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## Political obligation

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### Introduction

'Political obligation' is a broad notion and covers many things. Some have said, for example, that the citizen has an obligation or duty to vote. Others have claimed that citizens may have a duty to serve their country and possibly even to fight in its defence. Most people who talk of political obligation, however, have one thing in particular in mind: the citizens' duty to obey the laws in their own country.

The issue I want to discuss in this chapter is whether people do in fact have good and justifiable reasons for complying with laws that go beyond mere fear of punishment, and, if so, whether they are *bound* or obligated by those reasons to comply.

### 1 One main argument for a duty to obey the law: consent

Socrates had to decide whether to disobey an *unjust* but legal decision; the remarkable thing is that he decided to obey, for what he thought were sound reasons, in circumstances that would cost him his life. Socrates believed people had a *moral* duty to obey the law. It is a very strict duty based on an agreement they have made.<sup>1</sup>

What is distinctive about the agreement argument Socrates assented to (in the *Crito*) is that it puts the issue in terms of justice or morality. In our own political tradition there is an argument somewhat like the Socratic one; it stresses not the morality of keeping agreements but, rather, the connection between a legitimately constituted government, on the one hand, and a citizen's duty to obey the valid laws issued by such a government, on the other. This obligation is a strict one; it attaches to all laws and can be overridden, if at all, only in exceptional cases.

In this theory, usually associated with Hobbes and Locke in particular, a contract (sometimes called 'consent to government') is said both to authorise a government to make laws and to bind subjects to strict obedience. Actually the theories of Hobbes and Locke are not quite so simple as this.

Locke argues that, at a certain point (that is, upon reaching the age of adulthood and then by staying on, more or less voluntarily, in the face of an unexercised right of emigration), people become members or parts of a particular body politic. The main function of any such body is to create a constitution or form of government and, presumably, there is a consensus (what Locke calls a majority) among the citizens as to where – that is, in what institutions – the main powers of government (legislative, executive, etc.) have been lodged. Indeed, Locke says, if there were not this consensus the body politic would come apart, would simply disintegrate, and could only be held together by obvious and clearly improper force. Now, from these two facts (that one is a member of a body politic and that there is a consensually based constitutional government for it) it follows for Locke, as a matter of logic, that each citizen (each member of a political society so organised) is strictly bound to obey the laws duly issued by such a constitutional government. Or it follows from these two facts plus one other – if laws were not obeyed people would in effect have returned to the unwanted state of nature – that each member has the strict obligation in question. One has, in short, not consented (contracted, promised) in so many words to obey the laws; rather, one has consented to be a member of a body politic and from that fact, plus one or two others, it follows logically that the citizen has a strict duty to obey laws duly issued. One is thus obliged *as if* one had in fact expressly consented to obey.<sup>2</sup>

The doctrine of consent in Hobbes is, perhaps, simpler. Hobbes argues that all subjects of all governments consent in one and the same fundamental way. They simply 'stand aside' from their own exercise of natural rights (from the right to do anything they are physically able to do); thus each subject has individually consented (or, in effect, promised) permanently but conditionally to waive that exercise in deference to the exercise of that same right (the right to do anything) by the government. Hence, the subjects consent to be under the sovereign's will and are obliged to comply with it, whatever it is, in all or almost all cases.<sup>3</sup>

For the 'contract' theorists, just as for Socrates's idea of an agreement, the relationship of citizens to the government and its laws is construed on an analogy with some non-political undertaking, like promising, agreeing, consenting or signing a contract, which is obligation-creating in character. It is the fact of agreement or the act of consent that *grounds* the obligation to obey the law in all these theories.

I can see two main problems with this overall approach. First, there is the problem of what counts as consent. Second, there is the problem of whether consent so conceived can really bind people to obey all, or almost all, valid laws simply because these laws were issued in the correct way by a legitimate or effective government.

What counts as consent? All of the theorists count mere residence, permanent residence, during adulthood. Hobbes adds the interesting twist that a resident could even bow one's head and go on living under a conqueror, on pain of death

if such 'consent' were not given, and that would count fully as consent. Many people are reluctant to think that mere continued residence should count, especially under the condition Hobbes envisioned, as having exactly the force of an explicit and solemn promise.

Some have said that voting in a free election should so count. Well, so voting might commit you to accepting the outcome of the election, we might grant. But why should it commit you to accepting, being obliged to accept, all the laws issued by those elected? Some of those laws might be foolish or unconstitutional, or even wicked. Suppose you voted on the losing side. Your candidate did not win. You voted that way because you did not want a certain bad law passed. And now the candidate you voted *against* has, along with others, supported that very law. Or suppose it was a really wicked law, like the US law in the 1850s which required runaway slaves to be recaptured and returned to their owners, and you were a voter in the state of Massachusetts who did not like the idea of such a law and who had voted for a candidate who opposed it, a candidate who was then elected but whose vote against this law was then defeated in the next meeting of the national legislature. These examples suggest that it goes a bit far to say that simply by voting in a general election you are committed to accepting this law, and are obliged to obey it.

But what about an explicit and solemn promise, a full-bodied agreement to accept all valid laws and to be bound by them? Would that work? Not too well. Most citizens have never consented or contracted, in a way that can be regarded as really counting, to obey the laws of the country in which they reside. For example, not everyone (certainly not every citizen) has engaged in a meaningful act of consent in Britain or America or Canada; in fact, relatively few people there have done so. Therefore, if full-bodied actual consent is required, the contract theory cannot account for an obligation to obey the law in such countries.

One could always reply: well, if everyone had freely and explicitly promised to obey the laws in their own country (in a solemn oath of some sort), *that* would surely count. We could still ask, even if such a promise counted as consent, whether such explicit consent would or could *bind* those who had taken that oath, could *oblige* them, to obey all the valid laws of the land simply because they were the country's laws. Is the strict obligation to obey laws grounded merely in the bare existence of consent to do so or is it grounded in whatever good reasons (excluding fear of punishment, of course) one might have for so consenting in the first place?

Clearly, if we simply cited the reasons (but without an act of explicit consent by the people involved) then we no longer have actual consent as the ground of obligation, contrary to what the contract theory requires.<sup>4</sup> Suppose, though, we cited both the fact of an explicit and widespread agreement in a given country and good reasons for making such an agreement. One could still question whether the fact of explicit consent really added anything to these reasons.

Consider. If we regard our obligation to obey our country's laws as a moral obligation (as did Socrates in the *Crito*), then we probably also believe that most or very many of these laws have a good moral content (such as do the laws that prohibit murder, kidnap, rape or physical assault). But would not the prohibitions in such laws (given their good moral content) control our conduct, morally speaking, even if they were not set down in law? By the same token, they would also control our conduct, morally speaking, even if we had never explicitly and solemnly promised to obey the laws of the land.

The matter becomes more complicated when we consider laws that are morally indifferent. I would think a question of *moral* obligation could arise in such cases only where what the law required (for example, the payment of income taxes) could be shown to be necessary or substantially important to the government's continuing ability to encourage people's compliance with those laws that do have a morally good content.

When we come to wicked laws (laws with a bad moral content, like the Fugitive Slave Law mentioned earlier, or Nazi laws against the Jews) I think the matter changes considerably from what it was in the two earlier cases (the case of laws with good moral content and the case of laws with morally neutral content). I do not think it possible to ground the *moral* precept of obedience to law on a foundation of indifference with respect to whether the laws are, in most cases and in the long run, of a morally good or at least a morally acceptable content. The moral presumption here is surely against evil laws, and this presumption will tell against any morally based obligation to obey such laws. In the analysis we have given, a promise to obey evil laws could not be morally justified and any such promise, even the promise to obey *all* laws (just and unjust), would not have obliging weight.

## 2 Another main argument for a duty to obey the law: benefit

Dissatisfaction with consent theory has led political theorists to consider other possible grounds of an obligation to obey law. What follows is perhaps the most commonly cited alternative.

It is often alleged that the receipt of benefits obliges one, as based on a proper sense of gratitude, to show appropriate responsive conduct. Some have said (as it was said, for example, in Plato's *Crito*) that when the benefit comes from the government, the appropriate responsive conduct is to obey the laws.

Of course, some benefits are 'open'; they come to everyone and one can hardly help but receive them (like breathing clean air as the result of anti-pollution measures). Sometimes benefits come, even though one actively tries to avoid them. (Many of my neighbours actively opposed the city building sidewalks, along our street, but now they use those pavements like anyone else.) But some benefits are positively sought (and accepted) or are at least voluntarily received, knowingly and willingly. These it might be said are the ones for which one clearly owes a duty of gratitude, and appropriate responsive conduct is owed to the benefactor.

The question is, though, Where these benefits are positively sought or voluntarily received from government, does one owe obedience to law as one feature (perhaps the main feature) of one's appropriate responsive conduct? Does one, indeed, have an obligation to obey *all* the laws on such a basis?

Consider the following example. A black student (age nineteen) in South Africa during the period of apartheid requests and receives admission to a state-run high school and some monetary aid (to cover costs and fees) from the local education authority, support that is paid for out of tax revenues. Suppose it is believed that the student might now owe a debt of gratitude, to be paid back in some sort of appropriate responsive conduct. But what conduct is appropriate? Contributing to state-supported education in the future (through donation of one's time or contributing financially to a scholarship fund) might well be. But it can hardly be alleged that one now is obliged, morally obligated, to support the government and obey all its laws (including the laws that maintain apartheid). The same could be said of a white student in similar circumstances. That student might be thought to be obliged to contribute to state-supported education in the future, but there is no good reason to say that this student, who has probably received more benefits overall than the black student, is morally obligated, any more than is the black student, to support the government and obey *all* its laws.

Indeed, we could vary the picture somewhat, to include important benefits people receive (but without assuming their voluntary acceptance). For instance, both our students (black and white) might have benefited greatly from public health measures (clean water, sanitation, vaccination and other disease control programmes). Would it follow from this that either is morally obligated to support the government and obey *all* its laws?

The basic point I am making, that there is no obligation to obey *all* the laws of the land in such cases, would probably hold even if the evil apartheid laws were completely removed from the picture. The fundamental question here is whether the appropriate responsive conduct, said to be owed in these two cases of education and public health, can reasonably be thought to include supporting the government and obeying all its laws. More to the point, if you were to run through a wide number of cases, of various benefits actively sought or voluntarily received from government or of important benefits merely received, and reach the same conclusion in each case, then you do not think gratitude for benefits received does ground an obligation for recipients to obey *all* the laws of their country.

Some have pointed to a special version of benefit theory, called fair play, to make the case for a duty to obey law. Here is the picture they present. People are engaged in a joint activity, a practice or an enterprise, that is widely beneficial (like conserving water in time of drought or reducing electricity use in the face of a brownout [a partial blackout]). The benefits of this activity can only be obtained if most people join in, but doing so carries certain costs for each of them (for example, I cannot water my lawn, you cannot wash your car).

Now let us say that I (a university student) am engaged in such a practice (in a scheme of things) in which others are doing something to benefit me (like paying their taxes) and I have voluntarily accepted these benefits; now it comes my turn, after a few years have passed, to pay taxes (for I have now entered the workaday world). Fair play theory alleges that I am obligated, by my participation in this practice (in particular, through my voluntary receipt of benefits and the costs to others of these benefits being provided), to do my share, to return in kind the benefits I have received, by paying my taxes. And this means complying with the tax laws. (To keep matters simple, let us suppose that these laws are not unfair.)

Technically, the obligation I owe, under fair play, is to the other participants in the joint activity. It can become an obligation to obey the law only indirectly, in so far as the activity itself is essentially or significantly involved with one's being law abiding.

This said, I cannot quarrel with the analysis just given. The question, though, is whether you or I have an obligation to obey *all* the laws (including future laws, some of which might be bad laws or even evil ones).

The same thought experiment I suggested earlier would work here as well, to help answer this question. The issue we are raising here is whether the appropriate responsive conduct, said to be owed in this one case of receipt of benefits from tax revenues raised and spent, can reasonably be thought to go beyond conformity to the tax laws to include supporting the government and obeying all its laws. Surely, it does not. And if we took each practice up in turn, one after the other, we would reach the same conclusion in each case. Thus, a person who had benefited from other people's obedience to laws against theft should obey those same laws, were the circumstance to arise. You owe it to these others, in fair play, so to act. But there would be no generalised duty, a duty that went beyond conformity to anti-theft laws, to obey *all* the government's laws.

Indeed, if you ran through a wide number of cases, envisioning people's participation in a variety of practices or joint activities (where they voluntarily received benefits in each of them) and lumped them all together, you might conclude that the persons involved should do their share, to pay back in kind the benefits they have received. This may well involve a duty to obey several, even many, laws. But none of this would mandate the conclusion that fair play (in the case of benefits voluntarily received by participants in a wide variety of practices) would ground an obligation for each of them to obey *all* the laws of their country. Obedience to some laws may not benefit everyone (and obedience to some laws might not benefit anyone).

The conclusions reached in our survey of fair play are, of course, strengthened when we consider that some laws may be evil (like the Nazi laws against Jews or the apartheid laws in South Africa) and that such evil laws cannot benefit literally everyone. And if any are benefited in such cases (as some would be by wicked laws, as were slave-owners in a slave system, for instance) there is no *moral* obligation, no obligation of fair play, even for them (let alone for the persons victimised by such laws) to obey all the laws of the land.

### 3 A preliminary conclusion and some materials for a new start

We have now canvassed some of the main arguments for a generalised duty, a duty of everyone, to obey all laws. The arguments based on consent, on gratitude for benefits, and on fair play have been looked at in turn and each has failed.

Some have concluded from this that there simply is no obligation, no *moral* obligation, for everyone to obey all laws in their own country. In fact, there may not be a standing obligation, for some at least, to obey any of the laws.<sup>5</sup> Others, looking at this same sample, have concluded that none of the standard arguments will work but these theorists have left open that another, radically different, approach might work. And some have even suggested the main lines of such an approach.<sup>6</sup> I tend to side with this second view, suitably qualified.

The theorists we have been criticising all treat the obligation to obey the law as primarily a *moral* one and thus the grounds they emphasise are distinctively moral grounds. These theorists are interested in *general* grounds for obeying law – grounds operative in all or almost all societies, grounds that could cover all laws or, conceivably, all persons – and they disdain reasons which are local or distinctive only of a particular society (or specific kind of system). But their analysis, by its very nature, creates a deep problem: they cannot show that the duties so generated – by reference to these general, distinctively moral grounds (such grounds as agreement or express consent or gratitude for benefits received or fair play) – can ever be duties of all people in a given country to obey all the laws there. Or so I have argued. The quest for such generality has proven to be a hopeless and unrewarding one.

A second feature of the standard approach also needs bringing out. The favoured grounds cited in this approach all have in common that they invoke some *voluntary* act on an agent's part. Typically, the agents are here said voluntarily to have consented or, alternatively, voluntarily to have received benefits or, as yet another alternative, to have knowingly participated in a practice or joint activity from which they have voluntarily received benefits of the very sort they're now being asked to provide in turn. The main point relied on in all these cases is the same: having an obligation implies that one has *voluntarily* taken on that obligation through some sort of (morally approvable) transaction.

This pronounced emphasis on voluntariness may be out of place. One can have duties that are not based on voluntary acts at all. For example, children (say teenagers) could have duties to their parents which are not based on voluntary transactions on the young persons' part; among the benefits they have received are many that were not voluntarily sought or voluntarily taken (for example, the enormous number of such benefits they received when they were infants or very young children). More to the point, it may be the relationship they are in, with their parents, that counts entirely (or for the most part) for the duties they have.

Consider now a parallel case. The requirements on people's conduct that the law imposes are often there because of the status these individuals have (as

innkeeper or employer or, quite typically, as member and fellow citizen) in a given political society. The normative directions for conduct laid down in the law often come with the territory and are imposed simply by the rule-making actions of government officials. These requirements are, thus, unlike standard voluntary obligations in a number of important respects. They do not necessarily involve undertakings or determinate transactions that serve to bring a citizen specifically under a given requirement; they are not, in many typical cases, owed to definite or named individuals (but, rather, to all citizens); they are not imposed *because* the individual has been the actual beneficiary of the very way of acting which that individual is now being normatively directed to engage in, and so on. (This last point is in deliberate contrast with fair play.) We need, in short, to be able to discuss the duty one might have, to conform to such laws, without assuming that the duty is there on the basis of some voluntary undertaking or determinate transaction that has served to bring the citizen specifically under that requirement.

Another dimension to this important matter of voluntariness needs mention as well. Most people are in fact citizens or lifelong members of only one country during their entire lifetimes. They are born in that one country and they will spend their whole lives there. Many others have joined them, for reasons of their own, and have in effect cast their lots there; this we must grant. But we must be able to make a case for a duty to obey laws for this vast majority (those who were born there), if we are going to have any serious case for the claim that citizens have or may have a duty to conform to laws. We need, in short, to be able to discuss the duty one might have, to conform to laws in the country of their birth, without assuming that the duty is there and can only be there on the basis of some voluntary undertaking or determinate transaction that has served to bring the citizen specifically under that duty.<sup>7</sup>

One final point is worth making. People often talk about a duty to conform to law which is system specific. Here one's obligation to obey laws is not represented as a moral one at all; rather, it is thought to be based on some feature of the political system itself. Thus, someone might allege that in a democratic state the norms of democracy require that one accept democratically established law as law, as binding law, and be willing to comply with it so long as it remains in force.

The problem with taking a very general 'moral reasons' approach to political obligation (where we consider *only* moral reasons that would bind all people at all times and places to obey all the laws in their country) is not just that it would not work, a point I have already made, but also that it deflects attention from the notion of any sort of special obligation to laws *as laws*. It seems we should determine what it is about laws simply in so far as they are laws and about the specific political system in which they occur that might initially engender and justify such a duty. If we cannot do this, one might wonder if we are really talking about *political* obligation at all. We should, then, if we want to take seriously the issue of an obligation towards laws as such, make system-specific reasons our first line of attack in determining the grounds of one's obligation to obey the law.



Let me summarise the main themes, now, of our suggested new approach to assessing political obligation. First, we should emphasise the case of people who are born in a given country and are lifelong residents there. And we should not assume that any duty to obey laws, should there be one, is a duty voluntarily taken on or one involved in a transaction of some sort. Second, we would do well, at least as an initial step, to focus on specific features of the political system of the country in which these people reside, to see if these features give rise to any sort of duty to obey the laws there. And, finally, we should give up the quest for generality, of trying to find general reasons that would underwrite an obligation of all people at all times and places to obey all the laws in their country.

To follow out the new approach just suggested does not preclude us from asking moral questions. We can still ask whether a given system of political conceptions and institutions, in which the elements of political obligation have been established as embedded, can be morally approved. Or we can ask whether most laws generated by such a system can be morally approved. This is the same as asking whether a system-specific political obligation can be morally justified.

But the questions we are asking here can only be asked and answered in the order I have given. Without first showing that an obligation is owed to the laws *qua* laws and that such obligation can be given a system-specific justification, any programme for a moral justification of political obligation would seem to be off target. It could not tell us whether (or why) we have a duty to comply with laws simply in so far as they were laws. And this would be to miss the point of raising the issue *political* obligation in the first place. Or so I would argue.<sup>8</sup>

What we would be looking for, in carrying through this analysis, are reasons specific to a given political system that could bind people to conform with the laws, simply as laws, in such a system. If such a system actually exists to an appreciable degree in the country in which a group of people live, then we have found reasons that will bind such people to the laws there, merely in so far as these are duly enacted laws, or will bind them with respect to an important subset of these laws. In following out the lines of the new approach we might be able to come up with a definite and workable notion of political obligation.

We will not have time in the present study to carry through this analysis. What is important to see here is the basic approach we would be taking to it. But the analysis itself is something we must save for another day.<sup>9</sup>

## Notes

- 1 For that part of the *Crito* which contains the Socratic arguments against disobedience to law, see Plato, *Five Dialogues*, tr. G.M.A. Grube (Indianapolis, IN, Hackett, 1981), pp. 52–6.
- 2 For the main points (body politic, constitutional consensus, avoidance of state of nature), see J. Locke, *Two Treatises of Government* (first published 1690) ed. P. Laslett, 2nd edn (Cambridge, Cambridge University Press, 1970), *Second Treatise*, s. 97; and also ss. 89, 95–6, 98–9. Locke's account of the powers of government is found in

- Second Treatise*, chs 11 and 12. Locke's discussion of *express* consent, that is, the permanent or standing consent of citizen-members, occurs in *Second Treatise*, ss. 116–18; and his further account of it and contrast with *tacit* consent, that is, the temporary consent of visitors etc., is found in *Second Treatise*, ss. 119–22.
- 3 I said that, in Hobbes's view, each subject has consented here permanently but *conditionally*. The condition is that the government (the sovereign) does not invade the subject's unmistakably vital interests. The vital interests Hobbes had in mind are the subject's avoidance of 'death, wounds, and imprisonment' at the hands of the government (for elaboration see T. Hobbes, *Leviathan*, ed. R. Tuck (Cambridge, Cambridge University Press, 1996), ch. 14).
  - 4 The idea I have just suggested – that there might be good reasons for people to act *as if* they had explicitly consented – is sometimes called hypothetical consent. J. Rawls is often taken to have advocated such an approach in his *A Theory of Justice* (Cambridge, MA, Harvard University Press, 1999), ch. 3. (Rawls's book was initially published in 1971.) Here Rawls was discussing what would count as a reasonable agreement for people to make concerning the principles of justice that should govern the basic structure of their own society during their entire lives. See also J. Rawls, *Political Liberalism* (New York, Columbia University Press, 1996), pp. 273–4. For an important criticism of Rawls's contract theory of justice and for the whole 'hypothetical consent' approach, see Ronald Dworkin, 'Justice and Rights' (originally published in 1973), reprinted in Dworkin's *Taking Rights Seriously* (Cambridge, MA, Harvard University Press, 1978); see esp. pp. 150–8. There continue to be sophisticated defences of hypothetical consent (as conveying the best insight into traditional consent theory). Among those I particularly recommend are Thomas Lewis, 'On Using the Concept of Hypothetical Consent', *Canadian Journal of Political Science*, 22 (1989), and Cynthia Stark, 'Hypothetical Consent and Justification', *Journal of Philosophy*, 97 (2000).
  - 5 John Simmons, in his book *Moral Principles and Political Obligations* (Princeton, NJ, Princeton University Press, 1979) discusses a number of such grounds: fidelity or consent (chs 3 and 4), fair play (ch. 5), Rawls's natural duty of justice (ch. 6) and gratitude or repayment (ch. 7); see also pp. 15–16, 54–5. Simmons reaches the conclusion I have identified in ch. 8 of his book; many anarchist theorists would, of course, echo this conclusion. The idea that a theory of political obligation must concern itself, in particular, with the obligation of people to obey the laws in *their own country* is one that Simmons has brought to the fore and emphasised; see Simmons, *Moral Principles and Political Obligations*, esp. pp. 31–5 and also 37, 43, 54, 64, 155–6.
  - 6 John Horton, in his book *Political Obligation* (Atlantic Highlands, NJ, Humanities Press International, 1992), surveys these same grounds in chs 2 (on consent) and 4 (fair play and gratitude) and finds all of them wanting. His suggestion that we take a different basic approach is developed in the final chapter of his book (ch. 6). For a similar line of attack with a similar conclusion, see Ronald Dworkin, *Law's Empire* (Cambridge, MA, Harvard University Press, 1986), ch. 6.
  - 7 The approach I have just outlined in this paragraph has been taken by several theorists. See, for example, Rawls, *A Theory of Justice*, s. 19 and ch. 6, esp. ss. 51–3; R. Martin, *A System of Rights* (Oxford, Clarendon Press, 1993), ch. 8; also J. Waldron, 'Special Ties and Natural Duties', *Philosophy and Public Affairs*, 22 (1993), and the chapters in Horton and in Dworkin cited in note 6. For criticisms of this approach, see Richard Dagger, 'Membership, Fair Play, and Political Obligation', *Political Studies*, 48 (2000).

- 8 For elaboration, see Martin, *A System of Rights*, ch. 1, also p. 186.
- 9 See Martin, *A System of Rights*, ch. 8, for a more detailed working out of the notion of political obligation (or allegiance, as I prefer to call it) of the sort I have here suggested.