (eliminating

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[25] *Ibid.*

[26] *Ibid.*

the judgment of the subject) for obedience to its commands. However, according to Valentini this fails the CIT because whether a replacement law or new law satisfies P depends entirely on whether that specific law in fact recommends action that aligns with the reasons that apply to the subject. In other words, the law must be better at prescribing the right action in light of reasons that apply to you than your own judgment would. But there is no indication that laws will reliably do this. Our obedience would be based entirely on the degree to which law "tracks" our independent reasons and there is insufficient evidence that it does so. Thus, the instrumentalist view does not retain content-independence. Were we to employ her test, we would need to verify that new laws or laws with new content still match our independent reasons for acting accordingly. Thus, the reasons are not content-independent.

Yet, one objection Valentini addresses relates to the idea that Raz views authority relative to domains, or classes, of directives. This is important for our analysis of the relationship between content-independence and comprehensiveness. "The law has authority in a domain D, relative to subject S, whenever the putative subject would better comply with the reasons that apply to him in that domain by following the law rather than his judgment."[27] For example, the domain could be traffic regulation, taxation, or food safety. Thus, I need not rely on the fact that the individual law tracks my independent reasons, but rather that it is a member of a category of laws, compliance with which would better satisfy my independent reasons. Valentini's response is that, while there could be content-independence within domains, the domain would have to be defined independently of the content of the specific laws it covers and that the domain cannot simply be reverse engineered to cover laws that satisfy P. As an example, imagine that the state has authority in the domain of traffic regulation. One ought to follow the law in that domain even if some particular laws fail to make one "better conform to reasons that apply to one anyway." We ought to do so because following the law in that domain generally will do better at tracking reasons that apply to us than our own judgment (even if specific laws do not). Valentini writes

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[27] *Ibid.*

that the view "does deliver content-independence (in the domain of traffic regulation), but it is substantively implausible: it is at odds with our lived moral experience. And…it is also arbitrary."[28]

While it is perfectly appropriate for Valentini to reject the most plausible version of Raz's "instrumentalist" view as inconsistent with moral experience, we are more interested in the implications of her view of content-independence on comprehensiveness. Do her arguments against that view entail that content-independence cannot be present in a subset of the law? In other words, does an authority's ability to create content-independent reasons for obedience entail that subjects ought to obey all (or most) of its commands? I argue that the answer is "no." The rejection of the view cannot be separated from its specification of P. Because P depends on the law's ability to track reasons one has independently of the law, it is not surprising that we would find it implausible as a content-independent basis for action. But that highlights a problem with that specific rendering of P, not with the general idea of content-independence relative to domains. There can be content-independence in definable subsets of the law without the authority of the state being based on its ability to track reasons that already apply to me. We may have content-independent reasons to obey the law even if by that we mean obedience only to a subset of the whole.[29] Valentini's version of content-based content-independence does not entail comprehensiveness.

Notice also that what I have shown above applies more broadly than Raz's particular conception of authority within domains. We need not be concerned with why he believes authority can obtain in specific domains even when particular laws fail to satisfy P. Our concern is merely that there are domains that represent subsets of laws, that the state has authority in those domains, and that we consider the reasons imposed by legislation in these domains to be content-independent. To generalize, as

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[28] *Ibid*.

[29] We have to be careful with our language here, of course. Perhaps it is less appropriate to talk about our duty to obey "the law" without specifying what portion of it we ought to obey. However, if we restrict our discussion to that category, it is not inappropriate to say that we ought to obey the law because it is the law. If the state in fact has political authority in that area, then our reasons for acting will be because it has legislated thus.

long as the set of laws over which the state has the power to impose content-independent obligation are clearly definable, then it should not matter whether that set extends to all laws established by the state. Recall Green's claim that the force of content-independent reasons "does not depend on the nature or merits of the action they require."[30] This can be true for a well-defined subset of laws just as it can be of the entirety of the law. Raz's claim that, "there is no direct connection between the reason and the action for which it is a reason"[31] may also be true of a subset of laws. While this does not leave us with great clarity on the necessary conditions of content-independence, it does open the door for more possibilities than we would otherwise have entertained for political obligation.

ii. Intention-Based Content-Independence

Many definitions of content-independence are, like Valentini's test, focused on the content of the laws in question. As Sciaraffa writes, "Most current attempts at unpacking [content-independence] have followed Hart in distinguishing between reasons that are independent of the content, nature or character of the action for which they are reasons and reasons that are in some sense dependent on that content, nature, or character."[32] However, his revisionist view states that there may be reason to doubt that "content-based" analyses of content-independence capture what we want in the concept.

Sciaraffa develops an alternative "intention-based" analysis of content-independence to combat problems with the dominant view. He claims that content-based analyses fail to distinguish paradigmatic cases of content-independence from content-dependence. What separates these is in fact the intentions of those who issue the directives.

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30 Green, Leslie. "Legal Obligation and Authority". In *The Stanford Encyclopedia of Philosophy* (Spring 2004 Edition), ed. Edward N. Zalta. http://plato.Stanford.edu/archives/spr2004/entries/legal-obligation/.

31 (1986)

32 (2009)

> "CI Reason for Action: X has the intention that Y adopt the intention to ϕ."[33]

In the context of political authority, whether a law provides content-independent reasons is based on whether the authority intends for its subjects to take on the intention to do what the law prescribes. What concerns us is the degree to which Sciaraffa's intention-based view of content-independence entails anything about the scope of the subject's obligation to obey the law. Two critical points allow us to infer that it is possible for there to be content-independence in political obligation without comprehensiveness.

First, we could imagine a state whose "self-image"[34] is such that it does not intend for its subjects to adopt the intention to do what is prescribed in the law. At first glance this might seem implausible. After all, what kind of state imposes law without the intention that its subjects follow it? However, it is not difficult to find a reasonable theoretical basis for this. For example, Hart's mercantile theory of law treats the law as a choosing system.[35] According to this system, law is justified as a way of preserving the autonomous choice of individuals who wish to plan out their lives. Hart acknowledges that his conception of law does not characterize the reasons people cite for obedience or disobedience to the law, but one could easily imagine the intentions of states (whether actual or represented) excluding any reference to the idea that subjects intend to act as the law prescribes. The state may not expect anything about the subjects' intentions either way, but still retain the right to punish them if they do not comply.

The second point rests on the separation of certain rights in the state. As Robert Nozick wrote, "I may release someone from an obligation not

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[33] (2009, my bold).

[34] See Green (1988) and Klosko (2011) for interesting discussion on the state's self-image. For my part, I find the self-image of the state to be very little indication of its actual authority or our obligations to it. But there is no space to defend that view here. Neither does the matter affect the argument of the present paper in any way.

[35] Hart, H.L.A. 1968. *Punishment and Responsibility: Essays in the Philosophy of Law*. Oxford: Oxford University Press.

to force me to do A…Yet so releasing them does not create in me an obligation to them to do A."[36] If political obligation and rights of legitimacy are separable, then it is possible for a state to have the right to establish a broader set of laws than the set of laws that would impose an obligation on its subjects. This means that our obligations may be content-independent for some set of laws not coextensive with the laws rightfully established by the state. This may be the case even if the state has the intention for its subjects to intend to act on all of the laws it establishes. It is important to remember that the question is not whether we can imagine a plausible account of political authority that generates this result, but whether there is anything about content-independence by itself that guarantees comprehensiveness. It seems the answer is "no."

iii. Objections

At this point, it is worth responding to a few objections. First, while my concern has been primarily with the mere possibility of content-independence without comprehensiveness, one might wonder if the plausibility of finding a successful theory of political obligation resulting in that state of affairs affects the arguments more than I have implied. In other words, perhaps very few consider content-independence without comprehensiveness because it is too difficult to imagine a way to specify a subset of law that is clear enough to give content-independent reasons within it. While it is difficult to address the force of this objection without an actual theory that meets the criteria, we have some reason to think it is fairly weak. Those who support content-independence for political obligation do not necessarily consider themselves obliged to present a successful theory to show that there is in fact any political obligation with content-independence. In fact, some of the staunchest defenders of content-independence in political obligation deny that we have any such obligation because there are no successful theories that produce content-independent obligations to obey all of the law.[37] Yet, very few

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[36] Nozick, Robert. 1974. *Anarchy, State and Utopia.* New York: Basic Books, Inc.

[37] A. John Simmons is a possible example here.

doubt the importance of content-independence as a necessary condition for this reason.[38]

Perhaps the criticism is deeper than I have characterized it. One might worry that there is no way to specify a subset of laws for which we have content-independent reasons to obey. This may be a result of some intrinsic feature of content-independence. While it is difficult to know the substance of this criticism without further clarification, it is possible to allay some of the worry by pointing to an example that seems to work quite well. Sciaraffa writes that, "An agent's ability to play the role of coordinating agent is a condition that enables her (or its) directives as content-independent reasons over a limited domain. Namely, a person in the thick of a coordination problem has reason to follow the coordinating signals of the coordinating agent."[39] On this view the state acts as a coordinating agent and thereby produces content-independent reasons for others to follow its directives. However, the state does much more than this, too. It imposes and enforces laws against straightforward rights violations, for example. Thus, laws that serve as solutions to coordination problems may constitute a subset of the entire body of laws that the state establishes. If we imagine that none of the other laws established by the state impose content-independent obligations on its subjects, it still does not seem difficult to define the subset of laws for which subjects have content-independent obligations to obey.[40]

A second objection states that, despite the foregoing arguments, the language makes it intuitively implausible that content-independence is ever limited to a subset of laws. I alluded briefly to this at the very beginning of this essay. A simple characterization of political obligation can be paraphrased as "the duty for all (or most) subjects to obey all (or most) laws because they are laws." Our talk about the duty to obey the law suggests that we mean all of the law.[41] The idea that we are to obey

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38 Klosko (2011) is a recent exception.

39 (2009)

40 I make no argument for the success of this basis. I only point out that it is clear enough to serve as the basis for content-independence in a subset of the law.

41 At least some, like Wellman (2005), seem to take it that way.

them because they are laws might lead us to believe anything with that feature is morally binding on us.

The most troubling aspect of the paraphrase above is the clause because they are laws. If political obligation applies only for a limited subset of the entirety of the law, then in what sense can I be said to obey them because they are laws? However, the language itself should not trouble us much. We limit the domain of discourse frequently when we speak and our speech remains meaningful and intelligible. Thus, I might pick out a feature of objects within a category that indicates something about them without thereby using that same feature to come to the same conclusions about objects outside of that category. For example, if I am considering animals, I might say that it is a bird if it has feathers. I would be mistaken to infer the same conclusions about objects outside of that domain of discourse, such as a down pillow. In my saying that there is a duty to obey some subset of laws because they are laws, what I mean is that their being laws within the subset is sufficient for me to have a duty to obey them. In the example above, where the state plays the role of coordinating agent, this is just the feature that grounds our duty to obey. For that category, it is sufficient for me to know that the action is prescribed by the coordinating agent—it is the law. While this only applies within certain categories of law, within those categories there is content-independent obligation.

When we say that we have a duty to obey the law because it is the law, all we are really committed to is that the duty to obey the law should have the feature of content-independence to whatever extent we ought to obey the law and/or to the extent that the laws in question fall under the appropriate category of our discussion. Content-independence is an intelligible concept so long as it ranges over a definable type or category of laws. The duty to obey the law is content-independent if the requirement for action is in a sense "detached" from the features of the action apart from its being legally mandated. The requirement is detached from the action in case the action could have been different and the duty would remain unaffected, even if that refers only to a subset of the laws issued by the state. What we mean is just that there is something special about the law such that we ought to obey it not because of the particular

actions it requires, but because of its status as a command issued by a political authority.

3. Political Obligation without Comprehensiveness

At this point we can fully address the question whether comprehensiveness is a necessary condition for political obligation. For this, we must explore the arguments of Wellman and Klosko in greater depth. Wellman cites the problem of allowing many to use their discretion in determining which laws are worth following. If all subjects were allowed to do so, then the state would be unable to garner enough obedience to fulfill its function, which in his case is the coordination of the activities of its subjects. This is in part because if subjects used their personal discretion, there would be wide variation in the particular laws they each would choose to follow. Thus, any duty to obey would lack comprehensiveness for at least some (and probably most) subjects. Typically, criticisms against Wellman's view have more to do with the fact that a duty to obey the law is not really necessary for the state to fulfill its function rather than his statements about the lack of comprehensiveness in political obligation. But, our main concern is whether the lack of comprehensiveness itself causes any problems.

The problem of discretion is instructive. Let us assume that allowing full discretion to subjects about which laws they ought to follow could cause difficulty for the state in fulfilling its function.[42] Perhaps this is in part because it is difficult for people to be objective about right and wrong when it is convenient for them to do wrong. And it is certainly at least sometimes a great inconvenience to obey the law. If subjects simply choose to disobey when it is convenient for them to do so, some will become free-riders benefitting off the compliance of others, too much disobedience will make it difficult for the state to keep order or security,

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[42] Some will find even this implausible. I offer no argument against that view, since it is perfectly consistent with the argument I make in this essay.

and, most importantly for our purposes, it would be unclear in what sense there is a duty to obey the law instead of varied duties to obey some laws.

Despite the importance of taking these problems seriously, they are not the result of a lack of comprehensiveness. Rather, they are due to lack of practical uniformity in obedience. Subjects can be free-riders only when others have taken on a burden that they forego. However, whether subjects have comprehensive duties to obey the law or not is irrelevant as long as their duties are to obey the same set of laws. Without comprehensiveness, there may be portions of the law where no one has a duty to obey, but disobedience will occur on a fair and consistent basis. Those who can get away with it will do so. This is no less the case with the last problem. We can easily cite a duty to obey the law as long as we can point to one that is similar for all or most subjects. And this is not hard to imagine. Surely if we have a duty to obey some of the law (and not other parts), there will be a reason why the relevant categories demand obedience. As long as those reasons pertain to the duty holders as subjects of the state (i.e., as long as political obligation is general), then the problem is resolved. Variations in individual characteristics will not affect the uniformity of their duty to obey. Finally, while it may seem that the extent of disobedience is more difficult to overcome, this is not really the case. First, as has been widely argued, the ability of the state to provide prudential reasons via coercive threat provides many with non-moral reasons to obey. Additionally, though, the state will have no epistemic difficulties in enforcing the law because, presumably, it will be accessible which categories of law entail a duty to obey and which do not.

Klosko's view is slightly more complicated. He writes, "MP theory departs from this model [the traditional model of political obligation], in that different laws are to be obeyed for different reasons, based on the particular concerns of given laws."[43] As he views it, a multiple principle (MP) theory of political obligation will provide subjects with reasons to obey laws based on the category of law in question. This, he thinks,

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[43] (2005, p. 248)

captures the prevailing intuition that we ought to obey the law in a generalized sense. Even if we have different reasons for our obedience under different categories, we still have a presumption of obedience to the whole law. What concerns me here is the nature of these categories that Klosko uses.

In a rare empirical study on the subject, he analyzes qualitative data on intuitions about moral obedience to the law. He finds that while people do believe there is a generalized duty to obey the law, their views quickly become nuanced on reflection and many admitted that there probably are classes of laws that they are not obliged to obey. "The class of exceptions was comprised of laws that were viewed as trivial or useless, most notably certain traffic laws, and others that were viewed as morally dubious: underage drinking, antisodomy laws, etc."[44] Klosko is comfortable with these categories, because he does not see them as a threat to the state according to what I referred to as the discretion problem above. As he writes about the lack of obedience to the speed limit, "In regard to such a case, the presumption that a given law promotes the public good has been overturned by experience, which shows that it does not."[45] It is not problematic for subjects to reject certain laws as long as (a) it is clear that everyone can act likewise and their acting so will not pose a significant problem for the state fulfilling its function, and (b) it is obvious that most subjects understand (a) and believe it to be true. Thus, not all uses of discretion about the law are dangerous.

I believe Klosko should be more concerned about this use of discretion and less concerned about comprehensiveness generally. Remember that Klosko uses multiple reasons for obedience to different classes of laws, though these reasons may overlap on some laws. So there are multiple ways in which the subject might be required to obey different laws. However, the reasons why a law that one would otherwise have a duty to obey is no longer obligatory are completely different from the

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[44] *Ibid*. p. 249

[45] *Ibid*. p. 250

reasons why we are permitted to disobey. Thus, you have categories of law that are based on reasons for obedience and different categories of law based on reasons that overturn the duty to obey and the reasons that overturn the duty to obey cut across the reasons that support obedience for different classes of laws. An illustration may help. Let us assume that we no longer have a duty to obey the speed limit because it is "useless." Speed limit laws are not the only useless laws, one might think. Perhaps we may also disobey laws regulating the taxation of cash income over the amount specified by the state as taxable. But the categories supporting reasons for disobedience are very different from the categories supporting obedience. Our reasons to obey tax laws generally could be very different from our reasons to obey traffic laws. But it seems that our estimations of the usefulness of obedience to a specific law is in part dependent on our reasons for believing we ought to obey laws from that category in the first place. If uniformity is a problem in political obligation, it seems it will arise here as well. It would have to be fairly clear (a) what moral reasons we have to obey classes of laws in the first place, (b) what extension those classes have (which particular laws they include), (c) what moral considerations trump the reasons for obedience (and so support disobedience), and (d) when those considerations apply to particular laws within each class. It is implausible that people who have difficulty articulating their duty to obey beyond an initial simple intuition covering all laws will be able to agree on enough of these considerations for there to be any meaningful sense of uniformity in their beliefs about political obligation.

So discretion can be a problem, but it is only a problem when there is too much of it. As moral agents, discretion is inescapable on some level. Theorists find it perfectly acceptable to allow subjects to use discretion about whether laws are just or unjust. (See content-sensitivity.) My claim here is that as long as there are some definable categories of law within which subjects have a duty to obey, it is plausible that political obligation may lack comprehensiveness, and this does not have to include extensive

use of discretion on the part of subjects. I am inclined to believe that Klosko is correct in his initial statement about categories of law based on our reasons for obedience to them. If there is a basis for political obligation that entails a duty to obey the law, but one that falls short of comprehensiveness, it would not be at all difficult to imagine sufficient uniformity to avoid problems associated with excessive discretion. As long as there are no conceptual problems with non-comprehensive political obligation, then it seems to pose no moral issues related to the fulfillment of state functions. This leads to a few final considerations.

One way to characterize the bulk of the arguments above is just that there are ways that we might have a reason to obey laws that constitute a subset of the whole law, and that subset is demarcated according to certain moral considerations that limit the scope of application for that reason to obey. If content-independence applies we want the reason to be something like, "the relevant political authority commands it," without there being necessary additional reasons based on considerations pertaining to the content of (or intentions associated with) the action in question. For example, we want our reasons for driving on the right side of the road to be that it was commanded that we drive on the right side, not that driving on the right side by itself is safer, more convenient, more considerate, etc., independently of the command. Here we come to a possible objection. One might claim that there are no considerations that limit the scope to a subset of laws that are not also reasons. In other words, there are no merely enabling conditions (Sciaraffa) or features of legal commands that our obligation is conditional upon (Valentini) that would limit the scope of our obligation to a subset of laws the way I have described.

Recall again Scariaffa's example of the state as a coordinating agent. If the state commands us to drive on the right side of the road, our reason to comply is because it is a law issued from a coordinating agent. The objection would then claim that the state's being a coordinating agent is the reason why I ought to drive on the right side of the road, and my being

obligated to drive on the right side of the road is dependent on the content of that action's being the kind of thing that coordinates the activities of society in the right kind of way. It then appears that whether I ought to "obey the law" is really just a question of whether I ought to act consistently with coordinated activities, whether or not those activities are commanded by the state. That kind of reason does not look content-independent, which might undermine our confidence in the conceptual validity of political obligation without comprehensiveness.

But the objection would be conflating different levels of analysis of reasons. What makes something an enabling condition versus a reason is not exactly clear[46] and there is also room for debate about content-sensitivity, but since Sciaraffa acknowledges that his example serves as the former, I will focus on Valentini's content-sensitivity to illustrate the inadequacy of the present objection. Valentini characterizes content-sensitivity as a restriction of our obligation to obey laws based on their "meeting certain standards of moral acceptability," but she gives no argument for why content-sensitivity must only or even primarily be about moral acceptability. What makes moral acceptability a consideration upon which our obligation is conditional instead of a reason for our obedience is simply that it is not the reason why we are obligated to perform any specific act. The reason is that it was commanded by the relevant political authority. But we can say the same thing in the case of the state's being a coordinating agent. My reason for driving on the right side of the road is that the relevant political authority commanded me to do so. Part of the reason I think the political authority has its legitimate authority is that it makes such commands for the purpose of coordinating activities in society. In other words, even if I think the state's being a coordinating agent is a reason for something (i.e., its having authority to make certain commands), it need not be a reason for my doing something (i.e., driving on the right side of the road).

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[46] Cf. Raz, Joseph. 2006. "The Trouble with Particularism (Dancy's Version)". *Mind*, 115:99-120.

There are two dangers worth pointing out here. First, one might respond by saying that ultimately my reason for driving on the right side of the road is that driving on the right side of the road is consistent with the coordinated activities of society. However, this is to conflate the reasons for doing something and considerations that entail those reasons. I might acknowledge that I only have reason to drive on the right side of the road because of its being consistent with the coordinated activities of society, but that does not mean I have thereby characterized my reason. If every entailment relationship indicated that the source of the entailment was the ultimate reason for our obedience, then it appears not only that most accounts of political obligation fail to give content-independent reasons,[47] but that it would be impossible for any account to do so. Unless the duty to obey the law is not derived from anything (in which case, our millenia of trying to discover the source of it has been entirely pointless), then there will always be a separation between the immediate reasons for our action and the deeper sources from which the reasons are logically derived.

Second, even if we could easily imagine alternatives that make the state seem like an unnecessary third party in the process of doing the right thing, that does not mean we do not have content-independent reasons based on the state's commands. For example, perhaps some coordinated activities (like driving on the right side of the road) could have emerged organically in society without a political authority to command it. In that case, our reasons would be different, even if surprisingly close. We might drive on the right side of the road because "society has fallen into the practice of driving on the right side of the road" constitutes a reason for me to do likewise. So, is our reason for doing so just an apparently different version of the same thing? It is not. If as a matter of fact the state's authority is based in part on its function as a coordination agent, it does not matter how it could have been otherwise. It serves as the basis for coordinated action, so its commands are our reason for acting.

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47 Valentini would be happy to agree with this part!

In the case of content-sensitivity as a restriction on the entirety of the law, we say that we have a duty to obey the laws because they are laws, but not when they are laws that are morally unacceptable. In other words, we do not deny that there are laws outside of the category of moral acceptability, just that outside of the category their having the feature of being laws does not constitute a reason for us to act as they prescribe. Similarly, for some subset of the law, we say that as long as laws fall within it, their being laws is reason for us to act as they prescribe.

4. Conclusion

Statists, especially those like Klosko who pursue principles that generate a duty to obey only parts of the law, should not be so concerned about finding others to fill the gaps. There is no good reason for them to believe an adequate theory of political obligation requires comprehensiveness. This is an important result, since much of the perceived difficulty in providing a statist response to skeptics lies in their failure to produce a singular source that is both comprehensive and general. If legitimacy includes political obligation that is non-comprehensive, it may still be successful as long as it fulfills the other requirements.

This means that philosophical anarchists have more work to do. It may be true that they have been able to defeat the current theories available, but this victory may in part be due to an unnecessary reliance of the traditional model of political obligation. If we relax some of our assumptions, then it opens the door to new opportunities to establish a viable account of legitimacy that includes political obligation.

Finally, this affects the arguments of those who defend "weak" legitimacy, which does not include political obligation as a necessary condition. If indeed our intuitions press us to believe we have some duty to obey the law, we ought to pay attention to them. While intuitions by themselves do not dictate the truth, when it comes to our assessment of

concepts like legitimacy, we must account for the meaning of the concept as much as for the degree to which is conveys the truth. Thus, the empirical work of Klosko is important. And, as Wellman explains, while "it would be wrong to reject a theory merely because it could not accommodate all of our pretheoretic intuitions," we ought to do our best to accommodate those about which we have the strongest conviction. I claim to have accomplished this in at least one respect concerning the subject of political obligation.

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