

Justification

AND

Legitimacy

ESSAYS ON RIGHTS
AND OBLIGATIONS



A. JOHN SIMMONS

JUSTIFICATION AND LEGITIMACY

Essays on Rights and Obligations

A. JOHN SIMMONS

University of Virginia



CAMBRIDGE
UNIVERSITY PRESS

PUBLISHED BY THE PRESS SYNDICATE OF THE UNIVERSITY OF CAMBRIDGE
The Pitt Building, Trumpington Street, Cambridge, United Kingdom

CAMBRIDGE UNIVERSITY PRESS

The Edinburgh Building, Cambridge CB2 2RU, UK
40 West 20th Street, New York, NY 10011-4211, USA
10 Stamford Road, Oakleigh, VIC 3166, Australia
Ruiz de Alarcón 13, 28014 Madrid, Spain
Dock House, The Waterfront, Cape Town, 8001, South Africa

<http://www.cambridge.org>

© A. John Simmons 2001

This book is in copyright. Subject to statutory exception
and to the provisions of relevant collective licensing agreements,
no reproduction of any part may take place without
the written permission of Cambridge University Press.

First published 2001

Printed in the United States of America

Typeface Baskeville 10/13 pt. *System* QuarkXPress [BTS]

A catalog record for this book is available from the British Library.

Library of Congress Cataloging in Publication Data

Simmons, A. John (Alan John), 1950-

Justification and legitimacy: Essays on rights and obligations / A. John Simmons.

p. cm.

ISBN 0-521-79016-6 (hb) - ISBN 0-521-79365-3 (pbk.)

1. Political obligation. 2. Legitimacy of governments. 3. Human rights. I. Title.

JC329.5 .S55 2001

323'.01 - dc21

00-023590

ISBN 0 521 79016 6 hardback

ISBN 0 521 79365 3 paperback

JUSTIFICATION AND LEGITIMACY

A. John Simmons is widely regarded as one of the most innovative and creative of today's political philosophers. His work on political obligation is regarded as definitive, and he is internationally respected as an interpreter of John Locke.

The characteristic features of clear argumentation and careful scholarship that have been hallmarks of Simmons's philosophy are everywhere evident in this collection. The essays focus on the problems of political obligation and state legitimacy as well as on historical theories of property and justice. Cumulatively, the collection presents a distinctive social and political philosophy, exploring the nature of our most fundamental rights and obligations and displaying the power and plausibility of Lockean ideal theory.

The volume will be eagerly sought out by students and professionals in the fields of philosophy, political science, and law.

A. John Simmons is Commonwealth Professor of Philosophy at the University of Virginia. His previous books are *Moral Principles and Political Obligations* (1979), *The Lockean Theory of Rights* (1992), and *On the Edge of Anarchy* (1993).

EEJ 01 12

INTRODUCTION

Justification and Legitimacy brings together a closely related set of my papers in social, political, and legal philosophy. All of the papers assembled here concern the basic rights and obligations of persons, citizens, and states, and nearly all express my most recent thoughts on these subjects. All of these papers also exemplify or defend one particular approach to the fundamental questions of social, political, and legal philosophy. This approach begins with an examination of the natural moral condition of persons: that is, an examination of the basic rights and duties persons possess and of the special moral relationships into which they can enter (or in which they can find themselves), independent of their roles as members of organized political societies. The basic assumptions on which this approach is founded are: (1) that all persons, whenever and wherever born, begin their moral lives (upon rising to the status of full moral agents) with a substantial body of moral rights and duties, and (2) that the rights in question centrally include, and perhaps add up to no more than, a broad right of self-government or independence (both from other persons and groups and from states).

A person's standing as a legitimate subject of some government must then be understood, on this approach, as the result of a special kind of departure from that person's natural condition. The political realm is to be analyzed in terms of permissible transitions from the natural condition to the condition of political membership. The rights and duties of states and governments, the moral limits on the state's employment of coercive political power, and the demands of social justice are all to be explained by delineating the (actual and morally permissible) processes by which persons make the transition from the natural to the political condition.

This approach to political philosophy, then, constitutes a straightforward rejection of what we might call “political naturalism” – according to which the natural condition of persons born within the territories of political societies is one of political membership and political obligation. The political relationship is by contrast, according to the view espoused here, essentially “artificial” (that is, a product of human artifice), however “natural” it may be for us to create and live in political societies.

The best-known practitioner of this approach to social and political philosophy, of course, was John Locke, though many philosophers since Locke (and a few before him) have explicitly or implicitly practiced it as well. We can see Locke’s commitment to this approach just by noticing the most prominent claims in his writings. For instance, it would not be misleading, I think, to identify as the central theses of Locke’s *Second Treatise of Government* the following: (1) All persons are naturally free and equal; (2) persons can acquire natural property rights by laboring on unowned nature; and (3) all legitimate political power derives from the consent of those subject to it. In defending the first thesis, Locke lays out his view of persons’ basic rights and duties. All persons are by nature equally subject to the requirements of natural law and equally entitled to govern their own lives within the constraints of that law. In defending the second thesis, Locke explains one of the most basic and politically important sources of special rights and obligations. Persons are by nature capable of making for themselves (without the need for conventional, legal, or political sanction) full private property rights in fair shares of the earth and its resources; and it is only by the voluntary subjection of such property to the jurisdiction of a state that states can legitimately achieve their familiar territorial dimensions. The third thesis, of course, gives us Locke’s view of the only legitimate ground for the transition from our natural to our political condition. Without their free consent to membership in some legitimate political society, persons remain always in their natural moral condition, however thoroughly political their lives may otherwise seem to be.

Locke’s work thus identified as the three central problems the political philosopher must address: the nature and justification of our natural rights to self-government, the nature and justification of natural rights to property, and the nature and justification of political obligation and of governmental or state legitimacy. The papers collected in this book all explore, directly or indirectly, these three central problems of social, political, and legal philosophy. All the papers concern either the substance of the moral relationship between citizen and state or the extent of and grounds for individual natural rights. I do not, of course, always employ Locke’s

methods or follow his arguments, nor do I always accept anything like the conclusions Locke defended; but I do take my approach to these issues to be throughout Lockean in spirit, following the same basic orientation to these areas of philosophy and taking the same issues to be fundamental.

The first eight of the twelve papers assembled here address, in one way or another, the nature of the citizen–state relationship, dealing principally with the problems of political obligation and state legitimacy. Of these, only one (“‘Denisons’ and ‘Aliens’ . . .”) attempts a detailed or scholarly treatment of Locke’s own consent theory of political obligation and legitimacy, despite the broadly Lockean orientation of all of the papers. In “‘Denisons’ and ‘Aliens’” I offer both a new interpretation of Locke’s consent theory and a defense of the theory I attribute to Locke as the soundest position for a consent theorist to take. Some of the other papers on these themes aim instead to refute currently popular rival accounts of political obligation and legitimacy. Two, for instance (“The Principle of Fair Play,” “Fair Play and Political Obligation”), have as their target the fair play or fairness account of political obligation, according to which the citizens of reasonably just polities who have accepted the beneficial results of the cooperative sacrifices of their fellows owe an obligation to reciprocate by doing their fair shares in supporting the political scheme. This account, I am distressed to report, seems to enjoy more support today than it did when I first argued against it in 1979, which explains my return to the subject after twenty years. My conclusions about this account remain highly skeptical. Two other papers (“Associative Political Obligations,” “External Justifications . . .”) argue against the view of political obligation as an “associative” or “role” obligation, a view taken very seriously in Locke’s own day (and during several periods since) that is once again quite popular today. It is also a view that is diametrically opposed to the voluntaristic approach to such issues that I favor – and that Locke favored as well, if not, perhaps, in so wholehearted a fashion as do I. “Associativists” hold that our political obligations are binding on us simply by virtue of our occupation of certain social, institutional, or associational positions or roles. If my arguments against this view are sound, they effectively undermine theories of political obligation that are Hegelian or Wittgensteinian (or, more broadly, communitarian), as well as views like Dworkin’s “liberal associativism.”

In another of the papers dealing with political obligation (“The Obligations of Citizens . . .”), I try to provide some general organizing principles for discussions of political obligation, and I briefly lay out the grounds for my systematic rejection of all attempted defenses of political obligation. This paper, in addition to thus helping to motivate those that follow it,

offers a useful illustration of the practical bearing of arguments concerning political obligation on political policy issues – in this case, on the justification of military conscription. “Philosophical Anarchism” has as its objective a clear description and defense of my favored position on this subject, a position toward which all of the best arguments about political obligation seem to me to push us. This position is that all actual states are illegitimate, but that there may nonetheless be good moral grounds for supporting (or, at least, not resisting) the activities of many states. Finally, in “Justification and Legitimacy” I try to place all of the preceding arguments in a broader context, defending a Lockean view of the relationship between these concerns about political obligation and state legitimacy, on the one hand, and additional dimensions of institutional evaluation (such as virtue or justice), on the other. I argue that evaluations of states in terms of their legitimacy should be understood to be distinct from, and to vary independently of, their evaluations in terms of justice or goodness (i.e., that which “justifies” states), in opposition to the dominant schools of contemporary political philosophy.

The remaining four papers collected here address the other central areas of concern in a Lockean approach to social, political, and legal philosophy, though again only one (“Makers’ Rights”) includes any extended consideration of Locke’s own views. “Human Rights and World Citizenship . . .” discusses both Locke’s and Kant’s (rival) views of the natural moral condition of persons; it also tries to clarify the ways in which our views on that subject should affect our picture of the primary focus of loyalty for citizens, thus providing a perspective on the viability of the “cosmopolitan” stance in moral and political philosophy.

The last three papers (“Original-Acquisition Justifications . . .” “Historical Rights . . .,” “Makers’ Rights”) all concern the idea of natural property rights and allied historical accounts of distributive justice. Property is, according to the approach practiced here, a particularly important special natural right (with important correlated obligations) for a number of reasons. The private property (or use rights) of individuals in land is the material out of which states’ territories must be constructed in order for those territories to be legitimately subject to state jurisdiction. And the rights that politically associated persons must be understood to retain over their land and possessions constitutes one of the important limits on legitimate governmental power. Further, of course, many prominent conceptions of social justice revolve around or centrally feature respect for individual rights to property. A proper appreciation of the nature and grounds of natural property, then, is essential not only to a Lockean, but

to any, approach to social, political, and legal philosophy. The papers on property included here are all designed to defend (and to modify in ways that render more plausible) historical theories of property – and, in a more limited way, historical theories of justice – of the sort defended by Locke. I try to argue on behalf of these theories in something like their traditional form, maintaining that they in fact have the resources to respond to the familiar dismissive objections (e.g., of contemporary irrelevance and justificatory impotence) that recent philosophy has tended to casually advance and endlessly repeat. I try as well to orient my discussions so that they will bear in obvious ways on some actual examples of historical injustice and property violations, such as the case of Native American peoples.

I have dealt before with many of the issues addressed in these collected papers, particularly in my three previous books (*Moral Principles and Political Obligations* [1979], *The Lockean Theory of Rights* [1992], and *On the Edge of Anarchy* [1993]). The papers assembled here begin, in effect, where those books left off, though they presuppose no knowledge of my arguments there. These papers for the most part represent my most recent thoughts on these subjects and constitute, I think, substantial improvements upon and additions to the work done in those books. For those curious about my earlier arguments, one of the papers in this collection (“The Obligations of Citizens . . .”) does contain a summary of (and a slightly different way of characterizing) the general case that I made against political obligation in *Moral Principles and Political Obligations*. But virtually all of the papers here are otherwise essentially freestanding. Ten of the twelve papers in this book were written since the publication of my last book. Two (“Fair Play and Political Obligation . . .”, “Human Rights and World Citizenship . . .”) have not been previously published in English, while the others were published in a variety of (not always particularly accessible) places.

Two of the papers in this collection, however, are considerably older than the others, and their inclusion here requires some justificatory comment. “The Principle of Fair Play” (originally published in 1979) is included here principally to accompany and motivate a second (very recently completed) paper on the same topic (“Fair Play and Political Obligation . . .”), in which I both develop my earlier view and respond to some of the criticisms of my position that have been advanced during the past two decades. The other older paper, “The Obligations of Citizens and the Justification of Conscription” (from 1983), is included for different reasons. First, as already noted, it reorganizes and briefly summarizes my principal arguments against political obligation and so should help readers

see more clearly the general grounds for my philosophical anarchist conclusions. But it also contains a discussion of (and arguments against) the approach to the problem of political obligation that was Locke's chief target in his *Treatises*; namely, the view of political obligations as identical to (or strongly analogous to) filial obligations. This paper thus not only supports the case made in other papers in this collection against political obligation conceived of as a "role" or "associative" obligation. It also seems a particularly fitting contribution to an effort to sustain and expand a Lockean approach to normative philosophy.

I hope that readers will agree that the twelve papers collected here make genuine advances on some of the central problems of social, political, and legal philosophy. These papers should, at the very least, help to clarify the character, virtues, and limits of a broadly Lockean approach to those fields. Perhaps they will also, as I hope, help to convince readers that such an approach is genuinely fruitful in ways that require that it be taken very seriously by contemporary philosophers. For the conclusions this approach yields, however unfashionable they might be, seem to me to have considerable force in specifying the regulative ideals in light of which social and political philosophy should proceed.

ACKNOWLEDGMENTS

The author gratefully acknowledges the following publishers' permission to reprint previously published material:

"The Principle of Fair Play" originally appeared in *Philosophy and Public Affairs* 8:4 (Summer 1979), 307-337. Copyright 1979 by Princeton University Press.

"The Obligations of Citizens and the Justification of Conscription" originally appeared in R. K. Fullinwider (ed.), *Conscripts and Volunteers* (Totowa, NJ: Rowman & Allanheld, Publishers, 1983), 73-88. Copyright 1983 by Rowman & Allanheld, Publishers.

"Associative Political Obligations" originally appeared in *Ethics* 106:2 (January 1996), 247-273. Copyright 1996 by the University of Chicago Press.

"External Justifications and Institutional Roles" originally appeared in *The Journal of Philosophy* 93:1 (January 1996), 28-36. Copyright 1996 by The Journal of Philosophy, Inc.

"Philosophical Anarchism" originally appeared in J. T. Sanders and J. Narveson (eds.), *For and Against the State* (Lanham, MD: Rowman & Littlefield, Publishers, 1996), 19-39. Copyright 1996 by Rowman & Littlefield, Publishers.

"Justification and Legitimacy" originally appeared in *Ethics* 109:4 (July 1999), 739-771. Copyright 1999 by the University of Chicago Press.

"'Denisons' and 'Aliens': Locke's Problem of Political Consent" originally appeared in *Social Theory and Practice* 24:2 (Summer 1998), 161-182. Copyright 1998 by Social Theory and Practice.

"Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke" originally appeared in German only (under the

title “Menschenrechte und Weltbürgerrecht – die Universalität der Menschenrechte bei Kant und Locke”) in K. Dicke and K. Kodalle (eds.), *Republik und Weltbürgerrecht* (Weimar: Böhlau Verlag, 1998).

“Original-Acquisition Justifications of Private Property” originally appeared in *Social Philosophy & Policy* 11:2 (Summer 1994), 63–84. Copyright 1994 by the Social Philosophy and Policy Foundation.

“Historical Rights and Fair Shares” originally appeared in *Law and Philosophy* 14:2 (May 1995), 149–184. Copyright 1995 by Kluwer Academic Publishers.

“Makers’ Rights” originally appeared in *The Journal of Ethics* 2:3 (1998), 197–218. Copyright 1998 by Kluwer Academic Publishers.

CONTENTS

<i>Introduction</i>	<i>page</i> vii
<i>Acknowledgments</i>	xiii
1 The Principle of Fair Play	1
2 Fair Play and Political Obligation: Twenty Years Later	27
3 The Obligations of Citizens and the Justification of Conscription	43
4 Associative Political Obligations	65
5 External Justifications and Institutional Roles	93
6 Philosophical Anarchism	102
7 Justification and Legitimacy	122
8 “Denisons” and “Aliens”: Locke’s Problem of Political Consent	158
9 Human Rights and World Citizenship: The Universality of Human Rights in Kant and Locke	179
10 Original-Acquisition Justifications of Private Property	197
11 Historical Rights and Fair Shares	222
12 Makers’ Rights	249
<i>Index</i>	271

THE PRINCIPLE OF FAIR PLAY

I

The traditional consent theory account of political obligation can be understood as advancing two basic claims. (1) All or most citizens, at least within reasonably just political communities, have political obligations (that is, moral obligations or duties to obey the law and support the political institutions of their countries of residence). (2) All political obligations are grounded in personal consent (express or tacit). Today most political philosophers (and non-philosophers, I suspect) are still prepared to accept (1). But (2) has been widely rejected largely because it entails, in conjunction with (1), that all or most of us have undertaken political obligations by *deliberate consensual acts*. And this seems not even approximately true. If it is not true, then (1) requires a defense employing a more complex account of special rights and obligations than the one offered by consent theory.

One popular way of defending (1) relies on what has been called “the principle of fair play” (or “the principle of fairness”).¹ Advocates of this principle argue that promises and deliberate consent are not the only possible grounds of special rights and obligations; the acceptance of benefits within certain sorts of cooperative schemes, they maintain, is by itself sufficient to generate such rights and obligations. It is these arguments

¹ These are John Rawls' two names for the principle, from “Legal Obligation and the Duty of Fair Play,” *Law and Philosophy*, ed. S. Hook (New York: New York University Press, 1964) and *A Theory of Justice* (Cambridge: Harvard University Press, 1971). The same principle was alluded to by C. D. Broad in “On the Function of False Hypotheses in Ethics,” *International Journal of Ethics* 26 (April 1916), and developed by H. L. A. Hart (see below).

I want to examine. I begin with a brief discussion of the principle of fair play as it has appeared in recent philosophical literature. From there I proceed to a more general evaluation of the principle (in Sections II and IV) and of the theory of political obligation with uses it (in Sections III and V).

The first concise formulation of the principle of fair play was provided by H. L. A. Hart:

A third important source of special rights and obligations which we recognize in many spheres of life is what may be termed mutuality of restrictions, and I think political obligation is intelligible only if we see what precisely this is and how it differs from the other right-creating transactions (consent, promising) to which philosophers have assimilated it.

Hart's explanation of the "special transaction" he has in mind runs as follows:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission. The rules may provide that officials should have authority to enforce obedience . . . but the moral obligation to obey the rules in such circumstances is due to the cooperating members of the society, and they have the correlative moral right to obedience.²

While Hart does not refer to this source of special rights and obligations in terms of fairness or fair play, he does note later that "in the case of mutual restrictions we are in fact saying that this claim to interfere with another's freedom is justified because it is fair."³ We can understand him, then, to be claiming that, in the situation described, a beneficiary has an obligation to "do his fair share" by submitting to the rules when they require it; others who have cooperated before have a right to this fair distribution of the burdens of submission.

Hart's brief account of the principle of fair play, of course, leaves many important questions unanswered. What, for instance, are we to count as an "enterprise?" Are only participants in the enterprise obligated to do their part, or do obligations fall on all who benefit from the enterprise? Why is a set of rules necessary? Clearly a fuller treatment of the principle is essential for our purposes, and John Rawls provides one in his 1964 essay, "Legal

² "Are There Any Natural Rights?" *Philosophical Review* 64 (April 1955): 185.

³ *Ibid.*, pp. 190-191.

Obligation and the Duty of Fair Play."⁴ There Rawls builds on Hart's account to give both a more complete account of the principle of fair play and an extensive discussion of its application to constitutional democracies. His central presentation of the principle echoes Hart's:

The principle of fair play may be defined as follows. Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating.⁵

The context within which obligations (or duties – Rawls is not very concerned here with the distinction between them) of fair play can arise, as described by Rawls, can be seen to exhibit three important features, parallel to those we can discern in Hart's account.

- (1) There must be an active scheme of social cooperation. This does not really advance us much beyond Hart's "enterprise," but I think that both writers clearly intended that the principle cover a broad range of schemes, programs, and enterprises differing in size and in significance. Thus, both a tenant organization's program to improve conditions in an apartment building and an entire political community's cooperative efforts to preserve social order seem to qualify as "enterprises" or "schemes of social cooperation" of the appropriate sort. Rawls does set two explicit conditions, however, which help us limit the class of "schemes" he has in mind. First, they must be "mutually beneficial." This condition is, I think, implicit in Hart's account as well; indeed, the principle would be obviously objectionable in its absence. Second, the schemes must be just. This condition is nowhere alluded to by Hart, and I will consider it carefully in Section II.

⁴ See fn. 1 above. The versions of the principle which Rawls presents elsewhere do not differ substantially from this 1964 version; however, contrary to his claims in this version he does argue in *A Theory of Justice* that this principle cannot be used to account for political obligations.

⁵ "Legal Obligation and the Duty of Fair Play," pp. 9–10.

- (2) Cooperation under the scheme involves at least a restriction of one's liberty. Rawls does not mention here, as Hart does, that this restriction must be in accord with a system of rules which govern the scheme by determining the requirements of cooperation (although his later "institutional" language does follow Hart's requirement). Frankly, I can see no good reason to insist that the enterprise be governed by rules. Mightn't an enterprise be of the right sort which, say, assigned burdens fairly but not in accord with any preestablished rules? Cannot doing one's part be obligatory under considerations of fair play even if "one's part" is not specified by the rules?
- (3) The benefits yielded by the scheme may be received in at least some cases by someone who does not cooperate when his turn comes; here Rawls again makes explicit a condition which Hart clearly has in mind (since "free riding" is a problem only when this condition obtains). But Rawls adds to this the condition that the benefits in question can be obtained only if nearly all of the participants cooperate. I confess that I again do not see the necessity of this condition. Would it be any less unfair to take the benefits of the cooperative sacrifices of others if those benefits could still be obtained when one-third or one-half of the participants neglected their responsibilities towards the scheme? Would this make that neglect justifiable? Surely not. A scheme which requires uniform cooperation when only 50 percent cooperation is needed may perhaps be an inefficient scheme; but it is not clear that this would make considerations of fair play inapplicable. Consider a community scheme to preserve water pressure. This scheme prohibits watering lawns in the evening, when in fact if half of the members watered their lawns there would be no lowering of water pressure. Surely this is an inefficient plan, compared to alternatives. But once the plan was instituted, would a member be any more justified in watering his lawn in the evening than if only a few people's so doing would lower the water pressure? I think it is clear that he would not be. Certainly free riding is more dangerous to the scheme's successful provision of benefits when Rawls' requirement obtains; it may then be even more objectionable in those cases. But this additional objectionable element seems to have nothing to do with considerations of *fair play*.⁶

6 This argument also seems to me to provide an effective response to a recent attack on the principle of fair play made by M. B. E. Smith, in "Is There a Prima Facie Obligation to Obey the Law?" *Yale Law Journal* 82 (1973). Smith argues that failing to cooperate in a scheme after receiving benefits is only unfair if by this failure we deny someone else benefits within the scheme. But my example is precisely a case in which the failure to cooperate may not