Philosophy of Law
An introduction

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Part II

The reach of the law

6 Authority and obligation

When we switch our attention from the nature of law to the reach of the law, the first question is whether we have good reason to accept that the law has any proper authority at all. Why should we obey it? To a certain extent, the answer is implicit in the analysis of the 'nature of law' question. If law is held to be morally authoritative by definition, it will seem that an obligation to obey flows simply from the recognition of law as law. If the definition of law excludes this moral authority, the source of obligation must be sought elsewhere. The question about authority, however, is not as straightforward as this. What we are asking about is the kind of connection to be found between the authority of rulers to lay down laws and the legal and moral duty of the ruled to obey them. It is often asserted that there is a *prima facie* general duty of obligation to obey the law. What this means is that in the absence of special reasons that might justify a specific exemption, the acknowledgement of the law's authority leads to the acceptance of the duty of obedience. How it might lead to this, however, is a matter for debate. It may be for reasons quite independent of the authoritative status of the law. The special reasons for suspending this presumption, furthermore, suggesting that there are limits to the general duty, must arise from considerations powerful enough to override the standard reasons for compliance.

Common reasons for obeying the law

On the assumption that there are sound moral reasons for not breaking contracts, committing frauds or acts of violence, does the unlawfulness of wrongful acts provide an additional reason to conform? This is the question. If sound moral judgement were a sufficient guide to action, legal obligation would simply be a reinforcement of moral obligation. The law would be no more than a system of coercion to prevent or discourage people from acting harmfully. One obvious reason in addition to moral obligation is the instinct of self-preservation, the fear of sanctions. This is not the point. The question is whether the fact of legality as such creates an obligation beyond the moral obligation that might already be felt. Do we have to respect the law as law?

One fairly common belief is that the obligation is self-evident, because the law is, by definition, 'what you have to do'. The law is the law and it is there to be obeyed. The theoretical expression of this reason is the claim that the obligation is derived conceptually, that the obligation to obey is written into the very idea of legitimate authority. This is a *conceptual* justification. To say that 'X is a law' just means that X has to be obeyed. Disobedience is wrong by definition and the sanctions of the law are automatically justified. It should be stressed that on this argument the obligation is derived solely from the legality, not from the content of the law.

Another common belief is that the law has to be obeyed because its authority is essential for the continuation of civilised society. The emphasis here is on the dangerous social effects of any relaxation in the general obligation to obey. This argument is rooted in the utilitarian tradition, which today is more commonly termed *consequentialist*. This is a broader term that includes theories which reject the specific standard of utility but retain the basic principle that all actions are to be judged in terms of their effects, rather than, for example, their inherent goodness or badness. In the same way that Bentham in his critique of common law judged the merits of individual laws by reference to their overall utility, contemporary consequentialists justify a general obligation to obey the law by referring to the good and bad effects on society as a whole of obedience and disobedience. Given that general disobedience would have dangerous consequences, this approach establishes at least a *prima facie* duty of obedience, but leaves open the question as to whether this duty can be overridden in specific circumstances in which the effects of the injustice perpetuated by an unjust law outweighs the negative effects of disobedience.

A third type of justification is *contractual*, according to which the obligation arises from an agreement – either explicit or unspoken – already reached between the rulers and the ruled. The commitment on this line of reasoning is to obey the law, not for the sake of what might happen in the event of widespread disobedience, but as an expression of what is already due. The state has the right to expect obedience because consent has already been implicitly given. This justification is also open to refutation, depending on whether or not the rulers have honoured their side of the contract.

Obligation and legal theory

It is vital to understand that there is no simple correspondence between the major theories of law and these theories of obligation. It is a common mistake to divide natural lawyers from positivists by imagining that while the former urge us to disobey unjust laws, the latter insist that a bad law is still a law that has to be obeyed. In fact, the problem of how the nature of law relates to the source of obligation to obey is one of the most complex and paradox-ridden areas in contemporary jurisprudence. We can open up this area by observing that the mere statement or exposition of what the law

actually expects and demands of those subject to its jurisdiction in no way begins to answer the question about their obligation to obey these laws. The fact that there are sanctions to enforce the law does not create an obligation, it means only that we can be obliged to conform (Hart 1961: 80–1).

The central problem derives from the deep ambiguity in the terms 'authority' and 'authorisation'. Both positivism and natural law have been unclear about the relation between obligation and the authority of the law. Positivists have frequently been interpreted as arguing that any law that is valid according to purely technical criteria automatically creates alongside its legality a general obligation to obey. On the other hand, many positivists have seen the identification of the appropriate formal criteria for determining legal validity as having no direct bearing on the source of legal obligation. On this reading, the traceability of a law to a rule of recognition or a basic norm authenticates its status as law, but although this stamp of legality confers authority on the agencies of the law to coerce citizens into conformity, this does not settle the question of whether this authorised coercion should be obeyed. For those positivists who are also utilitarians, the obligation to obey is usually derived from criteria drawn from consequentialist arguments about the likely outcome of specific acts of disobedience or a general rejection of the authority of the law.

Within the natural law camp, the conceptual link between authority and obedience has been more prominent, but the implications overall are equally ambiguous. Some of the traditional Christian theories, in arguing that law is by definition morally authoritative, seem to build the obligation to obey into the concept of law. On the other hand, the stipulation that only just laws are truly legal has led many to conclude that it is only the body of just laws that can by definition lay claim to obedience. Rules or commands that are posited as law cannot, merely by virtue of being the authentic issue of a legitimate sovereign, make this conceptual claim. Most of the great natural lawyers nevertheless concede that any body of rules or commands authorised by a sovereign, irrespective of the degree of justice it exhibits, does constitute a system of positive law that lays serious claim to obedience. What they deny is that those laws that are not sanctioned by the higher law can be justified on the conceptual argument. When faced with laws that are manifestly unjust – such as laws that are detrimental to human welfare, or calculated to benefit only the ruler – the influential response of Aquinas was to argue that obedience could only be justified on consequentialist grounds. Although they are not truly lawful, there might yet be an obligation to obey unjust laws, if it was clear that the community would suffer greater harm from the rebellion than from the continuation of the tyranny. Nevertheless, Aquinas discusses at length the conditions under which abuse of power may release subjects from their obligation to obey, and the arguments for the justifiability of civil disobedience. It is important to note also that he regarded laws that directly contravene God's law, such as the worship of false idols, as laws that 'must in no circumstance be obeyed' (Aquinas 1948: 134–85).

Social contract theory

Apart from the conceptual and consequential arguments, the other main source of theories of obligation is the idea of a contract between rulers and ruled. On this account, we are obliged to obey, not by virtue of the meaning of 'law', nor by the bad consequences of breaking it, but because by living in society we have already in some sense placed ourselves under such an obligation. By far the most important and influential contract philosopher in recent times is John Rawls (1921–2002), whose writings have had their main impact on political and moral theory. Since the 1950s, Rawls has been developing a systematic liberal theory of substantive justice, based on radically egalitarian premises. In his major work *A Theory of Justice* (Rawls 1972), he established the main lines of argument for the renewal of social contract theory. What his theory of justice contained was an original and distinctively modern theory of obligation that was aimed at avoiding the weaknesses of traditional contract theory. His project in this respect can only be fully appreciated with a clear idea of the background.

The idea of an original contract

The idea that obedience to the law can be justified by reference to a prior agreement, contract or covenant between rulers and ruled is an ancient one. It was expressed by Socrates and Plato, by medieval theologians and by early modern philosophers from Hobbes to Kant. The essential feature of the traditional idea is that the justification looks backwards in time to find the source of obligation. We are obliged to obey the law, not primarily because of its intrinsic qualities as law, nor because of the good or bad effects of lawbreaking, but because of a prior agreement to do so.

The most vivid example of the contract argument is found in Plato's account of Socrates' response to his sentence of death in the dialogue *Crito*. To the frustration of his supporters, Socrates argued that he must accept the verdict of the court, because although unjust, it was *lawful*. This is the outcome of an imaginary dialogue with 'the laws' of Athens, in which Socrates admits that he would have no answer to their accusations if they saw him trying to escape the process of law. The arguments attributed to the laws – all of which Socrates endorses – include several aspects of the contract theory. The crucial types of argument in these passages can be classified as follows. The citizen must obey the laws in everything, because (1) general obedience is the condition for the existence of society, and without it there would be anarchy; (2) the citizen owes the state everything, including his or her life; (3) the citizen has agreed, both explicitly and implicitly, by virtue of receiving benefits from the state and choosing not to emigrate, to obey all the laws; (4) the citizen has the opportunity to persuade the state, through legitimate lobbying, to change the laws, but not the right to disobey them.

The conclusion towards which Socrates' arguments lead overall is that the obligation to obey the law is virtually unconditional. The only hint of a condition is the implication in the 'freedom to persuade' argument that it must be the kind of society which allows such criticism. The most important point concerning the idea of the contract is that 'the laws' argue that it was never their agreement that all their decisions would be just. The agreement was made and consent given to submit to the authority of the law on the basis of the benefits conferred on every citizen, who is free to take advantage of all the institutions created by law. On Socrates' account, there is no talk in the contract of fairness or justice.

Classical contract theory

The great age of social contract theory in Europe was the socially and politically turbulent seventeenth century, the outcome of which had great significance for the shape of the contemporary world. For many centuries before this, medieval theologians had sought justifications in the idea of the original contract both for the political power of the day and for rebellion against it. The practical problem that inspired the development of the theory was that of justifying the removal of tyrants. In the course of the arguments to this effect, they also laid down the terms under which an acceptable and effective monarch does rule. The answer, briefly, was that monarchs rule by virtue of the consent of the subjects, who have voluntarily subordinated themselves to the ruler in return for the ruler observing certain constraints on the exercise of power.

The situation in the early modern period was such that the leading political thinkers were deeply affected by the constitutional conflicts that culminated in the revolution of 1688, establishing the settlement that brought more or less permanent political stability to England. This century as a whole saw the transition from the accession in 1603 of James I – himself an intellectual defender of the divine right of kings and critic of social contract theory – to the establishment in 1688 of a monarchy firmly subjected to democratic constraint. The interim saw a succession of civil wars, the execution of a king and a period of military dictatorship. The leading English contractarian thinkers, Thomas Hobbes (1588–1679) and John Locke (1632–1704), were both motivated primarily by urgent political purposes. Hobbes, forced temporarily into exile in Paris by the English Civil War, inclined towards strong government without too much concern for its political colour. Locke, on the other hand, also suffering exile as a result of the repressive government of James II, was more interested in limiting the power of government.

The versions of the social contract elaborated by Hobbes and Locke, each based on radically different premises, have been and remain enormously influential in the modern world. What they proposed – Hobbes in *Leviathan*, Locke in the *Second Treatise on Civil Government*, which was largely a reply to Hobbes – were diametrically opposed accounts of political

obligation, based on conflicting views of human nature as it exists, or would exist without law or the other structures of civil society.

In both cases, their contract theories rest upon their understanding of *the state of nature*, which is the state presumed to have existed prior to the creation of any laws. For Hobbes, this was a state of permanent war of all against all, in which there are 'no arts, no letters, no society; and which is worst of all, continual fear and danger of violent death' (Hobbes 1962: 143). Locke had a more benign view of the state of nature, but still saw in it enough danger to bring about the existence of law, the main purpose of which was the peaceful settlement of disputes (Locke 1924: bk 2, ch. 3).

It was the manner of the transition from the state of nature to civil society with which the contract theories were concerned. For Hobbes, the source of our present obligation to obey the law is the agreement that first brought it into being, a contract that was made when the majority of people invested authority in a few people or one person who was powerful enough to suppress the warlike state of nature and keep the peace. This original contract involved a trade of their natural liberty for security and protection. For as long as those invested with the power can enforce the rule of law, the contract is binding.

Locke's interpretation of what the contract consisted in was a direct challenge to the absolutism of Hobbes. For the latter, the contract was valid even under extreme duress, rather in the manner that a military surrender is valid, despite the obvious duress. For Locke, it was a strictly conditional trade by those who voluntarily became subjects, granting the sovereign or sovereign body the right to rule on condition that he, she or they administer justice efficiently, as well as simply enforcing the peace. For Hobbes – the initiator in England of the command-positivist tradition – the will of the sovereign is absolute. For Locke, the sovereign is constrained by the democratic rule of law. If the sovereign's side of this bargain is not kept, the contract is void and rebellion is justified.

Weaknesses and criticisms of contract theory

Hobbes and Locke, in common with all contract theorists up to their time, wrote as if the contract between sovereign and citizens had actually taken place at some definite point in the distant historical past. From their point of view, this was a reasonable assumption. Given their theories about the social and political hierarchies in which they found themselves, and their respective interpretations of the free and equal state of nature, it stood to reason that there must have been a point in time at which this freedom and equality of status were negotiated away, in order to escape from the dangers of the state of nature. It was a question of establishing what this negotiation, this original agreement at the point of transition to political society, must have involved. So the main assumption was that the contract was a real event, rather than some kind of metaphor or convenient myth to underwrite obligation.

Given that the contract was a real event, and that this was necessary for it to be binding, the next question that arises is how it continued to create an obligation for all the subsequent generations. If their forefathers had signed away their freedom and equality, why and how should this affect their own position? Was there still an obligation to obey the sovereign? The answers to this question have varied. For medieval thinkers, the obligation is renewed by the reaffirmation of the contract with the succession of every monarch. This was implausible, to say the least. It could hardly be argued that the formal endorsement of a *fait accompli* was a free agreement carrying such significance. Hobbes's answer was not clearly formulated, but suggested a continuing obligation by virtue of the same arguments that had been persuasive at the time of the original contract. Hobbes's contract, it should be remembered, did not require free consent. For Locke, on the other hand, such consent was central; his answer to the question of continuing obligation was based on the claim that contemporary consent is *tacit* as opposed to the actual consent given at the time of the original contract.

The nature of social contract theory changed substantially in the period leading up to the American and French Revolutions. David Hume accepted the contract as a real event accounting for the origin of obligation, but denied that it could continue to operate as such a justification in the present. In particular, he poured scorn upon Locke's defence of tacit consent, likening it to the plight of a press-ganged sailor expected to accept the authority of the ship's master. For Hume, contemporary obligation has to be justified on the basis of actual benefits to be derived from a state that is generally obeyed.

The important breakthrough came with Kant's (1724–1804) relinquishment of the assumption that the social contract must be understood as an actual, literal, historical contract between sovereign and subjects. For Kant, the contract was indeed the source of obligation, but it was to be understood not as something that had happened in the past, but as 'an idea of reason' that exercised its influence in the present. The Kantian contract is hypothetical rather than real. It is what rational people *would agree to* if they found themselves in such circumstances as described by the traditional theory. For Kant, it is rational to assume that such a contract between subjects and sovereign does exist.

One major type of criticism that should be mentioned in conclusion here is the charge of logical incoherence. It has frequently been argued that the very idea of a social contract as a literal historical event, brought into being between free subjects and a designated sovereign, is self-contradictory. In order for such an agreement to be reached, it is argued, there must already have been in existence the kind of institutions, the recognition of which depends on a prior agreement to respect them. What this suggests is that the original contract would be trying to create an authority that is itself needed to create it. An extension of this criticism is that the concept of a contract is a legal one, which by definition cannot be applied in a prelegal situation. A

further extension of it is the argument that in a genuinely presocial state of nature, the individuals seeking a sovereign would not even have the appropriate language for appointing one and formulating the agreement.

While these criticisms show that the traditional versions of contract theory were making simplistic assumptions about the origins of political power and legal systems, they are not entirely convincing. They seem to depend on the more modern belief that the idea of a presocial state is a myth; however, even if this is so, there is nothing mythical about the creation of political authority and law. It is not clear why the transition from a prelegal society to a legal one would require a contract in this very literal legalistic sense; or that it would not have the linguistic resources to innovate in this way.

Even if these criticisms are not as damaging as they sound, however, the fate of literal social contract theory was sealed largely by the rise of utilitarianism from the late eighteenth century. For utilitarians, the source of obligation was essentially forward-looking or consequentialist; the justification for general obedience is future-oriented rather than rooted in a past agreement. The idea of a binding contract was seen as an anachronism. It was not until the second half of the twentieth century that this largely discredited idea was seriously revived.

Rawls: the original position

With this historical background in mind, we can now return to the contemporary revival of contract theory by John Rawls. One of his main explicit purposes was to promote a coherent alternative to utilitarianism as a general moral theory as well as a theory of obligation. The overall aim was to construct a theory of substantive justice rooted in the contract tradition. Rawls maintains that his own contract theory leads to principles of justice that would not be endorsed by utilitarianism. Within the social contract tradition, this firm linking of the contract to principles of justice owes more to Locke and to Kant than to Hobbes.

On this new interpretation, the idea of a real historical contract is completely defunct. As we have seen, there were early hints that a hypothetical contract could operate as the ground of obligation, and that this only became explicit in Kant's philosophy. Even in Kant, however, the notion was rather sketchy, and Rawls's project was to develop a complete exposition of this theme.

With the proposal that the contract is hypothetical, it becomes irrelevant whether such an agreement had any historic reality. It is more appropriate to understand it in a 'let us imagine • ' sense. Imagine a scenario in which a number of people are called upon to make the kind of agreement necessary to escape from the state of nature and establishing civil society. Assuming that they are rational individuals in the sense that they are all concerned with striking the best possible bargain for themselves, what would be the content of the contract they would freely consent to?

In this imaginary situation, which Rawls refers to as 'the original position' or 'the initial situation', the parties to the contract would be required to reflect on the principles of justice to be adopted by the society in which they subsequently have to live. The contract would then involve the endorsement, in advance, of these principles, to which they would subsequently be committed. The crucial feature of this imagined position is that when choosing the principles that would govern a just society, each subject would be 'veiled' from all knowledge of the place he or she is to occupy in that society. They would have no knowledge of their natural endowment of intelligence or practical ability; or of whether they would be male or female, black or white, rich or poor, healthy or disabled, intelligent or disadvantaged. What is concealed is anything that might give them a head start or a handicap. They would not even have foreknowledge of their own personality traits and inclinations, whether acquisitive or unambitious, adventurous or cautious. This is Rawls's 'veil of ignorance', one of the most famous metaphors in contemporary philosophy.

This original position, despite its intended similarity to the presocial 'state of nature' of classical contract theory, is quite different in as far as its subjects are not real reasoning people, deciding on the nature of the bargain to be struck with a sovereign. Rawls's 'parties' to the contract are theoretical constructs, individuals stripped of all knowledge of themselves. In important respects they are not presocial; they understand everything of the basic workings of society except their own nature and their own position in it. What they are deciding is what it would be rational to accept as a principle of justice if they did not know how they personally were going to be affected by it. As such, the veil of ignorance, and the original position that it qualifies, are essentially a device for the elimination of unconscious bias and prejudice.

Rawls describes his theory of justice as 'justice as fairness'. What this means is that given the 'blind' starting point from which the principles of justice would be agreed, that of the original position, no one has an unfair advantage through inside knowledge of how the arrangements chosen will affect them. Justice is fairness in the sense that it is chosen in the dark, so to speak.

What is actually chosen by the parties in the original position is a conception of justice, which embodies a set of principles of justice. These will determine the nature of the constitution and a legislature to enact laws, a legal system to administer it, and so on. The important point is the nature of the principles upon which all the other arrangements will rest. Rawls argues that the rationality of self-interest of those who do not know which way their luck is going to turn will inevitably guide them towards principles that safeguard the interests of everyone in society with as much equality as is practically realisable. This leads him to two basic principles of justice, whereby everyone would have the right to equal basic liberties and socio-economic inequalities would be arranged for the benefit of the least advantaged, with 'all offices and positions open to all under conditions of fair equality and opportunity' (Rawls 1972: 302).

These principles are certainly not self-evident, and Rawls does not make any such claim for them. They are what rational self-interest, veiled by ignorance, would demand. The truth of the matter, of course, is that such principles would be rejected by many in the real world. What Rawls does claim is that in modern democracies they are already widely accepted, and that those who do not can perhaps be persuaded by philosophical reflection The important point is that the reasoning is not based on considerations of utility or a concern for the general welfare, but on straightforward self-interest in the original position.

Criticisms of these basic features of Rawls's theory of justice have come from many different angles. Some critics have regarded the veil of ignorance as an elaborate way of expressing the commonplace observation that justice is objective and neutral, or that it achieves the same result as other less complex devices for adopting the position of the disinterested observer, such as the imaginary visitor from Mars. Others regard all these visions of impartiality as a sham, and Rawls's version of it as merely a projection of his own sense of justice. Others again have argued that on Rawls's own terms, the impartiality of the veil and rational self-interest would not lead to these two principles of justice. The basic assumptions behind the 'maxi–min' idea – that it would be in the rational interests of all to arrange inequalities for the maximum benefit of the least advantaged – has been subjected to extensive analysis and criticism. Robert Nozick (1938–2002) in particular has argued (Nozick 1974) that Rawls's egalitarianism is not justice at all, that it is a sophisticated piece of trickery to justify excessive intervention by a non-legitimate state, for the redistribution of the wealth and property legitimately held by those who have acquired it rightfully to those who have no right to it. For Nozick, only a minimal 'nightwatchman' state, protecting negative rights and regulating legal transactions, is justified. The Rawlsian contract, from this point of view, justifies systematic injustice.

On balance, however, Rawls's theory of justice and later theories influenced by it still stand up well against many of these criticisms. Although Nozick's rival libertarian interpretation of justice and rights has been influential, it is widely regarded not only as too extreme in its anti-welfare implications, but also as being basically flawed in its uncritical assumptions about the rightfulness of the acquisition of property holdings.

Rawls on duty and obligation

Throughout Rawls's analysis of the duty to obey the law (Rawls 1972: ch. 6), his reference point is that of the parties in the original position, the arguments that would prevail, the conditions they would insist upon and the social arrangements they would reject. For example, when he argues that consenting to unjust arrangements amounts to an extorted promise that is void *ab initio*, and hence that such consent does not create a natural obligation, his justification for this argument is that the parties in the original

position, rationally aware of their own interests, would insist on these conditions. The original position, then, is the contractual source of the obligation.

From this position, Rawls argues, it would be relatively easy to establish 'a natural duty of justice' to support institutions that are in fact demonstrably just, in that they show no favour or discrimination. If they are consistent with the two principles of justice – or if they come as close as possible to satisfying them as circumstances allow – the parties to the contract would agree to accepting the duty to obey, because each individually would expect to flourish under such arrangements. This natural duty, he argues, would be endorsed in preference to a principle of utility, because the latter is based not on rational self-interest, but on a calculation of what would be best for the aggregate welfare of all the citizens.

The more important question for Rawls is that of whether there can be a duty to comply with an unjust law, or with unjust social arrangements. From the outset, Rawls rejects the idea that the duty to obey can be restricted to perfectly just laws and institutions. This, he says, is as mistaken as regarding the legal validity of a law as a sufficient reason for obeying it. Clearly, in the case of an unjust law, the natural duty of justice does not apply. What the proper attitude depends on, according to Rawls, is the arguments that would be persuasive from behind the veil. He anticipates the objection that nobody in this initial position in which they are still 'free and equal' would contemplate endorsing a situation in which they will be expected to obey clearly unjust laws, an endorsement that would be contrary to their own interests.

It is this voluntary relinquishment of complete freedom from a duty to obey unjust laws that Rawls seeks to explain. In so doing, he argues that the parties to the original contract would reason, with the benefit of their knowledge of the way society works, that all social arrangements being fallible and imperfect, it is better to consent to one fallible procedure that is bound to produce some injustice than to make no agreement at all. The important distinction for Rawls in this context is between a 'nearly just' society and constitution and a clearly unjust society and constitution. The conclusion he is seeking is that there is a certain amount of injustice in the specific form of unjust laws that we have to put up with and recognise as binding, so long as the basic structure of society is reasonably just. His argument is that this conclusion is warranted by reference to the considerations that would be persuasive in the original position; the parties would recognise the inevitability of a certain amount of injustice. As fully rational agents, they would know that it would be in their own interests to curtail their expectations of perfect justice.

As Rawls realises, the real problem lies in distinguishing between circumstances in which we are bound to comply with unjust or unreasonable laws, and circumstances that involve a degree of injustice that is entirely unacceptable. His central argument is that the duty to obey depends on the degree of seriousness of the injustice. We are only obligated to regard unjust laws as binding within certain limits to what would be acceptable to the parties in the

original position. It is to establish the nature of these limits that Rawls's analysis turns to the question of how and when civil disobedience can be justified.

Injustice and civil disobedience

The central question in any discussion of civil disobedience concerns the point at which it becomes morally permissible – or even obligatory – to resist the authority of unjust laws or institutions. It should be noted immediately that it is never a question of legal permissibility: civil disobedience is illegal by definition and only reaches the political agenda when it is widely held that certain laws are wrong.

Definition of civil disobedience

A provisional definition of civil disobedience is that it means 'deliberate principled lawbreaking'. This makes it clear why it cannot be a legal activity, such as a campaign of demonstration against laws perceived to be unjust; its very purpose is to challenge these laws with defiantly illegal actions. One of the difficulties in defining it more precisely lies in the fact that its meaning has evolved by convention. Henry David Thoreau (1817–62) is thought to have been the first to use the term – in 1848 – in an essay justifying his principled refusal to pay tax to finance the US war against Mexico. The same term has since been used in many different contexts, the most famous of which have been the strategy of passive resistance employed by Gandhi against British rule in India and the civil rights movement in the 1950s–1960s in the USA.

In each of these cases, there is an emphasis on civil disobedience as essentially a non-violent strategy of resistance. So, in addition to the illegal activity being based on principle, it must also avoid violence. Non-violence is usually stipulated as part of the definition of civil disobedience in order to distinguish it from other forms of resistance to injustice, such as direct action, rebellion or revolution. This does not necessarily mean that violence is always wrong; what it does mean is that if the action is violent, it cannot count as civil disobedience. It should be noted, however, that this condition is not universally accepted (Bedau 1991: 130–44).

A number of other stipulations are conventionally associated with the definition of civil disobedience. It must be used only in the last resort, when all other legal methods to change the law have been explored and exhausted. It must be undertaken openly, which is to say that it must be an act of open defiance with the intention of publicising the injustice, rather than quiet non-compliance. Furthermore, those engaged in it should be prepared to submit to prosecution and punishment, rather than attempting to evade the process of law. Finally, it is usually stipulated that principled disobedience to one unjust law should be accompanied by scrupulous obedience to the law as a whole.

The initial definition from which we started was that of civil disobedience as 'deliberate principled lawbreaking'. This 'principled' feature distinguishes

it from (1) common criminal or civil lawbreaking for personal convenience or personal gain; and (2) opposing injustice to oneself for the sole purpose of asserting or defending one's own rights. In the sense intended, 'principled' means that it is motivated by a selfless concern with opposing injustice. It has often been objected that the exclusion of the second of these is an unfair condition. If an injustice is generalised, then those participating in organised disobedience are likely to be affected by it themselves. Principled activity and the defence of one's own rights should not be seen as inconsistent. A striking example would be the refusal to fight in what was widely held to be an unjust war. A second complication here, with the insistence on selfless motivation, is that the appeal to conscience on every issue of moral significance is thought by critics of civil disobedience to display another kind of self-centredness: a refusal to accept that the consciences of others must be respected and weighed against your own.

Justification of civil disobedience

On the question of the justification of civil disobedience, there are two polarised positions of unqualified approval and complete rejection.

First, those who argue that active disobedience to unjust laws is always a matter of personal moral decision according to conscience are arguing that conscience always overrides any general obligation to obey the law. This in effect means that there is no obligation at all, because it implies that, in the case of just laws, the obligation derived from conscience would be sufficient.

The most renowned advocate of this position was Thoreau, who had little time for the idea that the law is owed any respect:

> Must the citizen even for a moment, or in the least degree, resign his conscience to the legislator? Why has every man a conscience then? I think we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have the right to assume, is to do what at any time I think is right.
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> (Thoreau 1983: 387)

The appeal of this statement rests on the plausible assumption that one always has the right to resist outright injustice. Read more carefully, however, what it amounts to is a thoroughgoing individualism on all questions of moral seriousness, the implications of which are anarchic.

Second, those at the opposite end of the spectrum maintain that civil disobedience is never in any circumstances justified. From this point of view, the 'general' *prima facie* obligation to obey the law means general in the sense of 'universal' or 'exceptionless', rather than 'generally speaking' or 'in most circumstances'. This position includes Socrates' *Crito* position, allowing criticism and persuasion but completely outlawing principled disobedience. It also includes Bentham's famous dictum, urging legal

reformers to 'obey punctually, censure freely'. The view that civil disobedience is always wrong is usually confined to the context of liberal democracies or other forms of government under which some freedom of expression and criticism is possible.

Between these two polarised positions, many philosophers, including Rawls and Dworkin, have sought to develop a qualified defence of civil disobedience in carefully defined circumstances. What they are defending is the moral legitimacy of a certain kind of principled lawbreaking, overriding the *prima facie* obligation to obey the law.

Rawls on civil disobedience

Rawls's approach to civil disobedience flows directly from his contractual theory of obligation. Bluntly speaking, when the state breaks its side of the hypothetical contract, the obligation to obey is abrogated. Civil disobedience is then justified in carefully specified circumstances. What this means for Rawls is that a situation exists whereby the parties in the original position would find it irrational to agree with the disallowal or suppression of basic liberties or the equality of opportunity for any group in which they might find themselves when the veil of ignorance is lifted.

What Rawls explicitly assumes from the outset is that civil disobedience is only appropriate and feasible in a democratic society, a society that is – at least in principle – committed to the values of liberty and equality. In non-democratic societies, other forms of opposition and resistance are appropriate; however, this is not what Rawls is concerned with. Civil disobedience is taken up by citizens who regard the system as in the main a just one. A precondition for justifying it, he believes, is that those resorting to it accept that the system is a 'nearly just' one. Although it goes outside of the law to make its protest, civil disobedience stays within the limits of what Rawls calls 'fidelity to law, albeit at the outer limits of it'. That is to say, they accept the moral legitimacy of the law as a whole; this acceptance is evidenced by their willingness to accept the legal consequence of their actions.

Rawls is arguing, then, that there is a general duty of obedience and that civil disobedience can be justified in a contemporary democratic society. As we have seen, he argues not only that there is a natural duty to obey just laws, but also a duty to obey them – within certain limits – when they are unjust. If the society is 'well-ordered and nearly just', accepting the democratic principles of equality and mutual respect, there are many injustices that have to be accepted. It is only when an injustice becomes grave enough that civil disobedience is justified.

What he means is something like this. In any large society, there will inevitably be many grievances, real and imagined, about the distribution of wealth, undeserved privileges, miscarriages of justice or the state of the law on many different issues. Some examples of these will be serious, while some will be relatively minor injustices. Most of them are more appropriately

dealt with within the channels of the democratic political process. Relatively few of them justify civil disobedience.

In some cases, though, he accepts civil disobedience to be justified. How then does Rawls define it?

> I shall begin by defining civil disobedience as a public, non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. By acting in this way, one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social co-operation among free and equal men are not being respected.
>
> (Rawls 1972: 364)

Rawls is conscious of the restricted nature of this definition, which excludes many other types of principled disobedience. He adds that he does 'not at all mean to say that only this form of dissent is ever justified in a democratic state'. What he seeks to emphasise is the distinctiveness of this form of dissent, as opposed to, say, conscientious refusal.

What he means by calling it a political act is that (1) it is addressed to 'the majority that holds political power'; and (2) that it is an act 'guided and justified by political principles, that is, by the principles of justice' (ibid.: 365). What it always involves is an appeal by this dramatically public action to the commonly shared conception of justice in the society. When it is justified, Rawls sees civil disobedience as playing an important part in the democratic process, by highlighting the failure of society to live up to its own principles. So by its very nature, he argues, civil disobedience is a public act rather than a covert or secretive one. It is a form of public speech, and as such it needs a public forum. And for the same reason it is non-violent: as a form of speech, it is principally a form of communication. As violence, it negates itself as communication.

There are three presumptions that, according to Rawls, circumscribe the limits of justifiable civil disobedience. The first of these is the most important, identifying those types of injustice that are the appropriate objects for this kind of protest. What he argues here is that 'it seems reasonable, other things being equal', to limit it to instances of 'substantial and clear injustice' (ibid.: 372). For this reason, he says, civil disobedience should be restricted to protesting against serious infringements of (1) the principle of liberty; and (2) the principle of fair equality of opportunity. Both of these he describes as guaranteeing the basic liberties: the rights to vote, to hold office, to own property, and so on. Having included these clearly identifiable injustices in the category of wrongs that are rightfully opposed by civil disobedience, he proceeds to exclude socioeconomic injustices as suitable cases for civil disobedience on the grounds that they are much more difficult to ascertain. There is so much conflict of rational opinion as to whether and to what extent the existence of socioeconomic inequalities constitutes an

injustice, that civil disobedience would become too difficult to justify. Thus, apparently unfair tax laws, he says, unless they are clearly designed to attack a basic equal liberty (for example, a tax on a religious group or an ethnic minority) are best left to the political process.

Rawls's second presumption is that, for civil disobedience to be justified, legal means of redress have been tried, to no avail. Attempts to have discriminatory laws repealed have failed, so civil disobedience should normally only be taken up in the last resort. He accepts that this is not always the case and that sometimes the matter is too urgent to spend years on legal campaigns.

The third and last condition is more confused than the first two. The natural duty of justice, he says, may require a certain restraint. If one minority is justified in disobedience, then any other minority in relevantly similar circumstances is likewise justified. So many groups with an equally sound case might take up civil disobedience and cause a complete breakdown of the law. There is an upper limit on the public forum to handle all these complaints. It does seem odd that Rawls can contemplate such a scenario, with so many minorities being deprived of basic rights, and still call it a nearly just, well-ordered society.

Criticisms of Rawls

Criticisms of Rawls's general approach to obligation and civil disobedience have come from every direction. Clearly, those who reject contract theory based on rational self-interest will also reject these implications of it. A standard consequentialist justification of principled lawbreaking in pursuit of civil rights will be based, not on an appeal to an implicit rational contract, but to a comparison with the consequences of continued acquiescence. What releases them from the general duty of obedience is an outweighing of the consequences of submitting to unjust laws by the positive consequences of defying them.

Criticism also comes from those who reject the justification of civil disobedience unconditionally, on the grounds that the obligation is universal in a democracy, where it is possible to change unjust laws through more conventional political channels. On this kind of conceptual argument, 'principled lawbreaking' is a contradiction in terms if the law is by definition morally authoritative, even in its unjust manifestations. The implausibility of this criticism is highlighted by any consideration of the claim to have established an automatic link between the existence of a proper legal authority and the obligation to obey. It is quite clear that we can accept the democratic authority of a government without submitting to such an unconditional obligation. People can and do recognise the political legitimacy of governments, while quietly disregarding not only the laws that do not suit them, but also the ones they think irrational or unfair.

Others have criticised Rawls on his own terms, suggesting that there is something arbitrary about his narrow confinement of legitimate civil disobe-

dience to the special case of the civil rights of minorities. It seems obvious to many critics that there are other serious moral issues that might equally merit principled lawbreaking – issues relating to environmental dangers, unjust wars or unjust taxes – which are held to be wrongs or injustices that would not be countenanced in the original position. There is also felt to be something excessive about his justification of unjust laws that fall short of the threshold at which they create systematic structural inequality, on the assumption that rational agents – veiled from knowledge of whether they would be the victims – would regard such a high threshold of toleration of such injustices as 'the best possible world'. The objection here is either that this is not what we would agree to from behind the veil, any more than we would agree to extreme inequalities; or if it does imply this, then there is something radically wrong with the veil as a metaphor for justice.

If this last criticism is justified, however, it means in effect that there is no general *prima facie* obligation to obey the law, beyond the moral obligation that is there already. If at the first sign of injustice or unfairness the duty to obey disappears, it means that there is no special reason to respect the authority of the law. Another interpretation is that 'respect for the law' is just one reason to weigh against other reasons, enjoying no special status.

Conclusion

In contemporary legal theory, the relation between the idea of law and the meaning of its authority is still very unclear. As we saw at the outset of this chapter, any serious examination of the link between a valid authorised law and the duty of obedience leads into a conceptual quagmire. One thing that Rawls and his critics have done in recent years is to bring more structure into the debate on the origins of obligation and the conditions under which it might be suspended. One point upon which a degree of consensus is perhaps emerging is the recognition that there are limits to the authority of the law, and that the obligation to obey is not unconditional.

Study questions

General question: Do you agree that there is a general duty to obey the law? If so, what is its source?

Further study questions: What are the problems with the traditional social contract theories? Explain and critically evaluate Rawls's 'hypothetical contract' theory. Does it solve all the traditional problems of contract theory? Does he show that there is a natural duty of obligation to obey the law? What is civil disobedience? Is it compatible with the general obligation to obey? Does Rawls's 'original position' provide a sound basis for determining the justifiability of civil disobedience? If not, is there a better justification for civil disobedience?

Suggestions for further reading

Among the general books and chapters on political and legal obligation, the most noteworthy are Greenawalt (1987), Horton (1992), Pateman (1979), Beran (1987), Smith (1976) and Flathman (1973).

Important chapters and articles to consult include Raz (1979: 266–75; 1986: ch. 4), Lacey (1988: chs 4 and 6), Soper's article and the subsequent discussion in Gavison (1987). Useful shorter comments can also be found in Lyons (1984: ch. 7), Bix (1996: ch. 16) and Harris (1980: ch. 16).

For Aquinas's writings on obligation, see Aquinas (1948). On the history of contract theory, see in particular Jean Hampton (1986; 1997: ch. 2). There is also an excellent anthology by Lessnoff (1990), containing key selections from Hobbes, Locke, Kant, Rawls and others. The essential passages on contract theory can be found in Hobbes (1962: chs 6, 11–21) and Locke (1924: sections 1–6, 47–55, 123–41). Abridgements of these and of Hume's criticism of contract theory are reprinted in Cottingham (1996: part IX).

The essential reading from Rawls's *Theory of Justice* (1972) is Chapter 6. Important critical discussions of Rawls's theory as a whole include Nozick (1974: ch. 7) and Barry (1973). Daniels (1975) is a collection of critical essays.

On civil disobedience, the most valuable collections are both edited by Bedau (1969, 1991), including Plato's *Crito* and influential essays by Thoreau, Martin Luther King, Rawls and Raz. See also Singer (1973), Greenawalt (1987: chaps 3–4), Leiser (1973: ch. 12) and Kipnis (1977: section 4). There are useful shorter comments by Riddall (1991: ch. 15) and Singer (1993: ch. 11).