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**Article (Accepted version)
(Refereed)**

Original citation:

Valentini, Laura (2018) *The content-independence of political obligation: what it is and how to test it*. [Legal Theory](#). ISSN 1352-3252 (In Press)

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Available in LSE Research Online: July 2018

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The Content-independence of Political Obligation: What It Is and how to Test It

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Forthcoming in *Legal Theory*

(pre-publication, pre-copy-edited version)

Abstract: One of the distinctive features of the obligation to obey the law is its content-independence. We ought to do what the law commands *because* the law commands it, and not because of the law’s content—i.e., the independent merits of the actions it prescribes. Despite its popularity, the notion of content-independence is marked by ambiguity. In this paper, I first clarify what content-independence is. I then develop a simple test—the “content-independence test”—that allows us to establish whether any candidate justification of the obligation to obey the law delivers genuine content-independence. I apply this test to prominent such justifications and conclude that several of them, surprisingly, fail it.

1. Introduction

Consider the following dialogue.

John: “Damn! Another fine!”

Traffic warden: “Sir, the light was red, and you drove through.”

John: “But there was nobody around. I didn’t endanger anyone. Now give me a good reason why I should have stopped!”

Traffic warden: “The law says so.”

Is the traffic warden right? Answering in the affirmative means vindicating political authority and the corresponding pro tanto moral obligation (or duty) to obey the law.¹ Doing so is no easy task. It involves explaining something rather puzzling: the

¹ In this paper, I use the notions of obligation and duty interchangeably.

fact that one “is morally required to act as the legal rules direct *simply because they have the status of law*, and not because of the rules’ content.”² This is known as the content-independence of the obligation to obey the law.³

Despite being widely invoked in discussions about political authority, the notion of content-independence is clouded by ambiguities.⁴ Once these ambiguities are cleared, it also becomes apparent that several prominent theories of political authority do *not* establish a *content-independent* obligation to obey legal directives. To anticipate, I show that instrumentalist, fair-play, natural-duty, and associative theories of political authority all fail to vindicate a content-independent obligation to obey the law, while consent and democratic theories succeed. Even though my discussion does not culminate in a positive defence of either political obligation or anarchism, my argument makes several contributions to the relevant literature. It

² David Lefkowitz, *The Duty to Obey the Law*, 1 PHILOS. COMPASS 571–598 (2006), at 572–573, emphasis original.

³ The idea of content-independence was first introduced in H. L. A. HART, *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* (1982), ch. 10; see also JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986), ch. 2. As John Gardner has argued, the notion of content-independence is potentially misleading. A better label would be “merit-independence”: the obligatoriness of a certain action stems *not* from the *merits* of that action, but from the *source* of the requirement to perform it (in this case, the law). John Gardner, *Legal Positivism: 5½ Myths*, 46 AM. J. JURISPRUD. 199–227 (2001), at 209. In the main text, I will sometimes use the “merit” terminology. Note that, in the paper just cited, Gardner discusses merit-independence in relation to legal validity rather than moral obligatoriness. Still, that notion carries over to the domain of moral obligation.

⁴ For related discussions, which also highlight ambiguities in the idea of content-independence, see Stefan Sciaraffa, *On Content-Independent Reasons: It’s Not in the Name*, 28 LAW PHILOS. 233–260 (2009); Paul Markwick, *Law and Content-Independent Reasons*, 20 OXF. J. LEG. STUD. 579–596 (2000).

clearly sets out a necessary (though not sufficient) condition for a successful justification of political authority, shows that—contrary to first appearances—prominent candidate justifications fail to meet that condition, and highlights an important feature of justifications that do meet the condition.⁵

I proceed as follows. In Section 2, I consider what content-independence is a property of. In Section 3, I distinguish content-independence from other, related notions, and devise a test that allows us to establish whether any purported justification of political authority does indeed vindicate a content-independent obligation to obey the law: the “content-independence test” (for short, “CIT”). In Sections 4 and 5, I sort some prominent justifications of political authority into those that pass the CIT and those that fail it. In Section 6, I draw some brief lessons from this discussion and conclude.

Before starting, let me clarify terminology. First, I define *authority* as the moral power to place others under pro tanto obligations to do as one commands

⁵ One may wonder whether content-independence is indeed a necessary feature of the obligation to obey the law “proper.” In line with much of the literature, the present paper is developed under the assumption that it is. Skeptics about content-independence as a feature of political obligation are thus unlikely to be moved by my arguments. For reviews of the literature on political obligation and authority that state the content-independence condition, see, e.g., Lefkowitz, *supra* note 2; William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEG. THEORY 215–259 (2004); Thomas Christiano, *Authority*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), <http://plato.stanford.edu/archives/spr2013/entries/authority/> (last visited Apr 21, 2014). For a recent defence of content-independence, see N. P. Adams, *In Defense of Content-Independence*, 23 LEG. THEORY 143–167 (2017).

(where “pro tanto” means “susceptible to being overridden”).⁶ Suppose *A* commands *B* to ϕ . If *A* has authority over *B*, then *B* ought to ϕ because *A* has required *B* to ϕ . Second, I understand *political authority* as the moral power of the state to issue binding commands through law. Finally, I call the pro tanto obligation of obedience that the law places on citizens *political obligation*. (For ease of exposition, I will often omit the qualification “pro tanto” when referring to political obligation.)

2. What is content-independence a property of?

If one is politically obligated to ϕ , one ought to ϕ because the law commands ϕ -ing, not by virtue of the independent goodness of ϕ -ing. This is why political obligation is associated with the notion of content-independence. But what, exactly, is content-independence a property of? Two answers are in principle possible, each offering a distinctive interpretation of the expression “having a duty to do what the law commands because the law commands it,” i.e., a duty to obey the law.⁷

1. Having a duty to [do what the law commands because the law commands it].
2. Having a duty to do what the law commands [because the law commands it].

⁶ For some, the obligation to obey is owed to the authority (i.e., it is correlative to the authority’s right), and the authority may then hold those who disobey to account for their failures. Here, I remain agnostic about this feature of authority. My arguments apply whether the obligation to obey is taken to be correlative to a right or not. For defences of the rights-correlativity of authority-imposed duties, see Stephen Darwall, *Authority, Accountability, and Preemption*, 2 JURISPRUDENCE 103–119 (2011); Scott Hershovitz, *The Authority of Law*, in THE ROUTLEDGE COMPANION TO PHILOSOPHY OF LAW 65–75 (Andrei Marmor ed., 2012).

⁷ On this, see Hershovitz, *supra* note 6 at 69.

As observed by Scott Hershovitz, on interpretation (1), a duty to obey the law is a duty whose *content* involves performing certain actions for a particular reason (and not others), namely the fact that the law has issued a directive to that effect. In this case, content-independence is a property of an agent's obligatory "subjective" reasons for action. On interpretation (2), by contrast, the obligation to do as the law commands is *justified* by appeal to the fact that the law commands it. In this case, content-independence is a property of the *justification* of the duty to obey.⁸

Which of these two interpretations is preferable? Interpretation (1) seems implausible.⁹ To see this, assume, for example, that John has an obligation to obey tax law in sense (1). Assume, further, that John does pay his taxes as prescribed by the law, but that his subjective reason for doing so is *not* that the law requires him to pay—as demanded by (1)—but instead that justice requires him to pay or that he does not want to get caught cheating on his taxes. If we accept reading (1), we have to conclude that, despite paying the amount of tax required by law, John has disobeyed the law and thereby acted wrongly. Clearly, this is neither how we would

⁸ *Id.* at 69. Hershovitz uses the language of "grounds" instead of "justification." For the purposes of my discussion, these should be seen as equivalent. I employ the expression "justifying political obligation" meaning "explaining what grounds political obligation."

⁹ Interpretation (1) is in line with how, e.g., Leslie Green understands the content-independence of authority-imposed obligations: as placing constraints on the *reasons* that should *guide* their addressees' practical deliberations and actions. See LESLIE GREEN, *THE AUTHORITY OF THE STATE* (1990), at 41–42, 225. For critical discussion of Green's interpretation of content-independence, see Stephen Perry, *Political Authority and Political Obligation*, in *OXFORD STUDIES IN PHILOSOPHY OF LAW* 2 1–74 (Leslie Green & Brian Leiter eds., 2013), at 13–15.

normally use the language of obedience, nor does it seem substantively plausible to conclude that, by paying his taxes (as he ought to), John has acted wrongly.¹⁰

In response, one could suggest that interpretation (1) is more suited as an account of *virtuous* (rather than *rightful*) *acting*. Note, however, that this suggestion is plausible only in those cases where one's obligation to ϕ really is justified by the fact that the law requires one to ϕ , i.e., where interpretation (2) is satisfied. Otherwise, we would have to face the implausible implication that agents may act non-virtuously even when they act for the reasons that in fact justify the obligations that they have.

To see this, let us stipulate, for the sake of argument, that what justifies people's obligation to stop at red lights is not the fact that the law requires it, but broader considerations of safety. Amber always stops, but she does so not because the law requires it, but because this is safest for everyone. On the "virtue" reading of interpretation (1), by so acting, she displays a lack of virtuous character. But, surely, we would want to say that the virtuous agent is precisely the one who acts for the right reasons, i.e., for the reasons that *justify* the obligations that she has.¹¹ So, even as an account of virtuous action, as opposed to rightful or wrongful action, interpretation (1) only makes sense in those cases where it is true that one's obligation to ϕ is justified by the fact that the law demands that one ϕ s.

¹⁰ Hershovitz comes to the same conclusion, by pointing out that the law is often indifferent to *why* we act as it commands, so long as we act as commanded. See Hershovitz, *supra* note 6 at 67–68. For a similar argument, see also Perry, *supra* note 9 at 14. Cf. Joseph Raz, *Authority and Justification*, 14 PHILOS. PUBLIC AFF. 3–29 (1985), at 7.

¹¹ Cf. Joseph Raz, *The Obligation to Obey: Revision and Tradition*, 1 NOTRE DAME J. LAW ETHICS PUBLIC POLICY 139–55 (1985), at 140–141.

In light of these considerations, I will focus on interpretation (2), and treat content-independence as a feature of the *justification* of the obligation to do what the law commands.¹²

3. What content-independence is not, and how to test it

We are now clearer about what content-independence is a property of. Before moving on, we should also clarify what content-independence is not. Specifically, we should distinguish content-independence from *content-insensitivity* and *judgement-independence*. A failure to recognize these distinctions may be responsible for misplaced scepticism about the very possibility of there being a content-independent obligation to obey the law.

3.1 Content-independence, content-insensitivity, and judgement-independence

First, content-independence should not be confused with *content-insensitivity*.¹³ The fact that what justifies political obligation must be a property of the law qua law, and not of its content, is compatible with political obligation being *conditional on* the content of legal commands meeting certain standards of moral acceptability.¹⁴ This is a familiar phenomenon. Consider, for example, promise-based obligations. What

¹² This is in line with Stephen Perry's view that content-independence should be understood as a "constraint on the type of argument that can be offered to demonstrate that a directive is obligatory [...] [, and not as] a constraint on the practical reasoning of persons who are supposedly bound by the directive." Perry, *supra* note 9 at 15.

¹³ Cf. George Klosko, *Are Political Obligations Content Independent?*, 39 *POLIT. THEORY* 498–523 (2011). See also the critical discussion in Kevin Walton, *The Content-Independence of Political Obligations: A Response to Klosko*, 42 *POLIT. THEORY* 218–222 (2014).

¹⁴ But cf. Adams, *supra* note 5 at 151.

justifies those obligations is not an independent property of their content. If I promise to meet you for lunch, my obligation to meet you is not justified by reference to the independent qualities of the action “meeting you for lunch.” Meeting you for lunch might not be such a good idea. What justifies my obligation is the fact that I have made you a promise. Yet, if the content of my promise were deeply immoral, this would “block” the obligation-generating power of promising.¹⁵ For example, the fact that a mafioso promises another mafioso to commit some horrible crime does not generate any moral obligation: the criminal content of the promise invalidates it. This reassures us that we cannot have moral obligations to obey abhorrent laws, but it still does not tell us *by virtue of what* we can be obligated to obey morally decent ones.

Some anarchists, especially Robert Paul Wolff, seem to think that nothing could possibly justify a content-independent obligation to do as the law requires, since this would violate our duty to be autonomous and always act on our judgement.¹⁶ As frequently remarked in the literature though, this duty is rather dubious.¹⁷ If, say, Tom’s moral judgement is superior to mine, it is unclear what could possibly be wrong in my acting on the basis of Tom’s moral assessment of a given situation rather than on the basis of my own. Still, *even* assuming that there is such a duty—hence conceding one of the anarchist’s key premises—accepting content-independent political obligation, in the sense defended in the previous section, does not contradict it.

¹⁵ Joseph Raz, *The Problem of Authority: Revisiting the Service Conception*, 90 MINN. LAW REV. 1003–1044 (2006), at 1013.

¹⁶ ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM (1970).

¹⁷ Harry G. Frankfurt, *The Anarchism of Robert Paul Wolff*, 1 POLIT. THEORY 405–414 (1973).

To see this, consider the legal command “Stop at red lights!” If the law has authority, the existence of this legal command places you under a pro tanto obligation to stop at red lights. This is consistent with holding that, whenever you are faced with a red light, as a good or virtuous agent, you ought to deliberate about whether to stop and act on your best judgement. But if the law has authority, proper deliberation will have to take into account the fact that you have a law-based obligation to stop; an obligation that may be overridden by other considerations, depending on the circumstances.¹⁸

The existence of content-independent obligations, then, does not contradict the commitment to *judgement-dependence*: the idea that one ought to act on the basis of one’s own best judgment in any given situation. Vindicating authority is

¹⁸ This line of reasoning shares some similarities with the discussion in Joseph Raz, *Legitimate Authority*, in *THE AUTHORITY OF LAW* 3–27 (1979). Raz is committed to the view that a valid authoritative directive gives one second-order, exclusionary (or protected) reasons. See *Id.* at 17. A second-order, exclusionary reason to ϕ is a reason to ϕ that excludes some other reasons as grounds for (not) ϕ -ing (i.e., it is “protected” by this exclusion). This being so, on Raz’s view, a valid authoritative directive always affects the proper content of an agent’s practical deliberations: excluded reasons should not serve as grounds for action. However, if other, non-excluded reasons bear on an agent’s decision, these may figure in the agent’s practical deliberations. This is why Raz concludes that, in the face of valid authoritative directives, it remains true that one ought to “act on one’s judgement on what ought to be done, all things considered,” but it is not true that, in those cases, one ought to act on one’s judgement “on the balance of first-order reasons.” See *Id.* at 27, original emphasis. Some such first-order reasons will be excluded by authoritative directives. I thank Joseph Raz for discussion of these matters. Unlike Raz, I am not committed to the view that authoritative directives generate second-order, exclusionary reasons. Therefore, on the framework I have proposed, an authoritative directive can be treated as a first-order reason (or a pro tanto obligation) to be added to the relevant balance of considerations. Note, also, that conceiving of valid authoritative directives as giving rise to exclusionary reasons is arguably reminiscent of interpretation (1) of the obligation to obey the law, discussed and rejected in the previous section. One may thus wonder whether, on the “exclusionary reasons” framework, an authoritative command to ϕ gives us an obligation to [ϕ because it was commanded, and not because of excluded reasons (not) to ϕ]. For critical discussion, see Hershovitz, *supra* note 6 at 69.

hard not because authority negates our autonomy. The difficulty lies in explaining how the mere fact that some entity (e.g., the law) has issued a command to ϕ places us under an obligation to ϕ .

3.2 The content-independence test

If legal commands are to have any authority, some underlying principle must be invoked which allows us to explain why it is that “ ϕ -ing being the object of a legal command” matters morally. Political obligation does not presuppose a dubious derivation of an ought from an is. Instead, its justification involves identifying a morally salient property P that attaches to the law qua law, and thereby explains why the fact that a certain action is prescribed or prohibited by law is morally significant.

Consider a legal command to ϕ , and the claim that we ought to obey it because it displays property P . Now let us suppose that the command is “You ought to pay 10 dollars for this book” and that P is “fairness.” Although, at first, this may look like a justification for an authority-based obligation to ϕ , it is not. The relevant property P has little to do with the fact that ϕ -ing is prescribed by law, but attaches to its independent merits: 10 dollars is the fair price for the book in question. Therefore, P only justifies a content-dependent obligation to ϕ .

To determine whether the authority-justifying property P proposed by any given theory of political obligation/authority meets the content-independence condition, we can subject it to the following, simple content-independence test.

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).

A. 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.

B. 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.

As should be apparent, both **(A)** and **(B)** involve changing the content of the law, the former by modifying existing laws, the latter by introducing new ones. The rationale behind this test is simple. If the obligation to obey the law is content-independent, then it must continue to exist even if the contents of the law—i.e., the actions that are its object—vary, provided they fall within the bounds of moral permissibility. But if property P , invoked to justify the authority of law, is not displayed by legal commands *robustly* across variations in their content, then P cannot justify an obligation to obey the law because it is the law. P , in that case, cannot attach to the law as such: i.e., to legal directives qua legal directives.

These reflections may seem obvious, but appear to have been overlooked. As an application of the CIT in subsequent sections will show, prominent defences of the obligation to obey the law fail to pass it: they rely on morally salient properties that attach not to legal commands as such, but to the independent merits of their content.

4. Applying the test I: Theories that fail it

4.1 Instrumentalism

Instrumentalist theories justify authority by appeal to the benefits it brings to its subjects. The most influential version of instrumentalism is Joseph Raz's "service conception" of authority. In its original formulation, the service conception offers a schema for the justification of practical authority in general, rather than of the authority of law specifically. Still, that schema lends itself to being applied to the case of political authority. On this conception, the law has authority over an agent whenever he "would better conform to reasons that apply to him anyway [...] if he intends to be guided by [legal] directives than if he does not."¹⁹

This formulation leaves it in principle open what the relevant reasons that "apply to one anyway" are. Specifying this parameter, though, is unnecessary for our purposes. All we need is the property *P* that justifies the obligation to obey. On the instrumentalist view, this may be characterised as follows.

¹⁹ Raz, *supra* note 15 at 1014. Raz adds the caveat that authoritative commands are valid only regarding those issues for which "it is better to conform to reason than to decide for oneself" (*Id.* at 1014). Since this caveat is not relevant for my analysis, I have omitted it from the main text. For an earlier statement of Raz's view, see Raz, *supra* note 10 at 19.

P: “intending to be guided by the authority’s directives makes one better conform to reasons that apply to one anyway.”

Let us apply the CIT to instrumentalism, looking at whether the obligation to act as the law requires persists under variations in the content of the law. Recall that, according to the CIT, all variations are meant to take place within a morally permissible range.

Consider the following legal directives, addressed to citizen Sam, concerning tax contributions: “In year 1, you ought to pay 20000 dollars;” “In year 2, you ought to pay 21000 dollars;” “In year 3, you ought to pay 23000 dollars.” Let us assume that these directives exhibit *P*. For example, it may be that, in fact, Sam has *reason* to pay 20000, 21000, and 22000 dollars in each consecutive year, but if he were to do the calculation himself, he would come up with a tax bill of 22000, 23000 and 24000 dollars, respectively. In light of this, Sam clearly gets closer to the right result if he treats the law as binding instead of acting on his own judgement. He is 1000 dollars off in year 3 if he follows the law, but 2000 dollars off each year if he goes with his own judgement.

Let us then consider the following variation in the content of the relevant legal commands, in accordance with the CIT. Everything else is left constant, but now the law demands that Sam pays 23000 dollars in year 1, 24000 dollars in year 2, and 25000 dollars in year 3. In this case, it looks like Sam gets closer to what he has reason to do by following his own calculations, rather than the law’s commands. Those calculations are “only” 2000 dollars off each year, while the law’s are 3000 dollars off.

As this example illustrates, on the instrumentalist view, a variation in the content of the law suffices to make a difference to whether we have an obligation to obey it. This means that property *P* proposed by the instrumentalist does not vindicate a content-independent obligation to obey the law. This should be unsurprising. After all, on the instrumentalist view, obedience to the law is just a proxy for what we have reason to do. And whether the law is a good “tracker” of what we have reason to do rests on how closely its content reflects the reasons we already have. Variations in content will obviously make a difference to the obligatoriness of law.

Three objections might be raised at this point. First, it may be argued that the instrumentalist formula is compatible with the “tracked reasons” being of a procedural nature—as opposed to concerning the substance of the issue at hand—in which case my objection would no longer hold. For example, we may have most reason to act on the basis of democratic decisions; and if the law is democratically arrived at, following it maximizes our reason-compliance, independently of its content. The difficulty with this objection, as Scott Hershovitz has pointed out, is that it presupposes an implausibly broad interpretation of instrumentalism. On this interpretation, the theory loses its distinctiveness, and becomes compatible with all competing accounts of political authority (since each of them points to a particular set of reasons that apply to us, and which are said to justify an obligation to obey the law).²⁰

Second, it may be objected that my discussion misunderstands the content-independence condition, as proponents of instrumentalism conceive of it. Content-independence, so the objection goes, is a property of one’s reasons for acting as the

²⁰ See Scott Hershovitz, *The Role of Authority*, 11 PHILOS. IMPR. 1–19 (2011), at 4–5.

authority demands *when* the relevant conditions for its justification are satisfied. Those conditions, in turn, may well depend on the content of the commands issued by the authority. This means that in the first set of cases discussed above, where the content of the law is such that *P* is satisfied, Sam ought to [pay the amount prescribed by law *because* the law prescribes it].

The trouble with this response is that, as shown in Section 2, this understanding of content-independence—associated with interpretation (1) of the obligation to obey—is implausible. If the arguments in that section are correct, retreating to this understanding of content-independence will not make for a convincing defence of instrumentalism.²¹

Third, it may be pointed out that, for Raz, the law’s authority is evaluated relative to domains: i.e., *classes* of directives, not individual ones. The law has authority in a domain *D*, relative to a 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. In other words, relative to domain *D* (e.g., traffic regulation, taxation, food safety, etc.) the law “gets it right” more than the subject would. Domains of authority so conceived vary from individual to individual. To use Raz’s own example, while the law has authority in the domain of drug safety for the vast majority of the population, it lacks such authority vis-à-vis an expert pharmacologist.²²

Considerations of content matter to the identification of the domains in which the law has authority: the domains in which it exhibits *P* relative to a given subject. However, once we are *within* a domain in which the law exhibits *P*, legal

²¹ Cf. footnote 18.

²² RAZ, *supra* note 3 at 74.

directives are binding irrespective of content, including on those occasions when they are mistaken, and following our own judgment would deliver better reason-compliance.

Given this, my objection may seem to misfire. Recall that, in line with the CIT, the objection involved changing the content of a few legal directives such that, relative to those, Sam would be better off by following his own judgment than by being guided by the directives. But changing the content of a few directives, so the reasoning goes, need not make a difference to the law's authority relative to the domain of tax contribution *as a whole*. If it is true that, by and large, Sam is better off by following the law in that domain rather than his judgment—even once we take into account my envisaged change in content—then Sam ought to follow the law in that domain even in those particular instances where the law gets it “more wrong” than he would. If, however, changing the content of legal directives as I have in my example suffices to make the law less accurate than Sam's judgment in the domain of tax contribution *as a whole*, then Sam lacks a content-independent obligation to obey it in that domain.²³

Crucial to the present response to my argument is the notion of a domain within which the law has authority. For the response to be successful, a domain of legal authority has to be defined *independently* of the set of individual legal directives that exhibit *P*. If a domain were just a set of legal directives that individually exhibit *P*, changing the content of a single directive such that it no longer satisfies *P* would automatically strip that directive of authority. In that case, morally permissible variations in content would clearly affect the authoritativeness of legal directives: the CIT would not be passed.

²³ I am grateful to an anonymous reviewer for raising this objection.

What is needed, then, is an independent criterion for demarcating domains of authority. It seems, however, that no privileged criterion is available. One could, of course, reverse-engineer domains such that, within them, content-independence obtains. But this is both ad hoc and, as I will show, substantively implausible.

To see this, take again the domain of drug safety. Now suppose that our character, Sam, happens to know a great deal about two particular drugs (X and Y) such that, relative to those two drugs, he would do better by following his judgement rather than the law's directives. It is, however, still true that, in the domain of drug safety *taken as a whole*, Sam is better off by following the law. What principled reason is there for insisting on a single domain of drug safety in which the law has authority over Sam, as opposed to two domains: "safety for drugs X and Y" and "safety for all other drugs," with the law having authority over Sam in relation to the latter, but not the former? Indeed, why not divide up domains relative to different categories of drugs? Or why not extend the domain so as to include drug as well as food safety, and so forth? Any such domain-demarcations seem arbitrary.²⁴

²⁴ Raz shows awareness of this difficulty, but says relatively little about it. His solution—not further elaborated on—is that "a person or body has authority regarding any domain if that person or body meets the conditions [set out by the service conception] regarding that domain and there is no proper part of the domain regarding which the person or body *can be known* to fail the conditions." Raz, *supra* note 15 at 1027, added emphasis. This quotation is not fully transparent, but can be interpreted as suggesting that, for any domain in which the person or body exhibits *P* (on the whole), the person or body has authority except for those "proper parts" of the domain for which it is known to fail to exhibit *P*. Presumably, those "proper parts" will be identified by looking at specific directives and asking whether they are known to exhibit *P*: if the answer is "no," the directives will be removed from the domain of authority. Two points in relation to this response are worth making. First, Raz's short passage suggests that valid authority rests not

Of course, one can construct domains in such a way that, within them, content-independence is achieved. The content of a few individual directives may change such that they no longer satisfy *P*, but this is consistent with authority being kept within the domain as a whole, hence with respect to those directives too. But, as I hope to have shown, this result is theoretically dubious if it is the mere product of an artificial adjustment of domains.

Furthermore, adjusting domains so as to obtain content-independence is substantively implausible. This implausibility is brought out, unwittingly, in Raz's own discussion of the classic "red light on an empty street" scenario. Raz offers this discussion to showcase the virtues of his view. But in so doing, he seems to me to highlight a difficulty instead.

Raz considers the worry that, in the "red light on an empty street" scenario, one is obviously better off by crossing the street—contrary to the law—than by following the law's directives. Raz maintains that this observation does not invalidate the law's authority within the domain of traffic regulation, including in cases where, by hypothesis, ignoring a red light is the thing to do. This is because, within that domain, we are by and large better off by deferring to the law. Raz puts the point as follows. His passage is worth quoting in full:

From our vantage point we have invented an example in which the question [whether to stop] does not arise since the answer (there is no reason [to stop])

merely on directives exhibiting *P*, but on *it being known* that they exhibit *P*. This differs from Raz's official formulation of the service conception and creates ambiguities (which, however, I do not have the space to explore here). Second, this way of individuating domains of authority is susceptible to my original objection: a change in the content of a directive may make a difference to whether that directive is known to satisfy *P*, hence to whether it is authoritative. Thanks to Massimo Renzo and Daniel Viehoff for discussion.

is plain. But for the man in our example the question does arise; he has to discover whether there is no reason to stop. And if he is to inquire in this case, he has to inquire in many other cases. For us it looks ridiculous to hear him say, ‘I am bound to follow authority regardless of the merits of the individual case,’ for we know in advance what the merits are and forget that he has to find that out, and not only now but in many other cases as well.²⁵

This explanation is puzzling. It is not true that, when we are faced with a traffic light on an empty street, we need to work hard to find out what the merits of the situation are. Those are precisely cases where hard work is unnecessary, which is why we are better off following our judgment and crossing the street anyway. By contrast, when the traffic situation is more complex, we have reason to defer to the law, since the cognitive burden of figuring things out would be excessive and the risk of accidents high.

It is artificial to suggest that, because we are better off deferring to the law when traffic is heavy—hence most of the time—in the domain of traffic regulation, the law is *always* authoritative, even when in fact we would be better off by following our own judgment.²⁶ The view expressed in the latter statement 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, as I said earlier, it is also arbitrary. In fact, why not distinguish between the domains of “traffic regulation with heavy traffic” and “traffic regulation when there is no traffic”? And so on.

Unless instrumentalists can provide a non-arbitrary criterion for domain-demarcation, they should abandon reference to domains, and consider legal

²⁵ Raz, *supra* note 18 at 25. But cf. RAZ, *supra* note 3 at 62.

²⁶ Note that this way of proceeding is in fact at odds with a suggestion Raz makes elsewhere, discussed in footnote 24.

commands one by one, asking whether each command displays property *P*, in relation to a particular agent *A*, given the agent's state at time *t*, when the command is issued. But if this is how a substantively plausible and non-arbitrary version of instrumentalism works, then my original objection still applies. Variations in the content of the law make a difference to whether the law displays property *P*, hence to its moral bindingness. A plausible version of instrumentalism fails the CIT.

4.2 Fair play

Fair-play perspectives on political authority come in many variants, but the general principle underlying them has been succinctly stated by John Rawls: "We are not to gain from the cooperative labors of others without doing our fair share."²⁷ Fair-play theorists believe that this principle has important implications for political obligation. Citizens, they remark, benefit from the cooperative labors of others, in the form of receiving public goods and enjoying the stability offered by the rule of law. This puts them under an obligation to reciprocate, by doing their fair share in sustaining society. Doing otherwise would be equal to freeriding on others' cooperation. But what counts as doing one's fair share? Fair-play theorists answer:

²⁷ JOHN RAWLS, *A THEORY OF JUSTICE* (1999), at 96. For other versions of the principle, see H. L. A. Hart, *Are There Any Natural Rights?*, 64 *PHILOS. REV.* 175–191 (1955), at 185; George Klosko, *Presumptive Benefit, Fairness, and Political Obligation*, 16 *PHILOS. PUBLIC AFF.* 241–259 (1987); Richard J. Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 *ETHICS* 616–633 (1982). For a critique, see ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974), at 90–95. I am here only focusing on versions of fair play based on the mere receipt of benefits, not versions involving the *willful acceptance* of benefits. For discussion, see A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979), ch. 5.

obeying the law. The property *P* of legal commands that justifies obeying them, on a fair-play account, is the following.

P: “corresponding to what one ought to do as one’s fair share in a cooperative practice from which one benefits.”

Let us run the CIT. Take the legal command “This year, you ought to pay 30000 dollars in taxes.” Assume that the total sacrifice imposed by this legal command, *combined with* all other legal requirements, satisfies *P*, i.e., it amounts to your fair share of contribution. Now change the content of one legal command. For instance, assume that you are legally required to pay 35000 dollars instead. Everything else is exactly as it was before, hence there is no possibility for a “discount in burdens” somewhere else in the system. This being so, obedience to the new package of laws cannot correspond to doing your fair share anymore. Obedience now involves a net excess burden of 5000 dollars. Fair-play theory fails the CIT.

It might be objected that, provided the content of the law falls within the morally admissible range—as it does *ex hypothesi* in the cases I am discussing—variations in content make no difference to obedience corresponding to one’s fair share. For example, anything between 20000 and 40000 dollars to be paid in taxes may be consistent with the law’s demands corresponding to your fair share. However, anything more or less would automatically push the system outside the constraints of moral permissibility.

This response involves a suspicious reverse-engineering of the notion of a fair share, such that it fits anything the law demands within the constraints of moral permissibility. The question we are addressing is: Why ought we to do whatever the

law demands, provided it is not morally impermissible? Fair play theorists answer by appeal to the idea that doing so corresponds to doing one's fair share. But for this answer to *justify* the duty to obey the law, the notion of a fair share it invokes must not, by definition, be "whatever the law demands, provided it is not morally impermissible." If this is our *definition* of a fair share, then fair play theory will not justify the obligation to obey the law by reference to an independent notion of a fair share, but will simply *assume* that obligation.

Another objector might complain that I have misinterpreted the fair-play view, insofar as, on its most plausible version, that view need not appeal to an independent notion of a fair share in the first place.²⁸ Instead, the view is best interpreted as stating that: If one benefits from a cooperative practice, thanks to others' compliance with its terms of cooperation, one ought also to abide by those terms (provided these are not morally impermissible). Property *P*, for fair play theory, would then turn into *P'*.

P': "corresponding to the (morally permissible) terms of a cooperative practice from which one benefits."

Permissible variations in the content of the law arguably do not make a difference to its exhibiting property *P'*. Of course, we may conceive of changes in legal content that would make participation in the state (i.e., the cooperative practice on which we are focusing) no longer beneficial. However, those changes would likely be morally impermissible, since they would make living under the law no better than living in a

²⁸ Thanks to Massimo Renzo for pushing me on this.

lawless condition. For this reason, they would automatically fall outside the scope of the CIT.

Does this mean that fair play theory is, ultimately, capable of delivering a content-independent obligation to obey the law? Not really. First, this last “version” of the theory does not, in fact, seem to have much of a claim to being a version of *fair play*. After all, its core principle makes no mention of the idea of fairness. Second, and relatedly, the view we are considering is less plausible than the original one, precisely because unqualified conformity with existing (and morally acceptable) terms of cooperation may involve doing more or less than one’s fair share of reciprocation. Furthermore, what about terms of cooperation (e.g., particular laws) from which nobody benefits?²⁹ Consider new monitoring regulations recently introduced by several British universities, involving endless form-filling and reporting. It is virtually everyone’s view that such regulations increase administrative costs without generating any real benefit. Yet, they are part of the “terms of cooperation” structuring universities, and are certainly morally acceptable. But the claim, implicit in the revised version of the fair play view, that those rules *too* ought to be complied with appears ad hoc.

Surely, if benefiting is what triggers the demand to abide by relevant terms of cooperation, the demand ought to extend *only to mutually beneficial* terms of cooperation, not to all the rules structuring a practice that is on the whole beneficial.³⁰ But this would be tantamount to defending a “pick and choose”

²⁹ M. B. E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE LAW J. 950–976 (1973), at 958.

³⁰ George Klosko, *John Simmons on Political Obligation*, 7 APA NEWSL. PHILOS. LAW 1–9 (2007), at 3.

approach to obedience, where we ought to do as the law says not “because it is the law,” but because and to the extent that doing so is mutually beneficial. This would make the revised version of fair play more independently plausible, but would again fail to vindicate a content-independent obligation to obey the law.

It may be objected that the above discussion conflates content-independence with another feature of the obligation to obey the law, typically called “generality.” This is the idea that the obligation to obey the law binds one to obey *all laws*, and not only a subset of them. In response, I note that, although content-independence and generality are related, they are not the same. It is in fact possible to have generality without content-independence, for instance, when an obligation to comply with all laws in a given system is vindicated, but contingently on the laws having the content that they do. But whenever a certain property *P* fails to vindicate generality *due to some laws’ having a given content*, it automatically also fails to vindicate content-independence.

In sum, if I am right, the most plausible version of fair play theory fails the CIT. One could engineer a view in the vicinity of fair play that arguably does not fail the CIT, but this view neither appears properly to capture the moral rationale behind fair play, nor does it seem particularly plausible on its own terms.³¹

³¹ David Lefkowitz and Massimo Renzo have independently pointed out to me that fair-play theory may be interpreted as involving a duty to do one’s share in sustaining the benefit *of the rule of law*, which implies a duty to do *whatever* the law demands, without using one’s discretion in determining what counts as one’s share. This interpretation appears to deliver content-independence but, I suggest, it is ad hoc and substantively unconvincing. Consider, for instance, agent A being faced with a red light on an empty road. The present interpretation of fair play would require A to obey the law and not cross: doing otherwise would be a violation of the rule of law. But it is mysterious why crossing would count as unfair in a case like this. By crossing, A would not take advantage of others’

4.3 Natural duties: negative and positive

Natural-duty accounts of legitimate political authority hold that political obligation is justified by appeal to duties every human being holds just by virtue of being human, independently of voluntary acts or transactions. The relevant natural duties can be *either* positive—e.g., Samaritan duties to rescue others from certain perils—*or* negative—e.g., duties not to pose unjust threats to others. The duty of justice to support just institutions (or not to impose unjust ones) also belongs to the family of natural duties, though its status as a positive or negative duty is somewhat contentious.³²

Let me begin with positive duties of Samaritanism. These duties demand that we contribute our fair share in rescuing others from significant dangers. Proponents of Samaritanism in the context of political obligation note that the state of nature poses significant dangers to human beings, by constantly threatening them with war and instability. Since, so the argument goes, only under general laws can these dangers be avoided, Samaritan duties demand obedience to the law. Such obedience

compliance with the law: the road is empty. In fact, if everyone, in A's situation, were to cross the road, the benefits of traffic regulation would still be delivered. So we are not dealing with an instance of freeriding. Yet, on the "rule of law" interpretation of fair play, crossing the road would count as unfair. This suggests that the "rule of law" interpretation is ad hoc and substantively dubious: it stipulates that one's fair share in reciprocating benefits *always* amounts to what the law demands.

³² John Rawls, in *A Theory of Justice*, treats it as a positive duty, while Thomas Pogge, for example, sees it as a negative duty. THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS: COSMOPOLITAN RESPONSIBILITIES AND REFORMS* (2008).

corresponds to doing one's fair share in rescuing others from the dangers of the state of nature.³³ On Samaritan views, then, property *P* is characterised as follows:

P: "corresponding to one's fair share in rescuing others from significant dangers."

It is easy to see that property *P* cannot vindicate an obligation to obey the law irrespective of content. It suffers from exactly the same difficulties that plagued the first version of the fair play view. If law with content *C* corresponds to one's fair share of burdens, law with content *C**—where *C** implies a different share of burdens—will not.

Proponents of Samaritanism too may respond by removing all reference to doing one's fair share, turning *P* into *P*'.

P': "corresponding to what one must do to rescue others from significant dangers."

This move would again fail to deliver content-independence. To see this, let us assume, for the sake of argument, that the law, in state *S*, does satisfy property *P*' at time *t*. Let us imagine that, at time *t*', the parliament of *S* introduces a new tax, which requires every individual wishing to travel abroad to buy a stamp to attach to their passport. The stamp costs one dollar. It would seem strange to suggest that paying the one-dollar tax is what one must do to rescue others from significant

³³ Christopher Heath Wellman, *Toward a Liberal Theory of Political Obligation*, 111 *ETHICS* 735–759 (2001).

dangers. *Universal* lack of payment of *that* tax is perfectly compatible with the continued existence of the rule of law, peace and security. (And, plausibly, one may do a lot more to help those in danger by giving one dollar to Oxfam or some other charitable organization.)

It might be objected that by not paying, one is undermining the state's provision of vital services. What if, for instance, the funds collected through this new tax were intended for the public healthcare system? The issue with this objection is that, on the Samaritan view, what people are meant to be "rescued from" thanks to others' compliance with the law is not less-than-optimal healthcare, but the dangers of the state of nature. And even if not paying this passport tax would result in a failure to marginally improve the health service, it clearly would not send society back to state-of-nature conditions.³⁴

In sum, while obedience to a good portion of the law may be necessary to satisfy *P'*, *P'* fails to vindicate a content-independent obligation to obey the law because it is the law. Whether obedience is necessary to discharge one's Samaritan obligations depends on the content of the various laws one is subjected to.

Let us now turn to defences of political obligation based on a duty not to impose unjust threats on others. The line of reasoning behind them is remarkably similar to that invoked by proponents of Samaritanism. The idea is that submission

³⁴ Cf. CHRISTOPHER HEATH WELLMAN & A. JOHN SIMMONS, *IS THERE A DUTY TO OBEY THE LAW?* (2005), <http://ebooks.cambridge.org/ref/id/CBO9780511809286> (last visited Jul 23, 2016), at 182.

to a common legal framework, and obedience to it, is necessary for individuals not to pose unjust threats, as they instead do in the state of nature.³⁵

P: “corresponding to what one must do not to pose unjust threats to others.”

If my concerns about the revised version of Samaritanism are valid, then they seem equally to apply to the “unjust threats” version of the natural-duty argument. The example involving the passport tax proves the same point in this case. It is unclear how, by not paying that tax, one would pose an unjust threat to others (unless we stipulate, problematically, that disobedience to the law *by definition* constitutes an unjust threat). Even universal failure to pay that tax would not send us back to the state of nature. So again, while obedience to a good portion of the law may be necessary to satisfy *P*, on the unjust threats view, *P* fails to vindicate a content-independent obligation to obey the law because it is the law.

Finally, natural-duty-of-justice views hold that obedience to the law is necessary in order to promote justice (or not to be implicated in injustice): i.e., to respect persons’ rights. Depending on one’s understanding of what, exactly, justice is about, natural-duty views might collapse into one of the previous two.³⁶

³⁵ Massimo Renzo, *State Legitimacy and Self-defence*, 30 LAW PHILOS. 575–601 (2011). Though Renzo’s argument focuses on the state’s justification of *coercion*, he is explicit that he also intends to provide a justification for the state’s authority (at 577).

³⁶ RAWLS, *supra* note 27, at 99; Jeremy Waldron, *Special Ties and Natural Duties*, 22 PHILOS. PUBLIC AFF. 3–30 (1993); ANNA STILZ, LIBERAL LOYALTY: FREEDOM, OBLIGATION, AND THE STATE (2009).

P: “corresponding to what one must do to promote justice (or not to be implicated in injustice).”

To convey my scepticism about the content-independence of the natural-duty-of-justice view, I can rely on a helpful example offered by Chris Naticchia, aimed at showing how, on this view, “the normative force of legal commands [...] is in virtue of their content.”³⁷ Naticchia invites us to imagine a situation in which a particular subdivision of the Treasury, namely the one devoted to providing assistance to the needy (called *Health and Human Services*—HHS), is particularly inefficient. He then asks whether, given the rationale behind the natural-duty-of-justice view, citizens should comply with the demands imposed by HHS. His answer goes as follows: “Insofar as HHS is failing [...] to achieve what justice requires [...] we have no duty to support *it*.”³⁸ This short example shows how whether the law exhibits property *P*, as *P* is understood by the natural duty view, depends on its content.³⁹

Two objections might be raised in response. First, it may be suggested that Naticchia’s example is misleading, since the type of departure from perfect justice manifested by the HHS is sufficiently serious to fall outside the range of moral

³⁷ Chris Naticchia, *The Anarchist Within: Natural Duty of Justice Accounts of Political Obligation*, 7 APA NEWSL. PHILOS. LAW 14–18 (2007), at 16.

³⁸ *Id.* at 17, original emphasis.

³⁹ Cf. the reasons John Simmons offers to show that natural duty theories fail to meet the “particularity requirement” of political obligation. That is, they are unable to vindicate an obligation to obey the law *of one’s own state*. This is because whether obeying the law of one’s own state best promotes justice in general is contingent on *what* the law of one’s state is. SIMMONS, *supra* note 27, ch. 6.

permissibility. This response may undermine Naticchia's specific example, but not the broader rationale behind it. Namely, that we cease to be bound by an obligation to obey the law whenever justice can be better promoted through means other than legal obedience. Even if the law's departure from what justice requires is minimal, the obligation to obey at least some of it ceases to exist. But this simply means that the relevant obligation, on a natural-duty view, is not content-independent.

A second, more efficacious objection, points to the pervasiveness of reasonable disagreement concerning what justice requires. For example, there is reasonable disagreement about whether distributive justice demands basic income, Rawls's difference principle, or a somewhat libertarian arrangement. Equally, there is reasonable disagreement about immigration law, abortion, the full extent of freedom of speech and much else. Under these circumstances, proponents of natural-duty views can plausibly argue, justice requires that reasonably contested issues be settled democratically, by giving everyone an equal say.⁴⁰ In that case, doing as democratic procedures mandate is what honouring justice demands, and to the extent that the law is arrived at democratically, we ought to follow it, *regardless of its content*.⁴¹

I am sympathetic to this line of response, but for the time being, I limit myself to noting that it brings natural-duty-of-justice views very close to theories of political authority that appeal to the intrinsic fairness of democratic procedures. Those theories will be discussed in Section 5.2 below. Still, my arguments in the

⁴⁰ Simmons himself—who is a critic of natural-duty theory—raises this as a possible response to Naticchia's objections. See A. John Simmons, *The Particularity Problem*, 7 APA NEWSL. PHILOS. LAW 19–27 (2007), at 24.

⁴¹ For a Kant-inspired, natural-duty argument along these lines, see, e.g., STILZ, *supra* note 36.

present section are hopefully sufficient to show that natural-duty-of-justice views fail the CIT, at least when considered purely on their own terms (i.e., without being combined with democratic theories).

4.4 Membership-based/associative views

A large set of theories of political obligation can be classified under the label of “membership” or “associative” views. On these views, broadly construed, membership in a valuable (and morally permissible⁴²) association justifies an obligation to obey the rules of the association.⁴³

Different accounts of what makes an association valuable deliver different versions of the associative view.⁴⁴ On a subjectivist account, an association is valuable if one has the right attitudes towards it, e.g., if one identifies with it. On an objectivist account, an association is valuable if it instantiates objective moral values—such as reciprocity, justice, solidarity, mutual trust and so forth— independently of whether one identifies with it.

⁴² Here I only discuss associative views concerned with *moral* obligations. I set aside views according to which membership—including of morally impermissible associations (e.g., the Mafia)—generates sui generis, not strictly moral, obligations. See, e.g., MARGARET GILBERT, *A THEORY OF POLITICAL OBLIGATION: MEMBERSHIP, COMMITMENT, AND THE BONDS OF SOCIETY* (2006).

⁴³ See, e.g., RONALD DWORKIN, *LAW’S EMPIRE* (1986); DAVID MILLER, *ON NATIONALITY* (1995); Anna Stilz, *Nations, States, and Territory*, 121 *ETHICS* 572–601 (2011), sec. 5; JOHN HORTON, *POLITICAL OBLIGATION* (2nd ed. 2010); for discussion, see Bas van der Vossen, *Associative Political Obligations*, 6 *PHILOS. COMPASS* 477–487 (2011).

⁴⁴ I am abstracting away from the details of each associative view, and just focusing on their main structural features. This rather coarse-grained description of associativism suffices for my purposes.

No matter how exactly we characterise a valuable association, the property that associative views focus on in justifying the authority of law may be characterized as follows.

P: “constituting the terms of a valuable associative relationship in which one is involved.”

At first sight, it may look like *P* passes the CIT. By definition, the law *constitutes* society’s terms of association. A change in the content of the law does not invalidate *that* property of the law. Things are somewhat more complex, however. Exhibiting *P* requires the law to constitute the terms of a *valuable* associative relationship, and variations in the law’s content can certainly render an association no longer valuable.⁴⁵ Which content-changes have this effect depends on the underlying account of value at hand.

As I have mentioned, different versions of the associative view rely on different accounts of what qualifies as a valuable association. On a subjectivist account, changes in the content of the law that lead members to feel alienated from their polity empty the association of its value. For instance, some in the United Kingdom no longer identify with their country after its decision to leave the EU. On a subjectivist account, once Brexit comes into effect—with the associated legal changes—UK law will lack the power to obligate them. Similarly, on an objectivist account, changes in legal content that make an association no longer serve the relevant values—e.g., justice, reciprocity, equal respect, etc.—result in the law’s failure to exhibit *P*. This being so, associativist views too do not pass the CIT.

⁴⁵ I am grateful to an anonymous reviewer for drawing my attention to this.

It may be objected that this conclusion is too quick. Of course, to the extent that certain variations in content result in the law no longer displaying *P*, associative views do not deliver content-independence. At the same time, we can imagine a *range of cases* across which variations in content do not affect the value of an association, hence do not undermine the law's possession of *P*. For instance, imagine that the United States decided to follow several European jurisdictions and introduced "Bad Samaritan laws," which criminalize failures of easy rescue. This would be a change in the content of the law—new laws would be added—yet one that seems unlikely to make a difference to the value of the association "United States," whether this is understood subjectively or objectively. This suggests that, within a somewhat restricted range, content-independence obtains.

The difficulty with this response is that it trivializes the requirement of content-independence. The requirement would be satisfied for morally permissible variations in content that, in turn, meet some further *content-dependent* condition *C*. In the case of associative views, *C* corresponds to "consistency with an association being valuable." But note that all other theories of political obligation canvassed up to this point would also fit this schema. For instrumentalists, *C* equals "the content of the law is such that following it ensures better reason-compliance;" for fair-play theorists, it is "the content of the law corresponds to one's fair share;" for natural-duty theorists, *C* corresponds to "the content of the law is such that obedience to it is necessary to escape the perils of the state of nature;" and so forth. But in all these cases, it is not true that we have obligations to obey permissible law irrespective of content. Instead, we have an obligation to obey the law *because, and insofar as, its content is such that condition C is satisfied*. The structure of this obligation is clearly content-dependent. Therefore, all theories discussed up to now, including associative

ones, fail to vindicate a content-independent obligation to obey the law because it is the law.

5. Applying the test II: Theories that pass it

I now turn to the positive part of my analysis, by applying the CIT to vindications of political authority that pass it.

5.1 Consent

A long-standing tradition in political philosophy holds that the authority of law rests on the consent of the governed.⁴⁶ On this view, voluntarily agreeing to do as the law commands is sufficient to justify an obligation to obey it, provided its commands are morally permissible. The relevant property *P* identified by consent theorists is thus the following:

P: “corresponding to what one has voluntarily agreed to do.”

If one voluntarily consents to obeying *the law*—provided this falls within the limits of moral permissibility—then one’s consent will carry over no matter what precisely the content of the law is. For example, if I freely consent to doing whatever you tell me to do (provided this does not involve morally impermissible actions), whatever you tell me to do has the property of having my consent *because* you are the source of the demand. Similarly, if consent to obeying the law is what justifies the duty of obedience, then I ought to obey *the law* whether it demands that I pay 20000 or

⁴⁶ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C. B. Macpherson ed., 1980/1689); Hanna Pitkin, *Obligation and Consent--I*, 59 *AM. POLIT. SCI. REV.* 990–999 (1965); A. John Simmons, *Tacit Consent and Political Obligation*, 5 *PHILOS. PUBLIC AFF.* 274–291 (1976).

25000 dollars in taxes, and independently of whether my own estimate about what I owe is more accurate than the bill provided by the tax authorities.

Consent-based approaches to the obligation to obey the law easily pass the CIT.

5.2 Democratic theory

Democratic approaches to political obligation hold that our obligation to obey the law is traceable to the law being the outcome of intrinsically fair procedures, which give everyone an equal say in determining the rules that should govern them.⁴⁷ There are, of course, countless versions of democratic theory—each offering somewhat different explanations for the intrinsic fairness of democracy⁴⁸—but they at least share the view that the authority of law derives from its democratic credentials. Looking for property *P*, this can be characterized as follows:

P: “being the output of democratic procedures.”

Property *P* does appear to pass the CIT. Take again a law demanding that I pay 20000 dollars in taxes. Let us assume that *it*, together with every other law in the

⁴⁷ THOMAS CHRISTIANO, *THE CONSTITUTION OF EQUALITY: DEMOCRATIC AUTHORITY AND ITS LIMITS* (2008); GERALD F. GAUS, *JUSTIFICATORY LIBERALISM: AN ESSAY ON EPISTEMOLOGY AND POLITICAL THEORY*. (1996); ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* (1989); Daniel Viehoff, *Democratic Equality and Political Authority*, 42 *PHILOS. PUBLIC AFF.* 337–375; cf. DAVID ESTLUND, *DEMOCRATIC AUTHORITY: A PHILOSOPHICAL FRAMEWORK* (2008).

⁴⁸ Democracy is also defended as authoritative by virtue of the quality of its outcomes. Since, however, this defence of the value of democracy is clearly content-dependent, I set it aside for present purposes.

system under examination, exhibits the relevant property *P*: it is democratically validated. Let us then hold everything else constant—including the process through which law is created—but assume that now the law demands that I pay 25000 dollars. Clearly, a change in content makes no difference to whether the property of interest, i.e., “being the output of democratic procedures,” is satisfied. Since all else is held constant, the law in question is still the output of democratic procedures, and if it is this feature that explains why we should obey it, then obedience remains unaffected by changes in content. Democratic theory passes the CIT.

6. Conclusion

I have shown that, contrary to first appearances, prominent theories of political obligation do not vindicate a content-independent obligation to obey the law, and ipso facto, fail in their aim of vindicating political authority. However, I have also suggested that two theories—consent and democratic theory—succeed in passing the CIT. Where does this leave us?

First, let me point out the limits of my inquiry. As I signalled at the start, an ability to vindicate content-independence is typically regarded as a necessary, but not a sufficient condition for a successful defence of political obligation. The theories which, I have argued, meet this condition, can certainly be criticized for failing in other respects.

For instance, consent theory is unsatisfactory to the extent that it does not vindicate the universality of legal authority—i.e., its binding *all* citizens—since only a small number of individuals typically consent to legal obedience. Similarly, democratic theory has come under attack for failing to explain satisfactorily how it is that certain individuals are bound to obey a *particular* set of laws. As John Simmons explains, on a democratic view, if the United States annexed a portion of

Mexico (perhaps after a referendum in the combined territories of the US and that portion of Mexico) and started to govern the newly acquired population democratically, advocates of purely democratic approaches would have to conclude that former Mexicans are now obligated to obey US law. Yet this appears problematic.⁴⁹

Even if my discussion cannot deliver a positive defence, or a conclusive refutation, of the obligation to obey the law, reflection on its outcome may help us move the debate forward, by telling us something about the *kind of property* that a candidate theory of political authority should rely on. Specifically, both consent and democratic theories appeal to *procedural* properties of the law, i.e., properties that consist in the law being the object of some valuable procedure (e.g., democracy or consent), as opposed to *instrumental* properties, i.e., properties concerning the effects of complying with the law. If democratic decision mechanisms and acts of consent are valuable, then it may be that our duties to honour the values in question infuse the law with moral normativity, independently of the effects of obedience, provided these fall within the bounds of moral permissibility.

Democratic and consent views clearly pursue this proceduralist strategy. But what I wish to emphasize is the strategy itself, rather than these particular instantiations of it. Even if it turns out that democratic and consent theories do not succeed in vindicating political obligation, possible approaches pointing to other procedural properties of the law might. In sum, if the obligation to obey the law “proper” must be content-independent, and if a solution to the problem of political obligation exists, my arguments suggest that it is to be found in the space of the

⁴⁹ A. John Simmons, *Democratic Authority and the Boundary Problem*, 26 *RATIO JURIS* 326–357 (2013), at 340–343. Thanks to Anna Stilz for discussion.

law's procedural properties. That said, only time will tell whether the search for a procedural property *P* will deliver a definitive answer to the anarchist challenge.

Acknowledgements: I am very grateful to Christian List for extensive discussion and feedback, and to Kimberley Brownlee, David Lefkowitz, Massimo Renzo, and two anonymous reviewers for written comments. I also wish to acknowledge the support of the Leverhulme Trust (Philip Leverhulme Prize).