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EQUAL LIBERTY AND THE PRINCIPLE OF FAIRNESS:
AN EXAMINATION OF SOME CONTEMPORARY
CONTRACTARIAN THEORIES OF POLITICAL OBLIGATION
IN A CONSTITUTIONAL DEMOCRACY.

by

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CHAPTER ONE

INTRODUCTION: THE NATURE AND EXTENT OF THE PROBLEM

The surprising fact about political life, according to Hume, is the ease with which people obey their government. Why is this so? To be sure, there are several reasons why citizens obey their government and abide by the law. These reasons vary from simple habituation to a most rational calculation of advantage. Sometimes it does not even occur to citizens to do anything other than to obey. But even when the possibility of disobedience does occur (for example, in cases where there is a conflict between personal moral convictions and what the State demands), the citizens are more often than not restrained by fear of the probable consequences of disobedience. It must be admitted, however, that fear or force alone will not always be sufficient to secure universal obedience to law at all times. The history of civil rights movements in the United States in the 1960's and elsewhere is a telling evidence of this. How then do we justify the general practice of obedience to law? This is the problem which this essay proposes to examine -- a complex problem traditionally described as the problem of Political Obligation.

This problem or, (to use Professor H. Pitkin's now popular characterisation of it), "this cluster of problems" has been construed in different ways by different philosophers

in different periods of history. It has, for example, been construed as the problem of whether the obligation to obey and support the State and its laws is in any way distinctive or special.¹ Or is it merely a set of moral obligations as they happen to apply to law and the state in a particular circumstance?² Again it has been construed as the problem of whether there are in fact nation-states which enjoy de jure authority in contradistinction to merely claiming to have such authority? Finally, the problem of political obligation has been construed and discussed -- perhaps more persistently -- as the problem of whether a given person P has a prima facie obligation to obey his government in so far as this latter exercises political authority over him. So construed, the central question of political obligation has been taken to be: Why should P obey the law? Let us call this The Theme-Question or simply T-Q.

In recent times, some philosophers, (among them J.C. Rees and Margaret Macdonald) have been concerned to show that the Theme-Question poses a pseudo-question in so far as the question is meaningless in the legal context.³

1. John Chapman, "The moral foundations of Political obligations" in NOMOS XII: Political and Legal Obligation (New York: Atherton Press Inc., 1970), pp. 142 ff.
2. E.F. Carritt, Morals and Politics (Oxford: At the Clarendon Press, 1935).
3. J.C. Rees, "The limitations of Political Theory", in Political Studies, vol. 11, (1954), pp. 245-253; M. Macdonald, "The Language of Political Theory", in A. Flew's (ed.) Logic and Language, 1st Series (Oxford: Blackwell, 1952), pp. 167-186.

But it seems presumptuous to me to dismiss T-Q as a pseudo-question without some discussion as to the nature of the state and law and the relation between them. Besides, even though the Theme-Question might be meaningless in one context, it still does not follow that it is necessarily meaningless in other contexts. The different contexts -- legal, political and moral -- in which the question features need to be sorted out in order to determine in what context, if any, the question retains its meaningfulness. Not too surprisingly, John R. Carnes has argued persuasively that T-Q is not a political question, but a moral one.⁴ I shall attempt to clarify this viewpoint in chapter two. My concern in this introductory chapter is to define the nature of the problem. For in dealing with the problem of political obligation, philosophers have often overlooked the fact that there is here not just one question, but several, distinct though related questions which sometimes require quite separate considerations. I shall now try to distinguish these questions, and identify the one with which I shall be principally concerned.

4. J.R. Carnes, "Why should I obey the Law?" in Ethics, vol. LXXI, (Oct. 1960), pp. 14-26.

What sort of questions have political philosophers been asking and discussing under the heading of political obligation? S.I. Benn and R.S. Peters remind us that the people who have been troubled by the practice of obedience to law have not necessarily been professional philosophers, but have sometimes been practical men writing to justify a political upheaval or revolution, or men contemplating civil disobedience on principle.⁵ Such men have asked the more or less practical question of when, or under what conditions, obedience or disobedience to law is required and justified; what sort of principles could help a man decide when and when not he has a duty to obey the commands of his political superiors. But in asking these questions, these men are not, I hope, simply seeking to know how in fact people do behave vis-a-vis political authority. They are not, in other words, merely asking questions concerning a theory of political behaviour. Rather their questions relate to what Joseph Tussman has called the question "What should I do?":

There are two radically distinct points of view of perspectives from which political life or the political process can be studied. First, there is the perspective of the external observer

5. S.I. Benn and R.S. Peters: Social Principles and the Democratic State (London: George Allen and Unwin, 1959), p. 299-300.

concerned with the description of political behaviour. This is continuous with the interest in prediction of such behaviour since, of course, an adequate description may reveal patterns which form the basis of prediction. This perspective, intrinsic to most of what is called 'social science' might, then, be called 'descriptive-predictive'. Brought to bear upon the political agent or decision-maker its basic question is 'what will he do?'

But second, there is the point of view, not of the observer, but of the person (or persons) within a tribunal confronting his task. And this task is not predicting but deciding; the question is not what will he do but 'what should I do'. I shall call this essentially 'normative' or 'practical' perspective, the 'perspective of action'.⁶

Richard Flathman has similarly argued in his Political Obligation that the practice of political obligation belongs properly within the realm of action, not behaviour. He does not think that people ask the question "Why should I obey the law?" out of habit but in circumstances that call for good reasons for deciding to obey or not to obey the law.⁷

The concern over the practice of institutional obedience has also been expressed in the form: whom are we obligated to obey? The use of 'obligation' in the paradigmatic contexts of promising and contracting, where the obligation

6. Joseph Tussman: Obligation and the Body Politic (Oxford University Press: London, New York, Oxford, reprint 1973), p. 12.

7. R. Flathman, Political Obligation, (Atheneum: New York, 1972).

is owed to specific individuals has tended to obscure the fact that the obligation in the expression 'political obligation' is a function of the relationship between the individual and the legal system. Although Professor Hart has recently suggested that we speak of the obligation in terms of an "acceptance of the legal system" or "allegiance to the system", it still makes sense to ask: "whose legal system" in a situation of civil war or revolution.⁸

From asking "whom are we obligated to obey", it is a short step to asking, as does Professor Pitkin, "Is there really a difference between legitimate authority and mere coercion?" Not infrequently, in these days, of coups and counter-coups, people find themselves obeying the decrees and commands of X-government who has just ousted Y-government in a coup d'état. Who is the legitimate authority? Or are terms like 'legitimate', 'authority', 'obligation' parts of an "elaborate social swindle, used to clothe those highway robbers who have the approval of society with a mantle of moralistic sanctity"?⁹

One most obvious answer to the question of legitimation is the reductionist-realist solution of "might is right". This solution resolves the problem by denying that

8. H.L.A. Hart, The Concept of Law (Oxford, 1970), p. 198f., 134, 196.

9. H. Pitkin, "Obligation and Consent - I", American Political Science Review, 59 (1965), pp. 990-999.

7

there is any real difference between de facto and de jure authorities and/or by claiming that the problem of legitimacy is really the question of whether a group of people has the power to secure general obedience to its laws, and decrees. If a group of cut-throats seizes power in Canada and is able to enforce its laws on the people, it is by that very fact the legitimate authority. This solution is, of course, unacceptable as a criterion of legitimacy, and a basis of political obligation. As Rousseau points out in one of the opening chapters of his Du Contrat Social:

La force est une puissance physique; je ne vois point quelle moralité peut résulter de ses effets. Céder à la force est un acte de nécessité, non de volonté; c'est tout au plus un acte de prudence. En quel sens pourra-ce être un devoir?

Supposons un moment ce prétendu droit. Je dis qu'il n'en résulte qu'un galimathias inexplicable. Car sitôt que c'est la force qui fait le droit, l'effet change avec la cause; toute force qui surmonte la première, succède à son droit. Sitôt qu'on peut désobéir impunément on le peut légitimement, et puisque le plus fort a toujours raison, il ne s'agit que de faire en sorte qu'on soit le plus fort. Or qu'est-ce qu'un droit qui perit quand la force cesse? ...

Convenons donc que force ne fait pas droit, et qu'on n'est obligé d'obéir qu'aux puissances légitimes.¹⁰

10. J.J. Rousseau, Oeuvres Complètes Du Contrat Social, Edition Publiée sous la direction de Bernard Gagnebin et Marcel Raymond (Bibliothèque De La Pléiade, 1959). Livre I, Chapitre III, pp. 354, 355.

I am in agreement with Rousseau that force does not become law by disguising itself in the trappings of law. And legitimate political power does not ultimately rest on force but on a moral ground or principle. Even if we assume that we have succeeded in providing answers to the questions we have been discussing, I think we can still plausibly ask: But why obey a legitimate government or authority?

The plausibility of such a question derives, I believe, from the possibility of distinguishing between the different approaches that can be taken in answering this question. One approach to the question, the conceptual approach, consists in showing the conceptual or logical link between the words 'authority' and 'obedience'. But our question, construed as a conceptual inquiry, would seem to contain within itself a certain logical oddness in as much as it would be like asking "Why is a hexagon six-sided?" What else is a hexagon if it is not a six-sided figure? What else is an authority if it is not that which commands obedience? An answer to our question in terms of a conceptual analysis, even though formally correct, seems to evade the point of the original question. In the context of the problem of political obligation, our original question was not asked in that conceptual vein. Rather, our original question seems to have the force of "What reasons can be given for acknowledging and recognising authority?"

This way of rephrasing the question leads us to the second approach or what we may call the good reasons approach. To be sure, there are different reasons for recognising a

claim to authority. One obvious reason, similar to the reductionist-realist thesis discussed above, requires that an authority-claimant exercises effective control or power within a given geographical area. Imagine, for instance, that Rex is the rightful successor to the throne of Booz. But some of the people do not recognise him as such. The dissidents would, in fact, prefer and support Rex's uncle, Usurper, who, they feel, would make a more sympathetic ruler. If Rex quarters enough troops in the city and orders his troops to shoot demonstrating dissidents on sight, quite conceivably those citizens who are under his effective rule may later recognise his authority to rule and to make laws. (This is what lies behind the claim that power substantiates authority.) However, we should not allow this variant of the power theory to prevent us from recognising that there are other reasons for acknowledging authority such as general consent, hereditary succession, a benign reign, the pursuit of the common good, the possession of personal charisma, to mention a few. Now, to acknowledge a claim to authority from fear or from a dislike of the consequences for non-compliance is to admit a prudential reason or obligation: 'I ought to (or I had better) acknowledge Rex as being legitimately in authority or his troops will shoot me.' Admittedly, there would be no difficulty in answering our original question in terms of prudence or self-interest. However, since one does not need the reasoning of a philosopher to discover one's self-interest, a prudential answer to the question of political obligation is, for that reason, philosophically

uninteresting. On the other hand, to acknowledge a claim to authority because such a claim is supported by general consent on the part of the subjects, or in terms of a just, efficient rule, or the pursuit of the common good is to admit a moral reason or obligation. And to admit a moral reason or obligation for doing something is to recognise ceteris paribus that doing the thing in question is right, that is, morally right. What I want to suggest is that the notion of a (morally) obligating authority is inapposite without such reasons.

Perhaps we can now bring together the threads of our discussion. The problem of political obligation divides conveniently into four questions, which are mutually related but sufficiently differentiated:

- 1) When is a person P obligated to obey and when is he not so obligated?
- 2) Whom is P obligated to obey? (This question raises the issue of the locus of sovereignty.)
- 3) Is there a difference between legitimate authority and mere coercion, between a de jure and a de facto government?
- 4) Are there moral reasons which justify the practice of institutional obedience?¹¹ In this essay, I shall be principally concerned with question (4). That is,

11. The differentiation of these questions is due to H. Pitkin's articles cited above "Obligation and Consent".

I shall be concerned with a search for what, if anything, counts as determinative reasons, in Alan Gewirth's sense of the word, for the duty of obeying the State. However, to the extent that the citizen who knows only that he has a moral obligation to obey the law does not know enough (unless he also knows when this obligation may be suspended or withheld), I shall touch on such conditions as may warrant a recourse to civil disobedience. However, since the views I am about to examine are situated within the framework of the social contract theory, it may be useful to say a few words about the contractarian theory of political obligation.

II

The sixteenth and seventeenth centuries are often regarded as the heyday of the social contract theory, where the expression 'social contract' appeared as a shorthand for a collection of related and sometimes over-lapping conceptual models. In one model of the contract (or what is usefully referred to as the pre-political contract model), the contract is an agreement between discrete individuals. In this rather simple conceptual model, the collectivity is an agreement between the individuals who make it. This is the social contract proper, which is often deployed to explain the origin of the state or of society. This model of the contract theory presupposes that a number of individuals living in a "state of nature" come together to form a society.

(The Pilgrim Fathers of the original American Colonies are often cited as a good example of men translating this model of the contract theory into practice.)

However, a distinction has been made between this pre-political contract model (or the contract of society) and a governmental contract (or a contract of submission). This latter model of the contract theory, the political model, is conceived as an undertaking by individuals who agree with each other to obey a ruler so long as he governed in the general interest and kept within the limits set in the original contract. Thus, the political contract model is really the theory that the state in the sense of government is based on an implicit contract between ruler and subjects. (When the Commons of England in 1689 accused their former King, James II of breaking "the original contract betwixt King and people," they were invoking this model of the social contract theory.) And even though Hobbes had emphasized the pre-political contract model, one can detect a reference to the political model as well. For as Hobbes' contract theory eventually develops, the ruler is bound to give protection to the lives of his subjects, and if he fails to do so, they may rebel. This, surely, suggests that the contract of government is also implicit in Hobbes' theory.

The contract theory has traditionally been invoked to solve two questions: (i) What is the origin of the state, and (ii) What are the grounds and limits of political obligation? Before proceeding to examine the contribution, if any, of the social contract theory to solving the problem

of political obligation, it may be worthwhile to consider two historical criticisms that have been directed at this theory in general. First, critics of the theory have pointed out that in actual historical fact, states and societies are not products of any deliberate contract but have developed naturally from more primitive forms of association such as the family or the clan. In this respect, the theory construed as an actual account of the origin of the state, is historically false.

The second line of criticism fastens on the word 'contract'. Here, the critics claim that the theory involves itself in a vicious circle. 'Contract', they argue, is a legal notion, which is relatively new in the evolution of human society and in the development of legal (juridical) thought. Now, if the state (the law and the whole legal system) can only come into existence as a result of the contract, and if the 'contract' itself is a legal category, then indeed, it seems impossible either to have a legal system and/or for that matter, for a contract to be made. As J.W. Gough remarks, it is a serious (logical) inversion to derive the institution of government and so, of law, from a contract which itself is the creation of law.¹²

12. J.W. Gough, The Social Contract, pp. 3f.

Although it is conceivable that some earlier contractarian theorists may have inadvertently written and spoken as though they were referring to a historical social contract, there is no reason why we should interpret the contract theory in these terms. It is more instructive, I believe, to see the theory of contract, à la Gough at least, as really an attempt at analysing the philosophical base of the State. But what does Gough mean by this? I suppose he means that the idea of 'contract' is a powerful tool for reasoning about the conditions of political association; that the use of the 'contract' contains a recommendation as to how government and civil duty ought to be established and maintained. In using the phrase 'social contract', therefore, the theorist is not making any historical claim that society was actually formed through a contract. Rather he is maintaining that if society were subjected to a logical analysis, the rights and duties of its members would be found to be similar (or analogous) to the rights and duties which derive from a strictly contractual association. So interpreted, the historical criticism is, of course, beside the mark. Not surprisingly, recent adherents of the social contract theory have judiciously confined themselves to such a-historical interpretation. R.L. Nettleship, for example, admits that the conception of an "original contract" upon which society is founded is historically false but argues that the idea of "contract" is no less influential in socio-political thought for being unhistorical. By this, I suppose, he means that the rights

and duties of political society should be ordered "as if" they were founded on a contract; that any community, if it wishes to exist at all, requires a mutual recognition of rights and duties on the part of its members. Such a recognition, he says, constitutes a "tacit contract".¹³

Sir Ernest Barker goes much farther and re-defines the contract as an important element in modern political theory. He also admits that the social contract theory in both its forms (the social contract proper and the contract of government) is historically false. But he maintains that the idea of the social contract can still be retained in the form of a "political contract". Such a contract maintains that the state, as distinct from the society, may be conceived as a legal association, which is set in motion by the making of a constitution. Even though most societies have sprung into existence through a variety of factors (such as bond of kinship, common geographical boundaries, a system of economic cooperation, and so forth), a constitution which formally ratifies such relations is itself created at a point in time (after a revolution, a federal union, or whatever). And so, the constitutional articles of a State may be deemed analogous to the terms of a contract. Given this fact, Barker continues, it seems true that "the modern Western State today lives and breathes within the climate of contract -- mutual concession, mutual

13. R.L. Nettleship, Lectures on the Republic of Plato, (Macmillan: London, 1962), pp. 52, 53.

toleration, mutual discussion, mutual give and take."¹⁴

It is, of course, debatable whether the "climate of contract" of which Barker speaks is actually realised in any great depth in the modern Western State with its excessive bureaucratic controls. We can, however, agree with Barker on, at least, two points: (1) that there is an important distinction between society and the legal apparatus of the State, and (2) that no human society, whatever its shape or form, could remain long in existence without some degree of mutual give and take. (And such reciprocal ascription of rights and duties, I believe, is a hallmark of the contractual climate.) Thus, if we agree that a reciprocity of rights and duties between rulers and subjects is an important component of any ethically tolerable form of government, then, the real question is whether the contract imagery (analogy) and language encourages precisely this view. To quote Barker, the contract theory has stood for "the value of liberty, or the idea that will, not force, is the basis of government, and the value of justice, or the idea that right, not might, is the basis of all political society and of every system of political order."¹⁵ The contract analogy itself may be unfortunate in the sense that it is sometimes misleading.

14. Sir Ernest Barker, Social Contract, (Oxford: University Press, Oxford, 1947), pp. XV, XVII..

15. Sir E. Barker, Social Contract, p. VI.

But this is certainly not to deny that there are circumstances and situations -- feudal societies and multi-national federal states are some examples that spring to mind -- in which the terminology of contract is quite apposite.

Now, what answer does the social contract theory give to the problem of political obligation? The theory tells us that the justification for the duty of institutional obedience derives from the fact that we have (antecedently) consented or agreed in some way to do so. The problem with this answer, of course, is that accepting it seems to put a far greater proportion of the citizenry outside the practice of political obligation than otherwise, since it can always be critically pointed out that very few people have "consented to" or "contracted with" their government to obey the law. However, I think this criticism can be met in a number of ways. The first way is to admit that few people, if any, have been known to give their antecedent consent to their government, but then, to insist that the consent-answer is really only a recommendation that many more ought to do so. In other words, the consent-answer recommends that the structure of rights and duties, authority and obligation should be patterned on the willing cooperation of all members of the Body Politic. The task for anyone who accepts this interpretation will now be to show that there are genuine advantages to be derived from acting on the recommendation.

Another way of meeting the criticism is to maintain that in fact quite a large portion of the population have

consented to their government; and that the contrary impression (view) has resulted from a narrow (unwarranted) construal of the notion of consent. Anyone taking this line of defense will, then, be faced with the task of specifying either the meaning of consent or some variant of that notion. This seems to be the approach taken by Hobbes as he spoke about the "signs of consent by inference", by Locke in his notion of "tacit consent", by Sesonske, who writes about "the commitments we make by our continuing membership in a community", and by Peter Singer in his notion of "quasi-consent". If we are dissatisfied with these attempts, it is probably because antecedent consent is not a necessary

condition of the practice of political obligation.¹⁶

There is, however, another interpretation of the consent doctrine which does not fall into the definitional impasse to which the notion of antecedent consent leads. And it is worth mentioning.

-
16. A long standing controversy in political philosophy is the role of consent in political obligation. Or rather, how consent is to be presumed, understood and/or interpreted in a reasoned acceptance of obligation-rules. For this reason, several attempts have been made to tame the theory of consent. For instance, contemporary appreciations have been made of the great classical contractarian theorists (Hobbes, Locke, Spinoza, Hume and Rousseau) by H. Warrender, Sir Ernest Barker, J.W. Gough, Peter Laslett, and C.B. Macpherson. These commentators have all insisted that the classical theories are hypothetical. This makes the search for an actual contract or consent, if not otiose, then at least, misguided. As S.I. Benn and R.S. Peters have also remarked the social contract theory is not primarily history, but a metaphor designed to illustrate the type of relationship which holds between ruler and ruled. However, I like to suggest that 'consenting' like promising, agreeing, and other commitment locutions is an action that we take as opposed to events which happen to us. Consenting is a thing we do after deliberating and for reasons, not habitually or unreflectively. Consenting is in the class of locutions that J.L. Austin has called "Performative utterances". To be sure, there are few, if any, restrictions on what, substantively speaking, a person can consent to do. But there are restrictions on the circumstances under which one can consent. For example, for the question of consent to arise for P, there must ordinarily be a claim, proposal or request advanced by some second party, B. So that in the absence of such a request or proposal, it would be misleading for P to say "I refuse to consent to stay at home". Now, the particular consent theory that I criticise here is the one which says that consent must antecedently arise or occur in order that a claim or proposal generate an obligation for the person to whom it is addressed.

Suppose P is the victim of a hit-and-run motor accident, when Q drives along. Gasping with pain, P could only whisper these few words: "Call an ambulance; I am dying". It seems to me that suppositis supponendis the legitimacy of P's request is justified independently of Q's having antecedently consented and that Q is obligated to comply with the request. Or again, suppose that a group of students decide that it would be a good preparatory exercise to read Africa Report, since they intend to register for a course in African Affairs next term. Suppose further that one of them buys the first copy, and another buys the next copy, and so on, in turns, with Jack next in line. Jack, who has shared the copies bought by other members, now refuses to buy a copy -- arguing that he has neither consented to nor contracted with the group to buy a copy. I think one could say that Jack's argument is beside the point; that the obligation to buy a copy of Africa Report does not derive from his having

actually (or even antecedently) consented to do so.¹⁷ Rather this obligation derives from acting in a particular way (such as agreeing with the initial group decision to purchase copies of the monthly magazine and actually sharing the copies bought to date by other members of the group). It is the kind of obligation that Hart and Rawls label "playing one's part when it comes one's turn". The point I am making is that the consent which is relevant to the use of 'obligation' as a conduct-guiding concept need not, pace Hobbes and Locke, be always antecedent; it may be, and often is, consequent. That is, it may be a consent which is after the fact -- a consent which arises from showing that there are good reasons for feeling obligated or for being under an obligation. If such reasons are forthcoming (and if they apply to Q), then it will be appropriate to say Q has an obligation independently of whether or not he has given his prior consent. True, the

17. Again, the question whether this consent is actually given in an antecedent sense is irrelevant to the obligation. It suffices that a person behaves in a way that leads others reasonably to presume consent on his part. The status of this kind of consent may be illustrated by the legal notion of estoppel: Where A has by his words or conduct justified B in believing that a certain state of affairs exists and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time. In other words, there are circumstances where a person's behaviour may reasonably justify the presumption or belief that one has an obligation to act as if one had consented, even though there were no actual consent. Thus, one would be justified in assuming consent on the part of a person who has accepted the benefits of a mutually cooperative scheme and who has not indicated that his acceptance of such benefits is not to be construed as a sign of consent. See Spencer, Bower, and Turner, The Law Relating to Estoppel by Misrepresentation (Butterworths: London, 1966), p. 4.

idea of consent, throughout its early usage, may have been deployed to account for or to justify the right of the government to exercise political authority. However, in its current usage, it has acquired a new and richer meaning, since it is now used, à la P.H. Partridge, to validate the continuing processes by which government is made constantly responsive to the ideas of the governed.¹⁸ I wish to suggest, therefore, that the relevant sense in which political authority must be founded on the consent of the governed is the sense in which consent is a function of the role of government in the distribution of benefits and the common good. In other words, I am saying that a distribution of goods based on some principle of justice creates a presumption of consent on the part of the governed and so may be said to provide a basis for political obligation. And it is with these thoughts in mind that I propose to examine the contributions of H.L.A. Hart and John Rawls in providing reasons for the practice of institutional obedience.

III

It has been said of the theory of political obligation that originality in this sphere is almost always a sign of error. I may remark, therefore, that in broad

18. P.H. Partridge, Consent and Consensus, (Praeger Publishers, New York, London, 1971), pp. 28-29.

outline, the arguments and viewpoints developed by these men are contemporary, but not new. As far as the doctrine of natural rights is concerned, I shall concentrate directly on Hart's recent contribution, in which two articles are especially relevant: "Legal and Moral Obligation", and "Are there any Natural Rights?"¹⁹ The first article considers the role of language and rules vis-a-vis questions of duty and obligation that arise in social and political life, and the second proposes the thesis that if there are any moral rights at all, then, there is at least one natural right, namely, the equal right to liberty. This right, argues Hart, is all that liberal philosophers need to have claimed, (even though they may claim more), to justify any action or policy. But because this right is not "absolute", "indefeasible", or "imprescriptible", Hart explains obligation as it applies to socio-political practice in terms of a supplementary principle -- the mutuality of restrictions. Schematically, this sub-thesis is:

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

19. H.L.A. Hart, "Legal and Moral Obligation", in A.I. Melden's (ed.) Essays in Moral Philosophy, (Seattle: Washington University Press, 1958), pp. 82-107; "Are There any Natural Rights?" in Philosophical Review, vol. 64, (1955), pp. 175-191.

those who have benefited by their submission.²⁰

Hart's position in this article is similar to his position in a more recent article, in which he criticises Rawls' attempt to conceive "liberty" as an all-important political principle which can be negotiated or re-negotiated only for the sake of yet "greater liberty".²¹ However, Hart's theory has been called the Benefit-Received theory, and I shall examine it under this description.

As far as a distributive principle is concerned, I shall concentrate on Professor Rawls's articles dealing with questions and problems that arise under the rubric of justice and his recent book - A Theory of Justice (Harvard, 1971). Rawls thinks that the fundamental idea in the concept of Justice is fairness. And he regards the duty of fair play as a prima facie (moral) duty along side other prima facie duties such as fidelity and gratitude, which he treats as basic moral notions.

The Principle of Fairness has two parts. The first part states how we acquire obligations through voluntary acceptance of benefits and burdens, and the second part underlines the conditions under which we may incur the obligation of institutional obedience, as when, for example,

20. Hart, "Are there any Natural Rights?", p. 184.

21. Hart, "Rawls on Liberty and It's Priority", in University of Chicago Law Review, 40 (1973), pp. 534-553.

the institution in question satisfies the two principles of Justice. These principles are:

1) The Equal Liberty Principle which maintains that each person participating in a practice has a fundamental right to a most extensive equal liberty on a level and to a degree compatible with a similar liberty for others,

2a) The Difference Principle which states that the higher expectations of those better advantaged are just only if the long-run expectations of the least advantaged in the social system are maximised, and

2b) The Principle of equal opportunity which requires that where inequalities occur they be attached to offices and positions open to all. It is instructive to note that the second requirement of the Principles of Fairness is re-stated in the principle which enjoins the natural duty to uphold and support just institutions. And so, Rawls' contribution to the problem of justifying political obligation will be discussed within the terminological framework of what he has called "natural duties". His thesis may be stated as follows:

Everyone who is treated with reasonable justice by a just government has a duty to obey the laws of such a government provided these laws are not grossly unjust ... this duty arising from the natural duty to uphold and support all just institutions.²²

22. John Rawls, A Theory of Justice, pp. 334-337.

I have chosen to examine Hart's and Rawls' views on political obligation because their views are contemporary and much discussed and because these men represent a new group of thinkers (W.G. Runciman, David Richards, Peter Singer, Robert Dahl, James Buchanan and Gordon Tullock, and J.W. Gough) who are reviving and re-working the ideas of the social contract. These men have taken seriously two fundamental assumptions common to all democratic theory, namely, the assumption of equal liberty based on the doctrine of individual rights or on some principles of justice, and the assumption of the value of social peace and order -- assumptions which are necessary if men are to live together in an institution or society. But most importantly, I have chosen to examine the views of these men because both men have distinguished their contributions from the classical consent theory by stressing the need of 'consent' to government, not in an antecedent sense, but in a consequent sense. That is, these men are arguing that our obligation to obey the law does not rest on a prior promise or antecedent consent or contract as such but on the principle of "mutual restriction" or the "principle of fairness". Such an approach to our problem, I believe, is worth examining to see if its claims or conclusions are justified by the premises.

Basically, my methodological procedure in this examination will be a hybrid of what has been called the "analytic-linguistic approach" and the "substantive-argument approach". The first approach seeks to analyse 'obligation' and to inquire to what extent, if any, the use of this

concept has important analogues in socio-political practice. The second approach is concerned with an examination of the conditions conducive to institutional obedience. That is, what kinds of reasons would, if available, facilitate acceptance of the practice of institutional obedience? My principal analytic interest will be to clarify the expression 'political obligation' and to differentiate between the various questions usually subsumed under this blanket phrase. Also, I shall define such terms and concepts as 'authority', 'rights', and 'public goods', which contribute to a clearer understanding and appreciation of my subject-matter. Substantively, I shall attempt to suggest ways of amending, if and where necessary, the views of Hart and Rawls on the obligation to obey institutional rules.

Taking my introduction as the first chapter, the rest of this essay divides into five chapters. In my next chapter, I shall clarify the expression 'political obligation' and such concepts as 'obligation', 'duty', 'ought', and 'can', as a prelude to a consideration of the theme-question "Why should P obey the law?" My aim in this chapter is to show that T-Q is meaningful and that T-Q is a question of justification, not of a causal explanation.

In Chapter three, I shall examine Hart's conception of the problem of political obligation, beginning with a presentation of his concept of law, his concept of obligation and obligation-rules, and then going on to show in what respect his theory fails to provide a conclusive argument for political obligation. I shall also indicate how Rawls'

account may provide a break-through.

Next, I shall underline the significant shift in Rawls' own account of the duty of institutional obedience in his earlier article "Legal obligation and the Duty of Fair play"²³ and in his A Theory of Justice. This will be Chapter four.

In Chapter five, I shall look at the issue of civil disobedience. My aim here will be to provide a formula of definition as well as the logic of its justification in a constitutional democracy. And finally, Chapter six contains a summary and conclusions.

To forestall misunderstanding of my most central purpose in this essay, I should re-emphasise that the validity of the social contract theory does not depend on the historical issue of whether or not any State was ever so formed, rather it is an attempt to construct philosophically the logic of social interaction and to suggest principles through which men may agree to some form of constraint on their individual freedom. Furthermore, it will be recalled that Rawls' principle of fairness assumes an institutional background which is one of a constitutional democracy. I shall also assume that the reasons for obeying the law which emerge from my examination apply primarily to constitutionally democratic institutions

23. John Rawls, "Legal Obligation and the Duty of Fair Play", in S. Hook (ed.) Law and Philosophy: A Symposium, (New York, 1964), pp. 3 ff.

(even though sometimes they may be found to apply to other types of institution as well).

I do not claim that this essay will provide all the relevant answers, or even face all the relevant considerations to the definite solution of the problem of justifying institutional obedience. Rather if it succeeds in calling attention to some of the principles that need to be considered when one attempts to justify (morally) the practice of political obligation in a constitutional democracy, then, I think, it will succeed in its aim.

CHAPTER TWO

SOME CONCEPTUAL CLARIFICATIONS

What is the foundation of political authority? Why should citizens obey the law? Under what conditions and circumstances is obedience or disobedience to law required or justified? These are some of the questions which have rightly or wrongly been regarded as central to the problem of political obligation. And yet we may note that the expression 'political obligation' glosses issues of fundamental concern in metaethics. For example, does the word 'obligation' have a clear and definite meaning, such that accepting this meaning precludes all others? And if not, does the fact of using it in the expression 'political obligation' commit us to accepting one meaning rather than another? Obviously, then, we cannot begin to understand and assess the use of the concept of political and legal obligation until we have a clear idea of what we mean by the term 'obligation'. Preliminarily, it might in fact be useful to say something about 'duty' since 'duty' and 'obligation' have often been regarded as approximate

synonyms.¹

I

The Metaethics of 'Obligation'

Let us begin by considering some duty-statements and some obligation-statements: "The University Security officers have a duty to see that everyone is out of the library at closing time", "The duty on that camera is \$10." "The president of the A & P store has some time-consuming duties", "Members of the Canadian Armed Forces have a duty to defend the territorial integrity of Canada", "Jim has an obligation at the bank", "There is an obligation on motorists to report a fatal accident to the police", "We have an obligation to invite the Smiths to dinner having been to theirs for dinner four times already", "We have an obligation to tell the truth". From these statements, it is clear that 'duty' and 'obligation' can be used in both moral and non-moral situations. (Even the fact that we often speak of moral duties and moral obligations makes sense precisely as a contrast with obligations and duties that are not moral.) Also both 'duty' and 'obligation' allow the possibility of over-riding considerations. For instance, we can say and do say "As a member of the 5th year class, I have a duty to

1. C.H. Whiteley, "On Duties", Proceedings of the Aristotelian Society, (1952-1953), p. 96.

join in the sit-in strike, but in view of my membership on the school board, I am not free to do so". The same construction can be used with obligation. In this sense, both are like 'ought', which allows the possibility of countervailing 'ought'.² Thus it seems that 'duty' and 'obligation' preserve an identical core of meaning throughout their moral and non-moral uses. But the fact that they possess such a core of meaning is quite compatible with the fact that they also possess grammatical differences, or feature in different grammatical constructions. Professor Hart has remarked that "obligations" may be distinguished from "duties" by the fact that the former may be incurred or created voluntarily (as by a promise or contract) whereas the latter usually arise from a position of trust like that of a confidential servant or parent, from status or some recognised social roles. Thus when we want to refer to what a person is bound to do in virtue of his position or station, "duty" is the proper word; when we want to refer to what a person is bound to do in virtue of a promise or contract, "obligation" is the right word. Professor R. Brandt has

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2. The claim by some moral philosophers that "ought" implies "must do" and therefore is stronger than either "duty" or "obligation" seems sufficiently disposed of by W.K. Frankena when he claims that we can seriously defend uses of "ought" that do not imply "can", much less, "must do", just as we can seriously defend the use of "dear" in the statement "She is very dear to his heart" if we do not assume that "dear" always implies "expensive". Cf. his "Obligation and Ability" in Philosophical Analysis, ed. Max Black (Englewood-Cliff, New Jersey: Prentice-Hall, 1963), p. 151.

has called these uses "the paradigm uses" of the concepts. All other uses are "extended uses".³

Also, we do or perform our duty, but we may meet, fulfil or discharge our obligation. "An obligation" writes Brandt, "sounds like a payment due or a debt, which we are able to meet; whereas our duty is more like a job, a chore which we can do or perform". However, whatever the grammatical peculiarities of these concepts, Joel Feinberg has pointed out three contexts in which the language of duty and obligation is most at home:

First, there are the actions required by laws and by authoritative command ... Second, there are the assigned tasks which "attach" to stations, offices, jobs, and roles ... Third, there are those actions to which we voluntarily commit ourselves by making promises, borrowing money, making appointments, and so on ... we do this by utilizing certain social contrivances or techniques designed for just this purpose.⁴

I now wish to examine 'obligation' more carefully in order to determine what sense of the word is appropriate in the expression 'political obligation'.

The word 'obligation', along with its cognate terms -- oblige, obligatory, obligate -- derives from two Latin words, Ob (towards) and, Ligare (to bind). These words were

3. R.D. Brandt, "The concepts of obligation and duty", Mind, 73 (July 1964), p. 384 f.

4. Joel Feinberg, "Supererogation and Rules", Ethics, 71, 4 (July 1961), p. 277.

first used in the context of promising, contracting and oaths -- all of which were conceived to bind in some way.

'Obligation' has an abstract and a concrete sense. In the abstract sense, it refers to the condition or state of being bound. This is the sense in which we speak of the grounds of obligation, the theories of obligation. In this sense, too, the phrase "kinds of obligation" is generally taken to mean the different ways of being under an obligation, and accordingly, we have legal, social and moral kinds of obligation. In the concrete sense, however, the phrase "kinds of obligation" refers to the content rather than the form of obligation, that is, to the kind of performance required by the obligation. Thus we have financial obligations, family obligations, promissory obligations, and so on. The expression 'political obligation' appears to be a hybrid of these senses. We do not only speak of the grounds of political obligation in the abstract sense, but also we talk about our political obligations in the concrete sense.

Obligation: Description or Prescription?

Some moral philosophers have construed the tautology that "obligations are obligatory" as the claim that one necessarily must discharge the obligation. In other words, if S has an obligation to do X, then S must do X.⁵ And yet

5. "Must has a legal or moral force here. And it should not be confused with the sense of 'must' which expresses a causal connection. For example, "If his head is cut off, he 'must' die".

it does not seem to follow simpliciter from the statement that U (S has an obligation to do X) either that P (S necessarily must do X) or that Q (S has a moral obligation to do X). There are several reasons for this logical disconnection. One obvious reason seems to be the possibility of a conflict of mutually obstructive obligations, X and Y. For in this case, we will either have to deny that X and Y are obligations, or else give up the apparently tautological statement that "obligations are obligatory" in an absolutely binding sense.

Another reason for this logical disconnection is the two different senses in which an obligation-statement may be construed: i) in a descriptive, fact-stating sense, and ii) in a prescriptive, normative sense. Let us assume that some speaker SP is uttering U. Taken in the descriptive sense, SP may simply be reporting that S stands in a certain relation to other people -- relations of commitment and trust, for example. Or SP may simply be stating the fact that S's doing of X is required by some association of which S is a member and the rules of which SP, although not a member, knows about. The rules of the association may require, for example, that each member contribute \$1 towards its election campaign. In both examples, SP does not advocate the performance of X; nor does he endorse the doing of X. He may, in fact, not accept the relevant institution in which the rule requiring the performance of X functions. By contrast, the prescriptive sense of 'obligation' is used to advocate and to endorse a particular course of action as

required by one's previous act (such as a promise or a contract), or some moral rule or maxim (such as the maxim of beneficence). Thus SP may utter U to urge S to do X, not simply because the association rules require the doing of X, but because SP believes S is morally ~~obliged~~ ^{obliged} to do X, since he has voluntarily undertaken to abide by the rules or has benefited under the association. Hart and Rawls, among others, have held this view which I have called the "benefit-received theory" or the "duty arising from fair play". This is not the place to discuss the merits or demerits of this theory. It suffices to note i) that very often when we resort to the use of obligation-language we seem anxious to express a moral or a prescriptive point of view. We seem to be invoking a moral principle (such as the principle of beneficence, of fidelity, of gratitude, of non-maleficence) which requires that a given obligation be discharged, and ii) that whereas the prescriptive sense of 'obligation' has moral-ought overtones, the descriptive sense does not. Failure to distinguish between these senses of 'obligation' underlies many of the attempts to derive moral-obligation statements from factual-obligation statements. Such derivations begin from the fact that S has some obligation in the descriptive sense and conclude with a prescriptive-obligation statement to the effect that S morally should do X. This distinction is applicable to the claim that citizens have an obligation to obey their government. It is this distinction that highlights the question: Why should P obey the law? Before I move on to the discussion of this question, there is a

feature of 'obligation' that needs to be considered in so far as it contributes to a meaningful interpretation of the question. This is the relation between 'obligation', 'ought' and 'possibility'.

We generally say, at least in practical discourse, that "S is under an obligation to do C" only if it is within his capacity to do C. Accordingly, it would be senseless to say "S is under an obligation to perform a hysterectomy" where it is generally known that S lacks this ability. This point about obligation is summarised in the aphorism 'obligation' implies 'ability', or more commonly, 'ought' implies 'can'. It seems reasonable to say that a necessary condition of the use of 'obligation' in practical discourse is that we are able to describe the relation between S and C in terms of concepts indicating 'ability', 'capacity', 'capability', or other related concepts. And in circumstances when this is not the case, it would be improper to say "S is under an obligation to do C".

There are, however, well-established exceptions to this claim. I have in mind the so-called morality of aspiration or ideals. A Bantu boy might regard the life of a warrior chief as an ideal to aspire to and might in fact say "When I grow up, I ought to live as the warrior chief did". Even as he says this, he realises that the chief's life-style is beyond his natural abilities. A Christian might regard the life of his patron saint as an ideal towards which he feels he is called and to which he ought to aspire. Yet he realises that the life of such immense

grace and holiness is beyond his capacities. There is also the use of "ought" in the statement "The Christian ought to be another Christ", where a precondition for the intelligibility of this remark is that "he cannot". For if the 'ought' did imply 'can', then the doctrine that upholds man's inherent sinfulness vis-a-vis the infinite divine love would have been rendered senseless.

The exceptions to the 'ought-can' relation are not restricted to religious ideals, but include other kinds of ideals. The reason for this is analytic. An 'ideal', by definition, is something we strive towards, something that inspires us to improve our present level of in-put and out-put. For this reason, an ideal is usually set so high as to be unattainable. (We may recall the notion of 'ideal' in Platonic philosophy as an archetype of which the individual objects in any natural class are only imperfect copies.)

Besides, ideals are open-ended in character. The Christian ideal to live like Christ or the humanistic ethic of self-realisation help to illustrate the open-ended character of this concept. From this it seems clear that there is a sense in which a man cannot do what he ought to do or has an obligation to do. And it seems obvious that even in these instances we do have intelligent uses of 'ought' and 'obligation'. Clearly, then, there are uses of "ought" and "obligation" in which these words are quite consistent with "cannot".

But quite apart from the exceptions which I have

indicated, the generalisation 'ought' implies 'can' is relevant in a discourse about political obligation, where an important condition for the use of the concept 'obligation' is the presupposition that those who are obligated or are under the obligation can accept and discharge the task assigned by it. From this condition, it is a short step to claiming that not all obligations are common to all members of a society, just as not all what may properly be called political obligations are common to all citizens of a country; and that those who are presumed to lack the requisite ability or capacity either by reason of age, mental development or other peculiar characteristics, to discharge the task assigned are exempt. Before I go on to examine the meaning of the expression 'political obligation' I should meet two objections that have been raised concerning the use of the word 'obligation' in political practice.

Some philosophers have claimed that promising and contracting are paradigm sources of obligation; that to make a promise or a contract is to undertake an obligation. If S says to P "I promise to buy you lunch tomorrow", then S establishes a relation called an obligation between himself and P, which would not otherwise exist. In this context, S does not have to use the word 'obligation' to make his meaning clear or the obligation-relation perceptible.

Accordingly, these philosophers are claiming that 'obligation' is appropriate only in situations that are like promising or contracting. And so to use the word 'obligation' in the expression 'political obligation' is to

distort the logic of this paradigm. This objection has recently been raised by John Ladd.⁶

I think the objection is misguided. Although Ladd is correct in maintaining that there must be a set of rules governing the use of a word, it is not at all obvious that one and only one set of rules need exist. Words are often classified according to the exactness of their signification as univocal, analogical and equivocal. Univocal words or terms (such as gold or moon) signify one thing and one thing only. Analogical words or terms signify two or more things in virtue of a relationship of likeness among them. ('Head' may signify the upper part of the human body or a position of leadership.) An equivocal word or term, on the other hand, signifies more than one thing. (Examples of equivocal words are 'bank' and 'page'. 'Bank' may signify "the sloping margin of a river", or "an establishment for the custody of money, which also pays it out on customer's order". 'Page' may signify "one side of a book-leaf" or "a court attendant".) But even if all words were univocal, we would still be faced with the problem of a word's supposition, that is, the use of a word in different contexts. If a word can be put to different uses, then, it seems to me that we can reasonably assume that the different uses of a word presuppose different sets of rules. If this is so,

6. John Ladd, "Legal and Moral Obligation", in J.R. Pennock and J.W. Chapman (eds.), Nomos XII: Political and Legal Obligation, p. 4f.

then, there is a sense in which a 'paradigm' meaning of a word is nothing more than its clear, uncontroversial meaning (use) in a given context. And so, it does not follow from saying that promising and contracting are paradigm sources of obligation that only promises and contracts can properly generate obligations.

Another objection that has been raised concerning the use of 'obligation' in the expression 'political obligation' derives from the interpersonal character of obligation. It is claimed that obligation cannot be meaningfully used except as obligation to some specific person or persons; that there must be some one to whom the obligation is owed just as there is always some creditor to whom a debt is owed. Such "other person", they claim, is not easily identifiable in the use of the expression 'political obligation'.

This objection, again, rests on an unwarranted restriction of 'obligation' to promises and contracts. It does not seem at all necessary, at least as the word functions in current usage, that an obligation should be owed to some "other person". We talk quite meaningfully of the obligation to tell the truth, of the obligation to protect one's property, to protect one's interests, to defend one's good name. And it is not at all obvious that this obligation is owed to some "other". Besides, a large number of obligations that members of modern nation-states have, in contrast to feudal societies, derive from those non-fiduciary or non-contractual sources of obligation, that I have called the

defining features of the practice of obligation. However, if we must insist that obligations should be owed to some "other", then Professors Hart and Rawls have usefully suggested that political obligations are owed to "other" participating members of an institution, association or country. So far, I have shown that 'obligation' can be used meaningfully in a variety of contexts. I have also indicated that the binding force of an obligation may arise from any number of sources.

The question now is: does our analysis so far commit us to a particular meaning of 'obligation' in the expression 'political obligation'? I think it does, at least in the sense that it permits us to introduce a different set of conventions regarding the use of the word in the political domain. What then do we mean by the expression 'political obligation'?

I mentioned earlier that the expression 'political obligation' is a hybrid of the abstract and concrete senses of 'obligation'. That is to say 'political obligation' refers to the condition of being bound or of being under an obligation at the same time that it describes the content of the obligation, (that is, the kind of performance required by the obligation). It seems to me that a necessary condition for calling an obligation 'political' is that it refer to a relation which involves citizens and government. If we accept this condition, then we see that 'political obligation' refers to such relations between the citizen and the government as the obligation to vote, the

obligation to support and defend the policies of one's country, the obligation to take an active interest in public affairs, the obligation to respect the Constitution, the obligation to pay tax, the obligation to enlist in the Armed Forces, the obligation to obey (particular) laws, and various other obligations which arise simply from the fact of membership in a State. But the question which has traditionally -- and no doubt, most commonly -- been discussed under the rubric 'political obligation' is: Should a citizen obey the law? In asking this question it is not being suggested that political obligation and legal obligation are co-extensive phenomena, or that 'political obligation' and 'legal obligation' are synonyms. After all, there are various obligations which may be described as political which do not involve obedience or disobedience to particular laws. A citizen may have a (political) obligation to vote where, for instance, there is no law requiring him to do so. What is being suggested is that legal obligation forms the core of political arrangements and, therefore, of political obligation. In other words, whatever we may want to include in the notion of political obligation and political arrangement very few people, if any, would quarrel with the suggestion that the requirement to obey the law is an important component of it. It is for this reason that I shall use the expression 'political obligation' in the sense in which it entails legal obligation. This sense encapsulates our Theme-Question: Why should P obey the law?

II

The Theme-Question and Justification

In attempting to answer our T-Q, various conceptions of law have been proposed.⁷ One conception of law that seemed to have influenced so much of Anglo-American Jurisprudence until very recently is J. Austin's command theory of law. Austin claims to have found the key to an understanding of law in the notion of an order backed by a force sufficient to make it effective, and accordingly, he defines 'law' as the command of the highest legislative power called the sovereign. We can do no better than to quote the precise summary of this view:

Every Positive law, or every law simply and strictly so called, is set directly or circuitously, by a sovereign person, or sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme ... the notions of sovereignty and independent political society may be expressed concisely thus.

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7. For various conceptions of law, see these writings: Thomas Hobbes' Leviathan, with an introduction by M.J. Oakeshott, cited above, especially chapter xxvi; J. Bentham's A Fragment of Government and Principles of Legislation (New York: Noonday Press, 1954); Raz's The Concept of a legal system, (Oxford, 1970), especially chapters 6 and 8; Lon Fuller's The Morality of Law (Yale, 1969), chapter 5; Hans Kelsen's Pure Theory of Law, tr. by Max Knight (University of California Press: Berkeley and Los Angeles, 1967), and "The pure theory of law and Analytic Jurisprudence" in Harvard Law Review, vol. 55, 1941, p. 44-70; and Professor Hart's The Concept of Law, (Oxford: At the Clarendon Press, 1972), chap. 2-4.

If a determinate human superior, not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the society is a society political and independent ... The mutual relation which subsists between that superior and them, may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection.⁸

The Austinian account of law seems to me to be correct in several aspects. It is true, for instance, that the very essence of law is its ability to create duty, to guide action. It is true that law, for the political philosopher as well as for the legal theorist, is a basic category, a datum in socio-political practice; and it is true that to say that 'X is sovereign' in the legal sense (though not necessarily in the moral or religious sense) is to say 'X has supreme or final authority in a community'. This much seems to follow from the meaning of the words 'sovereignty' and 'law'. It is, however, false to claim that the obligatoriness of law derives from an order backed by threats. As H.L.A. Hart has pointed out, an order backed by threats may be given by a gunman, and "law is not the gunman situation writ large". Before discussing an alternative theory or account of the relation between the state and the law, it is useful to recall the historical development

8. J. Austin, The Province of Jurisprudence Determined, second edition, (Burt Franklin: New York, 1970), p. 169, 170, 171.

of the terms 'state' and 'law'.⁹

The English word "state" is a development from the classical latin word "status". Originally, this word meant the "position", "standing" of a person or body of persons, and only later, of the whole community. In its original use, it was politically colourless. It acquired political coloration when it was accompanied by such latin words as "civitas" or "respublica" (meaning 'public affairs'). In time, "status" acquired an 'i' (i-status) from which three English words have emerged: (a) estate, (b) Estate, and (c) State. When the word "state" appeared in 16th century England, it had undergone an Italian experience from which it acquired the idea of a high state ('stato') vested in one person or body of persons -- an idea which has persisted till today. Little wonder that Louis XIV of France was able to identify himself with the state: "L'Etat, c'est moi". He was sovereign; he was supreme; he was lord of all he surveyed. But not for long. For the rumblings of the French Revolution rampaged and ravaged the despotism of the French monarchy, and the idea of the state as a society of equals took root. Henceforth, the state was not any one person or body of persons, but the whole community: "L'Etat, c'est nous".

9. What follows in the next few lines is a summary of Ernest Barker's Principles of Social and Political Theory (Oxford, University Press, 1967), pp. 89-102, 172-177.

Contrary to popular belief, the root of the English word "law" is not the Latin "lex" or "legis", but a Teutonic word meaning "to lay on", which found its way into the English language via the Scandinavian invaders about 1000 A.D. The Oxford English Dictionary makes a connection between state and law, which enables us to conclude that the command of the state conceived as authoritative is ipso facto law for its members conceived as subjects under the state. This view does not correspond with the more contemporary notion of the state as an association, which lives together by virtue of a constitution or "contract". The state is now the "positum" or "standing" common to all of us as members of a common association or a legally cognised community. And correlatively, law emerges as the product, not of the authority of one person or body of persons "without legal limitation", in the words of Austin, but of the whole of the association operating through some form of participation or representation, as the case may be.

Hans Kelsen proposes an account of the relation between law and state in similar terms. Kelsen first agrees with Austin and others that there certainly is an intimate relation between these two social phenomena, but then denies that law is an instrument, even though an important instrument, of the state. In his opinion the state is not like a factory to which people go and which itself makes use of people. Rather the state is an association or an "activity", in which people participate or should participate and in which the rules like the rules of a game bind all

participants alike. Not for him the Austinian model of a sovereign individual or group of individuals who is "incapable of legal limitation" or who is above the law. Not for him the Austinian conception of "state" as the bearer of sovereignty within the political society, separate and distinct from the Body Politic. And so, not for him the Austinian dualism of law and state. Hence, he writes that:

In the norms of positive law no such thing as a "sovereign", a person or group "incapable of legal limitation", can be found ... (The Pure theory of law) does not deny the traditional view that the state is a political society but it shows that a number of individuals can form a social unit, a society, or better, community, only on the basis of an order (not order in the sense of a command) ... The state is not its individuals; it is the specific union of individuals, and this union is the function of the order which regulates their mutual behaviour. Only in this order does the social community exist at all ... If we recognise that the state is by its very nature an order of human behaviour, that the essential characteristic of this order of coercion, is at the same time the essential element of the law, this traditional dualism can no longer be maintained ... The dualism of state and law arises from hypostatising the personification, asserting this figurative expression to be a real being, and so opposing it to the law. If juristic thinking is freed from this fiction, then all the problems concerning the relation of state and law are revealed as illusory. Thus the much-mooted question whether the state creates the law is answered by saying that men create the law, on the basis of its own definite norms. The individuals who create the law are the organs of the legal order, or, what amounts to

the same thing, organs of the state. They are organs because and to the extent that they fulfill their functions according to the provisions of the legal order which constitutes the legal community ... In this sense, it can be said that the state creates the law, but this only means that the law regulates its own creation ... What Austin calls the "sovereign" appears as the order's highest organ and sovereignty is then not a characteristic of the individual or group of individuals comprising this organ, but a characteristic of the state itself. For sovereignty to be a characteristic of the national legal order, however, can mean only that above this order, no higher order is assumed.¹⁰

Hans Kelsen is, in effect, saying that state and law are logically deducible from each other, that the concept of state is equivalent to the concept of "legal order". It is important to note in this account that Kelsen has not been concerned with the conditions under which law may validly be enacted. Rather he seems to be anxious to show at this point only that law and state are closely related. The question I want to raise is: what happens to T-Q? How, in other words, does a Pure Theory of Law help us to answer T-Q? Or does it help us?

Our first reaction to T-Q vis-à-vis the Pure Theory of Law might be to say that obeying the law is simply right in itself; that this is what the word 'law' implies. But such an answer amounts to an admission that

10. Hans Kelsen, "The Pure Theory of Law and Analytic Jurisprudence", Harvard Law Review, vol. 65 (November 1941), pp. 63, 64, 65, 66. The words in parenthesis are mine.

our question vis-a-vis a pure theory of law makes no sense any more than the question "Why is a point that which has position but not magnitude?" or "Why must the cricketer obey the umpire?" makes sense to the Geometer or in a game of cricket. Such questions, asked within their respective domain, are simply without meaning.

Again, we might want to cite a further good towards which obeying the law is contributive. But then such a good must be sought outside the legal domain. And apart from the law, what other considerations are of interest to legal theory? From the standpoint of a pure theory of law, therefore, we might conclude that T-Q poses a meaningless question. However, to claim that T-Q is meaningless in the legal context is not to say that it is necessarily meaningless in other contexts. A person raising this question may not be confused at all about the relation of state and law, or about the meaning of 'law'. He may not be "puzzled" by the fact that other people like himself do, in fact, obey the law. But he may be someone who is wondering whether to comply with the National Service Act or leave the country, or whether to make a false declaration of income to the Tax Assessment Committee. Such a person, in my opinion, does not want to be told over again what he already knows, namely, that the state and law are intimately connected, and that the word 'law' implies obedience. Rather, he wants these assumptions justified. He wants to know on what grounds he should comply with these directives from his government. Now, since the existence of law may in fact

cause people to obey, but does not in and of itself justify such obedience, I want to suggest that what our questioner wants is a justification, not a causal explanation.

That there is a distinction may be seen from the following example. Suppose Mr. Contemplative walks into the coffee-room one morning with the astonishing announcement that he wants to cash in on a 10% graft from a Company contract. To the question: Why should he do it? Mr. Contemplative is likely to respond that: "Well, every contractor is doing it", "Oh! The Company won't miss it", "I am planning a vacation and I need some extra cash", or "I want to pay off my debts". While any of these reasons may indeed have been sufficient to explain why Mr. Contemplative wishes to take the graft, it hardly justifies him in doing so. For in a justificatory why as opposed to an explanatory why we are appealing to an independent measure or criterion of arbitration. This much is implied by Singer and Stevenson.

Marcus Singer has remarked that there are many contexts in which it is important to distinguish among reasons, good reasons, bad reasons, and non-reasons. There is a sense in which what someone cites as his reason for doing an action would in fact be his "reason in the sense of an explanation, not in the sense of a justification. Some one may have a reason for committing murder, he may have a very strong motive for doing so, and this can be used to explain why he did it; but one cannot have a

justification for committing murder".¹¹

C.L. Stevenson has discussed the issue in a situation parallel to Mr. Contemplative's:

Suppose that Mr. Pacifist says, "it is your duty to avoid a war even at the cost of losing your freedom," and gives as his reason, "a war, in this atomic age, would destroy the lives of millions of innocent people, with devastating effects on civilisation" ... We shall some of us have to deliberate before deciding whether Mr. Pacifist's reason justifies his conclusion or whether it doesn't. And just what will we be trying to decide? Is it some pre-ethical question that bothers us, concerned only with methodology? It seems to me obvious that we are confronted, rather, with a choice between evils - evils that we hope are only hypothetical, but are not so certain to be hypothetical that we can afford to disregard them. Which would be worse: to keep peace at the expense of our freedom or to destroy the lives of millions of people with devastating effects on civilisation? When we ask that we are in effect asking over again whether Mr. Pacifist's reason, if true, will justify his conclusion; and the words "reason", "justify", and "conclusion" certainly cannot blind us, in any such living context, to the fact that our question is a genuinely ethical question.¹²

A justification, then, seems to partake less of "my reason" for my action in the sense of what prompted my action and more of the "reasonableness" of my action, which should

11. M.G. Singer, Generalisation in Ethics (Russell and Russell: New York, 1971), p. 26.

12. C.L. Stevenson, Fact and Values (New Haven: Yale University Press, 1963), p. 88-89.

motivate anyone who faces a similar choice-situation. In a justification, at least Stevenson-wise and at most Kant-wise, what we seem to be claiming is an implicit moral commitment that the principles or maxims of our action can similarly be invoked by others.

Now, I submit that to ask for the justification of the law's obligatoriness is to ask that the question "Why should P obey the law?" be transferred from the purely legal domain to the ethical domain. One, in fact, wonders that this question has persistently been construed in causal terms, when a causal inquiry would more appropriately have taken the form "Why does P obey the law?" and not "Why should P obey the law?"¹³ The interesting question now is: What does moral philosophy or the moral philosopher do with our question? Or does he do anything with it?

One immediately thinks of Aristotle whose discussion of justice takes place, not in the Politics, but in the Ethics. One thinks of T.H. Green's Lectures on the principles of political obligation which makes it perfectly clear that the true ground or justification for obedience must be sought in the moral function or object served by law. It was Rousseau who initiated the contractarian thesis that citizens had rights apart from duties in opposition to

13. For a similar discussion of the form of this question, see Thomas McPherson's Political Obligation (London: Routledge and Kegan Paul, 1967), p. 6ff. Cf. also P.H. Nowell-Smith, Ethics (Penguin Books, 1967), pp. 226-227, 232-236.

the thesis that claims rights for the state irrespectively of its fulfilment of its functions to secure the rights of its citizens. The moral justification of the law's obligatoriness is also suggested by Professor Hart who refers to the "minimum content of the Natural Law". His point seems to be that however great the aura of majesty or authority which the official system may have its "demands must in the end be submitted to a moral scrutiny".¹⁴ And Professor Rawls treats the whole question of institutional obedience within the framework of his Justice as Fairness. He argues that everyone who is treated with reasonable justice by his government has a natural duty to obey all laws that are not grossly unjust, since everyone has a natural duty to uphold and support just institutions. We may conclude then that the ultimate basis of our obligation to obey the law is not the law itself but some moral consideration. In other words, our obligation to obey the law must be founded on moral reasoning.

III

Political Obligation and Moral Reasoning

In claiming that political obligation ultimately depends on moral reasoning, we need to face the question of how 'morality' is to be defined. This is admittedly a

14. H.L.A. Hart, The Concept of Law, p. 206.

difficult task. Our definitional difficulty arises in part from the fact that we normally evaluate the behaviour of others on the basis of and by reference to the moral principles and rules which we ourselves have adopted, and also in part from the fact that, as I.S. Berlin remarked, human purposes and activities do not automatically harmonise with one another. We can perhaps deflect this difficulty if we simply adopt the general criteria which have emerged from an examination of various prescriptive definitions of 'morality' by W.K. Frankena. According to him, an individual X's action or principle of action is a moral one if and only if it satisfies the following criteria:

- a) X takes it as prescriptive
- b) X universalizes it
- c) X regards it as definitive, final, over-riding, or supremely authoritative,
- d) It includes or consists of judgements (rules, principles, ideas, etc.) that pronounce actions and agents to be right, wrong, good, bad, etc., simply because of the effect they have on the feelings, interests, ideals, and so forth, of other persons or centers of sentient experience, actual or hypothetical (or perhaps simply because of the effects on humanity, whether in his own person or in that of

another).¹⁵

My next step is to examine two conceptions of morality vis-à-vis these criteria, and then to see how, if at all, these conceptions help to explain the relevant sense of 'moral' in the context of this essay. The first conception -- the Individualist Ethics -- has alternatively been called "Subjectivism" and "Individualism". The Individualist Ethics (IE) has been expressed in various forms. One extreme form is the Existentialist view, which makes morality a matter of authentic personal choice and decision. Generally, extreme existentialists reject the universalization requirement on grounds that man's choices are freely (existentially) made and every existential situation is unique. No justification is required for man's choices beyond citing the fact that they are existentially made. And if man's choices cannot be universalized, neither can they be prescribed. The extreme view,

15. W.K. Frankena, "The Concept of Morality", The Journal of Philosophy, vol. 63, no. 21 (1966), pp. 688 f. It may be noted that a view of morality which criterion (c) defines, taken by itself, does not seem adequate. However, Frankena has indicated elsewhere that this view can, at least, be made plausible if it is accompanied by the requirement (or postulate) that a moral action-guide which one adopts as ultimately authoritative will also be one that calls for consideration of others -- thus, in effect, conjoining criteria (c) and (d).

then, fails to satisfy criteria (a) and (b).¹⁶

Another variant of the IE has been espoused by Bernard Mayo and John Ladd, and implicitly by Hare and Nowell-Smith. This variant claims that one's principles are moral only if one takes them to be supreme or overriding and if one is willing to see others take them as supreme. Although this view seems to provide morality with a social dimension, since it entails legislating for others, yet it retains the basic veneer of the IE, namely, that content and form are relative to what the individual decides to accept or reject as a way of life.

We can see the defects of the IE. By denying that content is intrinsic to morality, the IE, especially in its existentialist form, is saying that a moral principle can have any content whatsoever and that any principle of action ('Stand up and run', 'Eat black-eye peas', 'Slap the first man you encounter in the morning') can be a moral principle for that matter. As J. Warnock warns, a conception of morality in terms of the IE would have the "obviously unacceptable consequence that everyone necessarily, however, bizzare his principles and practice may be, must be said

16. Hare tries to counter the existentialist rejection of the universalization requirement by arguing that the principles on which one acts are valid not only for one's own conduct but also for the conduct of others as well. In other words, "X makes decision D in circumstances C" entails " $X_1, X_2, \dots, X_n$ in circumstances C will make decision D".

to be regularly guided by moral principles".¹⁷ Besides, the IE seems to make nonsense of the central question of this essay, "Why should P obey the law?" For if P already accepts obedience to the law as his supremely authoritative principle, it makes no sense to ask why he should live or abide by such a principle.. And conversely, if P already has excluded "obedience to the law" from his concept of morality and so as a possible moral principle, it still makes no sense to ask "Why should P obey the law?".

At the other end of the meta-ethical spectrum, we find a conception of "morality" which tries to build into morality a definite, social trans-individual element. We may call this view the Trans-Individual Ethics (TIE). Contemporary writers like Hart, Rawls, Baier and Margaret Macdonald among others are inclined to stress the social dimension of morality rather strongly. In a critical comment on Hare's The Language of Morals, Hart insists on the "need to understand morality as a development from the primary phenomenon of the morality of a social group".¹⁸

It would seem that a basic presupposition in the TIE is the existence of a moral point of view shared commonly by those who hold the same factual beliefs. Accordingly,

17. J. Warnock, The object of morality (Oxford: At the Clarendon, 1966), p. 158.

18. H.L.A. Hart, "Legal and moral obligation", in R.E. Flathman's (ed.) Concepts in social and political Philosophy, (Macmillan Publishing Co., Inc., New York, 1973), p. 197.

one makes a moral judgment in the TIE if one is, at the same time, claiming as opposed to merely willing that others who take the moral point of view will themselves make this judgment, given the fact that they are similarly situated. In other words, when one makes a judgment in the TIE one is making two claims: (i) that one's judgment is valid for others, and (ii) that therefore, one's judgment or decision is corrigible by reference to the judgments of others. What sharply distinguishes the TIE from the IE is the insistence by the TIE philosopher that the moral point of view must be socially and materially defined. Such a definition, whatever else it wishes to reflect, must minimally reflect concern for the common good, for social togetherness, for harmony.¹⁹ The TIE conceives morality as a mode of human guidance, which logically involves a definite social content or direction -- whatever this content may be (social harmony, the common good, justice, efficiency, or, in general, consideration for others). It is this common good, justice or what have you, which now constitutes the content of the said moral point of view. One obvious advantage of this conception of morality, if one accepts it, is that it allows us to reason from state-

19. W.K. Frankena, "Recent conceptions of Ethics", in Morality and the language of conduct, ed. by Castaneda and Nakhnikian (Detroit: Wayne State University Press, 1965), p. 9.

ments of fact to prescriptive (normative) statements, from factual-Is statements to moral-ought statements. If one accepts the moral point of view or a social element as a necessary and perhaps sufficient condition of morality, then all one need show is that a given principle of action is an instance of TIE.²⁰ In other words, if one accepts "Always promote the harmony of society", for instance, as a basic datum or axiom of morality, and if it is shown that doing X, Y, Z will promote this harmony, then one morally should do X, Y, Z.

In this essay, I shall be concerned to argue, in part following Hart and Rawls, that justice or the existence of just relations among individuals in a cooperative venture or institution is a compelling reason for the duty of institutional obedience. Of course, in saying this, I do not mean that justice by itself is sufficient in all circumstances for political obligation. And the conception of justice that I wish to adopt is sufficiently set out for

20. In his "The Triviality of the debate over 'Is-Ought' and the definition of 'moral'", American Philosophical Quarterly, vol. 10 (January 1973), pp. 51-57, Peter Singer has tried to show that the importance of the TIE (which he calls "descriptivism", following R.M. Hare) is greatly reduced by the fact that the descriptivist unlike the neutralist or the individualist-ethicist, cannot logically require that one should act on a moral principle. To show that an action is required by a moral principle, he says, does not imply that one should logically do that action. That may be so. But that failure hardly tells against the TIE. All that the TIE theorist is obliged to show is that there is a deontic, not a logical, connection between an action and the enjoining moral maxim or principle.

my purposes by John Rawls in his broad treatment of Justice as Fairness. Professor Rawls speaks of the usual sense of 'justice' in which it is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims. He specifies further the principles of justice as a complex of three ideas: liberty, equality, and reward for contributions to the common advantage. He cites, as a reason, for obeying the government, the natural duty which all have to support and uphold institutions that are just. In other words, the obligation of the citizen to obey the laws of his government is congruent upon the government acting justly or ensuring through its laws that just relations prevail among its citizen-body. This kind of obligation has usually been referred to as a prima facie moral obligation. But what does this mean and why has political obligation been described as a prima facie obligation?

It seems that those political philosophers who have used the expression 'prima facie' in connection with political obligation have assumed that its meaning was well-established and have, therefore, refrained from defining it. At best, they have merely contrasted it with "absolute obligation". Peter Singer, for example, has written that whatever reasons there are for obeying the law in any society, there may be stronger reasons against doing so in particular cases, and that this means that our political obligations are not absolute. To talk of an obligation to obey the law, therefore, is to talk of an obligation to which some weight is to be

given. Obligations of this kind, he concludes, are usually termed "prima facie".²¹ Professor Rawls also explains his thesis as the claim that the moral obligation to obey the law is a special case of the "prima facie duty of fair play". What are we to understand by a prima facie obligation?

It seems that the phrase 'prima facie' is not expressing a duty, but something connected with duty. So, at least, Sir W.D. Ross who introduced the phrase into moral philosophy seems to say. It may be useful, then, to recall how this phrase was first used in a classification of duties.²² Ross begins by noting that the good is not the ultimate factor in moral decisions and actions, and that there is something in the performance of a duty which transcends the expectation of pleasure or happiness as such. When a common man fulfils a promise or repays a debt, he does so, not because he hopes thereby to maximise the good qua good but more importantly he does so because he realises that to promise is to undertake to perform a certain act and to incur a debt is to place oneself under an obligation to perform a specific action. It is this character of a certain class of actions -- irrespective of the circumstances within which they might occur -- that Ross wishes to encapsulate in the phrase "prima facie" duty. Accordingly, he writes:

I suggest 'prima facie duty' or
'conditional duty' as a brief way of

21. Peter Singer, Democracy and Disobedience (Oxford: Clarendon Press, 1973), p. 7.

22. Sir W.D. Ross, The Right and the Good (Oxford: At the Clarendon Press, 1930), Chapter Two.

referring to the characteristic (quite distinct from that of being a duty proper) which an act has in virtue of being of a certain kind (e.g., the keeping of a promise), of being an act which would be a duty proper if it were not at the same time of another kind which is morally significant.²³

Contrary to Moore's rather simplistic view of moral relations in terms of the good, Ross notes several facets of moral relations -- each of which is a foundation of a prima facie duty: promiser to promisee, creditor to debtor, wife to husband, child to parent, friend to friend, fellow country man to fellow country man. Some of these duties arise from one's previous acts such as a promise or a wrong done to others; some are created by services rendered to us by others; some are created by the possibility of achieving justice in distribution, and some others by the need for self-improvement. Couched in the language of the moral philosopher,

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23. I do not think that the phrase 'conditional duty' is an exact substitute for 'prima facie duty' since the former may suggest that the performance of a prima facie duty depends on something else. But this is simply not the case. As Ross himself remarks, it is characteristic of prima facie duties to have some weight irrespectively of the circumstances within which they might occur. It is, therefore, misleading to suppose that a prima facie obligation like a prima facie duty is binding only when there is no other duty or obligation. If anything, the weight of this class of obligations is such that any concurrent obligation would itself need to be weightier or more urgent than a prima facie obligation. In other words, unless there is some reason for voiding this class of duties, then, it is binding and should be discharged. This point will become clearer as the notion of prima facie duties is further examined.

these are the prima facie duties of fidelity, of reparation, of gratitude, of justice, and of self-improvement. Of course, Ross admits that this classification is by no means exhaustive or final.

Now, where does the duty of obedience to law fit into all this? How does Ross treat the question of obedience vis-a-vis his classification of duties? He suggests that the duty of obeying the laws of one's country is a hybrid of two prima facie duties, namely, the duty of gratitude for benefits received, such as protection and security under the law, and the duty of fidelity arising from the implicit promise to help preserve respect for law. This, he says, is in accord with the tenets of the social contract doctrine.

To sum up, we may note that prima facie duties are not absolute or even "actual" duties, that is, duties that must be performed. Rather they are authentic, conditional duties. This means that while we recognise the general principles behind these duties (promise-keeping, for example), the situation may arise where we may justifiably refuse to perform these duties. Thus, whether an act is or becomes an actual duty does not depend simply on the fact that the act falls within some general classification, but on a whole complex of variables, which cannot be determined in abstraction. In contrast, however, we may wish to say that a prima facie duty is a duty that we ought to perform only ceteris paribus. My use of the ceteris paribus rider in this context is suggested by John R. Searle, who had used the phrase to underscore the prima facie nature of promissory

obligation. He writes:

The force of the expression "ceteris paribus" (that is, other things being equal) is roughly to say that unless we have some reason for supposing the obligation void or that the agent ought not to keep the promise, the obligation holds and he ought to keep the promise.²⁴

In other words, there is always a presumption in favour of carrying out and performing an act which falls within the description of prima facie duties until this presumption is rebutted or the obligation countervailed by a more stringent obligation. When I write of the moral obligation to obey the law in this essay, I should be understood as meaning that this is a presumptive moral obligation. Now, saying that there is this presumption is quite consistent with maintaining that if the government passes too many laws in suspicious circumstances and with dubious objectives and motives, or enacts laws that are manifestly unjust, then, the right of the people to resist tyranny and injustice may well outweigh their duty of obedience.

24. J.R. Searle, "How to derive 'Ought' from 'Is'", in R.E. Flathman's (ed.) Concepts in Social and Political Philosophy, p. 60.

CHAPTER THREE

HART'S BENEFITS-RECEIVED THEORY

In influential articles, Professor H.L.A. Hart has developed a version of the Benefits-Received Argument and has assigned it a rather important place in thinking about the moral obligation to obey the law. In this chapter, I propose to examine Hart's argument. I shall argue, first, that his concept of law, although correct in essentials, is inadequate as an answer to the question, "Why should P obey the law?", secondly, that his derivation of the moral obligation of institutional obedience through "mutuality of restrictions" fails to be altogether convincing, and finally, I shall suggest that Professor Rawls' version of this argument, which he construes as the moral obligation arising from the principle of fairness, does provide a breakthrough from the moral impasse into which Hart's has led us. Accordingly, this chapter divides conveniently into three sections: (i) The Law: A Union of Rules; (ii) Rules and Reasons for compliance: The Limiting case of "Obey the law", and (iii) Hart's Benefits-Received theory: On rights and obligations.

The 'Law': A Union of Rules

What is Law? In The Concept of Law, Hart approaches this question with a combination of legal know-how, and philosophical acumen that is practically without rival.¹ From a review of how 'law' is used and from an analysis of the distinctive and complex elements that make up the standard case of a legal system, Hart isolates and distinguishes "three recurrent issues", which have formed a constant focus in any discussion on the nature of law, and which, therefore, may rightly be assumed to contain the key to an elucidation of law: How does law differ from and how is it related to orders backed by threats? How does legal obligation differ from and how is it related to moral obligation? What are rules and to what extent is law an affair of rules?²

The first of these issues emerges from the recognition that the law regulates human conduct. In other words, where the law exists certain kinds of conduct are made obligatory or non-optional -- obligatory, not in the sense in which the Police-officer frog-matches a criminal, but in the sense that pressure to comply is implied. The pressure may take the form of threats, which may be explicit or merely

1. H.L.A. Hart, The Concept of Law (Oxford: At the Clarendon Press, 1961).

2. H.L.A. Hart, The Concept of Law, p. 13.

implicit. The gunman who orders the shop-keeper to hand over the till or be shot if he refuses, is exerting this kind of pressure and in that sense regulating behaviour. Surely, it is the case that the gunman situation which characterises so much of Austin's analysis of law is a recognisable feature of law. But law is not simply the issuing of orders backed by threats. It is only one way in which human conduct is made less optional or obligatory. Human conduct is made non-optional in another way, namely, through obligations. When Y creates or incurs an obligation in respect of X, then Y's freedom of choice or action is to that extent limited, if not withdrawn. And the different kinds of obligation (moral, political, legal, and social) correspond to the different ways in which one's conduct may become non-optional. And even though we talk quite meaningfully about our obligations in morals and in ordinary non-legal discourse, Hart points out that there is a whole world of discourse in which the concepts of duty and obligation are really at home: this is the legal world. However, what interests us in all this is Hart's contention that the notion of a law without the idea of a rule is as meaningless as the notion of a legal obligation without a law. It would be extremely difficult, if not impossible, to elucidate the most elementary forms of law unless we first recognise the importance as well as the role of rules in social behaviour. This brings me to the third recurrent question: What are rules and to what extent is 'law' an affair of rules? Hart himself remarks that:

So many of the distinctive operations of the law, and so many of the ideas

which constitute the framework of legal thought, require for their elucidation reference to one or both of these two types of rule (primary and secondary), that their union may be justly regarded as the 'essence' of law, though they may not always be found together wherever the word 'law' is correctly used.³

The relation between rules and law forms the subject of the rest of this section, more so because an understanding of this relation is indispensable for an understanding of the other two recurrent issues, and also because we cannot understand Hart's distinction between legal and moral obligations otherwise.

Hart notes that the different kinds of rules need to be distinguished one from another, since they originate differently and exert different kinds of pressure on conduct. Apart from the more obvious kinds of rules (legal and moral) there are rules of etiquette and of language, rules of games, and so on. One rather obvious function which these rules perform irrespective of their mode of origin is that of determining what kind of conduct is permitted or forbidden to those who fall within their range of application. Hart distinguishes between rule-governed behaviour and merely convergent habitual behaviour in terms of whether or not deviation from the rule is punished or socially censured. A group of people may habitually play chess on every second Friday of the month. They may even play together. Yet there may be no rule requiring them to do so. But there is a rule that each

3. H.L.A. Hart, The Concept of Law, p. 151.

player starts off with sixteen chessmen, or that the 'King' can move or capture one square in any direction, or that the 'Queen' can capture or move as far as it wants in any direction -- horizontally, vertically, or diagonally -- unless it is obstructed by a piece belonging to either side. The difference between a rule-governed behaviour and mere convergent habit also expresses itself linguistically. Whereas we would not say that these men "must", "should", or "ought to" play chess every second Friday, we would be justified in saying that they "must", "should", "ought to" play according to the rules of the game, if they want to play chess.

However, some legal theorists claim that the use of "must", "should", or "ought" in the context of legal rules is to indicate that violations of the rule would be punished. This is the predictive theory of legal rules. Even though this theory fails as an exhaustive account of legal rules as such, it does underline the close connection between legal rules and coercive orders, which forms the central notion in Austin's analysis of law.⁴ Hart is perhaps less aware of Austin's influence on his own analysis of law in terms of coercive rules than is at first apparent. The point is

4. There are rules, which are no more than facilities or capacities, (rules of valid contract, of will, of marriage, and so forth), which do not bind under pain of punishment and which therefore the predictive theory does not explain. cf. Hart's The Concept of Law, p. 28.

significant also because it enables us to understand Hart's insistence on the irreducibility of social rules to habits or mere regularities. But, as I shall show later, Hart's characterisation of "moral obligation" fails precisely for this reason. The interesting question now is: To what extent is law an affair of rules?

Hart distinguishes between primary and secondary rules. The former impose duties, and so, are concerned with actions, which involve physical movements or changes; while the latter, confer powers. Under primary rules, human beings are required to do or forbear from doing certain actions whether they like it or not; under secondary rules, human beings may, by doing or saying certain things, introduce new rules of a primary dimension. He says:

What are called rules may originate in different ways and may have very different relationships to the conduct with which they are concerned Some rules are mandatory in the sense that they require people to behave in certain ways, (e.g., abstain from violence, or pay taxes), whether they wish to or not; other rules such as those prescribing the procedures, formalities, and conditions for the making of marriages, will, or contracts indicate what people should do to give effect to the wishes they have.⁵

The main argument of this passage is that the different types of rules (in this case, primary and secondary rules) possess different characters and perform different functions. What distinguishes these types of rules is that the primary

5. H.L.A. Hart, The Concept of Law, pp. 8-9.

type involves, as the secondary type does not, a standard of behaviour which binds everyone, not merely officials. In other words, it is the function of a primary rule to bind persons to act in a certain specifiable manner and to impose sanctions for deviance. For this reason, Hart regards criminal laws as strong analogues of primary rules.

We may become clearer on the nature of primary rules if we examine the nature of criminal laws. A crime is defined as any offence which, in the opinion of the community, deserves punishment.⁶ Thus, acts of bigamy, fraud, abduction, embezzlement, assault and various misdemeanours which are viewed with considerable displeasure are deemed punishable and, therefore, are an appropriate subject-matter of the Criminal Law. Primary rules, by analogy, will therefore regulate an area of human conduct which is considered wrong because it is prohibited or right because it is approved of (though not necessarily from the moral point of view). But sometimes such an area will coincide with acts which are mala per se (that is, acts which are morally wrong). Examples of this class of rules are the rules against murder, incest, or rape, to mention a few.

By contrast, secondary rules are to be looked at from the point of view of those who exercise the powers these rules grant. Thus, secondary rules lay down the

6. E. Jenks, The Book of English Law (John Murray Ltd.: London, 1967), p. 154.

minimum requirements which must be possessed by individuals who wish to mould their legal relations with others through such acts as marriage, contract, or will. It may be asked to what extent is it possible to classify most legal rules into secondary types or power-conferring rules in Hart's sense? The power of the district attorney to decide whether or not to publicly prosecute a hit-and-run motorist, the power of the Traffic-control officer to decide whether or not a given case is a case of parking violation, the power of the County Court judge to witness the oath-taking ceremony of Government security guards, and the power of civilian arrest which the Law grants to citizens generally to apprehend any persons caught in the act of law-breaking are some examples of secondary-type rules. More complex examples of secondary rules are the legal rules of marriage, of contract, of valid attestation, or the administration of trusts (where the law determines who shall exercise the power to enter into these relationships). For example, the law recognises marriage as the union of two (adult) persons of different sexes, who, at the time of marriage, are unmarried and who enter into this union with the object of setting up together a permanent and exclusive domestic life.⁷ In as much as marriage is a relation recognised by law, it can only be effected by the use of certain prescribed and legally recognised forms. The law may

7. E. Jenks, The Book of English Law, p. 220.

require (as, in fact, it does in many cases) that marriage be celebrated publicly (that is, in the presence of at least two witnesses), by an authorised person (clergyman, or a court registrar), and in a place set aside for this purpose. Apart from considerations of proper form, there may also be the requirements of age majority, the giving of consent, evidence that the contracting parties are free of a previous marriage, (if any), and are not consanguinously related in the degree forbidden by law. Where the proper form is not followed and/or the conditions are not satisfied, the marriage is declared null.

This brings me to another point. The distinction which Hart makes between primary and secondary rules is also reflected in the sanctions which accompany the violation of these rules. In the case of the former, these sanctions are punishment in the strict sense of the word. That is, the sanctions for breaking a primary rule are punitive or, at least, disciplinary. Such sanctions may vary from imprisonment to fines, recognizances, bonds and probation.⁸ On the other hand, since secondary rules consist in the valid exercise of legal powers, it would be misleading to speak of sanctions in connection with these rules. The nullity which ensues from the invalid exercise of legal powers or from failure to comply with the requirement of a secondary rule is not a sanction: it is not a sanction in the sense that a

8. E. Jenks, The Book of English Law, pp. 194-197.

sanction provides the normal motive for compliance with the rule. If anything, the effect of nullity is a built-in feature of secondary rules: it is part of the function of the rule in a way which punishment for the violation of a primary rule is not. Some examples will help clarify the point of the distinction. Consider the case of marriage, where the contracting parties violated the due form of marriage (for example, celebrating marriage without two witnesses) or some legal requirement (such as age majority, consent, or whatever). In this case, the contracting parties are not punished; but the 'marriage' is declared 'null'. The effect of nullity ensues ipso facto when some essential requirement for the exercise of a legal power is not fulfilled. Suppose, on the other hand, that X is an instance of a primary rule which prohibits loitering. My point is that it is possible for this rule to exist and even be violated without necessarily punishing loiterers. This is to say it is logically possible to distinguish between the behaviour or conduct which a duty-conferring (primary) rule regulates and the sanctions which accompany non-compliance with the rule. Now, such a logical disconnection does not seem possible with the secondary rule and the effect of nullity, which accompanies non-compliance.

However, more important is Hart's claim that law can best be understood as the union of primary and secondary rules. He does not claim that the word "law", wherever and whenever it is properly used, is sufficiently explained by this union. He recognises that "law" is itself a complex notion covering a diverse range of application. He does claim, however,

that because of its great explanatory power, (in elucidating the concept of law and the related concepts of obligation, obedience, duty), this union of rules deserves a central place. At the moment, Hart is concerned to explain 'obligation'. He maintains that the notion of 'obligation' entails the idea of a primary rule. But the converse is not the case. In other words, the existence of a rule does not presuppose the presence of an obligation. Although the idea of a rule and the notion of an obligation may both be seen to contain an implicit reference to a standard of conduct, nevertheless these notions are not always interchangeable or even correlative. The reason for this non-correlation, I think, turns on the fact that there are some rules (the rules of etiquette or correct speech) which are not thought of as imposing an "obligation". "Obligations" do not arise merely from the fact that a rule exists. The mere fact that a group of people (perhaps fastidious in matters of dress) as a rule wear coat-tails for cock-tails, would not in and of itself impose an obligation on me to dress in like manner. Additional features are required before such rule can be said to generate an obligation. First, the demand for conformity with the rule must be insistent and the social pressure brought to bear on non-conformists must be great. Secondly, the rules are thought to be essential to maintaining social life or some highly prized feature of it (such as the restriction of violence, the practice of honesty, truth, fidelity). And thirdly, the rules are no less binding on conduct for being in conflict with what an individual wants to do or for benefiting others.

Let us take a close look at these features. No doubt, Hart attaches great significance to "social pressure". In fact, he classifies the different obligations in terms of the kind of pressure which is exerted:

The social pressure may take only the form of a general, diffused hostile or critical reaction which may stop short of physical sanctions. It may be limited to verbal manifestations of disapproval or of appeals to the individual's respect for the rule violated; it may depend heavily on the operations of feelings of shame, remorse, and guilt. When the pressure is of this last-mentioned kind we may be inclined to classify the rules as part of the morality of the social group and the obligation under the rules as moral obligation. Conversely, when physical sanctions are prominent or usual among the forms of pressure, even though these are neither closely defined nor administered by officials but are left to the community at large, we shall be inclined to classify the rules as a primitive or rudimentary form of law.⁹

This is a remarkable passage. It is remarkable because of its similarity to Bentham's own account of duty (obligation), which Hart criticised. The only difference is that where Bentham spoke of "pain", Hart speaks of "pressure". It would be helpful to quote the pertinent text in Bentham:

That it is my duty to do, which I am liable to be punished, according to law, if I do not do; this is the original, ordinary and proper sense of the word 'duty'.

And, in explaining the notion of punishment, he writes:

I say punished, for without the notion of punishment (that is, of pain annexed to

9. H.L.A. Hart, The Concept of Law, p. 84.

an act, and accruing on a certain account, and from a certain source) no notion can we have of either right or duty.¹⁰

I am not at all clear as to the distinction which Hart wishes to make between Bentham's "pain" and his own "pressure", or if there is indeed a distinction, whether it makes any difference. Surely, as the word 'pain' is used in current English language, there is nothing that suggests that it means physical pain only. We talk no less intelligibly of 'emotional pain' as we do of 'physical pain'. And 'pressure' may be physical or emotional for that matter. Hart claims that Bentham's account is objectionable for at least two reasons: (1) it treats 'obligation' as the outcome of, rather than as a reason for, sanction; and (2) the application of a sanction implies that some one or a group of people possess enough "force" to make it stick. I think Hart's criticism and rejection of the "Bentham Model" turns on a narrow conception which limits 'pain' to mere physical sensation. And yet Hart's own account would fail for the same reasons for which he has rejected Bentham's. But this is a minor matter.

For he also notes that what is important is that the insistence on importance or seriousness of social pressure behind the rules is the primary fact determining whether they are thought of as giving rise to obligations.¹¹

10. Jeremy Bentham, A Fragment on Government, chapter V, Sect. VII, p. 293, in The Works of Jeremy Bentham, edited by John Bowring, (Russell & Russell, Inc.: New York, 1962).

11. H.L.A. Hart, The Concept of Law, p. 84.

From this statement, it is clear that Hart regards "insistence on importance" and "seriousness of social pressure" as the basis of obligations. But these features (even when they are accompanied by feelings of shame and remorse) are not sufficient determinants of moral rules, much less of moral obligations. Perhaps he is right in insisting on the need to understand morality as a development from the primary phenomenon of the morality of a social group.¹² Some moral philosophers (Rawls, M. Macdonald, P.F. Strawson, to mention a few) think so as well. But it is doubtful if there are contemporary moral philosophers who would want to base an analysis of moral obligation on whether or not social pressure is effectively applied. For what is involved in the morality of the rule is not simply the fact that a given people regard a given set of rules or mores as standard behaviour among the group and are prepared to apply pressure to assure compliance. It seems to me that over and beyond the features which Hart discusses and in addition to the formal criteria of 'morality' summed up by W.K. Frankena, we need to see the "morality" of the rule socially and materially. That is to say, we need to postulate that a moral rule like a moral action-guide will also show concern and consideration for others.¹³

12. H.L.A. Hart, "Legal and Moral Obligation", in R.E. Flathman's (ed.), Concepts in Social and Political Philosophy, p. 197.

13. See Stephen Toulmin, An Examination of the Place of Reason in Ethics, (Cambridge: Cambridge University Press, 1950), pp. 156-160, 202f. Also, P. Foot, "Moral Arguments", Mind, vol. LXVII (1958), pp. 502-513.

But perhaps Hart himself was aware of the shortcomings of his primary rules. For he speaks of three possible short-comings or defects which a primary rule in a simple social structure might experience. There is, first, the short-coming or defect arising from "uncertainty" as to what the primary rule is and/or demands; secondly, there is the defect arising from the static character of the rules, and thirdly, there is the defect of inefficiency, which means that the exertion of social pressure in any of its variations for violation of the rule is not administered by a special agency but is left to the individuals or groups affected. What remedy does Hart propose here? His remedy consists in introducing the secondary rules of recognition, change, and adjudication. The rule of recognition is to specify some feature or features which a rule must possess in order to be taken as an authoritative rule of the group. Rules of change allow for the creation of new primary rules and the elimination of old rules. And the rules of adjudication define individuals who are competent to pronounce authoritatively on whether or not a rule has been broken. Thus, the "primary rules of obligation" supplemented by the "secondary rules of recognition, change and adjudication" hold the key to an understanding of law and are, in Hart's terms, "at the heart of a legal system".¹⁴

14. H.L.A. Hart, The Concept of Law, pp. 92-95.

There is no doubt that the notion of a rule is crucial to an understanding of socially cohesive behaviour. We cannot understand social behaviour, much less understand society and its law apart from the rules which determine and give them meaning. Social rules are, to borrow a Wittgensteinian phrase, "forms of life". To the extent that a man's way of life forms the base of a pattern of reasons for action as well as a conception of socially acceptable behaviour, one might agree with Hart's claim that all rules are ultimately social. I am not about to challenge this serious claim, which seems to me to be basically sound: social behaviour is intelligible as an instance of rule application. What strikes me as particularly puzzling is Hart's statement that "obeying a rule need involve no thought on the part of the person obeying that what he does is the right thing both for himself and for others to do".¹⁵ Surely, Hart must realise that a pattern of conduct that has become invested with routine to such a level that it eschews considerations of the "rightness" or otherwise of action, must have its warrant in habit rather than in rationality. Hart's remark is all the more puzzling, since he is most articulate on the distinction between rule-governed behaviour and merely convergent habitual behaviour. If there is any point to this distinction, over and above the possibility of citing the rule as a "guide" to one's action, surely, it must be the possibility, as A. MacIntyre

¹⁵. H.L.A. Hart, The Concept of Law, p. 112.

has remarked, of "identifying the rules and their connection with reasonable or unreasonable beliefs". That is we cannot explain behaviour as an instance of rule-following without raising questions of reason or unreason.¹⁶ Given the importance that Hart himself attaches to this distinction, it is curious to note that he here atrophies the rule's connection with reasonable or unreasonable beliefs. But perhaps, what he meant to say is that most people most of the time follow or obey the rule as a matter of course rather than choice or deliberation. If this is what he had in mind, then he should say so. But even this factual claim would still not account for the claim (also factual) that some people some of the time do ask: Why should we obey this rule? When they do ask, it would be an unilluminating answer to say "Because it is the rule".

But why unilluminating? Surely, we must recognise cases in which our objection to this answer would be absurd, cases, that is, where our answer "Because it is the rule" would be the only answer possible. Suppose P in a chess game wants to know why the game should be terminated once his 'King' is check-mated. Surely, the only proper reply is simply: "Because the rules of chess require it". Such a reply should be counted as a reason for the termination of

16. Alasdair MacIntyre, "A Mistake about Causality in Social Science", in P. Laslett and W.G. Runciman, (eds.) Philosophy, Politics and Society (Oxford, 2nd Series, 1962), p. 62.

the game. Such a rule is constitutive of the game. To ask why one should comply with a rule constitutive of a practice is to betray one's ignorance of the practice and its rules. There is, then, an important sense in which the presence of a rule (a constitutive rule) limits the kinds of questions that can be intelligibly asked concerning the rule. It is the sense that all considerations, over and beyond the fact that the rule is of this type, are irrelevant and misdirected. If Hart's primary rules are also constitutive rules, this additional information might explain why he thinks that one need not consider the rightness or otherwise of compliance with the rule; that the rule itself explains and justifies compliance or obedience. But all rules are not of this type, as we shall soon see. How would Hart account for other types of rules (such as regulative rules, precept-rules, or instruction-type rules)? However, in opposition to Hart's thesis, I want to say in section II that reason and choice are essential in a discourse about political obligation. Reason and choice are not only desirable, they seem to me to be a central feature of the notion of obligation, especially, moral obligation.

II

Rules and Reasons for Compliance, The limiting Case "Obey the Law"

In recent discussions, there have emerged five main senses of 'rule' and hence five main types. There is a

sense of rule (1) as instruction, (2) as regulation, (3) as precept, (4) as practice or what John Rawls calls "practice-type of rule" and Hart and John Searle, "Constitutive rules", and (5) Semantic rules.¹⁷ Semantic rules or conventions regulate and guide the appropriate use of concepts. We find an example of this type of rule in the rules governing the use of the verb 'is', which Wittgenstein discussed in the Philosophical Investigations. There is the rule which allows us, for instance, to use the verb 'is' in the sentences "the rose is red" and "twice two is four", and there is also the rule which allows us to replace 'is' in the second sentence with the equal sign (=) and forbids this substitution in the first sentence.¹⁸ It would appear that semantic rules necessarily cut across all other rules, since a rule, whatever its type, must be stated by a suitable set of words. (For example, the Pawn promotion rule reads 'A pawn reaching the eighth rank must be promoted to a piece according to the player's choice'.)

17. Since this classification is bound to appear rather arbitrary not much point is gained in discussing them at length. For further discussions on 'rules', see Max Black's Models and Metaphors (Ithaca: Cornell University Press, 1962), pp. 109-15; John Rawls', "Two Concepts of Rules", Philosophical Review, vol. 64 (1955), pp. 3-31; John Searle, "How to derive 'Ought' from 'Is'" Philosophical Review, vol. 73, (1964), pp. 43-58. cf. also Max Black's "Notes on the meaning of 'Rule'" Theoria, XXIV (1958), pp. 142-144.

18. L. Wittgenstein, Philosophical Investigations trans. by G.E.M. Anscombe, (New York: The Macmillan Company, 1958), p. 558.

The different types of rules perform different roles, and they may or may not, depending on what type it is, give rise to obligations. Thus, Hart is correct when he said that the existence of a rule to X (verb) does not entail an obligation to X, any more than 'P ought to X' and 'P has an obligation to X (verb)' are synonymous. Rules of etiquette and semantic rules belong to this class. The type of reasoning appropriate to each rule is also different. Instruction-type rules appear to be laid down by some one who is "an authority" in Friedman's sense of this phrase. Consider the following rules that one is likely to find in any Good Luck and Safe Driving Booklet: "Check the rear view mirrors before you start your car", "Check the fuel gauge", "Get off the road, as soon as you feel drowsy", "Lock your car when you leave it at night", "Never use your horn as an offensive weapon".¹⁹ All these

19. It may be noted that any of these instruction-type rules that I have just mentioned could be incorporated in municipal legislation and would ipso facto become a source of legal obligation. When this is the case, such rules cease to function as mere instructions. Failure to lock one's car at night may, for this reason, be legally liable. However, my contention is that rules as instructions, unlike constitutive rules, do not in themselves, in the absence of other reasons that can be given in their support (such as evidence that complying with them is in the agent's interest), provide a ground or warrant for acting in the manner directed or required by these rules. That is to say in the case of instruction-type rules, the notion of giving reasons to support the rule is not only relevant but essential to the idea of following the rule. If Q, for example, asks P, his instructor, why he should check his rear view mirror before starting the car and if P replies, "Because there is a rule that says one should do so," Q will be well advised to look for another instructor.

rules are practical guide-lines or directives, which, in spite of their value, one may choose to follow or to ignore. Instruction-type rules are not spoken of as "violated" or "broken", nor is there a censure attached to them. Unlike constitutive rules, instruction-type rules do not define activities, much less constitute practices. It would, therefore, be misleading or inappropriate to talk of an obligation to comply with a rule of this type.

There are some uses of 'rule' for which the word 'regulation' is an approximate synonym. "Traffic rules" and "debating rules" are two rather obvious examples. Other words which may be appropriate, depending on the context, are 'law', 'bye-law', and 'ordinance'. Regulation-type rules have an author (or authors) who may talk of announcing, enforcing, changing, revoking, or re-instating the rule; and correlatively, this type of rule can be disobeyed, obeyed, broken, or rescinded. Because this class of rules derives from some one or group of persons "in Authority", à la Friedman, they are said to impose obligation to comply. Rules of game provide a good example. And their similarity to constitutive rules is easily noted.²⁰

20. Hart provides an excellent discussion of Constitutive rules relative to rules defining valid contracts, will, marriages. These rules do not define a moral obligation to make Wills, or Contracts, only the legal requirement that whoever does not follow them simply does not make a Will or Contract. See Hart's The Concept of Law, pp. 26-48, 78-79, 238-240.

"Do not cheat", "Do not lie", "It is a good rule to pay one's debt promptly", "Obey the law" -- these are some examples of precept-type rules. Although they have the same formulation as instruction-type rules, they differ from the latter in having a moral content and in serving a moral purpose. It has been argued that where precepts define or constitute practices, failure to conform will affect the logical status of action. "Do not lie" and "Obey the law" are precept-type rules which partially define practices. The former might be thought to affect the institution of promising, and the latter the morality appropriate to thinking about political obligation. The moral obligations implicit in precept-type rules derive from their being alleged means to moral ends.

Now, let us join up again with Professor Hart. There are, to be sure, a good many cases in which the presence of a rule seems to limit the kinds of questions that may be raised concerning a practice, institution or whatever. The obvious cases are constitutive and regulative rules, as I have mentioned already. But let us suppose that Hart's primary rule is neither the constitutive type nor the regulative type, but the precept type. Let us suppose further that the content of this precept-type rule is: Obey The Law. One general characteristic of precept-type rules is that they are not enacted or made by some one who is either "in authority" or "an authority". Rather they have evolved over time. Their binding character not infrequently flows from their being means to moral ends. Thus, when a precept-type rule is connected with law, it takes on a new dimension. Whereas 'obligation' is not

presupposed whenever and wherever the word 'rule' is used (as, for instance, in instruction-type rules), the converse is the case when 'rule' conjoins 'precept'. There is much more involved in following a precept-type rule than is allowed for by constitutive or regulative rules. There are moral elements or considerations involved -- considerations of justice, for instance, or of the common good, or of fairness. Moral considerations are implicit in the notion of a precept-type rule. 'Obey the law' as an instance of a precept-type rule is not just a matter of following a rule; but more importantly, it is a matter of understanding the features of the practice in which the rule operates.

At this stage of our discussion, two conclusions are in order: (1) "Why should P obey the law?" is a question that needs to be decided by looking to see what exceptions are allowed as part of the rules of the practice, and (2) a person P, who accepts the precept-type rule 'Obey the law', if he is to respond to it in a fully rational and moral manner, must understand and appreciate the features of the practice in which this rule exists. That is, he must consider features of the practice external to the rule itself.²¹ I would also think -- and this is more important -- that he would have to have a good understanding of the point or rationale of the practice or cluster of practices in which the rule operates. Thus, our Theme-Question turns out to be

21. R.E. Flathman, Political Obligation, (Atheneum: New York, 1972), pp. 90-92.

a special kind of question, with which Hart's analysis of 'law' in terms of primary and secondary rules, has not sufficiently grappled.

Hart has emphatically rejected the Austinian command theory according to which 'law' is simply the fiat of power or force; he has also rejected the conception of law as the repetitive pattern discernible in the behaviour of the state official and a correlative habit of civil obedience. It is not as though these conceptions of law were merely mistaken in detail; it is rather, as he says, that the idea of order, habit and obedience cannot by any combination yield an adequate analysis of law. 'Law' would require for its elucidation the union of primary rules of obligation and the secondary rules of recognition, change and adjudication. Even though it is a virtue of Hart's analysis that it presents the problem in a new light, yet his analysis neglects what Professor Lon Fuller has called the "internal morality of law" and T.H. Green "the moral purpose of law".²² Because of this neglect, his

22. Professor Lon Fuller demands that law be justified or validated by its responsiveness to social ends, needs, claims and interests, to social purpose. For him, the legal system is more than a set of related norms to be treated as unassailable factual data. Law is not a brute datum of social power but a mode of decision making guided by distinctive standards and ideals. There are, therefore, standards latent in any purported legal order that offer principles of criticism for the assessment of specific legal norms as well as of official conduct. See his "Positivism and Fidelity to Law: A Reply to Professor Hart," Harvard Law Review, 71, (1958), pp. 630-672. Also, see his The Morality of Law (New Haven: Yale University Press, 1964).

primary rules, even when supported by an insistent demand for conformity and great social pressure, do not provide an adequate basis for moral obligation. It is quite possible that this neglect was due to the fact that Hart has not completely shed the shackles of Bentham's predictive theory and Austin's command account of law. Marcus Singer, criticising what he calls a "basic unclarity" in Hart's book, concludes that the Austinian juristic extreme (according to which every rule imposing a duty must have a specific sanction attached to it) has influenced Hart's theory much more strongly than is at first apparent, and that consequently, the social dimensions of obligation-imposing rules have not received adequate attention.²³ And in a critical notice, L.J. Cohen has challenged what he calls the rather "large claims" of Hart's primary and secondary rules. It is not at all clear how Hart's claim to have found the key to the science of jurisprudence is to be understood or defended, or whether it can be defended.²⁴

Although Hart denies that there is any necessary connection between law and morality, and consequently that there is a moral obligation to obey the law as such,

23. M.G. Singer, "Hart's Concept of Law" in E. Allen Kent's (ed.) Law and Philosophy: Readings in Philosophy (Prentice-Hall, Inc.: Englewood Cliffs, New Jersey, 1970), p. 102.

24. L.J. Cohen, "The Concept of Law", Mind, LXXXI (July, 1962), p. 411.

nevertheless he concedes that such an obligation would exist were the situation such that members of one's society have obeyed the law and expect it to be obeyed.²⁵ Considerations of fairness, he argues, are sufficient to constitute a moral obligation to obey the law, where ordinarily it would be misleading to speak of this type of obligation. What these considerations are, when they occur, and how far, if at all, they support Hart's claim, will be the subject of the next section.

III

Hart's Benefits-Received Theory: On Rights and Obligations

Hart proposes the thesis that if there are any moral rights, then there must be at least one natural right, namely, the equal right of all to freedom.²⁶ By a "natural right", we are to understand a right which (1) all men qua men possess regardless of the character of the institutional arrangement in which they live, and (2) does not derive from membership in any voluntary association. In explicating his concept of freedom, he states that "any human adult capable of choice (1) has the right to forbearance

25. H.L.A. Hart, "Legal and Moral Obligation", in R.E. Flathman (ed.), Concepts in Social and Political Philosophy, p.199.

26. H.L.A. Hart, "Are there any natural rights?" in Philosophical Review, vol. 64 (1955), pp. 175-191.

on the part of all others from the use of coercion or restraint against him save to hinder coercion or restraint, and (2) is at liberty to do (i.e. is under no obligation to abstain from) any action which is not one coercing or restraining or designed to injure other persons". In Hart's estimation, this right is not "absolute" nor "imprescriptible". Yet it is all that political philosophers need to have claimed to support any program of action. Hart establishes his thesis via an analysis of the right-claiming phrase: "X has a right to". Many writers today have thought that this right-claiming phrase must be analysed in terms of duty or obligation, or more generally, as requirements or prohibitions on some one's behaviour, and that the idea of obligation or duty is central to that of right. This is the old age doctrine of the correlativity of rights and duties.²⁷ Hart agrees that there is a sense of 'right' which correlates the notion of 'duty'. We may call this 'right' in the strict sense or 'rights against'. To assert that X has a right to Q in this sense implies that some Y has an obligation or duty to X in respect of Q, and whatever would falsify one ascription or assertion would likewise falsify the other.

27. 'Rights' in the strict sense correlate 'duties' by definition, and vice versa. The paradigmatic example of such rights is the creditor's right to be paid a debt by his debtor. Both the creditor's right against his debtor and the debtor's duty to his creditor are logically co-existent.

But there is also a sense of right (that is, right as liberty) which does not logically co-exist with duty. To assert X's right to Q in the sense of liberty is to deny that some Y has a ground for interfering with X in doing or possessing Q. Rights as liberties are simply rights of non-interference. Accordingly, Hart concludes that a right-claiming sentence could mean either (i) that X has some special justification for interference with another's freedom which other persons do not have, or (ii) X is concerned to resist some interference by another person as having no justification. But because this right is not absolute or imprescriptible, as I said earlier, they may in special circumstances be justifiably interfered with.

In examining what may count as a justified interference, he distinguishes between special and general rights. Special rights impose obligations on other persons in virtue of their voluntary association or other interpersonal relationship in which they stand to each other. And General rights are simply exemplifications of the right to equal freedom, and so need not create "obligations", except in so far as they prohibit others from using coercion or restraint. (Well-known examples of general rights are the right to worship, and the right to free speech). The standard cases of justified interference which correspond to the three ways in which special rights are derived are promising, consenting,

and mutual restrictions.²⁸ If I understand Hart correctly, both types of 'right', logically and conceptually presuppose the natural right of all men to equal freedom. Hence, for Hart, there need be only this "natural right", the equal right to freedom. Now, let us assess Hart's conception of this right.

To be sure, there is much that the traditional natural right theorist would like to challenge in Hart's conception of this right. They would probably find it alternately amusing and presumptuous to be told that there is only one natural right, and/or if there are more, that they are neither absolute, inalienable, nor imprescriptible. (Recall that John Locke, the most quoted philosopher on natural rights, had spoken of, at least, two natural rights: the rights to life and liberty. The Constituent Assembly in France also spoke of The Declaration of the Rights of Man and The Citizen, and that "The purpose of all political association is the conservation of the natural and inalienable rights of man".) The problem with these rights is not so much their number as their defense. Traditional natural right theorists have invariably made the defense of their position co-extensive with the notion of a "purposive" human

28. Hart mentions and discusses other special rights-creating situations, such as natural relationships (father-child relationship). But I omit these because they have little or no political relevance.

nature or have adopted the "essence approach". Such an approach to, and defense of, the natural right problem, seems to me quite circular in as much as it uses as the meaning-criteria of "human nature" (namely, essential functions and attributes) precisely those characterisations which their antagonists are questioning. It is all too tempting, when we observe man behaving in certain ways, to claim that he acts for a purpose, and therefore, that his nature is purposive. The point of such a claim is to justify a certain concept of human nature as the real essence of man. But the claim itself is false, or, at best, circular, as Nielsen and Olafson have pointed out.²⁹ It may be true as a matter of empirical statement that man, when he acts, acts with an end in view or acts to achieve some purpose. But it hardly follows from this that man has a function or a purpose, that like mouse-trap, he was designed to achieve. The peculiar function or purpose of a mouse-trap, as its name indicates, is to catch mice. And a mouse-trap is a good mouse-trap if it effectively performs this function or satisfies this purpose. Man, by contrast, does not have a 'purpose' in the sense in which we can talk about the purpose of a mouse-trap. Man, in this sense, has no purpose. It is conceivable and, in fact, true that

29. Kai Nielsen, "The Myth of Natural Law", in Sidney Hook (ed.) Law and Philosophy, (New York University Press: New York, 1964), pp. 122-143. F. Olafson, "Essence and Concept in Natural Law Theory", in Sidney Hook, Ibid., pp. 234-240.

there are certain properties (language and culture, for example) which man and only man possesses. But we would not for all this, Professor Nielsen has argued, refuse to call some creature a man if he possessed all the characteristics of a man but lacked a culture. Nor would we refuse to call such a creature a man simply because he could not speak our language. Human attributes or functions do not come labelled with "essential" or "non-essential", and it is not clear enough what our criteria for so identifying these properties are. Thus, in defense of Hart, it could be maintained that his approach to natural rights was making no pretensions to an ontological status, only the logical claim that the natural right to equal freedom is the foundation of all rights. Besides, he was not concerned to derive this right from the concept of human nature. However, since this is not an essay on natural rights, I shall confine myself to criticisms of a different kind. I shall be satisfied with showing that Hart's arguments, if they claim anything, claim too much.

Consider his statement that to assert a "right" is to recognise a "moral justification" for interfering with the freedom of another, and that this in turn involves a prior recognition of the equal right to freedom. How does the assertion of the moral right of X to interfere with and so limit Y's freedom presuppose the "natural right of all to be free"? The first thing to note is that Hart's claim is put in the conditional form: "If ..., then, ..." and that within the context of his essay, the relation between the

antecedent and the consequent is to be viewed as one of entailment. I have already discussed the development of Hart's argument for his conditional. So far as that argument goes, Hart is correct in maintaining that interference with another's freedom requires a moral justification and that such a justification is offered or presupposed in the notion of a right. What bears examining now is Hart's extension of this argument to include the claim that this right must be one that is possessed equally by all men -- and possessed by them qua men. In other words, Hart intends that his assertion would be understood as expressing a necessary truth. But, surely, the necessary status of this claim does not seem to follow from Hart's analysis or argument. And it does not seem to follow because there is a logical gap between showing that moral rights presuppose the natural right to be free and establishing further that this right is possessed by all men. Hart can bridge this gap only if he makes a certain assumption -- an assumption that is neither explicitly stated nor defended in his essay. Thus, even though the claim itself may be true, Hart has not said anything to show that such is the case.

I said above that Hart puts his natural right claim in the conditional form: "If ..., then, ...". This conditional argument may be regarded as asserting one of two claims: i) a material implication -- in which case an independent argument or justification would be required to support the consequent. Hart has not provided any such argument. Or ii) an entailment. But this latter claim is implausible --

given that no conceptual convergence exists between there being a natural right to freedom and this right being possessed equally by all, as Hart wishes to conclude. It is simply not part of the meaning of 'a natural right' as Hart conceives it that it is possessed by all humans. Now, what assumption has Hart left unstated that needs to be stated if his claim is to hold?

Since Hart is concerned to claim only that there is this one natural right (although there may be others), I shall put the unstated or additional assumption necessary to yield Hart's desired egalitarian conclusion in the conditional form: If there is this natural right, then, all men possess it. But suppose I am wrong and Hart is right, then, even if there were some beings who possessed Hart's "natural right", it would not logically follow that all men must be among them. In this way, Hart's article would fail to yield any substantive egalitarian conclusions. For the anti-egalitarian would be able to claim that no justification is necessary for interfering with the freedom of some human beings, at least. Hart's natural right would, indeed, be "natural" in the sense that this right does not have its origin in any social or conventional framework, but not in the sense that it is possessed by all men,-- much less in the sense that it is possessed equally by all. Unless Hart is willing to explicitate and defend the tacit assumption I just mentioned, his argument does seem to claim too much. The rest of this section will be devoted to an examination of the third of Hart's justified interference, namely,

mutuality of restriction.

"Mutual restrictions" deserve further consideration because Hart maintains that rights derived from them correlate with political obligations. These rights and obligations arise, he says, in circumstances:

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 and make further rules, and this will create a structure of legal rights and duties, but the moral obligation to obey the rules in such circumstances is due to the co-operating members of the society, and they have the correlative moral right to obedience.³⁰

Schematically, Hart is saying that in a situation of mutual restrictions, if Y has benefited by X's submission to the law, X has the right to expect similar submission from Y. In other words, X may justifiably limit or interfere with Y's freedom. Such an interference is justified, Hart argues, not by an appeal to the equal right to freedom but "because only so will there be an equal distribution of restrictions

30. H.L.A. Hart, "Are there Any Natural Rights?", p. 185.

This passage has striking parallels with one defense in a cluster of defenses for political obligation which Socrates voiced in the CRITO and the APOLOGY. The pertinent defense has been called the Benefits-Received Argument. This, I hope, explains my characterisation of Hart's thesis by a similar title. See Irwin Edman, (ed.) The Works of Plato. The Jowett translation (The Modern Library, New York, 1956).

and so of freedom among this group of men". Acceptance of benefits does not only suffice to create this obligation, it also allows, it seems, those who have first submitted to the organization's rules to enforce the obligations on those who have benefited. Let us call this feature of Hart's argument, following Robert Nozick, the Principle of the enforceability of obligations.

This is an interesting thesis. It is interesting because it seems to hold that what is important or constitutes political obligation is not the individual acceptance of benefits per se. Rather it is accepting benefits which are themselves the product of a mutually cooperative scheme and which involve rules restricting individual liberty or action. In the context of this argument having benefited from a cooperative scheme or practice is considered a necessary condition of having moral obligations under the scheme. But this is not all. Hart's thesis also implies that acceptance of institutional benefits suffices to create this obligation, since he allows that the obligation may be enforced by other members in the case of disinclination. But is benefit-acceptance really a sufficient condition of political obligation?

Hart's sufficiency-claim is open to several objections. First, if acceptance of benefits were a sufficient condition of political obligation, then, Hart's argument would seem to endorse the apparent paradox that those who have admittedly benefited from, say, the Nazi regime, would have a moral obligation (in contrast to a merely legal obligation) to obey

the laws of that regime. But this argument would be morally inadmissible, if not offensive as well. Or even consider the question whether the Blacks in South Africa have a moral obligation to obey the law. There is, undoubtedly, a sense in which Blacks living in South Africa have enjoyed certain benefits: they have used government roads; some have availed themselves of certain public utilities (light and water) and certain facilities within set limits (parks and swimming pools), and they have probably called on the Fire Department when their houses were on fire. If political obligation were founded on benefits received, then, there would seem to be a strong case that South African Blacks owe a moral duty to obey the government. And yet South African Blacks have suffered far more than they have benefited under the system of legislative apartheid, which regards them as inferior for racial and ethnic reasons. Besides, if political obligation turned sufficiently on benefit-acceptance, we would be faced with a theory that obligates the citizen to unconditional obedience. That is, Hart's thesis would obligate citizens to obey the law whenever it can be shown that the citizens have, in fact, benefited from political association: such a theory would prevent or render irrelevant the consideration of other criteria (such as whether the regime in question encouraged active participation or not, or whether it was officially committed to the pursuit of iniquitous policies) by which this obligation should be judged. In short, having benefited from a scheme of social arrangement is not a sufficient condition of political obligation.

Secondly, the benefit-received argument seems to give the citizen a veto power over his obligation. A group of citizens who decide not to accept benefits, would, in the context of the sufficiency claim, lack a moral obligation to obey the law. Such citizens would not have to show that the regime in question was unjust, antithetical or otherwise suspect; they would not even have to make reasoned arguments in support of their renunciation of this obligation. But such a conclusion seems to me to be counter-intuitive. It would be a mistaken theory of political obligation and an unfortunate analysis of political practice that nullifies institutional obligation so readily. Taken as a sufficient condition of political obligation, the benefit-received argument does not seem very helpful in thinking about what the practice does or how it distributes social benefits. (Although both are closely related, it should be noted that the argument that one has no moral obligation to obey is not identical with the decision to disobey. "A does not have a moral obligation to do an act X" does not imply "A does not have a legal or prudential obligation to do an act X". So that in cases where the former assertion is true, the latter might be false, and vice versa.)

Now, the related question of whether acceptance of institutional benefits is a necessary condition of political obligation, I regard as extensionally equivalent to the notion of a cooperative scheme. In as much as an organisation, arrangement, or scheme -- whatever its type -- is committed to providing benefits for its members, such a scheme must actually

generate benefits if it is to obligate its members to obedience. The failure of any cooperative enterprise in this respect indicates flaws in it and raises the spectre of disobedience. Leaving aside the rather obvious cases of citizens who have claimed unemployment checks and used the city parks, or benefited in any way, it seems to me that the notion of benefit-acceptance could be even more tenuously construed. Thus, for example, the fact that there are laws at all -- even when these laws do no more than restrict the use of violence and others have obeyed them -- could be construed as benefiting under a legal system. In this sense, the traditional recluse or hermit must be said to benefit from social arrangements. Thus the necessity claim implied in Hart's thesis seems to do no more than to define a benchmark that needs to be met before the issue of political obligation can arise at all. But it does nothing to show, for example, that any citizen or group of citizens who have benefited have thereby incurred a binding moral obligation to obey the law. Conversely, if the scheme benefited no one or benefited only a few at great cost to the majority, this fact might be a reason for undermining the scheme. (Idealist political philosophers such as T.H. Green and B. Bosanquet hold this view as well.) Thus the question of whether acceptance of social benefits and advantages is a necessary condition of political obligation does not turn on whether discrete individuals, $X_1, X_2, \dots, X_n$ actually avail of these benefits. But it does turn importantly on whether the scheme or arrangement is concerned to maintain the characteristics of its members. It also turns

on whether the institutional rules are such that they maintain the minimum objectives of the scheme so that all who are members can still identify with it.

Another objection to Hart's argument has been made by Professor Nozick.³¹ Nozick's objection is presented in two steps: i) Should the principle of enforceability be introduced into a discussion of institutional obedience? and ii) does Hart really succeed in deriving a moral obligation to obey the law from the principle of fairness (which is another way of referring to the mutual restrictions thesis)? Let us begin with the first step in Nozick's objection.

According to Nozick, the principle of the enforceability of obligations does not only confer on participating members of an organisation the right to prohibit free-riders, it also ascribes the right to enforce this obligation on others and to limit their conduct in ways specified by the organisation's rules. Nozick rejects the application of this principle as not having been justified by Hart's "mutual restrictions" claim. His objection in this regard turns on Hart's inclusion of the enforcement right along with the notion of a "right to" or being owed an obligation.

31. Robert Nozick, Anarchy, State, and Utopia (Basic Books, Inc.: Publishers, New York, 1974), pp. 89-95.



According to Hart, to assert that one is bound by Y's right or is under an obligation to Y in any of the transactional relationships of promising, consenting or mutual restrictions is to recognise that Y is morally in a position to determine how "that other" shall act and in this way, limit his freedom of choice. It is this fact and none other, which makes it appropriate to say that Y has a right. Of course, Nozick agrees that enforcing obligations may be crucial to the viability of agreements. Yet, to forge a logical link between the right of enforcement and the notion of obligation, as Hart seems to do, distorts, according to Nozick, the logic of 'obligation'. After all, enforcement-rights are themselves merely rights, and the point of obligations can be explained without a logical correlation between 'obligation' and the 'right to enforce'. In other words, why must it be supposed that the right to enforce (obligations) derives from the existence of an obligation?

I am not at all certain that Nozick's objection in its present form can be sustained. But first, let us see what he says about prohibiting private enforcement of justice. In his construal of a state of nature, Nozick takes the nagging question to be: How might one remedy the "inconveniences of the state of nature" concerning which Locke spoke?³² The following possibilities offer themselves:

32. Robert Nozick, Anarchy, State, and Utopia, pp. 12-17, 88 ff.

(a) an individual may attempt to enforce his rights personally to the best of his ability, or secure the assistance of his friends to repulse aggression, (b) individuals may combine to form mutual-protection associations (barring, I suppose, the probability of intra-association aggression); (c) some individuals may form protective agencies selling protection plans and policies for more elaborate purposes, and in time, (d) the dominant protection association will emerge with sufficient weight and power to assure the protection of individual rights. (Nozick's "minimal state" is a logical out-growth of this protection model. It is conceivable, of course, that a number of individuals would prefer to remain in their "state of nature" and not deal with any of the protection agencies.) The question now is: What kind of protection can these agencies legitimately provide? In other words, do they exercise legitimate powers over all the rights of their members or only over the sum of the rights of their members? Nozick argues that the legitimate power of what a protective agency may or may not do is simply the sum of the individual rights which its members have and transfer to the agency or association. No new rights and powers may accrue to the association, which is not pre-owned by the members. He writes:

The legitimate powers of a protective association are merely the sum of the individual rights that its members or clients transfer to the association. No new rights and powers arise; each right of the association is decomposable without residue into those individual rights held by distinct individuals

acting alone in a state of nature. A combination of individuals may have the right to do some action C, which no individual alone had the right to do, if C is identical to D and E, and persons who individually have the right to do D and the right to do E combine. If some rights of individuals were of the form "You have the right to do A provided 51 percent or 85 percent or whatever of others agree you may", then a combination of individuals would have the right to do A, even though none separately had this right."³³

It seems to me that this passage contains the key to Nozick's denial that Y's right to q (a debt-repayment) against X correlates his right to force X to q. But by this denial, Nozick overlooks the semantic conventions governing the use of 'obligation' to guide conduct (not to describe it). Only one such convention need be mentioned here. This convention or rule states the conditions that obtain consequent upon (not antecedent to) most uses of 'obligation' in guiding conduct. A paradigmatic example of such conditions is disinclination. In other words, to say 'Y has an obligation to q' is appropriate in a context where Y shows notable disinclination to q (verb). And the convention relates to what a person P can and cannot say and/or do after ascribing an obligation of q-ing to Y. P, for instance, may reserve the right to enforce the obligation. And in most cases, he does (as in the case when he decides to prosecute Y for non-payment of rent). This semantic convention about

33. R. Nozick, Anarchy, State, and Utopia, p. 89.

'obligation', I believe sufficiently justifies the inclusion of the principle of right-enforcement in Hart's characterisation of the moral obligation arising from "Mutual restrictions".

I now come to the second objection which Nozick raises against the principle of fairness. This concerns what he calls "the supposed obligation to co-operate in the joint decisions of others to limit their activities". Nozick's strategy is to reveal, through a series of counter-examples, the inadequacy of the benefit-received argument. He invites you to suppose, for example:

(a group of) people in your neighbourhood ... have found a public address system and decide to institute a system of public entertainment. They post a list of names, one for each day, yours among them. On his assigned day, ... a person is to run the public address system, play records over it, give news bulletins, tell amusing stories he has heard, and so on. After 138 days on which each person has done his part, your day arrives. Are you obligated to take your turn? You have benefited from it, occasionally opening your window to listen, enjoying some music or chuckling at someone's funny story. The other people have put themselves out. But must you answer the call when it is your turn to do so?³⁴

This second objection by Nozick is one that I have myself been worried about in the preceding pages. But as I pointed out then the fact that one accepts benefits is not a sufficient condition of submission to the law. And as such,

34. R. Nozick, Anarchy, State, and Utopia, p. 93.

Nozick's objection to the benefit-received argument in its Hartian form may be sustained. But saying this does not make the issue of benefits irrelevant to the practice of political obligation. The question of whether or not a given practice provides benefits is especially relevant in the context of civil disobedience. (But this is a question I shall deal with in my chapter on civil disobedience.)

It may be admitted, then, that Hart's construal of the principle of fairness as a foundation of moral obligation has not really proved its claim. However, Professor Rawls has proposed a version of the Benefits-Received doctrine, which he has called the moral obligation arising from the duty of "fair play" and which, to me, seems to avoid some of the difficulties generated by Hart's own version. Rawls has enlarged the principle of fairness to include four additional conditions: (1) the persons who have this obligation must not only have benefited, they must also "intend to continue to accept benefits", (2) the success of the enterprise must depend on near-universal obedience to the rules of the practice; (3) obeying the rules involves some sacrifice, or at least a certain restriction of individual liberty, and (4) the practice must conform to the principles of justice. In his words:

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 benefit by not co-operating. The reason one must abstain from this attempt is that the existence of the benefit is the result of everyone's effort, and prior

to some understanding as to how it is
to be shared, if it can be shared at
all, it belongs in fairness to no one.³⁵

For Rawls, what is important is not just the acceptance of benefits derived from a mutually restrictive, co-operative enterprise, but the acceptance of benefits in a just constitution. Admittedly, the justice of the scheme is an essential condition in Rawls' construal of the obligation arising from the "duty of fair play". For he notes that "unless one obeys the laws (enacted under a just constitution), the proper equilibrium or balance between competing claims defined by the constitution will not be maintained". However, since I have introduced Rawls here only to show that his version of the benefits-received doctrine does have great possibilities, I shall now go on to examine the obligation or duty that arises from his principle of fairness.

35. John Rawls, "Legal Obligation and the Duty of Fair Play", in Sidney Hook, ed., Law and Philosophy, pp. 3-18, 10.

CHAPTER FOUR

JOHN RAWL'S PRINCIPLE OF FAIRNESS

The fundamental idea in the concept of justice, according to Professor Rawls, is that of fairness. And in a series of articles written over the past dozen years, he has developed and defended this conception of justice as fairness. In A Theory of Justice, however, Rawls has brought the ideas of these articles, veritably modified, into one coherent whole.¹ Two of the outstanding features of the theory are its explicit affinity with one of the major strands in the history of political thought, the Social Contract tradition, and its philosophical justification of the norms of democratic liberalism. For Rawls' primary aim in his book, as he tells us, is to "construct a workable and systematic moral theory" to oppose utilitarianism. And in pursuance of this aim, he will "generalise and carry to a higher degree of abstraction the traditional theory of the social contract" (p. viii). It is not surprising, then, that his theory centers on such notions as fairness and reciprocity, liberty

1. John Rawls, A Theory of Justice, (Harvard University Press: Cambridge, Massachusetts, 1971).

and equality. His contractarianism does not envisage an actual historical agreement. Rather, it is a hypothetical device describing an initial choice situation in which the participants are free and rational persons, concerned to further their own interests. In this chapter, I shall attempt to show how Rawls' conception of justice as fairness helps to justify the practice of institutional obedience. I shall do this in three sections. In section I, I shall underline the basic aspects of the theory as these intersect the overall aim of this essay, namely, the justification of political obligation. Section II examines the "principles for individuals" as the primary basis of institutional obedience, and finally, section III discusses the paradox of voting and the role of the majoritarian rule in a constitutional democracy.

I

Some Basic Aspects of Rawls' Theory and The Original Position

To begin, it is important to grasp Rawls' understanding of the notion of justice. 'Justice', for Rawls, is

a set of principles required for choosing among the various social arrangements which determine the division of advantages and for underwriting an agreement on the proper distributive shares. These principles are the principles of social justice; they provide a way of assigning rights and duties in the basic institutions of society and they define the appropriate

distribution of the benefits and burdens
of social co-operation.²

This statement should not be confused with his conception of justice (that is, his theory of justice). For those who hold different conceptions of justice can still agree on the minimal statement of the concept of justice. They can still agree, for instance, that an institution is just if it precludes arbitrary distinctions among its members. They may disagree, however, in their conception of those principles or features which are to define their respective institutions or practices.

Now, what, according to Rawls, are the features of a just society? What principles will determine the distribution of the various goods, benefits and burdens that the institution provides? The principles which Rawls says would determine a just society are summed up in their final statement, along with what he calls "priority rules", as follows:

- (1) Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all
- (2) Social and economic inequalities are to be arranged so that they are both:
 - (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
 - (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

2. John Rawls, A Theory of Justice, p. 4.

First Priority Rule (The Priority of Liberty)

The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty.

Second Priority Rule (The Priority of Justice over Efficiency and Welfare)

The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle.³

The first principle of justice is called the Equal Liberty Principle, and the (a) part of the second principle is called the Difference or maximin principle, and the (b) part, the Equal Opportunity Principle. The second principle of justice is also referred to as the Principle of Efficiency.

Rawls argues for the principles as those which rational contractors would choose in a hypothetical Original Position (O.P.), where they have minimal knowledge of the world, but do not know which individuals they will be. In general, Rawls adduces three arguments in support of his principles. The first, and no doubt, the most prominent, is the contract argument or the Original Position technique with which I shall be concerned in this section. The second is the argument from reflective equilibrium, and the third is the congruence argument.

The argument from reflective equilibrium is the claim that his proposed principles of justice generate

3. John Rawls, A Theory of Justice, pp. 302, 303.

individual judgments that more closely match our considered judgments than do any alternative principle or set of principles. The argument rests on two basic assumptions:

- (1) that individuals have a sense of justice which they draw upon in their daily life and with which they are able to appreciate the correctness or otherwise of certain social and political arrangements. (If, in a given situation, A is the right thing to do, and B the wrong thing to do, justice as fairness will tend to agree with the performance of A.)
- (2) It assumes that each individual is able to prioritise these immediate intuitions on the basis of their relative strength or certainty.

For example, most people think that stealing a loaf of bread from a poor starving widow is more clearly unjust than stealing a 50-lb bag of potatoes from the A & P Supermarket. And they might more easily be persuaded to abandon their view on the latter action than on the former. Thus, there could be balancing between principles and judgments. But Rawls is more interested in an equilibrium of a different dimension; he is looking for what he calls "reflective equilibrium" -- for an equilibrium which will (1) structure principles in such a way that their underlying assumptions are reflected; and (2) provide guidance in those cases where our convictions, if we have any, are either weak or contradictory. These conditions imply that the principles we extrapolate from our intuitions after critical reflection must have an independent appeal to our moral sense. But it is quite conceivable that no principle would have this

appeal. If that happens, we may need to adjust the principles at the expense of the intuitions, adjusting our intuitions in order to maintain the equilibrium. As Spencer Carr remarks, reflective equilibrium is marked by such give-and-take between the demands of principles and the demands of our intuitions.⁴ I will not discuss whether the argument from reflective equilibrium is generally true or not. I shall simply note Rawls' claim that justice as fairness produces a more satisfactory equilibrium than any alternative moral theory (utilitarianism or perfectionism).

The congruence argument amounts to the claim that justice as fairness and the sense of the good are mutually supportive, that promoting one ideal will tend to support and promote the other. In spite of the epistemic and motivational constraints imposed on the People in the Original Position (P.O.P.), Rawls allows that they do have rational life plans. It turns out that the concept of a rational life plan is a minimal statement of the primary goods the P.O.P. may desire, whatever else they desire. The question whether having a sense of justice is a good thing from the viewpoint of a well-ordered society is what constitutes the problem of congruence.

Rawls discusses four grounds of congruence. First, the fact that the principles of justice are a public conception

4. Spencer Carr, "Rawls, Contractarianism and Moral Intuitions" in Personalist, vol. 56, (Winter 1975), 83-95, 91.

and a commonly acknowledged moral conviction will tend to preclude or, at least, minimise the probability of hypocrisy and deception. This is especially true in a well-ordered society where a deceptive pose vis-a-vis the principles of justice is poorly, if at all, rewarded. Secondly, there is a connection between acting justly and certain natural attitudes. Rawls attempts to bolster this claim by referring to what he calls the "laws of moral psychology". He mentions three such laws -- each corresponding to the different stages of moral development in sequential ordering. (The different stages are the moralities of authority, of association, and of principles.) The first moral-psychological law, for example, states that a "child comes to love his parents only if they manifestly first love him". The second law states that people (whether as individuals or as groups) acquire the virtues of friendship and fidelity to the ideals of social cooperation by watching others do the same. And the third law states that once we have realised the advantages of just social cooperation in the preceding stages, we naturally desire to act upon the principles of justice.

It would be a mistake to suppose that Rawls is here attempting to give us some "laws" in the natural or physical science sense. It is perhaps more salutary to regard these "laws" as a stage-sequence model for moral development -- a model which he assumes better conforms to the conception of justice as reciprocity. However, the point that needs remembering as far as the second ground of congruence is concerned is that there is a natural desire to act in con-

formity with the principles of justice once the third developmental stage has been reached.

The third ground of congruence which Rawls discusses derives from what he calls the Aristotelian Principle. The Aristotelian Principle is basically a motivational principle which considers certain capacities or activities as desirable the more these capacities or activities are complex. (An individual who has the capacity to play both chess and checkers will more likely opt for the former, which is a more complicated game than the latter.) Presumably, the intuitive idea behind Rawls' use of the Aristotelian Principle is to account for the choices or, in any case, the preferences which we make. The capacities and/or activities which are suggested in this principle are an important component of what Rawls also calls a rational life plan or "primary goods". Now, given the fact that the Aristotelian Principle is operative in social life, Rawls maintains that participation in a well-ordered society is a great good both for the individual and for society as a whole. In the case of the former, such participation enables him to actualise his capacities -- capacities which might otherwise remain permanently latent. And in the case of the latter, participation makes available to all in greater or lesser degree the rich diversity of collective effort. Since the society that Rawls envisages is well-ordered in this sense, this fact counts in favour of adopting the principles of justice.

In the fourth ground of congruence, Rawls maintains that once we become clear as to the content of the principles

of justice we desire to act on them freely and rationally. The fourth ground of congruence seems to be an attempt on Rawls' part to incorporate the Kantian conception of moral principles as the product or outcome of rational choice. That is to say moral principles are the principles which persons who are at once free, rational and autonomous would choose to regulate their conduct. Such principles would have the characteristics of generality and universality. But more importantly they would be rational if they are moral at all. I shall not inquire whether these are decisive grounds of congruence between the good and justice. I shall simply assume with Rawls that the congruence argument fits much better with his contractarian postulates than does his rival conception, utilitarianism.

Before going on to describe the Original Position, it is important to note the formal constraints which Rawls imposes on the principles of justice. First, they are general in the sense that their formulation avoids any reference to or use of personal names. Secondly, the constraint of universality stipulates the widest possible range of application. The principles of justice hold for everyone in virtue of their being moral persons. Thirdly, the principles are public in the sense that they are openly acknowledged moral convictions. Lastly, there is the constraint of finality. The principles of justice are final in two relevant senses. In one sense, they specify all the considerations which are appropriate for settling issues of distribution and allocation of benefits and burdens, and for

adjudicating disputes. And in another sense, these principles over-ride other distributive considerations such as prudential and self-interested calculations and the demands of custom. They are, in these senses, the last court of appeal.⁵ With these constraints in view, how does Rawls construct the O.P.?

The construction of the O.P. may be viewed from the standpoint of what Brian Barry calls the epistemological and motivational postulates. The first relates to what the P.O.P. are presumed to know or not to know, and the latter to the requirement of rational egoism. We are to imagine a group of people gathered together (hypothetically, not actually) and about to agree on a set of principles of justice to regulate their conduct and the subsequent criticism and reform of their institution. It is assumed that each person participating in the practice (or affected by it) will agree to these principles in the full knowledge that they will be applied impartially to every case (including those cases that involve the participant). Further assumptions are made relative to the nature of the participants themselves and their relationships to each other, and crucial to the adoption of the principles of justice. Rawls describes four such crucial assumptions: (1) The P.O.P. do not know the nature of their particular circumstances (whether they are rich or poor, young or old, intelligent or stupid, male or

5. John Rawls, A Theory of Justice, pp. 130-136.

female, black or white, healthy or sick). They do not know the generation in history to which they belong. They are, however, presumed to know the general facts that affect their choice of principles (for example, the rules of human psychology and the elements of economics) but to lack the information that might enable them to tailor the principles of justice to their own cases. Such a black-out on information seems crucial to the acceptance of these principles. For if a contractor knew he would be a soldier in the new society, he would opt for legislation favouring increased defense spending. If a man knew he was rich he might opt for a principle that regards various taxes for welfare measures as unjust; and the poor man is most likely to propose the contrary principle. To ensure impartiality in the choice of institutional principles, Rawls introduced the "veil of ignorance".⁶

A second condition specifies that those who are to reach agreement on the principles of justice are mutually self-interested persons who are concerned to further and protect their own rights and whose continued allegiance to the practice turns on the prospect of self-advantage. It is not essential, though, that they should be mutually self-interested under all circumstances -- only in such circumstances as ordinarily affect the common practice. But that is not all. They are self-interested persons, who know more

6. John Rawls, A Theory of Justice, pp. 12, 19, 139-142.

or less accurately that they do have certain interests that need to be protected. In other words, they know that they have a system of priorities or a rational life-plan (although they do not know the details of the plan). They can, therefore, envisage the likely consequences of adopting one practice rather than another. But this condition of egoism seems to raise some problems. For, given that the P.O.P. are severally devoid of altruism and generally unwilling to have their interests sacrificed to the others, it may be asked: How are they to move to a choice of any principles whatsoever? It is crucial to find a way in which human conduct can be expressed in circumstances of justice. Rawls' answer to this choice impasse is to allow the P.O.P. to identify what he calls "primary goods".⁷ Accordingly, the assumption of rational egoism amounts to the claim that

The persons in the Original Position try to acknowledge principles which advance their system of ends as far as possible. They do this by attempting to win for themselves the highest index of primary social goods, since this enables them to promote their conception of the good most effectively, whatever it turns out to be.⁸

One final condition needs to be mentioned. In the Original Position, no one is in a position to coerce any of

7. "Primary goods", for Rawls, are those social goods (rights, and liberties, powers and opportunities, income and wealth) and those natural goods (health and vigour, intelligence and imagination) which every rational man is presumed to want, whatever else he wants. (p. 62).

8. John Rawls, A Theory of Justice, p. 144.

the others into agreeing to principles he would rather reject. As Rawls puts it, the P.O.P. are sufficiently equal in power and ability to ensure that in normal circumstances, none is able to dominate the others.⁹ Now, because of these epistemic disabilities and motivational constraints, Rawls labels his whole conception of justice "Justice As Fairness"; the justice of the outcomes is guaranteed by the fairness of the procedure.

Several objections have been raised against Rawls' use of the Original Position device. I should like to consider some of these objections and to see what defenses, if any, are open to Rawls. . . .

Robert Paul Wolff claims that Rawls' derivation of the principles of justice from the O.P. is invalid.¹⁰ He argues that even if these principles were actually the content of the concept of justice a society of individuals of the sort Rawls describes would not inevitably arrive at them through the bargaining process of the analytic construction. The constraints of the O.P. (equal power and liberty, for example) would, if anything, give rise to trade-in and pay-offs among members of the society. The constraint of egoism might lead to rancour and disaffection

9. John Rawls, "Justice as fairness", The Journal of Philosophy, vol. 54, No. 22. (October 1957), p. 655.

10. R.P. Wolff, "A refutation of Rawls' Theorem" in The Journal of Philosophy, vol. 63 (1966), pp. 179-190.

if the co-operative effort always worked contrary to some one's self-interest. Besides, the Equal Opportunity principle suffers from a basic unclarity. How are we to interpret the phrase "open to all"? May we interpret it to mean assigned on "the basis of fair competition" or through some random selection? It is true that Rawls had earlier interpreted the principle to mean "open to a fair competition" and assumed that the P.O.P. would see it in their individual interest to adopt it collectively. But Wolff argues that if the P.O.P. were allowed to be rational, as Rawls admittedly does, then, each would know what his talents were relative to other members of the practice and would to that extent be able to reason that he stood to gain or to lose in an open competition. Thus, while the better talented would opt for the fair competition rule, the less gifted would reject it and propose random selection in its place. This means that the Equal Opportunity principle would not be the unanimous choice of rational egoists.

In his book, Rawls deploys two arguments to counter this objection. First, he assumes that the rational egoist in question does not know his place or social status. Since no one has any reason to think that he will occupy a higher relative position in the social system, no one has any good reason to want to slant the bargaining process in a particular direction. Secondly, the rational egoists do not know how each rates in the general distribution of assets and abilities, intelligence and strength. In this case, the question of the "better talented" or which individuals stand

to gain would not arise. Of course, these counter-arguments are not entirely ad hoc. Rawls has previously touched on these points in an earlier writing.¹¹

Much of social and political philosophy in recent times has centered around the conception of a just social arrangement. But the question -- what is a just society? -- is one that admits of a variety of answers. For Rawls, a just social arrangement would include the principle that those who have been favoured by nature with talent, wealth or other social advantage "may gain from their good fortune only on terms that improve the situation of those who have lost out". The second principle of justice, particularly, the Difference Principle, is a forceful expression of this Rawlsian intuition. However, in Anarchy, State and Utopia, Robert Nozick challenges the maximin principle.¹² He argues against Rawls that it is neither reasonable, efficient nor just to suppose, on principle, that the better off do not have a right to their advantage. His own Entitlement Theory of justice is a strong commitment to the inviolability of fundamental individual rights. He reasons in the philosophical paraphrase of Kant that any principle of justice such as the maximin principle which relies on a patterned re-

11. John Rawls, "Constitutional liberty and the concept of Justice" in Nomos, vol. VI, (1963), p. 109.

12. Robert Nozick, Anarchy, State and Utopia, (Basic Books, Inc., Publishers: New York, 1974), pp. 188, 190ff.

distribution of goods is using people as means to promote the welfare of the worse-off, and in that sense, must grossly violate the social contract.

Nozick may have hit upon an important objection, but the objection is unacceptable. In order to appreciate this objection fully, it is important, in my view, to place it within its proper context: can the existence of a state be morally justified? Nozick's answer is that only a "night watchman" state -- limited to the narrow functions of protection against force, theft, fraud and the enforcement of contracts -- can be justified. Any extension of state functions beyond these minimal limits cannot be justified. (Thus, welfare programmes, health care, education and a host of other activities cannot be carried out by the state.) There are, he maintains, principles of just acquisition of holdings as well as principles of just transfer of holdings, and if a set of holdings is properly generated, no redistribution is needed.

Although Nozick directly singles out Rawls' maximin principle for attack, his objection is, in effect, a searching critique of what he calls pattern theories of justice. That is, his objection is meant as a challenge to all those political philosophers who have tended to assume without argument that justice requires an extensive redistribution of the social overhead through such means as progressive taxation. "Taxation of earnings from labour,"

he writes, "is on a par with forced labour."¹³ To illustrate his point, Nozick invites us to imagine a society in which the holdings have been distributed according to a pattern which satisfies a particular theory of justice (equality, need, marginal productivity, or whatever). Suppose that in this society a very large number of the people (one million odd) are each willing to pay 25¢ extra to ensure that Wilt Chamberlain plays. As a result, Wilt Chamberlain ends up with \$250,000 and thus upsets whatever pattern of distribution was in effect before the play season. In what sense, Nozick asks, is such an arrangement unjust? How could anyone (the state or some welfare group) be justified in re-distributing Chamberlain's profit, if, by hypothesis, the original distribution was just? Indeed, it would seem that no redistribution can take place, which does not violate Chamberlain's right to earn money or the right of his fans to do as they choose with what is theirs.

Nozick's theory, the entitlement theory, stresses a historical rather than an end-result or a patterned conception of justice. His theory is unpatterned since it does not give a rule for the size of the shares which any individual or individuals may acquire nor does it determine the range of such shares. And it is historical in the sense that it lists procedures by which individuals may justly acquire holdings. The entitlement theory derives its

13. R. Nozick, Anarchy, State and Utopia, p. 169.

descriptive title from its historical emphasis. Whether a distribution is just or unjust depends (in the typical case) on the details of how that distribution came about. It is not decided, in contradistinction to patterned or end-result theories, on the basis of the structure of the distribution in current time-slice. Nozick's characterisation of his theory bears this out:

- 1) A person who acquires a holding in accordance with the principle of justice in acquisition is entitled to that holding.
- 2) A person who acquires a holding in accordance with the principle of justice in transfer, from someone else entitled to the holding, is entitled to the holding.
- 3) No one is entitled to a holding except by (repeated) applications of 1) and 2).¹⁴

It is quite possible that a historical conception of justice, such as Nozick's, is, in some ways, superior to a patterned or end-result conception. But this is hardly the place to explore that possibility. However, several difficulties in Nozick's entitlement theory make his objection to patterned theories of justice unacceptable. It is true that he makes a strong claim for "inviolable" individual rights. But it is far from clear if he also makes an equally strong case for these rights. (In fact, he merely assumes that these rights exist.)¹⁵ His claim of "inviolable"

14. R. Nozick, Anarchy, State, and Utopia, p. 151.

15. R. Nozick, Anarchy, State, and Utopia, pp. ix, xiv.

individual rights does not seem to leave much room for the possibility of countervailing rights, or even for circumstances which might require that these rights be limited or restricted. We might well excuse Nozick on this point, since he admits that his theory has not yet come full cycle. But a much deeper difficulty still remains with the theory. The entitlement theory is admittedly concerned with three central questions, namely, the question of the original acquisition of holdings, the question of just transfer of holdings, and the question of rectification of injustices in holdings. The first question is the most fundamental. If there are no just acquisitions of holdings there would be no question of transferring them. And if the first and second questions are not pertinent, no problem of rectification arises. Now, if we are to assess Nozick's theory, we should look for precise formulations of the principle of justice in acquisition and for arguments in favour of such formulations. We would need to be clear about the notion of justly acquired holdings. We would need to know, that is, how persons or individuals come to acquire previously unheld property. But this is not all. The method or principle of just acquisition of holdings -- whatever it is -- must be non-arbitrary and must be capable of yielding full capitalist property rights. Until Nozick provides such a principle or formulation, his objection to patterned principles of distributive justice is untenable. As Derek Phillips has usefully pointed out, a historical conception of justice, especially a conception which relies importantly or crucially on the justice of the original

acquisition, obviously requires an explicit theory of property. But it is precisely at this stage in the exposition of his theory that he writes: "I shall not attempt that task here".¹⁶ Nozick's theory seems to presuppose rather than demonstrate that the redistributive functions of the state are unjustified because they interfere with the property rights of individuals. But it is just these property rights which stand in need of justification. And until they are justified, the Wilt Chamberlain's example proves little or nothing. Surely, one can admit with Nozick that intuitively there seems to be nothing very wrong with premium payments to Wilt Chamberlain. But such an admission should not be construed as a conclusive argument against pattern conceptions^L of justice and in favour of historical principles of distributive justice. Afterall, other intuitions may suggest that there is nothing very wrong about a bit of pattern-restoring re-distribution by taxing Chamberlain's now enlarged income.

Brian M. Barry has challenged Rawls' derivation of the principles of justice from the O.P. He charges Rawls with an inverse of what he calls "the standard liberal fallacy" (which is that if something is a collective good, it is ipso facto an individual good). Rawls' fallacy, then, according to him, is the claim that if something is an individual good, it is ipso facto a collective good. It is,

16. Derek L. Phillips, "The Equality Debate: What does justice require?", Theory and Society, vol. 3 (1976), pp. 247-272.

he says, an illicit move from "I would prefer more of X to less of X, all else remaining the same" to "I should like society to be so arranged that I get as much as possible of X". But clearly "X is an individual good" does not entail "there is a binding collective decision to choose X". Applying this analysis to the Original Position, Barry argues that Rawls has not provided convincing arguments for saying that his proposed principles are the principles of justice that would be chosen for judging the basic structure of society, and that even if they were chosen, that fact, in and of itself, would not guarantee that they were just.¹⁷

Barry's criticism is not well-taken. It ignores Rawls' contractarian argument or what Joel Feinberg has called "a contractarian theory of justification". Critics, (Barry not excepted) have often regarded and criticised the Original Position as an independent argument for the fairness of the two principles. Perhaps, in a sense, it is. But it is much more salutary to see the O.P. within a wider context. It is more salutary to see it, as Ronald Dworkin suggests, as an intermediate conclusion in a deeper theory that provides philosophical arguments for its conditions. This deeper theory is the Social Contract Theory. How does the Contractarian argument support Rawls' claim that his two principles are the principles of justice that the rational

17. Brian Barry, The Liberal Theory of Justice (Clarendon Press: Oxford, 1973), pp. 117-127.

contractors would choose? In what follows, I shall attempt to identify the principal features of this argument.

I begin by assuming (that a contractarian argument need not be committed to the existence of an actual, historical contract. Accordingly, we should not suppose that the P.O.P. or any group of people ever contracted into the society of the sort Rawls constructs. His contract is a hypothetical, instrumental device for reasoning about the constitutive principles of a just society. I shall admit the presently popular classificatory distinctions in ethical theory in terms of teleological and deontological theories.¹⁸ (Rawls himself admits this distinction). Deontological theories are characterised by such concepts as 'right', 'duty' or 'obligation'. In as much as justice as fairness is concerned with the priority of right over the good or consequences in general, Rawls' contractarianism may be seen as a particular form of deontological theory. Let me briefly explain my meaning. Deontological theories that are based on the concept of duty do not seem capable of bearing out the postulates of a contractarian argument.

18. A teleological ethical theory is a theory which considers consequences or the good as the only relevant criteria for preference among acts. And 'deontology' refers to 'right' oriented theories. However, since the chief purpose of classification in ethical theory as elsewhere is the clarification of obscure relationships by grouping together disparate items in terms of some commonly shared characteristic, such classifications are rarely air-tight.

For one reason, a duty-based theory is quite compatible with totalitarian political ideologies (like fascism) in so far as such a theory may stipulate a 'duty' notwithstanding that no political purpose is being served by it. It may stipulate, for instance, that citizens have a duty to contribute money for the support of the local pastor, even though it does not explain the connection, if any, between this duty and the ends of the state. And for another reason, even though a duty-based theory considers the individual, yet he is a victim of a Kant-like formalism: he must bow to the call of duty.¹⁹ It seems obvious, then, that only a deontological theory based on the concept of right, such as Rawls', takes the individual seriously and gives to each contractor a veto. The significance of the veto may have been obscured by the

19. Kant's deontological rigorism begins with the cryptic assertion about the absolute unconditionality of the goodness of the will. "Nothing", he says "can possibly be conceived in the world or even out of it, which can be called good without qualification except a good will". However, a good will manifests itself in acting for the sake of duty. He explicates the relationship between a good will and duty in the form of two propositions which delineate the concept of duty in his moral philosophy: (1) A human action is morally good to the extent that it is done for the sake of duty, and (2) the moral value of an action derives, not from the results it attains or seeks to attain, but from the formal principle or maxim of doing one's duty -- whatever that duty may be. If an act is to be deemed morally worthwhile, then, it must not only accord with the demands of duty, it must also be done for the sake of duty. Thus, in any account of a morally good act, the motive of duty must be simultaneously present and must in itself be sufficient to determine the placing of the act. See I. Kant, Groundwork of the Metaphysic of Morals, trans. H.J. Paton, (Harper & Row, Publishers, New York, 1956), pp. 18-30, 60f.

epistemic constraints in the analytic construction; it, however, resumes its importance once the "veil of ignorance" is lifted.

Once it is understood that the basic idea in the contractarian argument is the protection of individual rights and that these rights are an independent ground for assessing the basic structure of society, then, I believe, we can see, as Dworkin remarks, that the Original Position argues for the two principles of justice "through" rather than "from" the Contract.²⁰ Little wonder that Rawls maintains that "the procedure of contract theories provides ... a general analytic method for the comparative study of conceptions of justice". If there is any advantage in this way of reasoning about normative issues, I think that advantage hinges on the objectivity and impartiality that must characterise a conception of justice from "under the veil of ignorance" and in "an initial situation of equal

20. Ronald Dworkin, "The Original Position", The University of Chicago Law Review, vol. 40, (1972-1973), p. 508.

liberty".²¹

There is, however, one distinction in Rawls' theory, which, I believe, needs to be noted. Rawls distinguishes between what he calls "ideal theory" or "strict compliance theory" and "non-ideal theory" or "partial compliance theory". Partial-compliance theory studies principles that govern how we are to deal with injustice. Rawls admits that the really pressing and urgent problems concerning justice in daily life belong to partial compliance theory (problems of criminal justice, of international justice, of retribution or compensatory justice; problems of unjust constitutions, of civil disobedience and militant resistance). Ideal-Theory, on the other hand, presents a conception of a just society that we are to achieve if we can. It assumes strict compliance with principles of justice that are held to characterise a well-ordered society under favourable circum-

21. Joel Feinberg, "Justice, Fairness and Rationality", in The Yale Law Journal, vol. 81 (1972), pp. 1012-1018. There is, of course, the quite different criticism by Norman Daniels, who notes that equal liberty without equal worth of liberty is a worthless abstraction. In other words, the inequalities in income, power, and wealth which the second principle allows will adversely affect an individual's ability to exercise his basic liberty. That may be so. But it seems that public funding of political parties (as in the U.S.) or a limitation on the amount any individual or group of individuals may legitimately make in campaign contribution will minimise the danger that ordinarily might arise from the fact that certain people have a low income profile while certain others wield considerable economic power. cf. N. Daniels, "On liberty and inequality in Rawls," Social Theory and Practice, vol. 3, (1974), pp. 149-159.

stances (that is, an Original-Position-Society in which no one is envious or negligent or violates others' rights and everyone is rationally egoistic). Clearly, then, my interest in Rawls' theory of justice relates to partial compliance theory.

In the next section, I shall consider Rawls' partial compliance theory vis-à-vis the problem of institutional or political obligation. More specifically, I shall ask: How does Rawls' theory account for the moral obligation to obey the law? In an earlier article, Rawls construed political obligation as the result of a mutually beneficial scheme of social co-operation, or, as he then expressed it, "the duty of fair play". Rawls has since shifted his emphasis. Since "obligations" typically arise as a result of one's voluntary acts (such as undertakings and promises) and since it is difficult to say, from the viewpoint of the average citizen, what the requisite binding act is, Rawls concludes that the average citizen has no political obligation per se. In other words, since it is not always easy to determine when the average citizen has voluntarily availed of the benefits of an institutional arrangement, it is, by that same fact, not easy to say whether he has a political obligation as such. However, there is a natural duty on all to promote and support just institutions. This duty derives from the principle of positive natural duties. If one accepts this principle, then, Rawls' account of institutional obedience does constitute a significant break-through for the theory of political obligation.

To a large extent, Rawls' analysis of 'obligation' is correct, but it stops short of completeness. The characteristics of 'obligation' which he underlined belong to what R.B. Brandt has called the "paradigm uses" of this concept. But there are also other uses of 'obligation' (call them the 'extended uses') which I discussed in Chapter II and which Rawls seems to have overlooked in his analysis. Besides, Rawls has overlooked a rather important semantic convention governing the use of this concept, namely, its conduct-guiding character. In other words, "P has an obligation to file his income tax return" is semantically appropriate in a situation, for instance, where P recognises and accepts the income-tax-return rule but he is reluctant to comply. Given that P recognises the "natural duty" to support just institutions but shows notable disinclination to comply, this situation could be described in the language of obligation. But perhaps, Rawls' conclusion that the average citizen does not have a political obligation per se does not turn on the analysis of 'obligation'. Perhaps what he meant to say is that those citizens whose "equal liberties" are worth pretty little or who are always being given the short end of the stick cannot be said to have any genuine obligation to obey the law. If this is what he meant, then, there is some validity to the argument. But this strikes me as a different issue, namely, the issue of civil disobedience. I shall, in the next section, try to deal with the question of institutional obedience in greater detail.

II

Principles for Individuals: A Case for Institutional
Obedience

The principles of justice are intended to define the basic structure of society. They are, as it were, the fundamental charter of a well-ordered institution. But to have laid down the principles which apply to the choice of social institutions, admittedly, is not to have said how or why (or if at all) these principles apply to individuals. In order to do this, the P.O.P. must agree on a set of principles for individuals. What set of principles are they likely to agree to as regulating their commitment to the common practice? Imagine that the practice is a mutually beneficial scheme of social cooperation, which generates public or collective goods. The notion of 'public goods' in this context serves two functions. First, it indicates that the product of the association is such that if any person in the group consumes it, it cannot feasibly be withheld from the others in the group. And secondly, it underlines the possibility of free-riding.²² In other words, since any enterprise which is essentially joint may produce benefits anyway, whether or not some individual cooperates, an individual might consider it in his best interest, not to cooperate. He would prefer to reap the fruits of a

22. John G. Head, "Public Goods and Public Policy", in Public Finance, vol. xvii, no. 3 (1962), p. 199.

collective endeavour without sharing in any of the burdens involved in maintaining the scheme. This observation is similar to the concept of a rational egoist who will act to maximise his personal interest. Thus, even if the members of a joint scheme stand to gain more on balance through universal collective effort, the rational egoist would, under certain circumstances at least, gain more by non-cooperation and would therefore not act to promote the common interest.

Of course, a critic might deny that this observation bears out. He might argue, for instance, that the rational egoist will indeed support and contribute to the cooperative scheme, since he may assume that if he does not, others will not do so either. A free-rider attitude might snow-ball to the point where it prevents the scheme from generating benefits at all. This objection might be sustainable in a small-sized organization, where everyone knows everyone else. But it is certainly not true of large-sized organizations (like the Canadian Labour Congress, or the Canadian Union of Postal Workers, or even the State), which have large membership. And so the self-interested person would not necessarily believe that his non-cooperation is likely to be noticed or in any way significantly increase the burden for any other member. Much less is he likely to believe that his action would start a chain reaction that would destroy the scheme. These observations, then, hold true even when there is unanimous (or near unanimous) agreement about the common interest and the method of achieving it. The relevance of these observations about public goods and individual action

becomes clearer, when we consider a large organization where a single individual's contribution (take the marginal value of the tax dollar, for an example) makes no perceptible difference to the organization as a whole. In this case, the public or collective good will not be maximised unless there is some external inducement or constraint (such as coercion or persuasion).

Given, then, that the rational contractors are aware of these facts and that they are concerned to preserve the stability of their institution, what set of principles are they likely to agree to as regulating the behaviour of the members vis-à-vis the functioning of the common practice? They would agree to two sets of principles. First, they would accept a principle of fairness, and secondly, a principle of natural duties.²³ In other words, the rational contractors would accept a principle which determines when institutional rules are to be obeyed; they would urge that those persons who have voluntarily accepted the benefits of a just cooperative scheme must also bear the burdens associated with the stability of the scheme. And since it

23. Of course, the contractors would accept a number of other principles besides the two I have just mentioned. They would agree, for instance, to the principle of fidelity, the supererogatory principles of mercy and beneficence to regulate their interpersonal relationships. They would also agree to the natural duties of mutual aid, mutual respect and non-maleficence. But these have no direct bearing on the issue of institutional obedience. See Rawls, A Theory of Justice, Sections 18 and 19.

is conceivable that a given scheme is just without providing great public goods, they would agree to a principle of natural duties which will bind everyone to the scheme even when it is not the case that one has actually made notable gains under the scheme.

I now wish to examine these principles in their relation to the problem of political obligation. I shall begin with the principle of fairness. We may recall that the principle of fairness has two parts. The first states how we acquire obligations through voluntary acts (such as the acceptance of benefits), and the second part stipulates that the institution in question should satisfy the principles of justice, at least from the point of view of a partial compliance theory. Since the notion of fairness is fundamental to Rawls' conception of justice, I like to comment briefly on the wider and narrower uses of 'fairness'. This, no doubt, will help to accentuate the overall function of fairness in a discourse about cooperative schemes.

The complexity of the uses of 'fairness' may be indicated by an analogy with 'games'. We use the word 'games' to designate a variety of games, both competitive games like tennis, golf or croquet (the purpose of which might conceivably be the defeat of one's opponent) and non-competitive games such as 'patience' or 'solitaire' (in which there is no opponent). The analogy is rough, but it will do. In its broad sense, 'fairness' indicates that some consideration which is relevant to a given distribution has been met, but it does not specify what the consideration is. In this

sense, 'fairness' merely presupposes satisfaction with some distributive end-result. But "being satisfied" with a distributive end-result is not a sufficient condition of 'fairness' in the strict sense. Just as 'I love games' opens up a whole canvass of possible interpretations, so too 'I got a fair bargain' generates a myriad of questions: was the bargain 'fair' because it was carried out in accordance with certain specified rules? Was the relevant distributive criterion effort, ability or need? It seems that what a 'fair' bargain is in any given distributive situation is a function of the relationships in which the participants or beneficiaries stand to each other. This will be one thing in an equal-share business partnership, and another in a situation where, by hypothesis, the participants own nothing. Hence, Rawls speaks of the "usual sense of justice in which it is essentially the elimination of arbitrary distinctions and the establishment, within the structure of a practice, of a proper balance between competing claims".²⁴

Two kinds of fairness (procedural and background) seem to comprise the narrow uses of the concept. Brian Barry describes procedural fairness as the impartial application of the rules which define an activity.²⁵ A game of

24. John Rawls, "Justice as fairness", The Journal of Philosophy, p. 653.

25. Brian Barry, Political Argument (Routledge & Kegan Paul: London, 1967), pp. 92ff.

chess, for example, is procedurally fair if it is played by two players who move by turns, play on a chess-board that contains sixty-four squares, and each player starts off with sixteen chessmen, and the player who delivers a checkmate is declared the winner. 'Background' fairness, in addition to the requirements of procedural fairness, stipulates that certain background conditions be satisfied. For example, it would insist that the players in a chess-game be in the same chess class and are comparatively knowledgeable in chess. Given, then, that a distribution is fair, both procedurally and according to background fairness, it is reasonable to say that the competing claims of X_1 , X_2 , X_n have been fairly recognized. Although procedural fairness and background fairness guarantee the fairness of distributive outcomes quite independently of the consent of the participants or beneficiaries, (beyond the initial decision to participate in the activities) they still need to be further circumscribed. David Lyons has specified six conditions which must be present before an appeal to fairness can be made:

- 1) There is a general practice or pattern of cooperative behaviour that involves a number of individuals in certain ways and actually achieving a desired end;
- 2) the end is the production of a good or the avoidance of an evil which could not be achieved without such co-operation or such a general practice, or procedure;
- 3) the behaviour is typically burdensome, involving some hardship, frustration, sacrifice, inconvenience, pain, or other loss of benefits to the agent;

- 4) the benefits produced must be shared; that is, at the very least, a number of people have the opportunity of sharing in them and ordinarily do;
- 5) the total benefits distributed must outweigh the burdens required;
- 6) it must be possible to produce the good or prevent the evil without the cooperation of everyone who will enjoy the benefits or who will have the opportunity of doing so (in other words, there must be an occasion in which a non-universal general practice is sufficient to make the benefit available; or else there would be occasion in which the foregoing conditions were satisfied and some enjoyers who might produce failed to cooperate).²⁶

In as much as free-loading raises a special problem to joint enterprises or voluntary associations and in as much as the free-rider does not justify a special claim upon the effort of others, these six conditions minimise, if not eliminate, the appeal to utility maximization. In other words, the argument from fairness is not an appeal to the free-rider to help optimise productivity. (Recall that the marginal value of a single individual's contribution is imperceptible.)

In so far as an appeal to fairness in any actual case is most likely to occur within a more or less efficient system of rules and administration, the intuitive idea behind such an appeal is that if a person does not do his part as specified by the rules of an institution, then he does not get a share in any distribution of benefits.

26. David Lyons, Forms and Limits of Utilitarianism, (Oxford: Clarendon Press, 1965), pp. 164-165.

As Rawls construes this appeal, two conditions are necessary before a person can be said to have incurred an obligation to abide by the institutional rules: (1) he must have voluntarily accepted (and intends to continue to accept) the benefits of a scheme of social cooperation, and (2) the scheme or institution must satisfy the principle of justice. I have already argued that "benefiting" under a scheme of social cooperation is a necessary but not a sufficient condition of institutional obedience. But David Richards, following Rawls, argues that the rational contractors, knowing that the institutional rules could be extremely onerous, would not want to obligate anyone to the defence of an institution that might turn out to be grossly unjust. Two considerations, he says, would dictate this cautious approach. First, the P.O.P. in choosing principles for individuals would be guided by the principle of equal liberty and would now wish to allow individuals the liberty of not obeying institutions whose benefits they have not voluntarily enjoyed. And secondly, since the P.O.P. do not know their own particular temperaments, they would want to guard against the unpleasant (but quite possible) consequences of being born with revolutionary tendencies into a police state by insisting on voluntary acceptance as a condition of institutional obedience.²⁷ But does this shift in emphasis rescue the classical benefit-received theory of political

27. David Richards, A Theory of Reasons for Action, (Oxford: At the Clarendon Press, 1971), p. 151.

obligation from the Humean quip that enjoying the public goods (national defense, good roads, health programs, law and order) of the state is no more voluntary than remaining in a ship in mid-stream? Let us suppose -- without actually maintaining -- that it does and try to provide a plausible interpretation of the notion of 'voluntary acceptance'. When do we have the "voluntary acceptance" that Rawls' principle of fairness involves? "Voluntary acceptance" of benefits occurs, Richards says,

where there is some mature option of choice ... with the intention and expectation of encouraging others to rely on you to do your part in bearing the burdens, so that they will be encouraged to do their part ... (In principle), it means that no young child or even young adult who is not financially independent, and thus capable of choosing his own life, is bound to his native country by the principle of fairness, for he has no real mature option of choice between accepting and not accepting the benefits of the legal system. Such a person is morally at liberty to choose whatever country he pleases.

Given the expense of travel and the often stiff immigration requirements of most countries, I wonder what this "mature option of choice" amounts to in practical terms. But Richards is optimistic. For he continues:

... To the extent that there is increasing rapidity of travel and communications between nations, growing availability of travel to more income classes, and the reduction of immigrant restrictions between nations ... The possibility of real choice widens, and with it the applicability of the principle of fairness. Indeed, from the moral point of view, one can postulate the desirability of setting up a national

institution, whereby each person, at twenty-one say, could choose whether to stay or go, after full assessment of the relevant facts, and be assured enough money to cover his choice, if he chose to go.²⁸

This seems to me very unrealistic. But I do not think it is necessary for me to produce a graph of the immigration policies of various countries in recent times in order to underscore the unrealism of Richards' optimism. I shall instead employ the economic concept of public goods to show that 'voluntary acceptance' of public benefits is a spurious conception. In other words, I shall argue that the most fundamental benefits (national defense, law and order) which an institution like the State provides must be available to everyone if they are available to any one.

John G. Head notes two defining features of public goods, namely, indivisibility and non-excludability. The indivisibility feature relates to goods which, by their character, cannot be shared out among their beneficiaries. National defence is a good example. In as much as the government desires to defend the country against an attack, then all the citizens in that country are being defended. The defence of the country cannot be a defence of a section of the country or a section of its population. Thus, the indivisibility feature is really the claim that if X is a public good, then X can be made equally available to all. The second feature of public goods is its non-excludability.

28. David Richards, A Theory of Reasons for Action, pp.155-156.

Collective or public goods are usually defined by reference to a given group. Once this relevant group has been defined, no one in the group may be excluded from consuming them. Thus, collective goods are such that, if they are available to some of the members, they cannot be denied to others in the group (whether or not these 'others' have cooperated to produce them). The force of the 'cannot' that is relevant here is not a physical or technical 'cannot' but an economic one; and it only points up that since additional consumption does not diminish the amount (of defence, for example) available to others, it would be unwise to exclude anyone.

Now, in as much as an organization is logically committed to providing collective goods for its members and given these two defining features of collective goods, the importance of asking whether or not an individual member claims these benefits 'voluntarily' must indeed diminish to a vanishing point. In any case, prior to asking whether an individual member voluntarily accepts benefits is the admission that he actually accepts them. To ask "Did X voluntarily spill the ink?" makes sense only if we admit that X did spill the ink after all. But we must admit that to ask whether X voluntarily spilled ink in a practice where ink-spilling is recognized as normal would be linguistically odd. Similarly, in our society, where the practice of accepting benefits is recognized (and, I believe, appreciated), to ask whether X 'voluntarily' accepts benefits would be stylistically odd. In other words, when a person accepts a gift or a benefit, it makes no sense to ask "Do you accept

this gift voluntarily?" The natural economy of language dictated by the practice of benefit-acceptance would dispense with the use of such modifying expressions as 'voluntary', 'intentional' or 'deliberate'. Only if the action was done in peculiar circumstances or in a way which departs from the standard case, would it make sense to use these adjectival qualifiers or their adverbial variation. If X were to accept certain benefits that have already been disqualified as such by some extraneous factor (say, the benefits are goods generally known to have been stolen) then, we would want to find out whether X, (knowing that these goods were stolen nevertheless), 'voluntarily' accepted them.²⁹ Thus the notions of 'accepting benefit' and 'voluntariness' are not sufficiently separated to warrant the additional use of 'voluntary' in the expression 'voluntary acceptance of benefits'. The use of the expression in the context of institutional obedience may have been prompted by the belief that obligations (particularly, promissory and contractual obligations) have to be voluntarily assumed in order to be binding. But this expression turns out to be an unnecessary conception in the context of the principle of fairness.

Let us turn to Rawls' second argument (a supplementary argument, as it were), which urges citizens to support and comply with just institutions. Rawls construes

29. See J.L. Austin's "A Plea for Excuses" in Philosophical Papers, ed. by J.O. Urmson and G.J. Warnock, (Oxford University Press: London, 1970), p. 187.

such a support as a natural duty. I shall now attempt to explain what Rawls means by the principle of natural duties.

The first point to note is the distinction which Rawls makes between the principle of natural duties (in which is included the natural duty of justice) and the principles (or precepts) of natural justice. By the latter, Rawls means to underline some of the features which define the rule of law or some precepts of justice associated with the general administration of law. Once the principles of justice (especially, the equal liberty principle) have been adopted at the constitution-making and legislative stages, they become the take-off or reference point for the regular and impartial administration of public rules. They form, in other words, a bulwark of individual rights within the formal framework of the rule of law. They are what Rawls calls "justice as regularity" -- constraining all those involved in the administration of law to proceed and/or act in ways which enhance the exercise of individual liberties. Some of the precepts associated with natural justice are the maxims which require, for example, that judges interpret and apply the rule correctly, or that those who enact laws and give orders do so in good faith, or that similar cases are to be similarly treated, or that sanctions for law-violation should be proportionate to the crime. These precepts, according to Rawls, define the notion of natural justice.³⁰

30. John Rawls, A Theory of Justice, pp. 235-242.

By contrast, the principle of natural duties, with which I shall be concerned, is an important component of the notion of right in as much as it helps to define various interpersonal relationships and to explain how these relationships arise. Although Rawls insistently remarks that the principles of justice are principles for the design of institutions and practices, and not principles for individuals, yet we find that his principle of natural duties (like other principles for individuals) derives its content in part from the principles of justice. So that there is, in fact, no logical distance between what the two principles demand and what the principles for individuals recommend.

In general, Rawls acknowledges the existence of several natural duties, which he classifies into two main types, negative and positive natural duties. Negatively, natural duties require us to refrain from performing bad acts. Examples of this class of natural duties are the principles of non-maleficence (forbidding killing or causing unnecessary suffering) and non-malevolence (which proscribes having evil, malicious intentions towards others). Positive natural duties, on the other hand, enjoin the performance of good actions. They may require, for example, that a person should establish or advance just institutions (the natural duty of justice), or that a person should do a great good to another person if such a good can be brought about at little cost to oneself, (the natural duty of mutual aid). There is also the duty requiring, among other things, interference with, and guidance of, the action of highly

irrational or as yet non-rational persons such as the insane and children. Although Rawls does not particularly stress this distinction, the distinction itself is important in so far as it facilitates the priority problem between various duties. Where and when the distinction can be clearly made, negative natural duties would normally pre-empt positive duties. But from the point of view of justice as fairness, the fundamental natural duty is the duty of justice. This duty requires citizens to support and comply with just institutions where these are already in existence, and where not, to establish such institutions if this can be done without great cost to them. At another point, Rawls also mentions the "duty to oppose injustice".³¹ This latter duty forms the crux of his discussion of justifiable civil disobedience and I shall discuss it later. If I understand Rawls correctly, the principle of the natural duty of justice is premised on the two principles of justice. Thus, where the basic structure of society is just, or as just as can reasonably be expected from the standpoint of a partial compliance (non-ideal) theory, then everyone is bound to comply with the institutional rules. Although this principle reads like the second arm of the principle of fairness, it has obvious advantages over the principle of fairness. It does not, for instance, presuppose any act of

³¹. John Rawls, A Theory of Justice, p. 363.

consent or any voluntary act in order to obligate.³² Furthermore, it applies to everyone irrespective of their institutional relationships. The natural duty of justice, Rawls argues, is the primary basis of our political ties to a constitutional regime; it is this principle that binds citizens generally to their political institutions.

Surely, the advantages which Rawls claims for his principle of natural duties are in agreement with the uses of 'duty' in connection with status or role. (Consider, for example, the relation between the feudal lord and his vassal in medieval society, or between the doctor and his patient, or between the employer and the employee.) But most especially, these advantages point up the coercive feature

32. One might ask whether there is any sense in which Rawls' theory of political obligation is contractarian -- given the claim that consent is not essential to the natural duty to support just institutions. I have attempted to show earlier the attenuated sense in which 'consent' is used in contemporary political theory. Rawls' consent-disclaimer can only be understood in that sense. There is no denying that "consent" or "contract" plays a limited role in his theory of political obligation. But this is not to say that the idea of a contract is totally absent. After all, Rawls derives his principles of natural duties in the same rationalistic way that he derives his principles of justice. And so, the contractarian method is presupposed as the P.O.P. ask themselves what principles it would be rational to approve as regulating their commitment to the common practice. The natural duty of justice is thus contractarian in the sense that it is derived by this method. See also P.H. Partridge, Consent and Consensus (Praeger Publishers: London, New York, 1971); J.F. Jenkins, "Political Consent", Philosophical Quarterly, vol. 20 (1970), pp. 60-66.

of the concept of duty as it applies to certain social ties. In addition to the duties of mutual aid and non-malevolence, we may think of the duty of non-interference with the property of another or the duty of care, which every citizen is required to perform (if they can) to help avoid an unnecessary hardship. By calling these relations 'duties', we mean to say that their performance, at least in certain circumstances, may be enforced. After all, it is not unusual, as Joel Feinberg suggests, to align the idea of duty with the idea of coercion.³³ A duty, whatever else it may be, is usually something required of someone. That is to say a duty is something that we are expected to do whether we feel like it or not. (Recall Kant's notion of duty in his moral philosophy.) There are, in fact, situations in which it makes sense to talk of enforcing or imposing the performance of some duty. Consider, for example, the duty of the debtor to his creditor in respect of loans, or of the tenant to his landlord in respect of rents. Surely, these are duties which it makes perfectly good sense to say we may enforce. And although Rawls does not say it in so many words, yet it seems to me that his use of duty in the context of institutional rules and as a principle of various interpersonal relationships may have been suggested by this

33. Joel Feinberg, "Duties, Rights and Claims", in E.A. Kent's, (ed.) Law and Philosophy: Readings in Legal Philosophy (Prentice-Hall, Inc.: Englewood Cliffs, New Jersey, 1970), pp. 143-154.

coercive feature of the concept. The advantages he claims for the principle of natural duties over the principle of fairness which defines obligations seem to bear out this observation.

However, the question now arises: Granted that these principles for individuals have been adopted, how stringent is the natural duty of justice vis-à-vis other natural duties? Rawls does not provide us with any rigid priority rules for ranking the application of natural duties beyond telling us that, in general, negative natural duties take precedence over positive duties. Thus, in ordinary (concrete) circumstances, the natural duties of non-maleficence and non-malevolence may well trump the duty to establish and advance just institutions. Thus, although the natural duty of justice, like other natural duties, is stringent, yet the task it assigns vis-à-vis the law in any given situation is a prima facie one: this task is to be performed when doing so does not involve too great a cost either to oneself or someone else. Rawls himself admits in "Legal Obligation and the Duty of Fair Play" that the moral obligation to obey the law may be over-ridden in concrete circumstances by more stringent considerations.

Why should P obey the law? We find that Rawls does not offer a single principle but a complex of two principles: The principle of fairness which defines obligations and the principle of natural duties (in which is included the natural duty of justice). The first principle stipulates that if P engages in a mutually advantageous (political) association,

accepts its benefits and avails of the opportunities it offers to further his interests, then he has a moral obligation to help sustain the association by obeying its rules. But two cases do not seem to fall within the ambit of this principle and may, therefore, threaten the stability of the scheme. The first case may be seen to arise where the political arrangement is just but P is only a recently arrived immigrant. He has not claimed unemployment checks; he has not availed of the public health programs or used the city walks, or benefited in any way. The second case presumably arises in a situation where, again, the political arrangement is just but P is not a member of the association and so does not consider himself obligated to the institution in any way. Obviously, these cases cannot be solved by an exclusive recourse to the principle of fairness, where the stipulative condition is "acceptance of benefits". But these cases could be resolved by invoking the principle of the natural duty of justice.

Rawls' argument for institutional obedience, we have seen, is predicated on the justice of the institution as a fundamental requirement. But in practice, institutional arrangements relate to partial compliance theory. This means, in part, that they are examples of imperfect procedural justice, and may sometimes enact an unjust legislation. The question now is: Should P obey an unjust law? Or should we simply say that an unjust legislation ipso facto condemns itself and forfeits the claim to our obedience? In other words, should the mere fact that a certain legis-

lation is unjust weigh decisively in favour of disobedience? I think not. In as much as the constitutional process relies on some form of voting, the constitutional arrangement cannot guarantee that laws enacted under it will be just all around. However, this question relates to the status of majority rule, which is the subject of my next section.

III

The Status of Majority Rule in a Constitutional Democracy

Assume that a national electorate E is a finite, non-empty set of n -persons who have to choose between various alternative national programs, x , y and z . (No one is indifferent to the issues and all take part in the voting.) Assume that this choice is made by voting under some social choice rule R . Assume further that R is formulated as follows: In choosing among alternatives, the alternative preferred by the greater number must be selected. (Call R the majority Rule). In other words, in order for x to be regarded as the social choice, it is logically necessary that the number of persons who prefer x must be greater than the number who prefer either y or z .

Now, let me recall an alleged paradox in the principle of majority rule. Suppose that in a democratic election, 45% of E vote for x , 35% for y , and 20% for z . According to R , x is the social choice. And yet, those who vote for y prefer z to x , and those who vote for z prefer y to x . In the light of this additional information, it is

far from clear that x is the socially preferred alternative. For 55% of E prefer both y and z to x , or at least, prefer x the least. Surely, any individual who claims to prefer x to y , and y to z , if he is a consistent chooser, must prefer x to z . Any social choice rule, such as R , which permits an electorate (the greater number of which prefers y and/or z to x) to decide in favour of x , must be inconsistent. But that precisely is what the majority rule seems to allow. Since the social choice rule R functions in E , the members of E seem committed to saying both that ' x should be adopted' and ' x should not be adopted'. This is the voter's paradox.

The question now is: what is the status of a social choice or legislation enacted in situations such as R represents? In other words, why should those who have not voted for x feel obliged to accept and abide by x ? This question relates to the status of R as a decision procedure. It is the burden of this section to analyse the principle of majority rule in a particular institution, namely, in a constitutional democracy. I shall begin my analysis by examining two recent attempts to come to grips with the paradox or to re-state the majority rule so that it avoids it.

Richard Wollheim, in an incisive article, regards R as a democratic choice machine, which comes out with a choice of its own after each voter has fed his vote into it in a way which reflects his evaluations as opposed to his

wants.³⁴ One might attempt to resolve this paradox in one of two obvious ways. But both ways are untenable. In the first instance, the voter who expresses a preference for x where the democratic choice machine comes out with y need only be understood as making a hypothetical or provisional choice: "X ought to be enacted if other voters are of the same opinion". If a voter's vote for x were interpreted hypothetically, there seems to be no inconsistency in accepting the machine's choice, y, should the protasis fail to materialise. In the second instance, the choice of the machine might be construed impersonally or in non-committal sense: In as much as the democratic machine functions as an impersonal arbitrator, it cannot and does not create a moral obligation (either to accept the choice of the machine or to reject one's own preference) but only a tactical, prudential consideration in favour of accepting y.

But these two purported solutions are unacceptable. For one reason, a hypothetical vote for x where the antecedent is known to be unfulfilled or unfulfillable is irrational and pointless. For, in the final analysis, an hypothetical interpretation must mean 'if the majority prefers x, then x is to be enacted; if y, then y, and if z, then z.' Such an interpretation prevents the democratic machine from aggregating social preferences into an ordering.

34. Richard Wollheim, "A paradox in the theory of Democracy", in P. Laslett and W.G. Runciman, (eds.) Philosophy, Politics and Society, 2nd series, (Oxford, 1962), pp. 71-78.

For another reason, a non-committal vote for x or y could be constructed into the logician's disjunctive proposition "'Either x ought to be enacted' or 'y ought to be enacted'". But Wollheim is convinced that the voting paradox cannot be resolved by a negation of any arm of the disjunction. The only option available is to attempt to defend the compatibility of the assertions 'x ought to be enacted' and 'y ought to be enacted'. (Let us for the moment ignore the possibility that x and y are not jointly realizable.) How does he do this?

Wollheim defends this position by means of a distinction between direct and oblique moral principles. Direct moral principles are concerned with the morality of actions, and are usually identifiable through some general descriptive expression (such as murder, envy, benevolence, to mention a few). Oblique principles, on the other hand, bear a relation to morality only artificially, that is, by being the "result of an act of will of some individual or in consequence of the corporate act of some institution". x and y are not incompatible if one of them is asserted as a direct moral principle, and the other as an oblique principle.

I do not think that Wollheim's distinction helps to solve the voting paradox. Whereas the assertions 'x ought to be enacted' and 'y ought to be enacted' are indeed compatible, if we assume that x and y are simultaneously realizable, the same conclusion cannot be argued for where the enactment of one prevents the enactment of the other. I am persuaded that the point of voting between alternative

proposals is precisely to underline this exclusive feature. On the assumption of a simultaneous non-realizability, one of the assertions 'x ought to be enacted' and 'y ought to be enacted' must indeed be false. (Call the simultaneous non-realizability proposal the enthymemic premise: 'x and y cannot both be enacted'.) The total paradoxical situation can be represented as follows:

- (i) 'x ought to be enacted' (A direct moral principle)
- (ii) 'y ought to be enacted' (An oblique moral principle)
- (iii) 'x and y cannot both be enacted' (Enthymemic premise)

Ergo from (iii), either (i) or (ii) must assert a false premise.

If Wollheim's 'solution' is presumed to work, it does so because it ignores the paradox.

Whether or not Brian Barry really believes that resolving the voting paradox also involves regarding our democrat as some kind of a schizophrenic, he identifies two kinds of judgment: the voter's primary judgment and his corrected judgment.³⁵ In the primary judgment, the voter expresses a wish for policy x, which does not take account of the wishes or views of other voters. The corrected judgment takes into account the primary wishes of all. Thus if a vote shows that the majority favour y over x, (where an

35. Brian M. Barry, Political Argument, pp. 58ff.

individual voter had voted x), then y is his corrected judgment and should be enacted. Barry's attempted solution of the paradox is even less satisfactory than Wollheim's. If Barry's distinction between a primary and a corrected judgment holds at all, it holds only because the voter is presumed to know (or to surmise) what the 'corrected judgement' is likely to be. To the extent that this presumption makes sense, such a voter, could, in fact, be operating according to a rule that should such an outcome be the result of the vote, then his initial evaluation is to be altered to what is called the 'corrected judgement'.

It seems to me, however, that Wollheim's and Barry's attempts to resolve the voting paradox are rooted in their conception of a democrat. They conceive a democrat to be one who is necessarily committed both to asserting x and y , even when it is the case that both x and y are not jointly realizable. And yet a democrat need not be so committed. All that is required of him is a blank-check commitment to R as a decision procedure, since the total situation of voting takes place under R . A commitment to R is not to be equated with a commitment to particular outcomes ($Y_1, Y_2 \dots Y_n$). Rather it is a commitment to a rule of decision making. Thus, the democrat who votes x on his own conception of the best social policy and yet agrees that y ought to be enacted in virtue of R is not in any paradoxical situation, since x and y relate to different principles of justification. In other words, the democrat who votes x does not do so because he is a democrat; he votes x on its

own merit. On the other hand, he agrees to y because and only because he is a democrat. (He may, in fact, be unpersuaded about the relative merits of y. But this is immaterial to the function of R.) Wollheim and Barry are, therefore, mistaken to think that the democrat qua democrat is committed both to P (= x ought to be enacted) and not p (= y ought to be enacted) -- a straightforward, logical inconsistency.

Rawls' own contribution is quite instructive.³⁶ He construes the 'paradox' as the problem of the citizen in a constitutional democracy who is put in the situation of believing that policies x and y (both contraries) should be enacted. In other words, it is the 'paradox' of the citizen who votes in accordance with his conception of justice and yet accepts the majority decision when he himself is in the minority. Rawls denies that there is any logical 'paradox' in this situation: the choice of x on the minority level and of y on the majority is related to two different principles. The first principle relates to a person's conception of the best social policy, and the second, to the principles on which he accepts the constitution. And there is nothing in this situation which may not be found in any conflict of prima facie principles. However, since the 'paradox' was apparently claimed to be lodged at the

36. J. Rawls, "Legal Obligation and the Duty of Fair Play", in Sidney Hook, (ed.), Law and Philosophy, pp. 3-18.

heart of the democratic theory, I shall attempt to underline what is required in order for R to function as a decision rule in a constitutional democracy. In other words, what is the role of majority rule in a constitutional democracy? I should like to forestall one objection that is likely to be raised concerning majority rule. (Robert Paul Wolff has, in fact, raised it.³⁷ I am persuaded that the objection misfires.)

Wolff argues that any decision-making rule which requires less than unanimity is necessarily inconsistent with the concept of moral autonomy. Wolff's objection turns on two features of moral autonomy as he conceives it: first, the morally autonomous individual attempts to the best of his ability to form a true opinion as to the rightness or wrongness of his actions, and secondly, he acts upon this opinion. To use a scholastic terminology, the morally autonomous individual follows the dictates of his conscience. These two features are intimately bound together. To do the first without the second is to engage in a form of sterile moral intellectualism; to do the second without the first is to indulge in a form of well-intentioned irresponsibility. And yet the out-voted minority who is obligated by majority decisions is being asked to surrender his moral autonomy. Since Wolff does not condemn voting

37. R.P. Wolff, In Defense of Anarchism, (Harper & Row: New York 1970), pp. 12f, 59ff.

per se, I take it his objection is directed against "a less than unanimous decision".

Let us resort to our national electorate E , which we earlier construed as a finite, non-empty set of n -persons. Let us assume with Wolff for the moment that a voter is a morally autonomous person, who votes his conscience (if he votes at all). Wolff's unanimity claim may be stated as follows: E prefers x as a social choice policy if and only if the number of voters who prefer x is not less than the number of persons in E . However, a unanimity claim can be construed in a weaker and a stronger sense. In a weaker sense, if x is considered to be Pareto-wise superior to y (that is, if at least one member of the electorate strictly prefers x to y , and every other member regards x to be at least as good as y) then x should be considered as a unanimous social choice (since it is at least in some one's interest to be at x rather than at y and in no one's interest to be at y rather than at x). In the stronger sense, if every member of the electorate strictly prefers x to y , then, of course, we have a straightforward unanimous decision in favour of x . As far as it goes, the unanimity rule offers the most complete justification of a social choice. But this rule is not altogether unexceptionable. Unanimity is not easily obtained on social issues. One member differing on policy x must indeed 'block' the action of others in regard to x . Even Buchanan and Tullock who have complained that modern political theorists have shrugged off 'unanimity' too easily as a criterion of

collective choice, were compelled to admit "the paradoxical result that the rule of unanimity is the same as the minority rule of one".³⁸

But Wolff's demand for unanimity in decision making is implausible for other reasons. His argument concerning unanimous direct democracy and, by implication, against less than unanimous voting rests on an inconsistency and must therefore be rejected. Having conceived the autonomous man as the man who submits only to the laws that he has made, he concedes that a community may unanimously agree on some principles of compulsory arbitration to settle economic conflicts. When this happens, the individual will be morally obliged to obey the decision of the arbitration board even when this decision is adverse to the wishes of an individual. The reason Wolff gives for this is "because the principles which guide it (that is, the arbitration board) issue from his (that is, the individual's) own will".³⁹ In other words, Wolff is allowing that an individual may, after all, be morally obliged to comply, without forfeiture of autonomy, with a decision or command concerning the enactment of which he has exercised no direct influence. But I ask: If decisions -- whatever they are -- made by an arbitration board can morally obligate an individual

38. Buchanan and Tullock, The Calculus of Consent,
(University of Michigan Press: Ann Arbor, 1962),
p. 259.

39. R.P. Wolff, In Defense of Anarchism, p. 25.

without loss of autonomy simply because the board was acting in accordance with principles an individual has accepted, why should decisions adverse to the wishes of a minority group but made in accordance with procedures recognised and accepted by them constitute an infringement of their autonomy? Why, in other words, should it be possible to obligate one minority group that has lost out in a vote on the floor of the house to comply with a decision by the arbitration board of the majority, and not another minority group, if, by hypothesis, both groups accept the principles and procedures of decision making current in their respective social practices? Wolff does not say. I suggest that Wolff's inconsistency in allowing one and not the other stems from his model of morality. This model has its antecedents in the existentialist variant of Individualist Ethics, which views morality as a matter of authentic, personal choice. In this view, one creates one's own values and norms in a self-justifying act of choice or espousal. And the individual is constantly making decisions for himself and he remains at the same time the final arbiter of what he should do or not do. But such a model ignores the essentially social dimension of morality. It ignores the fact that men are born into societies which have acquired, over the years, a storehouse of norms and values and roles that provide a framework for

participation.⁴⁰

Another reason why Wolff's demand for unanimous decision making is implausible stems from his insistence that absence of reasons is a necessary condition of authoritative command. After defining authority as the right to command obedience on the condition that the binding character of the command derives purely from the person in authority and not by virtue of the command's independent moral force, 'obedience', in turn, is defined as doing what one is commanded to do because one is so commanded.⁴¹ It is not difficult to see why there ensues a conflict between authority and autonomy. For given his definition of authority, the autonomous man cannot obey anyone but himself and his self-determined decisions. And yet the availability of justifying reasons is crucial to the function of 'authority' in political practice. Consent, fairness, competence and economic efficiency are some of the reasons which justify the ascription of the right to command.

However, let us return to our main theme in this section. Although democratic theory may be variously defined, à la Dahl, let us suppose that there is general agreement on the fundamental propositions that (1) demo-

40. T.L. Beauchamp and K. Witkowski, "A Critique of Pure Anarchism," Canadian Journal of Philosophy, Vol. 11, (July 1973), pp. 533-539.

41. R.P. Wolff, In Defense of Anarchism, p. 9.

cratic government is government by the people and (2) democratic theory is concerned with processes by which the ordinary citizens exert control over their leaders.⁴² Given the fact that men are likely to judge differently, especially when their interests are concerned, it would be in their best interests to agree to a constitutional strategy for deciding whose opinion is to determine the legislative policy. Various decisional strategies (unanimous vote, minority vote and majority vote) are likely to be considered. I have already indicated that the unanimity rule is an improbable candidate -- given the diverse nature of individual voting preferences. And a minority vote cannot determine legislative policy. For all minorities have an equal claim, and there would be no theoretical justification for excluding any minority opinion. In other words, a minority rule effectively precludes a democratic collective choice. So it seems that by a simple process of elimination we are left with the majority rule. The majority rule would not be adopted, however, simply in virtue of an arithmetic necessity. Cogent arguments can be adduced in support of the majority rule in a constitutional democracy. In as much as democratic government is government by the people, there seems to be a prima facie case for the principle of majority rule as the best approximation of the popular temper. The nearer an opinion approaches

42. R.A. Dahl, A Preface to Democratic Theory (University of Chicago Press: Chicago and London, 1973), pp. 1f.

unanimity, remarks Rousseau, the greater is the domain of the general will. Although he recognises only one issue on which unanimous consent is essential, namely, the social compact itself, yet what he says in this context is a glowing testimony of the status of the majoritarian principle:

Plus le concert règne dans les assemblées, c'est-à-dire plus les avis approchent de l'unanimité, plus aussi la volonté générale est dominante; mais les longs débats, les dissensions, le tumulte, annoncent l'assendant des intérêts particuliers et le déclin de l'Etat.... Il n'y a qu'une seule loi qui par sa nature exige un consentement unanime. C'est le pacte social: car l'association civile est l'acte du monde le plus volontaire; tout homme étant ne libre et maître de lui-même, nul ne peut sous quelque prétexte que ce puisse être, l'assujettir sans son aveu ... Hors ce contrat primitif la voix du plus grand nombre oblige toujours tous les autres; c'est une suite du contrat même.⁴³

But the defence of majority rule requires something more. Even Locke's statement that man is naturally free and nothing "is able to put him into subjection to any earthly power but only his own consent" is not in any way peculiar to this rule.⁴⁴ For a minority rule would itself have to be founded on the consent of the governed. Neither is the possession of political power a sufficient condition

43. J.J. Rousseau, Du Contrat Social Book IV, Chapter 2, pp. 439-440. (Edition publiée sous la direction de Bernard Gagnebin et Marcel Raymond, 1959).

44. John Locke, Of Civil Government, (J.M. Dent and Sons, London 1924), p. 177.

of majority rule. For political power is not always spelt out in terms of numbers; often (perhaps even typically) it is the power of influence, of landed wealth, of inherited status or a monopoly on the means of violence. Surely, a minority is capable of wielding such power. The most persuasive argument for majority rule derives, I believe, from one moral principle likely to meet with universal approval among democratic theorists: the equality principle. Where each member of the body politic is accounted as the equal of everybody else, the greater political power can only be discovered by counting heads. Or more specifically, through the adoption of the principle of 'one person, one vote'. The equality principle, in some sense, could be construed as a purely formal principle, and as such, it would need to be supplemented by argument showing that citizens are indeed equal in a necessary relevant sense. We may, in this context, acknowledge the argument for universal equality based on the Kantian conception of men as ends in themselves. We may also acknowledge the Rawlsian argument for equality based on man's capacity for moral development. But for the purpose of voting and within the restricted context of a particular political association, membership is a necessary and sufficient condition of equal citizenship. To cite societies in which citizens have a right to vote but are not equal is not to say why (or that) they should not be equal. To acquire the right to vote, one does not need to be formally educated or public spirited. The right to vote is not acquired (although membership may be

granted) as a reward for good behaviour. By the same token, it is not forfeited as a punishment for bad behaviour. One acquires and retains this right as long as, having registered, one remains a member of the democratic polity. The right to vote is a right which no one can take or should take from the citizen. Thus, for all persons X, X is entitled to an equal voting right if X is a member of the democratic community. But saying that the majority rule is justified by the moral principle of equality does not completely allay our misgivings about its virtue in practice. If government by majority rule is not to degenerate into a self-perpetuating majority tyranny, it must be circumscribed by a set of rules. These rules are derived from those features which distinguish a democracy from other forms of government (a dictatorship or a plutocracy) which sometimes use the majoritarian principle and have often claimed to have majority support. What are these features?

R.M. MacIver has remarked that the growth of democracy has always been associated with the free discussion of political issues and with the right to differ concerning these issues. He writes that

it is a necessary condition of democracy that opposing doctrines remain free to express themselves, to seek converts, to form organizations and to compete for success before the tribunal of public opinion.... It is the meaning of democracy that force is never directed against opinion as such.... The citizen in a democracy can freely and vehemently object to policies pursued by his government, and the right to do so is ... a primary condition of any democratic order. These are the peculiar liberties

of democracy, by which it differs from all other forms of government. Whatever other liberties co-exist with these unless they are the direct corollaries and consequences of these fundamental ones depend on the disposition of the democracy.⁴⁵

Rawls also speaks of the constitutional guarantees of democracy as certain basic political liberties of equal citizenship. These include liberty of conscience and freedom of thought, liberty of the person and equal political rights. Any form of government, he says, would not be a constitutional democracy without a guarantee of these liberties as well as certain economic guarantees provided for by the principle of efficiency. These guarantees are necessary for the meaningful functioning of the majority principle. Accordingly, the majority principle is a fair decision procedure if and only if majorities are freely arrived at. This means that citizens are free to form themselves into majorities and, for that matter, into minorities; it means that they are at liberty to agree or to disagree with their rulers; it means that they are free to criticise government programmes and policies. Rawls sums up the political worth of these liberties in one word "participation". Justice as fairness, he argues, requires that where constitutional arrangements are necessary and to everyone's benefit, they should be worked out from a suitably defined initial situation of equality in which

45. R.M. MacIver, The Web of Government, (New York 1947), pp. 197, 199, 200, 201.

everyone is fairly represented. It is then and only then that there exists meaningful majority rule within the prescribed limits of a constitutional democracy. It may be asked whether decisions reached under the majoritarian rule are necessarily judicious decisions? And if not, what is the force of such decisions?

The majoritarian rule is a procedure for settling disputes of a political nature. It simply decides what constitutes a settlement in a given dispute, namely, the majority opinion, and not what constitutes a judicious decision. The distinction between valid and sound argument forms in logic is instructive. A valid argument form is one which has no substitution instance with true premises and a false conclusion. A sound argument form is a valid argument form with true premises. The validity of an argument does not guarantee the truth of the conclusion. Analogously, the validity of this decision procedure, like a valid argument form, does not guarantee the rightness of the decision. Thus, even when the majority principle adheres to all consistency rules (free election, free debate, equal opportunity for dissent and so on), there can still be meaningful disputes over whether the decision reached was a judicious one. To demand that the majority rule guarantee the rightness of its decisions is to completely misunderstand the role of this decision procedure. This decision procedure, à la Rawls, does not produce decisions to be taken as "right", but a rule to be followed. And no citizen is expected to believe that a particular legislation or policy represents

the best policy (morally speaking, that is) simply because it is enacted with majority support. But this fact does not diminish the obligatory force of the rule.

Suppose there exists a group of people, which regards itself as oppressed or constantly being given the short end of the stick. Suppose, further, that this group of people, even though they are regarded as citizens, constitutes a permanent minority within a larger political enclave: they have the right to vote but they are usually out-voted by a massive, consenting majority. Nothing they do or can do seems able to effect a change in the political direction of the state. They are, in the words of Michael Walzer, trapped in a moral and political ghetto. What is the obligation of this minority group within the democratic principle of majority rule? Or do they have any? In arguing the case for the moral obligation to obey the law, I have characterised this obligation as prima facie. Does the prima facie obligation to obey the law mean any more than that disobedience must always be justified? If not, then the disobedience of oppressed minorities would seem to be adequately justified by the burden of oppression which they experience at the hands of the ruling majority. If it is, are there limits to what minorities may legitimately do when protesting their oppression? These questions relate to the justifiability of civil disobedience. Bearing in mind that there may be different minority-types within a democratic rule with different problems requiring quite different solutions (such as a violent overthrow or a

secession), I shall assume that the minority type I have described recognises and accepts the political integrity of the state as well as the constitutionally established authority of the government. Since this group of citizens, by hypothesis then, does not contemplate secession or a violent overthrow, at what point, if any, does the presumptive obligation of institutional obedience cease to be binding on them? These are some of the questions I shall be considering in the next chapter.

CHAPTER FIVE

CIVIL DISOBEDIENCE: THE TEST CASE OF MAJORITY RULE

Traditional liberal theory of government recognises two obviously preferable means of seeking redress against social and political inequities: moral persuasion and due process (legal and political channels). To be effective, the former requires the presence of certain conditions (such as moral sensitivity, a moral point of view) in those to be persuaded. But these conditions are entirely beyond the control of the man attempting the persuasion. The latter assumes the availability of a certain amount of political power and leverage -- which is not always borne out by the actual realities of democratic politics. Oppressed minorities who can find neither audience nor readily accessible due process would seem to have no moral resources within the constitutional structure of their society and would sooner than later have recourse to rebellion. It is not surprising that classical liberal theory of government (at most Locke-wise and at least Rousseau-wise) seems to consider revolution or militant resistance as the only real alternative to normal politics. Fortunately, today, civil disobedience does present a real alternative to militant action.

But the term 'Civil Disobedience' has not always been used in a clear way. Indeed, conceptual confusion has arisen concerning its use. It has been used to describe, rightly or wrongly, anything from constitutional test cases (and such forms of protest as non-cooperation, hunger strike and self-immolation), to aiding the escape of a criminal. Closely connected with these misconceptions about the nature of civil disobedience are misperceptions of the way it operates. Since civil disobedience is generally regarded as a departure from normal, conventional politics, it tends, by that same fact, to be viewed by some as violent, lawless, unrestrained and coercive. Morris L. Ernst describes civil disobedience as unconventional political tactics whose intent is to persuade the majority by a show of force and/or to win political concessions through mass pressure.¹ Morris I. Leibman condemns intentional disobedience to law as the essence of criminality. "I cannot accept the right to disobey where, as here," he remarks, "law is not static and where, if it is claimed to be oppressive or coercive, many effective channels for change are available".² Given man's natural aversion to

1. Morris L. Ernst, "Free Speech and Civil Disobedience," American Criminal Law Quarterly, Vol. 15 (Fall 1964).

2. Morris I. Leibman, "Civil Disobedience: A Threat to our Law Society," American Law Quarterly, Vol. 21 (Fall 1964), pp. 24-25.

violence and coercion, one can understand and yet not justify this negative reaction to civil disobedience. An appropriate defense of the phenomenon of civil disobedience must therefore include a definition of the concept as well as an elucidation of the logic of its justification. In this chapter, I shall accordingly take up three issues. First, I shall examine the characteristics of civil disobedience which seem to enjoy considerable consensus in the literature on the subject. (drawing particularly on writings by H.A. Bedau, John Rawls, Marshall Cohen and Carl Cohen). My aim in this section will be to provide a formula of definition. Secondly, I shall distinguish this form of protest from another form of opposition to democratic rule, namely, conscientious refusal or objection. And thirdly, I shall take up the issue of justifiability within the frame of reference of Rawls' conditions of justified civil disobedience in a constitutional democracy.

To forestall any misunderstanding of my purpose in this chapter, I should point out that protests to political authority may take any number of forms -- with each form having its own logic of justification. There are, for example, such forms of protest as moral persuasion, legal-political struggle (election, free speech, petition, voting) or the use of due process. There are also civil disobedience, direct action (e.g. self-incineration, hunger strike), conscientious refusal, confrontationist protest activities (such as employing the threat of violence), selective acts of violence against property (often undertaken to give

credibility to threats of wider violence) and, perhaps finally, violent revolution (political assassinations and coup d'etat). There are differences in these forms of protest, which should not be blurred by the fact that the different forms of protest will sometimes be expressed by similar or even identical acts. For example, traffic obstruction, trespass, sit-ins and 'peaceful occupation' could be regarded as acts of civil disobedience and as confrontationist protest activities. Non-payment of taxes or non-cooperation may be the act of a conscientious objector as well as a selective act of violence leading to yet wider violence.

I

Towards Defining Civil Disobedience

I want to begin this section by examining the claim that civil disobedience involves disobedience to the law, and that consequently the civil disobedient is necessarily a criminal, who should be punished. But in what sense is the civilly disobedient a criminal who deserves to be punished? Or is there any sense in which the civil disobedient might be regarded as a criminal: this is the ordinary (trivial) sense in which his act of protest involves the violation of some valid law. I say 'trivial' because his act of illegality or disobedience does not have the selfish, dishonest intent normally associated with criminal violation of the law. But even if civil disobedience does involve

law-violation, does it follow from this that the civil disobedient should be punished? Ronald Dworkin does not agree that the civil disobedient, by the mere fact that he has disobeyed the law should be punished.³ I am inclined to agree with Dworkin on this point. However, the point I want to pursue at this time is not the Dworkinian perspective. Rather I wish to examine whether, all things considered, we should regard the civil disobedient qua civil disobedient as a criminal. My assumption is that the answer to this question will shed some light on the Dworkinian point. That is, suppose it is shown that the civil disobedient qua civil disobedient is not a criminal. Then, this fact will conceivably buttress the point Dworkin is making about not prosecuting the civilly disobedient.

It is true that many of the people who disobey the law are common criminals (arsonists, rapists, kidnappers, cheats, and murderers). But for there to be a crime, there needs to be an area of human conduct prohibited as such under pain of sanction by a rule of law. An act of civil disobedience does not seem to meet this condition, and so, by implication, the civilly disobedient is not a criminal in the strict sense of the word. He is not a criminal in this sense because there is no crime called "civil disobedience"; there is no area of human conduct mapped out as such and prohibited under sanction by the Criminal Code.

3. Ronald Dworkin, "On Not Prosecuting Civil Disobedience," The New York Review of Books, Vol. 10 (June, 1968), pp. 14-21.

No criminal code legislates for or against civil disobedience as such. In fact, the same point may be made more strongly by noting that no list of crimes in the sense defined above could contain a prohibition of civil disobedience. It is not that technically (or even conceptually) a law prohibiting civil disobedience cannot be enacted. It is rather that given the liberal-democratic character of our system and the constitutional guarantees of the civil liberties of free speech, free assembly, and freedom of dissent, any law purporting to prohibit civil disobedience would be unconstitutional from the very outset. The civil disobedient qua civil disobedient is not a criminal. 'There is no crime without a law' is, I believe, a salutary maxim of legal theory and practice. Civil disobedients might be arrested in the course of a protest march or a sit-in and subsequently charged. They are charged, not with committing 'civil disobedience', but with illegal occupation, traffic obstruction, holding a public parade without a permit, or with violating some incidental law.

However, I shall argue later that if a protester must disobey or violate a law in a civil manner, then, the law he disobeys must have sanction of punishment attached to it. In other words, he needs to violate penal laws. I shall now go on to examine those characteristics of civil disobedience which have great currency in discussions of the subject. A quick summary of these characteristics yields the following description of civil disobedience: it is (1) the deliberate violation of a law, which is committed (2) as a

form of protest, (3) publicly, (4) non-violently, and which is (5) conscientiously and (6) politically motivated. Other features which are implicit in this more or less rough characterisation will, I believe, emerge as I examine each characteristic in turn.

Civil disobedience and law violation

In as much as the civil disobedient does not violate the law simply as an end itself, one might suggest that his act of protest need not be construed as one of disobedience or even as involving law-violation. This suggestion is all the more tempting if we remember that often times what is being protested is not a law but a policy or decision. A prospective civil protester might point out the possibility of simply ignoring the proposed policy instead of actively breaking the law. I am persuaded, however, that this suggestion is unsound for two reasons. First, it is difficult to think of civil disobedience as not also involving some kind of a violation or refusal or non-compliance. As the term itself indicates, civil disobedience does involve disobedience. That civil disobedience involves a violation of law or some policy or decision of the government having the force of law is an analytic truth: it is something connected with the meaning of the term "disobedience". It is for this reason that civil disobedience is to be especially distinguished from direct action. Direct action, à la Bedau, is a type of political protest in which the dissenter uses his own

body as a lever with which to pry loose the policy of the government.⁴ (The self-incineration of the Buddhist monk or his hunger strike in protest against some government practice or policy seems to be a good example of a direct action protest.) Civil disobedience and direct action need to be seen as distinct types or forms of protest because the former involves, as the latter does not, the violation of law.

The second reason for rejecting the suggestion that civil disobedience does not involve law-violation stems from the conceptual connection between this form of protest and the paired concepts of legitimate (political) authority and acting illegally. To say a group of people possess legitimate political authority is to say they have the right or are permitted, provisionally at least, to define what is legal or illegal within the scope of their authority. And in as much as a person acts illegally if he acts contrary to a decision made by someone possessing legitimate political authority or to a validly derived law, the civil disobedient acts illegally when he protests a government policy by violating a valid law (forbidding parades without a permit or the occupation of government buildings). Marshall Cohen, Carl Cohen, David Spitz, John Rawls and L.W. Sumner, among others are prepared to say that for an act to be construed as an act of civil disobedience, it must involve a

4. H.A. Bedau, "On Civil Disobedience", Journal of Philosophy, Vol. 58 (Oct. 1961), pp. 653-665.

violation of law or some decision of government presumed to have the force of law. But the converse is, of course, not true. In other words, it is not the case that every law violation is itself an act of civil disobedience. (People who violate traffic laws or laws against trespass are not necessarily civil disobedients.) Furthermore, there are cases of illegal action (such as invalid testamentary acts, invalid marriages) which cannot be construed as acts of political protest, much less as acts of civil disobedience. It, then, makes sense to restrict our notion of illegal acts of civil disobedience to the violation of laws of a certain type, namely, penal laws. We may now re-state the first characteristic of civil disobedience in terms such as the following: A person, P, commits an act of civil disobedience if, at a minimum, it makes sense to say P acted illegally or violated a penal law or some decision of government thought to have the force of law. As the word 'disobedience' itself implies, it is necessary to violate the law or decision of some person or group of persons legitimately in authority before one can be said to have committed an act of disobedience.

The view that civil disobedience involves the violation of a law or a norm of public conduct generally thought to have a penal dimension is itself an outgrowth of a debate on whether or not constitutional test-cases (that is, cases in which the disobedient claims that the law violated is unconstitutional and therefore invalid) are admissible as acts of civil disobedience. There are

some commentators who completely exclude test-cases from the purview of civil disobedience. For example, Richard Wasserstrom⁵ has commented that:

if an act is performed under a claim of ultimately legal, that is, constitutional rights, it is simply not an act of civil disobedience, although it may be a protest against a serious wrong, and may be conducted in a fashion otherwise identical to that of an act of civil disobedience.⁵

Carl Cohen takes a position similar to Wasserstrom's. He argues that an act of law violation that is vindicated by the courts on grounds of invalidity or constitutional nullity cannot be an act of civil disobedience. Civil disobedience, according to him, cannot be legally justified any more than the moral obligation to obey the law can be justified on legal principles.⁶ On the other hand, Justice Abe Fortas seems to think that constitutional test cases are admissible as acts of civil disobedience. In fact, he believes that laws with, at best, doubtful constitutional validity constitute the core of civil disobedient actions. Civil disobedience or the deliberate violation of law is never justified, he writes, in a nation where the law being violated is not itself the focus or target of the protest. To do otherwise is to act unconstitutionally and immorally, since civil disobedience would now become a technique of

5. R. Wasserstrom, an untitled article in Civil Disobedience (Santa Barbara, California: Center for the study of Democratic Institutions, 1966), p. 18.

6. Carl Cohen, "Essence and Ethics of civil disobedience," The Nation, 198 (March 16, 1964), pp. 260-261.

warfare and not a form of civil protest. If the civilly disobedient must violate laws, then the laws he violates must be both invalid and unconstitutional. (Presumably, a group of house wives who continuously blocked traffic to Parliament Hill in order to protest Government cut-backs in Housewife Compensation and Benefit Allowance would not be civil disobedients because they would be disobeying a reasonable and valid law, which prohibits traffic obstruction.)⁷ It is easy to see that the social and moral reality of Fortas' criterion of civil disobedience amounts to a studied defense of the 'rule of law'. But his position is untenable. While Fortas' criterion allows the violation of unjust laws, it does nothing to remedy unjust social conditions that have not been given formal expression in law. And yet the conditions which the civilly disobedient protests are often in this category. There are often no specific poverty laws that the poor can violate in protesting poor living standards and conditions. Racism, bigotry, discrimination are a few of the social ills of a nation that are rarely, if ever, given legal expression.

My own view is that constitutional test cases should not be admitted as civil disobedient acts. To admit them would seem to imply the contradictory proposition that the law promotes and protects its own testing.

7. Abe Fortas, Concerning Dissent and Civil Disobedience (New York: The New American Library, 1968), pp. 16, 32-34, 62f.

-- given the analytic connection between law and obedience. In other words, the law logically cannot take the point of view that the breach of a law, in the course of a public protest, however civil, is no breach. But if the point of saying only clearly unconstitutional and unjust laws need be disobeyed is to protect the civilly disobedient from the consequences of his action, then it bears pointing out that much more is gained by foregoing such a protection. For one reason, the admission of illegality and the concomitant willingness to accept punishment will (as I shall show later) help to demonstrate the depth of the concern and commitment of the civilly disobedient on the issues involved, and so, more effectively register the aim of his protest on the public consciousness. For another, an admission of illegality helps to distinguish this type of law violation from the hard-core criminal type. If we admit that the civilly disobedient is not just presenting a test case, then, we become clearer on Rawls' point that those who use civil disobedience to protest unjust legislation or policy would be prepared to continue their protest even if the courts rule against them. The points I have raised suffice to show why civil disobedience involves the violation of a valid law. It remains to point out that the civilly disobedient need not violate the same law that is being protested. The reasoning here is quite straightforward. Apart from the fact that the object of the protest may not be a law or anything having the form of law, it would be ridiculous to suggest that the civil disobedient should commit treason or

murder in order to protest against unjust treason laws or to challenge overly harsh death-penalty laws.⁸ The civilly disobedient accomplishes his objective by violating incidental laws (such as trespass laws or traffic regulations).

Civil disobedience as a form of protest

Civil disobedience is also a form of protest (appeal, address, propaganda) carried out on the ground that some law, policy or decision of the government is against, or contrary to, good public policy. Unless this characteristic is assured in the definition of civil disobedience, it will be impossible or, at least, difficult to distinguish this form of law violation from certain other kinds of public law-breaking. To take one example. Suppose two groups of women set up shop in front of the Prime Minister's residence. At a minimum, they may be said to infringe the trespass law. But suppose further that the first group of women (call them Group A) set up coffee tables in front of the Prime Minister's residence simply because they believe it is a tourist center and the tourists here are more generous customers. But the second group of women who set up shop in front of the Prime Minister's residence are protesting the government Anti-Inflation Bill. This latter group is more likely to gain a sympathetic

8. John Rawls, A Theory of Justice, pp. 364-365.

audience.

The element of protest seems evident in much of the literature on civil disobedience. "The over-riding aim of those who engage in civil disobedience," writes Carl Cohen, "is to make an effective protest, to open grave issues to public debate, to register deep concern and vehement objection."⁹ Bertrand Russell remarks that by means of civil disobedience a certain kind of publicity becomes possible, and through recurrent reporting of the reasons for their actions "an irresistible popular movement of protest is under way".¹⁰ While there seems to be considerable agreement on the protest-feature of civil disobedience, there is some disagreement as to whether registering a 'protest' is the terminal point of civil disobedience or whether 'protest' is defined by a single aim. The thrust of the debate seems to suggest that 'protest' is itself only a means to some social objective. Howard Zinn, for example, believes that civil disobedience should be geared towards a vital social purpose. Such a purpose may be achieved either by violating an obnoxious law, protesting an unjust condition or symbolically

9. Carl Cohen, "Law, Speech and Disobedience," in H.A. Bedau's (ed.) Civil Disobedience: Theory and Practice, p. 176.

10. Bertrand Russell, "Civil Disobedience and the Threat of Nuclear Warfare," in H.A. Bedau's Civil Disobedience: Theory and Practice, p. 197.

enacting a desirable law or condition.¹¹ In the view of Gandhi and Martin Luther King civil disobedience should be constructed, at least, as part of an effort to achieve social change. And Rawls is convinced that the aim of the protest must be to bring about a change in the law or policies of the government. But quite conceivably, in any circumstances of actual or contemplated civil disobedience, there may well be an appreciable lack of congruence not only in patterns of reasonable and unreasonable disobedient behaviour, but also, by hypothesis, in equally eligible aims. But this lack of congruence need not be stressed when defining, (as I am now doing) the essential features of civil disobedience. It suffices to say that civil disobedience is generally considered to be a form of protest.

The concern to distinguish civil disobedience from other forms of opposition to legitimately constituted authority largely determines its remaining features: it is public, non-violent, conscientiously and yet politically motivated.

Given the aim and mode of civil disobedience, it would be odd if government agents or their representatives were to report, for instance, that a group of citizens had been caught unawares committing civil disobedient acts. For such a report would imply that the civil disobedients were concealing their acts from the appropriate authorities.

11. Howard Zinn, Disobedience and Democracy (Random House: New York, 1968), p. 119.

But how would their case become known? And how would their objective be attained? Stuart M. Brown, Jr., remarks that

an act of civil disobedience breaches the law openly in the course of a public protest against some offending statute, decree, verdict or practice. The breach may be planned or not, it may or may not be a necessary part of the protest but it must be open.¹²

The characteristic of publicity is essential in a conception of civil disobedience for several reasons: (1) it helps to demonstrate that civil disobedients are not covert plotters contemplating the subversion of duly constituted authority, (2) it distinguishes bona fide acts of civil disobedience from typical cases of crime (which are characterised by concealment); (3) it helps to persuade the public about the nature and direction of the protester's aim. But more fundamentally, it demonstrates the communal or civic character of his protest. It is for these reasons that civil disobedients normally notify the authorities in advance of the time and place of their protest.

What role does the word 'civil' play in the characterisation of disobedience? To be sure, the word, 'civil' connotes several features (political, public, non-criminal, non-violent) of the kind of disobedience to law under examination. But it has most often been used as a rationale for non-violence. Those who have either commented on civil disobedience or have practiced civil disobedience

12. S.M. Brown, "Civil Disobedience," The Journal of Philosophy, Vol. 58, (1961), p. 670.

have argued that the qualifier helps to underline the essentially non-violent, polite, (restrained, mannerly, respectful) attitude of the civil disobedient as he makes his appeal to the national conscience. 'Civil' disobedience has consistently been viewed in this light: it is non-violent. Thoreau, Gandhi, Martin Luther King and Ralph Abernathy have also spoken about the non-violent character of civil disobedience. Martin Luther King, for example, claims that violence "destroys community and makes brotherhood impossible. It leaves society in monologue rather than dialogue".¹³ This statement focuses a view of civil disobedience as a community effort in search of social and political change through dialogue with members of the community. Such a view squares well with the rationale of 'civil'. H.A. Bedau has also noted that the violence (the destruction of property or bodily harm, sabotage, assassination, street fighting) cannot be part of civil disobedience. And any disobeyer who engages in violent acts, (either by initiating or threatening one such act) cannot be "civil".¹⁴

Although 'non-violence' in civil disobedience seems to have gained considerable support from a growing number

13. Dr. M.L. King, Stride Toward Freedom (Harper & Row, Publishers: New York, 1958), p. 213.

14. H.A. Bedau, "On Civil Disobedience," in Journal of Philosophy, p. 656.

of writers on the subject, their assertions have, in the main, been concerned with reassuring a confused and distraught public confronted with this phenomenon. In Rawls, however, one notices a determined effort to shore up these assertions with arguments. He maintains, for instance, that violence (or at least, forms of it) is incompatible with civil disobedience as a mode of public speech. The civilly disobedient may warn and admonish but he must not use violence or threaten violence. Besides, the civilly disobedient, by the non-violent nature of his acts, seeks to demonstrate his fidelity to the rule of law and order. There is, to be sure, a time for violent reaction to social and political injustice. But when that time comes forceful resistance (not civil disobedience) would be an appropriate response.

These Rawlsian arguments are persuasive but not completely satisfying. They are not satisfying because they have assumed (like most other arguments) only one form of violence, namely, physical violence or violence that manifests itself in the breaking of windows and the throwing of "molotov cocktails". Accordingly, we have reacted against its introduction into democratic politics. But in doing so, we have failed to take due account of the power of non-violent resistance as an instrument of social change. Very briefly, then, I want to show, first that the difference between violent and non-violent methods of social change is not absolute, and secondly, I want to underline the precise claims of non-violence in

the conception of civil disobedience.¹⁵

There is no doubt that persons who share the notion of violent action as action likely to cause destruction of property, bodily injury or death, will tend to classify actions that do not produce these effects as non-violent, and in one bold stroke, depict non-violent action as all-of-a-piece. But such a classification obviously obscures such perfectly legitimate questions as to whether or not the non-violent action has been obstructive of the economic interests of others (in which case, it would be economic violence); or disruptive of municipal campaign and elections (in which case, it would be political violence); or whether it has promoted cheap publication designed to misinform the public about the social and moral realities of their cause (in which case, it would be social-psychological violence). How non-violent are civil disobedients who, for instance, refuse to pay taxes in the middle of the Financial Year as a sign of protest? Or how non-violent are civil disobedients who declare a "peaceful

15. It may be noted that there are various forms of 'non-violent' actions which are perfectly conceivable as violent. For instance, the unjust deprivation of the political rights of a citizen (political violence); the obstruction of a citizen in the lawful pursuit of and participation in free enterprise markets, (economic violence); the deprivation of the right to hold and practice religious faith, (religious violence); commercial advertising carefully designed to mislead the public (social-psychological violence). Victims of this kind of 'violence' are no more difficult to identify than are the victims of physical or bodily attack. See Ernst W. Ranly, "Defining Violence," in Thought, 47 (1973), p. 415-27.

march" at the site of an electioneering campaign? And yet in each case, by hypothesis, no stones had been thrown, no windows broken, no bodily injury had been caused. It is perhaps reflections of this kind that have forced Emma Goldman to say that the logical and inescapable end of civil disobedience is the destruction of public order.¹⁶ Even though we need not accept Goldman's verdict, we need to clarify the claims of 'non-violent' disobedience. To do this, we must take two steps: (1) we must reject the assumption that all behaviour is either violent or non-violent, and then, (2) we must choose between (a) eliminating non-violence as a characteristic of civil disobedience, or (b) re-stating the claims of non-violence so that it only delimits the range of eligible demeanours. By eliminating non-violence from the list of defining characteristics, one is not necessarily holding brief for violent tactics of disobedience. In other words, one can be committed to the reduction and elimination of violence and yet deny that the civilly disobedient is logically committed to non-violence. What such elimination purports is that in any case of civil disobedience the burden of justification rests on him who would employ violent tactics. Such a position has been taken by Christian Bay among others. Bay argues that civil disobedience should be kept

16. Emma Goldman, "Anarchism: What it really stands for," in Staughton Lynd, (ed.), Non-violence in America (The Bobbs-Merrill Company, Inc.: New York, 1966), pp. 119-134.

apart from non-violent action. The latter concept by definition rules out violent acts while the former does not.¹⁷ The difficulty with Bay's view, however, is that by eliminating 'non-violence' from our understanding of civil disobedience, it leaves us confused at those crucial moments when we want to be able to distinguish between acts of civil disobedience and acts arising from other forms of protests (such as confrontationist tactics).

On the other hand, we can re-state the claims of 'non-violence' to mean a de-limitation on the range of behaviour in which the civilly disobedient may engage. The argument here would be that the limitations are reasonable in the light of the aim of civil disobedience and in view of such characteristics as law-violation and publicity. Thus, for the purpose of defining civil disobedience, the characteristic of non-violence could be taken to mean no more than that the civilly disobedient (1) does not initiate violence, and (2) does not resist or seek to evade arrest, (that is, he is willing to take punishment for his law violation). I have argued earlier that the civilly disobedient violates a presumptively valid law. In saying that the law is presumptively valid I have implied that disobedience is generally thought to be punishable and

17. Christian Bay, "Civil Disobedience: Prerequisite for Democracy in Mass Society," Smith & Deatsch, eds. Political Obligation and Civil Disobedience: Readings (Thomas Y. Crowell Company, New York, 1972), pp. 293-310, 298.

that the civil disobedient must submit to such punishment when required. However, I do not mean to settle this issue by definition. The case for the willingness of the civil disobedient to accept punishment can also be made on substantive grounds.

In as much as a political minority does not challenge the integrity of the state or the whole legal system, there is a presumptive prima facie case for submitting to the penalty for law violation. First, such submission has the merit of pointing up the depth of the commitment which the civilly disobedient has for the politico-legal structure. The re-inforcing effect of this submission is also underlined by Marshall Cohen's argument that accepting suffering and punishment may force the majority to re-consider the law or policy which the minority is challenging.¹⁸ Secondly, in as much as the violation of a valid law may interfere with the legitimate interests of others, the frustration and resentment caused to these people will be substantially reduced if they realise that those who have caused this harm are themselves willing to pay the price. Furthermore, it will dissuade them from contemplating unilateral action (such as setting up a vigilante group) designed to bring the violators to justice. Thirdly, accepting punishment serves to under-

18. Marshall Cohen, "Civil Disobedience," The Great Ideas Today (Encyclopedia Britannica, Inc., Chicago & London, 1971), pp. 245f.

score the seriousness of the dissenter's views and the strength of his conviction. Realising that his action may call for legal prosecution and possibly a jail-sentence, the prospective civil disobedient will consider more carefully his proposed action and its cost-benefit trade-off. He will consider, in other words, whether the benefit of staging a protest march is commensurate with its costs and possible imprisonment. In one word, submission to punishment helps to check the irresponsible recourse to civil disobedience tactics and it sets an important limit on what might otherwise have resulted in a proliferating example of disrespect to law.

In order not to misconstrue my arguments here, I would like to draw attention to two points with which I have not been concerned. First, I have not, in arguing the case for accepting punishment, insinuated in any way that an act of civil disobedience is justified by the willingness to submit to punishment and to pay the price. The civil disobedient, I am persuaded, is not committed to such naive legal realism. It is thoughtless to suppose that law-breaking is justified by the willingness to take the penalty. The civil disobedient is no more justified in his actions by his willingness to take the penalty than the nefarious deeds of the arsonist and murderer are justified by his willingness to go to jail or to the gallows.

And secondly, even though the civil disobedient is willing to pay the penalty, it does not necessarily follow that the state should exert the penalty. The willingness of

the disobedient to submit to punishment does not foreclose the issue of prosecution. Ronald Dworkin has developed a strong case against prosecuting the civilly disobedient. Although the focus of Dworkin's argument was the conscientious objector, some of the reasons he offered are relevant here. For example, he argues that the prosecutor may decide not to press charges if the disobedient is young; if the law is unpopular, unworkable or generally disobeyed or in abeyance. He may decide against prosecution on the ground that this offender's law violation had no criminal intent nor was he motivated by a desire for self-advantage or political subversion.

Civil disobedience has also been referred to as a conscientious act by several commentators -- among them Bedau, Carl Cohen and John Rawls. More often than not they have merely asserted rather than argued the point. One thing that the assertion does not or should not seek to do is to justify disobedience to law simply on the ground that a given law is incompatible with one's conscience. As S. Hook has warned 'conscience' is a dangerous guide to principled political action since it could pave the way for totalitarians along with peace workers. Besides, I do not think that the "conscientiousness" of civil disobedience, pace H.A. Bedau, refers to weighing the consequences for everyone of obeying an objectionable law against the consequences of disobedience. The civil disobedient is not committed to such utilitarian calculations. What, then, does the assertion of conscientiousness imply?

There are two senses in which civil disobedience is a conscientiously motivated act. First, an act of civil disobedience is conscientious in the sense that it is performed from the principled and deeply held convictions of the protester. The civil disobedient does what he does (that is, he violates the law) in the honest belief that what he does is right in spite of the fact that it is either illegal or generally thought to be illegal. But civil disobedience is also conscientious in another sense. I have, in general, maintained that the civilly disobedient needs to be someone who recognises the political legitimacy of the government and would wish, all things being equal, to press his claims within the constitutional framework. But all things are not always equal: parliamentary issues and debates are free enough, but the majority always seem to vote along party lines. Political and legal procedures are constitutionally guaranteed but these are in default (either obstructed or inadequate). Yet the prospective disobeyer does not contemplate a violent overthrow of the government. (Recall that he is non-violent in the sense defined here.) His only recourse in these circumstances, it seems to me, would be to disobey the law in a civil manner as a sign of protest. In short, civil disobedience is also a conscientious act in the sense that it is engaged in as a last resort. In other words, the civilly disobedient should be able to say in support of his claim of 'conscientiousness' that normal channels of redress are not available, (either immediately or on the long run).

Civil disobedience has also been described as a politically motivated act. But the characterisation of civil disobedience as a political act could be variously construed. It could be construed, for example, as saying that those who employ civil disobedient tactics are persons who are concerned with the institutional framework of rule in the state or persons who seek a re-statement of the institutional structure of the state, or persons who wish to dissociate themselves from certain political events, policies or decisions. Such a construal of 'political act' is, of course, unobjectionable but trivial. It does not distinguish clearly between this form of protest (that is, civil disobedience) and other forms of political protest.

However, Rawls' argument for describing civil disobedience as a political act is both instructive and highly persuasive. His argument is based on the assumption of a common conception of justice which regulates political behaviour generally and helps to define constitutional procedures. Accordingly he writes that

... civil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by principles of justice which regulate the constitution and social institutions generally. In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though these may coincide with and support one's claims; and it goes without saying that civil disobedience cannot be grounded solely on group or self-interest. Instead, one

invokes the commonly shared conception of justice that underlines the political order.... By engaging in civil disobedience a minority forces the majority to consider whether it wishes to have its actions construed in this way, or whether in view of the common sense of justice, it wishes to acknowledge the legitimate claims of the minority.¹⁹

The view of civil disobedience as a politically motivated act represents the continuation of government outside of normal politics in as much as acts of civil disobedience are engaged in for political purposes, sanctioned by political considerations and guided by political principles. In view of the foregoing discussion, civil disobedience may be defined as a non-violent protest which consists in the deliberate and public violation of, at least, a presumptively valid law or some policy or decision of the government generally thought to have the force of law; it is conscientiously committed, (that is, as a last resort) and yet politically motivated.

I have noted in my discussion that sometimes the protest is directed, not against a law as such but against some policy or decision of the government on the ground that the said decision undercuts basic political rights and/or violates a shared conception of justice. And so, it is sometimes the case that no connection exists between the law violated and the decision or policy being protested. When this is the case, the disobedience becomes

19. John Rawls, A Theory of Justice, p. 366.

largely symbolic. That is, a law is disobeyed in order to protest the decision or policy. In as much as the notion of disobedience presupposes the concept of a law or, at least, some form of public conduct generally thought to have the force of law, which has been violated, the action is illegal. And in as much as the law violated also has a penal dimension, the illegality is presumptively punishable, although the court may decide not to prosecute.

What I have done in this section is to provide a formula of definition and to define civil disobedience accordingly. I have, in doing so, indicated a set of criteria for deciding when an act of disobedience to law is properly an act of civil disobedience. I have, however, not been concerned with the grounds (or whether there are any) of justified civil disobedience. To the extent that a formula of definition does not foreclose the possible grounds of justified civil disobedience (even though some grounds are ruled out as being incompatible with this definition), it also leaves untouched the issue of justifiability.

II

Civil disobedience, test-cases and conscientious refusal

I should like to distinguish between civil disobedience and two other forms of opposition to a democratically derived law, namely, constitutional test case and conscientious refusal (objection). I have already referred to the former

in my search for the formula of definition, and only little need be added here.

It seems to me that in a constitutional test case the disobeyer makes a two-fold claim. First, he breaks the law in order to find out how the law in question will be administered or enforced. In as much as the court can only rule on a case before it, it is essential that the law being tested be broken directly. The necessity for a test case of this kind seems to arise from the realisation that a law which is valid on its face may be questionable or objectionable by reason of its discriminatory application. In other words, a presumptively valid enactment may become unjust if unfair, discriminatory tactics are employed in its enforcement. Suppose the government enacts a law which requires citizens to obtain a permit in order to use the city parks. Such a law would be valid on its fact, or at least, there is nothing evidently unjust about it. But suppose further that the municipal council consistently refuses to issue such permits to people who belong to a particular ethnic minority or to persons who support Her Majesty's Loyal Opposition. By civilly disobeying the permit regulation, the minority aims to call attention to the unfair or discriminatory application of the law.²⁰

The second aim of constitutional testing relates to the law's probable invalidity. In this case, the law's

20. See Rex Martin, "Civil Disobedience," in Ethics, vol. 79-78 (1968-70), pp. 126f.

constitutional status is doubtful. Such a doubt may arise in several ways. Prescinding from the more common situation in which a doubt arises as to whether a particular law has been enacted with the requisite majority support, doubt about the invalidity of a law may arise from its presumed incompatibility with the conventional political morality of the people. Suppose a law were enacted in the British Legislature which makes it illegal for Britons to hold even private political discussions on the eve of an election. Surely, such a law would compromise the traditional principle of free thought and free expression and its constitutional validity would be questionable.

A doubt may also arise from an individual or group of individuals thinking plausibly that the demands of a law are not clearly evident. For example, does the law exempting citizens from military service on religious grounds also apply to citizens who oppose a war on grounds of personal moral convictions?

Again, the constitutional validity of a law may be in doubt if what the law prescribes flies too flagrantly in the face of reality or makes an impossible demand on people. If Parliament were to adopt a Bill which claims that mini-skirts caused cancer in the eyes of the beholder, or that no bachelor should have a female companion in his car after certain hours, surely, such a bill would put Parliament in ridicule and the rationality of the law in doubt. In cases of this kind, the law in question is disobeyed in order to force a court ruling

concerning its doubtful validity. In constitutional test cases, the disobeyer is normally expected to abide by the ruling of the court. On the other hand, the civil disobedients are usually prepared to continue their protest even when the courts have ruled against them.

Conscientious Refusal

Conscientious refusal (or objection) is a special type of law violation. It is disobedience to a specific law or norm having the force of law. The conscientious refuser, unlike the civilly disobedient, is not politically motivated; he is more concerned in bearing witness to a set of values which he holds to be incompatible with the law than he is concerned, if at all, about political structures. His disobedience springs from conscience or from faith. The refusal of the early Christians to perform pagan sacrifices, the refusal of the Jehovah's Witness to salute the flag, the objection of the pacifist to enlist for military service typify this kind of disobedience to law.

Conscientious refusal may be contrasted with civil disobedience. The man who disobeys a particular law from a conscientious or religious standpoint is not necessarily appealing to the majority to reconsider their decision or policy, nor is he invoking a commonly shared sense of justice. Hence, the action of conscientious refusal need not be public or reported to the authorities. (It is merely a contingent matter that his refusal becomes public

knowledge.). Those who disobey the law on conscientious grounds or claims of conscience recognise that the issues they raise may be incapable of resolution by substantially unanimous agreement. And so, their disobedience or refusal is not an act of civil disobedience.

There is, I believe, an important sense in which the conscientious refuser, unlike the civilly disobedient, makes a request to be allowed to benefit from everyone's deference to law, without himself sharing in the burdens. It is the sense that his objection may become recognised in law. I have particularly in mind cases of objection to wars (no matter how just) based on reasons of conscience or religious convictions. In Britain, for example, where the conscription law provides that all fit men of certain ages are liable for military call-ups, exception is made for those citizens who satisfy a tribunal that they have a conscientious objection. And in some countries, all men in religious orders (priests, monks, and Bishops) are, by a special Concordat, exempt from active military service. However, the decision to recognise the objection of the conscientious refuser lies wholly in the province of law. The moral beliefs and religious convictions of a man absolve him from obedience to the law only where the law

itself allows.²¹ The law may decide to recognise and so admit conscientious objection as a reason for non-compliance with a legal injunction. Where the law does so, conscientious objection thus becomes a legal ground of exemption from the application of some other rules -- the burden of proof resting on the claimant.²² The law may, of course, refuse to recognise an appeal from conscience as a legal ground for non-compliance. If this happens, it is open to the conscientious refuser to disobey and then face the penalty.

However, since there is no universally acknowledged method of telling when and where an individual's conscience legitimately absolves him from the duty of institutional obedience, traditional conscientious refusal -- where this is not on grounds of injustice -- is by this same fact of little appeal in a democratic theory of civil disobedience. I shall, therefore, have nothing more to say about the justification of conscientious objection.

21. Rawls has suggested that to the extent that political institutions approximate the principles of justice the number of unjust wars waged by such societies will diminish, and to this extent, the number of citizens who seek exemption from military service on grounds of conscientious refusal or objection must also diminish. Opus cit., pp. 369-371.

22. S.M. Brown, "Civil Disobedience," in Journal of Philosophy, cited above, pp. 637f.

III

Civil Disobedience: The Issue of Justifiability

Is civil disobedience justifiable? Or, if I may put the same question strongly, is it ever right for a democrat to disobey a democratically derived law? We can begin, it seems, by considering some counter claims to the justifiability of disobedience to law.

Some counter arguments considered

One extreme view claims that one is never justified in breaking the law. Now, we can examine this extreme view from two standpoints: (1) analytically and (2) substantively. Analytically, the view seems committed to saying either that every law is a morally just law or that breaking a law is always a greater wrong. The first arm of the disjunction is clearly false and the second, at best, doubtful. Very few people, if any, would attempt to defend the first arm of the disjunction upon serious reflection. Suppose a Parliament consisting of self-consciously obese members were to pass a Bill stating that all persons weighing less than 200 lbs. should not be allowed to work in government departments. This would be a valid law. But it would be unjust and morally unintelligible. If it makes sense to say of a certain Bill that it is legal but unjust, then it makes sense to say that much more is implied in the notion of obedience to law than is allowed for by the mere concept of law or by the fact that a given

law is valid.

The second arm of the disjunction already stands condemned by my denial that every valid law is a morally just law. But let us assume that only morally just laws are entailed by the second arm of the disjunction. It is still not clear that disobeying just laws is always a greater wrong. (But I mean to ignore this point.) I shall instead assume that the second arm of the disjunction is a shorthand for a vague utilitarian formula for settling questions of institutional obedience or for deciding when social acts are to be performed.²³ The inadequacy of this formula is soon exposed.* Assume that there is a valid law which prohibits abortion. But a teenage girl in a village has become pregnant from a rape committed by an escaped patient with a heritable mental disease. She is brought to the local gynaecologist and surgeon, who performs an abortion. I do not see how, in this case, the consequences of obeying the abortion law out-weigh those of disobedience. Or consider the case of a person who drives at 60 m.p.h. in a 50 m.p.h. zone in order to get his sick wife to the

23. I do not wish to get into a lengthy discussion of the merits and demerits of rule-utilitarianism -- whether, for example, the distinction between act-utilitarianism and rule-utilitarianism is a genuine one; or whether 'rule' in rule-utilitarianism is to be understood as a possible rule or a rule actually operating in society. I shall simply note the inherent inconsistency of the rule-utilitarian formula that prescribes that we obey the rule even in those particular cases in which it is obvious that disobedience is the most beneficial course of action.

hospital. His defense for disobeying the speed limit regulation is that in this case disobedience has better consequences for him.

Substantively, the view that disobedience to the law can never be justified may be construed as a shorthand for a number of arguments against disobeying the law. But only two of these need be noted here. The first argument is a replica of the social contract doctrine. The contract theory of political obligation, à la Locke at least, predicates institutional obligation on the consent of the governed. It has not been easy to specify what sense of consent is relevant to this duty nor to determine conclusively when consent has been given and when revoked. The difficulty with 'consent' in classical contractarian theories of political obligation, I believe, is too well-known to deserve any extensive treatment here. It suffices to note the various ways by which 'consent' is sometimes presumed (such as acceptance of institutional benefits, mutual restrictions, or participation). All of these have been put forward as grounds for the obligation to obey the law. This obligation is analogous, they claim, to the obligation to keep a promise. The purpose of this analogy, I suppose, is to underscore the point that the law should always be obeyed just as a promise should always be kept. Let us grant for a moment that there is indeed an obligation to obey the law analogous to a promissory obligation. Do we have an absolute obligation to keep a promise? I think not. There is a consensual agreement among philosophers

(Ross, A.I. Melden, J.L. Austin, J.R. Searle and Rawls) that there is a prima facie obligation to keep promises, not that there is an absolute obligation to do so. The prima facie obligation to keep promises means no more than that non-fulfillment must always be justified. And as I argued earlier, a prima facie obligation may be modified by several factors which obtain at the time of the discharge. For example, if X promised to take Y to lunch at 3 p.m. but realises, too late, that he has an important board meeting at 3.15 p.m., I believe X would be justified in breaking the lunch date.

Thus, even if we assume that the obligation to obey the law is like a promissory obligation, all we can reasonably conclude from this analogy is that the obligation of institutional obedience will sometimes but not necessarily always, override other considerations simply because we have consented to be so bound. It seems strange to say that because one has benefited under a scheme of social cooperation, one has thereby incurred an obligation to obey all its rules, even when it is the case that the social welfare of the members will be better preserved and promoted on a given occasion by disobedience.

Furthermore, the attempt to derive an absolute obligation to obey the law from the idea of participation has not been ~~very~~ convincing. J.P. Pramenatz, for instance, has written that

The citizen who votes at an election is presumed to understand the significance of what he is doing, and if the election

is free, he has voluntarily taken part in a process which confers authority on some one who otherwise would not have it.

By consenting to some one's authority, you put yourself under an obligation to do what the possessor of it requires.²⁴

This argument is persuasive but inconclusive. Plamenatz is correct in suggesting that we can reasonably assume consent on the part of a person who participates in a free and fair election (and who has not indicated that his vote should not be construed as a sign of consent). The matter is a conceptual one. It means, as Peter Singer has also suggested, that the normal case of voting must, in virtue of what voting is, be a case in which there is consent. What would be the purpose of voting if no one ever accepted the result of the vote?

But this conceptual point does not seem very convincing. For one reason, it ignores what Marshall Cohen has called the "phenomenon of voter apathy".²⁵ Voter apathy may express itself in one of two ways, that is, "benignly" or "malignly". In the one case, it consists in an attitude of relative unconcern with election issues, while one does nothing to undermine the political system. In the other case, the malignly apathetic voter does not believe

24. J.P. Plamenatz, Consent, Freedom and Political Obligation (Oxford, 1968), pp. 170-171. See also P. Singer, Democracy and Disobedience, pp. 50f.

25. Marshall Cohen, "Civil Disobedience," in The Great Ideas Today, pp. 240f.

in voting; he may, in fact, regard voting as a travesty of good government and would not hesitate to undermine the electoral process at an opportune time. Surely, we would hesitate to conclude that apathetic voters (especially the malignly apathetic voters) have consented to some one's authority and so have agreed to put themselves under an obligation to obey all his commands.

Another counter argument to the justifiability of civil disobedience claims that whereas disobedience can be justified in a dictatorship, it is never justified in a democratic state which provides its citizens with legal and political channels of redress. Those who have defended this view have often invoked the availability argument. T.H. Green, for instance, argues that although the citizen has the right to assess and evaluate the policies of his government, he is not free to engage in civil disobedience should he find a certain law contrary to good public policy. As a member of "popular government" with "settled methods of enacting and repealing laws", he should obey the unjust law, and meanwhile utilize conventional legal channels to obtain the repeal of the law. But until it is repealed he has a duty to obey it.²⁶ Similar sentiments have been articulated by a former Australian Prime Minister, when he remonstrated with those civil disobedients who were opposed to the presence of Australian troops in South

26. T.H. Green, Lectures on the Principles of Political Obligation, pp. 78, 111.

Vietnam. "Inciting people to break the law", he charged, "cannot be excused in a community which offers the opportunity to change the law through the ballot box."²⁷

It is easy to see that these views put a certain priority on the rule of law. But one can appreciate its claim for any society without conceding the argument. In other words, one can agree that law and order are essential conditions of social and political life without savouring the suggestion that unless there is total obedience the rule of law cannot be preserved. If the critics of civil disobedience mean to present the democratic citizen with a dry choice between total obedience and general disobedience, I think it is a choice he need not make. A choice of general disobedience is clearly indefensible in any society worthy of that name. And to choose total obedience to law is to give law and order a value which needs to be qualified. In a democratic society (such as I assume ours to be), which espouses other social values besides law and order, a plea for an undeviating obedience to law would more hinder than facilitate the realisation of such values as equality and various political liberties. Our respect for the rule of law must be contingent on and limited by those standards for judging both the quality of democratic processes and the purposes they promote. A rule of law which denies basic political rights or which extols obedience to the

27. Quoted in P. Singer's Democracy and Disobedience, p. 1.

law at the expense of social and political justice is nothing but a travesty of true democracy. The civil disobedient, far from constituting a threat to democratic rule, expresses great commitment to the rule of law. And by implication, the interesting question in the issue of justifiability is not whether it is ever right to violate a democratically derived law, but rather, what is the logic of justification. In other words, what specifiable political circumstances are likely to warrant and permit disobedience in a democracy -- without prejudice to the prima facie obligation to obey the law? What moral conditions form part of the necessary context of any act of civil disobedience?

The justification of civil disobedience²⁸

Civil disobedience needs to be politically and morally justified. In as much as by civil disobedience the minority seeks to dramatize what he honestly takes to be the fact that the majority has violated the conditions of political association, it is politically justifiable. And in as much as the civilly disobedient (whether he belongs to a minority or a majority group) violates the law on the ground that it is

28. I should here stress the point that the justification of civil disobedience cannot be sought in the legal domain. The legal justification of civil disobedience would require the enactment of a law which permits and so justifies civil disobedient acts. But the idea of such a law would orbit viciously. For it would imply that the law requires law-breaking.

unjust or immoral, civil disobedience is morally justifiable. The political justification of civil disobedience consists in a description of a set of constraints which regulate the use of disobedient tactics in a non-defective (continuing) democracy. It is for this reason that the political justification of civil disobedience is logically co-extensive with the arguments for my formula of definition. I shall therefore have nothing more to say on the issue of political justification except to extrapolate some constraining principles which are implicit in my definition. These principles are (1) the law should not be violated on the ground that one opposes the legitimacy of the government. One could not do this without ceasing to be civilly disobedient since, by definition, the civil disobedient recognises the political legitimacy of the government and does not contemplate its overthrow. By the same token, he eschews the use of violence or threats of violence to underscore his point, or the performance of actions which might proliferate anti-democratic effects. Surely, whenever and wherever, on grounds of mere strategy or tactics, a citizen engages in civil disobedience as part of a conspiracy to overthrow the existing government, his action is implicitly revolutionary and not genuinely civilly disobedient. One can certainly imagine a minority or any politically dissident group who, realising the futility of outright rebellion, executes a program of civil disobedience as part of a grand plan of revolutionary upheaval. This principle is meant to exclude the use of

civil disobedience with such intent. Let us call this principle the condition of non-revolutionary intent.

(2) In breaking the law, the civilly disobedient does not act merely out of self-interest nor does he seek to affirm some principle in private. Rather his breach of law is aimed at directing public attention to constitutional defects and, for the most part, in underlining some conception of political justice. The ostensible aim of civil disobedience cannot be to gain a private, personal advantage.

And finally, (3) the violation of the law must be seen as an affirmation of the general duties of citizenship in so far as by his willingness to accept the legal consequences of law violation, he aims to promote respect for the legal order. We may summarise conditions (2) and (3) as the principle of civic-regarding duty in a continuing democracy.²⁹

From the standpoint of a moral justification, the relevant question is: what conditions need to obtain before an individual or group of individuals can legitimately engage in civil disobedience? Or to ask the same question within the philosophical framework of Rawls' justice as fairness, when does the duty to comply with

29. See Rex Martin, "Civil Disobedience," in Ethics, cited above, pp. 130ff. Also Christian Bay, "Civil Disobedience: Prerequisite for Democracy in Mass Society", in Smith and Deutsch, (eds.), Political Obligation and Civil Disobedience: Readings, pp. 295-299.

laws enacted by a legislative majority cease to be binding in view of the duty to oppose injustice? Rawls lists four conditions under which civil disobedience may become justified as a form of protest in a constitutional democracy. The first relates to the kinds of social and political inequities that may be protested by civilly disobedient acts. These inequities need to be instances of substantial and clear injustice -- preferably limited to the violation of the equal liberty principle and to various infractions of the principle of equal employment opportunities. Let us call this the condition of substantial and clear injustice. This condition would require, then, that certain basic political liberties be guaranteed. Among the various liberties that Rawls often subsumes under the equal liberty principle and which rational contractors are assumed to opt for at the constitution-making stage are the liberty of conscience and thought, the liberty of the person and equal political rights. These liberties should be guaranteed by the constitution. Thus, for example, the liberty of conscience would insure that citizens are free to hold any moral or religious beliefs consistent with the total system of liberties. That is, their freedom of conscience should not in any way endanger a similar liberty for others. It would seem that religious beliefs that oppose political governments or seek to undermine them would be a real danger to stable political systems and may therefore not be constitutionally protected.

However, the political cash value of these various liberties may be summed up in two words: equal participation. The right to participate in political affairs is particularly crucial for all sane adults who are not otherwise disqualified. Such adults may form political parties and hold political rallies and assemblies. It is important to note three crucial liberties which the principle of equal participation guarantees for its adult citizenry. First, there is the guarantee that each adult has an equal right to vote consistent with the democratic principle of 'one person, one vote'. Secondly, it provides each adult equal access to public offices. In other words, any adult may, in principle at least, canvass for and may be voted into positions of public authority and trust. Along with this right, there is a fair opportunity to influence political decisions. And thirdly, the principle of participation is seriously undermined if it does not include free debate on political issues and government policies. The democratic process would seem to be seriously distorted if decisions are taken without consultation, for example. It is for this reason, Rawls argues, that the principle of loyal opposition is recognised.³⁰ If I may sum up this account of political liberties roughly but accurately, I would say that participation is the constitutional bulwark of equal citizenship.

30. John Rawls, A Theory of Justice, p. 223.

And yet political participation and therefore equal citizenship may not come easy for oppressed minorities. As I mentioned before, there are various ways in which equal citizenship may be denied to individuals. There is the more obvious way in which members of a minority group are not treated as citizens: they are accorded an inferior status and therefore do not count in the same way as everyone else. They are denied the right to hold political opinion and/or discussions; they are neither allowed to form political parties nor are they allowed to vote. Political liberty for this group of people is zero: they are politically neutralized. (It is doubtful whether civil disobedience is an appropriate response to this situation. I do not see how this group of minorities have a political obligation in a meaningful sense.)

But there are the more subtle shades of political neutralisation, where members of a minority group are only constitutionally regarded as citizens. That is, the constitution makes a show of granting them basic political rights -- the right to free political association and assembly, the right to vote, the right to education, the right to employment, the right to avail of public utilities, to mention a few. But these rights, for most of them, are rights which they cannot exercise in most parts of the country because of the social and economic discrimination which tends to re-inforce their minority status. Not only are they prevented from availing of the institutions of learning by local segregation laws, they are also subjected

to a scurrilous psychological campaign of racism and ethnicism. But worse still, they are prevented from becoming a majority by patterns of disproportionate representation and a prejudicial design of constituencies.

Given these incapacities of their political status, members of the minority would seem justified to use civil disobedient tactics to protest this sham of citizenship and suffrage. As David Richards has pointed out, when the various basic political rights that the equal liberty principle requires are not guaranteed for the members of its citizenry, then the very foundation of the obligation to obey the law is called in question and the principle of fairness would sanction civil disobedience.³¹ The minority status which I have attempted to construct, no doubt, meets the requirements of the first condition of justified civil disobedience, namely, that it should be limited to instances of substantial and clear injustice.

But are these the only contexts in which one might justifiably have recourse to civil disobedience? Or is the condition of clear and substantial injustice too restrictive to allow cases of civil disobedience which, by hypothesis, do not involve grave or substantial injustice but which nevertheless seem to us quite justifiable? Suppose a road running through a certain neighbourhood has been poorly constructed so that it makes a very sharp bend at the bottom

31. David Richards, A Theory of Reasons for Action, p. 160f.

of the hill. A number of automobile accidents have occurred there. The residents of this neighbourhood petition the municipal authorities to do something about this 'death-trap' of a road, but to no avail. Recourse to legal means has not been promising either. Would the people be justified in engaging in civil disobedience acts (possibly block traffic at peak hours every day) until the government shows some willingness to listen to or redress their grievance? It seems that on Rawls' construal of the condition of clear and substantial injustice this action would be unjustified since, by hypothesis, no basic political rights of the people had been violated. But why should civil disobedience be restricted to cases which involved only unjust laws or policies, when laws and government policy may be reprehensible for reasons other than that of gross injustice? Or could laws not be just and yet sufficiently bad in other respects? Suppose the government were to pass a law encouraging incest? Surely, we would agree that if the citizens decided to register their disapproval of such a law by engaging in civil disobedient actions, they would be justified. These are some of the questions which have worried L.W. Sumner about Rawls' first condition of justifiable civil disobedience.³²

32. L.W. Sumner, "Rawls and the Contract Theory of Civil Disobedience," in the Canadian Journal of Philosophy Supplementary Volume III (Spring 1977). See also, Vinit Haksar, "Rawls and Gandhi on Civil Disobedience" in Inquiry, vol. 19 (Summer 1976), pp. 167-172.

I think Sumner's worries are to a certain extent justified. Rawls' construal of his first condition is an outcrop of his view that civil disobedience is quite a serious affair. And so it is. But this seriousness need not preclude the adoption of limited (and perhaps localised) acts of disobedience to protest injuries or injustices that are themselves limited in character. Besides, since we do not know for sure that a near-just society (such as Rawls assumes for his theory of political obligation) would be like in practice, little is gained by an insistence that civil disobedience be limited to instances of substantial violations. Perhaps, we should now re-characterise Rawls' condition as the condition of clear injustice. That is to say that the violation need not be one involving gross and substantial injustice. It is sufficient that the violation is clearly noticeable (not merely imagined) but deeply felt by the disobedient.

Rawls' second condition stipulates that where a minority group is justified in engaging in civil disobedience, then any other minority relevantly similarly circumstanced would likewise be justified if they decide to employ disobedient tactics to protest their wrongs. In other words, minority groups who engage in civil disobedience must be willing to concede that other minorities who are victims of a like degree of injustice have the right to protest in a similar way. Suppose a person P claims that he is justified in doing Y whenever he is in situation S. If P's claim of a justified right were consistent, he must

agree that other persons $P_1, P_2, \dots P_n$ would be similarly justified to Y in S. Let us call this the condition of relevantly similar circumstances.

There seems to be something odd about a justification which one is claiming for oneself but which one is unwilling to concede to others who find themselves in similar circumstances. But let this presumptive oddity not hobble our effort to discover the precise meaning of this condition, especially in the light of the criticism that civil disobedience fails the test of ethically justified acts. There are two ways in which one might claim a right and at the same time refuse to grant this right to others who are in similar circumstances. My suggestion is that both ways mistake the premise of civil disobedience.

In the first place, a minority might refuse to concede to other minorities the right to protest their grievances because he believes, rightly or wrongly, that conceding such a right would have grave consequences (not the least being the erosion of the whole legal system within which the exercise of his own right is intelligible). He could not concede the right to civilly disobey the law to other minorities, so the argument goes, without condoning general and indiscriminate law violation. Imagine what would happen if every minority element had this right and frequently exercised it.

I do not think we should accept this argument. For one reason, minorities, individuals or groups of persons

who disobey the law civilly do not intend that the law should be broken indiscriminately. For another reason, we should not forget that the use of civil disobedience is constrained by such other conditions as the condition of clear injustice and the condition of last resort. I have already discussed the former, and the latter, we are yet to see.

The second way in which some one claiming the right to do something while denying a similar right to some other in circumstances similar to his is to argue that if the right to disobey the law were given to all, it would be difficult, if not impossible, to prevent a recourse to civil disobedience in precisely those circumstances which, by definition, are inadmissible grounds of civil protest -- for example, conscience, and/or revolutionary intent, and other anti-thetical causes. But again, this argument mistakes the premise on which the civil disobedient acts. The civilly disobedient does not claim the right to violate any law, and he does not intend to disobey the law as a lever towards revolt. There is, therefore, no reason to believe that conceding the right of civil disobedience to all minorities would result in indiscriminate law violation. Of course, it may happen that several minorities, in a multi-national state, have grievances which they would like to protest and that grave consequences would result if they all exercised the right severally. But this is a tactical and not a theoretical problem.

Since civil disobedients have great respect for the legal order and would not wish to press their claims in a manner inconsistent with their fidelity to the law, it seems reasonable to suppose that they would approach this tactical problem in either of two ways: (1) they may decide, by some lottery principle, which minority group would first present its case, or (2) they may decide to coordinate their protest by forming a "political alliance of minorities" to regulate the overall level of dissent. Whatever procedure they decide to follow, they should remember there is "a limit to which civil disobedience can be engaged in" without overly disrupting the rule of law and rocking the constitutional boat.³³

The third condition of justified civil disobedience requires that normal appeals to the majority have been made but these have proved ineffective. Let us call this the condition of last resort. Since civil disobedience is seen as disobedience to the law within the limits of fidelity to law, the specific constraints which its political justification implied are meant to express a commitment to the framework of law and order. In other words, civil disobedience may not be used to protest any and every form of social ill. Nor should it be used to protest even those cases usually considered grave unless conventional legal and political channels of redress have first been tried or

33. John Rawls, A Theory of Justice, p. 373.

have been shown to be unavailable. The use of the concept of last resort in this context needs clarification. But such clarification is difficult to make until we have examined what lies behind the availability argument.

Critics of civil disobedience have argued that where normal legal and political instruments (petition, the courts, the ballot box) are available as means of social change, one is not justified in disobeying the law civilly. On the face of it, this is an appealing argument. But it loses much, if not all, of its appeal once we become clearer about its unexamined premises or assumptions. First, the argument assumes that the legal channels of redress are available to all in more or less equal measure and can be relied upon to function fairly. It also assumes that the electoral process is open to all and that the democratic principle of 'one person, one vote' is strictly applied and that no man may count for more or less than one. The argument also assumes that constituents (or voters) do influence their elected representatives in a significant way. And finally, the availability argument is at bottom an extension of the fundamental principle of majority rule. In other words, it assumes that the minority-majority position is maintained through frank and open debate and an honest vote based on the merits of the case or the persuasion of arguments. But this is contrary to the political actualities of contemporary liberal-democratic politics -- where we often see entrenched majorities and suppressed minorities. It, therefore, bears asking:

Just how available are the so-called conventional channels? I shall briefly develop some counter arguments to the availability argument, and then, suggest a plausible interpretation for the condition of last resort.

In the first place, national elections are rarely single-peaked, and so, voting against a candidate or a party may not be an effective way of registering one's disapproval of some law, policy or decision of the government. This is especially the case if the views of candidates on election issues are not sufficiently unambiguous to allow differential choice between them. Add to this the fact that some issues do not lend themselves to resolution at the polls. Issues on which dissident minorities feel very intensely are not likely to be resolved simply because they have been defeated at the polls. And yet the democratic principle of majority rule (with its underlying assumption of political equality) has not provided any way to determine the intensities of individual or group preferences or what some Economics textbooks refer to as "interpersonal comparisons of utilities". Suppose a Parliamentary assembly has to choose between two mutually exclusive policies x and y . Suppose that somehow it is possible to measure the intensities of preferences (that is, how each voter feels about x and y). Suppose that the majority of voters in the assembly are indifferent to these alternatives or are only slightly interested in y (but that interest, in any case, is sufficient to tip the balance in favour of y) so that y is

adopted by a numerical majority. But suppose that the minority who lost out in this vote are intensely interested in x. Surely, this fact ought to be taken into consideration when legislating the outcome of the vote on x and y. In as much as the minority feels that the majority who have won in a national election are apathetic to these issues, they are not likely to feel represented. Therefore, the mere fact that the electoral process is available may not satisfy dissident minorities in a democracy -- and this is because, as Zashin has pointed out, the ballot box may not be suitable for introducing their specific, intense preferences into government decision-making.³⁴

We may note two other factors which undermine the availability argument. The first relates to the practice of voting according to party ideology and party identification as opposed to voting on issues. This means that for a significant number of voters national policy issues play a subordinate role in deciding how they will vote. Anyone who has had the occasion to interview voters or to question them on how and why they would vote in a given election would be surprised to know that very few of the reasons they give have any bearing on issues. People vote in large numbers for parties and for the personality (physical charm) of the candidate more often than they

34. Elliot M. Zashin, Civil Disobedience and Democracy, (The Free Press: New York, London, 1972), pp. 230-233.

vote on issues and for the candidate most likely to deal effectively and successfully with the issues. Even radio broadcasts and television debates have not exactly succeeded in changing this voter-behaviour. It would therefore be misleading to suggest that the electoral process is meaningfully available for solving issues raised by minorities (in an election where majorities vote along party lines or are apathetic to national policy issues).

The second factor derives from the tenuous relationship between minorities and an elected representative. Just how much audience can a minority expect from the elected representative of a fairly homogeneous constituency (1) if minority claims conflict with majority interest and (2) where majorities are unpersuaded by minority claims? If the elected representative failed to make any spectacular effort to accommodate or represent minority demands, he does not seem to run any high political risk, since, in any case, his re-election does not depend on minority support. On the other hand, a vigorous effort to satisfy minority demands in the face of majority opposition could alienate or antagonise members of the majority. Such appears to be the plight of suppressed minorities in some democracies: their minority status conceivably hinders any meaningful recourse to normal conventional channels of redress.

These counter arguments to the availability argument may suggest that the condition of last resort must play a limited role in a constitutional theory of civil

disobedience, if, as I have argued these channels are not really available. But this is not quite true. The justificatory principles that I have discussed so far have been limited to providing answers to two kinds of questions that necessarily arise in this theory: The What and the How. In other words, the principles of non-revolutionary intent and civic-regarding duty are concerned to tell us how the civil disobedient must conduct himself in the course of his protest action. And the moral condition of clear injustice as well as the condition of relevantly similar circumstances underline what (or the kinds of injustices that) may be civilly protested. The third question which a theory of civil disobedience answers relates to the When. In other words, having decided that one has a right to protest government wrong-doing in this manner, one needs to know what would constitute reasonable and legitimate procedures within the context of liberal-democratic politics. Two conditions guide us in this area, namely, the condition of last resort and the condition of reasonable design.

The condition of last resort, then, has both a negative and a positive function. Negatively, it seeks to ascertain that efforts to protest government wrong-doing within legal and political limits have been unsuccessful and that the use of civil disobedience is really necessary. But the burden of proof that this is indeed the case rests with the prospective civil disobedient. Positively, it recognises the existence of cases where the exhaustion of

conventional channels will not necessarily still minority demands and/or of cases where time may be a decisive determinant. In other words, it recognises, as Zashin has suggested, that certain political issues, contexts and situations may effectively preclude grassroots political and legal action.³⁵ How or when is this condition met? The condition of last resort would seem to be adequately satisfied either (1) by a showing that the normal methods of protest have been unsuccessful or are unavailable or have been found to be seriously in default, or (2) by proving that past recourse to conventional channels have failed to produce satisfactory results because of an apathetic majority, or (3) by showing that irrevocable damage would be done unless the proposed government law, policy or action were immediately prevented.³⁶ A case study of opposition to the New York City Council provides a good example, where the urgency of the situation dispensed disobedients from using normal channels of redress. The Council had decided to construct a restaurant car lot on Central Park. The residents of the neighbourhood unanimously petitioned the City Council not to destroy the Park, but the Council was unmoved. Instead it sent bulldozers to the site to

35. See Elliot M. Zashin, Civil Disobedience and Democracy, pp. 229-266.

36. John Rawls, A Theory of Justice, p. 373. Also J.L. Adams, "Civil Disobedience: Its occasions and limits," in J.R. Pennock and J.W. Chapman, eds. Political and Legal Obligation, Nomos XII, cited above, pp. 293-331, 302-305.

start construction. When the residents heard this they sent women and children to the construction site to sit in front of the bulldozer. (Meanwhile they filed a petition with the courts.) But as the sit-in protest continued, the Council decided to drop the project.

The next and final condition that Rawls considers may be called the condition of reasonable design. This condition stipulates that the act of disobedience should be rational and reasonably designed to advance the protester's aim. Where prospective civil disobedients have satisfied all three conditions mentioned above, there still remains the question of whether a decision to civilly disobey the law at this time would be a wise one. In other words, granted that one has established a case for civil disobedience he still has to decide on the important questions of a time-table and reasonable technique. To take an example, it would, in most circumstances at any rate, be tactically inappropriate for a group of citizens who are protesting against a municipal law or policy to occupy Federal Government buildings. It would be imprudent of a group of trailer drivers to express their disapproval of an additional government tax on gasoline by parking their vehicles in the middle of the highway at peak hours. The question of whether citizens may withhold their taxes as an act of civil disobedience is one that needs to be carefully thought through. A general non-payment of taxes may have a paralysing effect on the ability of the government to govern effectively. In view of Hobbes' characterisation

of revenue (taxation) as the "sanguinification of commonwealth", large-scale non-payment of taxes might be construed as an act of revolt. The most common techniques of civil disobedience are the sit-ins and the peaceful marches.

Therefore, in addition to the principles of political justification, prospective civil disobedients need to decide on an appropriate strategy. Since the poor timing of civil disobedience is more likely to provoke the harsh retaliation of the majority rather than their patient understanding and sympathy, the condition of reasonable design becomes all the more important. As Rawls has remarked, the minority may have established its right to disobey the law civilly and still act foolishly or irresponsibly unless there is some congruence between the protester's aims and his techniques.³⁷

The Rawlsian model of civil disobedience has been criticised as being either absurd or redundant, or both. Brian Barry, for example, argues that Rawls' model is much too restricted in scope. Barry's problem with Rawls' theory of civil disobedience is that it is essentially non-violent. Barry has difficulty understanding this: if a group of citizens who are pressing for a reduction in night flights from the local airport mow down with machine

37. John Rawls, "The Justification of Civil Disobedience," in R.E. Flathman's (ed.) Concepts in Social and Political Philosophy, p. 227.

guns the police officers who had been sent to arrest them, that action should be construed as civil disobedience in as much as it could be construed as an "obstruction". Or, as he says "there is no reason why the action should not ... be intended to obstruct -- to hurt rather than simply to demonstrate".³⁸ Unless civil disobedients can be allowed to register their protest in ways potent enough to drive their point into the minds (and perhaps, bodies as well) of the authorities, their act of disobedience is little better than the cry of the little girl who says, "If you don't do it I'll scream and scream until I make myself sick".

No doubt, there are certain circumstances in which minority groups protesting against an unjust law may be justified if they resort to violent, confrontationist tactics. Rawls himself is aware of this.³⁹ However, Rawls is not dealing with all forms of political protests -- only with a certain type which involves breaking the law as a way of forcing the authorities to re-consider their decisions. Within the limited perspective of his theory, he assumes that the society is "near-just" and that the citizens share a common conception of justice. Since Barry does not seem to accept these Rawlsian assumptions, we can meet him on his own ground by pointing out that violent

38. Brian Barry, A Liberal Theory of Justice, pp. 152-153.

39. John Rawls, A Theory of Justice, pp. 366f.

tactics will not always yield the desired objective, and that under circumstances at least, non-violent protest will not only be effective, but also it will appear to be more ethical. Besides, it seems that in a show of brute force between the minority and the majority, the former is more likely to be bested -- the latter controlling, as it does, the instruments of law and order, and the army. Furthermore, short of the open confrontation which Barry seems to advocate, the protester can more effectively advertise his grievance to the public by his non-violent restrained conduct at the same time that he demonstrates the depth of his sincerity by his willingness to accept the legal consequences of his actions. If Barry is worried about the supposed ineffectiveness of civil, non-violent methods of protest, he need only recall the Civil Rights Movements led by Martin Luther King and the non-violent resistance of M. Gandhi.⁴⁰

V. Haksar has also criticised Rawls' model of civil disobedience. He argues that this model contains assumptions which render civil disobedience redundant. Haksar is worried not so much by the fact that Rawls insists that the injustice suffered need to be clear and substantial as by the fact that any society which allows its members (or at least a good number of them) to experience "clear and

40. See M.L. King, Stride Toward Freedom, (Harper & Row: New York, 1958). Also, M. Gandhi, Non-violent Resistance (Schocken Books: New York, 1961).

substantial injustice" cannot be said to be a "near-just" society. And if the society or state has been insensitive to appeals made through normal conventional channels, what makes it suddenly so sensitive to appeals from civil disobedients?⁴¹

It seems to me that an admission that the violations need not involve gross or substantial injustice, as I have shown above, would go some way in meeting Haksar's objection. But the more important thing to note about civil disobedience as it is construed in this essay -- a construal which is in agreement with Rawls' definition substantially -- is that it is a limited form of political protest for a limited objective. This implies that it is not being claimed that civil disobedience will necessarily always and everywhere be effective in yielding the desired result or in removing an actual or threatened injustice. (It is not obvious to me that any one form of protest -- the Gandhian form of resistance included -- is effective in this foolproof sense.) Besides, it seems to me that Haksar's objection turns in part on a probable misinterpretation of Rawls' conditions of justified civil disobedience, especially the condition of last resort. The main claim of this condition is not that the normal channels of redress should actually have been exhausted and found to be ineffective in any one given case. (Afterall, Rawls must recognise that situations

41. Vinit Haksar, "Rawls and Gandhi on Civil Disobedience," Inquiry, vol. 19 (Summer 1976), pp. 161f.

do arise which effectively preclude a recourse to grass-roots legal and political action.) The condition of last resort, at least in its positive aspect, is concerned to allow, as I have argued above, that where there is sufficient evidence to show that irrevocable damage would be done by a recourse to normal channels, one could, other conditions considered, justifiably engage in civil disobedience. This interpretation is not only consistent with other justifying conditions that Rawls discusses, it is also compatible with the viewpoint of civil disobedience as a non-violent, conscientiously motivated act, which this paper also espouses. A protest movement which allows its members to suffer fines, imprisonment and bodily harm, such as civil disobedience quite plausibly can be and often is, is, in my view, not the "cosy" movement that Haksar envisages. The history of various civil disobedience movements in the United States confirms this view.

CHAPTER SIX

CONCLUSIONS

I

Let me begin my concluding remarks by recalling the central question of this essay: Why should P obey the law? I have called it the Theme-Question (T-Q). Now, I want to stress again the distinction between T-Q and a related question of political behaviour (Why does P obey the law?). Admittedly, there is a similarity between these questions: both questions seek reasons for institutional obedience. And yet there are important differences between them, and it is these differences that determine the kinds of answers that are appropriate to each question. In my view, answers to T-Q cannot achieve anything approaching completeness, unless one very important difference is kept in mind. Suppose we notice that every Tuesday members of the P.T. Bimbo Circus assemble on Sparks Street Mall and walk on their hands rather than on their feet. We are puzzled and we ask them why do they do that. They are likely to state certain facts about their circus (for instance, that they are advertising a performance), or about their proprietor, Mr. P.T. Bimbo (that he is a mean, ruthless man who insists

that members of his circus walk on their hands once a week or quit the circus), or about humouring Mr. Bimbo, who will then reward them generously, and so on. In other words, their answers are likely to be couched in terms of causes (fear of penalty for non-performance and rewards for compliance) or motives (advertising a performance). But suppose we asked them why they ought to (or should) walk on their hands rather than on their feet. If they do not find the question puzzling, they are likely to realise that an answer in terms of causes or motives will not do. This rough representation is analogous to the situation regarding institutional obedience. "Why does P obey the law?" is a question which calls for certain facts about the behaviour of P (his assumptions, his motives, his fear of punishment for non-obedience). But a question as to why P should obey the law cannot be answered in these terms. It is misleading to answer a question about what people ought to do either by pointing out what they, as a matter of fact, do, or by speculating on their motives for action. It is a recognisable fact that people will sometimes do what they ought not to do (and may later regret doing), or will sometimes leave undone what they ought to have done.

The difference between T-Q and the practical question of political behaviour also manifests itself in the distinction between 'is' and 'ought', which has been the topic of prolonged philosophical discussion. Not much point will be gained by resurrecting this 'is'-'ought' dispute. But it bears pointing out that the distinction

between 'is' and 'ought' questions has led to the distinction between the kinds of answers which are, in general, deemed appropriate to is-questions and ought-questions in political philosophy. Although "Why does P do x?" and "Why should P do x?" are related questions, they call for different kinds of answers. The former question demands an answer in terms of explanations for doing x, and the latter calls for justification for doing x.¹ An explanatory answer could consist in a statement of certain facts -- facts that bring out or underline the causes and motives of P's behaviour. Thus, to the question "Why does P obey the law?" we might explain by saying that "P habitually obeys the law", or "P believes in the rule that when one is confronted by law one obeys," or "P is especially fearful

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1. It may be suggested that the distinction between these questions is not always sharp, in the sense that one might use the same set of words to answer both questions. For example, we might answer both questions by saying "In the interest of peace and progress". In other words, we might say "P obeys the law in the interest of peace and progress", and "P should obey the law in the interest of peace and progress". However, we would still, I believe, characterise both answers differently. That is, we would call the first answer an explanation of P's motives for obeying the law, and the second, a justification of P's obedience. Furthermore, in certain circumstances at least, some explanations will preclude the possibility of a satisfactory justification. For example, "Why did you give P a grade of 'fail' for this course?" may be answered by saying "... because P is black". Now, while such an answer may indeed explain why the Professor failed P, it does not and cannot justify his action. In fact, such an answer leaves the professor's action unjustified and unjustifiable.

of sanctions imposed for disobedience". Any of these answers would be true or false depending on the evidence available in P's total situation to confirm or disconfirm these claims.

On the other hand, a justificatory 'why' calls for an answer that shows that P's action is right -- morally right. As I have tried to show earlier, a person raising our T-Q may not be troubled at all about the fact that he behaves in a certain manner vis-à-vis the law. He may, in fact, be able to explain his behaviour accurately. That is, he may know that he obeys the law habitually, or that he is fearful of sanctions for disobedience. He may not be in the position of the person who asks "But why do I do so-and-so?" as a prelude to discontinuing this behaviour. Rather, our questioner may be someone who wants his assumptions about law and obedience justified, someone who wants to know on what grounds he should comply with the dictates of law and the directives of government; someone, in other words, who wants to assume a theoretical-normative posture on the issue of obedience. Our questioner, therefore, appeals, in addition to explanatory causal factors, to an independent measure or criterion of judgement. What he seems to want is an implicit moral commitment that the principles or maxims of his behaviour can similarly be invoked by others. I submit, then, that T-Q poses a justificatory question: Why should P obey the law? The task before us is: How does one answer this justificatory 'Why?'

II

In The Concept of Law, Hart attempts to explain the basis of legal obligation. He agrees with J. Austin that 'law' without 'obligation' is a contradiction in terms. But he rejects the Austinian notion of law as an order backed by threats or force. Not only do we fail to recognise law in the gunman situation, we also refuse to ascribe punitive sanctions to testamentary laws and laws regarding valid marriage. In place of the Austinian command theory of law, Hart proposes a concept of law as the union of primary and secondary rules. The distinctive operation of law and the ideas which constitute the framework of legal thought may be explained, he says, by reference to one or both of these two types of rule. Hart's primary rules impose duties and obligations, and so are concerned with conduct. It would be a mistake to suppose that the duties and obligations created by the primary rule are necessarily moral in character. The main function of a primary-type rule is to regulate conduct. But every conduct-guiding rule is not necessarily a moral rule. Consider the following rules, which may be said to guide the conduct of motorists: "Do not over-speed on the blade"; "It is a good rule to slow down when approaching a sharp curve in the road"; "Do not leave your keys in a parked car".

Again, it is important to note that Hart does not say that all rules create obligations. In this, I am in agreement with Hart. Instruction-type rules are a good

example of the class of rules which do not create or impose obligations: they are practical guide-lines which one may choose to follow or to ignore. It would be misleading to talk of an obligation to comply with rules of this kind. The question now is: How does one distinguish between rules which create obligations and rules which do not?

Hart claims that the main rationale for the distinction is fairly simple. Rules are conceived of as imposing obligations when there are (1) an insistence or a general demand for conformity, and (2) great social pressure is brought to bear on deviants. However, I have argued that these two factors are neither sufficient nor necessary to determine whether a rule gives rise to obligations or not. But Hart is careful to point out that it is possible to imagine a society without a legislature, courts, or officials of any kind. In such pre-legal societies, the only means of social control would seem to be the general attitude of the group towards certain modes of behaviour. This general constraining attitude in a pre-legal society Hart conceives as a primary rule. Now, if a society wishes to live by primary rules alone, it must satisfy certain conditions based on some truisms about human nature and the world we know. First, there must be restrictions on the use of violence, theft and deception; secondly, those who oppose the rule must be in a minority, and thirdly, the community itself must be small -- preferably knit by ties of kinship, common sentiments and occupying a stable environment. Since the societies with which Hart is

concerned will not always be primitive, this simple form of social control will need supplementation in different ways. This explains why he introduces the secondary rules of recognition, change and adjudication to correct the defects of uncertainty, rigidity and inefficiency which might arise in a simple social structure of this kind. The secondary rules are able to convert a regime of primary rules into a legal system. In this way, Hart claims to have shown how "law is a union of primary and secondary rules". In this way, too, and for this reason, Hart claims that the obligation to obey the law from the legal standpoint devolves on everyone who lives within its jurisdiction -- an obligation which does not depend on anyone having consented to be bound by a particular law.

At this point, an objection that can be made against Hart's concept of law is this: How can someone (a political anarchist, for example) be said to have an obligation to obey the law, when he has not accepted the political legitimacy of the state, much less, the validity of the law? (After all, Hart's own account of obligation seems to require acknowledging, at least to one's self, that one has an obligation.) Suppose Esmie and Jamie have just immigrated to country-C. And the law here forbids all immigrants to take up government jobs until they have passed a Language-Proficiency test. Esmie who accepts the validity of the Aliens Proficiency Act proceeds to take the test. But when Esmie reminds Jamie about the law, she replies: "I do not believe I have an obligation to comply with such a law. I

think the law is discriminatory, and ought not to have been enacted". Such a reply would seem to have been anticipated by Hart. For he reminds us that we need to understand the obligation to obey the law from two points of view. From the first point of view (which we may call the Lawyer's point of view), the question whether "outsiders" or those who repudiate certain laws have an obligation to obey such laws simply does not arise, he says. So long as the law exists at all, it has some binding force. And the binding force of legal obligation does not hinge on the commitment of discrete individuals. All that is required for there to be a legal obligation in the lawyer's sense is (1) that the law is a valid enactment by proper authorities, (2) that there is a body of officials willing to enforce it, and (3) that active resistance to the law is the exception rather than the rule. Where these criteria are generally lacking, the legal order would simply break down.² (I have argued in my Chapter 2 against interpreting T-Q exclusively from the Lawyer's point of view.)

From the second point of view, if we wish to convince the political anarchist that he should obey the law, we would have to argue, not that he actually has an obligation to do so or that this obligation is part of the meaning of 'law'. Rather, we would seek to persuade him that he ought to accept the lawyer's point of view. In

2. H.L.A. Hart, The Concept of Law, pp. 111, 113.

other words, we would need to provide what Kurt Baier calls good reasons in support of the lawyer's claims.³ That is the obligation to obey the law must be supported by considerations external to the law itself. We are, therefore, not surprised that Hart puts this external argument for obeying the law in the form of certain special rights which citizens have with respect to one another or the necessity for mutual restrictions. This argument I have called Hart's Benefit-Received theory of political obligation.

Rawls seizes and develops this way of reasoning about our political obligations. He argues that political obligations are a function of just relations among citizens and that correct principles of justice are the principles which members of a society (who are at once free, equal and rationally self-interested) may be assumed to choose if they were to opt for principles for distributing benefits and burdens from "behind a veil of ignorance". Since no one in the Original Position knows those facts about himself which distinguish him from other participating members, it follows that no one can tailor these distributive principles to suit his own case. The principles they would choose may be regarded as fair in this sense. (This distributive strategy is reminiscent of the practice of allowing him who divides the cake to choose last.) Rawls assumes that people

3. Kurt Baier, "Moral Obligation", American Philosophical Quarterly, Vol. 3 (July 1966), p. 217.

who are related to each other in the ways he described would choose the equal liberty principle and the principle of efficiency as the fundamental charter of their society. And derivatively, they would also opt for several principles (he calls them the principles for individuals) to regulate interpersonal relationships and commitments.

I have, in the course of this essay, considered and, where necessary, answered several objections which have been directed at Rawls' derivation of his principles. I have also tentatively maintained that the question -- What is a just society? -- is one which admits of a variety of answers.⁴ However, I now wish to consider this question more closely against the background of Rawls' distinction between the concept of justice and the conception of justice. The concept of justice relates to the minimal definition of justice such that anyone who wishes to engage in a discussion of this topic or to theorise about it will be

4. Even though I am not proposing a theory of political obligation, I think anyone who intends to do so must at some point present a conception of a just state. Afterall, the notion of political obligation correlates with the idea of citizenship. That is, one can only have a political obligation to a state of which one is a citizen or member. Now, the distinction between the concept of justice and various conceptions of justice is meant to caution social and political theorists against collapsing the two. It is not meant to show, for example, that there is no rational basis for choice between different conceptions of justice or of a just social arrangement for that matter. See Michael Walzer, Obligations: Essays on Disobedience, War, and Citizenship, (Simon & Schuster, New York, 1971).

willing to accept quite apart from any argument. Statements such as the following seem to express a minimal condition for the correct application or use of 'just' or 'justice': "X is just if it precludes arbitrary distinctions among its members," "X is just if it takes due regards to the rights of all whom it substantially affects," "X is just if it renders to every man his due," or "X is just if it results in the proportionate treatment of each case". However, it is commonly argued that these expressions of justice, or what we may call, following Rawls, the concept of justice, are an empty form and cannot alone function as rules of distribution. This is to say the concept of justice cannot itself become a distributive, operative rule unless it is supplemented by some substantive criterion or criteria specifying how a given distribution is to be brought about. It is for this reason that C. Perelman has suggested that the conception of justice may be understood as an attempt to provide this much needed criterion.⁵

The list of criteria which have usually been mentioned in discussions about distributive justice includes need, merit, social worth or rank, legal entitlement, the moral worth of persons, and marginal productivity. These criteria are intended to provide a basis for determining what is to count as a just distribution in any given case.

5. C. Perelman, The Idea of Justice and the Problem of Argument, (New York: Humanities Press, 1963), pp. 6-26.

Thus, to link the concept of justice to the distributive criterion of need, for example, is to assert that a distribution of X which best satisfies this need (whatever it is) is the just one. If merit is the basis of the distribution, then that distribution is just which best takes account of the merits of its members. And if the distributive formula is legal entitlement, then a distribution of X is just if it gives to each beneficiary what the law entitles him to. These distributive formulas present various aspects of justice, which are quite distinct from each other and may, for the most part, be mutually irreconcilable. Thus, it is possible for people to disagree with each other in their conception of a just scheme. A person, for instance, may argue that a distribution of goods, which is based on individual need will result in unequal distribution since, in any case, needs are usually unequal. Another may reject the formula 'To each according to his merit' as a distributive criterion because he believes that merit is essentially a grading concept, and given the immense variety of individual differences, there will be no way of grading individuals without some arbitrariness. I have, however, brought out the possibility of such conflicts in matters of distributive criteria to underscore the point I am about to make, namely, that disagreements over criteria of just distribution are disagreements about conceptions of justice. As Rawls has also persuasively expressed this same point, it is not inconsistent for people who agree on the concept of justice to hold different conceptions of justice.

That is, those who agree that the idea of just social relations requires, for instance, the elimination of arbitrary distinctions in distributing social benefits and burdens, may disagree when it comes to specifying a standard for differentiation or what is to count as an essential reference point.

Another reason why the question "What is a just society?" is not susceptible to a single answer seems to arise from the fact that principles of justice should be proposed with a view to the morally significant ways in which members of a given society are related to each other. (The relationships of parents to their children, children to their parents, husbands to their wives, and vice versa are a good example.) It is important to recognise that such relationships may exist in ways which affect a person's freedom to enter new relationships or the extent to which he may make new commitments. If, as Nicholas Rescher has suggested, principles of justice are not to be arbitrary or merely imposed on people, writers on social justice need to keep this point in mind as they attempt to supply a distributive criterion.⁶ Besides, is there any justification for assuming that the principles of justice which are appropriate in one social setting will necessarily be appropriate in others? Unless, we wish to maintain that people are related only in one way, there

6. N. Rescher, Distributive Justice, pp. 5-22.

does not seem to be any justification for assuming that the question of a just society would be answered in one way or that social philosophers would answer in the same way.

I want to suggest, therefore, that the appropriate move to make where and when social and political philosophers disagree in their conception of a just social relation is to discover the assumptions which underlie the kind of society they have in mind, and then, to see how (or if at all) their model of society corresponds with society as we know it. The question I now wish to raise in connection with the foregoing suggestion is: What kind of society does Rawls have in mind as he proposes his principles of justice? Or to put the same question differently, what kind of social scheme could reasonably be thought to give rise to these principles? It might, of course, be objected that this question misrepresents the scope of Rawls' principles since Rawls himself seems to regard his principles of justice as principles for judging any distribution of goods in any society, or, for that matter, among societies.

I do not agree that I have in my question mis-stated the scope of Rawls' principles. As Rawls himself pointed out those choosing the principles of justice are themselves subject to the circumstances of justice. The circumstances of justice are those conditions or factors which make social cooperation both possible and necessary -- given that the participants recognise that social arrangements are typically marked by a conflict as well as by an identity of interests. Objectively, the circumstances of justice require that those

choosing these principles occupy a definite geographical area; that they are equal in power (or at any rate, no one can dominate the others or coerce them into endorsing distributive formulas they would rather reject);⁷ and finally, they experience moderate scarcity. That is to say they realise that the natural and social resources are not

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7. It seems we can talk about the notion of individual powers in two distinct senses. We can talk about the notion in a descriptive sense, where the concept is used to refer to the sum of a man's capacities and his actual ability or inability to command the skills and energies of other men. The descriptive concept of individual powers, it may be noted, does not stipulate that an individual should be guaranteed free access to what he needs to realise his capacities or even to live a dignified human life -- only to show that in point of fact an individual possesses or does not possess these powers. On the descriptive concept, the powers of discrete members of the society will be visibly different and, I might add, understandably unequal. However, it is the second sense of individual powers which is significant here. This is the ethical concept, which includes a man's natural capacities as well as his ability to develop, exercise and exert these capacities in ways designed to optimise the good life for him. The ethical concept requires that an individual be given as much freedom, power and opportunity as he needs to live a fully human life. The concept further assumes, not only that individuals are entitled to these prerequisite conditions of the good life, but also that they are entitled to them in substantially equal measure. On the ethical concept of individual powers, the fact that actual societies fail to satisfy the requirement of equal power may count against these societies but not against the concept itself, since the concept is primarily a recommendation that they should. See also C.B. Macpherson, "The Maximization of Democracy," in P. Laslett and W.G. Runciman, eds. Philosophy, Politics and Society, 3rd Series (Barnes & Noble, Inc., New York, 1967), pp. 81-103.

so abundant as to render social cooperation superfluous or redundant. Subjectively, although the participants are prepared to regard society as a mutually beneficial scheme, yet they realise that each has his own interests, needs or plans which may conflict with the interests of others. Hence, they are not indifferent to the ways in which social benefits are to be shared out. (It will be recalled that in "Justice as fairness", Rawls describes the rational contractors as mutually self-interested people whose allegiance to the scheme turns on the prospect of self gain.) However, the three important constraints to note among the circumstances of justice are the conditions of moderate scarcity and mutual disinterest, and the requirement that the participants are substantially equal in power in the ethical sense described above. For it is these conditions which define the role of justice. And unless they existed there would be no need and no reason to talk about the role of justice.⁸ I believe we can infer from these assumptions that Rawls was interested in a particular type of social relation. I believe also we can say that the type of society which he has in mind must be "well-ordered" since he argues that (1) the principles of justice work to produce such a society, and (2) his conception of "justice

8. J. Rawls, A Theory of Justice, pp. 126-130.

as fairness is framed to accord with this idea of society".⁹
 What societal model seems to bear out the Rawlsian assumptions?

III

Two models of society seem to preoccupy Rawls as he unfolds the economic underpinnings of the Difference Principle, namely, a capitalist model and a socialist model. Rawls begins by accepting the classical distinction between these two models of society in terms of the ownership of the means of production. In a socialist or public economy, the proportion of state-owned firms or the production line managed by state officials is much larger than is the case in a private-property economy or a capitalist system. The touchstone of capitalist market system is private ownership of the means of production. A necessary corollary is that production and services are stimulated by a profit-motive. This, of course, implies that the system is a relatively free market, in which entrepreneurs form any kind of economic alliances they wish and private businessmen are allowed to make most of their own decisions. Thus, in a

9. A society is well-ordered, according to Rawls, if it is designed to optimise the production of social advantages and if it is regulated by a common conception of justice. Even though these constraints do not define a well-ordered society in an exhaustive sense, nevertheless they do provide important starting points for such societies. See J. Rawls, A Theory of Justice, pp. 454f.

capitalist society, unlike a socialist one, government ownership of the instruments of production is either minimal or simply limited to public utilities. Although Rawls suggests that competitive markets are effective paradigms of private-property economy, it is important to note that socialist societies also make use of markets (even though they utilize markets for different purposes). A socialist society might use markets, for example, to ration actual production of consumable goods through heavy taxation. A private economy or capitalist society, on the other hand, will use markets both to ration production and to determine the direction of trade. Although the introduction of elements of market pricing into socialist economies has not met with great success compared to capitalist economies, this is beside the point at issue in this contrast. What is important is the fact that capitalism, in contrast to socialism, has traditionally been associated with a high degree of civil and political freedom. (Regretably, this freedom has not always been evident in most contemporary states which claim also to be a free market or capitalist system -- in South Africa, in the Philippines, in Argentina under Isabel Peron, or in present day Chile.) But such capitalist anomalies apart, it still remains the case that the idea of the open market requires that the individual shall be a freely choosing agent, economically and politically. That is to say the individual needs to be free not only to market his wares (whatever these are) but also to form political unions

and/or alliances.

Now, given the assumptions of an initial choice situation (the Origin Position) in which men are not only politically equal but also free and mutually self-interested, and given further the condition of ignorance, it may be suggested (or thought) that the structure of social, economic and political institution which best satisfies Rawls' conception of justice is the private-property economy, or simply, the capitalist social model. But such a suggestion hardly tells the whole story. There is no doubt that the distinctive features of Rawls' society have interesting parallels in the capitalist society: in the pure market system, each entrepreneur has his own private end which may conflict or compete with the ends and aspirations of other entrepreneurs; (in any case, these ends are not necessarily complimentary); entrepreneurial relationships are only instrumentally valuable (thus allowing each person to assess economic ties purely as means to his private ends); and, finally, since in the pure market economy no one knows how other entrepreneurs would behave, it is difficult for any one to manipulate the market contrary to its ostensible purpose.¹⁰ The fact that there is this similarity between the constraints of the O.P. and the requirements of the open market may count in favour of the analogy. But it does not follow from this

10. J. Rawls, A Theory of Justice, pp. 520-522.

that Rawls' model society is necessarily capitalist. Nor should we allow the analogy to prevent us from noticing that the Rawlsian model also has parallels with the socialist social model. Or why should it? Afterall, Rawls' model of society does not correspond perfectly to a pure capitalist society where production is managed exclusively by business men operating strictly from a profit motive. Rawls, we may have noticed, has undergirded his sketch with a set of regulatory guidelines designed to cope with the abuses of the market system. His difference principle, for example, seems designed to minimise such inequalities in income as would throttle equal employment opportunities and various political liberties, to prevent corporate monopoly of markets, and to guarantee a social minimum in real wages for all. But this is not all. Rawls is persuaded that government has the responsibility to safeguard the greatest possible freedom of choice for its citizens and to simplify the making of free contracts -- thus ensuring that markets remain truly competitive.¹¹ State intervention in the economy is required not only to prevent exploitative excesses by free enterprise, but also to ensure a social minimum for its citizens through such subsidies as unemployment checks, Old Age Pensions, Workmen's Compensation, Medicare, and various welfare programmes. (This seems to be the case with the Swedish

11. J. Rawls, A Theory of Justice, p. 273.

economy, which has about 90% free enterprise and a tax on profits and incomes as high as 80% to cater for its extensive welfare programmes.) It is not surprising that C.B. Macpherson, in view of these constraints on the use of markets, has characterised the Rawlsian model of society as a "reformed capitalist model".¹² But the interesting point to note is that Rawls' model could also pass for a socialist society. Perhaps we should in that event describe the Rawlsian model as a mixed-economy-model. After all, Stuart Hampshire has usefully pointed out that Rawls' conception of justice is not a moral defence of socialism any more nor less than it is a moral philosophy of high capitalism.¹³

Assuming, then, that a mixed-economy type of society underlies Rawls' theory of justice, how does this help us to understand his thesis about political obligation? We recall that one argument, among others, which Rawls adduces in support of the choice of principles is that societies which exemplify these principles will tend to be stable and its members will tend to cooperate voluntarily. We recall also that Rawls maintains that his principles of justice define a pattern of rights and obligations and

12. C.B. Macpherson, "Rawls' Model of Man and Society", in Philosophy of Social Science, no. 3 (1973), pp. 341-347, 345.

13. Stuart Hampshire, "A New Philosophy of the Just Society", in The New York Review of Books, vols. 18-19 (Feb. 1972-Feb. 1973), pp. 34-39.

duties -- among them the duty to obey the law. Schematically, he proposes his arguments for institutional obedience within the framework of what he calls the principle of fairness and the principle of the natural duty of justice. The principle of fairness stipulates that when one is a member of a scheme of social cooperation which is just and mutually beneficial (and which requires near-universal cooperation in order to generate benefits), and when one has availed of the benefits accruing from the obedience of others (and shows willingness to continue to avail of these benefits), then one has a good moral reason to do one's part when it comes one's turn (in this case, obey the law). Since Rawls maintains that his discussion of political obligation is carried out from the standpoint of a partial compliance or non-ideal theory of justice, we may assume that a society which is only "near-just" satisfies the first condition. Also, since a cooperative social scheme is logically committed to providing benefits for its members, the second condition may be assumed to hold. So far, so good. In fact, it looks good enough that it does suggest that perhaps a contractarian theory of political obligation can now dispense with the traditional requirement (at least Locke-wise) of prior individual consent.¹⁴

It will be recalled that one of the standard

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embarrassments of classical consent theory is that accepting it seems to put many citizens outside the practice of political obligation, since very few citizens, if any, have ever consented in an antecedent sense to obey their government. Various attempts to interpret 'consent' either expressly, tacitly or hypothetically, did not seem to meet with remarkable success. Rawls' construal of 'consent' in terms of an acceptance of benefits has the merit of side-stepping this problem. But even this Rawlsian perspective is not altogether unexceptionable. It has been argued against Rawls and Richards that accepting institutional benefits voluntarily is out of the question in as much as, for most people, there is no choosable alternative to remaining in their native country -- given, among other considerations, the stiff immigration laws of most modern states today. But the arguments of these objectors are misdirected. What they need to show is not that voluntary acceptance of benefits is impossible but that the concept 'voluntary' along with its cognates is unnecessary in a discourse about institutional benefits. Living, as we do, in a society which recognises and, I hope, appreciates the practice of granting and receiving benefits, it would be linguistically odd to ask whether some one accepts benefits 'voluntarily', (unless, of course, these benefits had been offered in peculiar circumstances).

The most important objection that the principle of fairness faces derives from noting that acceptance of benefits generally is not a sufficient condition of one

having the obligation to obey the law. This objection is well taken. But, perhaps, in that case, the principle should be understood as defining a necessary but non-sufficient condition of obligation. Little wonder that Rawls introduces the principle of the natural duty of justice in his discussion of institutional obedience: where the basic structure of society is just (or near-just), everyone, irrespective of his institutional ties, has a duty to do his part in the existing scheme. "Doing one's part", in the context of our discourse, means obeying the law. This duty obtains and should be met, if it can be met, at little cost to oneself or to someone else.

In this essay, I have attempted to show, through an examination of the views of H.L.A. Hart and John Rawls on political obligation, that our moral obligation to obey the law derives, among other considerations, from the duty to support institutions that realise substantive values like justice, liberty, equality or human rights. We do not need to be wide-eyed political cynics to discover that sometimes institutions will fail to realise these values in greater or lesser degrees, and not always (or even usually) in the full sense. Nor do we need to be socialist enthusiasts in order to be able to point out that the civil and political freedoms which liberal morality often extols -- freedom of thought and expression and freedom of contract -- will not always be a prime concern among the great mass of citizens in liberal democratic polities under conditions of scarcity. (It is understandable that the

great mass of people living in the Sahel regions of Africa or other pestilence-ridden areas in the world should be pre-occupied with the question of subsistence than with the freedom of thought and expression and voting rights.) It is for these reasons that I have suggested that if all a democrat knows in order to obey the law is that he has a prima facie obligation to do so, then, in my view, he does not know enough. He needs to know, in addition, what his options are whenever and wherever his government lapses in the pursuit of good, efficient and just legislation. He needs to know, in other words, the morally and politically acceptable defences of individual citizens or minority groups against laws which they consider objectionable. I have, in this regard, examined the phenomenon of civil disobedience. I have sought to extrapolate a definition which presents civil disobedience as an acceptable moral alternative to moral persuasion and other conventional channels of redress. My formula of definition, like my discussion of political obligation generally, has been carried out within the framework of a constitutional democracy. That is to say my criteria of definition and my principles of justification have been derived from certain assumptions of contemporary liberal-democratic politics. These assumptions, at least Rawls-wise, are (1) that the market experiences moderate scarcity, so that the citizens generally are not indifferent to the ways in which social benefits and burdens are to be shared out, and (2) the political and legal equality of persons. That is to

say in addition to universal franchise, citizens are considered equal before the law. Thus, where the injustice of law continually confront democratic citizens and where conventional channels are either ineffectual or unavailable, it is obvious that unless minority claims can be pressed in ways that are more effective and yet relatively tolerable to the majority only two alternatives remain: submission by the minority or repression by the majority. Needless to say both alternatives constitute a danger to good democratic government.

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ABSTRACT

The central aim of this dissertation is to examine the theory of political obligation put forward by H.L.A. Hart and by John Rawls. But, first, I identify and explain the constellation of concepts (obligation, duty, ought, can, rules and ideals) and the arguments concerning them, in and through which political obligation is often discussed and assigned. And secondly, I differentiate between the cluster of questions which have usually been asked or discussed under the heading of political obligation, and I identify the central aim of this paper with one of these questions, namely, 'Are there moral reasons which justify the ascription (or practice) of institutional obedience?' Thus, in examining the views of Hart and Rawls on political obligation, I am, in effect, searching for what, if anything, counts as determinative reasons for obeying the law.

As far as Professor Hart is concerned, I concentrate on two articles, "Legal and Moral Obligation," and "Are There Any Natural Rights?", and on his book, The Concept of Law. Hart develops his argument via the notion of natural rights. If there are any moral rights, then, there is, at least, one natural right, namely, the equal right of all to liberty. Since this right is neither absolute, inalienable nor imprescriptible, it follows that it may in

special circumstances be justifiably interfered with. In determining what counts as justified interference, Hart distinguishes between general and special rights. The former are simply exemplifications of the right to equal liberty, and the only obligation it seems to create is one prohibiting the use of coercion against others. Special rights, on the other hand, impose obligations on persons by virtue of their voluntary associations. The standard case of justified interference which seem to correspond with the three ways in which special rights are derived are promising, consenting and mutual restrictions. However, Hart argues that the rights which derive from mutual restrictions correlate with political obligation in the sense that when a number of persons agree to restrict their liberty in ways designed to maximize the benefits of social cooperation those who have submitted to these restrictions, when required, have a right to a similar submission from those who have benefited by their submission. However, I argue that Professor Hart's attempt to derive a moral obligation to obey the law from mutuality of restriction fails to be altogether convincing for several reasons.

(For example, his explanation of the concept of law in terms of primary and secondary rules is inadequate. And so too is his account of moral obligation in terms of an insistent demand for conformity and great social pressure.) I then indicate how Professor Rawls' version of a similar argument might provide a break-through.

In examining the contribution of Professor Rawls,

I focus especially on his article, "Legal Obligation and the Duty of Fair Play," and on his recent book, A Theory of Justice. This examination is carried out from the point of view of what I call an earlier and a later Rawls. The earlier Rawls attempts to derive political obligation from the duty of fair play or the principle of fairness: A person is required to do his part as defined by the rules of an institution when (1) the institution satisfies the two principles of justice, and (2) one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers. I criticise this position for, among other things, its insistence on the idea of voluntary acceptance of benefits.

The argument of the later Rawls is couched in terms of the natural duty of justice. This duty urges citizens to support and comply with institutional rules provided the basic structure of the institution is as just as it is reasonable to expect in the circumstances. Some of the advantages of this later position over the earlier one are discussed. However, I also show that if all a citizen needs to know in order to obey the law is that he has a prima facie moral obligation to do so, then, he does not know enough. He needs to know, in addition, what are the politically acceptable defenses of individual citizens or minority groups against laws which they consider to be morally objectionable. In this regard, I examine the phenomenon of civil disobedience.

I, first, propose a formula of definition for

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civil disobedience and, then, argue that the interesting question in the issue of justifiability is not whether it is ever right to break the law; but rather, what moral conditions form part of the necessary context of any act of justified civil disobedience. Four conditions are discussed. The first condition requires that the act of civil disobedience be used to protest against clear violations of the principles of justice. The second stipulates that minority groups who engage in acts of civil disobedience must be willing to concede that other minorities who are victims of a like degree of oppression have the right to protest in a similar way. The third condition requires that efforts to protest government wrong-doing within normally acceptable legal and political limits have been unsuccessful and/or that certain political issues, contexts or situations preclude effective action at the grassroots level. And, finally, there should be some congruence between the protester's aims, his time-table and his techniques. Thus, contrary to what many have thought or argued, an action of civil disobedience is shown to be justifiable -- whether such action is undertaken by an individual citizen, or by minority groups, or on a nation-wide basis.

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