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POLITICAL OBLIGATION:

THE GOOD MAN AND HIS DUTY TO OBEY THE LAW

BY

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Abstract

The 'problem of political obligation' is understood, here, to be one of trying to reconcile obedience to government and law with the essential pre-condition of responsible moral conduct - that is, with the freedom of the individual to act according to the dictates of his own conscience.

Primarily, we are concerned with that theory of political obligation wherein the duty of obedience (and the corresponding right of government to punish the disobedient) are derived from the 'consent' of the individual. By representing the duty of obedience thusly, as one which is freely and wilfully undertaken by the individual upon whom it falls, we would seem to be satisfying the requirements of the ethical individual. We argue, however, that there are problems with 'consent theory' - problems which differ, in themselves, depending on how one understands the act of consent.

For example, where consent is taken to imply an 'inviolable' act of submission to government and law, then each and every law becomes obligatory. The subsequent use of 'validity' as the indicator of a law's authority, and the irrelevancy of the content of a law (moral or immoral) to

one's obligation to obey it are of particular importance to us here. For they imply, ultimately, the irrelevancy of individual moral judgement where a law applies. (One is no longer free to act on that judgement.) Far from accommodating the 'good man', this use of consent appears to involve, we argue, an abdication of one's freedom to be good.

Alternatively, consent may be interpreted as a 'conditional' act whereby the individual re-affirms his right to resist government where it goes beyond certain 'limits' set upon its nature and purpose. Here, it is the reasons for which one might consent (rather than the act of consent itself) which give rise to the duty of obedience. The values one expects to realize through law - order, freedom, justice, the common good, etc. - these, rather than simple 'validity', become the final indicators of legitimate authority. But what if a law frustrates the achievement of these end? Does a duty to obey then exist? Whose judgement is to count in such an instance? These questions arise here precisely because one does not necessarily incur, with this use of consent, a duty to obey all valid law. For the same reason, we argue, this approach fails to explain the right of punishment that governments may still exercise over over any or all resistors.

Out of this discussion of the 'ends of government' one final question arises concerning the very assumption of

compatibility between public and private 'goods'; or between public principles of morality and the ones we use in our private lives. We conclude, in other words, by raising doubts about the feasibility of ever striking a 'final' accord between the good citizen and the good man.

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Introduction

> Among one's moral obligations is a prima facie obligation to obey the law.[1]

Why ought I to obey the law? Why ought I to do what I am legally obliged to do? That is the question to which our concept of political obligation addresses itself. I should like to deal with those explanations wherein the duty to obey the law is perceived (as above with Wasserstrom) as a moral issue. I will not, for the purposes of this paper, concern myself directly with those theories that provide explanations in terms of expediency, necessity, or force.

The context within which I wish to discuss the theory of political obligation is the liberal democratic State. The individual, upon whom this obligation to obey the law falls, will be taken as a 'given'. He is the autonomous,

rational and responsible man who rests at the centre of the moral system underlying the liberal democratic State. He is the man capable of independent rational and moral judgment, and consequently of responsible self-government and moral self-realization. He is the man endowed with the natural right to the freedom to decide where he ought to go with his life and how he ought to go there. His own 'dignity', essential to his humanity, depends upon the freedom he has to act according to his own will, wherein his humanity resides. His 'goodness' depends upon the freedom he has to follow the dictates of his own conscience, wherein final moral authority is located.

Within this liberal tradition, the 'good man' has certain definable features. He is, as Weldon describes him, a responsible moral agent, and not a subject of moral laws. As such, he obeys only those rules to which he has consented, and is "for that very reason entitled and obliged to break them when his moral judgment finds them inappropriate in a particular situation".[2] Upon this man can fall no 'obligation' to act, where that action or the 'good' at which it aims is not of his own choosing.

Confronting this individual is government: a distinct political apparatus that enables some men to make rules which other men are required to obey, rules to which obedience is neither voluntary, nor optional.

The demand we would make of the theory of political obligation is that it explain how it is that self-governing moral men would have a prima facie moral obligation to obey these laws made by others. Insofar as it takes as its subject matter the obedience to all valid laws of the State that is in fact required of us (or at least to those laws which can appropriately be discussed in terms of 'obedience'), and the fact of punishment that will follow any breach of a valid law, this theory usually tends to be, perforce, a general one. It seeks to explain obedience to <u>all</u> such laws (even to those which we might in conscience reject) as a 'duty', and the punishment that follows <u>any</u> act of disobedience as the corresponding 'right' possessed by the State.

Government and compulsory law would seem to pose, however, certain obvious difficulties for the freedom required for the realization of human goodness, difficulties which cannot be ignored by such a theory of obedience. As Parry defines it,

> The problem of political obligation is one of reconciling government with the very precondition of moral conduct.[3]

The nature of that obligation is one of the concerns of this paper. Of particular interest to us, however, is the manner and extent to which our rational and ethical individual, our 'good man', can be successfully accommodated by a general theory of obedience. Can such

obedience to government and law be reconciled with responsible moral behaviour?

I. The 'Good Man' and the Problem of Political Obligation

i) The 'Good Man' and his Obligations

The premise of our discussion is that the individual is the ethical unit of relevance. There are two parts to this view: firstly, the locus of moral judgment rests with the individual; and secondly, supreme value is placed on the individual, himself.

Describing the belief contained in the moral philosophy underlying the liberal democratic policy, Deutsch writes,

> . . . a man's dignity is impaired. . . if he is forced to do something that deprives him of autonomous control over his own behaviour and makes him instead the 'object' of another process, a 'means' instead of an end.[1]

This conception of an autonomous individual will and the value that is attached to the exercise of that will rests upon a broader understanding of man as an independent, rational and responsible being whose fundamental dignity resides in his individuality: in his self-determination. Human fulfillment lies in the individual realization of one's own will and one's one life, and not in the service of the wills or goals of others. To be used by another man as a means to his own ends, or to be forced to seek his goals as your

own is to suffer an unjustifiable act of violence, an act against morality, for one's existence as a man is negated.

The necessary condition for self-fulfillment through self-determination is freedom. It is the elemental right intrinsic to the human personality, a grant from no one, belonging to the individual simply because he has been born a man, and without which he cannot be human.

For the most part, our understanding of freedom, here, is contingent, as Tussman notes, upon an earlier association of the individual 'self' with reason, and not appetite or instinct.[2] Rousseau views man in such terms - "For to be subject to appetite is to be a slave. . . ."[3] So too does Locke:

> The freedom, then, of man, and the liberty of acting according to his own will is grounded on his having reason which is able to instruct him in that law he is to govern himself by.[4]

Our individual then is not selfish, irrational and ungoverned. He is self-governed. That freedom essential to his humanity lies not in his doing as he likes, but in his doing as he thinks he ought.

The narrower relationship with which we are concerned, between freedom and moral fulfillment, rests upon a similar view of man and individual moral will. In his freedom lies the essence of man's responsibility and 'goodness'.

Without it, morality is impossible. Where a man's behaviour is governed by an external will, where he cannot act as he thinks he ought, according to his own will, he is denied moral self-realization. Neither he nor his behaviour can be described as fully moral. For he cannot claim responsibility for himself or his actions.

Again, this freedom essential to the ethical personality implies not a lack of restraints, but restraints that are self-imposed. That some men do not behave in a rational, responsible and moral fashion does not affect his association of freedom with morality. Paradoxically, as Werner notes, to the man holding moral ideals, this statement that he is free to do as he likes will be trivial. And the person unaffected by such ideals will do as he likes anyway.[5] That is not to associate the restrictions which our moral ideals place on our behaviour with a loss of freedom. That would obscure the nature of morality that posits freedom and individual responsibility as the essence of moral activity. Without that freedom, we cannot talk of the 'good man' at all.

Given the primacy of the individual will in the realm of moral action, the individual conscience reigns supreme as the final authority in moral judgment, the ultimate source of moral legitimacy. Spitz confirms this faith in the individual conscience as a fundamental precept of our

social and political philosophy:

> On intrinsic grounds democracy affirms that each man's conscience is right.[6]

That is so, writes Plamenatz in agreement, not because the individual conscience is infallible, but because "it cannot be otherwise". That conscience is ultimate "only in the sense that no free agent can possibly appeal to any other authority".[7] Men can go no further than that source for moral guidance (fallible though such guidance may be) without compromising the moral nature of their actions, and without sacrificing their claim to goodness.

In essence, this means that morality cannot be imposed from without on man, by the State or any other authority. The individual conscience cannot be bound by or dictated to by any other will. And the moral duties a man has will derive from the principles he holds and the judgments he makes. He cannot be bound, in conscience, to seek a good that his own conscience rejects. He cannot have an 'obligation' that is not of his own choosing. His duties can only be imposed by himself.

We are not implying that the acceptance of a moral obligation is what makes it obligatory. It is so in its own right, as the embodiment of a moral principle. We are suggesting only that the acceptance of that principle is itself a pre-condition for a man having a moral obligation to abide by it. Or, as Werner puts it, the obligatoriness

of an action said to be moral will be sensible only to the man who already sees the action as moral.[8] A similar position is reflected in the suggestion by Benn and Peters, that a man "must see the point of an obligation before he can consider himself bound".[9]

Unless a man 'sees the point', unless he accepts the principle that implies the presence of an obligation, he cannot be induced to act on the basis of 'having an obligation' to do so. Where he is required to seek a good that is in contradiction with his own moral perceptions, the situation will appear to him as one of force, not of duty. He may act as desired in response to that force, but he will not consider himself morally obligated.

The problem that such a man faces under government, the 'problem of political obligation', would appear to be inherent in the political relationship itself between man and government: in the making of laws by some men, laws which other free and equal men are required to obey; in the supremacy of public judgment (as contained in those laws) over private judgment (to which we have already granted final authority). In this relationship, the individual finds himself required to act in ways that may not be of his own choosing. He finds his will subordinated to the authority of the will of others. His behaviour finds its reasons in that external authority, not in his own reason and judgment. He is a subject, not a moral agent. What then of his goodness?

ii) The Problem of Political Obligation

How can obedience to authority and law be reconciled with the pre-requisites of rational, moral existence - with the freedom essential to moral self-determination? Given our view of man and the self-imposed nature of his obligations, our theory must start with man as a free moral agent if there is to be any duty of obedience at all. And to writers such as Rousseau, who are deeply committed to man and human dignity, it must end with man as a free moral agent. That concern is reflected in the seriousness with which he views any loss of freedom to man:

> When a man renounces his liberty, he renounces his essential manhood, his rights, and even his duty as a human being.[10]

Yet an abandonment of freedom, and of conscience is implied by the 'duty' to behave in accordance with the judgments and laws made by others. The punishment that follows any act of disobedience on the grounds of private judgment makes our problem even more acute. Particularly if one interprets that punishment not merely as the result of breaking a law, but in a broader sense, as the result of being a 'good man', of acting in accordance with one's own conscience in contravention to what is perceived as an iniquitous law.

For Rousseau, the solution to our problem of morality and obedience to authority is to be found by

constructing the political association in such a way,

> . . . that each, when united with his fellows, renders obedience to his own will and remains as free as before. 11

The authority of the individual conscience remains intact. The problems surrounding the question of disobedience disappear. For the situation would never arise.

Our modern constitutional theorists are somewhat more willing to recognize the presence of government authority and control, the existence of which is belied by Rousseau's description of the political association. The laws of the State do exist. They are not the product of the will or judgment of the individuals to whom they apply. The force attached to the sanctions behind those laws leaves little doubt as to their compulsory nature. Obedience to them does not embody freedom, morality, and self-determination. That obedience is better described by restraint, compulsion, a lack of choice and a lack of personal responsibility.

From the standpoint of the State, the authority of its laws, as Thompson argues, has nothing to do with morality. It cannot. For the latter is the area of choice. And there is no freedom of choice in law.[12] Both Spitz and Mars draw our attention to this fact as an element built into the logic of law. "There can be no law to which obedience is optional", writes the former, and there can be no legal right to disobey. For such a right is not enforceable by law.[13] Nor can the constitution, writes the latter,

guarantee the right to what has come to be called civil disobedience. For "legally permissable law-breaking is non-sensical".[14]

Unlike our moral rules which are defined by their content and which are authoritative and hence obligatory by virtue of that content, the laws of the State are defined by the process by which they are made. They are authoritative and hence obligatory by virtue of the fact that they are 'valid', that they conform to the rules defining them into existence. All valid laws must be obeyed. The content of those laws, good or bad, just or unjust, does not affect the fact that they are laws. Nor does it affect the question of obedience. Validity defines a law, and validity defines the obligation to obey.

Given the reality of these legal obligations, the problem of obedience and moral existence remains. For unlike our obedience to moral rules, the obedience required of law depends not on any rational or moral evaluation of the content of law, but on the simple fact that a law exists. Our problem takes on an added dimension given the possibility of some conflict between the behaviour dictated by law and the moral dictates of an individual's conscience. It is the very definition of law, in terms of procedure and legality that enables such a situation to exist. That definition allows us to talk of a just or unjust law. Hobbes claims that such talk is non-sensical. "No law can be unjust",

he argues, so long as it is made by the designated Sovereign.[15] But if just and unjust do imply more than the legal principle of validity with which Hobbes equates them; if Good and Evil do have more substance to them than he is willing to allow when he reduces them to mere "names which signify our appetites and aversions"[16]; and if they are not absorbed by society and the State, as in Rousseau when he contends that "to obey the rules of society is to be free" and all else is slavery[17]; then we will have a 'problem of political obligation'.

Such a problem is only sensible given a presumption in favour of morality as both a reasonable and relevant system of thought in its own right. The possibility (if not the recognition) of just such an autonomous moral realm, open to man, independent of the State is implied by modern institutional and positivist legal theories. It is inherent in their separation of morality from politics and law and in their appeal to the principles of constitutionality as the source of political and legal authority. The State is not Good; it is Legitimate. It has no authority over the 'good man'; only over the citizen. Its laws do not function as do moral rules. For they make no claims upon the consciences of men, only upon their behaviour. Whereas our moral rules bind both. The solution to our problem of securing the authority of the individual conscience and the freedom for moral self-determination is presumed to lie in this principle of separation.

Unfortunately, the definitional and operational distinctions that we draw between our legal and moral rules do not enable us to draw such neat boundaries between the content of the political process and that of the moral process. In keeping with the conceptual distinction between morality and politics, and law, politics ought to be precluded from operating in the area of moral affairs, but it is not. Our laws and our moral rules do happen to deal quite often with the same subject matter. Moral judgments, on the issue, for example, of abortion, are made using the political process of decision-making. Laws, such as those forbidding theft or murder, do have moral content. Others such as our tax laws, do reflect certain principles of justice. Moral judgments are also made by our judges, who are empowered to require individuals to live up to them. The Court can declare a woman to be 'unfit' as a mother, and take custody of her child until such time as she demonstrates, 'to the satisfaction of the Court', the capacity for such a role.

The political rationale used to justify such laws may be perhaps prudential, rather than moral. But we still cannot prevent the effects of these kinds of decisions from spilling over into the moral sphere which the individual has defined for himself. What might be of purely practical import for the law-maker may be of moral significance for the individual.

We cannot keep politics and law from intruding into the private realm of morality. Nor are we accustomed to an idea of politics or law into which morality cannot intrude. Strictly adhered to, the conceptual division of politics and morality would remove such notions as equality, freedom and Justice from the realm of politics. Yet these principles have been essential to our attempts to mitigate the evils and injustices that may accompany political power. They justify the controls we place on political power, the legitimacy we bestow upon it and the demands we make of it. Indeed, as Weldon argues, "Dmocracy depends on moral philosophy, and does not include it as a by-product".[18] We may reject, then, any pretense by our political authorities to proclaim the Good and the Just. But this does not imply a rejection of the Good and the Just as guides for the creation and exercise of political authority.

It is because laws do have moral content and because they may have a moral impact that they pose a problem for the freedom of men to be 'good'. Because they have not only form, but also content, their validity is no longer the sole criterion for deciding whether or not they ought to be obeyed. We are required in fact to obey law, no matter how unjust, because of its validity. Because of its unjust content, however, the individual may decide that he has a moral obligation to disobey. He must then choose to do either what the law requires of him or else as his conscience dictates. His pre-

dicament is such that he may be punished if he chooses to be a 'good man'. But he cannot be a 'good man' if he abandons his own conscience and behaves in accordance with the judgment contained in the law.

We might note, at this point, that where a man is required to obey a law with which he is in full agreement, the problem created by the duty of obedience to political authority and law will have no measurable impact on man. In such an instance, we cannot tell whether he is obeying his own will or a valid law. It is where a particular law requires of an individual some action which he finds immoral, or prohibits him from acting for what he feels is the Good that the full impact of the duty of obedience is felt. It is where that duty is in doubt, where disobedience becomes a consideration and punishment a possibility, that our political obligation comes into definable conflict with the terms of moral existence.

The task of our theory of political obligation would be to explain how it is that obedience to such a law, so much at odds with one's own will, should be viewed with a sense of 'obligation', and not with a fear of the threat of punishment that lies behind it.

iii) The Theory of Political Obligation as a Necessary Link Between the Good Man and the Legitimate State

There is a sense in which the principle of separation

between law and morality does less to solve our dilemma than to clarify it. For the denial of inherent moral authority to political authority (absolutist or democratic) leaves political power and law to rest on little other than the fact of their existence. That power stands in need of a new justification if its laws are to be obligatory and not just commands backed by force. Obedience to a legal directive that lacks moral force - that can tell us only what we must do, not what we ought to do - requires a justification which obedience to a moral rule does not.

Why ought we to do what is legally required of us, especially when the conduct required in a legal obligation is contrary to what our moral rules prescribe? Why ought we to be good citizens if, in so doing, we are prevented from being good men? We do not usually ask why we ought to be good men or why we ought to do what is morally required of us (that which is 'right' for us to do). We do ask why we ought to do what the law commands. Our moral rules would appear to have a stronger claim upon our behaviour than do the laws of the State. H.A. Bedau weighs the relationship between law and morality in much this way. No one, he argues, ought ever to do anything "just because it is the law". He notes, in turn, the "heavy burden" that morality places upon a law "before it yields any authority to the law to guide one's conduct".[19]

The argument that, one ought not to obey a law simply because it is a law, implies that the question of obedience is itself outside the scope of law. This is not surprising given our principle of separation whereby law makes no pretense of binding the consciences of the men it seeks to regulate. For how can law, so conceived, possibly be obligatory in its own right? Thompson, despite his appreciative remarks on the 'authority of law', also places the question of obedience outside the framework of legal thought. 'Why obey?', he writes, is indeed a moral issue. But it has nothing to do with the authority of law. To obey is "something in me, not in the law".[20]

The argument that, one ought to obey law because it is law, is, however, the conclusion reached in law. From that perspective, where a valid law exists, so does an obligation. Those laws that are 'authoritative' (that are made by the men who have acquired the authority to do so by way of the system of rules by which such authority is conferred, and which conform to the system of rules by which they are defined as valid) are obligatory. For, within the confines of our grammar, as Pitkin suggests, to call a directive authoritative is to suggest that it ought to be obeyed.[21]

But these are logical facts built into the meaning of law in a constitutional system that defines authority and law in terms of rules, and not in terms of personal qualities or personal command. So far we have only been provided with

the explanatory circle of legal theory. By itself, the assertion that one ought to obey the law because it is the law merely re-asserts the legally obliging nature of a legal obligation. (Or else, as D'Entreves suggests, an unexplained value clause has been inserted into "what is otherwise purely and simply a tautology".)[22]

The full burden of that circle becomes apparent when we inquire of the authority of the more fundamental system of rules from which political authority and legality are derived. For the institutional jurist and the legal positivist, the legitimacy of these rules, much like the validity of more immediate laws, is a matter of fact. Where a law exists, it is valid (an invalid law is not a law). Where a legal system exists, it is legitimate. It exists if it works, if it gets itself obeyed.

Such an approach, as D'Entreves points out, leads us to the conclusion that no functioning legal system ever lacks legitimacy or authority. It necessitates that we 'take for granted' the essential authority of those rules that bestow authority on the State. Yet those rules themselves owe their existence to the fact that they are supported by the State.[23]

The self-justifying 'divine' State has been replaced, it would seem by the self-justifying 'juristic' State. To break that circle, the positivist or institutional theorist

may make the assumption that the fact of general obedience to law bears witness to the correspondence of the constitutional system with existing values in the society it regulates. Obedience is presumed to imply acceptance of the system, and with that acceptance, the system acquires authority. But obedience does not necessarily imply acceptance. The costs of such an assumption may be high, not only with respect to our ability to estimate the stability of a given political system, but also in terms of our theory. For in the latter instance, 'authority' may be bestowed upon a system that elicits obedience mainly by threat of force. And that is generally understood to be a contradiction in terms.

The State and its laws still seem to derive their 'authority', we would argue, from the fact of their existence despite the principles of constitutionality upon which that authority rests. We would not like to underestimate the advantages of the legalism to which such a notion of authority appeals: the provision for an orderly and predictable ascension to and execution of authority; the existence of devices for protecting men against the arbitrary abuses of political power and of channels for redressing any wrong; and the existence of devices for rendering political authority accountable and of channels for initiating changes in the political system and in laws.

But the existence of these legal channels by which man may approach government, while they may afford him some

protection against arbitrary rule, - do not, render him a free man under government and law. Nor does the existence of constitutional rules defining what is or is not legally authoritative power or valid law justify that power or make valid law obligatory. Those rules only set legal boundaries upon political power and law. They inform us of the extent to which we may be legally obliged to obey. But they do not explain our obligation to obey authority or law that conforms to those limits. While we may appreciate the limits that are placed on political power, these limits do not thereby 'moralise' that power or make it something that 'ought' to be obeyed.

Neither the possession of power, legal or otherwise, nor the fact of law are final words on the legitimacy of authority or the obligatoriness of obedience. Neither the source of law, the State, nor the meaning of law provides us with a reason for doing what is legally required of us. We must go outside the juristic circle for that reason. One's obligation to obey law, one's political obligation, is, then, something qualitatively distinct from one's legal obligation, and not explainable solely in terms of law.

The role we would assign to the theory of political obligation has to do with the relationship (or rather, the lack of any such relationship that we have noted above) between the Legitimate State (no matter how rule-bound) and the men who are its subjects. What is the relationship

between the authority of laws that can only tell men what they must do and the self-possessed authority of men who alone can tell themselves what they ought to do. If men are to have a 'duty' to obey law, then some link must exist between the consciences of men and law. Essentially, the gap between law and morality that is created by stripping political authority of inherent moral force must be bridged again. If the Legitimate State and valid law are to have any justifiable claim over the 'good man', then some link must be established between the good man and the good (obedient) citizen. In its absence, the factual supremacy of the demands of citizenship over those of morality rest on inadequate grounds.

The ultimate solution implied by this formulation of the problem is to present law as something to which obedience is morally obligatory. A justification of the power of the State and law on grounds of expediency, prudence or force cannot explain the supremacy of law and the right to punish the good but disobedient man. Only a moral justification can establish the necessary relationship.

If the obligation to obey law is to be a moral one, there would appear to be two approaches open to us. One is to represent that duty as self-imposed and hence a duty that has satisfied the pre-requisite of a moral obligation. The

other is to focus on the value of law - to represent law as something that 'ought' to be obeyed. These approaches are not completely separable. The self-imposed duty to obey is usually incurred in the light of the value we attach to law. But the problems attached to each are different. The first focuses on the origin of government and the right to rule, and hence on the obligatory nature of the act of consent; the second on the reasons for which we consent, and hence on the obligatory nature of the ends of government. For analytical purposes, then, we shall approach each argument separately.

II. Legitimate Authority; Consent and the Duty of Obedience

i) Consent and Legitimate Authority

The need for some theory of political consent derives from our initial view of man. As an autonomous, self-governing being, he cannot be subject to the will or power of others - unless he himself recognizes the authority of that power, or consents to his own subjection to it. Where that assent is lacking, comments Spitz, democracy's claim to obedience can only rest on power, not on "a universal morality".[1]

In the argument for obedience to law that derives from the theory of consent, it is our consent that bestows 'authority' (the right to make laws and punish the disobedient) on political power. Corresponding to this right to rule is a duty of obedience, a duty which depends essentially upon the correlation between legitimate authority and obedience. This right to rule and the duty to obey derive their moral force, their obligatoriness, from the obligatory nature of the act of consent, and not from the desired ends for which political authority is rationally (or selfishly) accepted. They depend neither on the

nature of authority as exercised, nor on the content of enacted law.

Specifically, we are assumed to have consented to the authority of the political and legal system as a whole, to the rules by which authority is conferred on law-makers and validity upon law. Hopefully, that would enable us to formulate a theory of obedience that would explain our duty to obey all law, without exception. All laws issuing from the 'accepted' process by which laws are made, even those which we do not find to our own liking, are obligatory. So long as a law is absolutely valid, made by the proper authorities in the proper manner, so too is our obligation to obey it absolute and unconditional. A man may still please himself as to whether or not he actually will obey, but having once consented, "what he cannot please himself about", it is argued, "is whether to acknowledge that the government has a right to be obeyed".[2] We may object, then, to a law because it is unjust, but we cannot challenge the right of the legislators to make it. We may, in fact, disobey that law because it is unjust, but we cannot challenge the right of the courts to then command our punishment for that breach of duty.

By consenting to political authority, then, we are assumed to have incurred an obligation to obey its laws. Because it is self-imposed, this duty of obedience satisfies

the minimum condition of any moral obligation - that it be freely assumed by those upon whom it falls. In keeping with our understanding of a self-imposed duty, and its fulfillment, it is not uncommon to find our obedience to law represented, not as a loss of freedom at all, but as something that should willfully and freely follow from our consent. For what a man orders on his own authorization, argues Rousseau, for example, can never have the force of law in a "compulsory sense".[3] Hobbes takes a similar stance. Where someone has been authorized to make laws, "he bindeth the author [the man who consents], no less than if he had made it himself".[4] Having authorized the making of law, it would seem that, in obeying those laws, the individual is only obeying himself. His voluntary subjection to law would seem to imply his voluntary obedience.

ii) Political Authority and Moral Men

By virtue of our consent, government and law acquire 'authority'. Consent theory thus encourages us to look upon law as something more than will or command backed by force. This is important for a theory of political obligation. For where the presence of force dictates our behaviour, the existence of an obligation is usually said to be impossible. The view of law as 'authority' and not 'might' enables us to perceive obedience to it in the voluntary terms that we traditionally attach to the concept of obligation and which is lacking in the latter view of law as command.

However, this view of law as an 'authoritative directive' has further significance for the individuals subject to it, given our understanding of the nature of authority (upon which there seems to be considerable agreement among our theorists). Authority, Benn and Peters remind us, contains within itself the very reason for obedience. Thus law, when represented as an authoritative directive, becomes, as they describe it, "a regulatory utterance for which no reasons need be given" for obedience beyond the fact of its authority.[5] Cassinelli, in a similar vein, draws our attention to the "relative insignificance of Truth, Goodness, or rationality" to the exercise of authority.[6] And there is Day who writes that obedience to a legal directive because of its authority must, of necessity, be irrational, "done without recourse to reason". For if we obey commands for good reasons, then we are not obeying them because of their authority.[7]

It would appear that where the presence of authority dictates our behaviour, any rational or moral force behind a legal command is of no consequence. We might conclude, then, that obedience to such a command because of the force behind it, be that the force of sanctions or the force of reason, indicates a breakdown of authority in the former case, and the irrelevancy of authority in the latter. In the former we can have no obligation in any proper sense. In the latter, the concept of obligation is superfluous. For such an

obligation to be relevant, law can be neither will (as our command theorists perceive it) nor reason or 'justice' (as our natural law theorists perceive it). That obligation pertains only where law implies authority.

Somewhere, then, analytically separate from the realms of 'force' and 'reason' lies the realm of 'authority', where law resides, and from which the rational and moral judgment of the individuals subject to it is excluded. There is little room here for our self-governing moral agent. Day comes to much the same conclusions. He notes that even though political authority "may be thought of as rational and moral because it is essential to a harmonious society", it also tends "to limit the subject's sphere of rational and moral decisions".[8] Therein lies the difficulty that a theory of obedience to political authority poses for men. It seems to invite an abandonment of individual judgment.

But a man can do more than just submit to political authority, Day tells us. He can still have opinions about good or bad.[9] Unfortunately this does not mean much in the context of our political obligation. For a man's private judgments still remain irrelevant to his duty to obey authority.

Without ever denying the right to individual judgment, consent theory renders that judgment of no consequence. In consenting to obey political authority, we are agreeing

to act according to the public will of the Sovereign. We are agreeing not to resist that Sovereign will where our own will dictates a contrary action. Men still have the right to <u>think</u> as they like, but they give up the right to <u>act</u> as they think they ought.

Hobbes uses the notion of consent to imply just such an agreement. It is the proliferation of these same kinds of judgments, and the chaos that he feels will follow from men acting independently according to their own wills, that prompts him to do so. As Campbell notes, for Hobbes, political authority is essential in order to provide the unity that is impossible precisely because of "man's penchant for attaching moral valuations to his conduct".[10]

Bedau seems to express the same fear and distrust of such independent action:

> We hesitate to allow that a man can know that he ought not to accept a certain policy if all he knows is that he has conscientious scruples against it. 11

A somewhat similar, and no less confusing position is taken by Spitz. "On intrinsic grounds. . . each man's conscience is right", he tells us. But at the same time he argues that this does not mean that a man has "a right to subordinate the laws to his conscience".[12]

Yet, the subordination of what we think to be 'right' or 'good' to the authority of law does not say much for the status of goodness and morality. Individual moral

judgment, previously held in such high regard that we sought to protect it from the claims of the State to moral authority, seems to have become 'mere opinion', more a matter of ideology perhaps, than a matter of right and wrong. Action in defence of one's own moral convictions seems to have lost its virtue. By devaluing such action, our notion of the 'good man' no longer has much significance.

More importantly, the denial (or voluntary abdication) of the right to such action according to private conscience wherever a law pertains (even where that judgment is deemed to be correct) also denies man the capacity to be good. It allows him only the luxury of thinking 'good thoughts'.

The assertion that he can still make such judgments seems to imply that the salvation of man as an autonomous moral being can be secured by granting him this right. That assumption itself implies a division of thought and action; and a division of man as well into a thinker (the moral being) and an actor (the obedient citizen). His freedom and his goodness are presumed to lie in this right to think as he likes, despite the lack of freedom to do as he thinks he ought.

But man cannot always be divided in this way. The 'good man' who holds pacifist (principles) does not return home unaffected by the (act) of killing in his role as a 'good citizen' at war with others. Indeed, the 'good man',

(the thinker) does not return at all if the 'good citizen' happens to be killed in the course of (acting) out his political duty to fight as commanded. The judgments a man holds and the actions he takes are intimately connected. Consequently, his liberty cannot be attached to only one faculty or the other. The man who can only think as he likes is not free. As Arendt, in her own inimitable style, suggests,

> Where knowing and doing have parted company, the space of freedom is lost.[13]

Nor is there any salvation to be had for the good man who is free to be moral only in mind and not in action. We can hardly attribute to him any responsibility for his actions where they do not derive from his own judgment. Nor can we attribute to him any power of self-determination that is in any way similar to what our liberal theorists had in mind. In effect, this separation of thought and action deprives man of the freedom essential to the human dignity that liberalism envisages for all men.

Ultimately that division renders both freedom and morality non-sensical. To the extent that they are internalized in the faculty of mind, morality and freedom are removed from the context in which they normally apply - man's behaviour and his inter-relations with other men.

Paradoxically, it is in precisely this realm of external action and human relationships that law is operative.

Yet, from the perspective of consent theory, obedience to those laws follows from their 'authority', not from any rational or moral judgment on the nature of the behaviour required. Such moral knowledge is irrelevant where law applies; but law itself applies to the only realm where moral action is possible. It would appear that as the State gradually expands the scope of its laws, we can progressively rid ourselves entirely of the burden of morality in our existence.

The right to one's own judgment on good or bad is, we would argue, a rather hollow victory for our 'good man' which tends to obscure the real impact of his presumed submission to political authority: in his obedience to the laws of the State, man is not fulfilling his own moral will, but the will of others as contained in those laws. He behaves as others think he ought. He seeks the 'good' which others think he ought to pursue. He does not have, as Gough notes, human liberty, the liberty to do good or evil (which would be incompatible with political authority). Under government and law he has only civil liberty, the liberty to do only good.[14] And that good will be defined for him.

The behaviour required of our good citizen by this theory of political obligation, that derives from the notion of consent appears to be much more like the "morality of the 'good child'" (as Campbell so aptly describes it), than

that of a responsible adult.[15] It involves an abdication of personal responsibility that is legitimized by an appeal to the 'authority' of law, to which willing and unconditional obedience is due. The individual may object, but in the end he must defer to that authority. And responsibility for his actions will be borne, not by himself, but by the makers of law.

Yet, contrary to parental authority, political authority aims not at its own dissolution, but at its own perpetuation. By his own consent the individual is presumed to have placed himself in this perpetual State of childhood. However, the fact that his subjection to government and law might be voluntary does not alter, we would contend, the impact that such subjection has upon the 'good man'. Whether he consents or not, man does not have the personal liberty to which Gough refers. He may have what Tussman calls 'political liberty' which, he writes, "does not turn on an absence of law but on whether the law is self-imposed".[16] (Locke makes reference to a similar type of freedom: the liberty of men in society which consists of their being "under no other legislative power but that established by consent".[17]) But the liberty a man has <u>under</u> government would appear, then, to be not at all the same as the personal freedom so essential to his moral behaviour, the freedom that consists of his will not being subject to any other will. Nor does the possession of that political liberty appear to guarantee the possession of personal liberty.

In fact, obedience to political authority, whether we have consented to it or not, implies the loss of just that freedom or right to act according to one's own moral will. The authority of that will is subordinated to the authority of law. And the 'good man' is subordinated to the 'good citizen'. Such is the very nature of our present situation under government and law, the situation which consent theory purports to explain. The 'good man' can, in fact, disobey laws against which he has conscientious moral scruples. The freedom he possesses to do so cannot be successfully curtailed in any practical sense. But the threat of punishment that lies behind law is a fairly explicit statement on the attitude of the State. The threat exists to discourage men from exercising their freedom to act according to conscience or any other force where it might involve breaking a law. The actual punishment that follows such a breach serves to deny that men have any 'right' to use that freedom or power they have to disobey, even where they may have a moral obligation to do so. Consent theory does not restore this right. It suggests only that in the very act of authorizing others to make laws for us, we have 'freely' abdicated our freedom to act according to our own moral will.

The subordinate status of individual judgment and the obligation not to act upon that judgment in contravention of a valid law are derived from the fact of our consent. So too is the right of government to punish us if we do disobey.

But what is the obligatory nature of this act of consent by which the above right and duty are justified? How does our consent to political authority render our obedience to it morally obligatory?

iii) The Obligatory Nature of Consent

Why does the man who consents to obey law therefore have a duty to obey law? The answer to that question lies in the common assimilation of the notion of consent or contract with that of 'the promise', and in the equally common assumption that promises are themselves obligatory.

Along these lines, Weldon argues that without the self-evident moral law that one keep one's promise, the problem of political obligation would be acute.[18] Similarly, Tussman comments with regard to the notion of consent, that if we didn't accept that such agreements should be honored, then "the attempt to solve problems by making agreements would be futile or silly".[19]

Pitkin, too, writes that the making of contracts presupposes "the social institution of promising". And she agrees that such self-assumed obligations do oblige. She further notes, however, that the obligation to keep one's word is not itself an obligation that is self-assumed. Nor is the obligation to keep a promise itself founded on a promise. Rather, the obligation to keep one's word rests on the meaning of the words "I promise" or "I contract". We

do not need to go beyond the grammatical implications of these words, she concludes, in order to explain the obligation that arises from them. Thus, the man who consents to obey law has an obligation to do so because that is what the words "I consent" mean.[20]

In keeping with her linguistic approach, Pitkin calls a breach of promise or contract a "philosophical disorder or paradox". Tussman, however, calls it a "moral disorder". There is a significant difference between the two. In my opinion, Pitkin's paradox is more sensible in certain circumstances than is Tussman's moral disorder. The latter phraseology suggests that it would be immoral to break a particular promise even which, if fulfilled, might lead to evil consequences. In the former instance, however, we can at least recognize that it is not always 'good' to keep all promises, nor that every breach of promise is immoral. Indeed, the occasion might arise where the only morally correct action open to the individual is to break his promise.

In other words, it is really only 'good' to keep good promises. To those who are unimpressed by the inherent tautology contained in such a proposition, we can only express our own scepticism about the alternative proposition that it is good to do evil where it is required of us by a promise. (Or that we have a moral obligation to commit some immoral act required by law because we have consented to obey the law).

This is not to deny that we fail to fulfill an obligation when we do break a promise. But it does deny that we are necessarily being immoral when we do so. What we are suggesting here is that the right and the obligation that derive from a promise have their co-relation both in logic and morality. But the logic and the morality do not always coincide. The 'logic' of the promise has to do with the words that are spoken. Pitkin has shown us the meaning of those words. The 'morality' of the promise, on the other hand, involves much more: the nature of the relationship that arises from a voluntary agreement, the nature of the agreement itself, and the consequences of that agreement. The obligatory nature of the promise holds, in logic, regardless of the nature of the promised action or its effects. Such is the conclusion, notes Raphael, that is reached by Hobbes. That is, "It is not necessary in fact. . . but it is necessary in logic. . . to obey a non-rational obligation."[21] The obligatory nature of the promise holds however, in morality, only after careful consideration of the agreed upon action and its effects. It may thus be necessary, in fact, to disobey a non-rational or immoral obligation arising from a promise. In breaking that promise, we may be wayward in our duty in a logical (grammatical) sense, but we are not necessarily morally remiss.

The theory of consent, as we have noted, uses the language of "the promise'. We would argue, however, that

it rejects these underlying sentiments that enter into the morally obligatory nature of the promise. It takes the form of the promise, but rejects the relevancy of content. It adopts the commitment of the promise, but rejects the underlying flexibility without which rational, moral men might never make such commitments. The argument that we cannot disobey laws issuing from the political process to which we have consented clearly assumes the inviolability of the act of consent. Having promised to obey, we are not at liberty, nor do we have the right to break our implied obligation, even in the particular case of an unjust or irrational directive.

In effect, the theory of consent adopts the logic of the promise but not the morality of it. The right of the courts to punish us if we do disobey addresses itself to that logic. Being 'purely' logical, however, this theory of political obligation fails to address itself to our 'good man' or to the circumstances in which he finds himself. His political obligation is reduced to a matter of words (as so notabley in Hobbes[22]). That obligation exists in a vacuum, logical, but nonetheless devoid of content and removed from the situation to which it must apply. It has little bearing upon the substantive moral duty an individual might have to disobey in a particular instance where 'keeping his word' would necessitate that he commit some injustice.

Indeed, this theory of political obligation seems strangely irrelevant to the question of whether or not a law ought to in fact be obeyed. If it is consent alone which defines legitimate authority and the duty of obedience, then a government can be legitimate and law valid without ever resolving the actual question of obedience. Our consent would be inadequate to conclude that question so long as we can still inquire as to the nature of the behaviour required by a law and its consequences. As rational, moral beings we are entitled to and would normally make such an inquiry. And we are further "entitled to and obliged" to disobey laws, even those to which we have consented, where our "moral judgment finds them inappropriate" in certain circumstances. Such is the obliging nature of our self-imposed moral duties. And such would be the morally obliging nature of the act of consent. When the notion of consent is understood, however, as an inviolable act, the obligation that follows is not moral, but logical. Such a theory of obedience cannot tell us whey we are morally obligated to obey the laws of the State, but only why we are logically obligated to do so. It thus fails to establish a link between the 'good man' and the 'good citizen'.

But peculiar to this self-imposed duty of obedience to government and its laws is, as we have noted, the subsequent irrelevancy of these same powers of rational and moral judgment before the political authority to which we

are consenting. The moral nature of the content of that act, that is of the specific relationship it sets up and its implications is, like its 'obligatoriness' open to question.

On this subordination of rational, moral judgment to political authority, Strauss comments,

> The supremacy of authority as distinct from reason follows from an extra-ordinary extension of the natural right of the individual. 23

On the basis of his natural right to self-determination, man is empowered to create an authority and subject himself to it if he so wishes.

This idea of men being able to create authority enables the contractual theorist to argue that the act of consent by which political authority is rendered legitimate, itself justifies the 'right' of government to rule and the 'duty' of men to obey it. McPherson questions this arguing that, to assume an obligation does not necessarily justify being obliged.[24] Nor, presumably, would our consent to the rule of another necessarily justify that rule.

Most contractualists appear to be sensitive to this point when they direct their attention to the issue of slavery and tyranny. Men are not generally assumed to have the right to commit themselves to the rule of a tyrant. Both Locke and Rousseau reject the 'legitimacy' of such an

absolute and arbitrary power. (Hobbes neither affirms nor rejects the tyrant. He manages to obviate the problem by defining tyranny out of existence). The difficulties attending the idea of consent and its relationship to the notion of a 'legitimate' power can be found in the classical argument on slavery. It is allowed that one man can consent to actually be the slave of another. However, what he cannot do, it is argued, is bestow on his master a 'right' to his obedience. Nor can he incur a 'duty' to be a slave. The relationship is prima facie unjustified and immoral. And it cannot be made moral by the act of consent.

There are limits, it would seem, to what a man's natural rights empower him to do. More accurately perhaps, there are limits to the way he can use his language to describe the world and his relationship to it. Thus, he cannot use the language of 'rights and duties' in a situation, such as tyranny or slavery, which is inherently devoid of any semblance of legitimacy. Nor can he use a notion such as consent to render the situation legitimate.

But what of the relationship between the citizen and his government? Is the fact of his consent sufficient to justify that relationship such that government might sensibly have a 'right' to rule and the individual a 'duty' to obey?

We have already suggested that the use of consent does not really enable us to distinguish the unconditional

willing obedience to political authority that is common to the citizen-State relationship from the behaviour that characterizes the master-slave, or father-child relationship. Whether an individual has consented or not, where he is ruled by others he is neither free nor self-determining. Our question is whether man, on the basis of his natural right to the freedom to determine his own life, can renounce that right and commit himself to perpetual childhood? Can he subordinate the exercise and fulfillment of his own rational and moral will, the very faculties by which he has been defined as a man, to the will and dictates political authority? Can he "renounce his essential manhood"?

While we must allow that a man can indeed consent to his own subjection to political authority, it is not at all clear that through such consent government can acquire a moral 'right' to rule nor that the individual can thereby incur a moral 'duty' to obey. For it is not clear that the relationship itself is a morally justifiable one.

How one views that relationship would depend, to some degree, upon the seriousness with which one viewed some of the consequences. For some the loss of the absolute freedom to govern their own lives may not be too bothersome, given the advantages of government. In her book on Anarchism, however, April Carter notes how others may perceive the lack of freedom to act according to one's own will as conducive to a neglect of individual critical judgment and personal

responsibility - of the sort common, for example, to "the 'somnambulent heroism' of those who go to war and commit atrocities".[25] The anarchist would stand opposed to the citizen-State relationship as one that is detrimental to the human character, and at times destructive of morality and Justice.

A more troublesome (and less subjective) issue, the one which Strauss raises, is that of man voluntarily incurring a duty to abandon reason and morality in favour of authority. Firstly, the possibility arises of a man incurring a moral duty to commit some injustice, as might happen where he must obey all 'authoritative' directives, good or bad. We would question whether such a situation is really sensible. Can an unjust law or immoral directive ever be obligatory, something that 'ought' to be obeyed? To us that seems prima facie nonsensical.

We would further question the very idea of men being able to render authority supreme to reason and justice by a simple act of will. Men may in fact respond to political power as though it possesses supreme authority. Whether or not it actually does is another question. The underlying assumption, that men can themselves create authority as opposed to merely recognizing it where it exists, is perhaps at the root of our difficulty here. Complicating this situation, however, is the rather unsubstantive character of authority and law in the government that derives its

legitimacy solely from the act of consent. Laws are authoritative not by virtue of their content, but regardless of that content. And men in government possess authority not by virtue of their wisdom and knowledge but by virtue of the office they hold and the rules defining that office. The incompetent Representative does not lose his authority to make decisions affecting our lives because of our estimation of him, until he also loses his office.

That authority of this sort should reign supreme over reason and morality, as a result of our consent, necessitates that we accept what would normally be a self-contradictory proposition - that the irrational, the immoral and the unjust, so long as they are legalized, have supremacy over their opposites. In other words, the notion of consent is being used to legitimize or to bestow authority upon directives that would otherwise lack legitimacy simply because they are contrary to the good and the just, and hence the 'right' course of action.

In the modern State this type of authority, inspired by and bound only by rules, may well be necessary and valuable. However, its peculiar lack of content would lead us to suggest that we ought not to be took quick to apply to it the same meaning as is generally implied by other non-political concepts of authority (i.e. they 'ought' to be obeyed). For that equation distorts or obscures a fundamental difference between political authority and our social

authorities. The scientist who acquires his authority as a result of his expertise and knowledge, or the social rule that derives its authority from its intrinsic content might properly elicit willing and unquestioning obedience. But we ought not to necessarily look upon the formalistic authority of government and law in those same unconditional and dutiful terms.

This would seem to imply, again, that political authority can be 'legitimate' (we have consented to it) without being obligatory. Alternatively, we might argue that legitimate authority is indeed obligatory, but that in order for political power and law to be truly 'legitimate' they must display more than a simple conformity with the rules of procedure and legality to which we are presumed to have consented. In either case, the relationship of consent to the obligatoriness of law seems to be restricted. In the latter case, the relationship of consent to the notion of legitimate authority is also restricted. It is this approach which we find more compelling, for it suggests limits (not unlike those commonly applied in the case of slavery) upon the capacity of man to create authority or to render legitimate that which is inherently not so. It allows us to distinguish between the existence of authority and the recognition of authority; similarly, we can avoid confusing the pre-condition of having an obligation (that we recognize an action as 'good') with the 'goodness' of the action itself.

Pitkin seems to recognize these distinctions when she suggests that legitimate authority is not the product of consent at all. It is, rather, "the kind of authority one ought to consent to". Thus,

> You are obligated to obey not really because you have consented; your consent is virtually automatic. Rather, you are obligated to obey because of the certain character of government. . . 26

By using consent thusly, as an after-the-fact rather than a before-the-fact concept, Pitkin manages to avoid the problems attending the notion of man 'creating' an authority which is removed from reason and morality, at the same time that it is given some artificial priority over them.

She also avoids the displaced emphasis on 'will' from which we feel consent theory suffers. That is, the theory of consent, wherein it is argued that since we voluntarily submit to law, law is therefore something that we ought to obey (regardless of what it is), is too narrowly concerned, we would argue, with satisfying the pre-condition of having such an obligation, to the neglect of what man can or cannot consent to, and to the neglect of what is or is not capable of being morally obligatory. A more balanced approach, and one that is implicit in Pitkin's view of consent, is to argue that in order for law and authority to be morally obligatory we must think of them as something we ought to obey and therefore do obey voluntarily. There is added value in such an approach in that,

apart from continuing to represent the duty to obey law as self-imposed, it is also probably closer in its understanding of what men do when they consent to government. That is, their acceptance of authority does not occur in a vacuum. To the contrary, when men authorize others to rule them, they generally have a certain kind of government in mind. Their acceptance of law is purposive, and their vision of what kind of authority would be acceptable is determined by values that affect its legitimacy. In other words, the idea of consent, as Benn and Peters note, usually admits of legitimate authority only when it satisfies certain moral criteria.[27]

But perhaps, then, it is not so much a matter of whether a man has the right to subject himself unconditionally to law; nor a matter of whether he can 'legitimize' unjust laws by his consent; but whether or not he actually does so. The suggestion that men do consent to government and law is itself factually dubious. But then the principle of consent is only offered as a conceptual aid to our understanding of the man-State relationship. Even so, however, the significance of this device tends to rest on how we already understand that relationship and on what we want the concept to explain. Accordingly, consent is often used to justify two alternative situations: either the subordination of the individual to the State; or the vindication of his rights against it.[28] In the former, man's submission to

the State is assumed to be absolute; In the latter, it is assumed to be conditional.

iv) The Duty of Obedience: Absolute or Conditional

Being a most avid proponent of the absolute subordination of the individual to the State, Hobbes draws up a contract of submission to secure the citizen's absolute duty of obedience to Leviathan. In that State, the individual has no right to disobey or resist even tyranny. He has only a duty to obey all law. As a subject, he is held accountable for every breach of duty. Alternatively, and herein lies the real essence of the contract of submission, the Sovereign has no duties to his subjects for which he can be held in account. For that would imply that the subjects hold a corresponding right on the basis of which they might justifiably disobey. The Sovereign does have duties; to maintain in existence a system of political authority and law; and to make good (needful) laws. But they are not duties to his subjects. For he is "obliged by the law of nature to render an account thereof to "God" and "to none but him".[29] In Hobbes' contract, then, a breach of duty by the Sovereign does not constitute a grounds for the subjects to disobey. Were the situation to be any different, the Sovereign could not truly be Sovereign.

The justification for this absolute lack of any right to disobey, even where the government is in breach of its

duties, derives from an interpretation of consent as an act of submission. However, an alternative interpretation of consent lies in approaching it as a construct for justifying just such a right of disobedience. Seliger, for example, suggests with regard to Locke, that "it was for the purposes of justifying revolt that he accepted the principle of consent".[30] And Riley argues, with regard to Rousseau, that consent and contract theory were for him "more a way of destroying wrong theories of obligation and authority than of creating a comprehensive theory of what is politically right".[31] This use of consent suggests not an acceptance, but a rejection of the absolute right of government to command obedience. It aims at securing precisely that right of disobedience which is given up in the contract of submission. It does so by imposing limits on the duty of obedience; our consent and our obligation are understood to be conditional. These conditions can take the form either of restrictions upon the kind of power that men need obey (commands overstepping these limits lack 'authority' and hence are not obligatory); or they can take the form of demands that men make of government. That is, political authority is defined not only in terms of the rights it has over those who consent, but also in terms of the duties it has to consenting individuals. And the government which fails to perform those duties or which thwarts the achievement of the ends for which men accept it loses its authority.

This conditional, rather than absolute moral duty of obedience is certainly more accommodating of our ethical individual. Similarly, the conditional use of consent is more compatible with the morally obliging nature of a self-imposed obligation than is its interpretation as an inviolable act. And it would also appear to be more compatible with liberal-democratic theory than is the Hobbesian act of submission. In our State, for example, we are more prone to argue that the duties which befall government, those of establishing the rule of law and of pursuing justice, freedom and the common good, are duties which it has towards its citizens. And it is to those citizens that government is accountable. Similarly, in Hobbesian theory all alternative grounds (moral or otherwise) upon which disobedience might be justified are rejected. But in democratic theory, as Weldon notes, while a strong prima facie case for obedience is attempted, such a duty is generally perceived as "one that is subject always to a liability to a morally legitimate infringement when circumstances warrant this".[32] Benn and Peters testify further to the 'limited' nature of this obligation in the liberal democratic perspective when they write,

> The right to criticise and censure a government, and the right to exercise a vote to remove it is a practical recognition of the principle that the duty to obey, understood as a moral duty, must always be conditional. . . 33

However, the 'conditional' acceptance of this duty suggests to us the existence of a linear relationship between the duty of obedience and the right of disobedience that this notion of consent supports. Thus, in the event of a controversial law, the conflict is not necessarily between what one ought to do morally and what one ought to do politically (or logically, as Hobbes would have it), but between what one ought to do and what one ought not to do. In other words, the possibility arises that the obligation to obey a law does not merely conflict with another (moral) obligation but actually ceases where an obligation to disobey that law occurs. And if the duty to obey does not exist, nor does the right of punishment.

Unfortunately, this conclusion is somewhat removed from our present situation. Any such act of disobedience is always subject to punishment. For in the practical application of law and authority, our State operates according to principles that are hard to distinguish from the contract of submission that Hobbes defines for us. There is no law to which obedience is not obligatory. And, while the government may have duties to its citizens, failure to perform them, quite simply does not constitute justifiable grounds for disobedience. We might argue even further, that our governors, unlike us are not punishable for any breach of their political

duties. They may lose their authority (their 'right' to rule), if they are voted out of office. The laws they make may also lose their 'authoritativeness', if they are declared invalid. But we may go to jail, not only for a breach of our duty to obey, but also when we exercise the ultimate right by which we render government accountable to us, that is, our presumed right to disobey. Our rulers, it would seem, are, with respect to their duties, in the end accountable only to God.[34]

If the contract of submission (that espouses the inviolability of the act of consent) fails to address itself to the 'good man', the 'conditional' theory of consent does so, but fails to explain, we would contend, the absolute right of punishment exercised by the State. This latter use of consent also substantially alters the nature of our theory of political obligation. For it directs us away from the act of consent as the origin of legitimate authority (as Pitkin suggests, "your consent is virtually automatic"). Instead, it turns us towards the 'conditions' or "certain character" of legitimate authority - that is, towards the nature and ends for which government and law are accepted.

In the following chapter, then, we shall ourselves turn to this theory that derives the legitimacy of authority and the duty of obedience from the ends of government. We

shall pursue the problem of disobedience, looking, in particular, at the principle of the common good by which the right of punishment is ultimately justified in this argument.

III. The Value of Legality and the Duty of Obedience

If the duty of obedience does not derive solely from the act of consent, nor do those laws, as we might recall, contain within themselves the necessary "elements of obligatoriness". D'Entreves has suggested a further possibility. Rejecting both the self-justifying juristic arguments and the 'origin of government' theories, he writes that, for laws to be binding, "that is, true ought-propositions and not mere statements concerning the use of force by the State", then some value must be placed on the system itself.[1] The value of legality, we would suggest, resides in the ends which government and law are designed to pursue and for which they are accepted. They are understood, here, to be the reasons for which government and law 'ought' to be obeyed. Our two questions, again, are: What is the nature of the obligation to obey that derives from a consideration of these ends? And, can such a theory of obedience be reconciled with the existence of the 'good man'?

i) Freedom: Order and Security

The laws of the State, it is argued, bring to our communal lives an Order without which there could be no freedom and no morality. The law brings a measure of predictability to the inter-relations between men; it brings security; it protects. Without these, justice between men, and the freedom necessary for individual human dignity and moral existence are both precarious, if not impossible. It is only through law that such Order is attainable. Therefore, we ought to obey law. In this way obedience to law is represented not as a loss of freedom at all, but as a gain.

Allowing the rather close identity of Order and stability that is implied by this approach, several questions still remain. The first concerns yet another equation made between Order and the laws of the State, and the subsequent assumption that since Order is essential to freedom, then these laws are equally necessary. Our question is, if we do need Order and security, do we therefore need the State?

Whether the State and its laws are vital to the existence of our free, moral agent has yet, we would contend, to be finally demonstrated. "It is not at all obvious", as Pitkin notes, "that government and law are indispensible to human social existence".[2] Spitz pursues the question more

closely, arguing that the very equation of Law with Order, upon which the assumption of 'indispensibility' would appear to rest, is itself unsound. Law does not create Order, he notes. Custom, moral codes and sentiments do.[3]

But the law 'protects' the individual, it is argued. Here, the type of 'freedom' secured by law appears to refer to the restrictions law imposes upon the actions of other men, and hence to the protection we ourselves gain from abuses by other men. We cannot ourselves be free unless others are restrained or have their freedom restricted so that they cannot infringe upon our own liberties. The free man would appear to be the secure man, the protected man.

But if our own liberty depends upon the imposition of restraints upon other men, it has not yet been explained why our own compliance with those restrictions is obligatory or even necessary. If that protection is not forthcoming unless we too obey, then, in the interest of self-protection, it would seem like a very good idea to obey. But do we therefore have a duty to obey?

On the whole, the connection implied here between the notions of protection and obligation is not all that clear. It is not a connection that we draw in all such circumstances. A women, for example, may choose to become an 'obedient wife', if her personal security is not otherside attainable. However, whether the husband who protects his wife thereby derives a

'right' to command her and she a'duty' to obey is not at all obvious.

It is the emphasis on self-protection and personal security[4] that is perhaps the cause of our difficulty here. For it reduces our political obligation from a matter of ethical principle to one of self-interest or prudence. Yet, as Brown argues, the very suggestion that we have a 'duty' to obey law for reasons of self-interest (or for other practical purposes) itself confuses a valid reason for obeying with a reason for obeying as a duty.[5] It is much like telling the man who wishes to cross the river that he has a 'duty' to walk down to the bridge; where all we really mean to say is that he 'ought' to walk down to the bridge; that it would be a good idea if he did so. But this peculiar sort of prudential obligation, as it is sometimes called, is simply not very amenable to the concept of duty that we wish to attach (and that we normally do attach) to our concept of political obligation.

Law may be valued, then, out of a desire for self-protection, however, the relevancy of 'duty' to this value is questionable. But so too is the underlying identity of the free man with the man protected by the laws of the State. Here again, we would question the 'indispensibility' of law. As Wollheim (much like Pitkin and Spitz) has noted, while the

restraint of others is indeed necessary for our own liberty, this does not imply that law is a necessary pre-condition for that liberty.[6] Men can and do restrain themselves, without laws; they do so as their 'customs, moral codes and sentiments' dictate. (And in that self-restraint they are free in a way that they cannot be free when they are restrained by laws imposed from without by the State.)

Indeed, we would suggest that the efforts of the State to protect men in a society wherein such self-restraint was not prevalent would probably be quite ineffectual. Similarly, the Order that we also need exists independent of the State and its laws; and if it did not, those laws would not likely be very effective in bringing it about. We may wish to call the 'customs and moral codes' that underlie this Order laws in themselves, because of the patterns of behaviour that they define and the restraints they place on men's behaviour. But this says nothing, we would argue, about the rules of behaviour and the restraints imposed on men by the State or why we ought to obey them.

Our intention here is not to argue for the uselessness of government, but only to suggest that we are perhaps misplacing our values if we obey out of a fear that without the State and its laws, we cannot be free, or that human dignity and goodness will not be possible, or that

Justice cannot prevail (the pre-condition for the achievement of these values may be Order and security of person, but not necessarily the State); and to suggest that we ought to expect something different or more from government.

Indeed, we would argue further that it is not Order and protection that we need to realize these ends, but a certain kind of order wherein certain kinds of liberties are protected. That is, even if we were to assume that the State was essential to social order, we cannot therefore assume that these ends have been reached. For, we cannot assume that the peace or stability that is equated with the order secured by law (or in its absence, for that matter) is a just one; or that the individual who is protected by law is therefore free. Hobbes would disagree. By equating the stability and security provided by law with freedom, justice and life itself, the need for Order appears, to Hobbes, to be sufficient to justify the power of the man that can create it; and the need for individual security appears to justify the power of whoever can protect us. But where Hobbes claims that law can never be unjust or oppressive, "For it shall never be that war shall preserve life, and peace shall destroy it"[7], Locke asks, "What kind of peace is it that protects oppressions?"[8] Locke, like us, rejects any attempt to equate Order with freedom and justice, and with it the underlying assumption that violence, insecurity,

injustice and oppression are only (and necessarily) attributes of the State of anarchy. In fact, these may also be attributes of the political order secured by the State, perhaps even guaranteed by the laws of the State in which they may be entrenched.

Contrary to Hobbes, laws can be unjust, they can oppress, and they can destroy life. Men prohibited by law from ever leaving the confines of their home may be well protected from one another and from the world, but they would not be free. Laws providing for the execution on the spot of all suspected criminals may eradicate crime, but they do not allow for justice. Laws requiring the conscientious objector to fight or provide financial support for a war may be defended in the name of national security; but that security is achieved at the expense of his own goodness and self-dignity. How can we appeal to the homosexual to obey laws that prevent or restrict him from being what he is by explaining that the domestic tranquility gained will provide him with a greater opportunity for self-determination and human dignity? How can we ask for obedience to laws that define and support the existence of a slave class, laws which may be of great benefit to the economic security of a political society, but which cannot be defended as having made justice and freedom possible in that society. Why ought such laws to be obeyed? How do we justify punishment for

disobedience to such laws that are so contrary to the ends for which legality is valued and from which the duty of obedience is derived?

Order and security, then do not always appear to be compatible with the freedom they are supposed to increase. It is even possible for a particular order to in fact negate the very conditions for which it is the presumed pre-condition. Thus we would argue, as does Spitz, that the value of Order, far from equalling the 'harmony' or stability that exists, is conditional upon other values; and that Order itself "is not a sufficient condition for these realization of these values".[9]

This is quite important for our theory of political obligation. It suggests that the duty of obedience cannot be deduced from the need for Order by itself, without any qualification on the nature of that order. To argue otherwise may lead us to assert a prima facie obligation to obey laws that secure even the most unjust and evil of political orders, so long as peace and stability reign. For these can be secured just as readily, perhaps even more readily, by an oppressive tyrant, as by a constitutional legislature. We may find ourselves under an 'obligation' to obey such a ruler; and in accordance with that obligation, our ruler would have a corresponding 'right' to punish us for any

disobedience. That, we would suggest, distorts and devalues two rather important words.

Order, then, as a value and as a reason for obedience, is of a highly conditional nature. Precisely because it is the condition and not the pre-condition that we seek through law, Order is of value, and therefore compelling only under certain circumstances; for the very same reason, the mere existence of some sort of order or another does not inform us as to whether legality is in fact serving (or prohibiting) our original purpose, the reason for which we value it.

Like the Federalists - "Justice is the end of government. It is the end of civil society."[10] - we would also contend that that purpose is not merely Order; but that we have a certain kind of order in mind when we accept government - that is, a just order.[11] It must certainly be so if obedience to law is to be compatible with the moral activity of our free, ethical agent. As a means to that just order, legality may be of considerable value. But that value is itself conditional, as would be the duty of obedience that it gives rise to, upon the nature of the actual order secured. Whether or not obedience to law can be reconciled with or said to represent an increase in the freedom essential to individual moral activity will inevitably depend on the

actual content of the restrictions imposed and the actions required by law. A great deal thus depends on whether or not the laws are just ones.

An obvious question arises here, of course, as to what constitutes a just political order or just laws. In response to this, the 'common good' is usually offered as the substantive principle for the final legitimation of authority, and as the conclusive answer as to why one ought to obey the law.

ii) Justice and the Common Good

The principle of the common good provides both a limitation on political power - that it not rule in its own interest - and a justification for political power:

> In the exercise of authority, the use of force can be justified only in the name of the common good. 12

As an ethical principle, the common good implies the existence of a moral duty of obedience, and purports to offer an ethical justification of punishment, both of which are lacking in the foregoing prudential calculation of government and law as a means to personal security and self-protection. As an extra legal principle to which laws must conform, the common good also opens the discussion of legitimate authority and the duty of obedience to include the nature of authority as it is exercised, and the content

of law.

As an ethical principle in the name of which one would have a duty to obey law, the common good implies a moral attitude towards the community as a whole. It implies that the subordination of the rights and interests of the individual to the claims of the community rests on a moral basis. The good of the community, the maintenance and servicing of its needs and rights is understood to be the purpose of the polity and the end of law. Law, insofar as it aims at the common good, is obligatory.

It is apparent that the common good will not be an easy principle to fit into the liberal democratic framework that holds the individual, not the community, to be the ultimate end of any process, including government. For notably absent from liberal theory is any suggestion of an obligation to seek any good in the name of the whole, regardless of where one stands in relation to that whole. Indeed, the fundamental element of liberalism, as Sabine reminds us, is the,

> ...refusal to contemplate a social good which demands merely self-sacrifice or self-abnegation on the part of the persons who share and support it. 13

The freedom and dignity of men are seriously threatened, from this liberal perspective, by any law requiring them to act simply for the good of others.

Nonetheless, liberal - democratic theorists hold, it seems, "a primary commitment to individual realization within the framework of the common good."[14] A major problem thus facing any discussion of the common good would be that of reconciling these collective values with individual values, the rights of the community with the rights of the individual, the good of the community as an end with the good of the individual as an end. In particular, why should the rights and interests of the community take precedence over private rights? How can the liberty of man be reconciled with laws that aim at the good of the community especially if that public good should conflict with his own particular good?

The advantage of the common good becomes clear. Through it we can obviate the need for any such demand to be made of the individual. For, as Hobbes argues, "the common good differeth not from the private".[15] Or, as Locke suggests, since "no man would change his condition with the intention that it be worse", men would only accept a government that extends no further than the common good[16] (the implication being that the common good is consonant with the betterment of the individual's condition). And of course, there is Rousseau:

> The unity of myself with others in a common good is the same in principle as the unity of myself which I aim at in aiming at my own good. 17

The significance of this 'unity' for our theory of political obligation is twofold: it provides the individual with a motive for obeying in the name of the common good; and at the same time, his liberty is preserved, even in the act of obedience. For the common good is also his good. In his private enjoyment of ends 'common' to others, man can both be free and subject to law. Indeed, the obedience of man to man is an illusion. He obeys only himself. For those laws, writes Rousseau, "are nothing but the record of what our wills have decided".[18]

The argument, however, that the interests of the community are our interests, that "we cannot labour for others without at the same time, labouring for ourselves"[19] seems to be less an explanation of our political duties, than it is an evasion. For it tries to secure our obedience without ever mentioning moral will or duty. Our attention is diverted from the moral issue and directed to the personal advantages that are to be had from obedience. And the common good appears to be less a matter of ethical principle than one of self-interest. (As such, the notion of duty, as we have noted earlier, is not relevant.) Nor can the fact that the ends sought by government are 'common' be relied upon to provide the common good with a moral character. For 'commonality' does not enable us to distinguish between purely practical goods (or self-indulgent goods) and goods of moral significance (goods that we would

have a 'duty' to seek).

A further question that arises where the individual obeys laws because they aim at the common good which is his good, laws that are a record of his own will, is whether he is equally justified in disobeying a law that conflicts with his own interest. Why ought he to obey a law which contravenes his own will, a law to which he does not give his assent?

So long as one adheres to the characterization of the common good in terms of individual goods, and so long as one assumes that the laws do in fact aim at the common good, this situation should not arise. That laws which aim at the common good can never conflict with the good of the individual becomes a truism. And one's presumed obligation to obey those laws would be perfect. There would be no reason to disobey.

Our only difficulty would seem to stem not from any conflict between the good of the community and that of the individual, but from our dependency upon those who make the laws to speak for the 'whole' community. We must rely upon them to discern the common good that is the object of the will of all men in society.

Yet, the order of values underlying the views men have on what goods are worth purusing, or what freedoms are worth preserving (or not worth preserving) is far from a

settled question. It thus seems likely that some discrepancies will arise concerning what men consider to be a common good or for the good of society. Since the authority conferred upon men to make laws gives them no monopoly over rational and moral powers of judgement as to what constitutes that good, what then is the 'authoritative' nature of their voice? Therein lies the peculiar difficulty which the common good presents for our theory of obedience. We may indeed have a duty to seek the common good. But as an ethical principle involving a moral judgement, that notion has nothing to do with the formal principles of political authority and law (assuming it is the content of law to which the common good refers,and not its source). That was supposed to be one of the virtues of the concept. In consequence, however, our discussion of obedience is also separated from the more formal aspects of government and law. And, insofar as our duty is to the common good rather than to authority or law per se, it would seem possible to disobey, as well as to obey as law in the name of the common good.

However, in the event of some disagreement over what constitutes the common good, the individual will still find himself required to seek the good that the government decides is 'his good'; he must seek the good that the government thinks he ought. But how can a man's moral freedom be reconciled with obedience to the judgement of others and

with pursuit of a good that he rejects? Why ought a man, indeed, how can a man have a 'duty' to abide by the judgement of those holding political authority? As Lukes suggests, if it is "special competence" that is at issue, then "deference to expert opinion" may be rationally justified; however, he continues, where it is the "'common judgement of men'" that is at issue, then such deference to authority would be "contrary to reason and duty".[20]

It could be, of course, that a man may not know his own good, or that he might be mistaken. And other men, such as Rousseau, might accordingly take it upon themselves to compel him to act in certain ways for his own good - that is, 'force him to be free'. (Although, in order for an individual to have in fact been 'freed', those doing the forcing would have to actually be 'right' in their evaluation of his good.) But it is still not clear why the ignorant should therefore have a 'duty' to pursue the good put forth by the wise. This is particularly so where that good is presented as a moral one, one that men ought to pursue because it is just and right to do so (as opposed to merely being in their self-interest to do so). For given our (and Rousseau's premise that no man can bind the conscience of another, individual conviction for any good put before him is a prerequisite for his having an obligation to seek it.

To accommodate this need for individual willingness, Rousseau argues that "the citizen consents to all the laws, including those that have been passed in spite of him..."[21] For laws that aim at the common good, aim also at his own good and give effect to his 'ideal' will, that is his will as it ought to be, as it would be were it not for interference from the 'particular', misguided will that he actually experiences. It is, then, not merely a matter of a man not knowing his own good, but also a matter of his not knowing his own will. Rousseau thus claims not only that a man can be forced to be free; but he also argues that even where a man clearly disagrees (ie. does not 'will') the good he is compelled to seek, his unco-operative obedience is really an act of 'free will' and hence consonant with the condition of 'duty.'

It is this latter claim which seems to us to be somewhat less than persuasive. Whether this man has a 'duty' to pursue a good he rejects; whether this situation, which has all the appearances of being one of force (he is being required to act against his own will) is really one of liberty (he is obeying only himself) would seem to be directly dependent upon the existence of Rousseau's second and true moral will. Yet, even if we were to assume the actuality of this will, we would still suggest that the vision of the

'good man' that devolves from it represents a substantial departure from our original idea of a self-determining moral being. At the root of this departure is the essential obscurity of our moral will, the fact that it is unknown to us as individuals - "For the will of the individual tends naturally to privilege, the general will to equality"[22]; and the subsequent definition of this will as that which accords with the will of society, rather than with that which the individual experiences.

First, the fact that we do not experience the General Will as individuals would appear to result in a separation of the notion of moral will from the rather important element of 'consciousness' which we usually associate with free will, morality (and self-determination), and by which we traditionally distinguish between the good man and the good act. We do generally insist, notes Pitkin, that men know what they are doing and that they do it for the right reasons before we call their actions fully moral.[23] To the extent that the 'consciousness' of the moral actor is at all significant, the unco-operative performance of some good (the unwilling fulfillment of the unknown will) would fail to satisfy the requirements of individual moral action - an action performed freely and wilfully by a man who understands it to be right and therefore obligatory (rather than it being obligatory because others say it is right).

Secondly, we would suggest that this same 'unknown' quality of Rousseau's moral will tends to seriously undermine individual moral autonomy. In effect, it causes the location of moral legitimacy to be altered. For man must now go beyond his own conscience and refer to the authority of the broader 'collective conscience' of the society of which he is a part. He becomes incapable of taking a moral position independent of society; he is deprived of personal responsibility for his actions (that responsibility would have to be shared by the society that wills the action). Our individual would appear to have lost control over his own actions. Indeed, we would argue that, by giving the individual a second will which can be defined only in terms of the will of society, and by locating freedom and (morality) in that second will, Rousseau effectively deprives the individual of the freedom that is associated with the liberal demand that he be able to determine his own life according to his own will, that is, a will free from subjection to other wills. For the will that can exist only in relation to the will of society is not free from subjection to the will of others; it is, instead, subject to the 'will of all'. Like de Jouvenal, we would argue that this "illusionary participation in the absolute sovereignty of the social Whole" (the freedom that Rousseau leaves his individual) does not satisfy the essential conditions of individual freedom, where that freedom means" direct,

immediate and concrete sovereignty of man over himself".[24]

These problems notwithstanding, we have yet to deal with the still important question concerning the very existence of Rousseau's second and true moral will that is crucial to his deduction of the consent (and liberty) of the dissenting individual. Again, however, because it is ever unknown to us as individuals, we find it to be, in principle, rather difficult to either deny or affirm the actuality of this will. But, if we cannot confront this issue, we might at least dispute, as we already have, that this will or its object (the common good) is known to anyone else. Insofar as the will of society is a reflection of the will supposedly possessed by the individual, we might look to the former in order to discover the latter. But we cannot assume that the 'true' social or General Will (which, by definition can never be contrary to justice or equity) is in fact reflected in society or in the institutions by which it rules itself. On the contrary, our societies are not infallibly just and equitable. They are often elitist, exploitive, racist and oppressive in what they seem to will as a whole. They can and do commit gross injustices against individuals and groups of individuals; and they do so often through their laws. We thus cannot assume that all the laws that we are in fact required to obey do aim at the common good, not even those laws that seem to reflect certain generally accepted social

norms.

More pointedly, however, society does not really appear to us, for the most part, the ideal form envisaged by Rousseau - that is, as an integral unit, or a moral being in its own right, with a will of its own that can never desire anything in opposition to the interests of its members. (If the 'social will' does not exist, then neither would its smaller corresponding component, that will unknowingly possessed by the individual.) Society, in fact, appears to offer us not one standard of what is just, equitable and right for all men, but competing standards which are themselves used to justify rebellion against the values being enforced by law.

Society, we would suggest, is much better represented as a collection of units with competing needs, interests and opinions, rather than as a unified whole. And one of the problems of politics and law is to effect some accommodation between these competing needs and interests, that is, to unit men who do not in fact act with one will. But it is the very absence of such unity that makes the common good so difficult to effect and its opposite so easy to secure. We might well value the political and legal framework as a device for bringing conflicting purposes 'peacefully' into accord; however, the political process of

compromise and bargaining between competing interests does not appear to us to be well suited to producing a good that is common,[25] and hence in our own interest to pursue,; nor does it appear well suited to producing a good that is necessarily right and just and hence one that all men 'ought' to pursue.

It is, again, this absence of a unified social will (that is reflective of, rather than supreme over, the will of all individuals) that makes any pretension on the part of our political authorities to speak for the 'whole', and to justify their actions in the name of the 'whole' (in all our names) so suspect. Murphy is unhesitatingly skeptical of such a claim:

> The authority of the common good as an ethical abstract is a moral platitude. The claim of the governmental agents to speak for it is a pretension properly subject to the continual scrutiny of citizens whose judgement is not subject to command. 26

Our intention here is not to detract from what is essentially a just and proper vision: that in the relationship between man and his government, there be some relationship between the ends sought through the laws governing society and the good of the individuals in that society. But this unity is not to be understood merely as an assumption whereby the power of government is justified. On the contrary, where that unity is not a fact, it becomes a legitimate demand,

and an effective limitation upon the power of government; as such the issue of unity provides us not only with a reason for obedience, but also with justifiable grounds for disobedience.

iii) The Ends of Government and the Duty of Obedience

Earlier, we asked of our theory of political obligation that it bridge the gap between the moral and the political-juridical realms. For as long as they remain apart, the priority of a man's interests and duties as a citizen over the good he seeks and the duties he has as a moral being remains unexplained. When we relate the ends of government to such principles as individual freedom, justice and the common good, we are suggesting the existence of such a link. We are implying the subordination of the political order to these other values. From such a perspective, the denial of inherent moral authority to the modern 'legitimate' State does not represent a 'separation' of the moral and the political (although the duty of obedience, as noted earlier, does become a problem because of that denial). It merely alters the source of moral legitimacy, such that it will come from below, rather than from above, from a self-justifying political power.

Yet, the application of such criteria to the ends of government causes us some difficulty in our attempt to provide a reason for obedience to all laws of the State, or a justification for the right of government to punish every transgression. For, at the same time that they define the legitimacy of authority and the obligatoriness of law, they also set limits upon that obligation, limits that supercede the question of 'legality'. Indeed, whatever it is that we aim at through law, when we relate obedience to those ends, we are implying that the possession of power and the fact of law are not final words about the legitimacy of authority or the obligatoriness of law. This assumes, of course, that government and law are not ultimate ends in themselves, but means, and fallible means at that. And that they do not automatically represent the achievement of the freedom, justice or good that we seek through them. They may, in fact secure the opposite. But if our duty to obey derives from these ends and the value we attach to them, could we not also have, in their name again, a right (perhaps even a duty) to disobey laws that frustrate their achievement? Hobbes seems to recognize such a right as being implied by this approach to obedience.

> The obligation a man may sometimes have, upon the command of the Sovereign... dependeth not on the words of our submission (our consent); but on the

> Intention which is understood to be the End thereof.
> Where our refusal to obey frustrates the End for which Sovereignty was ordained: there is no liberty to refuse; otherwise there is. 27

Whether such exceptions are limited, as in Hobbes, to 'life and death' issues such as the refusal to risk one's life in a war that is unrelated to the purposes for which the State exists, or whether one expects more from the State than the simple preservation of life, the conclusion remains the same. The theory of obedience that derives our duty to obey from a contemplation of the ends of government and law is unable to explain the duty we have to obey all laws - regardless of how they stand in relation to the ends that make them obligatory. Nor does it explain the right of punishment which the State exercises over the individual who exercises his own right to disobey where the law contradicts the very values which it is supposed to help him realize.

This right of punishment would itself seem to imply the supremacy of public judgement over private individual evaluation of those laws, and even further, the right of government to itself define what constitutes the good that is the end of government. Yet, the 'ends of government' argument does not really account for the authoritative character of the public view of what

constitutes a just political order, or of how men ought to behave, or of what liberties they should have and what 'goods' they ought to pursue; nor does it account for the duty of the individual to abide by the values underlying those public decisions.

Indeed, in its assertion of some identity between the public goods sought through law and the good of the individual, the 'ends of government' approach to law rather neatly avoids the fact of public judgement and its supremacy over the private judgement of the individual. It thereby obviates the problems that it would pose for our 'good man' - the man who 'renders obedience to his own will' only, and who neither is, nor can be bound by those values which our rulers express in their perception of justice and the common good, unless he already holds those values himself. Where it is true that the laws so consistently reflect our own will - where the ends pursued through law are our goals too, where those laws never cause us to suffer any injustice ourselves or bring indignity to our lives, and where they never require us to commit an act that we find immoral - then the problem of political authority (and public judgement) versus individual moral autonomy simply does not arise. Certainly there would not appear to be any problem in obeying laws that are in accord with what our own conscience dictates. At the same time, however, we would probably obey such laws, quite

willingly without having to be told why we ought to do so. That is, where the problem of obedience disappears, so too does the need for a theory explaining why we ought to obey.

Yet, at times, the law is quite clearly at odds with our own will, restraining us from doing what we think we ought, or requiring us to do what we think we ought not to do; we're, at times, required to obey laws that aim at some goal which we reject as either good or our own. At these times, our duty to abide by the public will contained in those laws is not at all clear. Here, the assertion of some unity between the individual and the society of which he is a part, between his good and that pursued by society through its government appears to be less a reality than the "confusion pretending to be a synthesis" that Bosanquet suggests it is. Ultimately, it does less to explain our duty of obedience than to obscure this paradox that exists where the individual and his government are apart. For, as Bosanquet also notes, while that separation remains, we cannot explain the rights of the majority or why a community should coerce a single rebel.[28]

Insofar as this unity is important, it would appear that a law could be produced only by the consent of every individual. However, this, as Locke notes, would make government virtually impossible. He therefore suggests that

the will of the majority itself be accepted as an "act of the Whole."[29] Tussman too, in a very similar fashion, suggests that participation in decisions, wherein majorities rule, be accepted as sufficient condition for the representation of law as 'self-imposed' (even though that decision may not reflect the will of the individual bound by it). For, we can get no closer, he argues, without dissolving the enterprise.[30]

Yet, if we are to represent the will of the majority as that of the Whole and if the ends pursued by the majority are to represent the good of the Whole; then it would seem to follow that, at times, the will of society and the common good defined by law will most certainly conflict with the will and good of other individuals in society. For this reason, the use of the will of the majority as a device for achieving the sought after unity - that is, as the solution to the paradox of disunity that is inherent in the very notion of majority rule - strikes us as somewhat peculiar. As an institutional device for arriving at decisions, majority rule simple does not produce any collective or social will which could be said to embody the will and interests of all individuals in society. No absolute or autonomous values, binding all men, arise from it, only particular values.

Moreover, so long as the authority of law and our obligation to obey it are to be derived from the character of what is willed, then our 'acceptance' of the will of the majority would be irrelevant to that obligation. Those laws would have to be judged, by themselves, for what they are. Our consent to abide by the will of the majority or of our representatives in government cannot make the good they decide upon a common good unless it is one in fact. Our consent cannot make the laws they enact truly just, unless they truly are so.

On the other hand, if it is to be argued that men are bound by the particular values held by the majority because they have 'agreed to accept' that rule, then the nature of our duty of obedience will have been substantially altered. In effect, this returns us to the theory of consent wherein man gives up the right to act on his own judgement; wherein the 'enterprise' is separated from the quality of its achievements; and man's duty to obey is separated from the reasons for which he engages in the 'enterprise'.

In this approach, some account is at least offered for the supremacy of public judgement over private[31] (that is, the right of government to apply its own perception of justice and the common good to the social order it rules;

and to punish those who rebel). However, the 'authority' that is bestowed on the public judgement, and the principle of 'equality' that underlies individual moral self-determination are not made any more compatible by the notion of consent. As we have argued in the previous chapter, our consent to abide by the public judgement (majority will or otherwise) rather than our own, does not alter the fact that such obedience occurs at the expense of individual moral autonomy.

As a device for salvaging the authority of the individual conscience in this situation, the second and true moral will that Rousseau envisages (in harmony with the public will) is, we would suggest, an even more perplexing solution to what is a difficult and perhaps insoluble problem. There may be an inherent and irreconcilable conflict (or lack of 'unity') between public and private rights; between public goods and the good of the individual; and between the principles of justice that operate in the public realm and those that operate in the private. Indeed, the recurrent problem in our discussion of obedience to law has been that the individual is not always well served by government; that the specific, or more immediate concerns of government - public order, the public good, political equality and the rule of law - are not always compatible with the personal

dignity and happiness of individuals, nor with the personal liberty essential to them.

If there were to be any one single attribute of the public realm of government and law that would bring it into conflict with the needs and concerns of the individual, it would probably be the essential irrelevancy of man's individuality and uniqueness at that broader level. For as Carter has noted,

> Conscious deliberations about society as a whole deal in categories of people and interests, and must exclude the unique personality and circumstances of each person affected by social decisions. 32

Chomsky also draws our attention to the social or political decision that is concerned more with the broad and long-term consequences of a policy on the system as a whole, than with the "intrinsic nature and quality of the action which the policy involves". In a somewhat more impassioned fashion than Carter, he notes how this evaluation of policies, by reference to remote advantages, tends to obscure from the political vision any consequential disadvantages that they might bring to the immediate circumstances - that the lives of the individuals who are required to perform them may be made "subhuman, wretched and shameful to themselves" during the process of obedience.[33]

Thus, a pacifist may be ordered into battle to

fight and perhaps kill; a farmer may be required to leave the land that has been his life for sixty years to make way for an aeroport; and still another man may be required to testify against an accused murder, despite threats against the lives of his children should he actually do so. All are bidden to do their 'duty' in the name of some remote 'public good'; but little consideration seems to be given to how seriously their own lives are affected.

Indeed, it seems to be that, as Schaar has argued, from the perspective of the public realm, all that really matters about man is his external behaviour - that it is uniform, regular, and predictable. Such behaviour is, of course, quite conducive to public order and unity. But Schaar questions, as do we, those who further presuppose that "by treating men uniformly - equally in the public realm", we can "preserve individuality in the private realm". Of such constitutional theorists, he writes,

> ...even though they may appear to make a plea for unqualified freedom, they in fact aspire to free only public man, to provide no more than his political equality.[34]

To us, this right to be treated equally <u>under</u> government appears to be quite different from and not necessarily compatible with the moral demand for the equal right of all men to determine their own lives. For this latter demand is predicated upon a recognition of individual

distinctiveness and an acceptance of the right of all men to realize their own individuality. It is predicated upon a view of human dignity that, as D'Entrèves argues, is specifically opposed to "the degradation of the individual to a simple means to an end, even if the end is the common good".[35]

However, the former rule of (political) equality, under which men are considered to be no different from one another, and are required to behave in the same manner as one another, does not free men from subjection to other wills. Men are still subject to rules made by others, but those rules shall now be characterized by their relation to society as a whole, and by the impersonal, impartial and detached manner in which they treat individuals in that society. Defined in terms of what is common among them, men are placed in appropriate categories, and made the objects of calculations made in terms of general rules and long-term social objectives. In effect, these individuals seem to no longer be human beings, but 'objects' of the governmental will; at times, 'means' to other 'ends' that the government finds desirable and in the public good, rather than 'ends' in themselves. And the rights or liberties they have as individuals tend to be seen as a function of the Whole, contingent upon the 'stability' of the group, rather than upon any consideration of what freedom a man ought to

have because he is a man and despite any threat that such freedom might present to public order.

Man, as he is envisaged by the public realm, is, as Schaar has observed, not very attractive, either morally or aesthetically. Above all, however, this 'public man' is "unreal".[36] As suggested earlier, a significant obstacle to our attempt to reconcile the demands of public life with the private happiness and personal liberty of the individual arises from this public attitude towards man. The principles of political equality and impartiality may be useful, not only to government (as Schaar suggests) - by providing it with a basis for making political decisions and creating a stable political order; but also to the individual - by providing certain elementary principles of justice to which the government and the legal system must conform and by which they are restrained. However, it is these same principles and this same detached attitude towards man that can, at times, obscure the impact of political and legal decisions upon real men - decisions which, because of their impersonal and general nature, can cause particular and 'real' individuals to suffer serious hardships and great injustices. Carter makes a similar observation.

> It is this impersonal aspect of judicial and political decisions and procedures that easily promotes inhumanity, that creates a gap between public and private morality, and arouses passionate protest against the

> artificialities of law and government.
>
> It is in this sense that there is a separate realm of public affairs which cannot be assimilated to other aspects of private life... 37

The 'unreal' quality of the public man is of significance not only to the question of compatibility between the requirements of citizenship and the private and moral life of the individual, but also to the theory of political obligation - the 'duty' of the individual to be a good citizen. For the individual upon whom the duty of obedience falls is a 'real' person whose perspective is private and who acts upon principles that are, in a sense, private. That is, the principles from which his duties derive (unlike those that operate in the public realm) reflect a concern with the particular, unique, and immediate character of his own existence and of the lives of other people who are real and important to him. As Weldon has argued, "insofar as the individual is real, a definite and not an abstract person", then the particular relationships that he has with others will be fundamental to him; but, "these relationships are describable not in terms of general laws, but of particular judgements", that deal more with the immediate consequences of the individual's actions upon himself and these other people. Moreover, insofar as the individual is, again, 'real' and not an abstract person, then the moral and political obligations that he has, the

obligations that will be 'real' to him, are those that arise from these particular relationships and particular judgments.[38]

It is, of course, 'real' men who are required to obey law, and it is to them that the obligation to obey must be real. That is, the problem of political obligation is not one of reconciling government and law with the legal personality, or public principles with 'public man' (which is self-explanatory). It is one of reconciling public principles with the principles and values in private morality. As the public realm becomes ever more abstract, however, as the impersonalism of government and law and the remoteness of its ends increases, the gap between that realm and the private life of the individual widens. And the duty of the 'good man' to be a 'good citizen' becomes less real and increasingly more difficult to explain.

IV. Conclusion

The attempt to rest government and the duty to obey it on some moral basis is, we would think, a proper one. The right of some men to make laws for others, to restrict their freedom and to punish them if they fail to obey does seem to us to be, in some sense, in need of a moral justification. We would conclude, however, as does Campbell, that a"a moral justification is more of a bane than a boon to political stability." For it would also enable us to appeal to morality to justify our disobedience to a State that fails to act morally or to laws that offend morality.

To arrive at a general theory of obedience that avoids this possibility and that explains the compulsoriness of all laws (even the most unjust) a notion of 'consent'

is sometimes used which assumed that the individual consents to the entire system of government and law, rather than to each and every law. And, insofar as it is to the process by which law is made that the individual consents, it is assumed that he incurs a duty to obey all the laws created by that process.

At the same time, whether or not our responsible, self-governing moral man can have a moral duty to obey law does depend, for the most part, on how successfully law can be represented as self-imposed. In this regard, the theory of consent has even further attractions. By consenting, the individual freely confers upon government the right to make laws, and voluntarily incurs the duty to obey them. That dutyrrests not on the fact of law, nor on the force behind it, but on morality, the morality of an obligation wilfully and rationally self-imposed.

This duty to obey law would appear then to satisfy the essential conditions of morally obligatory obedience.

And obedience to government and law would also appear to satisfy the 'pre-conditions of human moral conduct'.

But can freedom, the condition essential to human goodness be reconciled with this duty to obey all the laws of the State? Can the good man also be a good and obedient citizen?

In this regard, consent theory is not without its problems. Indeed, it is our conclusion that the self-imposed duty of obedience, insofar as it is a duty to obey all law, has repercussions which amount to a virtual negation of the ethical individual.

For, within the terms set up by this theory of obedience, all properly enacted laws are obligatory. The 'authoritativeness' of the laws issuing from the accepted political system derives not from their content, but from their conformity to the accepted rules of legality. The duty of obedience is due, then, independent of the results of that system.

This means that a man's rational and moral judgement on a law is simply irrelevant to his duty to obey it. Even just laws are to be obeyed, not for their justness, but because of their 'authority'. Whether or not a law is to be obeyed will be determined by a single question. Does this

law satisfy the requirements of legality?

Not reason, then, nor justice, but 'validity' will determine man's behaviour. Far from reconciling moral conduct with obedience to law, consent theory would thus have the individual abandon that very faculty - his conscience - in the exercise of which his goodness resides. The authority of that conscience is to yield to the authority of law.

Ultimately, however, the individual conscience is subordinated not only to law, but also to the primacy of the 'public judgements' contained in those laws. By rendering the individual conscience of no consequence, as it does, consent theory thus alters, in a sense, the effective locus of moral authority, placing it in the courts or the legislature. That is, even though we may not be bound to accept the public judgement as correct or as our own, nor are we free, having once consented, to act upon our own private judgement. But ultimately it is the former public judgement that is expressed in law which we must comply with. Thus, by our own passive obedience to those law, we fulfill, in the end, the moral will of others; we seek the good they hold valuable, and behave the way they think we ought.

To the extent, however, that our behaviour is guided not by our own moral will, but by the public will

contained in law, we are incapable of describing ourselves as moral men. Thus, in depriving the individual of the freedom to act according to the dictates of his own conscience, consent theory also denies him the freedom to be good.

In part, the problems associated with the theory of consent stem from its essential generality. In its reference to the rules defining the political system as a whole, that theory seems, in fact, to completely embrace the strictly legalitarian perspective of the State, and the language and formalistic logic of 'constitutional' jurisprudence. In consequence, any ends sought through the political process are, for the purposes of obedience, subordinated to the finality of that process. The discussion of law and obedience to it is arrested at the level of procedure and concluded by the fact of 'validity'.

The impact of this generality upon the individual is to leave him unable to act as a responsible moral agent, except by willingly obeying all laws in fulfillment of his original contract.

Potentially, he even ends up with a moral obligation to commit some act that in conscience he finds immoral. For all laws, even the most unjust, become obligatory. But how can we assert that our 'good man' remains 'as free as before', when he is subject to a law that requires

him to act in opposition to his own moral will?

Our theorists may seek to minimize the possibility of any such moral dilemma arising by imposing philosophical and constitutional qualifications upon the nature and purposes of the government to which men can or do consent. Ideally, the condition of individual freedom is to be maximized in the very process of government itself, and in the order it secures and the justice it brings to the relations between men. Men are to be governed not so much by other men as by law, by a law that is 'their' law, a law that seeks only the common good, which is 'their' good. In this sense, even though the individual does not actually make the law himself, his subjection to it can be represented, again, as'self-imposed' - and his obedience to it can thus be assimilated with freedom. For the law is nothing less than a reflection of what he himself would will. Insofar as this is true, the individual could not sensibly claim to suffer any injustice under law, nor be required by law to commit what he considers to be an injustice against others. He can willingly obey without any loss of freedom or moral integrity.

To the extent that these arguments dissolve the possibility of any conflict between the requirements of law and the dictates of the will of the individual, there would not appear to be any difficulty in reconciling government

and law with the liberty essential to human goodness. Where there is no discrepancy between the public will contained in law and that of the individual, obedience to law does not entail any loss of freedom. Where this situation holds true, however, a theory of political obligation would itself appear to be somewhat unnecessary, or, at best, redundant. It is not likely that the individual would even ask why he ought to obey. And any formal statement on his duty to obey laws which are, in fact, true reflections of his own will aiming at none other than the very good that he himself seeks, merely tells him that he ought to do or refrain from doing that which he already feels obligated to do, or not do.

At the same time, however, a theory of political obligation that rests on these principles cannot adequately explain the duty to obey where these circumstances do not in fact hold true - that is, where government obstructs the realization of freedom and justice, or requires the individual to act in opposition to his own will by having him seek some 'common' good or commit some act which in conscience he rejects. Nor (so long as the individual's own judgement is to retain its authority) does it explain why he should be punished when, in such an instance, he fails to obey. For that explanation, our theory of political obligation seems to be ultimately dependent upon a notion of consent that implies our willing submission to an authority bound, in its

law-making, only by the formal limits of office and procedure.

But more is meant by the qualifications limiting political authority, we would contend, than the descriptive rules laid down in the formal constitutional definitions of the State, its institutions and their functions. They include, rather, the abstract goals and guides in the light of which we accept government and construct its institutions. They cannot be forgotten once the act of construction is completed. To do so is to represent the State as the achievement of these goals, rather than as a means to their pursuit.

Thus, the 'conditional' nature which is often ascribed to the act of consent (or, co-incidently, to 'legitimate' authority), and consequently to one's duty to obey law refers, we would argue, to more than the constitutional issues of legality or validity. It implies the relevance of certain substantive and purposive criteria, beyond the fact of consent - criteria which, in the 'pure' theory of consent are so abruptly precluded from consideration in the discussion of legitimate authority and the duty of obedience. In this regard, the former theory of conditional consent would seem to provide more room for our 'good man' to exercise his rational and moral powers of judgement in determining whether or not a law ought to be obeyed. That, we would suggest, is to its

advantage. For where the moral (or immoral) content of law has no relevance to the duty to obey it (as is the case in the latter 'contract of submission'), then it may equally be so that such a theory is of no relevance to moral men. Such men may well have doubts, on moral grounds, about whether or not a particular law ought to be obeyed. But a theory of political obligation that can tell him, in reply, only that such doubts are of no consequence, fails to address itself either to the question - or to the 'good man'. Assuming our individual is not going to abandon his conscience, as suggested, such a theory of obedience seems to offer him very little help in deciding what to actually do (other than to inform him that he will be punished if he does disobey the law).

Insofar as we wish to formulate a theory of political obligation that does indeed accommodate, rather than negate the ethical individual, the theory of 'conditional' consent seems to offer greater possibilities than does the 'contract of submission'. Not only does it affirm the relevance of individual judgement in the determination of one's political duties (which need not be the same as one's legal duties); but also, the conditional acceptance of law - which implies that certain laws can and ought to be broken where circumstances and one's own judgement so dictate - is itself much closer, we would think, to our idea of a self-

imposed moral duty, than is the notion of an absolute duty to obey all law, no matter how unjust. A theory of political obligation that limits the individual only to willing and obedient submission to authority cannot reconcile citizenship with moral conduct. But, where the citizen remains a rational and responsible being in his own right, able to disobey as well as obey law, in the name of good citizenship, then some accommodation between the good man and the good citizen appears possible.

That one's duty to obey law should be understood as 'conditional' is, we would also argue, of further and particular importance in the modern State. That is, a simple mediaeval faith in the supremacy of law is no longer fully appropriate where one is ruled, not by laws that are 'given', but by laws that are 'made' by men. The circumstances in which such a belief was meaningful, no longer exist. Created and repealed at will in the legislature, law tends now to be more the product of government than its guide; or as Chomsky argues, more "an instrument for (government) purposes" than "a principle to be upheld".[2] (The same government commonly appeals to the 'rule of law' as a legitimacy symbol for its own decisions and for the rules it enacts itself.) But such laws, made by men and resting on human power,ought not to be regarded as absolute and supreme in that mediaeval tradition. To the contrary, it is precisely this sort of law, and the

very right of others to make it, that require some justification beyond the fact of their existence; it is precisely that law and that 'authority' that ought to be subject to one's moral and rational scrutiny before they are regarded as obligatory.

However, the idea of a 'conditional' duty of obedience to law allows for the possible existence of a valid law to which we not only have no duty of obedience, but to which we also have a right of disobedience. Such a theory is clearly at odds with our life under the modern State.

Our problem, here, is that the modern State, wherein the conditional acceptance of law and the right of resistance seem especially essential, operates according to the contrary principle that law is indeed supreme and absolutely binding.[3] There is no law which is not obligatory. Nor is there, under the laws of the modern State, any right, moral, civil or otherwise, to disobey a valid law. The punishment that surely follows the exercise of such a presumed right bears this out.

This discrepancy between a politically recognized right of disobedience and the legal rejection of any such right arises, in part, from the limited nature of the legal or 'constitutional' framework of thought - that is, from the logical restrictions inherent in the constitutional principles of legal authority and validity, upon which the State rests.

There is, for example, no such thing, in law, as civil disobedience, or a right to it. (No specific law either allows or prohibits it.) All disobedience from the perspective of law, is criminal, and is treated as such. Yet, in non-legal discourse, civil disobedience is often recognized as a meaningful action, distinct from criminality, and capable of political and moral justification. Along the same line, we will not find the right to resist tyranny recognized in law. For the law to provide us, in fact, with such a right, it would have to specify for us what does or does not constitute tyranny. And such a law, as Bedau tells us, "would be open to the same controversy it supposedly settles".[4] But the fact that there is no legal right to resist tyranny does not prohibit the recognition of a moral right to do so.

These situations should alert us to the limitations of legal reasoning in our attempt to understand the right of disobedience. That is, disobedience is not only against the law. It is also outside the law. In this regard it is not unlike the obligation of obedience. Neither the duty to do what one is legally obliged to do, nor the right not to do what is legally required of one derive from or find their explanation in legal principles.

Specifically, the right to disobey an unjust or immoral law rests on a claim of legitimacy that does not come

from law. This implies the rejection of State law as the only form of law, and the State as the only source of rights. It implies the rejection of legal action as the only legitimate form of action; and also, we would argue, a rejection of the legal channels of dissent and opposition to law as the only legitimate ones open to the individual. (In fact, disobedience usually occurs precisely when dissent cannot be contained within the limits permitted by law; when, as MacFarlane notes, the methods of opposition legitimized by the political and legal system prove inadequate to solve the problem that impels the individual to disobey.[5])

So long as morality does exist, then, as a legitimate system of thought, and is also independent of the State (to which our constitutional theorists give assent); and so long as our assent to and participation in the political system is not an abdication of morality, we would appear to have a morally legitimate right to disobey immoral laws.

Locke reminds us, however, of one important fact. That is, while we have the right (to resist), we will "surely lose". In otherwords, we will be punished for our disobedience, despite our moral justifications. In fact, upon disobeying, we will find ourselves before a court that will not, and indeed, cannot address itself to the moral nature of our action. They

will ask only whether we did or did not break a valid law. And punishment will follow depending on the answer to that 'legal' question alone.

But, the logical co-existence of a moral right to disobey and the legal rejection of that right does not in itself provide us with an explanation of this factual supremacy of the latter principle over the former. How is it that we are unable to object, in moral terms, to our legal obligation to obey; whereas, an act of disobedience that rests on moral grounds can be subjected to legal considerations, and in fact, concluded upon a legal note?

The legitimacy of this factual monopoly of legal rationality over moral, in a particular case of disobedience, depends we would argue, on the existence of some common ground between our legal and our moral principles, from which, or upon which the supremacy of the latter can be established.

Prosch would locate that 'common ground' in the act of disobedience itself. He adheres to a not unpopular belief that part of being a 'conscientious objector' is the willingness to accept punishment for one's disobedience.[7]

But this description of the conscientious objector, apart from being somewhat arbitrary (and far from self-

evident), itself displays a rather willing (and, we would think, unwarranted) acceptance of the supremacy and finality of law. Indeed, Prosch does not really define the relationship between the moral right to disobey and the right of government to punish the disobedient. Nor does he demonstrate the supremacy of the legal position. He simply yields, somewhat unexpectedly, to the legal fact that there is no right to disobey. This tendency to favour legal principles is perhaps more evident in his assertion that the willing acceptance of punishment, which is to be the true mark of the conscientious objector, is itself a recognition of the fact that we do not have the right to disobey. (Unless we accept this claim as a purely 'legal' one - and not a moral denial of such a right - such a stance would make conscientious disobedience non-sensical.)

By requiring the disobedient to willingly accept punishment, we might arrive, perhaps, at a notion of civil or conscientious disobedience which could be accommodated by the limits of strict legal thought. By the legal definition of such disobedience is not the final word. Indeed, as with the discrepancy between what the courts consider relevant when we do disobey (validity) and what is relevant in our actual decision to disobey (morality), there may be, attending the further question of punishment, similar disparate considerations. That is, punishment may be the legal consequence of

disobedience; but the acceptance of punishment is not necessarily an ethical requisite of disobedience that occurs for moral reasons. For, when we disobey on moral grounds, we are ultimately saying that it is wrong to comply with the particular directive at hand. But, in saying that it is wrong to obey that law, we are also saying, in a sense, that that law should not exist. And if we believe that the law should not exist, we might also argue that the punishment should not exist either. In other words, the punishment is no more acceptable than the law.

If we stay, then, within the moral framework which originally inspired our disobedience, we might arrive at a conclusion about punishment contrary to that contained in the formal language of legal right and obligation. But that conclusion is not necessarily false. And, in the absence of any obvious reason for suddenly jumping from that set of moral references (as does Prosch) to the legal position when it comes to the question of punishment, that conclusion may even be logically more consistent with our act of disobedience. As Power suggests, not to resist punishment may well "discredit the logic of disobedience".[8]

We would suggest even further that, not to resist punishment may also discredit the logic of our theory of political obligation. For the right of punishment depends

on the existence of a duty of obedience. But our theory of 'conditional' consent, although it does imply a moral duty to obey law, also implies the absence of such a duty where the law fails to satisfy certain moral (and non-legal) conditions.

This is better expressed, perhaps, by Locke when he argues that resistence to an unjust exercise of political power or to laws that contravene fundamental moral principles is not really disobedience at all. For such authority is not truly legitimate, and such laws are not truly laws.[9] It is this belief, that 'law' is more than just a valid rule enacted by the proper authorities, that enable Locke to affirm the right to "resist" certain unjust laws by denying the existence of a legal obligation to obey them.

Our notion of conditional consent does establish, then, a connection between the moral right of disobedience and the legal rejection of that right. But the relationship is a linear one. In other words, they do not represent conflicting moral and legal principles, one of which must yield to the other. Instead, we either have a duty to obey, or (under certain circumstances) we do not. And where the duty of obedience does not exist, the right of disobedience does. But, if there is no duty to obey, nor is there a right to punish those who do not obey.

Unfortunately, our demand that law satisfy more than the rule of validity before it can claim full authority

does not get us very far in the modern State where laws are laws, and hence obligatory, no matter how unjust; and where punishment is imposed on the moral resistor, despite his moral right to disobey. Indeed, in our dealings with that State, our moral obligations seem to be impossible to justify, and our legal obligations appear to be in need of no justification. At least, we cannot find, in our theory of political obligation, an explanation for the compulsoriness of all those legal directives, or for the right of government to punish all resistors, including the 'conscientious'.

Apart from the question of whether we need obey laws which offend the principles and purposes underlying our consent to government, we must also confront the assumption of compatibility between the public realm of citizenship and the private realm of the individual and the 'good man'; between public values and private; and between the good of the community which is the end of government and the liberty, dignity and happiness of the individual.

Indeed, the public and private realms appear to operate according to quite different ethical codes - the former centering around the rights and needs of the community, the latter around the rights and needs of the individual. Berlin, who pursues just such a theme in his analysis of Machiavelli, suggests that, while these two

moral systems are not autonomous, nor are they necessarily continuous (public values as a means to the realization of private values). They are, in fact, potentially conflicting systems.[10]

And the problem of whether or not to obey a particular law often involves less a clash of judgement about a particular 'good', than a conflict between these two ethical systems - between what is good and just in the public realm, and what is good and just for the individual in his private life. In this light, the gap between the law-abiding citizen and the individual who abides by his conscience appears to be a conflict between two different moral systems, rather than a conflict between citizenship and morality.

Rousseau, when he deprives the individual of any rights against the community and subordinates his needs to the 'over-riding claim of the community' seems to recognize the difficulty in reconciling the two.[11] Noting the problems that might occur should some decision have to be made between the rights of the individual and those of the community, Rousseau simply chooses the morality of citizenship and the public realm. For the public 'good' is, after all, much more general and impartial than is the 'partial' and particular good which individuals seek.

Contrary to Rousseau, however, we would suggest that the public good is not 'higher' than, but of a different order from the particular good of individuals.[12] In other words, it is not all that clear that the freedom that will be secured for the community by destroying a political enemy is of greater moral value than the loss of dignity and moral integrity, and even the life, of the individual who must go into the battle in opposition to the dictates of his conscience. Nor is it any clearer why the right of the court to require testimony in its pursuit of justice and security for the community is a morally superior claim than the right of the witness to his own security from the personal danger he might expose himself to by testifying.

Berlin credits his subject, Machiavelli, with having unmasked these kinds of "agonizing choices" that must sometimes be made, choices betwen public and private life that are logically incompatible. We must confront, he suggests,

> ...the possibility of more than one system of values, with no criterion common to the systems whereby a rational choice may be made between them. 13

Mr. Berlin's general conclusion is quite relevant to our narrower question of obedience to law: grave doubts arise about any attempt to formulate a theory in terms of a 'final' solution. Is it, then, worthwhile trying to

establish a final accord between the good man and the good citizen?

Whatever one concludes about that question, it seems difficult to deny the paradoxes involved, both in our theory and in our every day lives, between the two realms. Equally difficult to ignore is the very real supremacy of public principles over private, ultimately expressed in the right of punishment possessed by the State. In effect, the State, in exercising that right operates as though a final solution has been found. Whether that right derives from our 'consent' or from some other justification, it represents, we would argue, less of an ultimate accommodation between the public and private spheres, or between the good citizen and the good man, than an annihilation of the latter.

FOOTNOTES

Introduction (pp.1 - 4)

1. Richard Wasserstrom, "Disobeying the Law", Journal of Philosophy, 58:21 (October, 1961), P. 647.

2. T.D. Weldon, States and Morals, p. 266.

3. Geraint Parry, "Individuality, Politics and the Critique of Paternalism in John Locke", Political Studies, 12:2 (June, 1964), p. 169.

Chapter One (pp.5 - 23)

1. Karl W. Deutsch, The Nerves of Government, pp. 131-2.

2. Joseph Tussman, Obligation and the Body Politic, p. 52.

3. Jean Jacque Rousseau, "The Social Contract", in Social Contract, Sir Ernest Barker, ed., p. 36.

4. John Locke, "Second Treatise on Civil Government", in Social Contract, Sir Ernest Barker, ed., p. 137.

5. Charles Werner, "Good and Obligation", Ethics, 77:2 (January, 1967), p. 137.

6. David Spitz, "Democracy and the Problem of Civil Disobedience", American Political Science Review, 48:2 (June, 1954), p. 393.

7. J.P. Plamenatz, Consent, Freedom and Political Obligation, p. 100.

8. Werner, in his analysis of the relationship between the 'perception of good' and the doctrine of obligation goes somewhat further than do Benn & Peters. Given the need for the moral actor to himself recognize the good to be pursued, he suggests that the doctrine of obligation is superfluous to the situation. We shall ourselves pursue this line of argument in later chapters with respect to the theory of political obligation. Op. cit., pp. 135-8.

9. Stanley I Benn & R.S. Peters, The Principles of Political Thought, p. 389.

10. Rousseau, op. cit., p. 175.

11. Ibid., p. 180.

12. Samuel M. Thompson, "The Authority of Law", Ethics, 75:1 (October, 1964), pp. 20-21.

13. Spitz, op. cit., p. 392.

14. David Mars, "The Federal Government and Protest", Annals, 382 (March, 1969), p. 122.

15. Thomas Hobbes, Leviathan, Michael Oakshott, ed., p. 255.

16. Ibid., p. 48-9.

17. Rousseau, op. cit., p. 186.

18. Weldon, op. cit., p. 130.

19. H.A. Bedau, "On Civil Disobedience", Journal of Philosophy, 58:21 (October, 1961), p. 662.

20. Thompson, Loc. cit.

21. Hanna Pitkin, "Obligation and Consent - Part II", American Political Science Review, 60:1 (March, 1966), pp. 39-40.

22. A.P. D'Entrèves, The Notion of the State, p. 4.

23. Ibid., p. 147.

Chapter Two (pp. 24 - 53)

1. Spitz, op. cit., p. 395.

2. Thomas McPherson, Political Obligation, pp. 61-2.

3. Rousseau, op. cit., p. 203.

4. Hobbes, op. cit., p. 126.

5. Benn & Peters, op. cit., p. 23.

6. C.W. Cassinelli, "Political Authority: Its Exercise and Possession", Western Political Quarterly, 14:3 (September, 1961), p. 640.

7. John Day, "Authority", Political Studies, 11:3 (October, 1963), p. 268.

8. Ibid., p. 257.

9. Ibid., p. 269.

10. Blair Campbell, "Prescription and Description in Political Thought: The Case for Hobbes", American Political Science Review, 65:2 (June, 1971), p. 386. Campbell also notes how a devaluation of moral thinking is essential to Hobbes' desire to deny man any grounds whatsoever by which he might justify his resistence to a law.

11. Bedau, loc. cit.

12. Spitz, op. cit., p. 393.

13. Hannah Arendt, On Revolution, p. 268.

14. J.W. Gough, The Social Contract, p. 88.

15. Campbell traces how this moral and rational dependence of the individual upon political authority occurs in Hobbes, op. cit., pp. 380-388.

16. Tussman, op. cit., p. 5.

17. Locke, op. cit., p. 15.

18. Weldon, op. cit., p. 268.

19. Tussman, op. cit., p. 128.

20. Pitkin, "Obligation - II", op. cit., pp. 46-7.

21. D.D. Raphael, "Obligation and Rights in Hobbes", Philosophy, 37:147 (October, 1962), p. 351.

22. Hannah Pitkin, in her analysis of 'authorization' in Hobbes, draws our attention to the incompleteness and hence the limited value of his logical derivation of the concept of 'political obligation' from that of 'authorized political power.' Authority, she maintains, means more than 'that which has been authorized'. The authorization of power occurs in some context, or another, and thus implies not merely the power to act, but the power to act in 'a certain manner' and towards certain ends. Hobbes, she argues, presents us with an overly narrow perspective on authority which, by virtue of its lack of substance, tends to be rather sterile and of not much relevance to men 'heavily influenced by values'. See "Hobbes' Concept of Representation", American Political Science Review, Parts I & II, 58:2 (June, 1964) pp. 328-340; 58:4 (December, 1964), pp. 902-918.

23. Leo Strauss, Natural Right and History, P. 186.

24. McPherson, op. cit., p. 25.

25. April Carter, The Political Theories of Anarchism, p. 102.

26. Hanna Pitkin, "Obligation and Consent - Part I", American Political Science Review, 59:4 (December, 1965), p. 996.

27. Benn & Peters, op. cit., p. 385.

28. Gough draws our attention to these two traditional roles played by 'consent' in political philosophy, op. cit., p. 89.

29. Hobbes, op. cit., p. 247.

30. Martin Seliger, "Locke's Theory of Revolutionary Action", Western Political Quarterly, 16:63 (September, 1963), p. 550.

31. P. Riley, "A Possible Extension of Rousseau's General Will", American Political Science Review, 64:1 (March, 1970), p. 89.

32. Weldon, op. cit., p. 279.

33. Benn & Peters, op. cit., p. 175.

34. The cause of this situation is the fact that, as citizens, our political duty of obedience is translatable directly into our legal obligations. That is, when we break a specific law, we are also breaking our political duty. However, there are no specific laws (that can be broken so as to result in punishment) into which the political duties of the ruler can be translated. Thus he is not bound by law, to fulfill his duties, as we are -

that is, by the force behind it. John Dickinson takes a stance, not unlike our "accountable only to God" argument, when he suggests that the obedience of our rulers to their political duties is more a matter of reason, morality and custom, than a matter of strictly legal obedience. "A Working Theory of Sovereignty", Political Science Quarterly, 43 (1928), pp. 62-3.

Chapter Three (pp. 54 - 89)

1. A.P. D'Entreves, "Obeying Whom?", Political Studies, 13:1 (February, 1965), p. 4.

2. Pitkin, "Obligation - II", op. cit., p. 48.

3. Spitz, op. cit., p. 399.

4. By focusing on self-protection, we neglect what is likely to be a more fruitful approach in the attempt to connect 'protection' and the duty of obedience - that is, the mutuality of liberties secured and restrictions imposed. However, the derivation of the obligatoriness of laws from their mutuality (which would seem to have more to do with affection for and trust of one's fellow man than with the need for protection from him) diverts us from the present issue of security as an end of legality and the source of our duty to obey. Nor is the notion of mutuality itself free from difficulty. Do men have a duty to obey oppressive or unjust laws, simply because they are all equally oppressed? Certainly the fact that they are mutually oppressed does not alter the fact that they are not free.

5. Stuart M. Brown Jr., "Duty and the Production of Good", Philosophical Review, 61 (1962), p. 299.

6. Richard Wollheim, "Democracy", Political Thought Since World War II, W.J. Stankiewicz, ed., p. 121.

7. Hobbes, op. cit., pp. 122-3.

8. Locke, op. cit., p. 132.

9. Spitz, op. cit., p. 393.

10. James Madison, "No. 51", Federalist Papers, p. 324.

11. On the whole, the proposition that order is a pre-condition for the achievement of freedom and justice appears to us to be misleading. Given the fact that they do not always exist wherever order exists, the more pertinent issue would seem to be whether or not freedom and justice are characteristics (rather than the results) of an existing order.

12. S. de Grazia, "What Authority is Not", American Political Science Review, 53:2 (June, 1959), p. 329.

13. George Sabine, A History of Political Theory, p. 732.

14. Neal Riemer, The Revival of Democratic Theory, p. 69

15. Hobbes, op. cit., p. 131.

16. Locke, op. cit., p. 76.

17. Bernard Bosanquet on Rousseau, The Philosophical Theory of the State, p. 102.

18. Rousseau, loc. cit.

19. Ibid., p. 196.

20. Stephen Lukes, "Durkheim's 'Individualism and the Intellectuals'", Political Studies, 17:1 (March, 1969), p. 14.

21. Rousseau, op. cit., p. 273.

22. Ibid., p. 190.

23. Pitkin, "Obligation - II", op. cit., p. 50.

24. Bertrand de Jouvenal, On Power, p. 318.

25. Benn and Peters would like to use the notion of the common good in just such a context, wherein competing interests vie for service. In fact, they suggest that the common good is not so much a specific good that ought to be pursued, as the objective manner in which competing goods are looked it. It is a way of making moral decisions.

> To say that the State should seek it (the common good) is to say only that political decisions should attend to the interests of its members in a spirit of impartiality. (op. cit., p. 273.)

The argument - that the State should seek the common good, and men obey in its name, even though there is no common good - strikes us as being rather peculiar, and very misleading. The common good becomes a legitimacy symbol for any rational, impartial decision - even decisions that involve only partial interests. Brian Barry has, I think discovered the confusion underlying the argument. It is a confusion of concepts. Where a decision must be made between conflicting interests, where the interests of some must be sacrificed or compromised for the sake of other interests, the 'common' good is not very appropriate. We may talk about Justice in this instance, argues Barry, but not about the common good. See Brian Barry, "Justice and the Common Good", Political Philosophy, Anthony Quinton, ed., p. 189-192.

26. Arthur E. Murphy, "Simon's Philosophy of Democratic Government", Philosophical Review, 61 (1952), p. 210.

27. Hobbes, op. cit., p. 164-5.

28. Bosanquet, op. cit., p. 71.

29. Locke, op. cit., p. 57.

30. Tussman, op. cit., p. 55.

31. Hobbes, too, reverts to the 'authority' of the State to judge what laws are essential to its purposes, and to thereby justify the right of the State to punish the individual who, even in the interest of self-protection, exercises, on his own judgement, the right he has to disobey. This co-existence of a duty to obey (or be punished) and a right to disobey depends upon a radical separation of one's consent, and the reasons for which one consents. Where these intentions, and consent itself are considered together to be one act (as in Pitkin, where consent 'automatically' follows from the nature of government and law) this overlap does not necessarily happen. That is, where government ceases to be of the sort that 'one ought to consent to (that one ought to obey), then the duty to obey would not exist, and the right to disobey would come into force.

The individual, in Hobbes, finds himself in a much more unfortunate position of having to choose between two obligations - he cannot act upon both. But Hobbes does not offer any connection between these two obligations, nor any grounds upon which to choose. Nor does he explain why the duty of man not to act upon his own judgement should override, (as it finally does, with punishment) his right to disobey on the basis of his own private judgement. That punishment does effectively serve to deny any significance to such a right of disobedience.

32. Carter, op. cit., p. 87.

33. Noam Chomsky, "The Case for Civil Disobedience", New York Review of Books, 16:11 (June 17, 1971)

34. John H. Schaar, "Some Ways of Thinking About Equality", Journal of Politics, 26:4 (November, 1964), pp. 885-91.

35. D'Entrèves, The State, p. 226.

36. Schaar, op. cit., p. 891.

37. Carter, loc. cit.

38. Weldon, op. cit., p. 273.

FOOTNOTES (pp.111 - 119)

1. Campbell, op. cit., p. 380.

2. Chomsky, op. cit., p. 27.

3. Paradoxically, at the same time that the State embraces a sort of mediaeval belief in the supremacy of law, it rejects as irrelevant that aspect (or concept) of law that made such a belief sensible - that is, the value or principle expressed in law and from which the mediaeval law derived its authority. Now, all 'valid' laws are represented as 'supreme' and absolutely binding. But the question of 'validity', the modern indicator of a law's authority, would be meaningless in the context of mediaeval laws, which had no source to which authority might be attributed.

4. Bedau, op. cit., p. 663.

5. L.J. MacFarlane, "Disobedience and the Bomb", Political Quarterly, 37: (October-December, 1966), p. 374.

6. Locke, op. cit., p. 121.

7. Harry Prosch, "Towards an Ethics of Civil Disobedience", Ethics, 77:3 (April, 1967), p. 180.

8. Paul F. Power, "On Civil Disobedience in Recent American Thought", American Political Science Review, 64:1 (March, 1970), p. 40.

9. Locke, loc. cit.

10. Isaiah Berlin, "Machiavelli", New York Review of Books, 17:7 (November 4, 1971), p. 23.

11. Rousseau, op. cit., p. 181.

12. Cahn's argument that the distinction between the individual and the State is not physical (scope and power) but biological (time and function) provides an interesting basis upon which to challenge Rousseau's faith in the generality and impersonalism of the 'common' good as indicators of its objectivity or moral superiority. Edmund Cahn, The Predicament of Modern Democratic Man, pp. 21-22.

13. Berlin, op. cit., p. 30.

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