

# Political Legitimacy: What's Wrong with the Power-Liability View?

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**Abstract:** In this paper, I take issue with Arthur Isak Applbaum's *power-liability view* of political legitimacy. In contrast to the traditional view that legitimate rule entails a moral duty to obey, here called the *right-duty view*, Applbaum argues that political legitimacy is a moral power that entails moral liability for the subjects of political rule. According to Applbaum, the power-liability view helps us explain how responsible citizens in some cases can act contrary to law while still recognizing the claims of law. Against Applbaum's attempt at establishing the power-liability view through conceptual analysis, I argue that we cannot specify the moral implications of *de jure* legitimacy without considering the moral argument that justifies the right to rule. I further argue that Applbaum's normative account of political legitimacy implies commitment to a normative idea that forms the basis of a strong case in favor of the right-duty view. Finally, I argue that the present defense of the right-duty view has resources to account for the moral phenomena that prompt Applbaum's advocacy of the power-liability view.

**Keywords:** Arthur Isak Applbaum, civil disobedience, duty to obey, political legitimacy, republicanism, right to rule

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# 1 Introduction

Political legitimacy concerns the right to rule. Rulers that are *de jure* legitimate have a moral right to exercise political power. They can rightfully make, apply, and enforce laws on a given territory. According to a common and commonsensical view, here called the *right-duty view*, legitimate political rule entails a duty to obey for the subjects of rule. If a government is legitimate, then its subjects are obliged to act according to its laws and directives. Not so, says Arthur Isak Applbaum. In his book *Legitimacy – The right to Rule in a Wanton World* (2019), he seeks to replace the right-duty view with the *power-liability view*, for which the right to rule is a Hohfeldian power right to “create social facts and mechanisms of coordination” (47). On this view, to hold legitimate political power does not entail a duty to obey on the part of the subjects of one’s rule. The subjects of a legitimate government are instead liable to have their conventional legal rights and duties changed by the government. Whether they also are obliged to act according to the government’s laws and directives must be settled through further moral argument.

Applbaum advocates the power-liability view as a conceptually coherent alternative to the right-duty view. He also claims that it helps us explain how responsible citizens in some cases can act contrary to law while still recognizing the claims of law. On the one hand, he has in mind what can appear as morally insignificant transgressions of law, such as minor violations of traffic rules. On the other hand, he has in mind the Rawlsian account of civil disobedience, which in his view is a “poignant moral phenomenon” that conscientious citizens do not engage in lightly (Applbaum 2019, 44, 46). According to Applbaum, the power-liability view, in contrast to the right-duty view, gives us resources to understand this phenomenon, which involves breaking the law while still expressing fidelity to law.

In the bulk part of this paper, I challenge the power-liability view on moral grounds. Applbaum’s defense of the power-liability view relies on a strict separation of conceptual analysis and moral argument. By contrast, I contend that specifying the moral implications of *de jure* legitimacy cannot be disconnected from the way we justify the right to rule. Taking the perspective of *deontic republicanism*, which has roots in the political thinking of Rousseau and Kant,<sup>1</sup> I argue that the moral argument that establishes legitimate political rule

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<sup>1</sup> Philip Pettit (2013) characterizes Rousseau and Kant as originators of a distinct Franco-German tradition of republicanism, as opposed to the older Italian-Atlantic tradition that inspires his own neo-republican theory. It is this Franco-German tradition that I here refer to as ‘deontic republicanism’.

also establishes obligation to act according to public laws and directives. It may not be an analytical truth that political legitimacy entails a duty to obey, but the moral concerns that support the right to rule also support such a duty.

Interestingly, Applbaum integrates the basic normative idea of deontic republicanism, reciprocal independence, in his own normative account of political legitimacy, the free group agency view. In doing so, he commits himself to a normative idea that forms the basis of a strong case in favor of the right-duty view. Accordingly, there is discrepancy between Applbaum's conceptual defense of the power-liability view and his normative account of political legitimacy. Given his commitment to reciprocal independence, he should also be committed to the right-duty view.

I round off the paper by considering how a deontic republican defense of the right-duty view can give room for civil disobedience in Rawls' sense. In this connection, I emphasize the communicative nature of civil disobedience, and argue that presuming a duty to obey valid laws can help us account for acts contrary to law that express fidelity to law. Fidelity to law involves willingness to accept the legal consequences of breaking the law, and such willingness might reflect the presumption of a duty to act according to the laws that are broken.

The paper is structured as follows. In section 2, I present Applbaum's power-liability view. In section 3, I argue that the moral implications of *de jure* legitimacy cannot be specified through conceptual analysis, and that we should leave open what kind of moral relation holds between legitimate rulers and their subjects prior to a moral account of the right to rule. In section 4, I show how reciprocal independence plays an important role in Applbaum's free group agency view. In section 5, I present the deontic republican justification of the right to rule with the aim of explaining why commitment to reciprocal independence also implies commitment to the right-duty view. In section 6, I argue that the present defense of the right-duty view has resources to account for civil disobedience. Section 7 summarizes and concludes the argument.

## 2 Applbaum's Power-Liability View

Although Applbaum rejects the right-duty view, the moral right to rule is in his view more than a justified right to coerce or a permission to causally affect others by means of threats.

He agrees with Joseph Raz that legitimate authorities have the moral power to change the normative situation of others. Yet, in contrast to Raz, Applbaum (2019) denies that this power is “the power to obligate” (46).

According to Raz (1986), any exercise of power is exercise of authority only if “it includes an appeal for compliance by the person(s) subject to the authority”, which is an appeal that “makes sense precisely because it is an invocation of the duty to obey” (25–6). Against this view, Applbaum makes the case that legitimate authorities have the power to change the normative situation of their subjects in ways that fall short of imposing moral obligations on the subjects. He describes this power as the power to change the conventional legal and institutional claims subjects have against each other and against the authority. Corresponding to this power is a lack of moral immunity in the subjects against having their normative situation changed by the authority. According to Applbaum, this lack of immunity is the moral liability that legitimate authority entails. The liability does not necessarily imply a duty to obey the laws and directives that the authority promulgates. Whether valid law generates such a duty is in his view “a conceptually open question to be settled by substantive moral argument in light of morally relevant empirical circumstances” (Applbaum 2019, 48).

A possible virtue of this view is that it avoids the radical conclusion of philosophical anarchists via *modus tollens*. On somewhat different grounds, philosophical anarchists such as John Simmons (2001) and Robert P. Wolff (1998/1970) deny that we are morally obliged to act according to public laws just because they have been promulgated by the government exercising political power over the territory on which we live. Despite their differences, they both presuppose the right-duty view, and in combination with their skepticism about the moral duty to obey, this common presumption leads them to the conclusion that there are no legitimate governments. As Jiafeng Zhu (2017, 450) points out, this conclusion is not unavoidable if we adopt the power-liability view. By disentangling political legitimacy from the duty to obey, we can share Wolff and Simmons’ skepticism about the moral duty to obey without rejecting legitimate rule.

Applbaum makes a similar point when considering the Rawlsian idea of civil disobedience – that is, the idea of an illegal act performed “within the limits of fidelity to law” (Rawls 1971, 366). He argues that an advantage of leaving open the question whether we have a duty to obey valid laws is that it helps make sense of the common view that “sometimes one may disobey the law while still, in some sense, recognizing its claims” (Applbaum 2019, 46). A

problem for the right duty-view, says Applbaum, is that it has no room for civil disobedience in Rawls' sense. If an authority is legitimate and legitimacy entails a moral duty to obey, then it seems that there is no way to justify disobedience. Conversely, if disobedience is justified, then the right-duty view seems to imply that the authority whose laws or directives are disobeyed cannot be legitimate. The problem does not arise for the power-liability view, because on this view we can "drive a wedge between legitimate authority and moral obligation" (Applbaum 2019, 47). But how do we drive the wedge without ending up with the view that legitimacy simply is a moral permission to use coercive power?

Applbaum presents two hypothetical examples that illustrate what the power-liability view might mean in practice. In the first example – Beachowner and Clamdigger – a recent court ruling gives Beachowner the right to block access to a path through his own property to the shore. The path is the only way to access a clam flat from land, and Clamdigger's family has used it for generations by right of custom. Because of the ruling, Clamdigger no longer has a legal right to use the path without Beachowner's permission. Clamdigger accepts the legitimacy of the court, and so accepts that it has the moral power to make such a ruling. However, he finds the court's ruling mistaken on legal merits, and denies that he has a moral duty to act according to it. He continues to use the path, despite the chain with a no trespass sign that Beachowner has stretched across its entrance.

Denying that he has a moral duty to act according to the court's ruling, Clamdigger still accepts that something has changed normatively in his relation to Beachowner. Prior to the ruling, he had a moral claim-right to use the path, corresponding with Beachowner's moral duty not to block it. After the ruling, which changes their respective *legal* rights and duties, Clamdigger reasons that he no longer has a *moral* claim-right against Beachowner. Instead, they both have a moral privilege. Beachowner is now entitled to try to hinder access to his own property, perhaps by building a high fence. Clamdigger is for his part free to ignore such hindrances, but he has lost the moral liberty to remove or damage them. Admittedly, this interpretation of the present moral relation between Beachowner and Clamdigger appears rather arbitrary. Applbaum does not tell us how Clamdigger arrives at this view on the normative change effectuated by the court. Nor does he embrace the view as morally attractive. He does, however, argue that Clamdigger's view is conceptually coherent, and that it shows how a legitimate authority can change someone's normative situation without generating a moral duty to obey (Applbaum 2019, 55–6).

In Applbaum's second example – Motorist and the Long Red Light – at the outskirts of town, at a sparsely traveled intersection with unobstructed views in all directions there is a traffic light with a sign saying: “No Turn on Red”. The lights change at very long intervals, and it is public opinion that the traffic light was put up as an overreaction to a fatal accident at a busy intersection in the town center. Motorist approaches the intersection just as it turns red. Taking great care that there are no other road-users in sight, she turns on red, but is observed by a police officer on motorcycle hiding behind a cactus. She accepts that the police officer has the right to fine her and that she ought to pay her fines, so she pays without resentment (if not without regret). However, since she denies that she is morally bound by the ridiculous prohibition against turning on red, next time “she takes a long hard look at the cactus before turning on red” (Applbaum 2019, 57).

As in Beachowner and Clamdigger, the point of Motorist and the Long Red Light is to show how legitimate authorities can change our normative situation in a way that falls short of obligating us to act as public laws and directives tell us. According to Applbaum, Motorist can consistently think that she has a moral duty to pay the fine without being obliged to wait for a green light. Her belief about her privilege to ignore the red light may be defeated on moral grounds, but it involves no contradiction.

In practice, the power-liability view seems to concur with what Matthias Brinkmann (2020) has called the *transmission model* of political institutions. As opposed to the *authority model* (roughly: the right-duty view), the transmission model does not vest legitimate political institutions with a direct moral power to change the rights and duties of others. Instead, such institutions have an indirect normative impact through empirical circumstances established by their permissible exercise of power. The general idea is that changes in rights and duties can be triggered by finding oneself in a certain situation. Coordinating action, such as regulating the flow of traffic, is a paradigmatic case of how this works. Assuming we live in a state of nature, the fact that someone effectively coordinates the traffic at an intersection can trigger a duty to follow the instructions of the coordinator because of our general duty not to endanger others. The coordinator does not possess authority, but still has a normative impact on us via the empirical circumstances brought about by her coordinating action (Brinkmann 2020, 124–5).

Similarly, political institutions can transmit changes in our normative situation by establishing legal facts. By making, applying, and enforcing legal norms, political institutions

change the empirical circumstances in which we act. If in so doing they promote or safeguard important moral values such as stability, peace, justice, the rule of law, or welfare, they can also cause our rights and duties to change. The reason for such normative change is not that legitimate institutions have the moral power to put us under contingent obligations. The reason is that the institutions are in a unique position to secure moral purposes of such importance that we should not resist efforts at promoting them (Brinkmann 2020, 131–2).

Brinkmann’s description of the transmission model is remarkably close to Applbaum’s power-liability view, for which legitimacy is the moral power “to create and enforce *nonmoral* (or ... not yet moral) prescriptions and social facts ... that change the legal, institutional, and conventional situation or status of subjects” (Applbaum 2019, 47–8). In other words, what legitimate institutions can do, is change the empirical legal circumstances in which we act. The changed legal circumstances can in turn lead to changes in our normative situation, but not because legitimate rule implies a general duty to obey. Any normative change is conditioned on how well the institutions perform in their efforts at coordinating action. In many cases, morality forbids conduct in conflict with the prescriptions of law. But the lesson to be learned from Clamdigger and Motorist’s stances towards court rulings and traffic regulations seems to be that whether we should do as required by law has to be determined from case to case by our independent judgment of the law’s moral merit.

### 3 On Conceptual Analysis and Normative Argument

Applbaum’s defense of the power-liability view relies on a strict separation of conceptual analysis and normative argument. He aligns this separation with John Rawls’ distinction between concept and conception, “where a concept marks off the arena of a disputed idea that is filled, through normative argument, by conflicting conceptions or theories with different content, criteria, or conditions” (Applbaum 2019, 2). With respect to conceptual analysis, he warns against two pitfalls. On the one hand, there is the risk of talking past each other if a concept is specified too loosely. On the other hand, there is the risk of begging the normative question if a concept is specified too strictly. Applbaum’s repeated claim that a duty to obey must be established by moral argument, and that the idea of political legitimacy without a duty to obey should not be ruled out simply as a logical mistake, reflects the latter concern.

According to Zhu (2012), Applbaum fails to keep the power-liability view, as a specification of the concept of political legitimacy, free of substantive moral argument. Zhu links this failure to conceptual confusions in the use of Hohfeld's analytical scheme of legal advantages and disadvantages. In Hohfeld's analysis the advantages – right, privilege or liberty, power, and immunity – are distinct and do not entail each other. But in Applbaum's use, several advantages are incorporated into the concept of a power: “once unpacked, the power-liability view actually refers to: a liberty to issue the law, a power to change the moral status of the subject by issuing the law, a liberty to enforce the law and a claim of noninterference in the enforcement of the law” (Zhu 2012, 130–1). This incorporation of other advantages into a mere power undermines the aim of keeping conceptual analysis and moral argument strictly separate. Applbaum's actual view involves advantages that correlate with duties and no-duties, and “any conception of legitimacy that involves *a duty (whatever it is)* necessarily incorporates substantive moral argument” (Zhu 2012, 131).

My concern is not with Applbaum's lack of fidelity to Hohfeld's conceptual scheme. Nor do I find lack of success in keeping the power-liability view free of moral argument objectionable. To the contrary, I proceed from the assumption that specifying the moral implications of *de jure* legitimacy cannot be disconnected from the way we justify the right to rule. Taking the perspective of deontic republicanism, I argue that the moral argument that establishes legitimate political rule also establishes obligation to act according to public laws and directives. It may not be conceptually necessary that political legitimacy entails a duty to obey, but the moral concerns that support the right to rule also support the right-duty view.

In pursuing this line of argument, I take seriously Applbaum's warning against specifying political legitimacy too strictly through conceptual analysis. I assume that we need a substantial normative account of political legitimacy if we want to know what justified political rule implies morally for those being ruled. Conceptual analysis alone cannot provide an answer to this question. The power-liability view, conceived as a transmission model of political institutions, may be conceptually coherent, but prior to normative argument it is problematic to assert that it is “the correct conceptual account of legitimacy” or that “moral power, and only moral power, is at the core of the concept” (Applbaum 2019, 47, 265n6). By specifying the content of political legitimacy as a moral power correlating with moral liability on purely conceptual grounds, Applbaum begs the normative question. If a concept marks off the arena of a disputed idea whose content, criteria, and conditions must be filled through



normative argument, then we should leave open what kind of moral relation holds between legitimate rulers and their subjects prior to a normative account of political legitimacy.

Accordingly, I suggest that we conceive the core of the concept as the moral right to rule, where the right to rule entails the right to legislate, adjudicate, and enforce legal norms within a given jurisdiction. Inasmuch as it does not specify what kind of right the right to rule is, this specification demarcates the arena of the disputed idea more loosely than the power-liability view. At the same time, it is sufficiently strict to be fruitful. The specification clarifies that the discussion concerns the moral relation between ruler and ruled in a domestic context.<sup>2</sup> And it is non-question begging since it does not assume any controversial moral conclusion regarding this relation. The question whether legitimate political rule entails a duty to obey on the part of subjects is left for normative argument to resolve.

## 4 The Role of Reciprocal Independence in the Free Group Agency View

Interestingly, Applbaum integrates the basic normative idea of deontic republicanism in his own normative conception of political legitimacy, the free group agency view. The idea is articulated by Kant as a right to “independence from being constrained by another’s choice ... insofar as it can coexist with the freedom of every other in accordance with a universal law” (Kant [1797] 1996, 30). For the sake of brevity, I will refer to this idea as *reciprocal independence* (Zylberman 2016, 295). As a basic norm, reciprocal independence requires that we interact on terms that allow each person to pursue ends of their own choice independently of the ends that other people pursue. The norm concerns our standing in relation to others, and it resembles the neo-republican ideal of non-domination. However, in contrast to the mainstream neo-republican interpretation of non-domination as a consequentialist good (Pettit 1997, 97–102), reciprocal independence works as a deontic restraint. Whatever purpose we pursue, we must always act in conformity with everyone’s right to be their own master, understood relationally as having no one else as master (Kant [1797] 1996, 31). We

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<sup>2</sup> This specification does of course not rule out that it is meaningful to speak of and discuss the legitimacy of transnational, international or supranational institutions. It simply narrows down the discussion of *political* legitimacy to domestic public authority and its moral relation to those interacting on the territory defined by its jurisdictional borders.

are free to pursue ends of our own choice, subject to the restraint that we do so in a manner that respects everyone's right to choose their own ends.

Reciprocal independence is fully compatible with the fact that the choices of other people sometimes frustrate our pursuance of ends. We do not have a right to be unaffected by what others do, but our standing as moral equals requires that we interact on terms that prohibit us from subjecting others to our own arbitrary choice.<sup>3</sup> As a deontic restraint, reciprocal independence essentially is a prohibition against using other persons simply as means or their means as if they were ours. Even moral ends can only be pursued rightfully by means compatible with the independent standing of everyone else (Ripstein 2015).

It is clear from Applbaum's account that reciprocal independence plays an important role in the free group agency view of political legitimacy. According to the free group agency view, someone legitimately governs another if both governor and governed "remain *self-governing and independent* moral agents over time" (Applbaum 2019, 78). Self-government here refers to an agent's internal capacities whereas independence refers to how things stand between separate agents. A self-governing agent has the capacities to respond to reasons for action, to make choices guided by relevant reasons, and to behave according to one's choice.<sup>4</sup> Having these functional capacities is what makes an entity a moral agent "capable of action" and "the proximate locus of respect and responsibility" (Applbaum 2019, 77–8). An independent agent is an undominated agent whose "choice of ends is not subject to the control of another person" (Applbaum 2019, 78). Applbaum explicitly identifies this idea of independence with Kant's conception of external freedom. Following the interpretation of Arthur Ripstein, he argues that external freedom concerns how things stand between interacting persons and that external freedom is violated when someone destroys or usurps the bodily powers or legitimately acquired means of others (Applbaum 2019, 78, 267n5). The importance of this idea of external freedom for the free group agency view is underscored by Applbaum's account of three forms of tyranny that separately suffice to undermine political legitimacy.

According to the free agency view, three basic principles guide different aspects of legitimate political rule: the liberty principle, the equality principle, and the agency principle. The

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<sup>3</sup> Or, as Rousseau puts it: "Liberty consists less in doing one's will than in not being subject to someone else's" (Rousseau [1764] 2001, 260).

<sup>4</sup> It is unclear to me how the two latter capacities can be held apart. Making a choice seems to require the capacity to behave according to the choice. Arguably, to make a choice without the capacity to act according to it is not to choose at all. It is simply to engage in wishful thinking.

liberty principle concerns *what* governments legitimately can decide. It requires protection of all citizens by a set of basic rights and liberties compatible with equal freedom for all. Serious failure to exercise political power in accordance with this principle amounts to tyranny by practice. The equality principle concerns *who* decides. It requires that citizens have an equal say in the selection of who governs them, and serious failure to govern on terms compatible with it amounts to tyranny without title. The agency principle concerns *how* decisions are made. It requires that government acts as a competent group agent that counts all members as independent and self-governing persons, and serious failure to do so amounts to tyranny of unreason (Applbaum 2019, 4–5, 151–5).

The central role of reciprocal independence is perhaps most evident in Applbaum's account of tyranny by practice. Failure to establish legal norms and institutions that protect basic rights and liberties involves domination by *inhumanity*, which makes citizens vulnerable to being used as mere means for pursuing someone else's interests or purposes. Applbaum (2019, 151–2) illustrates this form of illegitimacy with the hypothetical case of Majoritaria, where laws authorizing public health officials to forcibly harvest the organs of healthy persons to save the lives of others can be enacted by majority rule. In terms of the free group agency view, the problem with Majoritaria is its lack of constitutional guarantees that protect the independence of its citizens over time.

At first view, the two other tyrannies concern failure to establish self-government at group level more than failure to secure the reciprocal independence of citizens. In a tyranny without title, subjects are disempowered. They have no choice in who governs them, and so there is no shared or unified moral agency that enables exercise of collective self-government (Applbaum 2019, 127, 172–3). In a tyranny of unreason, the problem is that governmental decision-making does not track the reasons that apply to citizens. Applbaum (2019) discusses lawmaking by lottery (153–5), unreflective preference aggregation (227–31), deceitful public officials (232–41), and incoherent legislation (241–5) as cases where free group agency is undermined because the functional capacities constitutive of a competent moral agent are missing.

On closer view, however, tyranny without title and tyranny of unreason are not only lacking in terms of self-government, but also entail domination that contravenes the independence of citizens. The absence of equal rights to choose who is to govern makes the subjects of a tyranny without title vulnerable to one-sided interventions and their choices subject to the

control of the ruler. Since they are ruled on terms inconsistent with the equality principle, lacking an essential mechanism for exercising control with who governs, they are dominated by *despotism*: “the equality principle is meant to ... secure the independence of citizens from the unilateral will of others by defeating domination by despotism. Having an equal say in who governs is necessary ... to solve the puzzle of how we can be both free and ruled” (Applbaum 2019, 198).

The subjects of a tyranny of unreason suffer another form of domination. Where political decision procedures are irrational or unresponsive to relevant reasons, subjects are dominated by *wantonism*. In failing to establish a competent group agent, a wanton government subjects the governed to a regime of arbitrary lawmaking instead of a coherent system of laws that secure each person’s independence. Applbaum (2019) characterizes such a regime as a state of lawlessness, which “is a state of mutual domination, where each, as self-legislator, self-judge, and self-enforcer, cannot help but coerce each other” (223).

The idea that lawlessness implies mutual domination is one of the defining features of deontic republicanism, and it is an important part of the argument presented in the next section. In this section, I have argued that Applbaum’s account of three forms of illegitimate law- and decision-making as forms of domination that violate each person’s right to external freedom makes reciprocal independence an essential part of the free group agency view. The point is significant, because if reciprocal independence is an integral element in Applbaum’s own normative conception of political legitimacy, then Applbaum is committed to a normative idea that forms the basis of a strong case in favor of the right-duty view.

## 5 In Defense of the Right-Duty View

The challenge of justifying political rule consists in showing how the troubling asymmetry between ruler and ruled can be squared with our moral standing as free and equal persons. For deontic republicanism, the answer to this challenge is that we can only interact consistently with reciprocal independence within a legal system which subjects us to public authority. Absent public institutions through which political power is exercised, the relations between interacting persons cannot be structured in a rightful way. Since rightful interaction requires subjection to public authority, deontic republicanism holds that we are obliged to

comply with valid laws and directives promulgated by legitimate public authorities. And this is of course the essence of the right-duty view.

It is common to justify public authority instrumentally, as a means for approximating moral purposes that are fully specifiable without exercise of public authority. Deontic republicanism deviates from this dominant trend in contemporary political philosophy by seeing public authority as an enabling condition for interaction on terms of reciprocal independence. On the deontic republican view, public authority is not a replaceable instrument exclusively judged in terms of its efficiency in realizing moral ends. Instead, public authority provides the “moral background conditions” that make reciprocal independence possible (Stilz 2009, 54).

To interact on terms of reciprocal independence, we need common rules, a common interpretation of the rules, and someone to enforce the rules.<sup>5</sup> We can only relate to each other as moral equals if our interactions are governed by rules that apply equally and non-arbitrarily to everyone. And our standing in relation to others can only be secure if there is a way to enforce the rules. Otherwise, we would have no other security for rightful claims and entitlements than the goodwill of others, which is to say that our standing as moral equals would depend on other people’s arbitrary choice. But who can make, apply, and enforce rules compatible with our standing as free and equal persons? According to deontic republicanism, only public authorities can do so.

Imagine that public legislative, adjudicative, and executive authorities were absent. Then no one would be in position to decide what counts as a common set of rules regulating interaction. Nor would anyone be in position to decide how generally binding rules (if they existed) apply to particular cases or to protect our independence by enforcing the rules. The problem with interaction in a condition absent public authority, is that enactment, interpretation, and enforcement of a common set of rules must be carried out by a private agent. Any private agent is free to propose a set of rules and an interpretation of the rules that may serve as an adequate specification of freedom as independence. Yet, so is everyone else, and since we are all equals, no one has standing to impose their favored set or interpretation on others. Similarly, no private agent has standing to enforce the rules, even if we were to agree on a given interpretation of the same set. Enforcement by a private agent is unilateral and arbitrary from the perspective of everyone else. Far from establishing a structure of

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<sup>5</sup> In this and the two following paragraphs, I rely indiscriminately on Ripstein (2009, 145–81), Stilz (2009, 27–56), Varden (2008), and Weinrib (2016, 47–53).

norms that enable interaction on terms of reciprocal independence, private enforcement of common rules would make everyone the dependents of the enforcer.

The solution to the problems of unilateral lawmaking, judgment, and enforcement is to establish a public authority made up of legislative, adjudicative, and executive institutions. Only by organizing public institutions that enact, interpret, and enforce laws is it possible to create a condition where private persons can interact on terms compatible with their standing as moral equals. This is possible because publicly authoritative institutions attach rightful exercise of power to offices regulated by legal mandate rather than to office holders as natural persons (Ripstein 2009, 191). Public institutions establish roles that enable officials to act as representatives of all subjects of public power rather than as private persons with their own private purposes. The institutions that make up a public authority thus provide a legal framework where the abstract idea of reciprocal independence can be given concrete content and binding force in a rightful way. For this reason, we can say that public authority is partly constitutive of our independent standing in relation to other private agents (Zylberman 2016, 296).

Since interaction in a condition without public authority is not compatible with reciprocal independence, a system of political rule that subjects both officials and private persons to a publicly known set of non-discriminatory legal norms is legitimate. On this point, Applbaum (2019) explicitly follows Kant: “being in a lawful condition is a practical necessity, a precondition for living with others without wrongly dominating them and being wrongly dominated by them in turn” (251; see also 129, 223). In view of Applbaum’s commitment to reciprocal independence, this agreement with Kant is not surprising. But it makes his rejection of the right-duty view puzzling because the moral considerations that justify the right to rule also support the view that we are morally required to observe the laws and directives of legitimate authorities.

As a basic norm, reciprocal independence binds all moral agents, be they individuals or group agents. The norm does not require that we make the free agency of others the purpose of our actions, but it obliges us to interact on non-dominating terms. This in turn implies a duty to act according to the public laws and directives that establish such terms. If the deontic republican justification of the right to rule is sound, it is not only legitimate for persons holding public office to exercise political power under the rule of law, but we, as subjects, also have a correlative duty to comply with the legal norms enacted and enforced by

legitimate governments. Since exercise of public authority enables interaction on terms of reciprocal independence, whoever refuses to comply with public laws and directives denies other persons a condition consistent with everyone's right to independence.<sup>6</sup>

Accordingly, both Clamdigger and Motorist do wrong when they disregard court rulings or traffic regulations. Perhaps they make no logical mistake, but they are wrong about the moral relation that holds between private persons and legitimate public authorities. In assuming the right to act according to their own private judgment rather than defer to public rules and regulations, they sustain a condition where each person's rights depend on the arbitrary choice of others. If everyone is free to decide whether public laws and directives merit compliance from case to case, the problems of unilateral lawmaking, judgment, and enforcement are left unsolved. In practice, it makes everyone judge in their own case. Clamdigger's decision that he does no wrong when trespassing is a clear case of someone making a unilateral decision regarding permissible use of someone else's property. Motorist's mistake is different. When turning on red, she does not violate the rights of another private person. Her mistake is to assume she is permitted to exempt herself from the rules constitutive of a system of public roads that legitimate rulers must provide to prevent that anyone becomes landlocked by large landowners.<sup>7</sup>

None of this implies that Clamdigger and Motorist cannot make up their own minds about the laws and directives that bind them. The deontic republican justification of political authority does not require that public officials make good decisions to exercise legitimate power. Like the judgments of private persons, the judgments of officials can falter, and publicly

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<sup>6</sup> Seen in this light, Rousseau's ([1762] 1968) infamous claim that whoever is forced to obey the general will is "forced to be free" (64) makes perfect sense. When a public authority enforces laws against unruly subjects that want to break them, it gives effect to the system of public laws and institutions that enable private persons to interact on terms of reciprocal independence.

<sup>7</sup> In addition to regulating interaction through a system of public laws, there are essential public tasks that only public authorities have rightful standing to perform. Essential public tasks are tasks that must be performed to avoid illegitimate dependency relations. Providing poverty relief through taxation is one such task. Poverty relief is necessary to secure everyone legal access to means with which they can pursue ends of their own. The provision of poverty relief must be public because any private solution would make the poor dependent on the goodwill of property owners (Varden 2006; Weinrib 2003).

Providing a system of roads or some form of infrastructure for transportation of persons and goods is another essential public task (and more relevant in this context). Absent public infrastructure for transportation, large landowners can acquire the power to hinder interaction between persons who need to cross their land to get in touch with each other. And this is incompatible with reciprocal independence, because then private persons decide what other private persons can do. At the same time, public roads are not free spaces anyone can use as they see fit. Public roads come along with rules governing their use – rules that only public authorities have moral standing to make. Since public roads must be accessible to all on terms compatible with the independence of every person, no private person can decide what the rules should be or make exceptions for themselves (Ripstein 2009, 243–52).

authoritative decisions can be both stupid and unfair. Traffic regulations may lead to inefficient flow of traffic and the tax burden of the rich may be too low. If so, the proper response is public criticism. But, as responsible citizens, we must still observe traffic rules and pay our taxes, because a system of political rule need not be ideal or fully just to be legitimate and authoritative. Against this background, there seems to be discrepancy between Applbäum's conceptual view and his normative account of political legitimacy. Given his commitment to reciprocal independence, he should also be committed to the right-duty view.

Since deontic republicanism grounds the moral right to rule in reciprocal independence, which implies the moral equality of all subjects of law, it might seem that only democratic authorities can be legitimate.<sup>8</sup> There is, however, no consensus on this issue among proponents of what I call deontic republicanism. Some, like Anna Stilz, claim that political legitimacy depends on democratic lawmaking. In her view, submitting to the authority of the state is a natural duty because of the state's function as a necessary background condition for reciprocal independence (Stilz 2009, 54), but we are not necessarily obliged to obey the laws of non-democratic states. Only if we have a say in the formulation of laws do we have an obligation to obey them.<sup>9</sup> For this reason, says Stilz (2009), "disenfranchised citizens do not have an obligation to obey minimally just laws" and "women did not have any political obligations to democratic states before the introduction of female suffrage" (95).

Others, like Jacob Weinrib (2016), deny that democracy is a condition of legitimate rule, even if only democratic lawmaking can "reconcile ... public authority with the independence of those who are bound by it" (59). In his view, legitimate rule depends on a system of public laws and institutions that secures the reciprocal independence of private persons in relation to each other. Such a system requires the rule of law, which involves "publicly enacted standards of behavior" that "demarcate a publicly knowable domain of permissible action" where private persons can interact "in accordance with the rights that each is publicly known to possess and the duties that each is publicly known to owe" (Weinrib 2016, 52–3). While the rule of law is compatible with a variety of lawmaking arrangements, only democratic lawmaking is fully just, because non-democratic arrangements, by denying the subjects of law the right to contribute to the making of law, impose constraints on the ruled not required by reciprocal independence. Still, since the rule of law can be realized without democratic

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<sup>8</sup> Thanks to an anonymous referee for prompting me to engage more thoroughly with this question.

<sup>9</sup> Christian Rostbøll (2015) seems to defend a similar view (267, 272).



lawmaking, the absence of democracy does not by itself undermine the right of a government to rule or the duty of subjects to obey (Weinrib 2016, 54–6).

As I see it, the latter of these two views on democracy and political legitimacy is most adequate. For one thing, to claim that legitimacy requires a just democratic system has awkward implications. If the moral right to rule depends on democratic lawmaking, then there was no legitimate exercise of public authority before the first democratic state came into being. But to say so seems counterintuitive, because it implies that no one was in position to determine or enforce legal norms enabling reciprocal independence during a vast span of human history, perhaps not before the French Revolution.

The view that we are only obliged to obey laws if we have had a say in their making also seems hard to square with the common and reasonable view that temporary residents are morally obliged to comply with the laws of the countries they visit. Stilz (2009) limits the democracy requirement for having political obligations to those who are born in a state and cannot leave (95). This way, she implicitly accepts that temporary residents are obliged to observe public laws, even if they had no say in the making of the laws. But, given her own account of political legitimacy, it is not clear why it makes a difference whether we are voluntary visitors to or involuntary inhabitants of a state. If political legitimacy and corresponding political obligations depend on the right to take part in the formulation of laws, why should the laws of a state matter more to temporary residents than to disenfranchised citizens? After all, as non-citizens, temporary citizens never took part in the process of making the laws.

If it is problematic to make legitimacy dependent on democratic lawmaking, the view that democracy is a condition of just, but not of legitimate government, seems to fit quite well with the deontic republican justification of the right to rule. The essence of the deontic republican justification is that submission to public authority enables reciprocal independence between private persons. Reciprocal independence is possible where someone exercises public authority and impossible where no one does. Accordingly, public laws and institutions that secure the reciprocal independence of private persons seems sufficient for political legitimacy to obtain.

To be fully just, exercise of political power must impose no arbitrary restrictions on its citizens. Arbitrary restrictions are restrictions that “cannot be justified by the need to secure everyone against the arbitrary power of his fellow-citizens” (Ebbinghaus 1953, 20). The

requirement that all restrictions should be non-arbitrary, has both substantive and procedural ramifications. Substantively, it requires that laws and acts of government exclusively serve the purpose of establishing relations of reciprocal independence. Procedurally, it requires democratic lawmaking. Accordingly, a fully just system of political rule takes the form of a self-legislating legal community where citizens collectively author the laws that bind them and where public laws and directives are limited to such that serve the purpose of harmonizing the independence of each person with the independence of everyone. Wherever a system of political rule fails to live up to this ideal (which is basically everywhere), a duty to approximate the ideal by reforming the system befalls public authorities (Ripstein 2009, 202–4; Weinrib 2016, 59–61; Weinrib 2019, 34–6). Still, any system of political rule where officials act on behalf of everyone by securing the independence of all private persons in relation to each other is legitimate, and it can rightfully demand that those subject to its rule must act according to its laws and directives.<sup>10</sup> The only alternative is a condition where we are systematically dependent on the arbitrariness of those with whom we interact. Since such a condition conflicts with reciprocal independence, we should put up with, but not stop criticizing, systems of political rule that are less than perfect.

A possible worry related to the view that unjust exercise of political power does not relieve us of political obligations is that governments seem incapable of doing anything that undercut their own authority. This worry is unfounded. Deontic republicanism requires that we obey public authority but does not consider any law or directive authoritative. The rationale that justifies the right to rule is to provide a rightful condition where private persons can interact on terms of reciprocal independence. Any law or directive that makes interaction on such terms impossible are illegitimate, and so does not morally require us to comply. To deny certain persons the right to acquire property or the right to enter legally binding contracts, or to make certain religious creeds or racial origins punishable by death can be characterized as “an act of inhumanity” (Ebbinghaus 1953, 21) or as “barbarism” (Ripstein 2009, 336–43; Weinrib 2016, 99–107). To enact laws or directives that are inhumane or barbarous is not simply to impose unjustifiable restrictions on the freedom of subjects. It is to use political power for purposes that are incompatible with a condition that enable interaction on terms of

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<sup>10</sup> Accordingly, non-democratic global institutions could also be authoritative for us. Since the legitimacy and justice of global institutions is a topic beyond the scope of this paper, I leave open the question whether justice requires democratization of such institutions.

reciprocal independence. Such use of political power is illegitimate, and no one is morally obliged to obey illegitimate uses of power.

Another possible worry concerns the standing of citizens under a non-democratic government. Arguably, since non-democratic governments are not accountable to their subjects, most citizens of non-democratic states stand in a problematic dependency relation to their rulers. Where lawmakers do not answer to the subjects of law, citizens are subject to the arbitrariness of those who make the laws. While this problem must be tackled somehow, it does not seem that more inclusive lawmaking procedures can solve the problem. Under majority rule, the minority is in a position comparable to the position of the majority under the rule of one or the rule of a few. They are subject to the arbitrariness of the aggregated preferences of the many. My hunch is that a solution to this problem requires a system of constitutional constraints on lawmakers. It lies beyond the scope of this paper to account for the essential features of a non-dominating constitutional system, but see Pettit (1997, 171–205) and Weinrib (2016, 147–160) for two different takes on how constitutional mechanisms can protect against domination in the vertical relation between ruler and ruled.

## 6 No Room for Civil Disobedience?

Appelbaum (2019) claims that “the power-liability view”, as compared with alternative views, “makes better sense of the complicated judgments responsible citizens make when they confront legal demands that are either tragic or trifling” (44). Presumably, the hypothetical cases of *Clamdigger* and *Motorist* exemplify the reasoning of responsible citizens when confronted with trifling demands. If the deontic republican defense of the right-duty view is sound, we should reject the reasoning of *Clamdigger* and *Motorist* as morally flawed. What, then, about judgments responsible citizens make when confronted with tragic demands, that is, moral reasoning in cases where effectively protesting political injustice seems to come at the cost of breaking the law? This is the problem of civil disobedience, which is a harder nut to crack for someone committed to the right-duty view. I believe the nut can be cracked without ruling out civil disobedience in legitimate states or judging governments illegitimate to make room for civil disobedience in Rawls’ sense. This is not to deny that there are tensions in an account based on the right-duty view, but the tensions can also help us explain some of the distinctive features of civil disobedience.

According to Rawls, civil disobedience is a form of political communication that involves acting contrary to law with the aim of changing unjust laws or policies in a nearly just society. It is a political protest that addresses the ruling majority and that invokes the fundamental principles underlying the political order (Rawls 1971, 365). As an illegal act, the protest still expresses fidelity to law by “the public and nonviolent nature of the act” and “the willingness to accept the legal consequences of one’s conduct” (Rawls 1971, 366).

It is clear why we should not engage lightly in civil disobedience if committed to the deontic republican justification of political rule. If subjection to public authority is the only way to escape subjection to arbitrary choice, then we can have no *right* to disobey legitimate authorities. A right to disobey is incompatible with reciprocal independence because it reintroduces the problems of interaction in the absence of public authority. Hence, explaining the moral gravity of acts contrary to law is no challenge for this view. But if the moral argument underpinning legitimate rule also establishes a duty to obey, how can we give an account of lawbreaking within the limits of fidelity to law?

To make room for civil disobedience from the perspective of deontic republicanism, one must see this special type of protest as an essentially communicative political act. The political nature of civil disobedience is reflected in both its objective and its justification. The objective is to induce changes in unjust laws or policies that public authorities so far have failed to remedy. The justification appeals to principles internal to the political system, and not to private moral convictions or religious belief. One does not claim a right to follow one’s own judgment whenever one happens to disagree with public authorities or to decide the terms that governs one’s interaction with other persons. Instead, one appeals to the better self of the majority in power, in an attempt at reducing the discrepancy between political practice and the normative principles governing this practice.

The communicative nature of civil disobedience is reflected in its public and non-violent character. As an attempt at conveying a political message to the majority, the purpose of civil disobedience would be undermined by secrecy. Accordingly, civil disobedience is not an attempt at escaping the demands of public laws. It is an illegal protest done in the open, for everyone to see. The point of the protest is to dramatize and bring an issue “out in the open where it can be seen and dealt with” (King 1963). Importantly, the aim is to induce change through rational and moral persuasion rather than by force (Brownlee 2007, 180). Since protesters want to set off a reform process guided by moral conviction, they avoid violence

and injury to others. Notably, protesters do not seek to subvert the system of public laws and institutions that enable reciprocal independence. Civil disobedience is not a revolutionary act, but a call for change in a political system ripe for reform. By announcing the protest in advance (Rawls 1971, 366), protesters even give the government the chance to take countermeasures.

Still, civil disobedience typically hinders other persons' freedom to pursue ends of their own choice. The protester avoids injury to others, but during the protest, someone else's plans and projects are obstructed. For this reason, it is reasonable to require that civil disobedience is a last resort, justifiable under the condition that "legal means of redress have proved to no avail" (Rawls 1971, 373). For the same reason, coercion and penal sanctions are appropriate public responses. Whatever motive one has for taking part in an illegal protest, it is the right and duty of public authorities to enforce the laws that secure reciprocal independence for interacting persons.

Admittedly, even if illegal protesting can be seen as a form of public criticism where lawbreaking has a symbolic function, there remains a tension between the idea of justified civil disobedience and the idea of a duty to obey the laws promulgated by legitimate authorities. However, unlike Applbaum, I am not convinced that the problem is best resolved by rejecting the latter idea. As an act contrary to law within the limits of fidelity to law, civil disobedience not only implies non-violence and publicity, but also willingness to accept the legal consequences of breaking the law. An advantage of retaining the idea of a duty to obey the law, is that we hold on to a possible explanation of such willingness, namely that it reflects the presumption of a duty to act according to the laws that are broken. On this view, the duty is not annulled whenever disobedience is justified. Instead, it is the presumption of a duty to obey that explains the willingness to accept the legal consequences of breaking the law. Certainly, the presumption of a duty to obey is not the only possible explanation. There might be concerns other than respect for the law that make a person willing to accept punishment (see Zhu 2017, 455–6). While this might be so, it seems that willingness to accept punishment on other grounds than respect for the law is no longer within the limits of fidelity to law, because then the law carries no independent moral weight in the lawbreaker's reasoning. Perhaps we should rather speak of fidelity to one's own unilateral judgment in such cases.

The idea can be elucidated by comparing it to emergency situations where survival depends on infringing someone's property rights. Joel Feinberg (1978, 102) describes the case of a hiker surprised by a severe and life-threatening blizzard. Luckily, the hiker comes across an empty cabin, smashes a window to enter, burns furniture to keep warm, and consumes part of the owner's food supply to sate hunger. While all of this is justifiable, the hiker still owes the cabin owner compensation for the damages and for the consumed food. The emergency justifies the infringement, but it does not void the hiker's duty to respect other people's property rights. The duty persists throughout the event, and it is this duty that explains why the hiker owes compensation to the cabin owner.

Similarly, we can say that justified disobedience does not void the duty to act according to valid law, and that the persistence of the duty explains how transgression of law can go along with fidelity to law. Of course, a situation where civil disobedience is justified differs in important respects from an emergency of the kind Feinberg describes. The illegal protest is a last resort in an endeavor to repeal substantial and clear injustices in the political system, but typically no one's life is in immediate danger. Still, the comparison can serve to illustrate the idea of a duty that remains valid even when there is a just cause for protest. Just as the hiker presumes no right to violate the cabin owner's property rights, so the citizen engaging in civil disobedience does not presume a right to disobey legitimate authorities. To the contrary, by readily accepting punishment for breaking the law, the duty to obey is presumed.

## 7 Conclusion

In the preceding pages, I have challenged the power-liability view by arguing that moral reasons speak in favor of the right-duty view. Based on the idea of reciprocal independence, I have argued that the moral concerns that justify the right to rule also justify the duty to obey. Reciprocal independence may be a controversial norm, but it plays an important role in Applbaum's own normative account of political legitimacy. And since reciprocal independence forms the basis of a strong case in favor of the right-duty view, there is a discrepancy between Applbaum's conceptual defense of the power-liability view and his substantive moral account of political legitimacy. Even if it is not an analytical truth that we are obliged to obey valid laws and directives issued by legitimate governments, Applbaum's normative commitments support the right-duty view.

I have also argued that the right-duty view can account for Rawlsian civil disobedience. The account is not without tensions, but the idea of a duty to obey valid laws can help us explain how transgressions of law can still express fidelity to law. Accordingly, I see no compelling reason to abandon the commonsensical view that exercise of legitimate political power involves imposition of contingent moral obligations on subjects.

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