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The Duty to Obey the Law

Philosophy Compass

Under what conditions, if any, do those the law addresses have a moral duty or obligation to obey it simply because it is the law? Political and legal theorists since Plato have developed a wide range of answers to this question, as well as numerous objections to those answers. This essay aims primarily to provide the newcomer with a point of entry into the debate over the existence and grounds of the duty to obey the law.

In light of this goal, I do not attempt to provide an exhaustive survey of all the different justifications that philosophers and political theorists have offered for such a duty. Instead, I identify five general approaches to carrying out this task, and offer a somewhat detailed discussion of one or two examples of each approach. This method allows for closer analyses of the arguments offered by proponents and critics of specific attempts to justify the duty to obey the law than would be possible in a comprehensive survey (or at least one shorter than a book-length treatment of this issue). Moreover, in many cases such a focus clarifies the challenges that any example of a given general approach must overcome. Discussion of each general approach to justifying the duty to obey the law concludes, however, with a footnote that lists additional examples not discussed in this essay.¹

In the interest of clarity and ease of exposition, the following study ignores several potentially important issues, which I simply note here. First, while some theorists draw a conceptual distinction between duty and obligation, I treat those two concepts as equivalent. Second, though there is more to the modern state than its legal order, and not

¹ Other recent surveys of the field include Christiano 2004a; Edmundson 2004; Green 2003; Kramer 2005; and Simmons 2002.

every legal order exists within a state, the terms ‘law’, ‘legal order’, and ‘state’ will be used interchangeably; for instance, by referring in some cases to a duty to obey the law, and in others to a duty to obey the state (or the state’s directives). Third, the discussion herein will usually proceed in abstraction from the legal categories of citizen, resident alien, legal visitor, and illegal visitor or immigrant; instead, I will refer to those alleged to have a duty to obey the law as the state’s subjects, or as those within the law’s jurisdiction. Finally, while this essay will focus on the duty of individuals to obey the laws of the state that claims jurisdiction over them, note that the question of what, if anything, justifies a duty to obey the law simply because it is the law arises as well with respect to states (and other international actors) and the international legal order (see Buchanan 2004; Lefkowitz 2006; Posner 2003).

The discussion proceeds as follows. In section I, I clarify the nature of a duty to obey the law. Section II focuses on relational-role, or associative, approaches to justifying that duty; that is, ones that appeal to the alleged normative importance of the fact that an agent occupies (often non-voluntarily) the role of member in the political community to justify the duty to obey its laws. Section III contains a discussion of attempts to ground the duty to obey the law in individual consent or the principle of fair play (on one interpretation of that principle). Both of these strategies qualify as voluntarist approaches to the duty to obey the law, since both treat an agent’s having that duty as conditional upon the free and informed exercise of his or her will or (actual) preference formation. Natural duty approaches are the subject of section IV. Defenders of this approach attempt to demonstrate that in order to fulfill one or another natural duty – a duty all agents have simply in virtue of their status as moral agents – individuals must

obey the law. Section V briefly considers an instrumental approach to justifying the duty to obey the law, one that derives this duty from an instrumental justification for the rationality of obedience to a practical authority. The discussion concludes in section VI with a short description of philosophical anarchism, an approach that denies that most subjects of contemporary states have, or are likely to come to have, a duty to obey the law simply in virtue of its status as such.

I

The duty to obey the law is usually conceived to be general, universal, content-independent, preemptive, categorical, defeasible, and particular.

Generality and Universality

Historically, most attempts to justify the duty to obey the law aimed to demonstrate that all those within the law's jurisdiction are morally required to obey it, and that they have a duty to obey the law in its entirety. Call the first property 'generality' and the second one 'universality'. Law typically presents itself as demanding general and universal obedience from those it addresses, and therefore the failure of a proposed justification for the duty to obey the law to support these demands marks that theory as, in some sense, deficient.

Content-Independence

Most philosophers also claim that the duty to obey the law provides a content-independent reason for action (or inaction). Content-independence refers to the alleged fact that an agent with a duty to obey the law is morally required to act as the legal rules direct *simply because they have the status of law*, and not because of the rules' content.

If Bob tells Susan that rose bushes need lots of sunlight to flourish, then the content of Bob's statement provides Susan with a reason to plant her rose bushes where they will receive lots of sunlight (at least insofar as it accurately expresses a fact about rose bushes). If asked to justify planting her rose bushes in a sunny spot in her yard, Susan will offer as her reason the fact that rose bushes need lots of sunlight to flourish. She may also offer Bob's telling her this as a reason to believe that rose bushes need lots of sunlight to flourish, but it is (what she believes to be) a fact about rose bushes, and not Bob's statement, that justifies her conduct.

In contrast, if Barbara has a duty to obey the law, then the mere fact that the law directs her to not use a certain drug, or to drive no faster than 35 miles per hour, provides Barbara with a reason not to do so. Barbara provides a sufficient justification for driving no faster than 35 miles per hour when she points to the fact that the law requires it.² In Barbara's case, it is the source of the statement, rather than what it says, that provides her with a reason for action.

Preemptive reason

Law purports to do more than offer a consideration for or against a potential course of action, to be weighed against any and all other relevant considerations. Rather, it aims to exclude from an agent's deliberation at least some of the considerations favoring or opposing the conduct at issue, considerations that in the absence of the law it would be morally and/or rationally permissible to take into account. In other words, law claims to provide those subject to it with a preemptive reason for action: a first-order reason to act or not act in a certain way, plus a second-order reason not to consider

² Note the difference between this justification and the reason for complying with the law provided by fear of the state's enforcement of it.

certain other reasons for acting or not acting in the way the law directs. Particular laws (or law in general) need not exclude all other reasons for action from an agent's deliberation, and a non-excluded reason for action might defeat or outweigh the reason for action provided by the law. Note, too, that the law typically rules out consideration of certain reasons for action-guiding purposes, but not for belief-formation purposes; the law does not care if, on the basis of excluded considerations, an agent forms the belief that conduct contrary to law would be best, so long as the agent does not act on this belief.³

Categorical and Defeasible

Like all moral duties, the duty to obey the law is categorical, meaning it provides those agents who have it with a reason for action that is not conditional upon their having any particular goals or ends. The duty to obey the law is also commonly described as *prima facie* or defeasible, meaning that in some cases it can be defeated by other moral considerations (i.e. ones not excluded by the law). In such cases, violation of the law does not in itself constitute an immoral act, even if the agent in question has a moral duty to obey the law.

Particularity

Finally, most philosophers agree that a successful justification of the duty to obey the law must account for the particularity of that duty. That is, it must provide an explanation for why an agent has a duty to obey the particular legal order that claims exclusive or primary jurisdiction over him or her, rather than an alternative existing legal order.

³ The description of a preemptive reason in the text draws on Raz 1979 and 1986. For criticism of this conception of a preemptive reason, see Shapiro 2002 and the articles cited therein.

II

Relational-role, or associative, duties are moral duties that agents are alleged to have merely in virtue of their occupying a role in some socially salient relationship, such as being a parent, a friend, or a doctor. These roles are at least partly constituted by various duties owed by the occupant of the role to the other(s) in the relationship, though exactly what those duties are may vary depending on the relationship in question, and to a certain extent, on the society of which the agents in question are a part. Since the duties attach to an agent simply in virtue of her occupying a role in a particular relationship, it makes no difference whether she comes to occupy that role voluntarily, as in the case of professional relationships and most friendships, or non-voluntarily, as in the case of sibling relationships. As these examples illustrate, all relational-role duties are “special” ones, meaning that they are duties an agent owes only to particular others (namely those with whom she has a certain kind of relationship), rather than universally to all moral agents, sentient beings, etc., in virtue of their status as such.

The claim that agents bear certain moral duties *merely* or *simply* in virtue of their occupying a role in a particular relationship implies a commitment to a non-reductive justification of these duties. A reductive justification of them would involve an appeal to some general moral principle, external to the relationship itself. For instance, a utilitarian might justify the duties of friendship by appealing to the contribution that their fulfillment makes to overall utility. In contrast, a non-reductive justification for relational-role duties involves an appeal to some feature of the relationship itself, rather than a moral principle external to it. Non-reductive approaches to relational-role duties can be divided into (at least) two categories: those that justify such duties by appeal to the

essential contribution occupying a role in a particular relationship makes to an agent's identity, and those that appeal to the non-instrumental value of participating in certain types of relationships, which an agent does by fulfilling the duties constitutive of the role she occupies in them.

In what follows, I consider two arguments intended to demonstrate that members of a political community such as a modern state have a duty to obey its laws simply in virtue of their status as members. As the term 'simply' indicates, both arguments rely on a non-reductive justification of relational-role duties: the first employs the identity constituting justification for such duties, while the second makes use of the non-instrumental value justification.

Identity Constituting Justification

Perhaps the most prominent defender of the identity account of relational duties is Alasdair MacIntyre. A central thread in MacIntyre's Communitarian ethics is his criticism of universal morality for the estrangement it requires of moral agents from the particular, historically situated, roles that he claims are constitutive of a person's identity. These roles are positions in various relationships with other agents, and it is the local normative structures of these relationships, and not universal moral principles grounded in non-relational properties such as autonomy or sentience, that provide the appropriate standard for the moral assessment of an agent's conduct. MacIntyre makes explicit the alleged necessity of both the connection between roles in various relationships and an agent's identity, and the connection between identity and moral justification, when he writes that "the rational justification of my political duties, obligations, and loyalties is that, were I to divest myself of them by ignoring or flouting them, I should be divesting

myself of a part of myself, I should be losing a crucial part of my identity” (MacIntyre 1982-83, p. 158; quoted in Simmons 2001, p. 80). Similarly, Michael Sandel speaks of “those loyalties and convictions whose moral force consists partly in the fact that living by them is inseparable from understanding ourselves as the particular persons we are – as members of this family or community or nation or people, as bearers of this history, as sons and daughter of that revolution, [and/or] as citizens of this republic” (Sandel 1982, 179). The liberal nationalist Yael Tamir concurs: “deep and important obligations flow from identity and relatedness” (Tamir 1993, 99; see also Miller 1995).

Suppose that an agent’s role as a member of a particular modern state partly constitutes his or her identity. What duties come with occupying that role? The usual response is those duties that contribute to the flourishing of the polity, or the life that members lead with one another. Foremost amongst these is a general duty to obey the law. As John Horton writes, laws “characteristically define the terms of association within a polity, [and] concern for the interests and welfare of the polity is a concern for these terms of association” (Horton 1992, 165). Hence obedience to law constitutes concern for the interests and welfare of the polity, or what is the same, the communal life the agent leads with his or her fellow citizens.

Proponents of the identity constituting justification for role-relational duties, including the duty to obey the law, typically appeal to three phenomena to support their position. First, they claim that many people find incoherent or unintelligible the thought of opting out of certain roles and their attendant duties. It simply makes no sense to ask of an agent whether she ought to fulfill those duties constitutive of the roles she occupies; occupying those roles and fulfilling the attendant duties is just what it is to be the person

she is. Second, they point to the strong sense of identification agents have with various roles they occupy; for instance, many peoples sense of themselves as members of a given state lead them to feel pride, shame, and/or guilt with respect to that state's conduct. This identification indicates the centrality of citizenship, and so of the duties that partly constitute the role of citizen, to the agent's sense of self. Third, they emphasize the regularity with which agents offer the fact that they occupy a role in a particular relationship as a sufficient justification for their actions. For example, Horton writes that a child's explanation for why she could not attend a party that coincided with her parent's silver wedding anniversary "would most likely involve spelling out what is involved in familial relations, at least as understood within a particular conception of family life, rather than referring to any general moral principle" (Horton 1992, 148; see also Scheffler 2001, 100).

With respect to the first two phenomena – the unintelligibility of opting out of a role, and the strong sense of identification with it – critics of the identity constituting justification claim that an agent's belief that she has a duty in virtue of occupying a particular role does not suffice to demonstrate that she does in fact have such a duty. These critics argue that many people's beliefs regarding their "station and its duties" arise as a result of manipulative indoctrination and propaganda employed by those who stand to benefit most from it (Simmons 2001; Wellman 1997). For example, lower rank members of an oppressive caste system may identify with the roles they occupy, and even find the idea of opting out of these roles unintelligible, and yet be mistaken in their belief that these roles generate genuine moral duties. As for the claim that an agent can offer a sufficient justification for her action simply by calling attention to a role she occupies, the

critic might deny this, and argue instead that a sufficient justification must ultimately provide a reason for fulfilling the role obligation. Suppose that in Horton's anniversary example, neither the child nor the parents love or care for one another, and they do not find that spending time with each other adds any value or meaning to their lives (indeed, the opposite is true). Even if her community's conception of familial relationships and the duties attendant upon people as children and/or parents includes a duty to celebrate anniversaries together, it is not clear that this child is either morally or prudentially required to fulfill that duty.⁴

Some critics also argue that the identity constituting justification for relational-role duties entails that members of a racist community – one in which the norms definitive of members' duties require them to treat people with dark skins as morally inferior to those with light skins – have a duty to commit racist acts (Buchanan 1989; Mason 1997). This entailment is alleged to provide a *reductio ad absurdum* refutation of the identity constituting account of relational-role duties.

Proponents of such an account respond to this criticism in at least two ways. First, some argue that universal morality places constraints on the kinds of relational-role duties that participation in a particular relationship generates (Horton 1992, 156-7). Insofar as a community's racist norms conflict with the demands of universal morality, those norms fail to impose any genuine moral requirements on members. Such a position is consistent with the view that local normative practices that do not conflict with

⁴ It is important to distinguish this point from the claim that the child ought to act *as if* she has a reason to fulfill certain relational-role duties to her parents. This claim is often made in the hope that a person's acting as if she has certain relational-role duties will create the non-instrumental value that such relationships can have. Note, however, that such a claim premises relational-role duties on the non-instrumental value of certain relationships, and not on the contribution occupying a role in a particular relationship makes to an agent's identity.

universal moral principles are independent sources of moral requirements; that is, that the demands they make of people in virtue of their participation in certain relationships are not simply specifications of universal moral principles. As noted above, however, whether an agent has any reason to comply with these local normative practices may depend on her having certain morally optional ends or motives. If so, such practices will not provide a secure foundation for a general duty to obey the law.

A second response to the racist community counter-argument holds that membership in such a community does entail a genuine, albeit *prima facie*, moral duty to commit various racist acts, but that this moral requirement is defeasible, and will almost always be overridden or trumped by some requirement of universal morality. For example, though a member of a racist community has a relational-role duty to join with other members of his community in beating an “uppity” black person, this relational duty is trumped by a duty of universal morality to refrain from deliberately inflicting bodily harm on another person or sentient being. The argument in favor of this second response depends on an appeal to people’s experience of conflict between their loyalty to fellow members of a community, friends, or family, and various moral duties they owe to all moral agents as such. It may seem strange to claim that an agent has even a *prima facie* duty to act contrary to universal moral norms. But Yael Tamir attempts to provide some support for this claim, by calling attention to the choice confronting a student who knows that his best friend has cheated on an important exam (Tamir 1993, 102). Regardless of whether the student informs the teacher or refrains from doing so, Tamir suggests that there is a moral loss: either a failure to do one’s duty to inform the relevant authority in cases of cheating, or a failure to display loyalty to one’s friend. Note, however, that it is

possible to accept Tamir's claim that partial duties of loyalty arising from roles in particular relationships will sometimes override impartial moral duties, without accepting the identity constituting justification for such duties. The intuition that the student may justifiably forgo informing the teacher of his friend's cheating may well rest on the belief that friendship is a non-instrumentally valuable relationship the promotion of which may sometimes take priority over adherence to universal moral principles.

Non-instrumental Value Justifications

Andrew Mason argues that the duties of citizenship can be justified by appeal to the non-instrumental value that bearing the relationship of fellow citizen has for those who occupy the role (Mason 1997). A relationship is non-instrumentally valuable if it is an end that agents appropriately seek for itself, and not merely as a means to some other end. Citizenship has non-instrumental value, Mason claims, "because in virtue of being a citizen a person is a member of a collective body in which they enjoy equal status with its other members and are thereby provided with recognition" (Mason 1997, 442). Though Mason is not concerned primarily with providing a justification for the duty to obey the law, it is easy to see how he could do so. Surely the recognition of others as having an equal status in the collective body that enacts and enforces laws must involve obedience to them, since to put oneself above the law seems to be nothing less than a denial of one's equal status with others in the collective body.

It is far from clear, however, that those who occupy the role of citizen in a particular modern state view themselves as participating in a non-instrumentally valuable relationship with their fellow citizens. More importantly, however, Mason offers no account of why agents morally or rationally ought to view citizenship as a non-

instrumentally valuable relationship. Doing so does not appear to be a necessary element for the living of a valuable or meaningful way of life, whatever its details. Consider, too, that those who demand equal treatment under the law, equal voting rights, and so on, typically advance their claims as a matter of justice, not the pursuit of a non-instrumentally valuable relationship with their fellow citizens. It may be, then, that all agents have a duty to treat others justly, and that doing so requires obedience to law, and perhaps other duties of citizenship as well. But this line of argument treats the duty to obey the law as entailed by a natural duty of justice, and so abandons the aim of providing a non-reductive justification for it as a relational-role duty.

Since Mason employs Joseph Raz's analysis of friendship to establish the possibility of justifying role-relational duties by appeal to the non-instrumental value of particular relationships, it is worth considering Raz's own conclusions regarding the similarities between friendship and citizenship (Raz 1979). Raz acknowledges that an agent may develop a sense of belonging to the political entity of which he is a member, and have certain duties in virtue of doing so. Yet he claims that no agent is morally required to develop loyalty to his or her state, just as no agent is morally required to develop any friendships. Moreover, obedience to law is not necessarily the only, or best, way to express one's loyalty to one's state. Respect for law, as Raz calls the expression of loyalty to, and identification with, the state, may be manifested through obedience to some laws but not others. In sum, Raz concludes that loyalty to the state is not morally required, that the expression of such loyalty when it exists need not take the form of

respect for law, and finally that respect for law need not include a general duty of obedience to the state's directives.⁵

III

Voluntarist approaches treat the duty to obey the law as conditional upon the free and informed exercise of an agent's will or preference formation, either with respect to the acquisition of the duty itself, or with respect to benefits the state provides. Attempts to justify the duty to obey the law by appeal to individuals' consent or the principle of fair play (on one interpretation) exemplify such an approach.

Consent

One way in which individuals might come to have a duty to obey the laws of a particular state is by consenting to its rule. Whether a particular utterance or action (or silence or inaction) counts as an act of consent is a matter of social convention, but the conditions necessary for a conventional act to be a genuine case of consent, and hence to generate a duty, are universal. First, the agent must know what she consents to.

Specification of this requirement will often be a matter of social convention, and will likely remain somewhat vague, though it is possible to identify certain cases in which the condition is not met. For example, a person who is deliberately misled about what she consents to may justifiably claim that her consent does not count as genuine. Second, an agent must know that her action or utterance is an act of consent; that is, she must perform the act with the knowledge that doing so is a way of acquiring an obligation.

Third, an agent must successfully communicate her intention to acquire an obligation to whomever that obligation is owed. Fourth, the act of consent must be voluntary, meaning

⁵ Other important relational-role defenses of the duty to obey the law include Dworkin 1986; Hardimon 1994; and Hirschmann 1989. For criticism of this approach, see Green 1989; Simmons 2001.

that it must be non-coerced and made against a background of reasonable options. Options are reasonable if the costs to an agent of refusing to consent are not too high; it may also be necessary for an agent to have more than two options. As these vague descriptions indicate, the voluntariness condition is like the knowledge of what is being consented to condition, in that while there will be some cases that are clearly voluntary or non-voluntary, there are also likely to be ones where people may reasonably disagree as to whether the condition is met. A fifth and final condition for genuine consent is that it be a personal performance, or else performed by an agent or trustee authorized to act for another. In the absence of such authorization, no agent can consent for another.⁶

In light of this understanding of the conditions for genuine consent, it is quite apparent that most citizens of modern states have never expressly consented to the authority of those states. Even immigrants who recite oaths of allegiance upon becoming citizens of a state may fail to meet the knowledge and/or voluntariness conditions, while those who simply find themselves subjects of a given state through an accident of birth rarely even have the opportunity to expressly consent to the authority of the state that rules them. Most theorists have therefore sought to identify as a form of *tacit* consent to the state's political authority some activity undertaken by most or all citizens of modern states. For example, Locke identifies continued residence beyond the age of consent, and perhaps even the enjoyment of any benefits provided by the state, as a form of tacit consent to obey the law (Locke 1993 (1689)). Yet tacit consent differs from express consent only in the form of its expression. There is no difference between the two in terms of the conditions that must be met for an act to count as genuine consent, and

⁶ For discussion of these criteria for genuine consent, see Simmons 1979; M.B.E. Smith 1973.

neither residence nor mere enjoyment of benefits provided by the state meets all of these conditions.

Consider, first, that with the possible exception of a few dedicated social contract theorists, subjects of modern states do not appear to intend that their residence within the state's territory be understood as a sign of consent to obey the law. Indeed, few of them are likely to have even considered why they do or do not have a moral duty to obey the law, and so it is hard to imagine why they would have ever conceived of their residence within the state's jurisdiction as implicitly consenting to the state's rule. Moreover, as Hume famously points out, many people are not in any position to consent voluntarily to the rule of the state that claims jurisdiction over them:

Can we seriously say that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the domination of the master; though he was carried on board while asleep, and must leap into the ocean and perish, the moment he leaves her (Hume 1953 (1748), 51).

Since they neither undertake any action or inaction for the purpose of acquiring an obligation to obey the state, nor do they live in circumstances characterized by the absence of coercion and reasonable options, in which consent would count as voluntary were it to be given, it follows that the vast majority of modern states' subjects do not have a duty to obey the law based in consent.

Thomas Christiano challenges both of these reasons for concluding that subjects of modern states have no duty to obey the law based in consent (Christiano, 2004a). First, he asks “if a person benefits by residing in a territory and everyone knows that the benefit only arises because of the obedience to law of the members, shouldn’t it be clear to this person that his compliance is expected of him if he remains in the territory?” (Christiano 2004a, 13). If the answer to this question is yes, then Christiano suggests the agent’s continued residence should be understood as consent to obey the law. Moreover, in the absence of a satisfactory excuse, even an agent who does not know that the benefits he receives from residing in a territory result from the other residents’ obedience to law ought to be treated as having consented to obey it. Culpable ignorance does not free an agent of the obligations she would acquire were she to recognize certain facts she morally ought to recognize.

One possible response to Christiano’s argument involves challenging the assumption that everyone knows, or even should know, that they receive certain benefits only because of others’ obedience to law. More importantly, however, the kind of counter-factual talk Christiano employs is at odds with the idea of consent as involving essentially an agent’s will or choice. To say that an agent has an obligation to obey the law because she would consent to it if she had different beliefs eliminates any role for the agent’s actual choice (or willing). It amounts to the claim that under certain conditions – for instance, when an agent enjoys certain benefits made possible only by others’ obedience to law – that agent has a duty to obey the law. Even if true, this claim does not treat the agent’s consent as a basis for that duty.

Christiano also challenges the claim, implicit in Hume's argument, that voluntariness is a necessary condition for genuine consent. With respect to the need for reasonable options, Christiano points out that people consent to pay their health insurance premiums, and are generally thought to acquire an obligation by doing so, even though the alternative (going without health insurance) can be terribly costly. As for the absence of coercion, Christiano notes that soldiers on the battlefield acquire various obligations to enemy soldiers when they consent to surrender to them, even though they are coerced into doing so (Christiano 2004a, 12).

In response to Christiano's health insurance example, one might try to limit the type of potential costs that, if they motivate an agent to consent, render that consent non-voluntary. For example, perhaps only those costs an agent will suffer as the result of another agent's act or omission, where the second agent intends by her act or omission to compel the first agent to consent, render the first agent's doing so non-voluntary. If so, then one might claim that while the potential costs of going without health insurance may be terrible, they do not render a person's consent to pay for health insurance non-voluntary, since those costs are not intentionally imposed by anyone for the purpose of compelling consent to pay for health insurance.

Of course, one might challenge this last claim. Perhaps attempts by private health insurance companies to block the creation of a single, government-funded, health insurance plan count as acts intended to use the terrible potential costs of going without health insurance to compel individuals to buy it. Alternatively, or perhaps in addition, one might point out that acts or omissions by some agents that impose terrible costs on others *who morally ought not to have those costs imposed on them* renders the latter

agents' consent, when motivated by fear of those costs, non-voluntary, regardless of whether those who impose the costs do so with the intention of compelling consent. If people ought not to have the terrible potential costs of going without health insurance imposed upon them, say because there is a basic moral right to health care, then consent to pay for health insurance in circumstances where that right is not respected renders the consent non-voluntary. This line of argument may prove problematic for the consent theorist, however, as it suggests that what matters for the voluntariness of consent is an account of the scope of an agent's liberty, and what sorts of treatment others owe the agent. If no one owes me X, then I am not coerced into agreeing to pay for X, even if not doing so would be terribly costly to me. It is not the potential cost to the agent of not consenting (i.e. having reasonable options) that matters, but rather whether the choice situation the agent confronts involves an actual or threatened violation of her rights. But then it begs the question against the duty to obey the law to assume that the cost of not consenting to obey the law not be too terrible if the agent's consent to obey the law is to count as voluntary. This assumes that the state or the other subjects of the legal order in question do not have a right to the agent's obedience to law, but it is the alleged fact that most people cannot voluntarily consent to obey the law that is meant to establish the claim that the state or other subjects of the law lack such a right.

Some theorists acknowledge that few, if any, subjects of modern states freely, knowingly, and intentionally consent to obey the law, but treat this as a starting point for developing an account of domestic political institutions and political culture under which a far larger number could, and perhaps would, do so (Beran 1987; Pateman 1979).⁷

⁷ For additional variations on the attempt to defend the duty to obey the law by appeal to consent, see Gilbert 1999; Murphy 1999; 2001.

Fair Play

The possibility of justifying the duty to obey the law by appeal to the principle of fair play (or fairness) has attracted a great deal of discussion from philosophers and political theorists alike. As stated by H.L.A. Hart, this principle holds that:

When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to similar submission from those who have benefited by their submission (Hart 1955, 185).

If we are justified in conceiving of a state's legal order as a joint enterprise, or as Rawls puts it, a cooperative scheme, then the principle of fair play justifies the claim that the state's subjects have an obligation to restrict their liberty in the ways the law specifies. Doing so counts as doing one's fair share in maintaining the mutually beneficial cooperative scheme structured by the law.

In several characteristically amusing examples, Robert Nozick demonstrates that as formulated by Hart, the principle of fair play is too broad (Nozick 1974, 90-95). Nozick invites his reader to consider a case in which a number of people in his or her neighborhood join in a cooperative scheme to operate a public announcement system that broadcasts music and news throughout the neighborhood. If everyone in the neighborhood participates in the scheme, then each person will have to sacrifice one day a year to operate the PA system. On the 134th day since the operation of the PA system began, those who initiated the cooperative scheme (and those who have participated in it since) show up at your door and inform you that you are required to operate the PA system that day. Their justification is that since you have benefited from the PA system

(and Nozick assumes that you have done so), you are now obligated by the principle of fair play to do your share in providing that benefit to all. Nozick contends that you are under no such obligation, though it might be nice of you to do so, and intuitively most people seem to agree with him.

Nozick believes the principle of fair play is fundamentally flawed because it allows those who organize a cooperative scheme to simply impose the benefits of that scheme upon anyone, and then demand that those persons contribute to the operation of the scheme in return for the benefits they have received. The agents who initiate the cooperative scheme thus exercise arbitrary control over the liberty and self-determination of those on whom they impose the benefits and corresponding obligations. Nozick, and many others, view this as incompatible with a proper recognition of the non-instrumental value and great (even pre-eminent) importance of individual liberty and self-determination.

One proposed modification to Hart's formulation of the principle of fair play, initially advanced by Rawls but developed in greater detail by A. John Simmons, states that the principle only generates an obligation to do one's fair share for those who *accept* the benefits provided by the cooperative scheme (Rawls 1964; 1971; Simmons 1979; 2001). Not everyone who *receives* a benefit from the scheme necessarily *accepts* it. Rather, to accept the benefit an agent must either try to get the benefit, or if it is one she cannot avoid receiving, then she must do so knowingly and willingly. The latter conditions require that the person know she is receiving a benefit; know that the benefit is produced by others' participation in the cooperative scheme; believe the benefits are worth the cost of restricting her liberty in the ways participation in the scheme demands, and not have the benefits forced upon her against her will. On Simmons's interpretation,

fair play obligations are voluntary, or acquired, ones; a person comes to have an obligation to contribute her fair share to the operation of a cooperative scheme only as a result of her free and informed formation of a preference order that ranks the receipt of benefits, at the cost of doing her share to maintain the scheme, over freedom from contributing to the scheme at the cost of going without the benefits it provides. By making fair play obligations conditional upon an agent's acceptance of benefits, Simmons renders the principle of fairness consistent with the idea that no person should have her liberty constrained arbitrarily by the will of another. Note, however, that fair play obligations are not reducible to those based in implicit consent. Whereas consent requires that an agent undertake a certain act with the knowledge that she will thereby acquire an obligation, the same is not true of fair play obligations; knowing and willing acceptance of the benefits suffices for the acquisition of a duty to do her fair share.

While Simmons defends the principle of fairness as a genuine moral principle, he offers two arguments intended to demonstrate that it does not justify the claim that all (or even most) subjects of a modern state have a duty to obey its laws. First, Simmons challenges the description of the state as a genuine cooperative scheme (Simmons 2001, 38-42). Genuine cooperation, as distinct from mere coordination, requires that each cooperator know that the others share the goal to be achieved by working together, and understand his or her contribution as part of a joint effort to achieve that goal. No such awareness holds with respect to most people's obedience to law, Simmons suggests. Small-scale cooperative schemes, from which Simmons suggests we draw our intuitions regarding obligations of fair play, are characterized by face-to-face interaction, horizontal structures of power and authority, and a conscious and willing sacrifice of individual

liberty for the sake of the common good. Modern states, in contrast, are massively impersonal, built around hierarchical structures of power and authority, and populated mainly by agents who comply with the law's demands largely from habit and fear of punishment. If Simmons is right to deny that states constitute genuine cooperative schemes, and that fair play obligations arise only in the case of such schemes, then it follows that the duty to obey the law cannot be justified by appeal to the principle of fair play.

Even if Simmons is wrong about either of these two claims, he also suggests that few citizens of modern states accept the benefits provided by the state to which they are subject. Though he offers no empirical evidence to support this claim, Simmons does offer three speculations to buttress his contention. First, he claims that "many citizens barely notice (and seem disinclined to think about) the benefits they receive" from their domestic legal system, to which it might be added that even in cases where they are aware of the benefits, subjects of modern states often fail to recognize that their provision results from others' obedience to law (Simmons 1979, 139). If correct, it follows from these claims that few people meet the knowledge condition for the acceptance of benefits.

Second, Simmons suggests that many citizens of modern states, faced with high taxes, with military service which may involve fighting in foreign "police actions" or with unreasonably restrictive laws governing private pleasures, believe that the benefits received from government are not worth the price they are forced to pay. While such beliefs may be false, they seem nonetheless incompatible with the acceptance of the open benefits of government (Simmons 1979, 139).

Note that the exact reasons why people believe that the burdens involved in contributing to the operation of the state are irrelevant, as is the truth of their beliefs. All that matters is that a person does not accept the benefits, delivered as they are at the cost imposed by the state, as long as she or he thinks the burden involved to be greater than the benefit.

Third, Simmons doubts whether most people regard the payment of taxes to the state as a contribution to the operation of a cooperative scheme. Rather, they regard the government as something like a company from whom they purchase certain goods, albeit a company that in many cases exercises monopoly power and the use of coercion to compel people to buy its products. It would not be surprising if many people did think this way about their state, or at least certain aspects of it, since private companies often provide the same or similar services. If they do so then they will not recognize the benefits they receive as the product of a cooperative scheme, and so they will not accept the benefits in the requisite sense. It follows that they have no duty to obey the law grounded in the principle of fairness (understood, once again, as a principle of acquired obligation).

George Klosko advocates an alternative strategy for defending the principle of fair play against Nozick's critique of it (Klosko 1992; 2005). He argues that the persuasiveness of Nozick's objection to the principle of fair play depends on the triviality of the benefits produced by the cooperative schemes in his examples. On the basis of this observation, Klosko contends that the principle of fair play should be understood to generate an obligation to contribute to a cooperative scheme only when the following three conditions are met. First, the benefits provided by the scheme must be worth the recipient's effort to provide them; second, the benefits must be indispensable for the

living of any (valuable) way of life, regardless of its details; and third, the burdens involved in the scheme's operation must be fairly distributed among those who participate in it. Each of these conditions calls for brief elaboration.

Though Klosko acknowledges that individual liberty has great value, he argues that the importance of indispensable benefits reverses the usual presumption in favor of treating the obligation to contribute to a cooperative scheme as dependent upon an individual's choice to join it, or to accept its benefits. Since the benefits are, by definition, indispensable for all human beings, it follows that no rational human would decide to forgo them; indeed, he or she will be willing to pay a very high price in order to receive these benefits. Klosko concludes, therefore, that participants in a cooperative scheme that provides indispensable benefits need not defer to each individual's evaluation of whether or not the benefits it provides are worth the cost of participation in it. Rather, the burden of proof lies with the individual who wishes to show that he can obtain them by some other means (or, if indispensable benefits are ones necessary for *almost* all valuable ways of life, that he is the exceedingly rare individual who does not require the benefit in question to live a valuable way of life).⁸

Given their nature, it seems that a person will have a fair play obligation to contribute to the operation of a cooperative scheme that provides her with indispensable benefits, even if others from whom she differs in no morally relevant respect receive a far greater benefit from the scheme than she does, and/or if the cost to these others is far less than it is for her. In order to avoid this comparative injustice, Klosko argues that the benefits the scheme provides and the costs involved in maintaining it should be

⁸ Klosko devotes considerable effort to demonstrating that only the state can provide indispensable benefits such as security. See Klosko 2005.

distributed fairly. He recognizes, however, that reasonable disagreement will likely arise regarding what counts as a fair distribution. In such circumstances, participants in the scheme must give precedence to the understanding of what counts as a fair distribution reached by a tolerably fair decision procedure. Such a procedure is one that, at a minimum, takes each person's views into consideration, and that advocates a conception of justice for which "powerful arguments can be (and have been) developed" (Klosko 1992, 71). Klosko claims that a plausibly liberal-democratic state, whatever its specific form, counts as one that both provides indispensable benefits (which, by their very nature, are worth their cost), and employs a tolerably fair procedure to determine how these benefits and burdens are to be distributed. It follows, therefore, that subjects (or at least citizens) of a liberal-democratic state have a duty to obey its laws, grounded in the principle of fair play.

Klosko's argument faces several difficulties. For example, it is not clear why agents are morally required to defer to the determination of a liberal-democratic state regarding what counts as doing their fair share to maintain the (alleged) cooperative scheme it constitutes. A similar problem arises for natural duty accounts of the duty to obey the law, as will be discussed below. Nor does the notion of a burden of proof seem apt in a discussion of whether an agent has a particular moral obligation. Klosko's argument may be relevant to the justifiability of the state's *enforcing* the law. If receipt of indispensable benefits does give rise to a fair play obligation, then perhaps fewer injustices will occur if those individuals not so benefited bear the burden of demonstrating that the law should not be enforced against them, rather than if the state bears the burden of demonstrating in each case that an individual does receive

indispensable benefits from it. But this issue is distinct from the question of the conditions under which an agent actually does have an obligation to do his or her fair share in maintaining the legal order.

Moreover, Klosko's interpretation of the conditions under which the principle of fair play generates obligations converts it from a voluntarist account of the duty to obey the law to a non-voluntarist one. Klosko remarks several times that he does not see why an individual's mental state is relevant to whether that individual has a fair play obligation (Klosko 1992, 50-2). The answer is that the principle of fair play can only be a voluntarist principle if the existence of the obligation depends on the obligated agent's will or preference order. As Klosko elaborates it, whether an agent bears an obligation of fair play depends on his status – specifically, his being a person who receives indispensable benefits from a cooperative scheme – rather than his doing something, such as choosing to join it or accept its benefits.

In itself, this change from a voluntarist principle to a non-voluntarist one raises no difficulties. A problem arises, however, because Klosko retains Hart's commitment to the individual's receipt of (indispensable) benefits from a cooperative scheme as the source of his or her duty to contribute to their provision. But while a person may act imprudently or irrationally if she acts on the (oftentimes, or even always) mistaken belief that she can do without the benefits the state provides, or obtain those benefits at lower cost by some other means, it does not follow necessarily that she acts immorally in doing so. To establish the latter claim, Klosko must demonstrate that agents have a moral duty to promote their own well-being and/or rationality, yet he makes no attempt to do so. While Kant argues that it is immoral for a person to act imprudently or irrationally, many

contemporary philosophers, especially those of a liberal persuasion, do not agree. Insofar as a person has no non-voluntary duty to promote her own well-being and/or rationality, she can be morally required to contribute to a cooperative scheme – even one that provides her with indispensable benefits – only if she voluntarily acquires an obligation to do so. If she does not, then she does not treat the other participants in the scheme unfairly when she fails to bear part of the burden for producing those benefits.⁹

While few philosophers defend the existence of moral duties owed to oneself, almost all defend the existence of non-voluntary duties owed to others. A natural (pun intended) move, then, in light of the last objection raised to Klosko's argument for a duty to obey the law involves substituting for the claim that the state provides indispensable benefits to oneself the claim that they provide indispensable benefits to others. Such a natural duty justification for the duty to obey the law is the subject of the next section.¹⁰

IV

Natural duties are ones people have simply in virtue of their status as moral agents; they need do nothing to acquire them, nor does their bearing such duties depend on their occupying some role in a socially salient relationship. Natural duties are also universal in scope; they are owed to all members of a class defined in terms of possession

⁹ Additional discussion of fair play and the duty to obey the law can be found in Arneson 1982; Carr 2002; Dagger 1997; Greenawalt 1987; Lefkowitz 2004; and Wolff 1995.

¹⁰ Attempts to justify the duty to obey the law in the (alleged) moral duty to display gratitude to those who intentionally provide one with a benefit are sometimes grouped together with consent and fair-play, since all of these duties arise from particular transactions between agents (e.g. Simmons 2002). Because duties of gratitude are non-voluntary, however, some legal philosophers elect instead to classify them along with role-relational justifications as associative accounts (e.g. Edmundson 2004). Regardless, gratitude accounts of the duty to obey the law confront numerous difficulties, foremost amongst them the incompatibility between the consensus view that those to whom gratitude is owed are not entitled to determine the form its expression must take, and the state's claim to determine how its subjects ought to conduct themselves. Defenders of gratitude as a justification for the duty to obey the law include Plato 1995; Walker 1988; 1989. Critics include Klosko 1989; 1991; McConnell 1993; Simmons 1979; Wellman 1999.

of some feature, such as sentience or rationality. Uncontested examples of natural duties include the duties to refrain from murder and lying.

Natural duty approaches to justifying the duty to obey the law contend that in order to carry out their natural duties, agents must obey the laws of the state that claims jurisdiction over them. Or at least they must do so if the state meets various criteria of procedural and/or substantive justice. Candidates for the natural duty that provides the basis for a justification of the duty to obey the law include a duty to maximize utility (Hare 1976), a duty to treat courteously or to esteem legislators who pursue one's own values (Soper 2002), a duty to support just institutions (Rawls 1971; Waldron 1993), a duty to rescue others from significant peril when the cost of doing so is not unreasonable (Wellman 2001; 2005), and a natural duty to respect others' basic rights, understood to consist in all those duties correlative to all persons' basic moral (or human) rights (Buchanan 2004; Lefkowitz 2005). Here I examine in detail only the last two proposals.

Almost all moral philosophers agree that agents have a natural duty to rescue others from significant harms, ones that would likely prevent any agent from living a valuable way of life, as long as the cost of doing so is reasonable. Christopher Heath Wellman argues that obedience to law should be understood as an instance of fulfilling this samaritan duty. Individuals can save others from the perils of a Hobbesian state of nature only by supporting the state. That support must take the form of obedience to law because those perils result from people's failure to coordinate on a relatively clear and uniform set of rules specifying what justice requires. In calculating the cost to the agent of obedience to law, Wellman claims that we ought to take into account the benefits that agent receives from the state, as well as the price he pays as a result of his obedience.

The result, Wellman contends, is that each individual receives a net benefit from the state, and so the duty to obey the law meets the condition on a samaritan duty that it not impose too great a cost on those who carry out the rescue.

A samaritan account of the duty to obey the law has at least two attractive features. First, it builds on a moral duty that enjoys widespread acceptance. Second, a samaritan account appears to provide a relatively straightforward justification for the particularity of the duty to obey the law (i.e. that agents have a duty to obey the laws of the particular state that claims jurisdiction over them). Though the duty is universal in the sense that it is owed to all agents (or possibly sentient beings) simply in virtue of their status as such, it becomes operative only when an agent happens to find herself in a position to effect a rescue. On the (perhaps questionable) assumption that agents are more likely to find themselves well placed to rescue their compatriots than foreigners, and that effecting such a rescue requires obedience to law, it follows that agents have a duty to obey the laws of their particular state.

Ignoring for the moment the possibility of challenging these last two assumptions, the characterization of support for a legitimate state as a duty of rescue has struck many as implausible (see Edmundson 2004; Simmons 2005). Consider a paradigmatic example in which all acknowledge a samaritan duty exists: a case in which an agent chances upon a drowning child that he can easily save, with the only cost to him being some damage to his running shoes. This case, like other paradigmatic examples, has the following three features: first, the agent with the duty confronts a statistically abnormal threat of immediate or imminent harm; second, only the agent in a position to provide immediate aid bears the duty to rescue, and only the person who is in immediate or imminent danger

of suffering harm has a right to assistance; and third, due to the unpredictable nature of their occurrence, it is almost inevitable that the burdens involved in rescue cases like this one will be distributed unevenly across the class of all moral agents. In contrast, the perils of the state of nature that Wellman invokes to justify a duty to obey the law are statistically normal. (Indeed, as Wellman must grant, it would be the ability of any group of significant size to avoid these perils in the absence of the state that would count as statistically abnormal). Compare, too, Wellman's defense of obedience to law as necessary to prevent future, potential, harms, namely those that would likely occur in the absence of the state, with the paradigmatic case of a duty to rescue those at immediate risk of harm, or those who are already suffering some (possibly increasing) harm. As noted above, the number of people in a position to provide aid in standard examples of samaritan duties is usually fairly limited, but Wellman invokes such a duty as a basis for a moral requirement borne by the millions of people subject to a given state's rule. Finally, as will become clear below, Wellman's argument depends essentially on the claim that each of the state's subjects has a duty to do his or her fair share of the collective task that is maintaining the state. In light of their unpredictable occurrence, however, the burdens involved in carrying out the rescues described in paradigmatic examples of samaritan duties cannot be subject to such a distributive requirement.

The last alleged difference between paradigmatic examples of a samaritan duty and Wellman's use of it may not matter much; some cases of rescuing others from immediate danger may still allow time for all those agents with the duty to fairly distribute the burdens involved in carrying it out. The other differences are more significant: paradigmatic samaritan duties address immediate and abnormal risks of

significant harm (both in terms of how many people suffer the risk and how often anyone does so) and fall on those who happen to confront the person in danger, while Wellman's alleged samaritan duty addresses a normal (indeed, ever-present) potential danger and fall on any moral agent that can do something to prevent this danger from occurring. It is not clear, therefore, that Wellman correctly characterizes the duty he describes as a samaritan one; rather, it may simply be one of the duties that correlate to all agents' basic moral rights.

The attempt to employ respect for others' basic moral rights as the basis for a defense of the duty to obey the law rests on an understanding of these rights as entitlements to certain conditions, such as freedom of movement, freedom of conscience, and adequate nutrition. So understood, respect for others' rights requires not only that an individual refrain from acts that violate these rights (e.g. unjustifiably imprisoning people), but also that she contribute to the creation and/or maintenance of a state of affairs in which all securely enjoy these rights. This understanding of the duties correlative to basic moral rights as encompassing both negative duties of forbearance and positive duties of provision is essential for a justification of the duty to obey the law. For if the correlative duties were only negative ones, as some theorists contend, then it would be possible for agents' to fulfill these duties without having to support just political institutions, and so without having to obey the law. In contrast, if the duties correlative to peoples' basic moral rights include positive duties of provision, and if as a matter of fact these duties can only be met only through support for political institutions, then the need to respect others basic moral rights provides a compelling basis for the duty to obey the law.

Defenders of basic moral rights as entitlements to certain conditions differ over their foundation; some appeal to a basic moral principle of equal concern and respect for all persons, others to a conception of the conditions necessary for the living of any valuable way of life, whatever its details, and still others to various hypothetical contract style arguments. Discussion of this foundational question is beyond the scope of this essay; however, the reader should note that the overall success of a justification for the duty to obey the law grounded in respect for basic moral rights depends on a compelling defense of the claim that such rights have as their correlates both negative and positive duties.

Apart from replacing a samaritan duty with the duties correlative to others' basic moral rights, a defense of the duty to obey the law premised on the latter proceeds in the same manner as a defense premised on the former. Even apart from the fact that some agents will deliberately or negligently fail to respect others' basic moral rights, well-intentioned and reasonable agents will likely disagree as to what exactly people are entitled to, and how to go about seeing that they get it. Defenders of the natural duty approach argue that these barriers to peoples' secure enjoyment of their basic moral rights can only be overcome by the creation and maintenance of political institutions that publicly enact, apply, and enforce laws; in short, only by the state. Thus in circumstances characterized by reasonable disagreement over what justice requires and how to achieve it, respect for others' basic moral rights requires deference to the state's settlement of these disputes; that is, obedience to law. Most advocates of a basic moral rights foundation for the duty to obey the law also acknowledge that, at least with respect to the correlative positive duties, there are limits to the sacrifices an agent must make so that

others can securely enjoy their basic rights. It may be, however, that the burdens an agent must bear so that others enjoy these rights exceeds those it would be reasonable for agents to bear in the case of a duty to rescue.

One objection typically advanced against all natural duty defenses of the duty to obey the law involves harmless disobedience (Edmundson 2004; Morris 1998; Simmons 2005). A specific individual's failure in a particular case to obey certain traffic laws, tax laws, environmental regulations, and many other types of laws, will often have no discernable effect, or even any effect at all, on the ability of the state to provide its subjects with secure enjoyment of their basic moral rights. Moreover, in some instances individuals may do more to promote others enjoyment of their basic moral rights, including perhaps the state's ability to facilitate this task, by violating, rather than obeying, the law. It appears, therefore, that a natural duty approach not only fails to justify a general and universal duty to obey the law, but at times actually requires disobedience to it.

Defenders of the natural duty approach begin their response to this line of criticism by noting that the harmlessness of a particular act of disobedience almost always depends on the obedience of a sufficient number of others. Given that all bear the same duty to ensure that others securely enjoy their basic moral rights, no morally relevant distinction exists between those who obey the law and those who disobey it. It follows that nothing justifies the latter exercising more discretion regarding the form their contribution to this collective task will take than that enjoyed by those who obey the law. But just such a claim to greater discretion is implied by an agent who disobeys the law, even if she believes (possibly correctly) that since enough others will obey the law, her

failure to do so will make no difference to others' secure enjoyment of their rights, and may in fact contribute positively to the achievement of this goal. In short, those who disobey the law treat those who obey it unfairly; they (implicitly) claim more than their fair share of the discretion compatible with the recognition that all moral agents are equally bound to do what it takes to secure or promote others' basic rights (Wellman 2004; 2005; Lefkowitz 2004).

Insofar as the possibility of harmless disobedience arises quite frequently, it may turn out that many acts of obedience to law are morally required out of respect for the others who obey the law, rather than for those who benefit from obedience to it (or, where they are the same class of people, that it is owed to others in virtue of the fact that they obey the law, rather than the fact that they benefit from it). Note that the argument from fairness applies here only because all agents have a duty to see to it that others enjoy their basic rights; this is what distinguishes this account from Klosko's fair play argument.

One might argue that if she grants (or would grant) others an equal right to disobey the law when their doing so is harmless (or at least when their doing so will better promote others secure enjoyment of their basic rights than will obedience to law), a person who disobeys the law does not treat those who obey it unfairly. Addressing this argument likely requires an account of why decisions regarding the distribution of discretion must be made by the agents collectively, rather than individually. Several natural duty theorists argue that in circumstances characterized by reasonable disagreement regarding the form that morally necessary coordination and/or collective action ought to take, agents ought to defer to a procedure for settling these disputes that

grants equal recognition to each agent's claim to authority. Only a suitably specified democratic decision procedure, including at least the norms of one person-one vote and majority rule, and perhaps other norms of participation as well, meets this condition. Therefore, citizens of a (reasonably just, or liberal) democratic state have a duty to obey its laws, because only by doing so can they both fulfill their duty to see to it that others enjoy their basic moral rights, and acknowledge the equal authority of those with whom they act to determine the form that this collective action or coordination ought to take (Buchanan 2004; Christiano 2004a; 2004b; Lefkowitz 2005; Waldron 1999).

A second objection leveled against all natural duty accounts involves their inability to justify the particularity of the duty to obey the law. Granting for the sake of argument that an agent's fulfilling her natural duties requires support for just political institutions, and that such support must take the form of obedience to law, critics argue that natural duty theorists cannot demonstrate why agents must obey the law of the state that claims jurisdiction over them, rather than, at least in some cases, the law of some other state (Simmons 1979; Simmons 2005).

It is not clear that defenders of a natural duty approach to justifying the duty to obey the law have a viable response to this challenge. The natural duty theorist might argue that some threats to others' basic moral rights take a form that can only be addressed by the coordination or collective action of agents living within a given territory, and that is why those living in that territory must obey the laws issued by the particular state that claims jurisdiction over it. Indeed, given that reasonable disagreement over what justice requires constitutes a significant source of danger to the secure enjoyment of basic rights, it might be thought that a state's ability to exercise (for

the most part) a monopoly over the settlement of such disputes, and to enforce its settlements, explains why those within its jurisdiction have a duty to obey its laws. Unfortunately, however, this line of argument may suffice to justify only a state's right to enact, apply, and enforce the law (and perhaps not even a general right to do so), but not a duty to obey it.

Nor does an appeal to fairness appear to bridge the gap here, since it must first be shown that agents have a duty to promote the particular just institutions that claim jurisdiction over them before it can be shown that their harmless disobedience treats other subjects of the state unfairly. The claim that subjects of a democratic state must obey its laws in order to recognize their fellow citizens' equal claim to authority may appear to do better, since it rests in part on agents' participation in a particular democratic procedure. But the distribution of the right to participate in actual democratic decision procedures is almost always morally arbitrary. Why is it those particular persons who happen to enjoy citizenship in a given democratic state that an agent has a duty to respect by deferring to the state's laws? Whether an agent has a claim to an equal say in determining the form that morally necessary collective action ought to take – that is, what the law ought to be – depends on whether that agent is in a position to contribute to securing some others' basic rights through her obedience to law. There is no reason to think that existing state boundaries accurately reflect this criterion. Moreover, when the two duties conflict, why think the duty to obey democratically enacted law will often, or even ever, defeat the duty to secure and promote all other persons' basic rights? Christiano suggests that it does so because only a democratic process publicly affirms the equal importance of each person, and justice must not only be done, but be seen to be done. Of course, a defense of the

claim that citizens of a democratic state have a duty to obey its laws need not entail that the duty in question often, or ever, defeats their natural duty of justice; after all, the duty is almost always described as a prima facie or defeasible one. Still, such a defense will be rather anemic, and describe a duty to obey the law that differs vastly from how that duty has been understood by theorists and states alike.¹¹

V

A fourth approach to justifying obedience to law rests on an instrumental justification for the rationality of obedience to a practical authority. A practical authority is one who claims that its directives provide those subject to it with a preemptive reason for action; that is, a first-order reason to do or not do some act, and a second-order reason not to consider certain other reasons that favor or oppose doing or not doing the act in question. States are usually understood to claim this type of authority over those within their jurisdiction. Joseph Raz contends that the state's claim to practical authority over its subjects is justified insofar as they are more likely to act on the balance of undefeated reasons that apply to them (what Raz calls 'dependent reasons') by obeying the law than if they attempt to determine for themselves what they have most reason to do (Raz 1979; 1986). This so-called normal justification thesis provides an instrumental justification for obedience to law, since under the conditions it describes the law serves as a means to the end of rational action (i.e. acts done on the basis of the balance of undefeated reasons). The normal justification thesis provides an account of the *rationality* of obedience to law; however, it entails a *moral* duty to obey the law in those cases where the dependent reasons an agent will do better at acting on by obeying the law are moral ones. In these

¹¹ In addition to those natural duty approaches noted but not discussed above, see also Finnis 1984; 1989; Honorè 1987.

cases, the 'ought' in the claim 'she ought to obey the law' is a moral one because the dependent reasons are moral.

Raz describes a number of scenarios in which the normal justification thesis warrants obedience to law. For example, the state may possess certain types of expert knowledge and/or skills that render it better able to determine what (most of) its subjects ought to do in a given domain of human conduct than those subjects themselves can do. Raz gives the example of state regulation of pharmaceuticals, but the same justification likely applies to any area of human endeavor in which rational action depends on a detailed understanding of specialized knowledge. Other instances in which the normal justification thesis entails obedience to law include cases where rational action requires coordination or the resolution of prisoner's dilemmas, or where individuals are likely to suffer from apparently natural irrationalities such as a bias in favor of physically attractive people or one arising from how the individual's choice is framed. Insofar as acting in the absence of expert knowledge, in an uncoordinated manner, and so on, will likely result in immoral treatment of others (e.g. the violation of their basic moral rights), these scenarios are ones in which those subject to the law have a duty to obey it.

Raz does not claim that the normal justification thesis provides a justification for a general and universal duty to obey the law. With respect to laws that stand in for people's lack of expertise, Raz acknowledges that some people will possess enough of the relevant knowledge and/or skills so that they will do better (or at least no worse) by exercising their own judgment than by relying on the state. Likewise it will sometimes be obvious that the need for coordination that normally warrants obedience to certain traffic laws does not apply; for instance, in the case of the oft-mentioned stop sign in the

desert. The normal justification thesis may also run afoul of the particularity requirement; for instance, an individual may have good reason to believe that some other state's laws regulating the use of pharmaceuticals better tracks the balance of reasons that apply to him than do the laws of the state that claims jurisdiction over him. If so, then while the normal justification thesis justifies this individual's obedience to law, it does not justify obedience to the law of his state.

The suggestion that an individual may have good reason to believe that another state's laws more accurately reflect the reasons that apply to him leads to a more fundamental criticism of Raz's instrumental justification of practical authority. Obedience to a practical authority allegedly serves to promote rational conduct by excluding from an agent's deliberation certain reasons that favor or oppose a given type of action (e.g. taking a certain drug). But how is an individual to determine whether that normal justification thesis warrants his obedience to a given alleged practical authority? It seems that in order to reach such a determination, the agent must judge for himself what the balance of undefeated reasons requires of him, so that he can then assess whether the alleged claim to practical authority is in fact justified. Doing so, however, obviates the need for the practical authority (Hurd 1999).¹²

VI

As the above discussion illustrates, every approach to justifying the duty to obey the law faces considerable practical and/or conceptual difficulties. This has led some theorists to adopt the view known as philosophical anarchism, according to which few (if

¹² For additional criticisms of Raz's instrumental justification for obedience to law, see Green 1989; May 1998; and Shapiro 2002. For an attempt to defend a more limited duty of obedience to the state on the basis of modifications to Raz's argument for obedience to a practical authority, see Edmundson 1998; for criticism of this attempt, see Lefkowitz 2004.

any) subjects of existing states have a duty to obey the laws of those states, simply because they are the law (Green 1988; Simmons 1979; 2001; 2005). These theorists emphasize, however, that individuals often have moral reasons to do that which the law would have them do. For example, agents have a moral duty to refrain from murder and theft, and to drive on the right side of the road when others do so, even if the mere fact that the law requires such conduct does not provide a reason to so act. It is laws that many view as paternalistic, such as ones forbidding the use of recreational narcotics, as well as laws intended to secure the continued existence of this particular state, such as those requiring military service, that a philosophical anarchist claims are ones with which most agents rarely, if ever, have an independent moral reason to comply (Simmons 2005).

Most contemporary philosophical anarchists admit that the subjects of a given state could come to have a duty to obey its laws by consenting to do so, but argue that this is extremely unlikely to occur. However, philosophical anarchism might also be defended on conceptual grounds (as opposed to practical ones), if, for example, the surrender of individual judgment constitutive of obedience to authority were to be incompatible with a proper respect for one's autonomy (Wolff 1971). For such an argument to succeed, however, it would have to be the case that respect for oneself as an autonomous agent required one to always rely on one's own judgment regarding what one has most reason to do, and few philosophers believe that such a duty exists.

Defenders of philosophical anarchism claim that, unlike political anarchists, they are not committed to the overthrow of the state (i.e. not just a particular state, like the United Kingdom, but the state as an institutionalized form of political organization).

Several writers challenge this claim, arguing that since the philosophical anarchist contends that in many cases individuals have no moral reasons to do what the law requires, it follows that the law wrongs them when it coerces them into compliance with it. The state, then, is no different than a bully, and just as bullies ought to be resisted, so too should the state be resisted and, if possible, eliminated. Philosophical anarchists counter that whether one ought to attempt to overthrow the state depends not only the number and kind of wrongs the state commits, but also on how many and what type of wrongs will occur under its replacement, as well as the costs involved in a transition to that state of affairs. Taking these into account, the philosophical anarchist contends that the overthrow of a relatively just state is not warranted, even though most of its subjects have no duty to obey it.¹³

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Bibliography

- Anscombe, Elizabeth. "On the Source of the Authority of the State," *Authority*, ed. Joseph Raz (New York: New York University Press, 1990).
- Arneson, Richard. 'The Principle of Fairness and Free-Rider Problems,' in *Ethics* 92(?), 1982, pp. 616-633.
- Beran, Harry. *The Consent Theory of Political Obligation* (London: Croom Helm, 1987).
- Buchanan, Allen. *Justice, Legitimacy, and Self-Determination* (Oxford: Oxford University Press, 2004).
- . 'Assessing the Communitarian Critique of Liberalism,' in *Ethics* 99(?), 1989, pp. 852-882.
- Christiano, Thomas. 'Political Authority,' in *The Stanford Encyclopedia of Philosophy*, ed. Edward N. Zalta, 2004a. available at <http://plato.stanford.edu/entries/authority>.
- . 'The Authority of Democracy,' in *Journal of Political Philosophy*, 12(3), 2004, pp. 245-270.
- Carr, Craig L. 'Fairness and Political Obligation,' in *Social Theory and Practice* 28(?), 2002, pp.1-28.
- Dagger, Richard. *Civic Virtues: Rights, Citizenship, and Republican Liberalism* (New York: Oxford University Press, 1997).
- Dworkin, Ronald. *Law's Empire* (Cambridge, MA: Belknap Press, 1986).
- Edmundson, William A. *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge: Cambridge University Press, 1998).
- . 'State of the Art: The Duty to Obey the Law.' *Legal Theory* 10(?), 2004, pp. 215-259.
- Finis, John. 'The Authority of Law in the Predicament of Contemporary Social Theory,' in *Notre Dame Journal of Law, Ethics, and Public Policy* 1, 1984, pp. 115-137.
- . 'Law as Co-ordination,' in *Ratio Juris* 2, 1989, pp.97-104.
- Green, Leslie. *The Authority of the State* (Oxford: Clarendon Press, 1988).
- . 'Associative Obligations and the State,' in *Law and Community: The End of Individualism?* eds. Allen C. Hutchinson and Leslie J.M. Green (Toronto: Carswell, 1989), pp. 93-118.
- . 'The Works of Joseph Raz: Law, Legitimacy, and Consent,' in *Southern California Law Review* 62, 1989, pp. 795-825.
- . 'Legal Obligation and Authority,' in *The Stanford Encyclopedia of Philosophy* (Spring 2004 edition), ed. Edward N. Zalta, available at <http://plato.stanford.edu/archives/spr2004/entries/legal-obligation/>.
- Greenawalt, Kent. *Conflicts of Law and Morality* (Oxford: Clarendon Press, 1987).
- Gilbert, Margaret. 'Reconsidering the 'Actual Contract' Theory of Political Obligation,' in *Ethics* 109(?), 1999, pp. 236-260.
- Hardimon, Michael. 'Role Obligations,' in *Journal of Philosophy* 91(?), 1994, pp. 333-363.
- Hare, R.M. 'Political Obligation,' in *Social Ends and Political Means* (London: Routledge and Kegan Paul, 1976).
- Hart, H.L.A. 'Are There Any Natural Rights?' in *Philosophical Review* 64(?), 1955, pp. 175-191.
- Hirschmann, Nancy J. 'Freedom, Recognition, and Obligation: A Feminist Approach to

- Political Theory,' in *American Political Science Review* 83(4), 1989, 1227-1244.
- Honorè, Tony. *Making Law Bind* (Oxford: Clarendon Press, 1987).
- Horton, John. *Political Obligation* (Atlantic Highlands, NJ: Humanities, 1992).
- Hume, David. 'Of the Original Contract,' in *David Hume's Political Essays*, (Indianapolis: Bobbs-Merrill, 1953 (1742)).
- Hurd, Heidi. *Moral Combat* (Cambridge: Cambridge University Press, 1999).
- Klosko, George. *Political Obligations* (Oxford: Oxford University Press, 2005).
- . *The Principle of Fairness and Political Obligation* (Lanham, MD: Rowman and Littlefield, 1992).
- . 'Four Arguments Against Political Obligations from Gratitude,' in *Public Affairs Quarterly* 5, 1991, pp.33-48.
- . 'Political Obligation and Gratitude,' in *Philosophy and Public Affairs* 18(?), 1989, pp. 352-358.
- Kramer, Matthew H. 'Moral and Legal Obligation' in *The Blackwell Guide to the Philosophy of Law and Legal Theory*, eds. Martin P. Golding and William A. Edmundson, (Oxford: Blackwell, 2005).
- Lefkowitz, David. 'A Contractualist Defense of Democratic Authority,' in *Ratio Juris* 18(3), 2005, pp. 346-64.
- . 'The Nature of Fairness and Political Obligation: A Response to Carr,' in *Social Theory and Practice*, 30(1), 2004, pp. 1-31.
- . 'Legitimate Political Authority and the Duty of Those Subject to It: A Critique of Edmundson,' in *Law and Philosophy* 23(?), 2004, pp. 399-435.
- . "The Principle of Fairness and States' Duty to Obey International Law," draft on file with author, 2006.
- Locke, John. *Political Writings of John Locke*, ed. David Wootton (New York: Mentor Book, 1993 (1689)).
- MacIntyre, Alasdair. 'Is Patriotism a Virtue?' The Lindley Lecture, University of Kansas. Reprinted in *Liberalism, vol. III*, ed. Richard J. Arneson (Aldershot, UK: Elgar, 1992).
- . "Philosophy and Politics." *Philosophy and Human Enterprise*, ed. J.L. Capps, United States Military Academy Class of 1951 Lecture Series (1982-83).
- Mason, Andrew. *Community, Solidarity, and Belonging*, (Cambridge: Cambridge University Press, 2000).
- May, Thomas. *Autonomy, Authority, and Moral Responsibility* (Boston: Kluwer Academic Publishers, 1998).
- McConnell, Terrance. *Gratitude* (Philadelphia: Temple University Press, 1993).
- Miller, David. *On Nationality*. (Oxford: Clarendon Press, 1995).
- Morris, Christopher. *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998).
- Murphy, Mark. 'Moral Legitimacy and Political Obligation,' in *APA Newsletter on Philosophy and Law* 99, 1999, pp. 77-80.
- . 'Natural Law, Consent, and Political Obligation,' in *Social Philosophy and Policy* 18, 2001, 70-92.
- Nozick, Robert. *Anarchy, State, and Utopia* (New York: Basic Books, 1974).
- Pateman, Carol. *The Problem of Political Obligation* (New York: John Wiley and Sons, 1979).

- Plato. 'Crito' in *Readings in Ancient Greek Philosophy*, eds. S.M. Cohen, P. Curd, and C.D.C. Reeve (Indianapolis: Hackett Publishing Company, 1995).
- Posner, Eric. "Do States Have a Moral Obligation to Obey International Law?" 55 *Stanford Law Review* 1901 (2003).
- Rawls, John. *A Theory of Justice* (Cambridge, MA: Belknap Press, 1971).
- . 'Legal Obligation and the Duty of Fair Play,' in *Law and Philosophy*, ed. Sidney Hook (New York: New York University Press, 1964), pp. 3-18.
- Raz, Joseph. *The Morality of Freedom* (Oxford: Clarendon Press, 1986).
- . *The Authority of Law* (Oxford: Clarendon Press, 1979).
- Sandel, Michael. *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982).
- Scheffler, Samuel. *Boundaries and Allegiances* (Oxford: Oxford University Press, 2001).
- Shapiro, Scott J. 'Authority,' in *The Oxford Handbook of Jurisprudence and Philosophy of Law*, eds. Jules Coleman, Scott J. Shapiro, and Kenneth Einar Himma (Oxford: Oxford University Press, 2002).
- Simmons, A. John. *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979).
- . *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge: Cambridge University Press, 2001).
- . 'Political Obligation and Authority,' in *The Blackwell Guide to Social and Political Philosophy*, ed. Robert L. Simon, (Oxford: Blackwell, 2002).
- . 'The Duty to Obey and Our Natural Moral Duties,' in *Is There a Duty to Obey the Law?* Christopher Heath Wellman and A. John Simmons (Cambridge: Cambridge University Press, 2005).
- Singer, Peter. *Democracy and Disobedience* (Oxford: Oxford University Press, 1974).
- Smith, M.B.E. 'Is There a Prima Facie Obligation to Obey the Law?' in *Yale Law Journal* 82, 1973, pp. 950-976.
- Soper, Philip. *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002).
- Tamir, Yael. *Liberal Nationalism* (Princeton, NJ: Princeton University Press, 1993).
- Waldron, Jeremy. 'Special Ties and Natural Duties,' in *Philosophy and Public Affairs* 22(?), 1993, pp.3-30.
- . *Law and Disagreement* (Oxford: Clarendon Press, 1999).
- Walker, A.D.M. 'Political Obligation and the Argument from Gratitude,' in *Philosophy and Public Affairs* 17(?), 1988, pp. 191-211.
- . 'Obligations of Gratitude and Political Obligation,' in *Philosophy and Public Affairs* 18(?), 1989, pp. 359-364.
- Wellman, Christopher Heath. 'Associative Allegiances and Political Obligations,' in *Social Theory and Practice* 23(?), 1997, pp.181-204.
- . 'Gratitude and Political Obligation,' in *APA Newsletter in Philosophy and Law* 99, 1999, pp. 71-77.
- . 'Toward a Liberal Theory of Political Obligation,' in *Ethics* 111(?), 2001, pp. 735-759.
- . 'Political Obligation and the Particularity Requirement,' in *Legal Theory* 10(?), 2004, pp. 97-115.
- . 'Samaritanism and the Duty to Obey the Law,' in *Is There a Duty to Obey the*

- Law?* Christopher Heath Wellman and A. John Simmons (Cambridge: Cambridge University Press, 2005).
- Wolff, Jonathan. 'Political Obligation, Fairness, and Independence,' in *Ratio (New Series)* 7(1), 1995, pp. 87-99.
- Wolff, Robert Paul. *In Defense of Anarchism*. (New York: Harper and Row, 1971).