

# SEVERING THE TIE BETWEEN POLITICAL AUTHORITY AND POLITICAL OBLIGATION

**John Richard Harris**

Texas Christian University

A number of philosophers are inclined to accept the conclusion that there is no moral duty to obey the law. This belief when taken in conjunction with the correlativity thesis means that no state legitimately holds authority. To see why this is we must first look at one of the main arguments for the correlativity thesis. It is argued that when we look at the very concept of legitimate political authority, we must accept a moral duty to obey the law because to claim otherwise is absurd. The very concept of authority implies a duty to obey. This claim, I argue here, is mistaken.

The correlativity thesis identifies a logical relationship between rights and duties. This is a feature of a particular kind of right. Wesley Hohfeld famously catalogued various kinds of rights and the implications of these right.<sup>1</sup> The kind of rights/duties correlation relied upon above is called a “claim-right.”

(CR) M has a claim-right to  $\Phi$  if and only if (iff) Z has a duty to (a) help M in getting  $\Phi$  or (b) a duty not to interfere with M’s  $\Phi$ -ing.

Notice that there are two alternatives for how one’s duty may be discharged. First, one may have a duty to assist the right-holder in getting what she has a right to. This type of claim right is called a positive right. Secondly, one may have a duty merely to avoid interfering with the right-holder in exercising her right. For example, if Mandy has a right to use her car, then Zack has a duty not to interfere with Mandy’s driving her car. Here Zack has a negative duty not to interfere with Mandy’s right to use her car as she sees fit. Similarly, if the state has a claim-right to make the law, then this right entails that the citizens subject to that state have a duty to obey the law. Those who wish to argue for such a close conceptual connection between the right to rule and the duty to obey the law must offer compelling reasons to accept the correlation between the two. How will such a tight connection be established? It is to this question that I now turn.

Joseph Raz argues that by rejecting the correlativity thesis we fail to remain faithful to the most important features of political authority. Raz gives the following thought experiment:

Try to imagine a situation in which the political authorities of a country do not claim that the inhabitants are bound to obey them, but in which the population does acquiesce to their rule. We are to imagine courts imprisoning people without finding them guilty of any offense. Damages are ordered, but no one has a duty to pay them. The legislature never claims to impose duties of care or of contribution to common services. It merely pronounces that people who behave in certain ways will be made to suffer. And it is not merely ordinary people who are not subjected to duties by the legislature; courts, policemen, civil servants, and other public officials are not subjected by it to any duties in the exercise of their official functions either.<sup>2</sup>

Raz suggests that two problems arise when imagining such a situation. First, no society like the one described ever existed. Most societies have legal institutions, and those institutions survive, in part, because those who are subject to the institutions accept the claim that they are obligated to obey. Also, if a society like the one described were to exist, most would not think that it was a society governed by an authority.

The first problem is not as serious as it might appear. The correlativity thesis suggests that there is a strong logical correlation between the right to rule and the duty to obey. The fact that no such society did exist, by itself, is insufficient to show that the correlativity thesis is true. Rather, what Raz's thought experiment must do is to show that no such society could exist, and while it is no doubt a strange society, no logical contradictions arise when imagining it.

The second problem is more damaging. The suggestion, if true, would show that such a legal system if it did exist would fail to be a political authority. So, conceptually the state as described could not rightly be called an authority. According to Raz, all states make claims that their citizens must obey their commands. What differentiates *de facto* authority from legitimate authority is the fact that legitimate authorities are justified in making their claims to obedience.<sup>3</sup> The challenge that Raz sets forth then is to provide an account of legitimate authority that is true to our concept of authority, yet does not entail a right to obedience. I hold that such a challenge can be met. The right to rule does not entail a duty to obey.

To see why, we must first determine what is it about the state's right to rule that generates a correlative duty to obey the laws. Here it appears that Raz relies upon two important features often associated with legitimate authority: preemption and content-independence. If we accept preemption and content-independence as the core features of legitimate authority, then, when, the state justifiably issues a command, the duty that one is under is to disregard certain kinds of reasons which may speak against the action (preemption), and to take the very fact that the command was issued as a reason in favor of acting (content-independence). What I argue is that, even if the state can preempt and provide content-independent reasons to obey, these reasons are not enough to generate a moral duty to obey. If this is the case, we can see that even

on Raz's account of authority the duty to obey should be conceptually severed from legitimate authority. The relationship, if there is one, is contingent rather than logical. To understand why this is we must first give an account of preemption and content-independence.

### PRE-EMPTION

Claims to authority are typically thought to preempt individual reasons.<sup>4</sup> What this means is that when A exercises authority over B it follows that B has sufficient reason to follow the orders of A despite the possibility that the balance of reasons favor acting otherwise.<sup>5</sup> For instance, when a parent tells her child to "come home when it gets dark," this command is intended to give the child a reason for returning at that time, and though the child may have other reasons for staying out (e.g., the child is still having a great deal of fun) the parent's authority is expected to provide a sufficient reason to act on her directives. Thus, the parent's directive preempts other considerations, and while the balance of reasons may favor doing other than what has been ordered, the subject is expected to ignore the balance of reasons favoring disobedience and do as ordered because of the preemptive quality of the order.

One might object here that if a claim to authority entails that one has sufficient reason to obey commands of that authority, then it follows that one has an obligation to do so even when the commands are morally objectionable. The worry is that sometimes those who hold political authority command their subjects to do morally objectionable actions. States sometimes command their subjects to "kill those innocents." If an authoritative command entails that one must ignore or dismiss reasons that speak against the command, then it seems that moral reasons are dismissed as well.

This objection requires that we clarify which reasons are preempted by authoritative commands. It need not be the case that all reasons are preempted by a command, rather it may only be certain kinds of reasons. Joseph Raz argues that at minimum an order, given by an authority, must exclude the recipient's present desires.<sup>6</sup> In many instances an order will exclude much more, but the minimum is this. Taking the case of the parent's orders given above, the child's desire to continue to have fun is preempted because the parent's authority excludes the child acting on such reasons. Still we must wonder what should be done when the state demands that we act immorally. Raz suggests that one may justifiably fail to obey an order by arguing that the order was not intended to apply in such cases. Raz writes:

It was never intended, one could claim, that one should obey even if it turns out that there was a strong moral reason for not doing so or if obeying would severely damage the recipient's interests or be unlawful. When such consideration amount to a justification and leads the agent not to follow the order, he cannot be said to have obeyed it but neither did he disobey it. It was not intended that he should follow it in such circumstances.<sup>7</sup>

Thus, Raz addresses this concern by suggesting that one may reasonably ignore (not disobey) certain orders because those orders were never intended to be obeyed in

the first place. But, as Raz himself notes, this will not always be the case.<sup>8</sup> Some political commands are given which require one to do what is clearly immoral, yet it may be that despite this fact the person giving the order does intend that it be obeyed. It appears then that Raz's suggestion will not be able to address the present concern. Surely it cannot be the case that moral reasons are excluded from one's deliberation about obeying an order because the individual who issued the order intended them to be excluded. Imagine a boss at an office ordering her employee to do a striptease for her. If the employee refused to do so for moral reasons, should he have cause to reconsider when the boss explains that she intended her order to preempt such considerations? It seems in this case that the employee may reasonably explain that he understands that she intended him to ignore such considerations, but what is at stake for the employee (and citizens subject to a corrupt state) is whether they ought to ignore such considerations.

Raz's proposal points us in the direction of how we ought to address this problem of preemption. While an order by an authority must exclude certain kinds of reasons for disobeying the order, it does not follow that an order excludes *all* reasons. Some non-exclusionary reasons may justify the subject in disobeying the order. Since a solution to the problem of political obligation is only intended to generate a duty to obey sufficiently just laws it follows that moral reasons are not excluded when considering whether to obey the directives of the state.<sup>9</sup> I take it that this is captured, in part, by Raz's famous "normal justification thesis." The feature of preemption is intended to show that authoritative directives must trump some reasons, perhaps a wide range of reasons, but it does not follow that the order preempts all reasons. In respect to the problem of political obligation, it is widely recognized that sufficiently strong moral reasons are not to be excluded when attempting to determine whether one should or should not obey the law. The feature of preemption should be made sensitive to this if it is going to work as a solution to the problem of political obligation. Thus, while preemption may exclude a wide range of reasons that speak against obeying a command, it does not exclude moral reasons. Preemption may always exclude personal preferences from consideration, but it never excludes moral reasons.

#### CONTENT-INDEPENDENCE

The feature of content-independence is intended to reflect the fact that justification for obeying the order is independent from reasons for complying with the commanded action itself. As Joseph Raz explains, "A reason is content-independent if there is no direct connection between the reason and the action for which it is a reason."<sup>10</sup> While this is closely related to the feature of preemption, they are not identical. The feature of preemption attempts to capture the fact that an authoritative command gives an agent a reason to exclude from consideration other reasons that speak against acting according to the command. When a person in authority gives a command to someone subordinate to her, the act of commanding is intended to give the individual a reason to obey, regardless of the reasons that may be given if a direct evaluation of the act itself were undertaken.

Authoritative commands are not the only kinds of requests or directives that have

the feature of content-independence. Suppose one makes a request of a friend. The request, simply because it comes from a friend, gives the recipient some reason to comply with the request regardless of the reasons for the act itself. Of course, in such a case the expectations of compliance may be fairly weak, what Phillip Soper calls “partial independence.”<sup>11</sup> Here the request itself is intended to provide some independent reason for compliance to be considered with other reasons, but it may not be sufficient for action. Mike’s friend may have other plans that he feels he cannot break. There will be some circumstances in which the claim is much stronger, what Soper calls “complete independence.” For instance, a commander may order a soldier to charge a hill that is heavily defended by the enemy. While the soldier may have very compelling reason to refuse (the command jeopardizes his self-interest, he disagrees with the present plan of attack, etc.), the order, in this case, is expected to give sufficient reason for action. The order in this case is intended to pre-empt such considerations as present desires and appropriate strategy, and the fact that the soldier has been given an order is intended to give the soldier a compelling reason to do as commanded.

Do legal directives have partial or complete content-independence? Both Raz and Soper argue the state has complete content-independence. Soper writes, “...[A]n authoritative legal directive, if it is legitimate, requires action even if the authority is mistaken in its evaluation of the action.”<sup>12</sup> Complete content-independence thus has two important features. First, a complete content-independent command gives the individual who was ordered a reason for action. This is content-independence. Complete content-independence requires that the individual who was given the order disregard reasons that speak against obeying the command. This is the feature of preemption.

Again, one may worry that if complete content-independence entails that one must obey the government even if it is wrong, then one may find oneself obligated to obey unjust or immoral commands. Soper himself writes that complete content-independence “...arises where one intends the content-independent reasons to be sufficient to determine action without reference to the ordinary reasons, thus (for all practical purposes) displacing them.”<sup>13</sup> If Soper is right, then a command gives sufficient reason for action, and this could mean that one has sufficient reason to do what is morally impermissible.

But Soper is wrong about this. Despite Soper’s suggestion that there are two kinds of content-independence (complete and partial), what must be recognized is the fact that there is only one kind of content-independence. Sometimes content-independence is coupled with preemption, giving us, what Soper calls complete content-independence (as is the case when a military commander orders a soldier to charge a hill). Sometimes content-independence is not coupled with pre-emption giving us what Soper calls partial content-independence (as is the case when a friend asks for a favor). By recognizing this we can see that Soper has made the force of complete content-independence too strong. What must be remembered is that while complete content-independence entails pre-emption, pre-emption only excludes certain kinds of reasons from consideration. So, the soldier who is ordered to charge a hill by a legitimate authority is expected to exclude reasons of self-interest or disagreements about military strategy from her deliberation about whether to act or not, but this does not mean that all reasons are to be excluded. The soldier who is ordered to kill innocent non-combatants

may legitimately include moral reasons regarding this action and determine that she ought not obey.

So legal commands are typically taken to have complete content-independence, but this only means that legal orders (a) give the recipient reason to obey simply because of the relationship between the commander and addressee, and (b) compels the recipient to exclude some (but not all) reasons which speak against obeying the command. Thus, a complete content-independent command can give sufficient reason to act absent moral reasons to do otherwise. For instance, if the only reasons that speak against obedience are reasons of self-interest, then the command pre-empts such reasons, and the fact that the command itself gives the addressee reason to do as ordered means that one has sufficient reason to do as commanded. It is equally true, however, that a complete content-independent command does not necessarily give one sufficient reason to act. If one has moral reasons to refuse to obey an order, then one must weigh the strength of the content-independent reason for action against the weight of the moral reasons that speak against the action. If the moral reasons are strong enough, then one should not obey the command.

What emerges from this is that one does not violate the state's right to legitimate authority if she fails to obey the state's command. The state only has a right to have certain reasons excluded from the addressee's deliberation, and the addressee must take the command as a reason in itself to do as commanded. One can satisfy the duties that arise from this without necessarily doing what the state ordered. Thus the soldier who refuses to go to war for moral reasons does not violate the state's claim to legitimate authority just so long as when he deliberated about whether or not to go he excluded considerations of self-interest and worries about military strategy, and he took the fact that the state commanded him to go to war as a reason to go. If the soldier does so, but decides that the balance of moral reasons favor disobedience, then the soldier has done as he feels morally compelled to do *and* has fulfilled his duties to the legitimate authority.

What comes from the state's right to preemption and content-independence is that those who are subject to the state have a duty to give the state its due consideration. Just so long as an individual takes the state's legitimate authoritative commands into account when deciding what to do, then this person has fulfilled his duty to the state. To be clear, the state's claim of legitimate authority only justifies a right to due consideration, and this is clearly not the same as a right to be obeyed. We find then that the obligation to the authority has been discharged, yet the authority has not been obeyed. The tie between authority and obligation has been severed.

### NOTES

1. See Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Readings in the Philosophy of Law*, ed., Jules L. Coleman (New York: Garland, 1999): 164-207.

2. Joseph Raz, "Authority and Justification," *Philosophy and Public Affairs* 14.1 (1985): 6.

3. Raz, "Authority and Justification," 6.

4. Philip Soper, "Legal Theory and the Claim of Authority," *Philosophy and Public Affairs*

18. 3 (1989): 215. See also Joseph Raz, *The Authority of Law* (New York: Oxford UP, 1979) 16-19.

5. Raz, "Authority and Justification," 8.

6. Raz, *The Authority of Law*, 23-24.

7. Raz, *The Authority of Law*, 24.

8. Raz, *The Authority of Law*, 24 footnote.

9. I take this to be an obvious implication of the fact that the duty to obey is a *prima facie* duty. The duty to obey can be trumped by moral considerations. Raz's account of authority must be able to reflect that fact.

10. Raz, *The Authority of Law*, 35.

11. Soper, 218.

12. Soper, 218. Raz does not use the term "complete content-independence," he does argue that political authoritative commands are "protected reasons." Protected reasons are facts that give both a reason for an action (content-independence), and an exclusionary reason for disregarding reasons against the act (pre-emption) (see Raz, *The Authority of Law* 18). Thus, I take "protected reasons" to be the conceptual equivalent of "complete content-independence."

13. Soper, 218.