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THE OBLIGATION TO OBEY THE LAW: AN ESSAY ON LAW, SOCIAL INSTITUTIONS, AND MORALITY

by

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of the requirements for the degree of
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CHAPTER I

THE OBLIGATION TO OBEY THE LAW

1. Introduction

It is often said that we have an obligation to obey the law just because it is the law. This idea has been espoused in the West at least as early as Socrates and it is espoused today. It is not the special claim of any particular ideology but has been held by advocates of most political persuasions. In times of crisis it is argued over with passion and what is at issue is none other than the question of how much obedience and loyalty we owe to our political institutions. It is the aim of this dissertation to examine this claim critically, to make clear exactly what is asserted by it and to see what can be said for or against it.

Let us call the claim that people have an obligation to obey the law because it is the law the obligation-to-law (OL) principle. In this chapter, I shall attempt to state this principle in a clear and precise manner. In doing this I hope to capture exactly what is meant by those who would endorse it. In the ensuing chapters I shall be concerned to evaluate the principle. To do this it will be necessary to examine the validity of more general principles that have typically been appealed to in support of it. Thus in the second and third chapters I examine various utilitarian principles, and the fourth chapter deals with certain views about the moral nature of social institutions. The last three chapters deal with principles of justice and fairness. It

is the aim of this dissertation, then, not only to find a solution to the 'applied' question of political obligation but also to deal with more general normative issues. This dissertation is thus intended as a contribution to the controversies surrounding the proper statement of utilitarianism, the validity of utilitarianism as a moral principle, the effects of institutions on moral obligation and the place of principles of justice in morality. Something will be said, helpful I hope, on all these questions.

To get on with the task of clarifying the OL-principle, it will be useful to try to answer the following questions: What kind of obligation does a proponent of the principle have in mind? What does he mean by the law and by obeying the law? Upon whom is this obligation to obey the law supposed to fall? And how powerful is this obligation, that is, is it an 'absolute' obligation or a 'prima facie' obligation or something else?

2. Legal and Moral Obligation

The sort of obligation being claimed, I believe, is always a moral one, not a legal one. I shall use the phrase "legal obligation" in such a way that it is necessarily true that if a law applies to a man he has a legal obligation to obey it. The assertion, then, that a person has a legal obligation to do something is just the assertion that there exists a law, requiring him to do it, under whose scope he falls. What is being claimed, then, is that we have a moral obligation to fulfill our legal obligations.

It is also clear, I think, that those who claim that we have an obligation to obey the law are not arguing that it is always or generally in our best interest to obey the law. They are not just giving us

prudential advice, for they would hold that we ought sometimes to obey the law when it is not in our best interest to do so, or when we can get away with breaking it. I shall thus take it that what is being claimed is a moral obligation to obey the law. I shall use the words "obligation" and "ought" in their moral (as opposed to legal and prudential) senses unless I explicitly note otherwise.

3. Law and Natural Law

3.A. The nature of law. It is alleged, then, that there is a moral obligation to obey the law. But what is a law and how shall the term "law" be used? The kind of laws I am talking about, it should be obvious, are the laws of a state. These can be distinguished from scientific laws in that they are prescriptive, rather than descriptive. They are rules intended to govern the behavior of rational creatures who have the power to obey them or disobey them, as they wish. Descriptive laws, on the other hand, describe invariable or statistical regularities in nature; the entities they govern 'obey' them because they must, not because they want to or think it best. The laws of a state can also be distinguished from moral 'laws' or principles. Whatever else they may be or not be, moral principles are the standards of moral criticism and thus are not themselves open to moral criticism. The laws of a state, however, are open to moral criticism and thus cannot be identified with moral principles. Most importantly, the laws of a state can be distinguished from the rules of the moral code of a society in that the latter are established and enforced by informal means, by 'mere opinion' and social pressure, while the laws of a state are the 'official' and formal rules of the society. They are explicitly adopted by men who have the authority to make laws, who have followed certain

procedures and who have established explicit sanctions to be applied to those who break the laws. The laws of a state, then, are distinguished from the rules of 'positive morality' by the institutionalization required for their establishment and enforcement.

A central task of the philosophy of law is to clarify the nature of the institutionalization that makes a rule a law. Doing this is giving an analysis of the concept of law. In this dissertation I shall not attempt to offer a general analysis of law. In order to discuss the question of whether there is an obligation to obey the law, I do not think it is necessary to give such a general analysis. Most of the arguments I shall examine clearly rest on our 'intuitive' understanding of what the non-technical term "law" means and refers to in ordinary usage. Some of the arguments, however, do rest on particular analytical claims about what a law is or what obeying the law necessarily involves. And in those cases important aspects of the analytical question will be taken up. But no general analysis of law is necessary in order to begin this discussion or carry it on. Whether I am correct in this or not will depend, of course, on whether the ensuing discussions are successful.

3.B. The nature of natural law. While I am reluctant to attempt a full-scale analysis of law, there is a certain view about law that must be discussed briefly. I have said that a law is a social rule which is the product of some sort of explicit institutionalization. Let us say that it is a rule which fulfills certain institutional criteria. There are some philosophers--many of whom are in the natural law tradition--who hold that no such rule can be a law unless it fulfills the further condition of having a certain moral content. No such rule can be a law

unless it conforms with true moral principles or with 'natural law.' The force of this proposal is that we should not call a social rule a law if it is immoral or unjust.

The natural law theorist has reasons for his proposal. He believes that "the world is ruled by divine providence," that "the whole community of the universe is governed by divine reason."[1] The law which emanates from God for the governance of the world is called the Eternal Law. That part of it which rational creatures can know without the help of grace and which is intended to govern their behavior is called the Natural Law. The natural law both describes the natural inclinations of rational beings and prescribes to them the following of these inclinations as proper behavior. The function of human laws or the laws of a state is to express the natural law, apply its general precepts to particular situations and give it a human sanction. Since the natural law is a moral law, the function of human law is thus to express and provide a sanction for morality. It is for this reason that many natural law theorists propose to deny the epithet "law" to rules of the state which are immoral.

I shall not, however, adopt this proposal. It is based on certain theological and metaphysical views and on views about the nature of morality and the function of human law, none of which are obvious. But leaving this objection aside, the result of accepting this proposal would very likely be confusion. It seems to me that the natural law theorist is making substantive moral judgments but he puts them in the guise of linguistic recommendations. That is, he is of the opinion

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[1]Saint Thomas Aquinas, Summa Theologica, I-II, q. 91,1, quoted in Saint Thomas Aquinas, Treatise on Law (Chicago: Henry Regnery Company, 1963), pp. 12-13.

that there is no obligation to obey what we would ordinarily call bad or immoral laws. But he puts this by saying that such laws are not 'really' laws or should not be called laws. Clarity is more likely to be retained if we stick with ordinary usage and allow rules that fulfill the institutional criteria for law to be laws, whether they are moral or immoral. The substantive question of whether we have an obligation to obey such laws can then be tackled on its own merits, that is as a substantive moral question, rather than as a question of definition.

A law is thus, among other things, a man-made social rule. Sometimes laws are moral and good, sometimes not. This is how I shall use the term and this is how it is used in ordinary language.

4. Citizens and States

4.A. Residence and citizenship. Upon whom is the obligation to obey the law supposed to fall? It would seem that we can safely say that it falls on whomever the laws apply to. But to whom do the laws apply? I think it would generally be said that the laws of a state apply to or govern those who are situated within its territorial limits and that legal jurisdiction is a function of geography. It would not, however, be correct to say that being within the territory of a state is either a necessary or a sufficient condition for the laws applying to a man. The laws of a state can apply to its citizens when they are outside its territory. A citizen could, for example, be prosecuted for treason even though he committed his crime outside the state. On the other hand, states normally do not apply certain laws to non-citizens in its territory, especially if they are just visiting, for example, certain tax and conscription laws. It thus seems that laws fundamentally apply to people within a certain territory, but exceptions are sometimes made

for non-citizens and extensions for citizens.

I believe that those who hold that there is an obligation to obey the law because it is the law have usually meant by this that the citizens of a state ought to obey its laws. This is not to say that non-citizens do not have an obligation to obey the laws of states they visit or reside in. They may very well do so, but it is prima facie plausible to think that the reasons for this may be different from the reasons why citizens of a state ought to obey its laws. It is felt, that is, that citizenship brings with it a special obligation to obey the law. I shall thus be concerned in this dissertation only with the claim that the citizens of a state have an obligation to obey its laws.

4.B. 'Deviant' citizenship. There is, however, a problem concerning the nature of citizenship. Citizenship is not a natural but a conventional and legal relationship between a man and a state. It is thus at least theoretically possible for a state to extend citizenship--and its correlative rights and obligations--to people who do not reside in its territory, do not desire its citizenship and do not acknowledge it. Suppose, for example, that the members of a certain state are composed largely of people of one ethnic group and they pass a law conferring citizenship on people of the same ethnic group in a neighboring state. Suppose that the people in the neighboring state do not desire the citizenship, do not acknowledge it and benefit in no way from it. Shall we say that they nevertheless have an obligation to obey the laws of the first state?

I do not think that those who hold that there is an obligation to obey the law because it is the law would hold that it falls on these people. I think it would be held that in order for a law to apply to

a man for the application of the OL-principle, either one of two further conditions must be true of him, in addition to his bearing the legal relationship of citizenship. He must either be 'part of the society' in which these laws hold or he must acknowledge the citizenship. To be part of the society means having one's welfare directly protected and enhanced by the enforcement of the laws of the state and this will normally require residence within its territory. The other condition, that of acknowledging citizenship, is meant to account for those who live outside of the state but still 'see' themselves as citizens of it (and are accorded citizenship by the laws). I think it would be held that such people are also obligated.

For the purposes of this dissertation I shall say that the obligation to obey the law is supposed to fall on the citizens of a state but I shall use the word "citizenship" in the more 'reasonable' sense I have been trying to bring out. That is, I shall say that a man is a citizen of a state if and only if he is legally a citizen and is either part of the society involving that state or acknowledges the citizenship. Undoubtedly, a more detailed examination of the concept of citizenship would bring out more complexities but it is not necessary to get caught up in these for the purpose of gaining an initial understanding of the OL-principle.

Originally I suggested that the answer to the question, "Upon whom does the obligation fall?" could be found by seeing to whom the laws of a state <u>apply</u>. But now we see that there are two classes of people to whom the laws apply, citizens and non-citizens, and it is only with the obligation that citizens allegedly have that I shall be concerned. That is, I am concerned with the obligation that is supposed to fall only upon <u>some</u> of those to whom the law applies.

4.C. Must the state be just? There is yet another restriction that some will want to make. For reasons that will be brought out later, it may be held that the obligation falls on citizens only if their state has some special moral character, i.e. is just or 'good' or democratic and so on. For the sake of having a word, let us now take those who would say this as requiring that the state be just. To say this, incidentally, is not to say that citizens of states that are not just need never obey the law. It can be held that they ought to obey the good laws and other laws when disobedience would have bad consequences. But it is to say that they have no 'overall' obligation to obey the law (in a sense to be clarified later, sec. 6).

Given this we can distinguish two claims, that any citizen of any state has an obligation to obey all of its laws or that only citizens of just states have this obligation. One who holds that there is an obligation to obey the law may have either of these in mind and we shall have to examine these claims separately.

5. The Varieties of Law

Another clarification about law is necessary. Hart[2] and others have pointed out recently that not all laws actually prescribe or proscribe certain kinds of behavior. There are laws of a legal system, which Hart calls secondary rules, which tell us just when a primary rule prohibiting or requiring some specific kind of action has been enacted. A legislator does not break a law if he fails to follow such procedures; he simply fails to make a law. Analagously there are laws that allow us to enter into agreements with others and thereby take on

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[2]H.L.A. Hart, The Concept of Law (Oxford: Oxford University Press, 1961), chapters III-IV.

legal obligations, eg. under certain conditions an act of ours can constitute the making of a contract with someone, which is legally enforceable.

From these considerations Richard Wasserstrom has concluded that

> to talk about disobeying the law or about one's obligation to obey the law is usually to refer to a rather special kind of activity, namely, that which is exemplified by, among other things, actions in violation or disobedience of a penal law.[3]

It seems to me that this is slightly misleading. Not all laws that prohibit or prescribe something are penal laws, eg. a law levying a tax is not a penal law. Moreover it seems that once we have made a legally valid contract, we then have a legal obligation to fulfill its terms and we thus act against the spirit of the law if we breach it, other things being equal.[4] Consider, moreover, a legislator who believes he can make it appear to people that a certain law has been enacted, although he has not gone through proper procedures. Suppose he does this and people obey the law and violators are punished. Has the legislator broken the law? What he has done is usually not punishable and there is no statute forbidding precisely such acts. But, on the other hand, he has not followed the appropriate, legally validated rules for enacting legislation. And it seems that this is the significant thing. We could argue for a long time over whether this should or should not be called law-breaking, but, surely, the overriding point is that the legislator has not followed the procedural rules of the legal system

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[3]Richard Wasserstrom, "The Obligation to Obey the Law," UCLA Law Review (1963), p. 786.

[4]I do not wish to suggest here that we have a legal obligation to do all those acts such that if we were not to do them we may be brought into a civil suit and lose. I am concerned only with clearly defined legal obligations we have taken on by voluntary acts.

and if there is an obligation to obey the law one violates it by such sleight of hand just as when one breaks a penal law. If there is an obligation to obey the law, it surely devolves not only on ordinary citizens with respect to penal laws and contractual obligations, but also on officials with respect to using proper legal procedures.

In sum, there are many ways in which we could fail to be law-abiding. The obligation to obey the law then, might better be described as an obligation to be law-abiding, which includes obeying specific prescriptions of the laws, fulfilling legal obligations we take on and the use of proper legal procedures by officials (even though their misuse might not be a clear instance of law-breaking). When I speak of the obligation to obey the law, it is such law-abidingness that I have in mind.

6. The Power of the Obligation

6.A. Absolute obligation. So far I have held that those who believe that there is an obligation to obey the law because it is the law have in mind a moral obligation, which falls on the citizens of every state or of 'just' states, and which is fundamentally an obligation to be law-abiding. We must now raise the question concerning what can be called the power of the obligation. I shall say that an obligation to do acts of kind, X, is absolute if it is always our actual duty to do any particular act of that kind, when we are confronted with the alternatives of doing it or not doing it. An absolute obligation is never overridden in actual situations by other considerations. Now it may be held that we have an absolute obligation to obey the law. To say this is to say that it is never morally justifiable in any concrete case to break the law. The obligation is never overridden by other moral

features of the situation.

Few who reflect on the matter would nowadays hold this very stringent thesis. It is obvious that a state could set up cruel and inhumane laws which ought not to be obeyed. The genocidal laws of Nazi Germany are examples of this. In the face of these examples, it is often suggested that the reason such laws need not be obeyed is that a state like Nazi Germany is thoroughly corrupt and unjust and that there is no obligation to obey the law in such states. But it might be held if a state is good or just or democratic, then there is an absolute obligation to obey all its laws. It is never right to break laws--even the bad ones--of a good state. If we call the first view that the citizens of every state have an absolute obligation to obey all its laws, Absolutism, we can call this more moderate view, Modified Absolutism.

Modified Absolutism avoids some of the more obvious counter-examples that plague Absolutism, but it is still not a plausible view. Even the best of societies can, in a weak moment, enact the worst laws or embark on disastrous policies so that disobedience is justified. But to make this point, let us consider not a bad law of such a society, but a very good and reasonable law:

> In the Commonwealth of Pennsylvania it is unlawful to operate a motor vehicle that has not been inspected. The penalty is not high --perhaps $25, more or less, depending on the whims of the magistrate. But the action is unlawful. Now suppose an uninspected car is the only vehicle available for transporting an ill person to a hospital for urgently needed care. The position stated implies that such an emergency would not provide a moral justification for breaking the law.[5]

It strains credulity, however, to suppose that anyone would hold that

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[5]Richard Brandt, "Utility and the Obligation to Obey the Law," in Sidney Hook, ed., Law and Philosophy (New York: New York University Press, 1964), p. 51.

there is no moral justification for breaking the law in cases like this.

The general problem with this kind of absolutism is this: the fact that a particular act is an act of conformity to a law of a good society does not guarantee that the act will not have other features which would make its performance disastrous from a moral point of view. Its particular consequences, especially, cannot be 'read off' from its being an act of that kind but are determined by the nature of the law at issue, just how other people are affected, the political situation and so on. It is always possible to imagine an act of obedience to the law having, in concrete circumstances, consequences that would make its performance morally unthinkable. The absolutist must either be blind to the fact there are other features of this sort that are relevant to moral decisions about particular acts or place too high a valuation on obedience to the law. I conclude, then, that both kinds of absolutism are implausible.

6.B. Prima facie and presumptive obligation. A weaker claim still is that the obligation to obey the law is a prima facie obligation. But this notion of prima facie obligation is complicated and our first task must be to try to clarify it.

The phrase "prima facie obligation" can be used in at least two different ways. When it is said that people have a prima facie obligation to do acts of kind X, this could be taken to mean that the fact that an act is of kind X is a good moral reason for doing it, though it may be outweighed by stronger reasons in particular cases. Or it could be taken to mean only that it is likely that any particular action of kind X will turn out to be obligatory. On the latter meaning the fact

that an act is of kind X is not in itself a good moral reason for doing it but it suggests that there are likely to be such reasons. I will speak of there being a presumptive obligation to do X in the latter case and reserve the phrase 'prima facie obligation' for the former case.

The view that there are such things as prima facie obligations goes along with the idea that there are 'intrinsically' right-making and wrong-making features of acts. Consider, for example, the feature of causing an injury to someone other than the agent and let us call this M--for maleficence. W.D. Ross[6] and others would hold that insofar as an action has M it is morally criticizable. We cannot, however, say that such acts are actually wrong because, as we have noted, they may have other features which make them morally praiseworthy and override the fact that they are M. They are thus prima facie wrong and the fact that an act is M is a good reason for not doing it. If the act is to be permissable in some situation its M-ness must be overridden. M, moreover, is the kind of feature that in itself makes for the wrongness of an act, and not because M is connected with some other feature. That is why we can speak of M as being intrinsically wrong-making.

To understand the concept of presumptive obligation, let us consider the following view about promising:

A) Most of the time a person makes a promise he causes someone else to have certain expectations.
B) Breaking the promise usually upsets those expectations.
C) Having one's expectations upset is being injured.
D) Injuring someone is prima facie wrong.

Propositions (A) - (D) do not justify the claim that there is prima facie obligation to keep promises because it is possible that there be

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[6]W.D. Ross, "What Makes Right Acts Right?" The Right and the Good, (Oxford: Oxford University Press, 1930), pp. 16-47.

cases in which the making of a promise does not cause expectations and the breaking of it does not cause injury. In such a case the fact that an act breaks a promise would not be a reason against doing it and that fact does not have to be overridden for the act to be justified. But because of the likelihood that when a promise is broken expectations will be upset, we can speak of a presumptive obligation to keep promises. There are likely to be good reasons against any particular act of promise-breaking.

There are two features of the above case that should be distinguished. First, the connection between breaking promises and causing injury is a contingent one. It is logically possible that there be broken promises that cause no harm. Secondly, it is empirically certain that there will be such cases--there are many acts of promise-breaking that cause no harm. Is the obligation only presumptive because of the contingent connection between promise-breaking and harm or because of the empirical certainty that there will be broken promises without harm? This question calls for a decision as to how to make the distinction between presumptive and prima facie obligation and I am going to use these terms in such a way that what is important is the logical possibility of broken promises without harm. We can thus define the two kinds of obligation as follows:

> An obligation to do (or not to do) acts of kind X is prima facie if and only if X is an intrinsically right-making (or wrong-making) feature of an action.
>
> An obligation to do (or not to do) acts of kind X is presumptive if and only if X is contingently connected with an intrinsically right-making (or wrong-making) feature of an action.

The obligation to do X will be presumptive even if there is a universal law linking X to an intrinsically right-making feature, Y. I choose this way of talking because even in this latter case, it will still make

sense to say that X does not give us the 'real' reason why the act is right. The intuitive distinction is this: when X is prima facie obligatory, X is the reason why the act is obligatory, while when X is presumptively obligatory, it is only connected to such a reason.

Before we can use this there is one more case that we must bring out. It is possible that there be a feature of an act, X, such that it does not at first seem to be the case that there is a prima facie obligation to do such acts, but when one examines the nature of X more closely, one finds that if an act is of kind X, it logically follows that it is also of kind Y and there is a clear prima facie obligation to do acts of kind Y. In such a case I shall say that there is a prima facie obligation to do acts of kind X and that X is an intrinsically right-making feature of an act. The peculiar feature of the case is that the phrase 'X' does not itself clearly identify the nature of that right-making feature or clearly express the reason why the act is right, although that reason can be drawn out by analyzing the concept of X. It may be, for example, that 'X' is a complex description and 'Y' is just one element of the complex and it takes some analysis to realize that Y is a part of X. For the sake of having a name, I shall call such a prima facie obligation, a complex prima facie obligation.

As an example of a complex prima facie obligation, let us consider one of the arguments Socrates uses in the Crito to support the claim that there is an obligation to obey the law. Socrates held that a citizen, by not leaving his state, makes an agreement to obey its laws. This is not just a contingent matter, that is, it follows necessarily from the fact that one is a citizen of a state and has not left it that one has made an agreement to obey its laws. Consider, then, an act of obedience to the laws of a state by a citizen. If Socrates'

analysis is correct, such an act is necessarily an act of keeping a promise. If, then, there is a prima facie obligation to keep a promise, there will be an obligation to obey the law. The obligation is prima facie rather than presumptive because it is a necessary and not just a contingent matter that obedience to the law by a citizen is the keeping of a promise. Seeing that such obedience is the keeping of a promise is gaining a deeper understanding of what such obedience is; it is not coming to know a generalization based on the experienced concurrence of such acts of obedience and acts of keeping promises. The prima facie obligation, however, is complex because the phrase "obedience to the law by a citizen" does not clearly reveal why such an act is obligatory. Analysis is needed to bring this out. Therefore, if Socrates' analysis is correct and if there is a prima facie obligation to keep promises, there is an obligation to obey the law which is both prima facie and complex.[7]

As we shall see in the next section and in later chapters, the concept of a complex prima facie obligation is extremely important as a tool for analyzing the claim that there is an obligation to obey the law.

6.C. Prima facie obligation and the law. Given this, to say that there is a prima facie obligation to obey the law is to say that the fact that an act conforms to a law is an intrinsically good moral reason for doing it and that being in conformity with a law is an intrinsically right-making characteristic of an act. This explains why it is said that there is an obligation to obey the law because it is the law--that

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[7]I shall discuss Socrates' arguments in more detail in Chapter V, sec. 4.

an act conforms to the law is itself a good reason for doing it. On this view, moreover, the obligation to obey the law is not based on the content of particular laws. One has an obligation to obey a particular law, not because it is a good law or a just law or even because doing so had good consequences, but because it is the law.

To say all this, however, seems to suggest that the obligation to obey the law is a 'fundamental' one like the obligation not to harm others--no further reason can be or need be given for the claim that one ought to obey the law other than 'it is the law.' But against this, it seems clear that the claim that there is an obligation to obey the law is one that stands in need of some kind of justification. If acts of law-breaking are wrong there must be some further reason for this other than that they are acts of law-breaking. Thus it has been held that the obligation to obey the law

> must rest on some more general principle; that is, it must depend on some principle of justice or upon some principle of social utility or the common good, and the like . . . I mean to exclude the possibility that this obligation to obey the law is based on a special principle of its own.[8]

This seems to me clearly correct. The question of political obligation cannot be resolved by saying that there is an obligation to obey the law and that is that--or by simply asserting that the fact that an act conforms to the law is an intrinsically good reason for doing it. It is not inconceivable that someone might argue this way, but he would not convince anybody.

If those who hold that there is a prima facie obligation to obey the law are committed to the view that the obligation is 'fundamental' and that no further reason can be given, then there is no such prima facie

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[8]John Rawls, "Legal Obligation and the Duty of Fair Play," printed in Hook, op. cit., pp. 3, 4.

obligation. But I do not think that they are committed to this. They can claim that the prima facie obligation is a complex prima facie obligation. They can argue, that is, that it is possible to show, through an analysis of the concept of law, that every act of obedience to the law necessarily has some further feature which is intrinsically right-making and 'fundamental.' To say that an act is right solely because it conforms to the law does not clearly identify this feature which makes it right and it does not clearly express the reason why such acts are right. But the reason can be brought out by gaining a deeper understanding of what obeying the law really involves. Thus the feeling that there must be a 'further' reason why we ought to obey the law will be satisfied, but it can be said that this further reason was really involved in the original reason--we just did not realize this. As I shall show later attempts to justify the claim that there is a prima facie obligation to obey the law by appeal either to the supposed intrinsic moral nature of social institutions (Chapter IV), or to fair play, tacit consent, and the social contract (Chapters V - VII) are attempts of just this sort.

6.D. Presumptive obligation and the law. It is important to note at this point that, given the way I have defined prima facie obligation, the claim that there is such an obligation to obey the law cannot be defended by an appeal to utilitarian considerations. The utilitarian must argue that obedience to the law, either in particular cases or in general, will have better consequences than disobedience. But whether this is true or not, it is certainly only true as a matter of fact--it does not follow necessarily from the fact that an act is an act of obedience to the law that it will have good consequences or is a member of

a class of acts that will have good consequences if generally done or conforms to a rule that would have good consequences if everybody acted on it,[9] etc. There can at most be a presumptive obligation to obey the law. It is worth noting that this point is not confined to the utilitarian treatment of the law, but applies to other interesting classes of acts as well. For the utilitarian there can be only one prima facie obligation--to perform acts which have, or are of a sort that generally have, good consequences. There will be at most a presumptive obligation to tell the truth, keep promises, be fair, etc., for in none of these cases does it follow necessarily that such an act has good consequences in particular or in general.

Although the appeal to social utility cannot ground a prima facie obligation to obey the law, it can still ground what I shall call a universal presumptive obligation to obey the law. Let me explain this. If Y is an intrinsically right-making feature of an act and every case of X is, as a matter of empirical fact, also a case of Y, then I shall say that there is a universal presumptive obligation to do X. If the connection between X and Y is less than universal, but many cases of X are also cases of Y, then the presumptive obligation is non-universal. Now, it is at least arguable that, as a matter of empirical fact, every case of obedience to the law has good consequences or is the sort of act the general performance of which has good consequences, etc. If this were ture, it would follow on utilitarian grounds, that there is a universal presumptive obligation to obey the law.

I think it is important to take seriously the assertion that

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[9]I shall attempt to clarify what is meant by phrases like this and to separate the different versions of utilitarianism in Chapters II and III.

there is a universal presumptive obligation to obey the law. Although it is not as strong as the claim that there is a prima facie obligation to obey the law, it is still strong and certainly controversial. I suspect, moreover, that many who hold that there is an obligation to obey the law might have such a view in mind and many who deny that there is such an obligation would be eager to deny just this. It is still true on this claim--as with the claim of prima facie obligation--that there is always some reason for obeying every law, because if an act is an act of obedience to the law, there will as a matter of fact always be a reason for doing it. Moreover, if it is ever right to break the law, there is always some reason to obey it that has been overridden. It is, moreover, the strongest claim that can be made on utilitarian grounds, and there are many who would defend the obligation to obey the law on such grounds. It thus seems to me that an examination of the question of whether there is an obligation to obey the law must include this claim as well as the claim that there is a prima facie obligation.

With respect to the possibility of there being a non-universal presumptive obligation to obey the law, I will only say that I do not think it is what proponents of the obligation to obey the law have in mind or what opponents have wanted to deny. It is too weak, for it does not hold that there is always some reason to obey the law. Even a skeptic with respect to the obligation to obey the law could hold it. In fact, I think it is pretty obviously true. It is not really what is at issue.

I conclude then that a proponent of the OL-principle is saying either that there is a prima facie obligation to obey the law (a complex one) or that there is a universal presumptive obligation. Which he is holding will depend on what he appeals to in defense of the thesis--on

whether he appeals to some necessary characteristic of all instances of law-abidingness or to some feature common to all instances of conformity to the law as a matter of empirical fact. The latter defense and the claim that there is a presumptive obligation will be examined in Chapters II and III, while the claim that there is a prima facie obligation will occupy the remaining chapters.[10]

7. The Strength of the Obligation

We must now take up the question of what I shall call the strength of this obligation. The strength of an obligation is a function of how easily it overrides or is overridden by other obligations. A weak obligation is rather easily overridden; a strong one overrides many others.

I think that those who hold that there is an obligation to obey the law would hold that it is a rather strong one. In other words, they would want to claim not only that there exists a 'defeasible' obligation to obey the law but also that it is very often our actual duty to obey

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[10]At the beginning of this chapter I said that I was going to discuss the view that there is an obligation to obey the law because it is the law. It might be said that only those who hold that there is a prima facie obligation to obey the law hold this and those who hold that there is a universal presumptive obligation to obey the law believe that there is an obligation to obey the law because of what obeying or disobeying the law leads to. I think this is correct. Thus I shall be discussing not only the view that there is an obligation to obey the law because it is the law, but because of what obeying or disobeying the law always leads to.

Strictly speaking one might say that the only one who holds that there is an obligation to obey the law because it is the law is one who holds that the principle of law-obedience is a fundamental principle. One who endorses a complex prima facie obligation to obey the law may then be said to hold that there is an obligation to obey the law because of what obeying the law necessarily is, eg. keeping a promise. But it does not seem to me to be stretching a point too much to see him as holding that there is an obligation to obey the law because it is the law. The obligation is based on what the law, or obeying it, is, rather than on what the law, or obeying it, is contingently connected to.

the law. I shall now try to express the precise claim of this sort that I think would be made.

Let us note, first, that we can evaluate a law in terms of its content or in terms of the consequences of obeying it or disobeying it in particular circumstances. To evaluate a law in terms of its 'content' is to evaluate it either in terms of the moral character or the act prohibited or required or in terms of the consequences of the law generally being followed. A law forbidding murder is a good law because murder is wrong. A law, such as the one discussed above (I.6.A.), requiring the registration of automobiles is a good one because it would have good consequences if generally followed. Now from the fact that a law is good (or bad) judged in these ways, it does not follow that the consequences of obeying it on a particular occasion will be good (or bad). Thus in the example mentioned above, the consequences of obeying the automobile registration law were worse than disobeying it, since someone may have died had it been obeyed. On the other hand, there can be bad laws which are such that the consequences of obeying them in a particular case will be better than disobeying them.

Consider, now, good laws, i.e. laws whose 'content' is good. There is no problem for the proponent of the obligation to obey the law about good laws, when obedience to them would have good consequences. But what about a good law in those particular cases in which obedience would have worse consequences than disobedience? It seems to me that proponents of the obligation to obey the law would hold that in such cases the law should usually be obeyed. And the same, I think, is true of laws that are indifferent, neither particularly good nor bad. Again I think it would be said that such laws usually should be obeyed, even when there are bad consequences of so doing. Now let us consider bad

and unjust laws. It seems to me again, that it will be held that there are at least some cases in which such laws ought to be obeyed, even if doing so has worse consequences than disobedience. I suspect that most proponents of the obligation to obey the law will hold that bad laws ought almost always to be obeyed. But as a minimum they will say that they must at least sometimes be obeyed, regardless of consequences. In sum, then, I shall take the claim that there is an obligation to obey the law as asserting that the obligation has at least this strength: when the consequences of obedience are worse than the consequences of disobedience, it still requires obedience to good and indifferent laws most of the time and to bad laws some of the time.

In this dissertation I shall not be concerned so much with questions concerning the strength of the obligation as with the prior issue of whether a prima facie of universal presumptive obligation exists at all. But these points will prove to be of some importance for the discussion of Act-Utilitarianism in the next chapter.

8. Skepticism

I shall say that a person is a skeptic with respect to the obligation to obey the law if he denies both that there is a prima facie and a universal presumptive obligation to obey the law. In this section I shall clarify the nature of this skepticism.

Let us consider a particular act, p, which is illegal. I shall say that p is otherwise prima facie indifferent, obligatory or immoral, if p would be correctly judged to be prima facie indifferent, obligatory or immoral, leaving out the mere fact of its illegality. This judgment can be made not only on the basis of the kind of act p is 'intrinsically' but also on the basis of its consequences in the particular

circumstances in which it is contemplated. It may be that it will have certain consequences it would not otherwise have just because it has been made illegal, eg. doing it might bring down a 'rain' of repression. These consequences will be relevant to the judgment I have in mind. Only the mere fact of its illegality is irrelevant.

Now one who holds that there is a prima facie obligation to obey the law must hold that there is a prima facie obligation not to do p, even if p is not otherwise prima facie immoral. The mere fact of illegality makes a difference. It is just this that the skeptic denies. He will hold that p is prima facie immoral or prima facie obligatory only if it is otherwise prima facie immoral or obligatory. Thus, there is a prima facie obligation not to do p only if p is otherwise prima facie immoral. The mere fact of illegality makes no difference. The skeptic then will judge each particular case of obedience or disobedience to the law on its own merits, with respect to the particular nature of the act and its particular consequences.

One who holds that there is a universal presumptive obligation to obey the law can agree with the skeptic that the mere fact of illegality is morally irrelevant. But he must hold that, as a matter of fact, whenever a particular act is illegal, doing it will otherwise be prima facie immoral and whenever a particular act is legally required doing it will otherwise be prima facie obligatory. That is, whenever an act is legally required or prohibited, there will always be, as a matter of fact, some intrinsically good moral reason for doing it or not doing it. But this, too, the skeptic denies. That is, he must hold that there are in fact cases in which an act is illegal but not otherwise immoral and cases in which an act is legally required but not otherwise obligatory. If there are such cases, there can be no universal

presumptive obligation to obey the law.

In sum, the skeptic is committed to saying two things: 1) the mere fact of illegality (or legality) makes no difference and 2) there are actual cases in which an act is legally required (or prohibited), but there are in fact no moral reasons at all for doing it (or refraining from doing it).

It should be clear that to say this is not to counsel universal disobedience, to hold that anything goes, murder is justifiable, we needn't pay our taxes and so on. In fact the skeptic can hold that almost all laws ought to be obeyed. He can note that many laws prohibit acts that are bad in themselves--malum in se--and he can hold that such laws ought to be obeyed. Other laws set up reasonable schemes of social cooperation which are designed to increase social welfare and he can hold that these, too, should be obeyed. Moreover, he can hold that very often the consequences of disobeying laws, even bad and unjust laws, are worse than obeying them and thus he can claim that many bad laws ought to be obeyed. Thus he can hold that there is almost always a good reason for obeying any particular law. He can admit, that is, that there is a non-universal presumptive obligation to obey the law, based on the good content of most laws and on the bad consequences disobedience often brings about. What he cannot admit is that the mere fact of illegality is morally relevant or that there is always a good reason for obeying the law.

I hope that this clarifies the issue between the skeptic and the non-skeptic and does away with one typical misconception--that on the one hand we have the proponent of the obligation to obey the law who stands for order, stability, civilization, etc., and on the other hand, the skeptic who espouses anarchism, chaos, instability and so on.

What is at issue is not the relative value of order vs. chaos, although, as we shall see, this issue is certainly behind some of the arguments people give for the obligation to obey the law. What is at issue is the precise moral force of the invocation: 'do that, because it is the law.'

9. The Obligation-to-Law Principles

In this chapter I have been trying to express what people have in mind when they hold that one has an obligation to obey the law because it is the law and I have argued that they have in mind the following:

> There is a moral obligation to be law-abiding which falls on the citizens of either a) every state or b) states that are just. Being law-abiding means obeying legal prescriptions, fulfilling incurred legal obligations and following proper legal procedures. This obligation is not an absolute obligation but either a complex prima facie obligation or a universal presumptive obligation. It has the following strength: it requires actual obedience to good and indifferent laws most of the time and to bad laws some of the time, when the consequences of obedience are worse than the consequences of disobedience.

Given this, we can distinguish the following four moral principles (for convenience I shall simply refer to the strength of the obligation by saying that it is 'very strong'):

OL1: Every citizen of every state has a very strong prima facie obligation to obey all the laws of his state.

OL2: Every citizen of every just state has a very strong prima facie obligation to obey all the laws of his state.

OL3: Every citizen of every state has a very strong universal presumptive obligation to obey all the laws of his state.

OL4: Every citizen of every just state has a very strong universal presumptive obligation to obey all the laws of his state.

I am suggesting, then, that those who hold that there is an obligation to obey the law have at least one of these four principles in mind, and it is these that I shall be examining in the following chapters. The

conclusion of my examination will be that none of these principles can be defended and that consequently the only position it is rational to hold is the one I have called skepticism.

CHAPTER II

UTILITARIANISM AND THE LAW

Those who hold to one of the obligation-to-law principles may, if asked for a justification, respond by pointing to the social utility produced by obedience to the law and the bad consequences that can result when laws are disobeyed. It is well-known, however, that there are a variety of different ways that social utility can be appealed to and, consequently, there are a variety of different theories that all go under the name of Utilitarianism.[1] In this chapter I will examine attempts to ground OL-principles by appeal to both Act- and Rule-Utilitarianism. In the next chapter I shall discuss what is often called the Generalization Argument.

1. Act-Utilitarianism and the Law

In this section I shall examine how the OL-principles would be evaluated from the point of view of Act-Utilitarianism (AU). An act-utilitarian is one who judges the moral worth of an action in terms of its consequences. He holds, roughly, that one should do that act which, of all the acts open to one, has the best consequences; or if several acts open to one have equally good consequences, and these are better than the consequences of the alternative acts, then one should do one of these acts.

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[1]Several varieties are distinguished by David Lyons in Forms and Limits of Utilitarianism (hereinafter referred to as FLU) (Oxford: Oxford University Press, 1965).

1.A. Three problems for AU. To make all this precise, however, is not easy. There is, first, the problem of when a consequence is a good or bad one. A utilitarian needs to have a theory of value, or, as it is often put, a theory of intrinsic goodness. I shall not attempt to assess the adequacy of typical theories of this sort, since the features of act-utilitarianism that are relevant to the issue at hand are not a function of which of these theories of value is adopted.

Secondly, there is the problem of just what is a consequence of an act and what is 'part' of an act. Suppose I play a game of tennis which I enjoy. Is my enjoyment a consequence of my playing? It seems odd to say this. The act of playing is itself enjoyable and so it seems that my enjoyment is part of the act, not a consequence of it. Nevertheless, the act-utilitarian, if he thinks that enjoyment is a good thing, would want to say that this act has good consequences, because I enjoyed it. How can this be interpreted?

What he has in mind, I think, is that my performance of the act brings into being the enjoyment and it would not have come into being unless I performed the act. In this sense that act 'produces' some intrinsic good, whether this good be naturally described as a consequence of the act or as part of it. I shall thus take the utilitarian as holding that something is a consequence of an act if and only if it comes into being if the act is performed, either as a causal consequence of the act or as a part or 'aspect' of the act.

Given this understanding of consequences, we can see act-utilitarianism as involving, in addition to a theory of value, what we can call a maximization principle. That is, the act-utilitarian must say that the best act for us to do is that one that has the best consequences or maximizes intrinsic good. But this leads to a third problem.

The act-utilitarian is usually taken as saying that it is obligatory for us to perform the act that has the best consequences or if several acts have equally good consequences but better than all the rest, that it is obligatory to perform one of those acts. But to say this seems to commit him to saying that

> if I would like strawberry jam better than peach on my toast for breakfast one morning, then it is my duty to have strawberry rather than peach.[2]

And this is absurd. Moreover, there seem to be many acts of benevolence which we feel it would be good for a man to do and which do have the best consequences, but which we do not feel it is his duty to do.

To get around this, Narveson[3] has suggested that the act-utilitarian can hold that the act with the best consequences has the greatest moral value and that only a sub-class of these acts are duties. I do not know whether this can be worked out. As we shall see the relevance of utilitarianism to our problem does not depend on a solution of this difficulty and I shall thus continue to speak of the utilitarian as holding that an act with the best consequences is obligatory.

1.B. Overall consequences. Another clarification will be helpful. We can distinguish the assertion that an act has some good consequences from the assertion that it has good consequences overall. It has good consequences overall if some of its consequences are good and either none of its consequences are bad or, if some are bad, the good 'outweigh' the bad. Conversely, it has bad consequences overall if some of its consequences are bad and either none are good or the bad outweigh the good. When I speak of an act as having good or bad

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[2]Jan Narveson, Morality and Utility (Baltimore, Maryland: The Johns Hopkins Press, 1967), pp. 91-92.

[3]Ibid., p. 92.

consequences, I shall mean, unless I explicitly say otherwise, that it has good or bad consequences overall.

It is also worth pointing out that one act will have better consequences overall than another if and only if 1) the first has good consequences and the second has bad, indifferent, or good, but not as good, consequences; or 2) the first has indifferent consequences and the second bad; or 3) the first has bad consequences and the second worse. When I speak of one act as having better consequences than another, I shall mean better consequences overall.

1.C. AU, prima facie obligation and the law. What can the act-utilitarian say about prima facie obligation? Act-utilitarians do not tend to speak of prima facie obligation as much as other theorists because their theory is primarily concerned to tell us when an act is our actual duty. There is, however, a place for prima facie obligation in act-utilitarianism but there are several possible views an act-utilitarian might take. He can hold that the fact that doing an act has some good consequences, or that not doing it has some bad consequences, are intrinsically good reasons for doing it. On this version --I shall call it the weak version--there will be a prima facie obligation to do acts of a certain kind if every instance of that kind of act necessarily has some good consequences or if, in every instance, failure to perform that kind of act necessarily has some bad consequences. On the other hand, an act-utilitarian might deny that having some good consequences or bad consequences is itself a good reason for doing or not doing an act, because its other consequences are also relevant. And he might hold that there is an intrinsically good reason for doing an act only when its overall consequences are good or the overall consequences of not doing it are bad. On this version--the strong version

--there is a prima facie obligation to do acts of a certain kind only if every act of that kind necessarily has good consequences overall or failure to perform each act of that kind necessarily has bad consequences overall.

It is not necessary for us to decide between these for, as I have already argued (I.6.D.), it is a contingent matter whether an act of obedience of disobedience to the law in any society or in a just society will have good or bad consequences. Thus AU cannot support the claim that there is a prima facie obligation to obey the law and thus cannot support either OL1 or OL2.

1.D. AU, presumptive obligation and the law. With respect to presumptive obligation, once again, a strong and a weak version can be distinguished. On the weak version there is a universal presumptive obligation to obey the law if, as a matter of fact, every act of obedience to the law has some good consequences or every act of disobeying the law has some bad consequences; on the strong version every act of obedience must have good consequences overall or every act of disobedience must have bad consequences overall. Is it reasonable to suppose that any of these states of affairs exist in every society? It is not. Consider a law which requires reporting to the authorities all persons of Jewish origin in a society like Nazi Germany. In almost all cases obeying this law would have no good consequences and ipso facto no good consequences overall; and in almost all cases disobeying it would have no bad consequences and ipso facto no bad consequences overall. Thus whichever version of presumptive obligation we use, act-utilitarianism cannot support OL3.

This leaves only OL4. Can it be said that obedience to the law in a just society always has good consequences overall or at least has

some good consequences; or that disobeying the law in such a society always has bad consequences overall or at least some bad consequences? Again the answer is no. Consider the case mentioned above (I.6.A.) in which the only automobile available for driving a sick person to a hospital is an uninspected one and there are laws against driving such vehicles. Such laws are reasonable and could exist in a just society, whatever we ultimately mean by a just society.[4] But in this case obedience to the law would certainly not have consequences that are good overall and it is likely that obedience would have no good consequences whatsoever. Moreover, disobeying this law would certainly not have bad consequences overall and it is likely it would have no bad consequences whatsoever. AU cannot therefore justify OL4 either. It cannot thus be claimed on the basis of Act-Utilitarianism that there is an obligation to obey the law.

1.E. The strength of the obligation. It is worth noting, as a final point, that even if it were correct to say on AU that there is a universal presumptive obligation to obey the law, this obligation would not have the required strength. As I have argued, one who believes that there is an obligation to obey the law will hold that there are cases in which we have an actual obligation to obey the law, even though the overall consequences of doing so in a particular case are worse than the overall consequences of breaking the law (cf. I.7.). The act-utilitarian cannot, of course, accept this. He must hold that

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[4]The question of just when a society is a just one is a complex one and is discussed in detail in Chapters V and VII. For the present discussion we can take the claim that a particular society is just as asserting that it has some global feature, which is compatible with it having some unjust laws and unjust social conditions. If we were to require no injustice in a society to call it a just one, then no earthly society would fill the bill.

whenever the consequences of breaking the law are better than obeying it, one should break it. This is more evidence, then, that he is a skeptic with respect to the obligation to obey the law and if any of the OL-principles are to be justified in a utilitarian manner, it will have to be on some other version of utilitarianism.

2. Utility and Rules

2.A. Rule-Utilitarianism (RU). Let us now look at Rule-Utilitarianism. An act-utilitarian judges the rightness of an act in terms of its particular consequences, in terms of what Lyons calls its simple utility.[5] But a rule-utilitarian does not do this. Very roughly, RU says that we should judge an act, not on the basis of its simple utility, but on the basis of the utility of the rule which requires it. It is right if and only if the consequences of everyone's obeying the rule which requires it are good--better than the consequences of people obeying other rules.[6] Now the rule 'Obey the law,' it will be said, has utility. If the rule-utilitarian thinks that it necessarily has utility, he will hold that there is a prima facie obligation to obey the law. If he thinks this is so in all societies he will defend OL1, but if he restricts this to just societies he will defend OL2. If he thinks it is a contingent matter that the rule has utility, he will defend OL3 or OL4.

In my discussion of act-utilitarianism I was concerned with the question of whether any of the OL-principles follow from it, but I shall not be so concerned with that kind of question here. I will be

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[5] FLU, p. 3.

[6] As we shall see, a rule can maximize utility in several different senses which give rise to the several different kinds of rule-utilitarianism which are discussed in this chapter.

more concerned with the prior question of just what RU is and whether it expresses a valid moral principle. I shall argue that it does not and that it therefore does not really matter which, if any, OL-principle follows from it. Thus, I shall not worry about the question of whether the rule-utilitarian can claim a prima facie obligation or only a universal presumptive obligation (although as I have already suggested I think it can only be a presumptive one); nor with the question of whether the obligation is supposed to hold in all societies or only in just ones. These questions are not important if the theory itself is defective.

2.B. Institutional rule-utilitarianism (IRU). To get clear on RU it is necessary to make some distinctions and to note that there can be several versions of the theory. When a rule-utilitarian speaks of rules he may mean rules which actually exist in a social group, which people accept and act upon, or he may mean possible rules which could be part of the practice of a social group but may not be. In "Two Concepts of Rules,"[7] John Rawls seems to advocate that we should obey useful rules of existent social institutions we participate in even when obedience would not have good consequences. I shall call this view Institutional Rule-Utilitarianism (IRU), and I will discuss it first.

The main problem facing a defender of IRU is this: although many of the rules of existing social institutions are efficient, ie. have good consequences if generally followed, it is rarely the case that they are the most efficient possible. Almost any institution can

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[7]Philosophical Review, Vol. 64 (1955), pp. 3-32.

probably be improved upon, if only slightly. But if the rule must be as efficient as possible, few social rules would morally require obedience. If the rule, then, does not have to be the most efficient one, how efficient does it have to be? Suppose it is said that it must have a good deal of utility. But then why should one obey the rule in those instances when there would be more utility in disobeying? Why this departure, on a utilitarian theory, from what is apparently the most utilitarian thing to do? Surely some reason is rightfully called for and must be given.

The answer, however, that is usually given completely changes the theory from a utilitarian theory into something else. Rawls, for example, says that when we come under the rules of an existent practice, we somehow do not understand the situation if we think we can judge what ought to be done on the basis of simple utility. More precisely, if an act is required by an existent rule, we do not understand the state of affairs if we think it makes sense to decide whether we have an obligation to do the act on the basis of its simple utility. This suggests the view that it follows logically from the fact that a rule exists that we have the obligations it accords us. It follows from this, however, that if we know that a rule exists we can know a priori that we have an obligation to obey it.[8] The utility of the rule, then, does not matter and an evaluation of it in utilitarian terms is not necessary.

This, then, turns IRU into a version of what I shall call the Institutional Theory of Obligation, which is, roughly, the view that institutions have an intrinsic moral significance, that we take on

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[8]This point is made by Charles Landesman, "Promises and Practices," Mind, LXXV (1966), pp. 239-43.

obligations simply by being part of them, regardless of their utility, fairness and so on. I shall clarify and discuss this view in Chapter IV and thus will say no more about it and IRU here.

3. General Rule-Utilitarianism (GRU)

3.A. When everyone cooperates. Let us now look at another form of Rule-Utilitarianism which does not restrict itself to institutional rules. It says, roughly, that an act is right if and only if it is in accord with a rule or set of rules that maximizes utility, whether or not that rule or rules exist. But what is it for a rule to have or maximize utility? The most natural thing to say is that the utility of a rule is the utility produced if everyone successfully follows it. We can thus express this view as follows:

> A particular act, X, is right if and only if it conforms to a rule such that if everyone successfully followed it the consequences would be better than if everyone followed any alternative rule.

Let us call this General Rule-Utilitarianism (GRU).

To discuss this it will be helpful to distinguish two different cases involving useful rules, those in which they are generally being followed and those in which they are not. Let us suppose, first, that we have a useful rule that is generally being followed, for example:

> Keep promises, except when the consequences of doing so would be very bad.

Now, let us compare this with the following:

Keep promises, except when breaking them has better consequences.

The first rule is, of course, morally preferable, but the second if successfully followed would produce more utility. To see this it is important to realize that the difference in practice in following the two rules would be small. The problem with breaking promises is that

if too many are broken the institution will be weakened. But the follower of the second rule will not break promises that weaken the institution, for to do so would be to perform an act that has bad consequences. We are assuming, remember, that he successfully follows the rule. He will thus pay special care to the effects of his act on institutions. There will be, however, a small class of promises such that if they are broken the institution will not be hurt and there will be better consequences in breaking them than in keeping them. The follower of the first rule will not break these, while the follower of the second will and it is here that the extra utility of the second rule is produced.

In general, whenever we are engaged in a useful institution and the circumstances are such that one can increase utility by disobeying its rules, there will be a rule permitting disobedience that increases utility, if generally followed, more than the institutional rule does. Thus the follower of GRU will act just like the act-utilitarian in these cases. But to act in this way, very often, is wrong. GRU thus does not diverge from AU when it is supposed to.

3.B. <u>When no one cooperates</u>. Let us now consider a case in which we can think of a useful rule but it is not generally being followed. In such cases it is often true that, while utility would be maximized if the rule were generally followed, if it is not generally followed, to act on it would have no especially good consequences, or perhaps even bad consequences. In such cases it seems silly to follow the rule. What would GRU say?

It seems that on GRU we should follow the rule, even if no one else is following it, because GRU tells us to act on those rules that

would maximize utility *if* everyone were to follow them. It does not require that the rules actually be followed. To see this consider the following example.[9] Six people are travelling in an automobile to some destination important to all of them. The car stalls and can be started again only if *all* of them push it. Utility would then be maximized if they were all to follow the rule "Push the car." But suppose that three refuse to push. It still seems, on GRU, that the others ought to push because then and only then would their act conform to the rule which would maximize utility if everyone followed it.

This conclusion might be resisted on the ground that 'Push the car' is not the best rule. The rule that would maximize utility if everyone followed it is really this: 'Push the car if and only if the others push it.' This is a better rule, it will be said, because it will not require the loss of utility that would come from pushing the car when others are not pushing.

It is, however, false that the second rule is the best rule, according to GRU. The *criterion* GRU uses for determining the best rule is the rule that would have the best consequences *if everyone followed it*. And 'Push the car' is the best rule, given this criterion. This can be seen by noting that everyone can follow the second rule by not pushing the car. Thus there is a way of everyone's following the second rule which would not produce as much utility as everyone's following the first rule and thus it is not as good a rule. It seems to me that the proponent of the second rule is really giving us a rule that would be best for particular individuals to follow if everyone either is or is not following the best rule, ie. the rule that

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[9]This example, slightly adapted, is taken from Lyons, *op. cit.*, Chapter V.

would have the best consequences if everyone were to follow it. But this is not the criterion GRU uses; it in fact presupposes it.

3.C. GRU, AU and the fallacy of composition. If what I am saying is correct GRU diverges from Act-Utilitarianism with respect to rules that are not generally being followed. But it seems that it should agree with AU here. We have also seen that it agrees with act-utilitarianism when good rules are being followed, and it should not agree there. It thus seems, as Lyons puts it, that GRU diverges from AU when it ought to agree and agrees where it ought to differ.[10]

It has been held, however, that GRU does not really differ from AU at all. In "Towards a Credible Form of Utilitarianism," Richard Brandt[11] argues that GRU and AU are extensionally equivalent, that is they give the same moral advice in particular instances. His argument is simple. GRU says that we should act on a rule which would maximize utility if everyone followed it. It seems obvious, however, that there is one rule such that if everyone followed it utility would be maximized and this is the rule 'Maximize utility.' But to follow this rule is to act as an act-utilitarian.

Brandt's argument is based on the following claim, which he takes to be obvious:

> If everyone always did the very best thing it was possible for him to do, the total intrinsic value produced would be at a maximum.[12]

I shall restate this, more simply, as follows:

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[10] FLU, pp. 128-39.

[11] In Castaneda and Nakhnikian, eds., Morality and the Language of Conduct (hereinafter referred to as MLC) (Detroit: Wayne State University Press, 1965), pp. 107-40.

[12] Ibid., p. 121.

S. If each individual always maximizes utility, utility would be maximized.

This sounds necessarily true, but it is false and it is illuminating to see why. To do this we need a case in which what each person does is causally independent of what other people do, ie. what each person does does not motivate or fail to motivate others to act as they do. Suppose, for example, that we have a group of five people such that it would be a good thing if all of them attended a certain meeting, but no good would be produced if only some of them wen. Suppose that none of them do in fact go. Their actions are causally independent if it is not the case that if one had gone that would have caused the others to go or that some stayed home because they knew others would stay home, and so on. They made their decisions independently of each other. Let us assume, in this case, that their acts are independent in this way.

Now, an individual act has the best consequences if, given the circumstances in which it is done, there is no alternative act that would have better consequences. In this sense, each person in our example does the act which produces the most utility. Consider one person. His alternative to not going is going. But, given that the others are not going and his going would not have caused them to go, the consequences are better if he stays home. And the same is true for each of the others. Thus the act of each person maximizes utility; but utility is not maximized as it would have been had they all gone to the meeting.

This point can be put more generally. Let us say that the utility of a set of acts is the utility produced if all of them are done. The utility of a particular act is the utility that results from doing it in a particular situation. Given this we can rewrite S as follows:

S'. If each individual act in a set of acts maximizes utility, the set of acts maximizes utility.

We can see what is wrong with this by noting that we judge the utility of a set of acts by comparing it with other possible sets. On the other hand we judge the utility of an individual act by comparing it with other possible individual acts. And we judge that it maximizes utility if, given the other members of the set, there is no alternative that would produce more utility. The essential point is that the utility of the whole set is irrelevant to this. Let me explain.

Using our example, let C be the set of acts, x,y,z,etc., which is composed of all the people going to the meeting and let AC be the set of acts -x,-y,-z,etc., which is composed of everyone's staying home. C clearly has, as a set, more utility than AC.

But consider now a particular act -x in AC. If the acts in set AC are causally interrelated, it might then be the case that, if the person who did -x had done x, this would have motivated the person who did -y to do y and so on. In such a case we would conclude that -x did not maximize utility; the alternative x would have had better consequences. But suppose now that the acts in the set are causally independent, that is, if the person who did -x had done x, this would not have changed the behavior of the others. Then -x maximizes utility, because, given the other members of the set, doing x would not have done any good. And the same is true of -y,-z,etc. Thus, on the assumption of causal independence, each member of AC maximizes utility although the set does not. Moreover, the question of whether the whole set maximizes utility is not relevant to the question of whether each member does.

It follows from this that we cannot infer from the fact that

the individual members of a set maximize utility that the set does. To do so is to move invalidly from the assertion that all the members of a class have a certain property to the assertion that the class as a whole does. Thus the problem with S' is essentially that it commits the fallacy of composition.

In sum, the rule 'Maximize utility' is not always a rule such that if everyone followed it utility would be maximized. Thus Brandt is wrong: GRU is not extensionally equivalent with act-utilitarianism.

3.D. A valid principle. It is worth noting here, however, that although S' is false, its converse is true. Consider:

T. If a set of acts maximizes utility, each individual act in the set maximizes utility.

This is true. Consider a set of acts, C, that maximizes utility. Suppose some individual act in C, call it x, does not maximize utility. There is then an alternative to x, -x, which produces more utility than x. There is then a set of acts, C', made up of all the acts of C with the exception that -x replaces x and C' has more utility than C. But this is impossible since C maximizes utility. Thus it is impossible that there be a set of acts which maximizes utility but each individual act does not. So T is true. I suspect that Brandt and others who believe in S (or S') may do so because they confuse it with T which is true and necessarily so.

3.E. Acts, sets of acts and utility. There are some valuable lessons about utilitarianism to be learned from this. It is certainly the aim of the utilitarian to have utility maximized in the sense of having that set of acts which would create the most utility performed. This is certainly the kind of thing John Stuart Mill was after. The

utilitarian, however, also wants to use some sort of utilitarian principle as a criterion for judging individual acts. How is this to be done? Suppose the set of acts which maximizes utility is performed. Then, because of the truth of T, each individual act will maximize utility. It will therefore seem reasonable to judge individual acts on the grounds of whether they themselves maximize utility. And this gives us straight act-utilitarianism, the view that an act is right if and only if it maximizes utility.

But due to the fact that we judge the comparative utility of individual acts and sets of acts in different ways, this leads to the problems we have already encountered. It also leads to further difficulties with respect to the attributing responsibility. To see this, consider again our example and suppose that three go to the meeting and two do not. Recall that the attendance of all five is needed for a good effect. We would naturally want to say that those who did not go were at fault, but on AU we cannot say this. Consider the individual act of one who did not go. If he had gone, since there is still someone else who did not go, it would not have done any good. Thus his act of not going maximizes utility and is right. Moreover, those who did go did the wrong thing because they could have done an alternative act, not going, which would have maximized utility.

It is quite true that if we consider the set of acts of the two who did not go, we can say that the set did not maximize utility, because there is an alternative set which would have been better. But act-utilitarianism does not allow us to judge this way. We can only judge the individual act. And the rub is that an individual act that maximizes utility may not be part of a set that does.

These problems may motivate a utilitarian to give up the attempt

to judge an individual act on the basis of its simple utility, and to judge it instead on the basis of whether it is or is not part of that set of acts which maximizes utility. And this is general rule-utilitarianism--the view that we should do an act if and only if it is part of the set of acts that maximizes utility. But this, as we have seen, also runs into problems. First, when no one else is performing acts in this set, it will often be silly for one or a few persons to do so. And secondly, as I pointed out in section 2.B., when there is a good rule that is being followed, and the act of breaking that rule has better consequences than following it, it will be included in the set that maximizes utility. But it seems that we often ought to forego the utility and obey the rule. GRU has problems at both ends, so to speak.

3.F. A theory of cooperation. What is needed here is what might be called a theory of cooperation. It must have two parts. First, it must show us why we should at least sometimes obey useful, existent rules when doing so does not have as good consequences as breaking them. So far we have seen that neither AU nor GRU show this because they, in fact, require us to break the rules in these circumstances. I shall be arguing throughout this dissertation that the question of why we should obey useful rules when breaking them would have better consequences can only be answered by an appeal to considerations of justice and fairness. Appeals to the Generalization Argument (Chapter III) and the Institutional Theory of Obligation (Chapter IV) can be seen as alternative ways of trying to answer this question without appealing to fairness. I shall argue that they fail.

A theory of cooperation, secondly, must also tackle problems

'on the other end,' when good rules are not being followed. It must tell us how to get out of a 'state of nature' into a state of cooperation. It is reasonable to hold that we have an obligation to encourage and help bring about efficient social institutions. But the question is, how we should act to fulfill this general obligation. Neither AU nor GRU is subtle enough to answer this. To say with act-utilitarianism that we should not cooperate unless enough other people cooperate to make the consequences of our cooperation good may never get us out of a state of nature. To say with general rule-utilitarianism, on the other hand, that we should always cooperate even though no one else does is silly. Some middle ground is needed and it is not provided by these utilitarian theories.

4. Practical Rule-Utilitarianism

4.A. Teachable rules. Before leaving rule-utilitarianism behind, there is one last form of it that has to be considered. GRU, we have seen, is equivalent to act-utilitarianism in those cases when good rules are generally being followed. Brandt[13] has suggested that the problem would not arise if we required people to follow rules which would maximize utility, not if everyone successfully followed them, but if everyone accepted and tried to act upon them. Consider again our two rules about promising:

> Keep promises except when so doing would have very bad consequences.
> Keep promises except when breaking them has better consequences.

We have noted that the second rule has better consequences if everyone successfully follows it. But it seems reasonable to hold that there would be better consequences overall if people actually were taught the

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[13] MLC, p. 123.

first rule and tried to act upon it. What we are supposed to do, then, is to figure out what are kinds of rules it would be best to teach people and get them to act on in their daily activities. And the typical rules of moral codes people normally live under usually fill this bill. This view can be expressed as follows:

> A particular act, x, is right if x conforms to a rule such that if everyone accepted it (ie. tried to act on it), the consequences would be better than if everyone accepted any alternative rule.

I shall call this Practical Rule-Utilitarianism (PRU) and I shall call the kinds of rules that conform to it practical rules.

I think this view is insightful at least in giving some kind of explanation as to how typical, socially sanctioned moral rules come about. Rules that would allow for all the kinds of exceptions which would maximize utility if allowed would often be difficult to learn. On the other hand, the rule 'maximize utility' is very difficult to apply to particular situations. Given human nature as it is, we would probably create more utility if we teach the simple, fairly exceptionless practical rules that occur in most moral codes, than if we try to teach more rigidly utilitarian rules. This sociological point, presupposed by PRU, is undoubtedly apt.

4.B. Rules of thumb. But is PRU adequate as a moral theory? The first question we have to raise is whether PRU really is a rule-utilitarian theory, for there seem to be many reasons why an act-

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[14]This differs from Brandt's formulation in several ways: 1) Brandt speaks of 'recognizing' a rule where I speak of 'acceptance,' but I think this comes to the same and 2) he includes a proviso about what to do when there are established moral beliefs in the group that conflict with the best rule according to PRU. This is meant to solve some problems which even if Brandt solves them leaves the kinds of criticisms I want to make of him intact and so for convenience we can leave this out.

utilitarian would want people to try and follow practical rules. J.J.C. Smart puts the point as follows:

> For an extreme utilitarian [i.e., an act-utilitarian] moral rules are rules of thumb. In practice the extreme utilitarian will mostly guide his conduct by appealing to the rules ('do not lie,' 'do not break promises,' etc.) of common sense morality. This is not because there is anything sacrosanct in the rules themselves but because he can argue that probably he will most often act in an extreme utilitarian way if he does not think as a utilitarian.[15]

This is so because the rules of common sense morality often tell us to do kinds of acts which maximize utility most of the times that they are done. The rule against lying, for example, can be conceived as resting on the following probability statement: 'The probability that any act of lying will maximize utility is very small.' Now in many cases it is reasonable for an act-utilitarian to follow such rules rather than figure out which act will maximize utility. This is obvious in cases in which we may not have time to make calculations. Smart also mentions cases in which a person's own interests are involved. In such a case his calculations might be biased in his own favor and he might underestimate the harm that some act he wants to do will cause others. Often in such cases it will be more reasonable to follow the common sense rule than puzzle out the case. Many more such cases can be thought of.

Since the advocates of both AU and PRU can recommend that people follow practical rules, what distinguishes the theories? Now it should be clear that while the act-utilitarian will recommend following such rules when doing so would most probably maximize utility, he would not hesitate to break such a rule if he knew that more utility

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[15]"Extreme and Restricted Utilitarianism," Philosophical Quarterly, VI (1956); reprinted in Philippa Foot, ed., Theories of Ethics (Oxford: Oxford University Press, 1967), p. 174.

would be produced if he broke it. Practical rules clearly are for him rules of thumb to be used when information is imperfect, but to be dispensed with when a direct application of the principle of utility is possible. But what would the follower of PRU suggest? If he also holds that the rules should be broken when doing so would maximize utility, then his theory will not be an improvement on act-utilitarianism in just those cases in which he wants it to be. In fact it will be difficult to see just why it is a rule-utilitarian theory at all. The aims of act and rule utilitarian theories can be distinguished, the aim of the former being the performance of acts that maximize utility, the aim of the latter being the performance of acts that conform to rules which maximize utility.[16] These two aims can conflict, as when breaking a practical rule which conforms with PRU would produce more utility than following it. In such a case an act-utilitarian treats the rule only as a rule of thumb and breaks it because following does not conduce to his aim. But a rule-utilitarian accords the rule a higher status because his aim just is conformity to such rules. He will thus follow it (unless, of course, it can be shown that breaking it will in fact conform to a better rule, which in the case of PRU, it cannot). Thus if an alleged follower of PRU holds that a practical rule should be broken when doing so has more utility, he is adopting the act-utilitarian aim and treating the rule as a rule of thumb and his theory can hardly be called a rule-utilitarian one.

4.C. Reason-gaps. If it is to be a rule-utilitarian theory, PRU must then say that the rule should still be followed. But now we can raise the same kind of question we raised with respect to institutional

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[16] A similar point is made by Lyons, FLU, p. 150.

rule-utilitarianism. Why should the rule be followed when breaking it would have more utility? How does the fact that an act conforms to a rule which would maximize utility if everyone tried to act on it give us a sufficient reason for obeying it when there would be more utility in not doing so? Surely a reason is called for here, especially since there is a better rule which would maximize utility if successfully followed and which would allow us to break the practical rule. Certainly we need a reason for following PRU here, but PRU does not give us any.

We might say that PRU, as well as Institutional Rule-Utilitarianism (IRU), suffers from a reason-gap. While it might give us the right advice, it does not clearly show us why it is the right advice. It does not give a complete and satisfactory reason or explanation for what it recommends that we do. But such completeness is necessary for fundamental moral principles to be fully satisfactory.

It is plausible to suspect, moreover, that the extra reasons needed to explain the advice PRU gives will involve an appeal to other moral principles, like the Institutional Theory or fairness. But to appeal to something like this is to move away from strictly utilitarian considerations.[17]

We can conclude this discussion of PRU by noting briefly that it fares no better than GRU in cases in which good rules are not being followed. It will require us to follow rules which would maximize utility if everyone tried to act on them, even when they are not trying

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[17]I shall discuss practical rules again in Chapters VI and VII, where I discuss the view that fairness requires obedience to such rules when they are rules of a scheme of social cooperation. The practical-rule-utilitarian, however, cannot appeal to fairness as a reason and still be a utilitarian.

to act on them. But, as we have seen, this is implausible. Like GRU, practical rule-utilitarianism has problems 'at both ends,' ie. when useful rules are being followed and when they are not.

5. Conclusion: The Dilemma of Rule-Utilitarianism

We can conclude this discussion of rule-utilitarianism by noting the following Dilemma of Rule-Utilitarianism. In cases in which good rules are generally being followed, both practical and institutional rule-utilitarianism suffer from the reason-gap. General rule-utilitarianism does not but then it agrees with AU and gives the wrong advice. Thus if a form of RU gives the right advice, it does not give sufficient reasons for it, and if it gives sufficient reasons for its advice, the advice is not right. It cannot win. Moreover, in cases in which good rules are not being followed, both PRU and GRU give silly advice, while IRU is silent, being concerned only with rules that actually exist. We cannot therefore find adequate justification for the obligation to obey the law in any form of rule-utilitarianism.

CHAPTER III

THE GENERALIZATION ARGUMENT

1. "What if Everyone did that?"

When a person contemplates breaking the law, he may be greeted with this question: "What if everyone did that?" The questioner would normally be taken as implying that the consequences of everyone's doing what the first person contemplates doing would be bad and that no one should do what would have bad consequences if everyone did it. Following Singer,[1] I shall call this principle the Generalization Argument (GA).

GA may be appealed to in order to defend a prima facie obligation to obey the law if it is held to be a necessary truth that there would be bad consequences if everyone broke the law. And if it is held that this is true in all states, OL1 would be said to follow, but if restricted to just states OL2 would follow. If, on the other hand, it is held to be a contingent matter that everyone's breaking the law has bad consequences, then a universal presumptive obligation will be argued for, and either OL3 or OL4 will be said to follow. Once again, as in my discussion of rule-utilitarianism in the last chapter, I shall not be concerned with the question as to which, if any, of these follow, but with the prior question as to just what the principle means and whether it is a valid or adequate principle.

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[1]In Marcus George Singer, Generalization in Ethics (hereinafter referred to as GE) (New York: Alfred Knopf, 1961).

1.A. GA and Utilitarianism. We can express the Generalization Argument as follows:

> GA. An act, x, is wrong if the consequences of everyone's doing x would be bad.

Like Rule-Utilitarianism, GA is supposed to be an improvement over Act-Utilitarianism, in that it holds that we sometimes ought not to do an act that has the best consequences, because the consequences of its general performance would be bad. Thus, even though there would be no bad consequences in breaking a particular law, one should still obey it because of what would happen if everyone broke the law; even though the abstention from voting of one person would not have bad consequences, still one should vote because of the disaster that would ensue if everyone refrained; even though it would not hurt if one person picked one flower, we should not do that because of what would happen if everyone did; and so on. These are the kinds of examples by means of which GA is often introduced, according to which it is supposed to give better advice than act-utilitarianism.

Understood in this context--as an improvement on AU--GA is naturally thought of as a kind of utilitarian principle. It judges an act, not in terms of its simple utility, but in terms of the utility that would be produced by its general performance, ie. by what we may call its general utility. It may be held, moreover, that the proper way to employ the principle of utility is to apply it to an act in terms of its general utility, rather than in terms of its simple utility. If we did this a generalized form of utilitarianism, analogous to act-utilitarianism, would go as follows:[2]

> GU: An act, x, is right if and only if the consequences of

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[2]This point is made by Lyons in FLU.

> everyone's doing x are at least as good as the consequences of everyone's doing any of the alternatives to x.

Following Lyons, I shall call this General Utilitarianism.

GA, we should understand, is not the same as GU. It tells us only that a certain state of affairs is sufficient for an act being wrong, while GU gives us necessary and sufficient conditions for an act being right. Moreover, GA is non-comparative,[3] that is, it judges an act wrong if it has negative general utility, while GU judges an act right or wrong only after comparing its general utility with that of the alternative acts. Thus an act judged wrong on GA could turn out right on GU because the alternative acts have even worse consequences if generally performed.

In this chapter I shall be examining the adequacy of GA, rather than of the broader GU. I do this because I think that people have something like GA in mind when they raise the question, "what if everyone did that?" that is, they want to point to the bad consequences of everyone's doing something and, having done this, believe they have given a reason against doing it. I do not think they would be so quick to adopt the broader principle, GU. I think, however, that the criticisms I shall make of GA can be applied, fairly easily, to GU as well.

1.B. GA and fairness. As I have been suggesting, GA is often thought of as a utilitarian principle, an improvement on act-utilitarianism. Thus when a person raises the question 'what if everyone did that?' he is pointing to the fact that the act has a negative general utility and implies that this is in itself either a good or sufficient reason for not doing it.

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[3]For various distinctions of this sort that can be made for utilitarian principles, see Lyons, FLU, Chapter I, sec. C.

It is reasonable to wonder, however, whether this is the proper way to understand GA and the question "what if everyone did that?" It has been held by some[4] that what is involved is basically an appeal to fairness, rather than, or in addition to, an appeal to utility. Thus it may be said that one who raises the question 'what if everyone did x?' is pointing out that since it would be bad for everyone to do x, it is unfair for one person to exempt himself from the general injunction not to do x.

I am of the opinion that this is the proper way to understand GA, that we will not understand its power until we see it as a principle of fairness. It has nevertheless been interpreted in a purely utilitarian way[5] and I shall be concerned in this chapter with the adequacy of such an interpretation. I shall argue that it does not work and this will clear the way for an understanding of it as a principle of fairness.

1.C. The problem of the appropriate description. Let us now look more closely at GA. It says:

> x is wrong if the consequences of everyone's doing x would be bad.

Is the obligation not to do such an act prima facie or absolute? The defender of GA will want to hold that it is a prima facie obligation in order to account for the following case--the consequences of everyone's doing a certain act are bad, but the consequences of everyone's doing any of the alternative acts are worse. In such a case, he would

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[4]Lyons, for example, FLU, Chapter V.

[5]I believe that Singer (GE) and Jonathan Harrison in "Utilitarianiam, Universalization and our Duty to be Just," Proc. Arist. Soc., Vol. 42, 1952-53 (reprinted in Olafson, Justice and Social Policy [Englewood Cliffs, N.J.: Prentice-Hall, 1961], to which all page numbers refer) are good examples.

want to hold, on utilitarian grounds, that the act is justified; it is the least of all the evils. Let us then restate the principle as follows:

GA. x is prima facie wrong if the consequences of everyone's doing x would be bad.

This leads us, however, to the central problem for GA, which is that it is difficult to say just when an act is such that the consequences of its general performance are bad. This is so because whether an act has negative or positive general utility depends on what description we give of it. To see this consider an act of law-breaking which, in the circumstances in which it is done, has good consequences overall, ie. has positive simple utility. As an act of law-breaking, it is the kind of act the general performance of which has bad consequences. But it can also be described as an act of law-breaking which does not have bad consequences; suppose, for example, it is an act of running a red light when there are no other cars or people around. Now, it would not be a bad thing if everyond did that. So under the latter description the act does not have negative general utility. Which description is appropriate?

It may be thought that the defender of GA can just say that insofar as an act can be given a description under which the consequences of its general performance are bad, it is prima facie wrong, and insofar as it can be given a description under which the consequences of its general performance are not bad, it is prima facie right or permissible. This, however, will not do. Consider the example of someone's running a red light illegally when there are no other cars or people around. The defender of GA will then have to say that as an act of breaking the law, it is prima facie wrong and as an act of

breaking the law which does not hurt anyone it is prima facie right. To say just this, however, is to be committed to a kind of neutrality about the act, for all one can say is that in a way the act is wrong and in a way it is right. But the defender of GA would want to say, at least, that it is more wrong than right, that the description under which it is wrong is more appropriate for the application of GA than the other one. In fact, I think he would want to say something even stronger, which is that since the act is an act of law-breaking, and thus has negative general utility, the fact that it will not have bad consequences in the particular circumstances is, from the point of view of GA, of no account whatsoever and, correspondingly, the description under which the act does not have negative general utility is not at all appropriate for the application of GA. Let me try to explain why he would (or should) say this.

Remember that GA is supposed to be an improvement on act-utilitarianism. It is supposed to account for our feeling that certain acts which have good consequences ought not to be done on the ground that it would be a bad thing if everyone did them. Moreover, a defender of GA will usually express the attitude that if an act is such that there will be bad consequences if everyone does it, the fact that doing it may have some good consequences in a particular situation is of no account; it is just not relevant. He will not say that, since the act has a negative general utility and a positive simple utility, it is both prima facie wrong and right, according to GA, with its wrongness 'overriding' its rightness. The judgment to be made on it with GA is that it is prima facie wrong and its positive simple utility is irrelevant.

As a utilitarian, a defender of GA need not dismiss the simple

utility of an act altogether. If an act has a negative general utility but the consequences of doing it on a particular occasion are extremely good, he may hold it legitimate to balance the judgment against the act on the basis of general utilitarian considerations with the judgment in favor of it on the basis of its simple utility. That is, he may, as a utilitarian, allow for the occasional balancing of general and simple utilitarian considerations. But this is consistent with my claim that from the point of view of GA alone, simple utilitarian considerations are irrelevant.

But consider now an act which has a negative general utility but which would not have bad consequences if done in a particular case. The act can then be given a description under which the consequences of its general performance will not be bad. For example, if it is an act of breaking the law which does not hurt anyone, it can be described simply as 'an act of law-breaking which does not hurt anyone' and the consequences of the general performance of this kind of act are not bad. But if this is allowed to be a relevant or appropriate description for the application of GA, then the simple utilities the defender of GA wants to dismiss as irrelevant simply reappear under this general description. Thus, to be consistent, he must also hold that this description is inappropriate, and that the act is not prima facie permissible in virtue of that description. In sum, then, an act of breaking the law which does not hurt anyone will not be both prima facie wrong and right according to GA. It will simply be prima facie wrong because the description under which it is permissible must be ruled out as irrelevant.

The problem, then, for the defender of GA is to find a criterion for deciding which of all the descriptions applicable to an act is

appropriate for applying GA. Moreover, in order to defend GA as an adequate utilitarian-type principle, his criterion must fulfill two requirements. First, it must give us the 'right' descriptions, ie. the descriptions that a reasonable and moral man would pick antecedent to having a criterion. It must, for example, pick 'breaking the law' rather than 'breaking the law when no one is hurt;' 'picking a flower' rather than 'picking a flower when no one else picks any flowers' and so on. If the criterion used gives us the wrong description, GA will not do the job it is supposed to do and not be an adequate moral principle.

Secondly, since GA is taken to be a general utilitarian principle, no considerations that are incompatible with general utilitarian considerations can be used in picking the criterion. The criterion must either 'follow' from the very nature of the principle, or if external considerations are used, they must either be general utilitarian considerations or morally neutral considerations. It would obviously be absurd to use a criterion of fairness, for example, or even of simple utility for picking the appropriate description.

1.D. Lyons and Singer. In the remainder of this chapter, I shall examine two important attempts to develop such a criterion. In section 2 I shall treat David Lyons' discussion. He holds that there is a criterion which follows from the nature of GA and perhaps other non-moral considerations, but it turns out that on this criterion GA is extensionally equivalent to--ie. gives the same advice as--Act-Utilitarianism. Thus he holds that GA is not an adequate principle because it is no improvement over AU and gives the wrong advice. I shall argue that Lyons is wrong, that the criterion he thinks follows

from GA does not follow and thus GA is not extensionally equivalent to AU.

In section 3, I will examine the more sympathetic treatment given of GA by Marcus Singer. Singer believes that there is a criterion according to which GA gives the 'right' advice and that this follows from certain non-moral and logical considerations. On his criterion GA is not extensionally equivalent to AU. I shall argue that this also fails.

My conclusion will be that there is no such criterion to be found and that understood as a utilitarian principle GA is indeterminate. Every description is equally good and thus we get no genuine advice from it. I will suggest, moreover, that the only way we can pick an appropriate description is to use considerations of fairness, but once we do this we get a whole new picture of GA and it becomes reasonable to restate it more explicitly as a principle of fairness or fair play. We shall see that the whole attempt to understand it in a utilitarian way misses the point.

1.E. Some terminology. Before getting on with the discussion of Lyons and Singer, I shall introduce some terminology to make things easier. Following Hume and Lyons,[6] I shall speak of the tendency of an act to refer to the consequences of its general performance. If the consequences of its general performance are good, I shall speak of it as having a positive tendency; if bad, a negative tendency; and if indifferent, an indifferent tendency. As we have seen, an act will not have a tendency simpliciter, but only as an act of a certain kind,

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[6] FLU, p. 3.

under a certain description. (I shall come back to this later, section 2.E.)

Secondly, I shall call a description of an act a negative description if under that description the act has a negative tendency, ie. the consequences of its general performance are bad. And a description is positive or indifferent also if the tendency is positive or indifferent. Lastly, I shall say that a description of an act is AU-equivalent if the judgment of the act under that description made by GA would be the same as the judgment made by AU.

2. Extensional Equivalence: Lyons' Argument

From his discussion in Forms and Limits of Utilitarianism, especially Chapter II, we can attribute to Lyons the following thesis:

> L. There is one and only one criterion that can properly be used for choosing descriptions for GA and on this criterion every appropriate description is AU-equivalent.[7]

If this is true, GA is no improvement over AU and gives the wrong advice. Let us now see whether it is so.

2.A. General relevance. Although he does not state these as explicitly as I shall, Lyons offers in Chapter II of FLU three conditions which he believes are individually necessary and, taken together, sufficient for a description to be an appropriate one for a principle like GA. I shall call these the condition of general relevance, the condition of material relevance and the completeness condition, and I shall look at them in turn.

Lyons holds that a description of an act is appropriate with respect to a moral principle, M, only if a judgment of the act under

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[7]Lyons' argument is specifically about GU, rather than about GA. But if it is true of GU it will also be true of GA.

relevance is vacuous because it does not rule out any description as inappropriate.

2.B. Material relevance. The condition of general relevance, however, is only a necessary condition. A further condition of material relevance is also required, according to Lyons. Consider this description: "a lie told by a man with ten fingers." This fits the condition of general relevance for GA because it has a negative tendency. Since almost all men have ten fingers, the class of such acts would be almost identical with the class of lies. Lyons, however, argues that the description is materially irrelevant because the bad consequences of such acts are not causally related to the fact that the man has ten fingers. Since the principle at issue is a utilitarian principle, Lyons argues that the only properties that should be allowed in descriptions are those in virtue of which an act causes utilities and disutilities. Lyons calls these general utilitarian properties,

> causal properties in virtue of which the universal performance of acts of that kind would produce some utility or disutility.[10]

If acceptable, this condition would solve one problem that Jonathan Harrison fell into in his defense of GA.[11] Consider the case of a man with thirteen fingers who tells a lie. Suppose he defends himself by claiming that the consequences of everyone with thirteen fingers telling a lie are not bad. Harrison argues that he cannot describe his act this way because this description can be 'irrelevantly generalized,' that is, by subtracting characteristics such as being done by a man with thirteen fingers,

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[10] FLU, p. 57. Lyons' general discussion of this condition can be found on pp. 52-61.

[11] Loc. cit.

that description can be made with M.[8] This is the condition of general relevance. Such a condition is very sensible but I fear it is vacuous. Lyons, however, does not think so. He says, with respect to a principle like GA which judges an act wrong if it has a negative tendency, that

> an acceptable description for the application of such a principle must have an undesirable tendency (a negative generalized utility). It must be the case that, if everyone did that sort of thing (acts of the kind mentioned), the consequences would be undesirable on the whole. Thus if the description 'lying' has a tendency which is undesirable, then such a description is acceptable on this approach . . . But . . . descriptions which do not have undesirable tendencies cannot be acceptable; for a negative principle cannot yield any judgments at all about acts in respect of tendencies that are not undesirable.[9]

This is plainly false. Suppose that D is a positive description of an act, ie. one under which it has a desirable tendency. Then it follows on GA that the act is not wrong as an act of kind D; as such an act it is prima facie permissible. Moreover, should the act be capable of descriptions only in terms of desirable tendencies, it would follow that, on GA, there is nothing wrong with it.

The problem here is that the feature mentioned in a moral principle will always be one that an act either has or does not have. Suppose, for example, that a moral principle judges an act prima facie wrong if it has a certain feature. Then, if the act has the feature, it is prima facie wrong. If it lacks the feature, we can conclude--not that the act is not prima facie wrong, because there might be other reasons for still asserting this--but that a certain reason against it is lacking. And coming to know this can be just as informative as coming to know that it is prima facie wrong. Thus the condition of general

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[8] FLU, p. 38. [9] FLU, pp. 38-39.

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[10] FLU, p. 57. Lyons' general discussion of this condition can be found on pp. 52-61.

[11] Loc. cit.

> I can obtain a more general class of actions, the consequences of the general performance of which do not differ from the consequences of the general performance of actions belonging to it.[12]

In general he holds that if an act is a species of a genus, and the tendency of the act under the species description does not differ in value from the tendency of the act under its genus description, the species description is inappropriate.

The trouble with this criterion is that, as Lyons has also pointed out,[13] it does not work. The consequences of the general practice of lying by thirteen-fingered men are less undesirable than the consequences of the general practice of lying. And this is so, quite simply, because there are few thirteen-fingered men. Nothing in Harrison's criterion guards against this possibility. On Lyons' criterion, however, being thirteen-fingered is immediately ruled out because it is not a property in virtue of which lies told by such men have bad consequences. It is not a general utilitarian property.[14]

2.C. Is material relevance necessary? Should we accept the condition of material relevance? To answer this, it will be helpful to realize just why we accept the condition of general relevance, even though it is vacuous. The condition of general relevance says that a description must be such that a moral judgment can be made on the act by a given moral principle. It is therefore logically impossible to

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[12]Harrison, op. cit., p. 64 (italics added). [13]FLU, p. 58.

[14]Harrison's criterion, incidentally, does not rule out AU-equivalent descriptions. Consider the descriptions 'refraining from voting' and 'refraining from voting when this doesn't have bad consequences.' The latter cannot be irrelevantly generalized. In fact, if a particular act has a positive simple utility, while being of a class that has a negative tendency, it can always be given an AU-equivalent description which necessarily cannot be irrelevantly generalized, for ex hypothesis, the value of the tendencies of the species and genus acts are different. Harrison also believes that a genus description is inappropriate whenever there is a species description that is not irrelevantly generalizable. His own criterion thus makes AU-equivalent

evaluate the act at all on that principle unless this condition is fulfilled. Perhaps the fact that the general relevance condition can be so tautologically defended is ample explanation of its vacuity.

The material relevance condition is not so easily justified because there is nothing logically absurd in evaluating an act on GA using materially irrelevant descriptions. Lyons seems to think, however, that the condition is somehow necessitated by the fact that the principle is of the type it is, or has the general content it has:

> Pure teleological principles are concerned, ultimately, only with the values of the consequences of actions. Thus, when pure teleological principles are applied, particular actions may be viewed only with respect to their teleologically significant properties, that is, those properties, <u>in virtue of which</u> actions produce utilities and disutilities.[15]

The trouble with this is that the phrase "in virtue of which" is too vague. Consider the bad consequences of lies told by thirteen-fingered men. It is true that the bad consequences caused by some particular instance of such an act are not nomologically related to the fact that the agent has thirteen fingers. But consider the <u>class</u> of such acts. The class of such acts does not have as bad consequences as the class of acts of lying in general because the former class contains only thirteen-fingered men, of which there are very few. It seems that the specification of the members of the class affects the value of the <u>tendency</u> of the act.

Let us say, along with Lyons, that a property is causally relevant if it is nomologically related to the bad consequences in any particular instance of an act. Let us say also that a property is

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descriptions always appropriate and therefore makes GA extensionally equivalent to AU, a consequence he apparently did not see.

[15] <u>FLU</u>, p. 57 (italics added).

tendency-relevant if it affects the value of the tendency of an act. Being thirteen-fingered, then, is not causally relevant, but it is tendency-relevant. Lyons' thesis, then, is that we must choose descriptions that refer to causally relevant properties and reject those that refer to properties of acts that are only tendency-relevant.

But why should we do this? Why should we accept causally relevant descriptions and reject tendency-relevant ones? I see no reason for this. In fact, since we are dealing with a general utilitarian principle, one that judges an act in terms of its tendency, it would seem more plausible to accept tendency-relevant descriptions rather than causally relevant ones--if we are going to do any accepting or rejecting at all. After all, what is important is the consequences of everyone's doing an act, and not the consequences of a particular instance of that act on a particular occasion.

What is really needed here is an explanation of why having thirteen fingers does not excuse a man from the general injunction not to lie. And certainly the natural thing to say here is that it is not fair for a person to get out of the requirement of truth-telling on the ground that he is thirteen-fingered. There is after all a distributive question involved here, a departure from equality which needs justification. It seems reasonable to conclude, then, that the material relevance condition does not 'flow' from the nature of GA, understood in a utilitarian way. If it is plausible at all to hold that only causally relevant descriptions are appropriate, its plausibility is based, I suggest, on certain background conditions of fairness that need to be brought out. What these conditions are will be discussed in Chapters V and VI, when fairness is more explicitly discussed.

2.D. The completeness condition. I shall, for the sake of argument, 'give' Lyons the material relevance condition. Even with it, his thesis L--the claim that every appropriate description for GA is AU-equivalent--does not follow. Consider again our example of an act of illegally running a red light when there are no other people or cars around. Described either as an act of law-breaking or as an act of running a red light when no one else is around, it fulfills the condition of material relevance. But Lyons must claim that the description of it as an act of law-breaking is irrelevant. To do this he needs a third condition, the completeness condition, which he expresses as follows:

> The general rule is, that other things equal the more complete description is the more adequate or acceptable one.[16]
>
> What we require . . . is a method of applying the forms of utilitarian generalization which envisages a single, complete and relevant description for a given act.[17]

Lyons' claim, then, is that a complete description will always be AU-equivalent and thus GA will be no improvement on act-utilitarianism.

To discuss this I want to separate the following two questions:

a) When is a description complete with respect to GA?

b) Must an appropriate description for GA be a complete one?

I shall argue that there is a reasonable sense of completeness in which only AU-equivalent descriptions are complete with respect to GA. This admission, however, is essentially terminological, for I shall then argue, against Lyons, that such completeness is not required by GA. I shall thus agree with Lyons on (a) but disagree on (b).

2.E. When is a description complete? To answer this, we must note

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[16] FLU, p. 38. [17] FLU, p. 51 (italics added).

some differences between the roles descriptions play in simple and generalized utilitarianism. Consider a particular act, x. It is plain that with respect to a simple utilitarian principle like AU, its rightness or wrongness depends on all the consequences x has. Because of the extensionality of the concept of causality, however, it does not matter how we describe x; it has the consequences it has no matter how it is described.

But what about the tendency of the particular act, x? The tendency of an act is the consequences of the general performance of that kind of act. As I noted in section 1.C., we can only calculate the tendency of an act, once we have classified it in some way. No such reference to kind or type is needed to calculate its simple utility. And this is so because to measure its simple utility we have to examine the act alone. But to get at its tendency, we are concerned with it as a member of a class of acts, with features it has in common with other members of that class. If this is so, we cannot speak of the tendency of a particular act, as we can speak of its simple utility. It is only as an act of a certain kind that an act can have a certain tendency. And since any particular act will be of many kinds it will have many different tendencies.

We can put this in another way by saying that in attributing a certain tendency to an act we are relating that act under a certain description to consequences having a certain value. Thus the notion of having a tendency is referentially opaque. From the facts that an act under description, x, has a certain tendency and that act x = act y, it does not follow that the act under description y has that tendency. But such substitutability does hold for simple utilities.

Consider now a single act which is the breaking of a promise,

preventing someone from getting severely injured and mildly disturbing someone (eg. the promisee). Let us suppose that its simple utility is positive; it does not change if we change descriptions. But what of its tendency? We can only speak of its tendency as an act of a certain sort. We might say that it has an undesirable tendency as an act of promise-breaking, a desirable one as an act of preventing harm and so on.

Suppose we put all these descriptions together and view the act as promise-breaking-which-prevents-harm-though-disturbing-someone. Now if we take all the descriptions of an act which fulfill the material relevance condition, which I have been assuming for the sake of argument to be valid, and put all these descriptions together, we shall get what I shall call a resultant description. I shall also call this resultant description of the act its complete description. It is complete in the sense that it is a composite of all the materially relevant descriptions of the act. It will do no harm and beg no questions to call this, with Lyons, the complete description of the act.

A complete description will always be AU-equivalent. To see this consider our case of a person running through a red light illegally when there are no other people around. This act has a positive simple utility. It can be given a negative description as an act of law-breaking and a positive one as an act that does not hurt anyone. Now if we put these together we will have an act of law-breaking that does not hurt anyone and the consequences of everyone's doing this would not be bad. So under the complete description the act has a tendency which is positive and the description is AU-equivalent. An analogous argument can be given to show that if the simple utility is negative, then the resulting complete description will ascribe a

negative tendency to the act. A complete description of an act then is always AU-equivalent.

2.F. Is completeness necessary? We now come to the central question. Is a resultant, complete description more appropriate for GA than a less complete description? An argument is certainly needed for this, but Lyons is rather short on argument here (which is surprising since the completeness condition is necessary for his whole thesis). The only argument I can find is the claim that

> failing to make a description complete for the application of a form of utilitarian generalization is akin to failing to take into account all the utilities and disutilities attributable to a given act when a form of simple utilitarianism is applied.[18]

Is this correct?

It is certainly true that we do not make a correct judgment of an act on AU if we do not take into account all of its consequences, its long-range as well as short-range consequences. But it is not equally obvious that we would make an analogous mistake if we did not use a complete description for a principle like GA. We would make an analogous mistake if, having already decided on a description of the act, we were to fail to take into account some of the consequences of the general performance of that kind of act. For example, suppose we are interested in knowing what the tendency of an act of promise-breaking is. We might conclude that it has an undesirable tendency because such acts tend to cause discomfort to the promisee. But to conclude the matter here would be to fail to take into account all the utilities and disutilities attributable. We should also consider the fact that if promise-breaking were to become a general practice, people

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[18] FLU, p. 61.

would make less and less promises and a valuable mode of interaction between people would cease. Failing to take this into account is precisely akin to failing to take into account the long-range consequences of a particular act on AU. But this mistake can only be made once a description of the act has already been settled upon. Its possibility is therefore irrelevant to the problem of choosing descriptions.

The central reason why the analogy between GA and AU fails is this: While we can investigate the simple utility of an act using any description of it, we can determine its tendency only when we have classified it in a certain way. It has no tendency simpliciter. There is thus no generalized utility of the act we can fail to take into account by choosing one description rather than another. Thus we do not leave out any utilities by choosing a non-complete description and, so far as I can see, the complete description of the act is just one among many.

A lingering doubt may remain which I shall try to expunge. Consider a particular act, x, which can be given two descriptions, K and M, the former complete, the latter incomplete. Suppose we pick M. Haven't we left something out? After all, there are features of the act, x, which affect its utility but which M does not cover. It is quite true that M leaves out such features, but they are features related to its simple utility. In a sense, an M-type description will always leave something out for AU (although this does not matter for evaluation, since, as we have seen, any description will do for AU). But on what grounds can it be said that it leaves something out for the application of GA?

The only way this could be argued, I think, is on the ground that when people normally use GA they mean to refer to the act as

classified by its complete description. When we ask a person "what would happen if everyone did that?" we mean to get him to see that it would be bad if everyone did exactly what he is doing. The word "that" refers to the act he is doing in all its 'particularity' and only a complete description which captures its total causal properties picks out the right kind of act.

This argument is clearly defective. It cannot be defended by reference to general claims about demonstratives, for, although a demonstrative like "that" refers to a particular, it is not necessarily the case that the user of the demonstrative is interested in all the features of the particular. If I tell someone to bring me a chair like that one, it is certainly in order for him to wonder just what features I want duplicated and he does not necessarily make a mistake if he brings me a chair that does not have exactly the same properties (suppose the first chair had a pretty girl sitting in it and the one he brings me does not--I may be disappointed but not usually because he has misunderstood me).

Moreover, it is certainly not true that when we raise the question, "what if everyone did that?" we mean to refer to the act in all its particularity. I might be refraining from voting and someone might ask me, "what would happen if everyone did that?" knowing full well that my particular act would have no bad consequences. It is thus not true that people mean to pick out the act in all its particularity; in fact there are certain features of it that they feel ought to be overlooked.

I conclude, then, that the completeness condition is ad hoc and Lyons' whole enterprise of trying to see just what kind of description 'flows' from the nature of a principle like GA--understood in a

utilitarian way--is doomed to failure.[19] Nothing follows and all these questions are left up in the air. Once again it seems reasonable to replace the question as to what does or does not follow from GA with the question of whether it is legitimate for a person to exempt himself from following a reasonable general rule on the ground that his breaking the rule will not have bad consequences. The question is whether this is a fair excuse. What I have been trying to suggest so far is that no answer--not even, as Lyons thinks, a bad answer--can be given to this if we insist on thinking of GA purely as a kind of utilitarian principle. But I cannot conclude this discussion until we look at Singer's attempt to defend GA and present another criterion--one which follows not from the nature of the principle, but from considerations of logic and reason--on which GA ends up giving the right advice, without having to bring in an explicit notion of fairness. Let us now turn to this.

3. Extensional Non-Equivalence: Singer's Argument

From his discussion in Generalization in Ethics, especially Chapters III through VI, we can attribute to Singer the following thesis:

> S. There are criteria that can be used for telling which descriptions are appropriate for GA and on these criteria appropriate descriptions are not AU-equivalent.

If this is true, GA would be an improvement over AU. Singer actually argues for a broader thesis, not just that appropriate descriptions are not AU-equivalent but that in every case the criteria give us the 'right' description, the one that would accord with our intuitive

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[19] By a similar argument, we can conclude the same for the broader principle, GU.

convictions. S follows from this more general thesis, hence if S is incorrect, as I shall argue, it will follow that the general thesis is incorrect also.

Singer reaches his conclusion by examining a number of different problems that GA runs into if forced to use certain descriptions and he thus suggests ways in which these descriptions can be ruled out. I shall look at some of these problems in turn.

3.A. Invertibility. GA has been criticized for making it wrong to produce food, for example, because the consequences of everyone's doing that would be bad. Singer points out that it is also true that there would be bad consequences if no one produced food.[20] In such a case he says that the generalization argument is invertible and he says that

> in order for the generalization argument to have a valid application with respect to some action it is necessary that it not be invertible with respect to that action.[21]

So he wants to rule out descriptions that make the argument invertible. For clarity's sake, I shall use the word "invertible" to refer to descriptions in accord with the following definition:

> 1. A description of an act is invertible if and only if under that description the consequences would be bad if everyone did the act and if no one did the act; or, in other words, both the performance and the non-performance of the act have undesirable tendencies.

The description 'producing food' is thus invertible because the consequences of everyone's doing this would be bad and the consequences of no one's doing it would also be bad. Singer argues that such descriptions are not appropriate for GA.

What reasons does Singer have for claiming this? He says that

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[20] GE, p. 72. [21] GE, p. 72.

when an act is given such a description, it is

> described in too general a way. To be morally determinate it would have to be given a context.[22]

And in order to get an appropriate description we must specify

> the circumstances of the act to the point sufficient for the generalization argument to be applicable to it.[23]

The non-invertibility condition thus seems to be a kind of completeness condition for Singer, akin to Lyons' completeness condition.

Granted, however, that such descriptions are rather general and could be made more specific, why must we choose the more specific over the more general description? I think that Singer's real argument here is just this: obviously if such descriptions are allowed, GA will not work. Thus people cannot have these descriptions in mind when they express a principle like GA. So we have to rewrite the principle to bring out just what people have in mind and incorporate the non-invertibility condition as follows:

> GA. An act, x, is prima facie wrong if the consequences of everyone's doing x would be bad and the consequences of no one's doing x would not be bad.

To take this 'solution' of the difficulty, incidentally, is not to argue that the non-invertibility condition follows from the nature of GA; it is to admit that, as previously understood, it does not follow at all. It must, therefore, be explicitly written in. I shall admit the legitimacy of doing this although it is plain that this can be done only up to a certain point: if one keeps doing this, one will have after a while simply a list of wrong acts, rather than a general principle which tells us why they are wrong.

It is important to note, moreover, that the non-invertibility

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[22] GE, p. 76. [23] GE, p. 80.

condition does not rule out AU-equivalent descriptions. With respect to the example I have been using, both 'breaking the law' and 'breaking the law when no one is hurt' are non-invertible. The former has a negative tendency but its opposite does not; the latter does not even have a negative tendency. The non-invertibility condition thus rules out some inappropriate descriptions, but not all, and if AU-equivalent descriptions are to be ruled out, some other means will have to be found for doing this.

3.B. Reiterability. There is another kind of description which gives GA trouble, descriptions which Singer says are too specific. Suppose everyone ate at six o'clock. The consequences of this would be very bad and it would seem to follow from GA that it is wrong for anyone to eat at 6 p.m. Singer says, however, that

> . . . this argument in no way depends on the exact time specified. If we could argue that no one has the right to eat at six, we could argue that no one has the right to eat at five, or at seven . . . We could therefore argue that no one has the right to eat at any time.

In this kind of case Singer says that the argument is reiterable,

> it is applied to some action arbitrarily specified, as part of its description, as taking place at some particular time, or at some particular place, or by some particular person or in relation to some particular person or thing.

Reiterable descriptions can be rejected, says Singer, because

> any instance of the generalization argument that is reiterable is also invertible.

Thus reiterating the eating at 6 p.m. argument we get the conclusion that no one ought to eat. But if

> no one were to eat, the consequences would be just as undesirable, presumably, as if everyone were to eat at the same time.[24]

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[24] GE, pp. 81-82.

The central problem about Singer's remarks here is that the description "eating at 6 p.m." is not itself invertible. A description is invertible if and only if the consequences of everyone's performing the act referred to by it are bad and the consequences of no one's performing it are also bad. But "eating at 6 p.m." is not invertible according to this, for its general non-performance does not have bad consequences. Nor does the fact that the argument can be reiterated for other times make that description invertible. Singer can argue for invertibility only by comparing the description "eating at 6 p.m."--which I shall call D--with the description "eating"--which I shall call E. Neither D nor E is itself invertible. But D has a bad tendency and the non-performance of E has a bad tendency. What Singer must argue is that somehow the undesirable tendency of D must be compared, not with the tendency of the non-performance of D, but with the tendency of the non-performance of E. How can this be shown?

I suggest that we can understand this only by using the notion of what I shall call an invertibility situation. We have such a situation whenever a use of GA logically commits us to judging wrong an act whose universal non-performance would have bad consequences. I shall argue that though the description D is not strictly speaking invertible, nevertheless its use leads to an invertibility situation, ie. it commits us to judging wrong an act whose universal non-performance would have bad consequences. To see this, consider that if we use GA in the above fashion to show that eating at 6 p.m. is wrong, we must use it in all consistency for all other times with the conclusion that all acts of eating are wrong. We can state this as follows:

> If, according to GA, eating at 6 p.m. is wrong, then, according to GA, eating at any time is wrong.

Thus the choice of description D, though itself non-invertible, logically requires us to judge that acts of type E are wrong. But the universal non-performance of such acts would be very bad. Thus the choice of description D puts us in an invertibility situation, ie. one in which we must judge wrong an act whose non-performance has a bad tendency.

In order to claim without begging the question that such descriptions are to be ruled out, this condition must also be built directly into GA. We want to distinguish, then, two ways in which a description can lead to an invertibility situation. It can be <u>directly invertible</u> or lead to such a situation through reiterability. I shall call the former invertible descriptions, the latter reiterable. We can define invertibility as in (1). But a definition of reiterability will be quite complicated. What makes a description reiterable is that it leads to an invertibility situation through repeated applications of--what? Not of GA, because we are now on the road to formulating GA so the principle itself rules out such descriptions, But, then, what principle? Obviously it is the unmodified GA-principle we have been working with all along: x is prima facie wrong if the consequences of everyone's doing x are bad. I shall call this UGA, the unmodified GA. We can now define reiterability as follows:

2. A description DS (where D refers to a genus of acts, S to a species) is reiterable if
   a) the universal performance of DS-acts is undesirable.
   b) the universal non-performance of DS-acts is not undesirable but
   c) the universal non-performance of D-acts is undesirable and
   d) repeated applications of UGA to D-acts leads us to the conclusion that D-acts are wrong.

We can now rewrite GA as follows:

> x is prima facie wrong if the consequences of everyone's doing x would be bad and the consequences of no one's doing x would not be bad--unless there is a kind of act, y, such that the consequences of no one's doing y would be bad and x is a species of y-acts and repeated applications of UGA to y-type acts yields the conclusion that no one ought to do y.

This is complicated but I do not see any simpler way of expressing what must be expressed within Singer's framework. Moreover, I think that what GA says is clear once one understands what is being said and that the restrictions built in make the principle somewhat more plausible. What they are getting at is that it would be foolish to judge wrong an act that would have bad consequences if no one did it, and the restrictions rule this out. But they do not rule out AU-equivalent descriptions, as we shall see below.

3.C. Prohibitions vs. permissions. The non-invertibility and non-reiterability conditions incorporate restrictions into GA when we are using GA to conclude that some type of act is wrong to do. They prevent us from judging as wrong acts that are obviously not wrong. They thus restrict the range of negative moral rules that can be validated by GA. But there is another problem for GA with respect to which the non-invertibility and non-reiterability conditions are useless, and this is the problem of acts being judged right or permissible on GA which are obviously not right. Consider an act which is the telling of a lie but which is done at 6 p.m. Suppose someone claims that his act of lying is permissible because it is a 6 p.m. act--that is the description he gives of it--and the consequences of the general performance of that type of act are indifferent. How can we rule this description out? Invertibility and reiterability are of no help, because a necessary condition of a description being invertible or reiterable is that the tendency of the act so described be negative. In other

words, invertibility and reiterability enable us to show that an act can be right even though it has a negative tendency; they are of no help in showing that an act is not right when it does not have a negative tendency.

This problem is especially acute when we are dealing with AU-equivalent descriptions. Consider again our example of someone breaking the law and trying to justify this on the ground that, in this case, no one is hurt. His description of it as an act of law-breaking which does not hurt anyone is neither invertible nor reiterable, for under this description the act does not have a negative tendency and thus fails to fulfill a necessary condition for invertibility or reiterability. The non-invertibility and non-reiterability conditions thus do not rule out AU-equivalent.

3.D. Iterability. Singer appears to believe, however, that AU-equivalent descriptions can be ruled out on the ground that they are reiterable. Since this cannot be, we must try to see what he is getting at. I think that he sees the situation this way: Once we have found a description of an act under which it has a negative tendency and the description is neither invertible nor reiterable--a description like 'breaking the law'--there exists a kind of 'rule' against the act, such that the burden of proof falls on one who wishes to claim that a particular instance of the act is permissible; he must show that he is a legitimate exception to the rule. Moreover, if he wishes, to use our example, to break the law when doing so does not hurt anyone, then if he can show he is a justified exception, the description of the act as an act of 'breaking the law which does not hurt anyone' is the appropriate description and the act is prima facie permissible. But if he cannot show this, then 'breaking the law' is the appropriate description

and the act is, according to GA, prima facie wrong. In general if the exception can be justified, the more specific description is the appropriate one; if it cannot be justified the general description is appropriate.

What shall we say about this method and its presuppositions? I think it can be admitted, for the sake of argument, that if we have found a description under which acts have a negative tendency and the description is neither invertible not reiterable, then there is a kind of rule against that kind of act, which I shall call a provisional rule. It is important to note, however, that to say that there is such a rule is not to say that the act is prima facie wrong on GA. To say that the act is prima facie wrong requires one to have shown that the description in terms of which the rule is framed is the appropriate description for applying GA, and this has not yet been shown. Thus 'breaking the law' is a description in terms of which a provisional rule can be formulated, but it has yet to be shown that it is the appropriate description for GA. If, in some cases, 'breaking the law when no one is hurt' is an appropriate description, while 'breaking the law' is not, then there will be no prima facie obligation to obey the law on GA, for there will be cases in which nothing has been shown to be wrong by GA with breaking the law. So the claim that there is a provisional rule against an act is not to be confused with the claim that the act is prima facie wrong on GA.

It is also important to point out that Singer assumes that if an act is such that its general performance would have bad consequences and there is consequently a provisional rule against it, then some particular instances of the act would have bad enough consequences so that they would be wrong. I think that this is not unreasonable and can be accepted for the sake of argument. Let us suppose, then, that

if there is a provisional rule against an act, at least some instances of it will be wrong. With respect to any particular instance, then, we can raise the question as to whether it is right or wrong. And since we can know that in some instances such acts are wrong, the burden of proof can be thought of as falling on one who wants to show that the instance is not wrong. This is what Singer does and I believe that his method, at the outset, is not unacceptable.

Given then that there is a provisional rule against an act, how can one show that any particular instance of it is not wrong? Singer says that one can show this by showing

> that one is a member of a certain class of persons (has certain characteristics) such that if every member of that class (everyone with those characteristics) were to act in that way the consequences would not be undesirable, or by showing that the circumstances of one's action are such that the consequences of everyone's acting in that way in those circumstances would not be undesirable. This would be to show either that there is a relevant difference in the characteristics of the agents involved or that there is a relevant difference in the circumstances.[25]

This criterion for justifiable exceptions does not, however, rule out AU-equivalent descriptions. The person who breaks the law when doing so does not hurt anyone can argue that the "consequences of everyone acting that way in those circumstances would not be undesirable." In fact, Singer's criterion seems to make it always justifiable to break provisional rules when doing so does not have bad consequences and thus his criterion makes AU-equivalent descriptions preferable.

To rule this out Singer adds that appealing to one of these exception-making circumstances is legitimate only if

> the argument [is not] reiterable with respect to that class of persons or circumstances selected. Otherwise the class in question would be "distinguished" by a characteristic in terms of

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[25] GE, p. 83.

> which everyone would be an exception, and hence not really distinguished at all.[26]

I think that Singer is using "reiterable" here in a different sense than before. He has in mind that there are certain alleged exceptions to a provisional rule such that if they are allowed to be exceptions, then it follows logically that every instance of the prohibited act will be an exception. And this is incompatible with the claim that there is a provisional rule against such an act, for if there is such a rule, not every instance of the act can be right. Suppose, for example, someone claims that it is all right for him to lie because he is a man. Now if this is a reason for him to lie, it is a reason for everyone else and every instance of lying becomes an exception to the rule against lying--and this is incompatible with saying that there is such a rule. Singer's claim then is that we cannot allow something to be an exception to a provisional rule if allowing it would be incompatible with the claim that there is such a rule.

If this is what Singer has in mind by calling such descriptions reiterable, this is different from what he has in mind by reiterability as we have so far understood it. For the sake of clarity, I shall call such a feature of a description iterability, which can be defined as follows:

> 3. A description, DS, is iterable if and only if there is a provisional rule against acts of type D and allowing DS to be an exception to the rule against D logically entails that every case of D is an exception to the rule against D, this being incompatible with the claim that there is such a rule.

His claim, then, is that any iterable description is inappropriate for the application of GA. If all this is accepted, he must next show that

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[26] GE, p. 83.

AU-equivalent descriptions are iterable and can thus be ruled out. We shall see whether he can do this in the next section.

It is worth pointing out here that Singer is trying to rule out certain exception-making descriptions on the basis of logical considerations--on the ground that allowing them leads to logical inconsistencies. He is not ruling them out because it is unfair to allow them or on the basis of any other moral consideration. Thus if AU-equivalent descriptions can be ruled out in this way, he can claim to have defended GA without having had to bring in explicit considerations of fairness. Let us see now if this can be done.

3.E. AU-equivalent descriptions. Are AU-equivalent descriptions iterable? Suppose that there is a provisional rule against breaking the law and someone attempts to justify breaking a law on the grounds that, in this case, no one is hurt. If we allow this as an exception, must we allow that there is always a justifiable exception to the rule against breaking the law? To argue this it would be necessary to claim that no instance of breaking the law hurts anyone. Then, and only then, would allowing an exception in one case apply to all cases. But it is plainly false that no act of law-breaking hurts anyone. In fact, if this were true, there could not be a provisional rule against law-breaking in the first place, for the act would not have a negative tendency.

We can generalize this last point as follows: If an act has a negative tendency under description D, then there must be at least some cases in which a particular act of kind D has bad consequences. But if this is so the AU-equivalent description, 'doing D when it does not hurt anyone' will never be iterable, since, as we have just seen,

there must be cases in which it is false that D does not hurt anyone. Thus the conclusion we reach is the exact opposite of Singer's and is this: If there is a provisional rule against acts of kind D, then the description 'doing D when no one is hurt' logically cannot be iterable and is thus always appropriate. So AU-equivalent descriptions are ruled in, not out.

3.F. Inconsistency vs. unfairness. What can Singer have in mind? Suppose that we have a society of ten people such that the tax laws will yield good consequences if and only if at least nine of them pay their taxes. Non-payment of taxes will have a negative tendency in the society and there will be provisional rule against it.

Suppose that A comes along and says that he need not pay taxes because he will miss the money more than the government.[27] Let us suppose that this is true of each member of the society. Given this it would be inconsistent of us, on these grounds, to judge that A is justified in not paying taxes without judging that all the others are justified as well. To do this would be to apply a standard in one case, while refusing to apply it in a precisely similar case, and this would not make sense. Moreover, the description A would give of his act--'non-payment of taxes when the agent would miss the money more than the government'--is iterable, since it would apply to everybody. Thus if A is exempted, then everyone must be exempted and this is incompatible with the claim that there is a rule against non-payment of taxes.

There is one feature of this case which it is very important to note and this is that it is logically possible to apply the standard to

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[27]This example is mentioned in GE, p. 87.

everyone. That is, the standard of letting people out of tax-paying because they will miss the money more than the government can be applied to everyone and inconsistency results when it is applied to some but not to others.

Keeping this in mind, we need to consider a different kind of case. Suppose that A comes along and says that he need not pay his taxes because everyone else is paying taxes so his act of non-payment will not have bad consequences. He describes his act, let us say, as an act of 'non-payment when everyone else pays.' We would not normally think of this as a good reason for allowing A to be exempted from paying taxes. The question is why? Can we show an inconsistency here as we did in our first case? Singer thinks we can, that if we were to let A out on these grounds, then everyone else "could argue in the same way" and this would show that "everyone is an exception, which is strictly nonsense." This, however, is not so.

To see this, it is necessary to note that, unlike our first case, it is not logically possible to apply the standard we use to let A out to everyone. Our standard is to let someone out of paying his taxes when everyone else pays. Clearly we can only let one person out on this standard, for if two people do not pay their taxes, then neither performs an act of non-payment when everyone else pays. There can be only one such exception on these grounds.[28]

It follows then that we are not involved in an inconsistency in the application of a standard if we let A out but not B, because once we have let A out, we cannot also let B out on the same standard.

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[28]It is for this reason that the description 'non-payment when everyone else pays' is not iterable. If we allow one person to be an exception, we are not committed to allowing everyone; in fact, we are committed to allowing no one else.

What kind of objection, then, can B make? Plainly, he will say that there is nothing special about A that justifies his getting out of paying taxes rather than B or anyone else. Thus it was unfair to let A out. The standard used to let him out is not a fair standard.

In other words, what each person "could argue" is that he has an equal claim with A to the exemption. Given this, it is unfair to give the exemption to A and not others. What follows it not that if A is an exception, then, in all consistency, everyone is an exception, but that if A is an exception, then, in all fairness, everyone should be an exception. Since everyone cannot be excepted, A should not have been. Thus there is no inconsistency per se in letting A out and not the others, but it is logically impossible to do this and be fair at the same time.

The same would be true if A had been exempted on the ground that his act could be described as 'non-payment of taxes which does not have bad consequences' (instead of 'non-payment of taxes when everyone else pays'). Once again not everyone could be exempted on this criterion and it would be arbitrary to let A out rather than anyone else. It, too, is not a fair standard. Allowing AU-equivalent descriptions, then, is unfair, not inconsistent.

We return, then, by a different path to the same point we have come to before: it is impossible to find criteria for appropriate descriptions for GA, if we interpret it solely as a utilitarian principle. Some explicit considerations of fairness need to be brought in. Thus Singer's attempt to save GA, on logical grounds, as well as Lyons' attempt to scuttle it, are both doomed to fail.

4. Conclusion

I conclude that interpreted solely in a utilitarian way, we cannot use the Generalization Argument to ground any of the OL-principles. Consider our act of illegally running through a red light when no one else is around. We do not know whether to say that there is a prima facie obligation not to do that act because, as an act of breaking the law, it has a negative tendency, or to say that there is no prima facie obligation to refrain from it because as an act of breaking the law which does not hurt anyone, it does not have a negative tendency. To conclude that refraining from the act is prima facie obligatory we would need a criterion on which the former description gets chosen, rather than the latter. But there is no such criterion.

If we think, however, that the question 'what if everyone did that?' still has some moral force, especially with respect to contemplated law-breaking, we must find some new way of understanding it. I have been suggesting that there is some explicit principle of justice of fairness behind it. It is also worth noting here that we tend to point to the bad consequences of everyone's doing a particular kind of act only when people are <u>not</u> generally doing that kind of act. If everyone were already breaking the law, it would be pointless to try to talk someone out of breaking the law on the ground that it would be a bad thing if everyone broke the law. "But everyone is already doing it" seems often to be a good excuse. The question, 'what if everyone did that?' seems to have its greatest force in the context of useful rules or practices that are generally being followed and in the context of existent social institutions. If a person can get out of obeying one of these rules without hurting the others, we will raise the question 'what if everyone did that' and thus point to some unfairness

involved in his doing what not everyone can do. I suggest then that GA is best reinterpreted as a principle of fairness applicable to those involved in useful practices or institutions. Following Rawls,[29] I shall call the principle involved here the principle of fair play and will examine it specifically, and in application to the law, in Chapters V through VII.

Since I am suggesting that the appeal to fairness is applicable basically to those involved in useful institutions and practices, I shall put off an explicit examination of fairness for a chapter in order to examine first the relation of institutions and social rules to morality. In the next chapter I will therefore deal with a view that places great stress on the nature of social institutions for grounding moral obligations, including the obligation to obey the law, and which also puts little emphasis on fairness. If it fails, it will be even more urgent to get clear on fairness.

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[29]See John Rawls, "Legal Obligation and the Duty of Fair Play," reprinted in Hook, op. cit.

CHAPTER IV

INSTITUTIONS, MORALITY AND THE LAW

1. Introduction

1.A. Deriving 'ought' from 'is.' In his important article, "How to Derive an 'Ought' from an 'Is,'"[1] John Searle argues that we can logically deduce evaluative conclusions from certain kinds of facts. These are 'institutional' facts; they can occur only when an institution or practice exists within a social group. An institution or practice is defined, roughly, as a set of rules for behavior which are accepted and acted upon by the members of the group. Certain descriptions of a person's acts are possible only when such an institution exists. For example, putting a piece of paper with green ink on it into the hands of someone can be described as giving him some money only if the institution of money exists in the society. But given that the institution does exist, then his act is the giving of money and that fact is an institutional fact about him. Institutional facts are contrasted with 'brute' facts; the fact that one man puts a piece of paper with green ink on it into the hands of another man is a brute fact, because it is not necessary for any institutions to exist for that description to apply to the act.

In his article, Searle pays special attention to the concept

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[1] Philosophical Review, Vol. 73, 1964, pp. 43-58, reprinted in Foot, ed., op. cit., pp. 101-114. All of my references are to the Foot volume.

of promising. He argues that from the statement "Jones promised to pay Smith five dollars," it follows logically that Jones placed himself under (undertook) an obligation to pay Smith five dollars.[2] And this is so because "promising is, by definition, an act of placing oneself under an obligation."[3] We shall see that this definition is correct, he argues, when we see that the fact that a man has promised is an institutional fact about him and such institutional facts logically entail obligations.

Searle is not the only defender of the view that promises entail obligations and that institutional facts have obligation-creating roles, although different authors argue the point slightly differently, emphasizing different arguments. In a recent book, Russell Grice argues that

> promising is the function of placing oneself under an obligation and . . . the proposition that A promised to do x implies that A has an obligation to do x if he can.[4]

Grice places great emphasis on the Austinian notion that "to promise is to do something rather than to say something;" to make a promise is to make a performative utterance.[5] The same point is also stressed by Henry Jack in "On the Analysis of Promises."[6] These authors do not, however, put explicit emphasis on the notion of institutional facts. Since it is possible on Austin's view to utter a performative only in the context of conventions and institutions, it is reasonable to think

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[2]Ibid., p. 102. [3]Ibid., p. 103.

[4]The Grounds of Moral Judgment (Cambridge: Cambridge University Press, 1967), p. 46.

[5]J.L. Austin, How to do things with Words (Cambridge, Mass.: Harvard University Press, 1962).

[6]Journal of Philosophy, Vol. 55 (1958), pp. 597-604.

that the obligation-creating aspect of these utterances is a function of their institutional context and I believe this is what these authors have in mind.

Abraham I. Melden in his article "On Promising" also agrees with Searle and Grice when he says that

> to recognize that one is obliged because one has promised is to recognize what is involved in the performance of promising.[7]

He, too, defends this view by making reference to institutional facts, although he does not explicitly use such language; what he does say is that when we interact with our fellow men, moral relations exist between us, as a matter of fact. By engaging in social relations with others we become members of a moral community. The promise utterance, for example, "has no use except in the context in which the parties concerned are members of or constitute a moral community . . ." This view is further developed in Melden's book, Rights and Right Conduct. He focuses there not so much on the concept of promising, but on the right of parents to receive special consideration from their children. Such a right is involved in the "moral context" of the family, an institution

> the members of which are bound together by affection and common interest . . . Within such an institution the natural relations of parents and offspring are well defined and within certain limits are associated in optimum cases with powers and privileges . . . to give special consideration to one's parents is to take account in one's action of their moral role and of ours with respect to theirs in the common life of the family and the community within which the life of the family proceeds . . .[8]

The entailment between facts and values arises for Melden because social institutions are by their very nature moral institutions.

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[7]Mind, Vol. 65 (1956), pp. 49-66.

[8]Rights and Right Conduct (Oxford: Basil Blackwell, 1959), pp. 48-49. All further reference to Melden will be to this book.

Melden's views are fairly complicated and will receive special consideration later in this chapter. Views like Melden's can be found in G.E.M. Anscombe's "Modern Moral Philosophy," and "Brute Facts,"[9] and in Arthur Murphy's interesting article, "Reason in Ethics."[10]

John Rawls, in "Two Concepts of Rules,"[11] also seems to be in substantial agreement with Searle. As we have seen (II.2.B.), Rawls is primarily concerned in that article to defend a version of Rule-Utilitarianism, which I have called Institutional Rule-Utilitarianism (IRU). Such a view tells us that we ought to obey the rules of existent social institutions even though the consequences of not doing so may be better. IRU is thus supposed to be an improvement on act-utilitarianism. I argued that the important question such a theory must answer is the question of just why we should obey the rule in such cases and I suggested that the answer given by Rawls transforms the theory into one very much like Searle's.

We can see this by noting that crucial to Rawls' argument is a distinction between the justification of a practice or an institution and the justification of particular actions within the context of a practice. When asked to defend a particular act within a practice, he says that one

> doesn't so much justify one's particular action as explain, or show, that it is in accordance with the practice. The reason for this is that it is only against the stage-setting of the practice that one's particular action can be described as it is. Only by reference to the practice can one <u>say</u> what one is doing. To

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[9]Anscombe, <u>Philosophy</u>, Vol. 33 (1958), pp. 1-19; and <u>Analysis</u>, Vol. 18 (1958), pp. 69-72.

[10]In a collection of his essays, Hay, Singer and Murphy, ed., <u>Reason and the Common Good</u> (Englewood Cliffs, N.J.: Prentice-Hall, 1963).

[11]In Foot, ed., <u>op. cit.</u>

> explain or defend one's own actions, as a particular action, one fits it into the practice which defines it.[12]

Rawls here agrees with Searle that the fact that an act has been performed within a practice is an institutional fact, for the act can only be described as it is "against the stage-setting of the practice." Moreover, Rawls appears to think that there is a good moral reason in favor of an act if it is in accord with the rules of an existent practice. And with respect to promises, he says that one who believes that it is permissible to break a promise when doing so is "best on the whole," does not know what it means to say "I promise."[13] Rawls thus seems to be arguing that there is a logical connection between promising and being under the obligation not to break a promise when doing so is 'best on the whole.' Thus the reason for obeying the rule is not at bottom a utilitarian reason but a reason having to do with the 'intrinsic moral nature' of existent institutions. Rawls' view is thus substantially the same as Searle's.

1.B. The institutional theory of obligation. I have been trying to show that the view that existent social institutions have an intrinsic moral significance[14] is fairly widely held. I shall call this view the Institutional Theory of Obligation, or IT for short. In the remainder of this section I will give a clear and precise formulation of this theory and I will show how it bears on the question of whether there

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[12] Ibid., p. 165. [13] Ibid., p. 156.

[14] It may be held that Searle was trying to argue that institutions have a normative significance but not necessarily a moral significance, and that the obligations which follow from institutional facts are genuinely obligations, but not moral obligations. Searle is difficult to interpret on this and several other matters and I shall take up the question of how to interpret him in section 2.

is an obligation to obey the law. In the remaining sections I will examine and criticize the theory.

It is often held that one can make a moral judgment on some facts only by appealing to some general moral principle. For example, suppose that A hurts B. One might conclude from this that A acted immorally, or prima facie immorally, by invoking the general principle that it is wrong to hurt people. Such a principle is conceived as being synthetic, ie. not true because of the meanings of its terms. Moreover, it will be held, on this view, that the principle cannot be derived from the factual judgment but is logically independent of it. Thus moral reasoning is seen as drawing moral conclusions from the combination of logically independent factual judgments and moral principles. It is impossible to draw the conclusion from one of the premises alone. This is an old picture of moral reasoning, going back at least to Aristotle's practical syllogism.

Defenders of IT hold that it is not always necessary to appeal to general moral principles and that moral conclusions can be drawn from factual propositions alone. Suppose that John has promised to do x. Most defenders of IT believe that we can conclude directly from this that John is under an obligation to do x. It is true that the inference is mediated by the proposition that those who promise put themselves under obligations but this is held to be analytic. Since it merely spells out what is involved in making a promise, it is already contained in the factual judgment. It is not an independent, synthetic moral principle. One can thus draw the moral conclusion merely by spelling out in further detail the factual premise.

On the traditional model of moral reasoning, facts do not have intrinsic moral significance because one has to go 'outside of them'

to get moral conclusions, ie. one has to appeal to principles that cannot themselves be derived from the facts. On IT we can say that some facts do have intrinsic moral significance because one need not go 'outside of them' to draw moral conclusions. The facts themselves are in Melden's terms, 'invested with moral import.'[15] That A, having promised to do x, has a moral obligation to do x, is a fact about A. Many institutions thus have intrinsic moral significance because many institutional facts just are moral facts, the existence of obligations, rights, etc. The traditional distinction is done away with, at least in institutional contexts.

1.C. Relevance to law. If the Institutional Theory is correct, it can be applied to the law if we make the following assumptions:

a) a legal system of a state is an institution or practice, and

b) it is the kind of practice which involves obligations, rights, etc.

It seems reasonable to admit (a) for if anything is a practice, one would think that a legal system is one; it should be a paradigm case. And we can admit (b) although we should note that there are two different ways in which a legal system can be seen as a practice of this sort. First, obligations and rights attach to many of the roles of the members of a legal system. Legislators have the right and obligation to make laws, judges and jurors have the duty to determine whether laws have been violated, and when a law is passed it confers obligations on citizens. Moreover, when citizens enter voluntarily into legal relations with each other, as when they make a contract, they

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[15]Melden, Rights, p. 40.

take on obligations and rights with respect to each other. Thus a legal system can be thought of as a 'structure of norms,' of people related to each other by rights and obligations.

On the other hand, we can think of the legal practice as something broader than a set of roles involving rights and obligations, but as a practice of a social group which contains rules about when laws may and may not be disobeyed. It need not be, and usually is not, a law of a legal system that citizens ought to obey the law, but it may be a rule of a more encompassing practice that includes both the set of laws and rules about when these laws ought to be obeyed. Hard questions can be raised as to just what these rules are and how we determine them, but, for the sake of argument, I shall admit that the practice of law in a typical state includes the rule that citizens ought to obey the law.

Given this it can be said that a legal system is just the kind of practice that is alleged to have intrinsic moral significance by a defender of IT. The fact that one is a citizen, then, will be an institutional fact and if the Institutional Theory is correct, it will follow from the fact that one is a citizen that one has an obligation to obey the law. A citizen will <u>necessarily</u> have a reason for obeying the law and will thus have a prima facie obligation to obey the law. If IT is correct, then, it will ground OL1--every citizen of every state has a prima facie obligation to obey its laws.

In the rest of this chapter I shall examine two versions of IT, those of Searle and Melden. I shall argue that neither doctrine succeeds and that we cannot, consequently, ground OL1 in this way. It will be my contention that we must appeal to moral principles to get truly

moral conclusions from institutional considerations. I shall begin with Searle.

2. Searle's Derivation

2.A. How it's done. Searle begins his article by writing down the following five propositions:[16]

> (1) Jones uttered the words 'I hereby promise to pay you, Smith, five dollars.'
> (2) Jones promised to pay Smith five dollars.
> (3) Jones placed himself under (undertook) an obligation to pay Smith five dollars.
> (4) Jones is under an obligation to pay Smith five dollars.
> (5) Jones ought to pay Smith Five dollars.

Searle tries to show that the relations between any statement on the list and its successor while not always one of entailment

> is nonetheless not just a contingent relationship; and the additional statements necessary to make the relationship one of entailment do not need to involve any evaluative statements, moral principles, or anything of the sort.[17]

The step from (1) to (2) is mediated by the premise that one who utters the words "I hereby promise to do x" promises to do x in certain conditions. This, according to Searle, is a fact about English usage. The step from (2) to (3) is mediated by the 'tautological premise' that those who promise put themselves under obligations. The steps from (3) to (5) work as follows: Searle believes that if you have put yourself under an obligation you are under one if other things are equal and in fact other things are equal if you have not been released from it; and if one is under an obligation to do x, then one ought to do x if other things are equal and in this case other things are equal if no other obligations override the obligation to do x. In all these cases Searle

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[16]Foot, ed., op. cit., p. 101.

[17]Ibid., p. 102.

feels that the premises and claims needed to go from one step to the other are not or need not be evaluative.

2.B. Is the obligation a moral obligation? Before we can examine this derivation, there are some difficult questions that must be faced concerning both the interpretation of Searle's argument and the precise relevance of his thesis to the law. We have to answer the following two questions: what does he mean by an obligation? what does he think it necessary for a person to do in order to incur or take on an obligation? I shall look at these in turn.

I suggested above (note 14) that while Searle holds that obligations follow from certain institutional facts, it is not obvious that he thinks of these obligations as moral obligations. It may be that he wants to argue that institutions have a kind of normative significance, but not necessarily a moral significance, and that the obligations which follow are genuinely obligations, but not moral ones. It is difficult to know exactly what he wants to say, because he is not explicit on this question. But let us consider what would follow if his view were that institutional facts entail obligations, but not moral obligations. What would it mean to say this?

To say this would be to look on an institution as a 'structure of norms' or as a set of persons related by non-moral obligations, rights and responsibilities. But to say of a person in such an institution that he has an obligation to do something would not be to say that he has a good moral reason for doing it; it would be to say only that he has a good reason, from the point of view of the institution. And to conclude that he ought to do something, given these obligations, would not be to conclude that he ought, from the moral point of view,

to do that thing. Thus while a person might have an obligation in this institutional sense--he has what I shall call an institutional obligation--it will not follow that he has any kind of moral obligation or moral reason for doing anything. There is no doubt, moreover, that a person has an obligation to obey the law in this sense, that is, he has a legal obligation to obey the law. But our question is whether he has a moral obligation to obey the law, that is whether he has a moral obligation to fulfill his legal obligations. It follows, then, that if we interpret Searle as holding that the obligations which follow from institutional facts are not moral obligations, we would divest his view of any significance with respect to the question of whether there is an obligation to obey the law; in fact, I think it would divest it of significance with respect to any moral question whatsoever.[18]

To avoid this conclusion I shall interpret Searle as holding that the obligations which follow from institutional facts are moral obligations as well as institutional obligations, and provide us with moral reasons for acting. Whether this is what he actually has in mind is really not the issue, for this is a plausible way of interpreting him and the arguments he gives can be seen as arguments for this thesis. The question, then, is whether they are good arguments.

2.C. Is a speech-act necessary? Assuming it is Searle's view that moral obligations follow from certain institutional facts, what does he think a person must do in order to incur such an obligation? One

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[18]This may be seen as a rather cavalier dismissal of the significance of the conception of an institution as a structure of norms. To be fair, I shall return to this conception again when discussing Melden, section 6.B.

who holds the institutional theory in its most extreme form[19] holds that anyone engaged in an institution that accords obligations to him has the moral obligation to fulfill those institutional obligations, regardless of how he came to be engaged in the institution. It may be denied, however, that Searle holds this strong view. With respect to the case of promising, to which he devotes a great deal of attention, a person who makes a promise puts himself under an obligation because he has performed a certain speech-act. It may be said, then, that Searle's view is that one incurs a moral obligation within an institution only when the obligation is contingent on the performance of a speech-act. The fact that one 'falls under' the rules of an institution and the rules accord one an obligation is not enough; it must be the sort of obligation that depends on saying something.

If this is Searle's thesis then it would not be relevant to the law, for it is not reasonable to suppose that the obligation to obey the law depends on the performance of a speech-act. Naturalized citizens often must promise to obey the law and there are occasions in which non-naturalized citizens, on taking certain offices for example, may also make such promises. But there is no special speech-act of committing oneself to obey the law which it is reasonable to think that every one who is a citizen of a state must have performed. So if this is Searle's view it is not relevant to our problem.

I believe, however, that Searle is committed to something stronger than this. Under the institution of promising, the performance of a speech-act puts one under an obligation. This is so, according to Searle, because it is a rule of the institution of promising--and hence

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[19]And, as I hope to have shown by the end of this chapter, the only genuine form. (cf. 6.C.).

an institutional fact--that a man who has performed that speech-act has put himself under an obligation. But under other institutions a person can incur an obligation or have one devolve upon him in other ways. To use one of his own examples, "By undertaking to play baseball, I have committed myself to the observation of certain constitutive rules."[20] In other words, it is an analogous institutional fact about a man who has undertaken to play baseball that he is committed to obeying certain rules, to get off the field if he is tagged out and so on. But in this case the obligation is not dependent on a speech-act.

My point, then, is that how one comes to incur an obligation in a particular institution depends, for Searle, on the nature of that particular institution. The need for a speech-act is a contingent feature of the example he happens to use. He thinks of it, moreover, as only one of the possible examples and says that once we begin to grasp the nature of institutional facts, we see that

> many forms of obligations, commitments, rights and responsibilities are similarly institutionalized . . . It is one such institutionalized form of obligation, promising, which I have invoked above to derive an 'ought' from an 'is.'[21]

Thus the need for a speech-act is a contingent feature of the example he happened to use.

2.D. Is a voluntary act necessary? It may be admitted that the performance of a speech-act is not always necessary for incurring a moral obligation within an institution on Searle's view, but it may be held that he sees some kind of voluntary act as necessary, that, for him, one's institutional obligations are moral obligations only if one's

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[20] p. 113. [21] p. 112 (italics added).

engagement in the institution is or is the result of a voluntary act. I am not sure that even this is correct. Another example he gives is that of the institution of private property; 'one ought not to steal' is a constitutive rule of that institution[22] and thus one engaged in that institution will have an obligation not to steal. But it seems that one can be engaged in that institution without performing any voluntary act, by in fact doing nothing but existing in a certain kind of society.

If Searle, however, does mean to hold that some voluntary act of engaging in the institution is necessary, then the question of whether there is an obligation to obey the law will depend on whether it is sensible to say that the citizens of a state have performed a voluntary act of engaging in the legal system, ie. have in some way given their consent to the system. This is an old view concerning the source of political obligation and I shall discuss it in some detail in the next chapter, V.4. So the view attributed to Searle under this interpretation will be discussed in the next chapter.

I shall here take Searle as arguing for the full-blooded institutional theory, that merely existing under the rules of an institution confers on one the moral obligation to fulfill one's institutional obligations. I have tried to show that there is some reason to think that this is the view he has in mind. But whether he does or not, I think that the arguments he gives can be put forward in defense of this thesis. So once again the important question is not whether Searle holds this view, but whether his arguments support it.

2.E. The use of "obligation." There are two other points that must

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[22]p. 113.

be taken up before we can examine the arguments, and the first concerns Searle's use of the term "obligation." On his use there can be conflicts of actual obligations and the obligation we ought to act on has to be determined. It does not follow from the fact that something is our actual obligation that we ought to do it. Other philosophers, however, have wished to describe the facts so that an entailment holds between our actual obligations and what we ought to do. They describe situations of conflict as conflicts between prima facie obligations, and what our actual obligation is has to be determined.

I do not think that any substantive issue hangs on the choice of terminology here. Proponents of both terminologies agree that conflicts occur. One calls them a conflict of actual obligations and denies the entailment between actual obligations and what we ought to do. The other describes it as a conflict of prima facie obligations and holds that there is an entailment. It does not seem to matter which way we describe the situation, so long as we are clear.[23] I shall thus stick with Searle's terminology in discussing him, although I have used the prima facie terminology in the rest of this essay. Whatever is said, I believe, can be put both ways.

2.F. A revision. More importantly, there is a problem about the step from (3) to (4) that should be cleared up before getting started. Searle says that (4) follows from (3) only if other things are equal, ie. one who places himself under an obligation is under an obligation only if other things are equal. But, if we look at the propositions directly it seems that (4) follows immediately from (3). How could

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[23] In Chapter V of Rights and Right Conduct, Melden argues that the prima facie terminology is confused. I am unable, however, to see how there is any substantive issue here.

one place oneself under an obligation and not thereby be under one? One cannot place oneself under a tree and not thereby be under one. Analogies here may be misleading but the same seems to be true with obligation.

This problem I think is due to an ambiguity in (4). It has to be made clear exactly <u>when</u> Jones is alleged to be under an obligation to pay Smith. Let us assume that Jones uttered his words at time t and said he would pay Smith at time q. (3) then becomes

(3') At t, Jones placed himself under (undertook) an obligation to pay Smith five dollars at q.

But (4) can now be rewritten in either of two ways:

(4') At t, Jones is under an obligation to pay Smith five dollars at q.
(4*) At q, Jones is under an obligation to pay Smith five dollars at q.

It is obvious that (4') follows directly from (3'). If the conditions are such that we can truly say that Jones undertook an obligation at a certain time then he must be under the obligation at that time. But (4*) does not follow immediately because one will have the obligation at a later time only if other things are equal and one has not been released from it. I believe that Searle had (4*) in mind by (4) and we can just drop (4') from the series as unnecessary.

To achieve clarity and to avoid using primes and asterisks, I shall rewrite the whole series with the implicitly understood temporal indicators made explicit:

(1) At t, Jones uttered the words 'I hereby promise to pay you, Smith, five dollars at q.'
(2) At t, Jones promised to pay Smith five dollars at q.
(3) At t, Jones placed himself under (undertook) an obligation to pay Smith five dollars at q.
(4) At q, Jones is under an obligation to pay Smith five dollars at q.
(5) At q, Jones ought to pay Smith five dollars.

I shall understand this as Searle's derivation, although in discussing it, it will often be possible without begging question to use the sentences in the simpler derivation in 3.A.

3. Problems with Ceteris Paribus

There are two kinds of criticisms that are generally made of Searle's arguments. The first, and most prevalent, allows that Searle can go from (1) to (3) and attacks the moves from (3) to (5). I shall call this the ceteris paribus objection. The second argues that Searle is not entitled to get to (3) in the first place and locates the problem in the jump from (2) to (3).[24] I will call this the institutional objection. I believe that the institutional objection goes to the heart of the issue, while the ceteris paribus objection, while important, is secondary. I shall begin, however, with the ceteris paribus objection.

3.A. Entailment and entitlement. The ceteris paribus objection is made by James and Judith Thomson in "How not to Derive an 'Ought' from an 'Is.'"[25] I shall present their argument very briefly. They concern themselves with the step from (4) to (5). According to Searle one can go from (4) to (5) without an evaluation because unless

> we have some reason (that is, unless we are actually prepared to give some reason) for supposing . . . the agent ought not to keep the promise (step 5), then the obligation holds and he ought to keep the promise.[26]

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[24]There is a third kind of objection which attacks the move from (1) to (2), from the fact that one has said certain things to the fact that he has promised. This kind of objection can also be made against Melden and I will put off discussion of it until I discuss Melden, 6.A.

[25]Philosophical Review, Vol. 73 (1964), pp. 512-16. See also J.E. McClellan and P. Komisar, "On deriving 'ought' from 'is,'" Analysis, Vol. 25 (1964); and W.D. Hudson, "The Is-Ought Controversy," Analysis, Vol. 25 (1965).

[26]p. 105.

The Thomson's point out that, while we might not have a reason for thinking that he ought not to keep the promise, there might, nevertheless be a reason for breaking the promise, of which we are unaware and which outweighs the reasons for keeping the promise. If we cannot give a reason we might be entitled to conclude (5) on the basis of (4), but (5) might still be false. The Thomson's thus accuse Searle of "having conflated a question of entailment with one of entitlement."[27] They argue that to get (5) from (4) we need the stronger premise that there is not in fact a more weighty reason for breaking the promise. But to assert this is to make an evaluative claim; it is to say that there are no obligations, incumbent on Jones,which outweigh his obligation to keep the promise. And this is clearly evaluative.

While I think the Thomson's argument is correct, I do not think it is decisive against Searle. First it seems plausible to hold that (3) itself is already an evaluative proposition. If it is and it is allowed that Searle can get (3) from (1), then his case has already been made, an evaluation has been derived from a factual proposition. The fact that a further evaluation is needed to get from (3) to (5) should not be surprising. Thus the Thomson's arguments work only if (3) is non-evaluative. It will be important thus to see whether (3) might be evaluative and can be derived and I shall examine this in the institutional objection.

Secondly, I believe that Searle has a reply to their objection. He says that if he is wrong about 'other things being equal' not requiring an evaluation,

> we can always rewrite my steps (4) and (5) so that they include the ceteris paribus clause as part of the conclusion. Thus

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[27]Thomson, op. cit., p. 515.

> from our premises we would have derived 'Other things being equal Jones ought to pay Smith five dollars' and . . . we would still have shown a relation between descriptive and evaluative statements.

The Thomson's deny this because they assume that the statement 'Jones ought other things being equal to do x' is a tautology, which can be unpacked as "If there is nothing sufficient to make it false that Jones ought to do x, Jones ought to do x."[28] But this is surely to miss the point of the ceteris paribus, or prima facie clause. As I have argued (I.6.B.), to say that Jones ought prima facie to do x is to say at least that there exists a good moral reason for Jones to do x and this is to do more than utter a tautology. Thus the Thomson's fail to show that a prima facie ought cannot be derived without an evaluation from (3).

3.B. 'The right thing to do.' I think that the essential insight of the ceteris paribus objection is this: Searle claims that he will derive an 'ought' from an 'is.' If he means by an ought-statement, a statement to the effect that some act is the right act to do, the act we ought actually to do, the ceteris paribus objection shows that he fails. Dwelling on the institutional facts that involve us can at most tell us that we have certain institutional (or prima facie) obligations. To know these facts is, if Searle is right, to know that we have moral reasons for doing certain kinds of things. But to weigh these reasons when they conflict, or to conclude that no counter-reasons exist in some particular instance, requires a kind of judgment that goes beyond the institutional facts. Dwelling on the facts thus can never make up our minds for us as to what is the thing to do in a

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[28] Ibid., p. 514.

particular situation. A certain kind of gap between facts and values will remain.

While I think it important to point this out, the ceteris paribus objection still leaves filled a more important gap, for it leaves untouched the claims that we can derive statements about good moral reasons from factual judgments. No one who believes in a logical gap between factual and moral judgments would be pleased with this state of affairs. Moreover, if (3) is already evaluative, the ceteris paribus objection attacks at the wrong point. It is to the jump from (2) to (3) that I shall now turn.

4. The Heart of the Matter

4.A. Institutional facts and constitutive rules. I shall assume now that (3) is already an evaluative statement. Can we get it from (1) without an evaluation? I believe that the jump from (1) to (2) can be made without an evaluation. A man makes a promise when he utters certain words in certain conditions. This statement does not seem to me to be evaluative, nor do we need to make an evaluation to conclude that the conditions obtain. So I believe that there is no trouble in the step from (1) to (2).[29] We can now face the central issue, whether we can go from (2) to (3) without an evaluation, ie. without appeal to a synthetic moral principle. Searle, too, believes that this is the heart of the matter for he says that

> the whole proof rests on an appeal to the constitutive rule that to make a promise is to undertake an obligation.[30]

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[29]As I said earlier (note 24) an objection can be brought here and I will discuss it in 6.A. For now I assume that there is no problem with this move.

[30]p. 112.

As I noted at the beginning of the chapter, Searle believes that (2) entails (3) because "promising is, by definition, an act of placing oneself under an obligation." And this is so because

> no analysis of the concept of promising will be complete which does not include the feature of the promisor placing himself under or undertaking an obligation to the promisee, to perform some future course of action, normally for the benefit of the promisee. One may be tempted to think that promising can be analyzed in terms of creating expectations in one's hearer's or some such, but a little reflection will show that the crucial distinction between statements of intention on one hand and promises on the other lies in the nature and degree of commitment or obligation undertaken in promising.[31]

In order to make a case for the claims contained in this paragraph Searle makes a distinction between rules that "regulate antecedently existing forms of behavior" and rules that "do not merely regulate but create or define new forms of behavior." The former are regulative rules: rules of polite table behavior are examples of such rules because they regulate eating but "eating exists independently of the rules." The latter are constitutive rules; the rules of chess are an example of such rules, for they

> do not merely regulate an antecedently existing activity called chess; they, as it were create the possibility of or define that activity. Chess has no existence apart from these rules.[32]

Searle holds that institutions like "marriage, money and promising" are systems of such constitutive rules; institutional facts are facts which presuppose such institutions. He concludes that

> Once we recognize the existence of and begin to grasp the nature of such institutional facts, it is but a short step to see that . . . it is often a matter of fact that one has certain obligations and commitments, rights and responsibilities, but it is a matter of institutional fact, not brute fact.[33]

I shall now try to make clear exactly how Searle thinks we can come to see this. I shall argue, with respect to promising, not so

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[31] p. 103. [32] p. 112. [33] Ibid.

much that Searle is wrong in his claim that promising is putting oneself under an obligation, but that the appeal to institutions and institutional facts he makes fails to show this.

4.B. The analogy between chess and promising. To get a clear idea of what Searle is saying, consider the following rule of chess:

> B: The bishop moves to any square on either of the diagonals on which it is placed.

Now suppose that A is playing chess and makes a move of his bishop. It must be the case, then, because of B, that he moved his bishop-piece diagonally. Any other move of that piece would not count as, would not be describable as, a genuine move of the bishop. Thus from the statement that A moved his bishop, we can logically deduce via B that he moved his bishop-piece diagonally. Let me put this formally:

I. 1. A is playing chess.
   2. A made a move of the bishop.[34]
   3. A move of the bishop is a move of the bishop-piece diagonally during a game of chess.
   4. Thus A moved his bishop-piece diagonally.

It is important to note that in this argument premise 3 is supposed to be a necessary truth, an analytic statement, based on the rule B. Thus we can move from premises 1 and 2 without the mediation of any 'synthetic' propositions. We might construe premise 3 as a rule of inference, allowing us to go from 1 and 2 to 4.

With respect to promising Searle, I believe, would present a similar analysis. The following is a constitutive rule of the institution of promising:

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[34]It is necessary to emphasize that a move of the bishop means a proper move, not just any move of the bishop-piece. Construed in the latter way, the argument would not be valid. It should also be noticed that (1) is not strictly necessary, since (3) and (2) entail it.

P: If one promises to do x, one puts oneself under an obligation to do x.

Now suppose that A is engaged in the institution of promising and makes a promise. It must be the case, then, because of P, that he put himself under an obligation. Thus from the statement that A made a promise we can logically deduce via P that he put himself under an obligation. Or more formally:

II. 1. A is engaged in the institution of promising.[35]
2. A promised to pay B five dollars.
3. One who promises to do x puts himself under an obligation to do x.
4. Thus A put himself under an obligation to pay B five dollars.

In this argument, too, premise 3 is supposed to be a necessary truth, an analytic statement, based on the rule P, and thus we move from premises 1 and 2 to the conclusion without the mediation of any synthetic propositions. It is in this way, then, that "the whole proof rests on an appeal to the constitutive rule that to make a promise is to undertake an obligation."

The heart of this analogy is the claim that premise 3 is a necessary truth in both examples. I shall argue that there are good reasons, drawn from the nature of institutions or practices, for concluding that premise 3 in the chess case is analytic. I shall argue that these reasons do not apply to the promising case and that nothing Searle has said compels us to accept the claim that II.3 is analytic and therefore the analogy fails.

4.C. <u>The disanalogy between chess and promising</u>. We determine whether a chess-player has followed the rule, B--the bishop moves

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[35]Once again this premise is not strictly necessary for (2) entails it. The importance of leaving it in will be made clear in section 5.

diagonally--by seeing whether he has moved his bishop-piece diagonally. We use this as our criterion of whether he has followed the rule and, consequently, I shall call such a rule a criterion-rule. Given this we can say also that a move of the bishop-piece diagonally constitutes criterially a move of the bishop, that is moving the bishop is nothing but moving the bishop-piece diagonally in a certain context. Thus premise I.3.--a move of the bishop is a move of the bishop-piece diagonally in a game of chess--is necessarily true. It tells us just what a move of the bishop is; it defines that move. There would be room for doubt about this only if there could be some other rule besides B which could, so to speak, have an 'opinion' about what a move of the bishop might be. But this is absurd. The rule B and no other defines what such a move is.

The same is true of the following rule of the institution of promising:

> Q: A promisor is one who says "I promise" in certain conditions.

This, too, is a criterion-rule and promising is constituted criterially by saying "I promise" in those conditions. This rule thus tells us what a promise is; it defines that 'move.' No other rule could have an 'opinion' about what a promise is.

The same, however, is not true of the rule P:

> If one promises to do x, one puts oneself under an obligation to do x.

This is not a criterion-rule. We do not determine whether a person has made a promise by seeing first whether he has put himself under an obligation. Thus putting oneself under an obligation does not constitute criterially the making of a promise.

What follows from this is that the reasons which make it

obvious and evident that I.3. is a necessary truth do not apply with respect to II.3., for the rule P does not tell us what promising is in the way that I.3. tells us what a move of the bishop is. This can be brought out by seeing that it is not absurd in this case, as it is in the chess case, to think that there might be some other rule besides P which, so to speak, can have an opinion about the moral force of promising. Consider, for example, this rule:

> One who promises to do x puts himself under an obligation to do x if and only if x is not an evil act.

One who endorses this rule believes that a promise to do evil has no moral force whatsoever, not an unreasonable position. Thus it has not been shown that II.3. is analytic (while it has been shown that I.3. is analytic) and the possibility remains open that I.3. expresses a synthetic moral evaluation and that the rule P is a rule of obligation which just happens to be involved in the institution of promising and has moral force only if it is a good rule. Nothing said so far rules this out. One will be convinced by the analogy at this point only if one already assumes that obligations are institutional facts which can logically be inferred from other institutional facts.

Before leaving this, I want to make clear exactly what I am saying and what, more importantly, I am not saying. I am not saying that I have proved that II.3. is not analytic. Nor am I making the general assertion that a proposition of the form 'x is P' will be analytic only if P is a criterion for the application of 'x'. All I have wanted to deny is that Searle has shown, by appeal to institutions, that II.3. is analytic. His analogy is not convincing. This may not be saying much but I think it is saying enough. If his analogy is to work he must show that the reasons that make it plausible in

certain cases to deduce one fact from another via institutional facts are also applicable to the controversial cases, the existence of obligations. And I have tried to show that the reasons are not applicable.

This point can be made in yet another way: In the chess case by using premise I.3. we are entitled to move from the existence of an institutional fact--the move of a bishop--to the existence of a brute fact which constitutes criterially the institutional fact, ie. moving the bishop-piece diagonally. We are moving, so to speak, downward from the institutional fact to its relevant brute fact and the move is obvious and undeniable because the institutional fact plainly requires the brute fact.

The use of P in the promising case, however, is different. We do not move from an institutional fact downward to the brute fact plainly necessary for it, but we move from an institutional fact upward to another allegedly institutional fact. This move is not so plain and obvious and in fact lacks the features that makes the downward move so plausible in the chess case. Once again, it seems that one will be convinced that the obligation follows from the institutional fact only if one already assume that some moral obligations are institutional facts. If one does not assume this, one can see the claim that the obligation exists as a judgment about an institutional fact, based on a synthetic moral evaluation. This has not been ruled out and the analogy between chess and promising is not strong enough to justify the claim that II.3. is a necessary truth.

4.D. Chess, promising and the law. It will be helpful at this point to apply this conclusion to the law. If the argument about promising were good, then the following argument about the law would also be good:

A. 1. C is a citizen of state, S.
2. A citizen of a state has an obligation to obey its laws.
3. Thus C has an obligation to obey the laws of S.

Rule A.2. is a rule of the legal practice just as P is a rule of the institution of promising, and if we must accept II.3. as a necessary truth we will also have to accept this.

To see, however, that this will have the same problems as the promising case, consider this argument.

B. 1. C is a citizen of state, S.
2. A citizen of a state is a person who was born in the state or went through its naturalization process.
3. Thus C was either born in S or went through its naturalization process.

This argument is directly analogous to the chess case. B.2. expresses a criterion-rule and allows us to infer the relevant brute fact from an institutional fact. The rule A.2., however, is not a criterion-rule. And thus the reasons that might compel us to admit that B.2. is a necessary truth will not apply to A.2., just as they did not apply to II.3. The possibility is left open here, as in the promising case, that A.2. is a synthetic moral evaluation.

5. The Existence of Institutions

5.A. "According to the rules . . ." At this point one who disagrees with Searle might suggest that instead of premise II.3., the only premise one is entitled to assert as a necessary truth is the following:

II.3'. According to the rules of promising, one who promises to do x puts himself under an obligation to do x.

And this, it will be said, would justify only the following conclusion:

II.4'. According to the rules of promising, A put himself under an obligation to pay B five dollars.

And consequently it will be said that it does not justify our original conclusion:

II.4. A put himself under an obligation to pay B five dollars.[36] This can be seen by considering the following case. There might be some set of rules--which I have made up--according to which by writing this I put myself under an obligation to pay the next man I see a dollar. So according to the rules I have the obligation. But it does not follow that I have the obligation simpliciter. The same will be true, it will be said, of the promising case.

Against this, it may be suggested that II.4. really does follow from II.3'. and that I am misled into thinking that it does not follow by failing to understand what is involved in the fact that the institution of promising actually exists. My hypothetical set of rules, according to which I undertake an obligation to give the next man a dollar by writing this, does not exist. But it may be said that if it actually existed as a set of social rules and thus governed the situation I was under then I would have acquired the obligation. Analogously, since the institution of promising actually exists in our example it might be held that, even from II.3'., we are entitled to derive the stronger conclusion II.4. In other words, it might be claimed that the following argument is sound:

III. 1. The institution of promising exists.
2. A promised to pay B five dollars.
3. According to the rules of promising, one who promises to do x, puts himself under an obligation to do x.
4. Thus A put himself under an obligation to pay B five dollars.

It might be said that Searle has something like this in mind, ie. he has in mind the view that the fact that an institution exists makes its rules of obligation operative. To evaluate this we must raise the

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[36]A similar point is made by R.M. Hare in "The Promising Game," Revue Internationale de Philosophie, 1964, pp. 398-412, reprinted in Foot, ed., op. cit.

question as to what it is for an institution to exist.

5.B. Hart's analysis. To answer this it will be helpful to give a summary of H.L.A. Hart's analysis of what it is for the institution of law to exist.[37] What does it mean to say that a law exists? Hart says that with respect to the subordinate rules of a legal system such as penal laws and

> the statutes conferring legislative powers on a municipal corporation, the assertion that the rules exist means that they belong to a class of rules marked off as valid rules of the particular system by criteria specified in the fundamental rules of the system, such as the English rule that what the Queen in Parliament enacts is law, or in the United States the rule of the Constitution that (subject to certain restrictions) what Congress enacts is law in certain fields.[38]

In the Concept of Law, Hart distinguishes between primary and secondary rules. Secondary rules are rules of recognition for the existence of primary rules. A primary rule exists when it is 'valid' and to say this is to say that it has passed the criteria of the fundamental rules of recognition, which are secondary rules.

But what is it to say that fundamental rules exist. Hart says that

> "Exist" here can not mean "valid," given the system's criteria of validity, as roughly it does in the case of subordinate rules of the system. In this case, "exists" must refer to the actual practice of the particular social group whose legal system is under consideration.[39]

But what does it mean to say that a rule is part of the actual practice of a social group? To make this clear, Hart distinguishes first between believing that one is obliged to do something and believing that

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[37]His analysis is given in The Concept of Law, Chapters V-VI (hereinafter referred to as CL), and "Legal and Moral Obligation" (hereinafter referred to as "LMO") in A.I. Melden, ed., Essays in Moral Philosophy (Seattle, Washington: University of Washington Press, 1958), pp. 82-107.

[38]"LMO," p. 88. [39]"LMO," p. 88.

one has an obligation to do something. To believe that you are obliged to do x is to believe that you will suffer it you do not do x. Being obliged is being forced. However to recognize or believe that you have an obligation to follow the rule 'Do x' is to believe that the rule constitutes

> a standard of behavior so that deviations from it are treated as occasions for criticism of various sorts.[40]

Reference to the rule is thus taken as a reason for doing x and support for demands that others do x. He argues that a rule is part of the practice of a social group only when it is seen this way. A fundamental rule of a legal system exists when it is so treated by the group. Hart, however, does not think that everyone must see the rules this way. In his article he does not say how many people must take them this way, while in his book he suggests that officials must, while ordinary citizens can just follow the rules out of prudence.

We can sum this up as follows. For Hart, a practice exists in a social group when its rules are, by an unspecified number of the group, treated as standards of and good reasons for behavior. Let me shorten this by using the words "accepted" to mean "treated as standards of and good reasons for behavior." And let me say that, according to Hart the rules must be <u>generally</u> accepted. We will not get into any problems with this terminology if we are just clear as to what it means. We can then simplify Hart's thesis as follows:

> A social practice exists in a social group when its rules are generally accepted.

I do not wish to maintain that there are no problems with this analysis, but I wish to focus on its general point. It analyzes the

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[40]"LMO," p. 90.

existence of institutions or practices in terms of the beliefs or standards of the people involved in the practice, and such an analysis strikes me as very plausible. It should be noted, however, that it is in a sense a 'reductive' analysis. It seems to analyze away the existence of institutional rights, obligations, etc. in terms of the beliefs and actions of people. It might, for instance, be claimed that to say that an institution exists is just to say that people have certain rights and obligations, not just that they believe that they do. This, I believe, is a view Melden would take and I shall discuss it in detail in the next section. But for now, I want to assume that the 'positivist' kind of analysis is correct, at least in its essential point, and see what it does to Searle's argument.

5.C. Reductio ad relativism. Given this analysis, then, we can say that the institution of promising exists in a social group when the set of rules that constitutes that institution is generally accepted, ie. generally taken as standards for behavior. Let us focus, however, just on the particular rule we are considering. And we can put premises 1 and 3 together and get the following derivation:

1. In the social group of which A is a member the following rule is generally accepted: one who promises to do x puts himself under an obligation to do x.
2. A promised to pay B five dollars.
3. Thus A puts himself under an obligation to pay B five dollars.

Now this clearly is not valid. To make it so we would need the following premise:

4. If a certain rule is generally accepted by the members of a social group, the members of the group have the obligations that rule accords them.

I find this an unattractive principle, a form of cultural relativism. Social mores do not seem to be the moral institution of life. However,

the best criticism to make is probably this. (4) is the kind of principle that expresses the view that institutions have intrinsic moral significance. And Searle's whole task can be conceived of as showing how it is that (4) is true. But to do this, ie. to get a moral conclusion from institutional facts, he must assume (4). Thus his argument is circular.

In fairness it should be emphasized that this criticism depends on interpreting the existence of an institution in the positivistic way that Hart interprets this, and it is not at all clear that Searle would accept such an interpretation. But it does follow that the only way to resuscitate Searle's defense of the Institutional Theory is to give some kind of non-positivist analysis of the existence of institutions. Searle himself does not seem to me to offer such an analysis, but I think Melden attempts to do so. I therefore now turn to his views.

6. Melden's Version of the Institutional Theory

6.A. Institutions as moral structures. In Rights and Right Conduct, A.I. Melden expresses, I believe, three different conceptions of the nature of social institutions. At some places he clearly thinks of an institution as a moral structure, at other points as a non-moral normative structure and still at other places as a set of social roles. I shall examine each of these conceptions in turn.

Melden pays special attention, not to promising, but to the obligation of children to give their parents special consideration. Consider the following two statements:

1. A gives special consideration to his parent.
2. A does what is morally required.

It would be incorrect to say that whenever (1) is true (2) is true.

But it does seem reasonable to say that if (1) is true then so is this:

> 2' In the appropriate circumstances, A does what is morally required.

Now (1) is a factual judgment and (2') a moral evaluation. Do we need a synthetic moral principle to go from (1) to (2), as the traditional view (1.B.) suggests?

Melden argues that we do not need to appeal to a synthetic moral principle; a statement like (1) has intrinsic moral significance. He argues that we see a gap between (1) and (2) only if we fail to understand the concept of a parent. A parent is not just an immediate biological forebear,

> the concept of father is not to be identified with the biological concept of male parent . . . A paradigm case of a father is a male parent who plays his social and moral role with respect to his offspring in the circumstances of family life. Given such a context one's male parent is a father.[41]

The concept of father is, thus, a moral concept and

> the moral connection between giving special consideration to one's father (or parent) and doing what is morally required does not wait upon the introduction of a further premise, but already exists in the familiar moral use of the crucial term 'father' (or 'parent').[42]

Melden fills this out by arguing that to say that someone is a father is to say that he fulfills a role within the institution of the family and that role is defined as a set of rights and obligations.[43] Given this we can go from (1) to (2') as follows:

1. A gives special consideration to his father.
2. A father is one who has a right to special consideration from his children.
3. It is morally required in the appropriate circumstances to do what others have a right to have you do.
4. Thus, in the appropriate circumstances A does what is morally required.

As in Searle's derivation neither (2) nor (3) are synthetic moral

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[41] Rights, pp. 41-42. [42] Ibid., p. 41. [43] Ibid., pp. 48, 76.

principles but conceptual truths and tautologies, and as such already 'contained' in the first premise.

Given this point of view it is clear that there is no gap between (1) and (2') that needs a synthetic moral principle to fill it up. I shall argue, however, that this gap is filled only by opening up another and equally interesting gap. In particular, if (1) is already invested with moral import, we might wonder what is involved in its acceptance. Suppose the following is true:

1. A gives special consideration to P.
2. P is A's immediate biological male forebear and has seen to the growth and development of A.

Now, suppose we define a father as follows:

3. A father is someone, x, who is the immediate male forebear of another, y,[44] and has seen to the growth and development of y and has the right to special consideration from y.

Now, we cannot conclude from (2) and (3) that P is A's father, because it has not yet been asserted that P has the right to special consideration from A. What we need is this:

4. If x is the immediate male forebear of y and has seen to y's development and growth, x has the right to special consideration from y.

Given this we can conclude

5. P is A's father.

and from this and (1) we can conclude that

6. A gives special consideration to his father.

Now, (6) is the first premise of our earlier argument and from it we can conclude without appeal to a moral principle that A, in the appropriate circumstances does what is morally required. But now to get to

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[44]This is not, of course, the normal definition because it leaves no room for parents of adopted children. I leave this out for the sake of simplicity.

(6) (or (1) of the first argument) we must assent to (4) and (4) certainly seems like a moral principle, that can be denied without contradiction.

The lesson here is that if role-concepts like 'father' and 'parent' are construed as having moral import, as Melden argues, then the use of them presupposes assent to certain moral principles. If one believes, for some reason, that immediate biological forebears who have seen to growth and development do not have the right to special consideration then one will, if Melden's analysis of 'parent' is correct, either stop using that word, or redefine it and use it without its value implications (ie. use it in what R.M. Hare calls its inverted commas sense[45]). The point is well-put by Dorothy Emmet:

> The notion of a role . . . provides a link between factual descriptions of social situations and moral pronouncements about what ought to be done in them. It has, so to speak, a foot in both camps, that of fact and value; it refers to a relationship with a factual basis and it has a norm of behavior built into it which is being explicitly or tacitly accepted if the role is cited as a reason . . .[46]

In filling the gap he does, Melden thus opens up an equally important gap. It is quite true that on Melden's view moral conclusions can be drawn from 'institutional facts' without appeal to synthetic moral principles. But this is because assent to certain institutional facts will itself require an appeal to such a principle. And thus the need for moral principles is not dispensed with. The defender of IT needs judgments that institutional facts exist which do not themselves presuppose synthetic principles and from which moral

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[45]The Language of Morals (Oxford: Oxford University Press, 1952), Chapter VII.

[46]Rules, Roles and Relations (New York, London: Macmillan-St. Martin's Press, 1966), p. 41 (italics added).

judgments can be deduced without such principles. Melden, in this argument, has not provided this.

It is also possible to criticize, on these grounds, Searle's move from premise (1) of his derivation--Jones uttered the words 'I hereby promise to pay you Smith five dollars.'--to premise (2), that Jones promised to pay Smith five dollars. One who wishes to object to Searle at this spot will admit that it is a necessary truth that one who has made a promise undertakes an obligation. The concept of promisor is thus admitted to be a morally impregnated concept, like father. But given this, the move from (1) to (2) will require assent to the synthetic moral claim that one who has uttered the words 'I promise to do x' undertakes an obligation to do x. If one does not accept this, one will refuse to call Jones a promisor, or will call him a promisor only in its 'inverted commas sense.' In other words, saying that Jones made a promise may commit one to the view that he undertook an obligation. But if one does not wish to be committed to that view, he need not say that Jones made a promise.

6.B. Institutions as normative structures. Involved in Melden's outlook (and Searle's) is the claim that an institution is essentially a kind of normative structure, ie. a set of persons related to each other by obligations, rights, responsibilities, etc. There is much plausibility in this. Judges, base-runners and departmental chairmen seem to have obligations and rights attached to their very 'being.' Slight attention to ordinary discourse will show that we speak rather matter of factly of various obligations and rights we have as members of on-going institutions.

Let us consider the obligation a departmental chairman is said

to have to call periodic meetings. Does he really have that obligation? There is a problem here, however we answer this. To deny that he has seems to be denying a matter of fact. But to assert that he has seems to commit ourselves to making moral judgments on his behavior that we might not want to make. To bring this out consider a political party which requires its members to pay a certain amount of dues. Do the members have the obligation to pay the dues? I think we would often, in some moods, say quite matter of factly that they do. But at other times and in other moods, if we are opposed to that party, we might not wish to say that they do. To do so seems to condone the practice. We might rather prefer to say that no one owes anything to <u>that</u> kind of party.

The statement that someone has an obligation to do something thus seems to have two kinds of uses. When we are concerned with the morality of a situation, we may assert that someone has an obligation only if we morally approve of the institution at issue. I find it difficult to say, for example, that slaves have any obligations to obey their masters and this is because I find the institution illegitimate. To make statements of obligation in this context is to make statements from what H.L.A. Hart calls 'the internal point of view.'[47] We make them as someone who accepts the rules at issue, using them as guides to conduct. On the other hand, when we are not so concerned with the moral rights and wrongs, we quite matter of factly attribute obligations to people, according to the institutions they come under. We might, for example, define a slave as one who has certain kinds of obligations to his master and not mean by this to make any kind of moral

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[47] <u>CL</u>, p. 86.

judgment on the situation. Analogously we might say that the members of the above discussed political party do have obligations to pay their dues. To make obligation-statements in this frame of mind is to make statements from what Hart calls the 'external point of view.' We are making a kind of anthropological statement that certain rules 'apply' to people without endorsing the rightness of their application.

It is quite reasonable, I think, to construe an institution as a structure of norms from an external point of view.[48] In such a case the assertion that a person has an obligation does not require assent to a synthetic moral principle. But it is also clear I think that from such external obligation statements no moral conclusions can be deduced without the aid of moral principles. To make such a statement is, by definition, not to commit oneself to any kind of moral evaluation. This is precisely what is involved in the statement being from an external point of view. Moreover, it seems that such statements can be analyzed along 'positivistic' lines. The claim that a slave has an obligation to obey his master will become the assertion that according to the rules of slavery, accepted by a social group, a slave has such an obligation. From this, we have seen in discussing Searle (5.C.), no moral conclusion might be drawn.

I have so far looked at two conceptions of institutions implicit in Melden. The first conceives of an institution as a moral structure and the problem with this is that assent to institutional facts

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[48]It may be for this reason that the Thomsons, op. cit., section 4.A., are willing to agree with Searle that we can deduce from the fact that someone has made a promise that he has put himself under an obligation. This, they say, will not disturb many anti-naturalists (p. 516). I suspect that this is because they treat the statement that such a person has any obligation from an external point of view, although I might be wrong. I argue below that no moral conclusions can be drawn from such a statement.

requires assent to synthetic principles. The second sees an institution as a normative structure and we have just seen that in the sense in which doing this avoids the problem of the first conception, no moral conclusion can be deduced from institutional facts. But there is yet a third conception of institutions and of roles in Melden which it is necessary to look at.

6.C. Institutions as sets of social roles. In Chapter XIII, Melden makes a distinction between social and moral roles, or the social as opposed to the moral character of a role. He says that the word 'father'

> marks the social role of a person within a complex institutional arrangement, in which he and others participate, and to which in distinctive ways they contribute. The moral character of that role has to do with its central importance to the continuing existence of a family in which all participate and flourish.[49]

He says further, that the social role is not 'exclusively moral in character.' It seems thus that he means by the social role what someone in that role characteristically does. For example the social role of the father involves, among other things, seeing to the development and growth of his offspring. This is a non-normative definition. Thus if the institution of the family is conceived as a set of social roles, the assertion that some family exists will not require assent to any synthetic moral principles.

How, then, can moral conclusions be deduced from such institutional facts? Melden says that a social role has attached to it a moral role when the role is necessary to the continuation of the institution. For example, the status of father has moral significance because

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[49] Rights, p. 77.

> that status whether explicitly recognized as moral or not, is a moral status precisely because it is essential to the continued existence of the family community.[50]

We can express this as follows:

> A. Moral rights and obligations attach to a social role if the role is essential to its institution.

In order to discuss this, I shall use the word 'practice' to refer to any rule-governed activity. Now, Melden does not appear to think that A is true of any and every practice. For example, according to the rules of chess, if one's king is put in check, one must move him out of danger, if one can. This is essential to playing the game. But Melden would apparently not want to say that a player has a moral obligation to protect his king.[51] And this is because the point of playing chess is 'the enjoyable exercise of a sophisticated intellectual skill.' But the point of morality, he says, is

> the achievement, for those who participate in the moral life, of the diverse forms of happiness possible for moral agents.[52]

Thus he seems to feel that a practice is a moral one only if it has this as its point. Let us rewrite (A) to bring this out:

> B. Moral rights and obligations attach to a social role if
> a) the role is essential to its institution (or practice)
> b) the point of the institution is the happiness of all involved.

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[50] Ibid., pp. 76-77.

[51] One of the things that makes the Institutional Theory plausible is the feeling that players in games do have obligations to follow the rules, eg. a baseball player who is out has the obligation to leave the field. I want to say that the rule of the game does not attribute to him a moral obligation. And insofar as we are tempted to attribute to him a moral obligation it is not just because he has the obligation, according to the rules, but because if he does not get off the field he messes up the game and inconveniences others and, also, by playing the game he has, at least implicitly, made a promise to abide by the rules. In other words, moral principles must be appealed to before we can attribute a moral obligation.

[52] Rights, p. 85.

Now, this can lead to some quibbling. Playing chess does make people happy; why is that not its point? What seems necessary is that the institution be important in securing the self-preservation, welfare and personal development of its members. I shall take the second condition in this sense.

Now this can have some startling developments. It may be arguable in many cases that the point of an institution like slavery is decidedly not the happiness of all involved. Moral rights and obligations will not then attach to such an institution.[53] Moreover it is often argued that various institutions of law and property are 'designed' to secure the welfare of one class or ethnic group at the expense of another. If these claims are correct, no moral rights and obligations will attach to such institutions.

More importantly, proposition B seems to be a far cry from the claim that institutions have intrinsic moral import. To make this clearer I shall speak of the obligations and rights that one has according to a practice as role-obligations and role-rights. Now one way of phrasing the institutional theory of obligation is thus:

IT: Necessarily every role-obligation is a moral obligation.

This version has the virtues of purity and simplicity. But (B) represents a qualification of it, an attempt to distinguish between institutions and attribute moral qualities only under certain conditions. But what are the grounds for such distinctions? If moral content is not a necessary feature of institutions as such, it begins to appear that the attempt to make distinctions is an exercise of moral reasoning

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[53] In "Justice as Fairness," in Laslett and Runciman, eds., Philosophy, Politics and Society, 2nd series (Oxford: Basil Blackwell, 1967), pp. 132-157, Rawls argues that slavery is not a moral institution just on the grounds that the inequalities involved in it do not work out to the advantage of everyone.

and that a proposition like (B) is essentially a synthetic moral principle. Thus Melden must show that a principle like (B) is analytic, and he has not even attempted to show this.

6.D. The need for moral principles. Perhaps the best way to show that (B) is not analytic is to show that it, as it stands, is not adequate and that even more tinkering needs to be done. What shall we say about those cases in which the happiness of all is the point of an institution, but the institution does not succeed in fulfilling its point? We can distinguish two cases. It can either fail completely or partially. Let us consider first a case in which it fails completely, in which every time an individual does what he is supposed to do, ie. fulfills a role-obligation, he makes things worse. It would clearly be madness here to claim that people have moral obligations to fulfill their role-obligations

Supposing that complete failure vitiates the rights and obligations, how much success is necessary? Melden does not think that complete success is necessary, for he argues that we must act in accord with

> the actual moral relations in which agents stand to one another within such institutions as the family . . .[54]

even though the institution would better achieve its point if the relations were different. I think it would be helpful here to look at several examples. Consider an institution of property that fairly well achieves its point in a society except that the zoning laws have loop-holes such that one who owns land in a residential area can, under certain conditions, build a factory there. Suppose this would be a bad

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[54] Rights, p. 85.

thing. The land-owner thus has a right, according to the institution. Does he have the moral right to build the factory? It does not seem to me that he does, but I am not concerned to argue the particular case. The main point is that if one thinks he has the right, this requires argument. Proposition (B) does not provide a sufficient reason for his having the right. One wants to know why, when it would be a bad thing for one to have that right, he has it. Note that it will not do to say that he has the right, but it is overridden. For such a right is always overridden and a right always overridden is not right at all.

Consider, now, this case. Suppose A is under a legal obligation to pay his taxes and suppose this would be a hardship for him. Once again, does he have a moral obligation to pay it? Insofar as we want to say that he does, I think the appeal to (B) alone will not give us the reason. We might appeal here to the Generalization Argument which was examined in Chapter III or to some kind of principle of fair-play to the effect that he must bear the burdens of institutions when he accepts their benefits.

In general, the difficulty with (B) is that it gives us no reason for accepting an institution's view of rights and obligations when more good would come of not doing so. I am not arguing that a reason cannot be given, but that to give it some kind of appeal to utility or fairness or justice seems to be needed. And this is to say that an appeal to some kind of synthetic moral principle is necessary. It thus seems that whenever it is morally correct to fulfill our role-obligations or exercise our role-rights, there will always be further reasons that need to be adduced, general principles that must be appealed to, and that the mere mentioning of our role will not suffice.

And to say this is to admit that institutions do not have intrinsic moral significance.

6.E. Summary. I conclude that Melden's attempt to give a non-positivistic analysis of social institutions fails and the problems can be summed up in this way. Conceived as a moral structure in a non-positivist way, no one need admit that a certain institution exists unless he is willing to adopt certain synthetic moral principles. If, on the other hand, we conceive of an institution as a non-moral but normative structure or as a set of social roles, institutions can be admitted to exist but from this no moral conclusions follow without appeal to a synthetic moral principle. What Melden needed to prove is that we would be compelled to admit that certain institutions exist, without having to assent to any moral principles, and once we admitted this, certain moral conclusions would necessarily follow. But this just is not the case. The gap between fact and value has not been bridged. The Institutional Theory does not succeed and we therefore cannot ground an obligation to obey the law on the claim that it follows necessarily from the institutional fact of citizenship.

7. Conclusion: Morality and Ideology

It will be helpful to conclude this discussion of IT by putting the above criticisms in a different, more politically relevant light. I shall do this by referring to an article by P.F. Strawson called "Social Morality and the Individual Ideal." Strawson construes an institutional obligation, as Hart does, as a 'socially sanctioned demand.' Does an individual have a moral obligation to fulfill such demands? Not always, Strawson says, because although a socially sanctioned demand is

> doubtless a demand made with the permission and approval of a society; and backed, in some form and degree, with its power . . . the idea of a society as the totality of individuals subject to demands may here come apart from the idea of a society as the source of sanction of those demands.

It is thus possible that

> the sanctioning society may simply be a sub-group of the total society, the dominant sub-group, the group in which power resides. Mere membership of the total society does not guarantee membership of the sanctioning part of society.

One may thus not be a member of the group or class who makes the rules. Strawson notes, further, that although each person might prefer the existence of a society over a state of nature, it does not follow that he has

> an interest in the particular system of socially sanctioned demands to which (he) is subjected.

No interest of his may be safeguarded by the system, eg. he may be a slave or be denied civil rights. Strawson concludes that unless at least one or both of these conditions, ie. that one have a say in what is sanctioned and the sanctions protect one's interests, are met,

> it does not seem that the fulfillment of a socially sanctioned demand comes anywhere near being what we should regard as the fulfillment of a moral obligation . . . (In fulfilling such a demand) I may be doing what I am obliged to so; but scarcely what I am morally obliged to do.[55]

An institution thus certainly does not have intrinsic moral relevance. To take on moral relevance it must, from Strawson's point of view, be somewhat democratic and/or protect the interests of all those involved. Dwelling on this point makes me come to see the Institutional Theory of Obligation as a politically conservative theory. It seems to counsel and demand obedience to unjust political forms and submission to authority and the mores of a social group. It appears to be political ideology dressed in the guise of logical necessity.

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[55]Strawson, in Philosophy (1961), pp. 1-17 (italics added).

Defenders of IT, I am sure, will attempt to deny this charge on the grounds that they allow institutions to change and that, at any rate, institutional obligations are only prima facie. Nevertheless, there is an emphasis on respect for the status quo which I find overbearing. I suspect that one's attitude towards the theory will depend to a large extent on one's political outlook. It is not a theory that would appeal to those intent on bringing about needed social change.

The question, then, as to when an institution demand moral respect is an intensely political and moral question. It cannot be settled by logical necessities. What is needed is discussion of synthetic moral and political principles, in particular principles of justice. It is now time to turn to this.

CHAPTER V

THE PRINCIPLE OF FAIR PLAY (I)

1. Introduction

I have suggested several times and in a variety of ways that the obligation-to-law principles can be defended, if they can be defended at all, only by appealing to an explicit principle of justice or fairness. The most traditional defenses, I think, rest on such an appeal. Society, it will be said, is a large and complicated scheme of social cooperation, which affords benefits to those involved in it. For the benefits to be produced it is necessary that its laws be obeyed. A person, then, who receives the benefits of a society ought to bear the burden of obedience to its laws. Not to do so is unfair --it is free-riding, getting something for nothing. And this is true even if the law is bad, for it is general law-abidingness that is essential for the production of the benefits of society.

Following John Rawls, I shall call the principle appealed to here the principle of fair play.[1] It can be expressed, roughly, as follows:

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[1]In "Justice as Fairness," Philosophical Review, Vol. 67 (1958), and in "Legal Obligation and the Duty of Fair Play" (hereinafter referred to as "LO") in Hook, op. cit. Other discussions of this principle can be found in C.D. Broad, "On the Function of False Hypotheses in Ethics," International Journal of Ethics, Vol. 26 (1916); H.L.A. Hart, "Are There any Natural Rights?" Philosophical Review, Vol. 64 (1955); G.H. Von Wright, The Varieties of Goodness (New York: The Humanities Press, 1964), Chapter X; and Lyons, FLU, Chapter V. Hart calls it the principle of mutuality of restrictions, Von Wright calls it the principle of justice and Lyons calls it a principle of just practice. There are differences in wording and emphasis in the different

FP1: If a person receives the benefits of a scheme of social cooperation, he has a prima facie obligation to bear its burdens. Not to bear the burdens is prima facie unfair.

One who accepts this principle can argue that there is a complex prima facie obligation to obey the law (cf. I.6.B.) by claiming that if we examine the concepts of law and society, we see that

a) a society is necessarily a scheme of social cooperation,
b) citizens are necessarily persons who receive the benefits of such schemes, and
c) obedience to the law is a burden assigned by the scheme to those who receive the benefits.

If this is so, then every act of obedience to the law by a citizen is necessarily an act of bearing the burdens of a cooperative scheme. If such acts are prima facie obligatory, as FP1 asserts, it will follow that citizens have a prima facie obligation to obey the law, ie. there will always be a good moral reason for them to obey the law since such an act will be the bearing of a burden of a cooperative scheme. In this way principle OL1 can be defended.

There are some who would deny that FP1 really catches the notion of fair play. They would hold that a person has an obligation, on grounds of fair play, to bear the burdens of a cooperative scheme he benefits from, only if the scheme has a certain moral character; it must, for example, be just. Such people, then, would accept the following as the proper expression of the principle of fair play:

FP2: If a person receives the benefits of a scheme of social cooperation and the scheme is just, he has a prima facie obligation to bear its burdens.

Given this, it will follow that the citizens of a just state will have an obligation to obey its laws and our principle OL2 will be defended. In either of these ways, then, the principle of fair play can be used

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discussions and some substantive disagreement but they are all trying to get at the same fundamental idea.

to ground the claim that there is an obligation to obey the law.

In this and the remaining chapters I shall assume that conditions (a) through (c) are acceptable and focus attention on the underlying principle of fair play. In this and the next chapter, I will attempt to understand and evaluate the principle and determine its proper expression. The central question that will be taken up is the question of whether it is necessary for a cooperative scheme to have a special moral character before one who receives its benefits is obligated by it on grounds of fair play. I shall argue that it is necessary for a scheme to have a special moral character--it must be fair--before one who receives its benefits is obligated by it and that, consequently, those who think that the mere receipt of the benefits of a scheme is enough to 'bind' one to it are mistaken. In Chapter VII, I will apply the principle directly to the law and I will argue that, while there is a valid principle of fair play, it does not justify the claim that there is a prima facie obligation to obey the law either in every society or in just ones.

2. Cooperative Schemes and Justice

2.A. Varieties of cooperative schemes. Let us consider first the notion of a scheme of social cooperation. Such a scheme exists among a group of people when benefits accrue to the members of the group if and only if they perform certain acts which are normally thought of as unpleasant or restrictive of liberty or both--and this will often take the form of following rules. The people may be said to be cooperating because the production of benefits is causally dependent on their doing what is required of them. It is the result of their mutual sharing of burdens.

Cooperative schemes may differ with respect to the consequences of 'burden-avoidance' or non-cooperation and we can distinguish three general kinds of schemes. I shall say that a scheme is rigid when each person receives a benefit only if everyone cooperates. If one person cops out the benefits cease for everyone. One can imagine a cooperative game set up in this way.

Secondly, a scheme is connected when, anytime someone dodges his burden, someone else must bear a greater burden or receive less benefits. In such a scheme non-cooperation affects the distribution of benefits, while in a rigid scheme it affects their very production.

Lastly, I shall call a scheme loose when it is possible for some to dodge their burden without affecting anyone else adversely. In such a scheme, according to Rawls,

> the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if one person knows that all (or nearly all) of the others will continue to do their part, he will be able to share a gain from the scheme even if he does not do his part.[2]

In a loose scheme the non-cooperator does affect the distribution--he makes himself better off than he would otherwise be--but not at anyone else's expense.

2.B. Rigid schemes. I shall not pay much attention to rigid schemes for the following reasons. Let us suppose that a person is involved in a rigid scheme. It might be held that he has an obligation to bear its burdens because he ought not to prevent others from attaining goods. Failure to bear the burden would violate the duties of beneficence and non-maleficence, as W.D. Ross calls them.[3] It is wrong on grounds of

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[2]"LO," p. 10.

[3]"What Makes Right Acts Right?" p. 21.

simple utility. But to say that he has an obligation on these grounds does not seem to be saying that he has an obligation on grounds of fair play. That notion involves the idea of someone having an obligation because he has received certain benefits. Bearing the burden is a return for the receipt of a good. Also fair play involves the idea of someone cheating, or free-riding, getting something he does not deserve. But the problem here is that the non-cooperator hurts everyone, including himself.

Now it is true that there is a broad, utility-laden sense of justice such that

> given any two levels of the production of a good known to be possible in given circumstances, then, other things being equal, the higher should be preferred on grounds of justice.[4]

Thus what he does can be held to be unjust or unfair in this sense but the notion of fair play is somewhat narrower.

2.C. The principle of identity. I will now try to bring out what I take to be essential to the notion of fair play. It is commonly held that the justness of a state of affairs is a function of the distribution of goods and evils among the persons involved in it, and that an unjust act is essentially one which causes an unjust distribution.[5] Whether this is true in every case or not, it will be my contention that the principle of fair play is a distributive principle and that 'playing unfairly' is essentially causing a certain kind of unjust distribution in a cooperative context from which one benefits personally.

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[4]G. Vlastos, "Justice and Equality," in R. Brandt, Social Justice (Englewood Cliffs, N.J.: Prentice-Hall, 1962), p. 60. See also W. Frankena's article in the same volume, "The Concept of Social Justice," p. 17.

[5]The classical discussion of this view of justice is by Aristotle, Nicomachean Ethics, Book V, tr. by Martin Ostwald (Indianapolis, Indiana: Bobbs-Merrill Company, 1962).

To begin to see this, let us, following C.D. Broad,[6] call those who receive benefits enjoyers and those whose acts of restraint produce those benefits producers. Suppose now that we have a state of affairs in which we have two distinct classes of people, X and Y, of equal numbers. And suppose, furthermore, that all the members of class X are enjoyers of a certain benefit, but it is possible that the producers of the benefit could be members of either class X or Y. That is, it is possible that the class of enjoyers is not the same as the class of producers.

Now, Broad holds that

> the appeal to "fairness" seems to rest on the principle that the best possible state of affairs is reached when the group of producers and that of enjoyers is as nearly as identical as possible.[7]

And it seems to me that this principle is obviously correct, so far as it goes. It is simply fairer that the members of class X be the producers rather than the members of class Y. And this is true because it is they who have received the benefits. In general when burdens have to be borne for benefits produced, it is simply fairer that the burdens be distributed among those who receive the benefits rather than among any other class of people. This is a basic principle of distribution, which cannot be analyzed by any more fundamental notions. Let us call this principle the principle of identity.

2.D. The principle of proportionality. There is another principle that we need in order to bring out what is involved in fair play. According to Broad it is another dictate of common sense that for the fairest state of affairs to be reached it is not sufficient that

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[6] Op. cit., p. 388. [7] Ibid.

producers and enjoyers be identical, but it must also be the case that

> the share in the good produced that falls to each producer is proportional to his sacrifice in producing them.[8]

That is, those who receive more benefits should bear greater burdens than those who receive less and vice versa. Let us call this the principle of proportionality. It, too, is a fundamental distributive principle.

2.E. Fair exemptions. I want to hold that the duty of fair play is, roughly, the duty to promote and maintain distributions that conform to the principles of identity and proportionality. But to make this claim precise a qualification is needed about proportionality and identity. Putting together Broad's principle of identity and proportionality, we get the following:

> B. Fairness requires that each enjoyer be a producer and that his share in the good be proportional to his sacrifice in producing it.

This, however, is too strong. It is going to an extreme to hold that it is never fair for an enjoyer to fail to be a producer or to produce less than is proportional. A person may have reasons that make it fair for him not to cooperate, if, for example, he is handicapped or aged or sick. In general there are certain situations or features of persons that entitle them to be exempted from the requirement of cooperation and in such cases it is not unfair for them to fail to cooperate. Moreover, as I shall argue below (VI.2.), it is often reasonable in a loose cooperative scheme to allow some enjoyers not to produce and to pick these people out by a fair exemption-procedure. This is what a draft lottery, for example, does. I shall argue that in such cases it

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[8] Ibid.

will also be fair for those so exempted not to cooperate.

Given this we can reformulate Broad's principles as follows:

> P. Fairness requires that each enjoyer be a producer and that his share in the good be proportional to his sacrifice in producing it, unless there is something about him or his situation that makes it fair for him not to produce or to produce less than is proportional.

From now on, when I refer to the principle of proportionality, I will have this comprehensive principle in mind. It is a weaker principle than Broad's because it allows for deviations from strict equality of burden sharing on the basis of other considerations of fairness. Fairness, as I understand it, is broader than equality.

I shall not attempt here to give a general answer to the question of exactly when a distribution is proportional and when exemptions are fair. I shall, however, take up questions concerning the proportionality of certain particular distributions as they become relevant.

2.F. Fairness, justice and utility. It is important to point out here that the principle of proportionality is only a prima facie principle, that is, there will be cases in which a person who has benefited from a scheme will be morally justified in not bearing a burden, even though he is not entitled to an exemption on grounds of fairness. This will be so, for example, if his bearing the burden in a particular case will have very bad consequences or conflicts with a stronger obligation. Or it may be the case that exempting him from a particular burden may enable him to undertake some project that will increase the utility of all or most of the members of the scheme. In such a case considerations of utility may overcome considerations of fairness and the distribution caused by his not bearing the burden may be justifiable on the whole, even though it contains some unfairness.

Consider, next, a case in which one person in a cooperative scheme has a special problem; he has, let us say, a compulsive fear of undertaking the burden--a fear which is not shared by others. In such a case it may make sense to temper fairness with mercy and let him out. We let him out not because there is something special about him that entitles him to be let out--this would be letting him out on grounds of fairness and would be justified by the principle of proportionality itself--nor because of the utility that would be produced by letting him out, but because we have sympathy for his particular disability. If justice, in a wide sense, includes mercy or the taking into account of special circumstances of this sort, we can say that the resulting distribution is just on the whole, even though it contains some unfairness. Another example of this sort is the granting of conscientious objector status to those who object on moral grounds to participation in all wars. I believe it is just to exempt such a person from participation in a war, even if the war is just and necessary, on the ground that there is important value in not forcing people to violate the deepest dictates of their conscience. However, although it is just on the whole to exempt such a person, there will still be a significant amount of unfairness involved, since someone else must take his place. In sum, then, fairness or proportionality is not the whole of justice, although it is an important and significant part of it.

I want to claim, then, that the duty of fair play rests ultimately on the distributive principle of proportionality. It is the duty, when one is engaged in a cooperative scheme, to act on that principle. I believe, moreover, that this is true of both connected and loose schemes. It is arguable that what I say is true of connected but not of loose schemes and I shall examine this objection in the next

chapter. For the present, I mean this claim to apply to both kinds of schemes. I shall now draw out the implications of this claim and attempt to prove it by answering possible objections.

3. Justicism: Three Versions

3.A. Must the scheme be just? To bring out the implications of my claim it will be helpful to note that we can distinguish existent from non-existent schemes of social cooperation, just as, in discussing Rule-Utilitarianism in Chapter II, we could distinguish existent rules of social groups from rules that are only possible. The benefits a person receives in an existent scheme are the benefits he in fact receives and the burdens of the scheme are the burdens it assigns to him, the burdens the members of the social group expect him to bear. These expectations will often be expressed in rules which are accepted by the group.

It is obvious that any existent scheme may not be the best of all possible schemes. In particular an existent scheme could violate the principle of proportionality and assign burdens to some out of proportion to the benefits they receive. Let us say that a scheme is just[9] when and only when it adheres to the principle of proportionality. As I have noted there are those who hold that a cooperative scheme does not obligate a person unless it is just. We can now explain the rationale for this view as follows. If the scheme is just, violation of its

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[9]It would perhaps make more sense here to use the word "fair" rather than "just," but most discussions of the morality of institutions and of the state are couched in terms of whether they are just or not. Rawls, for example, says that a person is not obligated by a cooperative scheme unless it is just. I shall thus use the word "just" rather than the word "fair" in order to be in accord with the rest of the discussions, but when I say that a cooperative scheme is just, I shall mean that it is just in the narrow sense of justice which the principle of proportionality expresses. "Just" in this context is synonymous with both "fair" and "proportional."

rules will cause a disproportionate and unjust distribution. But if the scheme is not just, these consequences will not follow and it will be difficult to see what it is that one has done wrong who breaks its rules. He would not have created an unjust distribution.

If we were to accept the view that a scheme must be just before one can be bound by it, we would see the principle of fair play as being expressed by FP2, rather than FP1, and we can state both of these now more precisely as follows:

FP1: A person has a prima facie obligation to bear the burdens assigned to him by an existent scheme of social cooperation if he receives its benefits.

FP2: A person has a prima facie obligation to bear the burdens assigned to him by an existent scheme of social cooperation if
1) he receives its benefits and
2) the scheme is just.

If I am correct in my claim that the principle of fair play rests on the principle of proportionality, then it seems that we should accept FP2 rather than FP1, for the principle of proportionality tells us to bring about proportional distributions and there is no guarantee that obedience to the rules of an existent scheme will do this unless it is just. Shall we then accept FP2?

3.B. Degrees of fairness. There is an obvious difficulty with FP2, which needs to be ironed out. The suggestion that a scheme is either just or unjust is inaccurate. There can be degrees of justice or of proportionality. Consider, for example, the following set of distributions of 'units of good and evil' among four equally deserving persons:

		A	B	C	D
I.	Benefits	5	5	5	5
	Burdens	2	2	2	2
II.	Benefits	6	6	4	4
	Burdens	2	2	2	2
III.	Benefits	7	7	3	3
	Burdens	2	2	2	2

II is obviously fairer than III and I is fairer than II. If we can say that I is perfectly fair, perhaps we can say that a scheme which gives all the benefits to one person and the burdens to the others is close to being perfectly unfair.

Given this, the defender of FP2 has the problem of deciding how just a cooperative scheme must be in order to obligate a man. If perfect justice is required, few of the schemes we come across in daily life will obligate us. But if not perfect justice, then how just must it be? Any answer to this may seem arbitrary.

There are two different solutions a defender of FP2 might suggest with respect to this problem. First, he might hold that there is some point, difficult to determine with exactness, at which a scheme becomes adequately just. It need not be perfect, that is, better schemes could have been thought up and instituted, and it will at least sometimes be the case that not bearing the burden of the scheme will cause a fairer distribution than bearing it. But, given what can be expected of fallible human beings, it does a reasonably good job. Let us say that it is <u>generally just</u>. On this view a person will have a prima facie obligation to bear the burdens of a scheme he benefits from if the scheme is generally just and he will have this obligation even in those cases in which bearing the burden would bring about a less proportional distribution than not bearing it. On this view FP2 would be rewritten as follows:

> FP3: A person has a prima facie obligation to bear the burdens assigned to him by an existent scheme of social cooperation if
> 1) he receives its benefits and
> 2) the scheme is generally just.

A second alternative--and one which I shall argue is better--begins with the fact that even if the scheme is imperfect it is still

possible to compare the fairness of the distribution that would be brought about if one bore the burden with the fairness of the one brought about if one dodges it. And it will be said that one has prima facie obligation to bear the burden if and only if the distribution brought about by bearing it would be fairer than the one brought about by avoiding it. Consider, for example, distribution III above. Suppose that the consequences of person C's failure to cooperate is that person D's benefit goes down, ie. we get this:

A	B	C	D
7	7	3	1
2	2	0	2

This is less fair than if he were to cooperate and thus he has an obligation to cooperate. He has to choose the 'lesser injustice' or the 'greater imperfect justice.' Consider, on the other hand, a case in which his failure to cooperate leads to the following:

A	B	C	D
6	6	3	3
2	2	0	2

This would be fairer than his cooperation and in such a case it would be said that he has no obligation on grounds of fairness to cooperate.[10]

It also seems reasonable to say that in cases in which it is more just to cooperate than to fail to cooperate, the strength of one's prima facie obligation to cooperate will be a function of how much fairer cooperation is than non-cooperation. One will have much stronger obligation to cooperate in a perfectly just scheme than in those that depart from perfection and the greater the departure the more easily is the obligation overridden. This also suggests that the strength of one's obligation will depend on how one in particular is treated by

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[10]This does not rule out the possibility that he may have an obligation to cooperate on other grounds, such as benevolence.

the scheme. It is more likely that the failure of A or B to cooperate in the above scheme will bring about an unfair distribution than if C or D were to fail to cooperate.

3.C. Act-justicism. One who held this view as a way of accounting for the fact that there are degrees of justice would rewrite FP2 as follows:

> FP4: A person has a prima facie obligation to bear the burdens assigned to him by an existent scheme of social cooperation if
> 1) he receives its benefits and
> 2) his cooperation would lead to a fairer distribution of goods and evils--according to the principle of proportionality--than would his non-cooperation.

What is most significant about this is that on this view one's obligation to obey the rules of the scheme is determined by how one's act conforms to an ideal distribution of goods and evils as determined by the principle of proportionality, rather than by its conformity to the actual distribution determined by the existing cooperative scheme. We have a view here, then, which in the realm of justice is akin to act-utilitarianism. It holds that whether one ought to obey a scheme depends on whether the particular act of doing so will bring about a greater amount of fairness (as determined by proportionality) than not doing so. The fact that a certain cooperative scheme already exists and assigns a certain distribution is logically irrelevant. This is analogous to the act-utilitarian view that the fact that a certain rule exists is logically irrelevant and whether one should obey it or not depends on the particular consequences of obedience vs. disobedience. To coin a barbarous phrase we might call this theory, which is the analogue of act-utilitarianism, act-justicism.

3.D. Rule-justicism and non-justicism. As we have seen, some forms

of rule-utilitarianism hold that people ought to obey useful rules that exist even in those cases in which disobedience would have better consequences. Those who hold that one is obligated to bear the burdens of a cooperative scheme which is generally just, even when disobedience would be fairer and more proportional, can be seen as holding an analogous view, which I shall call rule-justicism. Both rule-utilitarianism and rule-justicism hold that there is something special about the mere existence of a useful social rule or a generally just cooperative scheme, while act-utilitarianism and act-justicism are skeptical of this. A rule-justicist will hold that the principle of fair play is expressed by FP3.

Lastly, there is the view of one who holds that a person who receives the benefits of a scheme is obligated, on that ground alone, to bear its burdens. On this view the scheme does not need to have any special moral character. A proponent of this view would then endorse FP1. I shall call this view non-justicism.

Given these distinctions, three different views about fair play can be expressed--as it is seen by the act-justicist, the rule-justicist and the non-justicist:

AJ: The principle of fair play is a valid moral principle and it is expressed by FP4; that is, one has a prima facie obligation, on grounds of fair play, to bear the burdens of a cooperative scheme if and only if one has received its benefits and one's cooperation would bring about a fairer distribution than one's non-cooperation.

RJ: The principle of fair play is a valid moral principle and it is expressed by FP3; that is, one has a prima facie obligation, on grounds of fair play, to bear the burdens of a cooperative scheme if and only if one has received its benefits and the scheme is generally just. It is not necessary that one's particular act of obedience cause a fairer distribution than disobedience.

NJ: The principle of fair play is a valid moral principle and it is expressed by FP1; that is, one has a prima facie

> obligation, on grounds of fair play, to bear the burdens of a cooperative scheme if and only if one has received its benefits. It is not necessary that the scheme be generally just nor that the distribution caused by obedience be fair.

The issue, then, is simply: which of these is right?

I shall argue that act-justicism is the correct view. I have already said that I will argue that the duty of fair play is simply the duty, in cooperative contexts, to bring about fair and proportional distributions. Both rule-justicism and non-justicism deny this, for both hold that it is at least sometimes the case that fair play requires one to bring about a distribution which is less fair and proportional than a distribution one could have brought about. On these views, then, proportionality is not the <u>whole</u> of fair play; in fact, on non-justicism it is not relevant at all. My task, then, will be to show that proportionality is the only consideration that fair play is concerned with.

In the next sections (4 through 6) I shall examine non-justicism. It seems to me that non-justicism is the prevailing view about fair play, that is, most people would hold that the fact that one has benefited from a cooperative scheme somehow binds one to it, regardless of the proportionality of the distribution determined by one's act of bearing the burdens of the scheme, and that, moreover, this is a dictate of fairness. I shall examine the reasons that can be given for this and I shall argue that there often are good reasons for obeying the rules of a cooperative scheme that have nothing to do with considerations of proportionality. But I shall hold that these reasons have nothing whatsoever to do with fairness and that consequently non-justicism must be ruled out as an account of the duty of fair play. In section 7, I shall examine rule-justicism and again I shall argue that there are reasons for obeying generally just cooperative schemes, which are not

reasons of proportionality, but are not reasons of fairness either.

I now turn to this question: what are the reasons for obeying a cooperative scheme that make it seem that merely benefiting from the scheme requires one to obey it?

4. Cooperative Schemes and Voluntary Acts

The kind of case that comes to mind when one looks for such reasons is one in which a person receives the benefits of a cooperative scheme through some voluntary act, knowing full well that the rules of the scheme treat him unjustly. It might be said that he knew what he was getting into, he knew what burdens were required for the benefits he received. If he was not willing to bear the burdens, he should not have taken the benefits. Thus if he takes them, he must bear the burdens.

This argument introduces into the discussion a new set of factors that are important--the manner of the individual's involvement with a cooperative scheme. An individual may have received the benefits of a scheme involuntarily as a child is benefited by the care of his parents. Or his receipt of benefits may require a voluntary act--the voluntary acceptance or 'seizure' of the benefits when he had the opportunity to do otherwise. In addition his receipt of the benefits might be conjoined with an explicit agreement to abide by the scheme.

According to the above argument, he has an obligation to bear the burdens of the scheme, regardless of its moral character, when the acceptance is voluntary and made in full knowledge of the nature of the scheme. The examination of this will require a digression into what is meant by words like 'voluntary' and 'intentional.' I shall return to the argument after the digression.

4.A. The intentional and the voluntary. When does one act voluntarily? It is fairly obvious that not all intentional acts are done voluntarily. One who gives one's money to a robber does not act voluntarily, but he acts intentionally. To say that an act is done intentionally is to say, very roughly, that the individual had reasons for doing the act and performed the act because of those reasons.[11] One who gives money to a robber has reasons for what he does--he is trying to save his life. On the other hand, a person who, using Aristotle's examples, is carried by the wind or other men has no reasons for what happens to him and thus does nothing intentionally. The robbery victim, then, acts intentionally but not voluntarily.

Why is his act not voluntary? This is a very complicated question and it is not necessary for our purposes to give much of an answer. The intuitive answer is that he acted involuntarily because he acted from external coercion, or constraint. But to say this is not to say that he was like the man blown by the wind, but that he had certain kinds of reasons for his act; his reason, for instance, was the avoidance of immediate bodily harm caused by a human agent. Crudely, it can be said that people who act from reasons like this act involuntarily and a voluntary act is one that is not motivated by the kinds of reasons that lead us to speak of coercion and constraint. 1

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[11]An enormous literature has grown up recently on the concepts of the intentional and the voluntary. I shall not here try to suggest detailed analyses of these concepts, but merely hope to make a few important distinctions and clarify my use of these terms. For a more adequate account of intentional action which my remarks, I believe, reflect, see Donald Davidson's "Actions, Reasons and Causes," Journal of Philosophy, Vol. 60 (1963), pp. 685-700. For the voluntary and the involuntary one cannot neglect Aristotle's discussion in Nicomachean Ethics, Book III. See also the discussions by Gilbert Ryle, The Concept of Mind (New York: Barnes and Noble, 1961), Chapter III, section 3, and J.L. Austin, "A Plea for Excuses," in Philosophical Papers (Oxford: Oxford University Press, 1961).

shall not, however, attempt to give any more of a detailed analysis of the kinds of reasons that make an act involuntary.

What I want to emphasize--and what will be relevant to our question--is just this: to say that an act is done voluntarily tells us very little about the circumstances of its occurrence. It does not imply, for example, that the decision to do it was easy. Consider, for example, someone who must choose between being drafted to fight in a war he thinks immoral, going to jail or fleeing. Coercion is not the only thing that makes acting fraught with unwanted consequences.

It is also true that from the fact that an act was done voluntarily, it does not follow that any other alternative act would have been reasonable for the agent. Consider, for example, a person who voluntarily accepts welfare. The act is voluntary, because it is not coerced, not motivated by certain kinds of reasons. But in most such cases no other choice would have been reasonable. Coercion, thus, is not the only thing that forces our hand. In general, to say that an act is done voluntarily rules out one kind of restraint--coercion--but it leaves room for other kinds.

4.B. Tacit consent. Let us now examine the claim that a person is bound by a cooperative scheme, regardless of its character, if he voluntarily accepts its benefits, knows what the scheme is like, and moreover had reasonable alternatives to joining the scheme, ie. either the benefits were not vital or there were alternative schemes he could have joined. I shall argue that in such a case he does have a prima facie obligation to bear its burdens, even if the scheme treats him unjustly. But the reasons for this are complex.

There are two different ways in which one can voluntarily

become engaged in a cooperative scheme. One might make an explicit agreement or promise, in words or writing, to abide by the scheme. On the other hand, one might simply take benefits that are there to be taken, knowing that one is expected to bear a certain burden in return. It is the latter case we are essentially concerned with.

If one makes an explicit promise to abide by a cooperative scheme, then one has an obligation to do so, but the obligation is based on the duty one has to keep one's promises and not, apparently, on grounds of fair play. There is, however, an old and important tradition that seeks to reduce, or at least understand, the obligation to play fair in terms of the obligation to keep promises. In fact, this sort of account is perhaps the most typical one that is given of political obligation. It is given not only by democratic social contract theorists like Hobbes, Locke, and Rousseau, but also by Socrates in the Crito, where he holds that one who violates the law breaks a 'just agreement.'[12] All these people find the ultimate grounds of political obligation in some kind of agreement each person has made or consent freely given.

The obvious difficulties with such theories is that few of us have made such explicit agreements to abide by the law. These theorists have thus been compelled to make reference to some kind of implicit agreement or tacit consent. Thus the laws tell Socrates in the Crito:

> But we say that every man of you who remains here, seeing how we administer justice, and how we govern the state in other matters, has agreed, by the very fact of remaining here, to do whatsoever

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[12]Plato, Euthyphro, Apology and Crito, tr. by F.J. Church, revised by R.D. Cumming (New York: The Liberal Arts Press, 1956), p. 59.

we tell him. And, we say, he who disobeys us acts unjustly . . [13]

He has agreed, not by any verbal or written act, but by staying in the state. Locke puts the point more explicitly as follows:

> . . . There is a common distinction between express and tacit consent . . . Nobody doubts but an express consent of any man entering into any society makes him a perfect member of that society, a subject of that government. The difficulty is, what ought to be looked upon as a tacit consent, and how far it binds, ie. how far any one shall be looked on to have consented, and thereby submitted to any government, where he has made no expression of it at all.

Locke's answer is that any man who

> hath any possession or enjoyment of any part of the dominions of any government doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment as any one under it.[14]

It is tempting to argue that this appeal to tacit or implicit consent is really a dodge to save a theory--the theory that no one can be obligated to do anything unless he has promised to do it. And it might be held that what is important is the fact that he has benefited from the cooperative scheme that is the state. He has an obligation to obey the law, ie. bear the burden, because he has benefited. It is this which is important and not some fictitious agreement.

I think, however, that this dismisses the theory too quickly. We have been concerned with a case in which a person voluntarily takes the benefits of a scheme that he knows to be unjust, when there are reasonable alternatives. It is natural to feel that by taking the benefits he commits himself to bearing the assigned burdens. I think that this can only be explained by saying that by taking the benefits

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[13] Ibid., p. 62.

[14] John Locke, Second Treatise of Civil Government in Treatise of Civil Government and a Letter Concerning Toleration (New York: Appleton-Century-Crofts, 1937), paragraph 119, pp. 78-79.

he did make an implicit promise to bear the burden and that is why he is obligated. Let me try to explain this.

It is obvious that one can make a promise to do an act, by saying 'I promise to do x', only because a set of conventions exists to the effect that saying those words in certain circumstances constitutes making a promise. There are other ways in which a person can make a promise--by signing his name, for example, to a document and thereby making an agreement or contract to do x. It is also the case that according to the convertions necessary for making a promise, one who makes a promise to do something commits himself to doing it.

Now, let us look at a different institution, that of exchange. Consider a bakery which confronts one with the following price list when one enters the door:

Bread	.35
Rolls	.08
Cupcakes	.15
Pies	.88

If one has 35 cents and gives it to the baker, one is given a loaf of bread. An exchange has been made.

Suppose, now, that the baker comes to feel that it is inconvenient for him to stay in the store, taking baked goods off shelves in exchange for money, and that he would be better off spending his time baking or playing golf. Suppose then that when one enters the store one finds no sales-people in it, but one finds rows and rows of baked goods and the following sign:

> Honor Bakery Store--Pick out the baked goods you want and then deposit the appropriate change in the box on the counter:
>
> | | |
> |---|---|
> | Bread | .35 |
> | Rolls | .08 |
> | Cupcakes | .15 |
> | Pies | .88 |

Now, it seems to me that there is a set of conventions or generally accepted rules, at least in this society, that anyone who comes into the store and takes some baked goods makes an agreement--an implicit one--to pay the assigned price for it. His taking the goods is very much like signing a contract, the terms of which are set out by the sign posted in the store. One agrees to the contract, not by signing it, but by taking some baked goods. By taking the goods he commits himself, according to the rules, to paying the assigned price.

This sort of device for making an agreement to pay a certain price for getting a certain benefit is quite widespread, although it does not work perfectly because of the absence of sanctions. Now, it seems to me that we have an analogous situation when a cooperative scheme exists and one can take its benefits voluntarily, it is made clear just what burdens one is expected to bear, and there are reasonable alternatives to not joining the cooperative scheme. In such a case it seems to me that there is a set of conventions to the effect that one who takes the benefits implicitly agrees to bear the assigned burden. One, then, has an obligation to bear the burden based on the obligation one has to keep one's agreements and promises. And this will be true regardless of the moral character of the scheme (although it is reasonable to think that this will affect the strength of the obligation).

4.C. <u>The limits of tacit consent</u>. Now, all this is true, I have said,when there are reasonable alternatives. That is, it is true when the consequences of a person's not taking the benefit are not severe. If there were no reasonable alternatives, that is, if the benefit were vital to his welfare, then I do not think that his taking it amounts

to a promise to abide by the assigned burdens. Let me explain why. When there are reasonable alternatives, a person is in the position of one who is doing all right and seeks to increase his well-being with further benefits. In such a case it makes sense to set a price for the increase and let him take it or not if he feels the price is worth it. Suppose, on the other hand, that the benefits are essential to his well-being. I think the heart of the matter is that, if these benefits can be and are being produced, he has a right to them, since they are essential to his welfare. And it is because he has a right to them that he need not promise anything to take them.

The right, however, is not completely unconditional. Others, after all, will have the same right and if the production of the benefits requires a certain sacrifice from all, then he can be legitimately asked to bear a fair burden in return for the benefit. Let us say that he has a right to the benefit, provided he does his fair share. But it is obvious now that the fair share is determined by the ideal principle of proportionality and not the de facto cooperative scheme and his obligation results from considerations of fairness, rather than his having made an implicit promise.

4.D. Tacit consent and the state. Before going on it is important to point out that there are certainly degrees of reasonableness of alternative courses of action. Sometimes it will be absolutely unreasonable not to take the benefit, at other times the issue will be cloudy, and at other times there will be many reasonable alternatives. It will thus not always be easy or possible to say whether one has an obligation on these grounds; moreover the strength of the obligation will be a function of the degree of availability of alternative actions,

getting weaker as these alternatives grow less reasonable until at some vague point there is no obligation at all.

It is also important to point out that while I have tried to defend the contention of the social contract theorists and others that there is such a thing as implicit consent, the appeal to such a consent is unsatisfactory as a general account of political obligation. Applying what we have said so far to the state, a necessary condition for agreeing implicitly to abide by its laws would be the performance of a voluntary act, by which one receives its benefits, when there are reasonable alternatives. To work this out, the consent theorists suggest that at a certain age each person is free to remain in his state or go somewhere else. His act of remaining is the voluntary act of taking its benefits, the act by which he commits himself to abide by the rules. But, as I have argued, it is necessary that the alternative of leaving the state be a reasonable one, that is, the consequences of doing this must not be too severe. But for most people today the alternative of leaving the state is not a reasonable one and I doubt that it ever was. For one thing, it often requires significant financial means to travel from one state to another, and many people--perhaps a large part of the population of most states--lack these means. They certainly cannot be said to have promised to obey the law by not leaving the state. Secondly, for those who do have the plane or bus fare, there is still a great personal cost involved in moving from the state one was born in and locating in a foreign nation, among people who speak an alien language, far from family and friends. Leaving one's state may also require giving up a good job and risking the possibility of never finding one that is comparable; there are many other things of value that one will have to abandon. It is also the case,

in today's world, that the features of one's nation that one finds objectionable may be shared by most other nations, or other nations may have special vices of their own. It is difficult to find a nation that is not involved in evil in one way or another. One may, of course, attempt to settle in one of the few spots left on earth upon which civilization has not yet encroached, but this will involve a life of hardship many will not find reasonable.

In other words, for the average person, the consequences of moving from his own state to another are very harsh. It is not as if he can look down from afar on a variety of different kinds of states and simply choose one to live in. He is already enmeshed in his native state, the personal cost of moving to another is great, and there really is not much variety to choose from. And sometimes moving from his state is not even a possibility. Remaining in a state, then, cannot in general be taken as the making of an implicit promise to obey its laws.

It can also be argued in some cases that if one objects to certain policies of one's own state, one ought not to leave it, but one ought to remain and work to get these changed. From this point of view, leaving the state is running away from a problem rather than facing it, and the alternative of leaving the state is not reasonable because it is immoral. If leaving the state would be immoral, one cannot be construed as having made an implicit promise to obey all its laws by staying.

Despite all these difficulties with tacit consent as a <u>general</u> criterion of political obligation, it is important to realize that there can be particular laws which produce benefits, such that citizens can have reasonable alternatives to taking <u>those</u> benefits. In such

cases the acceptance of the benefits will constitute an implicit agreement to obey a particular law. Thus it may be true of some laws that obedience to them by some people is the keeping of an implicit promise, but this certainly is not so for all laws.

In sum, the realm of tacit consent is much narrower than the social contract theorists envisaged. An obligation to obey the law cannot therefore be based on consent.

4.E. The principle of tacit consent. Given what I have been arguing in this section, we can now express the following principle of tacit consent:

> TC: A person has a prima facie obligation to bear the burdens assigned to him by an existent scheme of social cooperation if he has made an implicit promise to abide by the scheme, ie. if
> a) he accepts its benefits voluntarily and
> b) there exist reasonable alternatives to his taking the benefits.

This, then, is one way in which a person can have a reason for obeying a cooperative scheme even though a more proportional distribution would be caused by his disobeying it. But his obligation on these grounds has nothing to do with fairness or fair play.

Noting that a person can also make an explicit promise to abide by a cooperative scheme, we can then distinguish three ways in which a person, who has voluntarily accepted the benefits of a scheme, can take on a prima facie obligation to abide by it:

> 1. He made an explicit agreement to abide by the scheme.
> 2. He made an implicit agreement to abide by the scheme.
> 3. His bearing of the assigned burden would lead to a fairer (proportional) distribution than would his not bearing it.

These are three sufficient conditions for a person coming to have a prima facie obligation to obey the scheme,[15] but only in the third case

is the obligation an obligation of fairness. Thus, as I suggested above (3.D.), there are often good reasons for obeying the rules of cooperative schemes, regardless of distributive considerations, but reasons having nothing to do with fairness.

5. Cooperative Schemes and Benefits Received Involuntarily

Before we see what kind of reply a non-justicist would make to all this, it is important to examine what should be said concerning a person who benefits from a cooperative scheme involuntarily, as a child is benefited by his parents. Does such a person have a prima facie obligation to bear the burdens of the scheme and if so is it a fair play obligation? I shall argue that under certain conditions he does have an obligation which is grounded on fairness.

What we have to contend with here is another view, also expressed by the social contract theorists, that a person cannot become obligated to do something except through a voluntary act of his own. Locke holds that each man

> is naturally free and nothing (is) able to put him into subjection to any earthly power but his own consent.[16]

We would not be naturally free if we had obligations we did not voluntarily take on. This line of thought goes hand in hand with the view that it is more than logically possible that men can be self-sufficient outside of all schemes of social cooperation. Cooperation is a device that rational men engage in to increase their utility, but not an inevitable aspect of human life. Without cooperation, life might be

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[15] More than one of these could apply to a person at one time, ie. he might have made an implicit promise to abide by the scheme and his abiding by it would also lead to a proportional distribution.

[16] Loc. cit.

'nasty, brutish, and short,' but not impossible.

Such a view lacks sociological perspective. It is a commonplace to note that our existence is bound up with the schemes of organization under which we live and that living in societies is, if anything, more 'natural' than living outside of them. We are born into social organizations, nurtured by them and develop only through them. There is truth in the remarks of the 'laws' when they tell Socrates that they are his parents--

> We brought you into the world, we raised you, educated you, we gave you and every other citizen a share of all the good things we could.[17]

Cooperation is thus necessary for our well-being and not a mere adjunct helpful for increasing our utility.

Given our dependence on the community, it is reasonable to think it can have claims on us independent of our voluntary acts. It can certainly expect us to bear a fair and proportional share of the kinds of burdens that are essential for the production of the vital benefits we received and which will help produce such benefits for others. Thus I think that we do have a prima facie obligation, on the basis of fairness, to bear fair and proportionate burdens in return for vital benefits involuntarily received.

To say all this, however, is not to deny that men are 'naturally free' in any significant sense. Recognition of the claims of the community does not add up to a denial of the existence of overriding human rights which social organizations ought not to violate, and to say that our welfare often depends on cooperation is not to say that every form of cooperation is equally good. The claims of the individual

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[17]Plato, op. cit., p. 61.

are essentially claims concerning the structure of the organizations he comes under and do not derive from his possible existence in a state of non-cooperation.

My argument, I believe, has shown that a person has an obligation to bear a fair share of the burdens for benefits involuntarily received when these benefits are vital for his welfare. But what shall we say when the benefits are not vital, as when we receive something in the mail we do not particularly want (like a credit card). I am not sure what to say about this and am inclined to say that there is sometimes an obligation and sometimes not, but I shall avoid the issue because it is not important for our purposes. What I want to emphasize is just that there are important cases when we have an obligation, based on fair play, to bear burdens for benefits involuntarily received. This does not, moreover, change the understanding we have so far of fairness, for it is an obligation to bear the burdens assigned to us by a cooperative scheme only when those burdens are fair and proportional. It is not an obligation to bear the assigned burdens simpliciter.

6. Non-Justicism: Last Gasp

So far the brunt of my argument has been this: one has no prima facie obligation, based on fair play, to abide by the rules of a cooperative scheme one benefits from if disobedience would promote a fairer and more proportional distribution than obedience. There is no fair play obligation to obey the rules of a scheme per se. There are cases, however, in which one makes an explicit or implicit promise to abide by the rules of a scheme and then one does have a prima facie obligation to abide even if disobedience would be fairer. This

obligation, however, is not based on fair play, but on promising. Thus if the obligation is to abide by the rules of the scheme per se, it is not a fair play obligation, and if it is a fair play obligation it is only an obligation to do what is ideally fair, regardless of the de facto cooperative scheme. I have called my view act-justicism and contrasted it with what I call non-justicism, which holds that the mere involvement in a scheme does obligate one, on grounds of fairness.[18]

As a final attempt to be fair to non-justicism, I shall consider a statement of the principle of fair play that is given by H.L.A. Hart:

> 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.[19]

There is no requirement explicitly stated here that the scheme be just (although it is certainly a possibility that Hart has simply assumed that this is the case). The point seems to be that if one has benefited through restraint shown by others, then one has an obligation to restrain oneself as well, so that the others might benefit. All well and good. But what if one receives paltry benefits as compared with others and is expected to show greater restraint? And what if one would bring about a more proportional distribution if one failed to restrain oneself or restrained oneself less than expected? What reason could there be for doing more than is fair, ie. for doing what is expected, when that is more than fair?

Perhaps the following. Let us say that a cooperative scheme is

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[18]Many of these remarks also apply to rule-justicism which I shall discuss specifically in the next section.

[19]Hart, op. cit., as reprinted in Anthony Quinton, ed., Political Philosophy (Oxford: Oxford University Press, 1967), p. 61.

rational if and only if each person involved considers the benefits he receives worth the cost. A scheme can be rational even though it treats certain people much more fairly than others. Now let us suppose that A receives the benefits of a rational scheme, but is expected to bear disproportional burdens. It might be said that he has an obligation to bear his assigned burden because he is better off than he would be if there were no scheme at all. Even though he is treated comparatively unfairly, he is still benefiting. And these benefits are due to the restraint others have shown. So he, too, should show the restraint that is expected of him.

But this argument is unconvincing. It can certainly be admitted that he ought perhaps to show some restraint, but the central question is how much? All the others are really entitled to claim from him, it seems to me, is a fair amount, and not the expected amount if that is unfair. Suppose, in fact, he were to do what is expected of him even though it is unfair to him. His restraint simply causes others who are benefiting from the injustice to keep on benefiting. No man, however, can be expected or required to acquiesce this way in his own exploitation.[20]

The argument I have been criticizing is in fact very Hobbesian because it holds that a person has a prima facie obligation to abide by a cooperative scheme, regardless of its character, if it would make him better off than he would be in a state of non-cooperation, a state of nature. Analogously, Hobbes held that one should obey all the laws

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[20]All this is not to deny that there might be other reasons for him to acquiesce, if for example his not acquiescing would cause great harm. It may thus sometimes be morally obligatory for him to accept the unfairness, even just on the whole. But his obligation in these cases will not be based on fair play, but on benevolence or something else.

because civil society, no matter how bad, is better than a state of nature. But Hobbes felt this way because he looked on civil society as a very rigid cooperative scheme, as if a few acts of non-cooperation would lead to chaos. But cooperative schemes need not be like this. Non-cooperation or less cooperation than expected may lead to a fairer state of affairs if the scheme is not rigid. The fact that one is better off than one would be in a state of nature in no way shows that one should restrain oneself, on ground of fair play, more than is ideally fair. Non-justicism therefore fails as an account of the duty of fair play.

7. Rule-Justicism

Having disposed of non-justicism, we now need to look at rule-justicism, the view that one has an obligation, on grounds of fairness, to bear the burdens of a cooperative scheme one benefits from if it is generally just and good, and one has this obligation even in those cases in which disobedience would cause a fairer distribution than obedience. To say that a scheme is generally just, it will be recalled, is to say that, although it contains some unfairness, it is reasonably good, given what can be expected of ordinary human beings. Rule-justicism thus agrees with act-justicism that a cooperative scheme must have a special moral character before a person has an obligation to bear its burdens, but it disagrees with act-justicism in holding that proportionality is not the whole of fair play. It does not see it as the whole of fair play because it says that fair play sometimes requires one to bring about a distribution that is less fair and proportional than another one he could have brought about.

In order to examine this view, let us suppose that A has

received the benefits of a generally just scheme but is expected to bear a disproportional burden. It is admitted that in all respects the distribution brought about by his not cooperating is fairer than the one brought about by his cooperation. How, then, can it be held that fairness requires him to cooperate? It seems to me that the rule-justicist has the same kind of problem that was attributed to the non-justicist in the last section. It is true that A is benefiting from the scheme. And the scheme is not only what I have called a rational one--one in which each person considers the benefits worth the cost--but a rather good one. Given this it certainly seems reasonable that A should bear some burden, but the crucial question again is: how much? Again it seems to me that all the others are entitled to expect from him, on grounds of fairness, is a fair burden and not the expected amount if that is unfair. Although the scheme is generally just, A is in fact treated unfairly by it. It is difficult to see why fairness would require him to acquiesce in his own exploitation.

The following, however, is true: if the scheme is a generally good one and is not likely to be replaced by a better one, then A ought to be careful not to damage it or destroy it and this may require him to bear the burden despite its disproportionality. But this is not an obligation based on fairness, but on the bad consequences his disobedience would bring. In general, if a scheme is generally good and just, and if it is unlikely that it will be replaced by a better one, one can be said to have an obligation to act in such a way so as not to harm the scheme. And this may require one to obey it even though disobedience brings about a fairer distribution than obedience. But this is clearly not an obligation to bear one's burden on grounds of fairness; rather, it is a case in which utility overcomes fairness. The

obligation to obey cooperative schemes because they are generally just is thus not an obligation to obey them on grounds of fairness or fair play.[21] Rule-justicism therefore also fails as an account of the duty of fair play.

8. Conclusion

8.A. Final version of fair play. I conclude that act-justicism is correct, that the principle of fair play is expressed by FP4 and that it is a valid moral principle. For the sake of simplicity I shall rewrite the principle with the use of the following convention. If it is true of a person involved in a cooperative scheme that

> his cooperation would lead to a more just distribution of goods and evils--in accordance with proportionality--than his non-cooperation,

I shall say that the scheme is sufficiently just. The principle of fair play can thus be expressed, simply, as follows:

> FP: A person has a prima facie obligation to bear the burdens assigned to him by an existent cooperative scheme if
> 1) he receives its benefits and
> 2) the scheme is sufficiently just.[22]

We can contrast this with another principle which incorporates

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[21] It is often held that one has an obligation to obey the law when a society is generally just in the sense I have been discussing. I shall discuss this claim in detail in Chapter VII.6, and I will argue again that any such obligation is based on utility rather than fairness.

[22] It ought to be clear that to say of a scheme that it is sufficiently just is different from saying that it is generally just. In fact a scheme can be sufficiently just with respect to one act and not sufficiently just with respect to another. One will have an obligation to obey it in the first case, but not in the second. A scheme, moreover, will be sufficiently just on the whole if and only if it sets up the distribution of benefits and burdens in such a way that each act of bearing the burden will cause a fairer distribution than not bearing it. So its being sufficiently just on the whole depends on its being sufficiently just in all its 'parts,' and to say that it is sufficiently just is not to attribute some 'global' characteristic of justice to it, as one does when one says that it is generally just.

the principle of fair play, the principle of tacit consent, considerations concerning explicit promises, and certain utilitarian considerations, which we might call the principle of social cooperation:

> SC: A person has a prima facie obligation to bear the burdens assigned to him by an existent scheme of social cooperation if he receives its benefits and
> 1) he made an explicit agreement to abide by the scheme; or
> 2) he made an implicit agreement to abide by the scheme; or
> 3) the scheme is generally just and good, and not bearing the burden will damage it; or
> 4) the scheme is sufficiently just.

This principle, I suggest, is often confused with the principle of fair play, which is much narrower, and this accounts for the tendencies towards non-justicism, the view that we have an obligation to obey existent schemes of social cooperation regardless of their moral character, and rule-justicism, the view that we have an obligation to obey such schemes if they are generally just.

8.8. Fair play and conservativism. I shall end with a few reflections on this. As I have defended the principle of fair play, one has no obligation to bear the assigned burdens of a cooperative scheme if not doing so would lead to a fairer distribution than doing so. On the non-justicist version of fair play one does have an obligation to bear the burdens merely by being involved in the scheme. It should be clear, then, that fair play according to non-justicism is a much more conservative principle than it is on the version I have presented. It is more conservative because it counsels obedience to existing institutions and cooperative schemes regardless of their moral character and the consequences, with respect to fairness, of obedience. I think, moreover, that people generally take the principle of fair play in this conservative light, and that it is used to demand obedience to authority when

it is not justified. What I have tried to show, however, is not that the principle of fair play is invalid, but that the conservative, non-justicist interpretation of it is invalid. Such an interpretation, I hope to have shown, rests on an insufficient understanding of the distributive considerations upon which fair play rests, in particular the principles of identity and proportionality. I am saying, then, that the principle of fair play is valid, but it is a much less conservative principle than one might originally think. It follows from this that whether it can ground an obligation to obey the law of sufficient strength is also much less obvious than it was at first sight. But this will be discussed in Chapter VII.

One last point. It does not follow from this version of fair play that if one has no obligation to bear the burden assigned to him by a cooperative scheme--because the scheme is insufficiently just--that he has no obligation to bear some burden. He does. He has an obligation--on act-justicist grounds--to bear just as heavy a burden as is fair. And this may often be less than the burden assigned, but a burden, nevertheless.

CHAPTER VI

THE PRINCIPLE OF FAIR PLAY (II)

1. Loose Cooperative Schemes

1.A. Proportionality. I have been arguing that the duty of fair play rests fundamentally on the distributive principle of proportionality, the principle that each enjoyer be a producer and that his share in the good be proportional to his sacrifice, unless there be something about him or his situation that makes it fair to exempt him from producing or producing proportionately. My claim has been that the duty of fair play is just the duty to promote and maintain such a distribution. I have, however, avoided the general question as to when a distribution is proportional and have assumed that the notion of a proportional distribution is clear enough to enable me to get on with the discussion. There is, however, a problem that must be faced as to whether a certain kind of distribution is proportional in a loose cooperative scheme. Let me explain the problem.

Suppose we have a cooperative scheme that distributes benefits equally among equally deserving persons and requires of them equal burdens. Suppose that the scheme is connected, that is, if one person fails to cooperate, someone else must bear a greater burden or share less of a benefit. A person who fails to cooperate in this case clearly causes a disproportional distribution. He makes someone else bear a greater share of the burden or receive a lesser share of the benefit than is fair, and he benefits from this unfairness. The

injustices caused by violating connected schemes are tangible and palpable.

But what happens if the scheme is a loose one? Let us recall that in such a scheme it is possible that some get out of bearing their burdens without it being the case that others are adversely affected, ie. non-cooperation does not cause others to receive less benefits or bear greater burdens. There is a possibility of what Rawls calls a free benefit or what we might more accurately call free non-cooperation. Suppose, then, that someone can violate our scheme without hurting anyone. Is it unfair for him to do this? Does it violate proportionality? This is the question I shall take up in this chapter.

There are many who think that non-cooperation in such a case would be unfair. Rawls, for example, holds that in such a case

> a person who has accepted the benefits of the scheme is bound by the duty of fair play to do his part and not take advantage of the free benefit by not cooperating.[1]

I agree with this, but I think it needs some arguing. After all if a person fails to cooperate, at least one person is better off and no one is worse off. The state of affairs caused by non-cooperation is Pareto Optimal[2] with respect to the state of affairs that would result from cooperation. How could it be reasonable and moral to forego such a good? How could fairness require it?

1.B. The importance of loose schemes. Before trying to answer this, let me say a word about the importance of this subject to our general

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[1]"LO," p. 10.

[2]One distribution is pareto optimal with respect to another if it makes at least one person better off and no one worse off. This idea was suggested by the economist Pareto, Manuel d'economie politique, (Paris: V. Giard and E. Briere, 1909). The concept of Pareto Optimality has been used a great deal in welfare economics.

topic. First, it should be fairly obvious that many of the most important schemes of social cooperation, whether they are backed by the law or not, will be loose. Consider, for example, a taxation system in a large and complex society. Certainly non-cooperation by one man is not going to make any noticeable difference. But that does not seem to give him a reason for avoiding payment. Or consider the case of voting where the vote of any one man is insignificant. Yet it still seems that he ought to vote. We have come across these cases before and it is just these obligations that the various utilitarian doctrines we looked at were unable to account for. I have been suggesting all along that the principle of fair play will give us an account.

Secondly, it should also be plain that legal systems will almost always be loose cooperative schemes, that is, there will be many instances when one can break the law without hurting anyone. But those who believe in a strong obligation to obey the law certainly will not think that this is a good reason for breaking the law. Moreover, many of the most important and controversial cases of law-breaking are cases of just this sort, for example, many of the acts of peaceful and non-violent civil disobedience that have occurred in this country in the last decade. If the principle of fair play is to ground a prima facie obligation to obey the law strong enough to cover these cases, then it must be shown that free non-cooperation is at least sometimes prima facie unfair.

This topic is thus important both with respect to the general theoretical considerations I have been discussing and with respect to the particular case of the law.

2. The Indispensibility of Loose Schemes

2.A. Exemption-procedures: explicit. How can it be argued, then, that free non-cooperation is prima facie unfair? To answer this we must see why we have loose cooperative schemes at all. Suppose we are designing a cooperative scheme that will distribute benefits equally among equally deserving persons. How should the burdens be distributed? It seems rational to require only enough burdens for the benefits to obtain, for to require any more is to require needless unpleasantness. Suppose that we have 100 persons and could get by with 95 burdens. What shall we do? It would certainly be fair to decrease each burden a bit and create five new burdens so that there are 100 rather than 95 equal burdens. But this is not always possible. It may be that 95 burdens of a certain degree are required. Or the notion of decreasing the burden may not apply. Consider voting. One either votes or he does not. It is not clear how the burden could be decreased.

What, then, shall we do when such manipulation is not possible? It would seem quite reasonable to require only 95 burdens but find some fair way for deciding which people will be exempted. And this is so because since everyone is equally deserving, everyone is equally entitled to be exempted from the burden. No one has any more claim to the exemption than anyone else. But while not everyone can enjoy the exemption, everyone can be given an equal opportunity to enjoy it. A fair exemption-procedure, such as a lottery, does just this. With the use of such a procedure we do not require any more burdens than is necessary and our sense of fairness is satisfied.

The inclusion of an exemption-procedure changes a loose cooperative scheme into either a rigid or a connected one. It tightens the scheme by removing the slack that allows some instances of non-

cooperation to have no effect on the rest of the scheme. Can we, then, do without loose schemes altogether?

To answer this, we must note that there are two ways of conceiving how an exemption-procedure can be built into a scheme. We can first conceive of a scheme as being constituted by certain rules, which can be broken a certain number of times. Suppose that each individual appeals to some explicit source which tells him just when he may break the rules and the source decides this on the basis of a fair procedure. This 'source' need not be a person; it could be a machine programmed to allow rule-breaking a certain number of times, picking people at random. I will call this kind of procedure an explicit exemption-procedure. A draft lottery system can be seen as such a procedure, allowing a certain number of persons to get out of the requirement of universal service.

We can distinguish two kinds of explicit procedures. In the lottery case, the agent appeals to an external source, an outside authority, for a decision on his case. I will call this an authoritative procedure. But it might also be possible for a person to use a procedure he can work by himself, in order to exempt himself from following a certain rule. To use an example given by Smart in "Extreme and Restricted Utilitarianism,"[3] he might figure out how many people are involved in the scheme and how many could break the rule and conclude, for example, that one out of every twelve acts of rule-breaking would be permissible. He might then throw dice and break the rule only if a certain number came up. If everyone did this, the probability is that the rule will be broken only enough times to get all the free

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3J.J.C. Smart, Philosophical Quarterly, Vol. 6 (1956), reprinted in Foot, ed., op. cit.

benefits without hurting anyone. I will call this kind of procedure an individual procedure.

2.B. Exemption-procedures: implicit. It is also possible to conceive of an exemption-procedure as being built into the rules of a cooperative scheme. In such a case the rules will tell us not to do acts of certain kinds except in certain kinds of situations, that is, they will contain both a prohibition-clause and an exemption-clause. The exempting situations will be ones in which it is both fair for everyone to act contrary to the prohibition-clause and will not decrease the benefits brought about by the scheme. Consider, for example, our preference for the rule 'Don't cross a well-kept park lawn unless not doing so would have very bad consequences' over just 'Don't cross well-kept park lawns.' In such a case the exemption-procedure is built into the rule and makes the cooperative scheme more efficient without sacrifice of fairness. I shall call this a case of an implicit exemption-procedure.

To sum this up, there are two kinds of exemption-procedures, explicit and implicit. Under the explicit kind, there are those that are authoritative--a person appeals to an external source for a decision--and those that are individual--he uses a procedure he can manage by himself.

2.C. Social costs. With the aid of these distinctions, it can be shown that in many cases we cannot do without loose schemes. There are three reasons for this and I will discuss them in turn.

First, the inclusion of an exemption-procedure will often involve an undesirable social cost. If the procedure is an authoritative one, for example, it will require setting up a social mechanism to tell

people when they may break the rules. Suppose a park lawn would survive if only twenty people crossed it per day. We might set up a machine programmed to give the green light to only twenty random persons when they press a button on it. The machine would be a kind of mechanical lottery, but it would be unsightly and hardly worth the cost.[4]

The same problem will arise for both individual and implicit procedures. Using an individual procedure a person determines whether his act of rule-breaking is permitted by appealing to a mechanical method he works by himself and using an implicit procedure he tries to figure out whether his act falls within an allowable class of exceptions. In some cases teaching people to do this and having them take the time to do it will not be worth the bother.

2.D. Theoretical impossibilities. The second reason why we have to have loose schemes is that it is often theoretically impossible to find a procedure which apportions exemptions fairly and removes completely the looseness from the scheme. To see this, let us look first at implicit procedures. On such procedures exemptions are built into the rules. But this is possible only when we have some idea of the kinds of situations in which exemptions can be made fairly, that is, to build exemptions into our rules, we need to be able to characterize exempting situations in general terms. But we cannot always do this. Consider a rule against crossing park lawns. An implicit procedure can be added to this by allowing exceptions when the consequences of

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[4]Of course whether 'it's worth it' will depend on the nature of the scheme. A high social cost will be acceptable for a procedure that exempts people from the draft, for instance, but not just to keep a lawn green.

refraining would be very bad. But it will still be possible for people to break this rule and not hurt anyone. And it will not be possible to 'pick out' further exemptions in terms of special features of the persons or their situations. In relevant respects everyone will be alike. At this point we will have to appeal to an artificial method, an explicit procedure.

This, however, also runs into problems. In order to remove the looseness from the scheme by means of an explicit procedure, we will need to know just how many instances of rule-following are necessary for the benefits to be produced and how many instances of rule-breaking can be borne. To know this it will be necessary also to know how many persons are involved and how many instances will arise in which people will want to break the rules. But these are usually not the sorts of things we can know precisely. The precise number of exemptions that could be allowed with respect to rules against crossing park lawns, for example, cannot be determined. For any number we pick it is likely that a few more or less would do just as well. What is usually needed is general cooperation and it is difficult to get any more determinate than that. If rough estimates of these things are made and incorporated into explicit procedures, it will still be reasonable to think that cases will arise in which a person can take a free exemption, even though the procedure does not allow it. The scheme, though tighter, will still be loose.

2.E. Overly complicated rules. The third reason why we need loose schemes is that exemption-procedures will often be too complicated for people to act on successfully. As we saw in discussing Brandt's version of Rule-Utilitarianism (II.4.A.), a rule which would have the

best consequences if everyone successfully followed it may have worse consequences than some other rule if everyone is taught it and attempts to act on it. The rule that is best in theory may be second best in practice. The same can be true for fairness. A rule may apportion exemptions that are ideally fair but fairness will be better served in practice if people attempt to act on a simpler rule which does not contain exemptions; people will mess things up if they try to act on the more complicated rule. It may be the case, for example,--and I shall discuss this in detail later--that the rule 'Obey the law except when the law is bad' is an ideally fair rule, but that if people attempt to act on it they will break too many good laws and that fairness will be better served if people are taught the simpler rule, 'Obey the law.' When we have two such rules, one of which is theoretically superior but practically inferior, I shall call the former a theoretical rule and the latter a practical rule.

There are many reasons why people may be unable to act successfully on theoretical rules. They may lack the knowledge to tell whether their act fits into a complicated class of exempted acts, they may lack the ability to discriminate what class of acts theirs falls into, they may tend to make judgments in their own favor due to bias, etc. Whatever the reasons, in these cases it will often be reasonable in practice to forego the attempt to build in an exemption-procedure and accept a loose scheme.

To summarize we have found three kinds of reasons why loose cooperative schemes exist:

1. The inclusion of a fair exemption-procedure may involve a social cost that makes it undesirable.
2. It may not be theoretically possible to frame a fair

exemption-procedure which completely removes the looseness from the scheme.

3. Fair exemption-procedures may be too complicated for people to act on successfully.

Whatever their 'ideal' demerits, then, loose cooperative schemes are a practical necessity.

3. Loose Cooperative Schemes and Fair Play

3.A. The behavior of others. Let us now get back to the question of what one should do if he can break the rules of a loose scheme without hurting anyone. Is it fair for a person to do this? Initially it seems that it is not fair because such a person is an enjoyer without being a producer. He thus violates the requirements that enjoyers be producers and that their share in the good be proportional to their sacrifice. The question, however, now becomes a question of whether it is fair for a person to be exempted from the requirement that he produce on the ground that not producing will not hurt anyone. In other words, it is a question of whether a distribution in which a few enjoyers are exempted from producing because not doing so will not hurt anyone is fair and proportional overall.

To answer this let us consider an example that was used in discussing the Generalization Argument (III.3.F.). Suppose we have a society of ten people such that benefits will be produced if at least nine of them pay taxes and suppose that it is not possible to set up a fair exemption-procedure which lets one person out. A comes along and holds that it is fair for him to be exempted because, since the others are paying, his act will not hurt anyone. He claims that his act falls under a fair exempting condition. He will also assert that he is not being arbitrary, like one who claims he need not cooperate because he is rich or white or aristocratic. The key fact about A is

his situation--that he can fail to cooperate without hurting anyone--and he would be willing to universalize his act and permit anyone in that situation to fail to cooperate.

It seems to me that the facts about his situation just do not make it fair for him not to cooperate. As I suggested in discussing this earlier, everyone would like to get out of paying taxes and there is nothing special about A that makes it fair that he get out of it rather than anyone else. To this it will be replied that what is special about him is his situation--the fact that he can fail to pay taxes without hurting anyone. But it is plain that others could have been in that position and he is in it only because others are willing to cooperate and pay taxes. That is, he is in that position only because others are generally cooperating and have restrained themselves from not cooperating. What he must show, then, is that a distribution in which he is allowed to get into that position and exploit it is fairer than one in which anyone else is allowed to exploit that position. But, by hypothesis, there is no difference between him and the others and so he cannot show this. It is therefore not fair for a person to fail to cooperate merely because his non-cooperation will not hurt anyone and benefits him.

A person who claims that such non-cooperation is fair is basically saying that he may fail to cooperate just because others are cooperating. If, however, the reason his act will not have bad consequences is something else--for example, someone else paid his taxes for him--then it may very well be fair for him not to cooperate. But, then, of course his reason is not merely that his act will not hurt anyone. What I am trying to rule out as unfair, then, are only those acts of non-cooperation that are possible because of the looseness of

the scheme, ie. only those acts that are possible because it is only general cooperation that is strictly necessary.

I also want to say that the obligation to cooperate here is rather weak, certainly much weaker than it is in connected schemes, in which one hurts someone by not cooperating. It will not take much to justify particular instances of free non-cooperation. My only point is that they are not justified on grounds of fairness simply because they are instances of free non-cooperation.

3.B. Cooperation and community. Against what I have been saying it might be suggested that the whole matter ought to be looked at in a different way. A person, it will be said, has no moral obligation on grounds of fairness to cooperate when not doing so would not hurt anyone. On the other hand, his cooperation in such circumstances expresses a sense of community. Such a person identifies himself with the rest of the social group and takes on the same burdens as the others. The willingness to do this, it will be said, is a good thing both for the community and the person, both a public and a private virtue. It is a public virtue because it strengthens the community when such willingness exists and it is a private virtue because it is good for the individual that he have such willingness. People need to participate in the life of the community, to align themselves with a social group. The willingness to cooperate even when it would not hurt anyone not to helps to fulfill this need. It is thus good for people to avoid free non-cooperation, even though it is not obligatory.

I certainly do not disagree with the positive thesis suggested by this account--that the willingness to cooperate when not doing so will not hurt anyone is both a public and private virtue. But it is

not incompatible with this that there is an obligation to cooperate in such circumstances. Moreover, if there is such an obligation, it, too, can be seen as resting on a sense of community. A person involved in a cooperative scheme receives benefits that are the result of everyone's effort. He could not have created them by himself. More generally, his welfare depends on the scheme of cooperation that exists within his social group. The claim that it is only fair that he cooperate if everyone else does and bear the burdens everyone else bears is the claim that he recognize obligations as a member of a community, whose benefits he receives. It is an obligation based on the fact that his well-being is bound up with the well-being of others.

Moreover, if this is correct, one who is moved to act by considerations of fairness is moved to act on the basis of his interrelations with his fellow men. He expresses in his actions the sense of community and solidarity every bit as much as, if not more than, the man who is moved to cooperate on the ground that his participation would be good for him and the community. That is, the sense of community is expressed <u>equally</u> by the view that avoiding free non-cooperation is obligatory and by the view that it is merely virtuous.

Perhaps the best way to attempt to solve this issue is to raise the question as to whether the members of a community have a right to be indignant with free non-cooperators. If free non-cooperation is unfair, there must be some <u>to</u> whom it is unfair and this can only be the other members of the cooperative scheme. Do they have the right, then, to be indignant with free non-cooperators? I think that they do, for much the same reasons I gave above (3.A.). They can point out that free non-cooperators are avoiding burdens they also want to avoid and that free non-cooperators can do this only because they, the cooperators,

are cooperating. Moreover, there is nothing special about the non-cooperators or their situation that differentiates them from the cooperators. It seems reasonable, then, for the cooperators to feel annoyed with the non-cooperators on grounds of fairness. The non-cooperators have gotten out of a burden unfairly.

To say this, however, is simply to repeat the arguments I gave in section 3.A. for the claim that free non-cooperation is unfair. One who wishes to defend the alternative account, then, must deal directly with my arguments and show that they are defective. As they do not seem defective to me, I will remain with the conclusion that free non-cooperation is unfair.

3.C. 'Conscientious' disobedience. There is a kind of case I would like to mention here although I will not discuss it in detail until the next chapter. Suppose that we have a loose scheme which involves a practical rule (cf. 2.E.). That is, with respect to the rule people are expected to follow, there is an alternative theoretical rule, which contains a fair exemption-procedure but is too complicated for people to act on successfully. Suppose someone claims that he is justified on grounds of fairness in breaking the practical rule in conformity with the theoretical rule. Such a person is not claiming he may break the practical rule just because doing so will not hurt anyone but because he is exempted from obedience by a rule which is ideally fair.

I shall call this kind of disobedience conscientious disobedience. There are two ways in which it might be conscientious. First, a person, A, may benefit personally from his rule-breaking, but he may feel that the theoretical rule accords him the right to do certain things which the practical rule unjustifiably violates. Consider, for

example, laws that prohibit a person from performing an act that affects only himself. Suppose our practical rule is 'Obey the law' and our theoretical rule is 'Obey the law except when it prohibits "self-regarding" acts.' A may feel he has a moral right to obey only the theoretical rule when it conflicts with the practical rule. He is not simply taking a personal benefit but believes he has moral grounds for this.

A person's rule-breaking may also be conscientious if he feels he has an obligation to break the practical rule, if, for example, obedience to a practical rule would require him to allow someone to be treated unjustly. In such a case, if the practical rule has sanctions attached to it, it may go very much against his self-interest to break it. In both these cases of conscientious disobedience, A's rule-breaking is very different from that of a man who breaks rules solely for his own gain. If A can be said to be cheating, it is a very sophisticated kind of cheating.

Nevertheless, it will surely be argued that the practical rule takes precedence over the theoretical rule in these cases. Though it would not be unfair for one to act on the theoretical rule in a social vacuum, it will be said that fairness requires that one obey a practical rule when it is part of a cooperative scheme. This point is similar to the point expressed by Practical Rule-Utilitarianism (II.4.) which holds that it is learnable and teachable rules that we ought to obey, rules which would maximize utility if everyone tried to act on them. The trouble with PRU is that it simply asserts that such rules ought to be obeyed without saying why. But now it may be argued that it is a requirement of fairness that one who receives the benefits of a scheme run on such rules ought to obey them.

The issue of whether fairness requires obedience to practical rules is at the heart of the question of whether there is an obligation to obey the law. I shall thus put off further discussion of this until the next chapter, VII.3.

4. Conclusion

I conclude that the fact that one can fail to cooperate in a loose scheme and not hurt anyone is not, in itself, a reason for non-cooperation. It may still be the case that fairness requires cooperation. It is important, however, to be very clear as to just what this conclusion is. It does not follow that it is always the case that one has an obligation on grounds of fairness to forego free non-cooperation in a loose scheme. This will be so only when the scheme is sufficiently just, according to other distributive considerations. Let me explain this.

In the argument above I have proceeded on the assumption that we have a scheme in which benefits are being distributed equally among equally deserving persons. In such a case they should bear equal burdens, even though not all the burdens are strictly necessary. Cooperating makes this distribution fairer than not cooperating.

But now consider a case in which benefits are distributed unequally among equally deserving persons. And consider a man who receives the short end of the benefits but is expected, let us say, to bear greater burdens than those who get large benefits. Suppose also that his non-cooperation will not hurt anyone. In this case, fairness does not require him to bear the assigned burdens, because a fairer distribution would be brought about by his non-cooperation, or by his cooperation to a lesser degree than expected of him.

In sum, then, whether one has a prima facie obligation on grounds of fairness to bear the burdens of a loose cooperative scheme when one can avoid them without hurting anyone depends on the overall distribution set up by the scheme. Given the overall distribution, cooperation may lead to a more proportional distribution or to a less proportional one. The whole point of my argument in this chapter has been just this: the fact that one's non-cooperation will not hurt anyone does not make the distribution caused by non-cooperation fair; other things being equal, it makes it unfair. But if other things are not equal, such non-cooperation may be fair.

Loose cooperative schemes, therefore, present no special problems. As with connected schemes one has an obligation on grounds of fairness to obey them if and only if they are sufficiently just, when cooperation leads to a fairer distribution than non-cooperation. In such a case one has a prima facie obligation, on grounds of fair play, to obey, even though non-cooperation may be Pareto Optimal.

In this chapter and the previous one I did two things. I examined the principle of fair play and tried to determine just why and exactly when it requires us to obey the rules of a cooperative scheme. I then concentrated on the special case of a loose cooperative scheme to show that if all other conditions are right, free non-cooperation is unfair. We are now in a position to apply all this to the law and determine whether there is a prima facie obligation to obey the law based on considerations of fair play.

CHAPTER VII

FAIR PLAY AND THE LAW

Is there, then, a prima facie obligation to obey the law based on considerations of fairness? To answer this let us recall that we can distinguish the following obligation-to-law principles:

OL1: Any citizen of any state has a prima facie obligation to obey its laws.

OL2: A citizen of a state which is just has a prima facie obligation to obey its laws.

I shall argue that neither of these can be justified on grounds of fair play. I shall look first at OL1--the claim that an obligation to obey the law exists in every state, regardless of its moral character.

1. Society as a Cooperative Scheme

As I suggested at the beginning of Chapter V to defend either OL1 or OL2 it will have to be the case that when we examine the concepts of law and society, we see that a society is necessarily a scheme of social cooperation, that citizens are necessarily persons who receive the benefits of such schemes and that obedience to the law is a burden assigned by the scheme to those who receive the benefits. If this is so it follows that every act of obedience to the law by a citizen is necessarily an act of bearing the burdens of a cooperative scheme. I shall accept this.

Now, if it is also the case that any act of bearing the burdens of a cooperative scheme by one who receives its benefits is prima facie

obligatory, it would follow that there is a prima facie obligation to obey the law that falls on the citizens of every state and OL1 would be justified. It should be plain, however, from all that has been said in the last two chapters that there is no such prima facie obligation--the fact that an act is the bearing of the burdens of a cooperative scheme is not all by itself a good reason for doing it. Such acts are prima facie obligatory on grounds of fairness only when cooperation would bring about a fairer distribution than non-cooperation.[1] Thus for there to be a prima facie obligation to obey the law in every state on grounds of fair play, it will have to be the case that every act of obedience to the law necessarily brings about a fairer distribution than disobedience. Is it reasonable to think that every act of obedience to the law has this feature?

1.A. Fair play and unjust laws. At first sight, it does not seem reasonable, for it is obvious that there are laws such that disobeying them will cause a fairer distribution than obeying them. An unjust law, for example, is one which, among other things, distributes some goods and/or evils unjustly and thus it will often cause a fairer distribution to break such laws than to obey them. This is not inevitable. It may be that circumstances are such that if one breaks such a law one will make things even worse. But this will not often be the case.

In general as I have defended the principle of fair play it looks as if whether one has had an obligation to obey a particular law will depend on its content and on the circumstances in which obedience

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[1]They would be prima facie obligatory on grounds of promising if the citizens of a state can be said to have made an explicit or implicit promise to obey the law. I argued in V.4.D. that they cannot in general be said to have made an implicit promise and it is even more obvious that they cannot be said to have made an explicit promise.

or disobedience is contemplated. One will have a prima facie obligation to obey it only if obeying it will cause a fairer distribution than disobedience. Therefore it seems that, on grounds of fairness, there is no obligation to obey the law as such, but to obey the law when doing so promotes fairness.

1.B. Aspects of a distribution. The proponent of OL1, however, has a reply to this and to see what it is, it is necessary to note that a distribution need not simply be fair or unfair but can be fair from one point of view and unfair from another. It may, for example, distribute good things in accordance with need--those who need more, get more--and so be fair on that criterion, but it may also give less to those who have worked harder and more to those who have worked less and be unfair on that criterion. Let us put this point by saying that, since there are several criteria for a fair distribution, a distribution can have many aspects and it can be fair in some aspects and unfair in others. Obviously, the question of whether any particular distribution is fair on the whole will involve weighing its fair and unfair aspects against each other to see whether the fairness is worth 'purchasing' at the price of the unfairness. Some of the most controversial social issues are of just this sort.

Given this, a proponent of OL1 can admit that, when a law is unjust, breaking it will often cause a distribution which from some aspect is fairer than the distribution caused by obeying it. And he can admit that if a social system were an ordinary cooperative scheme there would be no prima facie obligation to obey the law. But he will hold that a social system has certain special features such that, from another aspect, obedience to the law always causes a fairer distribution

than disobedience. The problem is to say just what is special about social systems that makes things turn out this way.

1.C. The social decision-procedure. What is special is that a social system is a cooperative scheme which includes a decision-procedure. Let me explain this. In order for the members of a society to benefit from it, there must be certain overall policies, ways of doing things, etc., that are put into effect throughout the society. But how are these policies to be decided? Since people differ to a great extent about what they want and what they think good, it is inevitable that there will be much disagreement over what these policies should be. There thus must be some kind of social decision-procedure to decide on the rules and policies. Without such a procedure, there can be no society. The various forms of government are different kinds of decision-procedure. In a monarchy, for example, decisions on social policy are made by one man; in a democracy they are made through a majority vote of the people or their representatives, etc. Every society must have some such procedure.

It is also true that the benefits of society will not be produced unless people generally abide by the decision-procedure. Such obedience is a burden because it will often require us to do things we do not want to do and things we do not think are the best thing to do. But if each man were to enter society fully intending to do whatever he wants to do and what he thinks best, there could be no society. To a large extent people must restrain their own desires and abide by the social decision-procedure, if there is to be a society.

Given all this, the proponent of OL1 will argue that we have a fair distribution of benefits and burdens when those who receive the

benefits of a social system also abide by the results of the decision-procedure, whether they like the results or not. This is so because general obedience to the decision-procedure is necessary for the benefit to be produced. Now, the basic results of the decision-procedure are laws. Thus, whenever one breaks a law he causes a distribution which is unfair in that someone who gets the benefits of the system does not abide by the decision-procedure and this is a kind of free-riding. Thus, every instance of obedience to the law causes a distribution which is fairer in the relevant aspect than the one caused by breaking it and there is thus a prima facie obligation to obey the law.

1.D. The 'necessity' of general conformity. This is a powerful argument,[2] but let us look at it more closely. The conclusion of the argument is this:

> C. A distribution in which all who receive the benefits of a social system abide by its decision-procedure is fairer than one in which some who receive the benefits do not abide by the procedure.

This conclusion is supposed to be based on the following 'fact:'

> F. For the benefits of society to be produced, it is necessary that people abide by the social decision-procedure.

Let us look at this 'fact' more closely. In what sense is conformity to the decision-procedure necessary? It is certainly not the case that every instance of obedience to the law is essential or the social

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[2]And an old one. I think it is the argument of the social contract theorist that remains when the requirement that people have consented to obey the law is jettisoned. A social contract theorist like Locke sees the obligation to obey the law as based on a reasonable implicit promise. What is left when it is denied that there is such a promise is the claim that it is reasonable for men to live in civil society rather than in a state of nature. But to do this they must be guided by the social decision-procedure rather than by their own desires and their own judgments as to what is right and wrong. Thus it is reasonable and fair that all who receive the benefits of society abide by its decision-procedure.

system will collapse. A social system is not a rigid cooperative scheme. It is also not the case that any time someone breaks a law, someone else suffers, ie. a social system is not a connected scheme. It is clearly a loose scheme; there are many possible instances of free non-cooperation. What is necessary then is general conformity to the decision-procedure. Within the context of such general conformity, much law-breaking will not have bad consequences.

But even this, it may be said, is too broad. If we are concerned with the mere existence of society and its basic benefits, then what is necessary is general obedience to some of the most fundamental laws, such as laws against murder, assault, theft, etc. And if we are talking about what is necessary for the production of benefits above this basic level, then what is necessary is that people generally obey the good laws, ones which set up reasonable schemes of social cooperation that really do produce benefits. If a law is severely unjust, then it will often be better if people disobey it and general disobedience of such laws might be a good thing. The skeptic with respect to the obligation to obey the law can argue then that the non-skeptic cuts things up too broadly and fails to make distinctions that should be made.

1.E. General conformity and fairness. Let us step back a bit and see just what the issue is here. The non-skeptic holds that a fair distribution will be obtained if everyone who receives the benefits of a social system obeys the following rule:

R. Obey all the laws.

He tries to back this up by appealing to the general necessity of conformity to this rule. But this appeal to general necessity does not

seem to work because the skeptic can argue that all that is needed is general conformity to something like the following, more specific, rule:

R'. Obey all the laws, except those that are bad and unjust.

But this makes plausible only the weaker claim that a distribution is fair when everyone who receives the benefits of a social system obeys the good and just laws. There is nothing prima facie unfair about breaking bad and unjust laws. How, then, do we decide whether it is R or R' that everyone ought to obey?

This problem is really an instance of a more general problem that I will now clarify. Let us say that a class of acts, M, is strictly necessary for the production of some benefits when the failure to perform an act in M by one person either causes the benefits to cease for everyone or causes someone else to receive less benefits or bear a greater burden. Bearing the burdens is strictly necessary if a scheme is rigid or connected. Let us say, also, that a class of acts, M, is generally necessary for the production of benefits when there are possible cases in which one can fail to perform an act in M without it having any adverse consequences.

Now suppose we have a class of acts, M, which is generally necessary for the production of some benefits. For many such classes it will be possible to think of a more specific class, MN, which is also generally necessary for precisely the same benefits. MN will do this by leaving out some of the acts in M which can be avoided without anyone being hurt. Suppose, for example, that M = voting and MN = voting except by those who are crippled. Both these classes are generally necessary for the same benefits. When we have such a situation, which

set of acts is prima facie obligatory, the general one or the specific one?

The answer is that it is sometimes one and sometimes the other. To see this, consider the case of maintaining a park lawn. Let us suppose that M = the class of acts of refraining from crossing the lawn and MN = the class of acts of refraining from crossing the lawn except by those with red hair. For the lawn to be kept up, let us suppose that either of these classes will do, that is, it is generally necessary that people do not cross the lawn or that people with non-red hair do not cross the lawn. But in this case it is the more general class that is morally significant. We feel that everyone has an obligation to refrain from walking across the lawn. Why?

The answer seems to be simply that it is not fair to pick out those who will be allowed to cross the lawn on the basis of the color of their hair. In other words, if we require only MN, people are exempted on the basis of an unfair exemption-procedure (cf. VI.2.). On the other hand, with respect to the class of voting vs. voting except by those who are crippled, it seems proper to choose the more specific description and this again is so because in this case it is fair to allow people to refrain from voting if it is a hardship for them to get to the polls.

In general it seems reasonable to say this:

> MN is to be preferred to M when requiring only MN fairly exempts a class of people from following the rule 'Don't do M;' otherwise M is preferable.

In other words, when MN does not exempt people in a fair way, there is a prima facie obligation to do M. But when MN does exempt people fairly, there is only a prima facie obligation to do MN. This is so because since the exemptions allowed by MN are both fair and do not

have any bad consequences, there is no reason to require them.

Now let us say that the class of acts R = the class of acts of obedience to the law and the class of acts R' = the class of acts of obedience to the law except when the law is bad or unjust. There will be a prima facie obligation to obey the law, on grounds of fair play, if it can be shown that requiring only R' exempts a class of people unfairly from following rule R. But now we are back where we began. The non-skeptic argued that such exemptions would be unfair because of the general necessity of obedience to R. But we have seen that the appeal to general necessity does not decide the matter because both R and R' are generally necessary. To decide whether we should choose R or R' we must first decide whether R' exempts people unfairly. So the appeal to general necessity does not decide the basic question of whether it is unfair for people to break bad and unjust laws.

2. The 'Practical' Argument

2.A. Theoretical fairness. Are there any other ways the non-skeptic can argue that the exemptions granted by R' are unfair? I want to argue that he cannot show that they are theoretically unfair but must argue that they are practically unfair. Let me explain this.

In the last chapter (section 2.E.) I distinguished theoretical from practical rules. Theoretical rules include a fair exemption-procedure and practical rules do not, but practical rules are superior in practice, that is, a better state of affairs will be obtained if people generally try to act on them rather than on theoretical rules. Now, I think that the best argument remaining for the non-skeptic appeals to the practical superiority of R over R' and the claim that fairness requires that one obey practical rules when people are

incapable of acting successfully on theoretical rules. To argue in this way, however, is to admit that the exemptions allowed by R' are theoretically fair. It seems to me that this should be admitted.

To see why it should be admitted let us consider the following facts:

First, if everyone successfully acted on R' rather than on R a better state of affairs would come about. All the good laws would be obeyed and the injustices caused by the bad laws would not occur. Such laws, if generally disobeyed, would become unenforceable and would cease to be laws.

Secondly, those who break the law, acting on R', cannot be accused of selfish free-riding. They are breaking the law because it is bad and their disobedience will most likely be conscientious rather than self-interested. They also may be very conscientious about obeying laws that are good and just.

Thirdly, some adherence to R' is necessary for a good society. This point is expressed well by Bertrand Russell and John Rawls:

> . . . democracy, though much less liable to abuses than dictatorship, is by no means immune to abuses of power by those in authority or by corrupt interests. If valuable liberties are to be preserved there have to be people willing to criticize authority and even, on occasion, to disobey it.[3]

> If straightway, after a decent period of time to make reasonable political appeals in the normal way, men were in general to dissent by civil disobedience from infractions of the fundamental equal liberties, these liberties, I believe, would be more rather than less secure. Legitimate civil disobedience properly exercised is a stabilizing device in a constitutional regime, tending to make it more firmly just.[4]

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[3]Bertrand Russell, "Civil Disobedience and the Threat of Nuclear Warfare," in H.A. Bedau, ed., Civil Disobedience (New York: Pegasus, 1969), p. 156.

[4]Rawls, "The Justification of Civil Disobedience," in Bedau, op. cit., p. 251.

These facts are, I think, incontrovertible.

What, then, is wrong with acting on R'? In fact, if occasional adherence to R' is helpful, why not constant adherence? If men were to break all the unjust laws (and only these) this would be an even greater check on tyranny. Certainly the only problem with allowing men to do this is that it seems that they cannot do it successfully. If allowed and encouraged to act on R', men will break good laws as well as bad and chaos will ensue. The human animal, it will be said, cannot be allowed too much discretion in these matters. Thus, if it is unfair to break bad laws, it can only be so because of the practical inferiority of R' to R. There is nothing theoretically wrong with R. Let us, then, turn to the practical argument.

2.B. The practical argument. The practical argument has two premises:

1. Although theoretically superior, the rule R' is practically inferior to the rule R.
2. Fairness requires that one obey practical rules when people are unable to act successfully on theoretical rules.

The conclusion is that one ought to obey R, that is, one has an obligation to obey the law as such.

I believe that this kind of argument is really at the heart of most attempts to argue that there is an obligation to obey the law. Perhaps the most typical objection to civil disobedience goes something like this: If civil disobedience is allowed, then men may pick and choose which laws to obey and this is intolerable. Surely behind such an objection is the fear that if men are encouraged to judge whether they should obey the law on the basis of its content and the consequences of their acts, they will abuse the privilege and this will lead

to intolerable social disorder and chaos. As one author has put it, it is dangerous to allow "every man to act on his own private judgment where conflicting human interests are concerned (allowing, in other words, each man to judge his own case) . . ."[5] If the private judgment of each man was infallible, then there would be no problem; but it is notoriously not infallible and cannot be given free reign.

Consider also those who object to civil disobedience on the grounds that law-breaking inevitably leads to the destruction of society. Taken literally this is clearly false, since much law-breaking is tolerable and has nothing but good consequences. But behind this view probably lies the feeling that if law-breaking is allowed in certain types of situations, then everyone must be taught that they can break the law in that kind of situation and this will be abused. Once again the assumption is that in certain moral matters people cannot be allowed too much discretion.

2.C. A question of ideology. I also want to suggest that conceiving of the issue this way also explains the ideological nature of the dispute about the obligation to obey the law. Suppose premise 2 is accepted. Then whether there is an obligation to obey the law depends on whether people can be allowed to act on a rule like R' without intolerable social consequences. But whether one thinks that people can be allowed such discretion or not--and exactly how much discretion--will depend on one's beliefs or presuppositions about human nature. If a conservative is one who believes that people are incapable of handling too much freedom, then we can see why he tends to believe in a rather

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[5]Jeffrie G. Murphy, "Violence and the Rule of Law," Ethics, Vol. 80 (July, 1970), p. 320.

strong obligation to obey the law. The less the faith in human nature, the stronger the obligation is felt to be. Consider, along these lines, Thomas Hobbes, whose belief in a near absolute obligation to obey the law was accompanied by the belief in the absolute selfishness of every human being. On the other hand, the liberal is more willing to countenance civil disobedience and other violations of the law, and he is also likely to be more optimistic about the potentialities of mankind. At the extreme is the anarchist who denies entirely the need for law and whose faith in human nature is great.

These kinds of beliefs, I have said, are ideological, and all I mean by this is that they are an essential part of any coherent political philosophy and the grounds for believing them are rarely crystal clear. Premise 1 thus raises complex ideological, psychological and sociological issues. In this chapter I shall be mainly concerned with the more narrowly philosophical and moral issue concerning the validity of premise 2--that fairness requires obedience to practical rather than theoretical rules. I will, however, make a few comments on the ideological issue in section 5. I now turn to the examination of premise 2.

3. Conscience vs. the Law

3.A. Conscience and universalizability. Let us suppose that A knows that a certain law is either unjust or bad and his breaking it will not have bad consequences. By breaking it, then, he breaks a practical rule in conformity with a theoretical rule. How can it be argued that this is unfair? It cannot be said that he has been unfairly picked out for exemption to the rule because, by hypothesis, the theoretical rule apportions fair exemptions. Moreover, since he breaks the rule because he feels he ought to or has the right to, his disobedience is

conscientious. He is not merely exploiting a free benefit, getting something for nothing.

Let us consider the following argument:

> . . . we ought to be able to see the advantage of having a public decision procedure (a Fair Rule of Law) for the binding resolution of controversy. The workability of such a procedure presupposes the willingness of each man governed to be prepared to act against his own particular judgment when such action is dictated by the decision procedure. Each man calls on others to do this (calls on Maddox, for example, to obey the law of the land even if he disapproves of it), and those who make such a call must, in fairness, be prepared to do likewise. This imposes upon every man a prima facie obligation to act against his own private judgment in circumstances where the law so requires.[6]

A's reply to this will be that he does not call upon each man 'to act against his own particular judgment when such action is dictated by the decision procedure.' If that were so, then in fairness, he would be obligated to answer the call as well. But he can say that he is only calling on men to act against their own judgment when their judgment is wrong or when, though right, there would be bad consequences in acting upon it.

But how are men to know when their judgment is right? Surely telling them to act on their judgment only when it is right is tantamount to telling them to act on it all the time. One cannot make a moral judgment and then undertake another inquiry to see whether it is right. Nor are there external authorities one can consult for a final answer. Thus if men are told to act on their judgment whenever it is in fact right, they will act upon it even when it is wrong. In other words being told to act on your judgment only when it is right has the effect of being told to do whatever you think is right. And this will have intolerable consequences.

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[6]Murphy, loc. cit. (italics added).

3.B. Secrecy and morality. A might reply--do not tell them. If he says this he commits himself to acting on a principle which he is willing that all men act upon, but he is unwilling to make it known that he feels this way. There is a kind of duplicity about this in that his public pronouncement about what is right and wrong may not then accord with his private beliefs. But there have been those who have wanted to argue the stronger point that if a principle cannot be publicly taught, it cannot be a correct moral principle. Jonathan Harrison holds that:

> no principle is fit to be a moral principle unless it is fit that it should be universally adopted and applied . . . Our attitude towards a principle cannot be a distinctively moral one unless we are prepared to accept, and sometimes to recommend, its universal application.[7]

But so far as I can see Harrison gives no argument for this. Sidgwick, on the other hand, embraces quite openly the possibility that a correct moral principle ought not to be taught. In defending Utilitarianism, he entertains the possibility that a utilitarian may doubt whether the principle of utility, which approves of exceptions to social rules in certain cases,

> is adapted for the community in which he is actually living; and whether the attempt to introduce it is not likely to do more harm by weakening current morality than good by improving its quality. Supposing such a doubt to arise . . . it becomes necessary that the Utilitarian should consider carefully the extent to which his advice or example are likely to influence persons to whom they would be dangerous: and it is evident that the result of this consideration may depend largely on the degree of publicity which he gives to either advice or example. Thus, on Utilitarian principles, it may be right to do and privately recommend, under certain circumstances, what it would not be right to advocate openly; it may be right to teach openly to one set of persons what it would be wrong to teach others; it may be conceivably right to do, if it can be done with comparative secrecy, what it would be wrong to do

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[7]"Utilitarianism, Universalization and our Duty to be Just," in F.A. Olafson, ed. Justice and Social Policy (Englewood Cliffs, N.J.: Prentice-Hall, 1959), p. 79.

> in the face of the world; and even, if perfect secrecy can be reasonably expected, what it would be wrong to recommend by private advice or example.

Sidgwick recognizes that these conclusions are paradoxical, that the

> moral consciousness of a plain man broadly repudiates the general notion of an esoteric morality, differing from that popularly taught; and it would be commonly agreed that an action which would be bad if done openly is not rendered good by secrecy.

He goes on to suggest that the solution to this may be that the idea that there is an esoteric morality should itself be kept a secret:

> Or if this concealment be difficult to maintain, it may be desirable that Common Sense should repudiate the doctrines which it is expedient to confine to an enlightened few. And thus a Utilitarian may reasonably desire, on Utilitarian principles that some of his conclusions should be rejected by mankind generally. . .[8]

Despite the paradoxical nature of his thesis and despite the fact that it can involve us in duplicity, it seems to me that Sidgwick is right, that a principle can be a correct moral principle even if it would be bad to make it universally known. A moral principle is correct when it tells us just what it is about an action that makes it right or wrong. But there is no reason to believe that such features have to be simple and their presence easily ascertainable. They may be complicated and the attempt to ascertain their presence in particular situations may be very difficult. Consider also the tendencies in human nature to misjudge the facts through prejudice and various emotional responses. It is thus quite understandable that it could turn out to be dangerous to teach the correct principles, dangerous to teach the principles which would bring about the best possible state of affairs if everyone successfully acted upon them. There may be an understandable gap between ideal moral principles and the rules it is reasonable

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[8]Henry Sidgwick, The Methods of Ethics, seventh edition (Chicago: The University of Chicago Press, 1970, reissued in 1962), pp. 489-90.

to include in the moral code of a society.

It therefore seems to me that a rule may be a correct moral rule even though it would be dangerous to encourage everyone to act upon it. Moreover, there seems to be nothing wrong or unfair about acting on such a rule, so long as one is able to act on it successfully, and one is willing that others act on it when they can do so successfully. Thus the fact that it may not be reasonable to teach and encourage people to break laws that are unjust does not show that it is unfair for a person to break a law which really is unjust.

3.C. Equality of opportunity. Against my conclusion, the following argument may be given. It would be admitted that a rule can be a correct one even though it would be a bad thing to teach it universally. But it would be held that it is still unfair for a person to act on such a rule, rather than on a practical rule, because one who does is unwilling to give others the opportunity to act on that rule. He is unwilling to let them know that he thinks it is legitimate for them to act on that rule and thus he denies them some information. A person's opportunity to do something, however, can be denied by keeping him in ignorance of the fact that he can do it and this is just what a person like A does. He is exploiting an opportunity he is unwilling to tell others about and this is a denial of equal opportunity and hence unfair.

This argument is not decisive. Consider the following case: food is to be distributed among a group of persons. A is told where the food is but does not tell the others and eats it all himself. It is clear in this case that A has denied the others the opportunity to get food by keeping them ignorant. This is so because the information he denies them is both a necessary and a sufficient condition of their

being able to get the food, that is, without being told the place of the food, they cannot find it, but once they are told they can go and get it.

Now I think that it can be argued that A does not deny others the opportunity to act on the theoretical rule because the information he does not give them is neither a necessary nor a sufficient condition of their being able to act on the rule. It is not a sufficient condition because, as we have been assuming, they would not be able to act on the rule successfully even if they were taught it. So A's telling them about the rule would not itself give them the opportunity. This is unlike the food case in which all that is needed is that the others be told of the location of the food.

It is not a necessary condition for the following reasons: A himself came to see the appropriateness of the theoretical rule by thinking about it. He was not just taught it or told about it. Now the others, too, could come to see the appropriateness of the rule, if they had adequate critical abilities. Either they can develop these abilities or not. If they cannot, then nothing is a necessary condition of their acting successfully on the rule and A's telling them about the rule is thus not a necessary condition. If they can develop these abilities, it is reasonable to think that what they need is a better moral education, a better development of their reasoning and critical abilities. Their ability to come to see the appropriateness of and act successfully on the theoretical rule can be developed independently of their being told by A or anyone about the particular rule. Given the development of the appropriate abilities, they can think up the rule themselves. Thus it is not necessary that A or anyone teach them

the rule. A's particular actions, then, do not constitute a denial of opportunity.

4. Law and 'Subjective Duty'

4.A. Recapitulation. I have been trying to argue that it is not unfair for a person to act on a theoretical rule even though he has doubts about the wisdom of teaching and encouraging others to act on the rule. It is true that one must be willing to universalize one's action in the following sense: one must approve of others acting on the rule when they can do so successfully. And with respect to the law, if one feels that one is justified in breaking a bad or unjust law when the consequences of so doing are not bad, one must be willing that others also do the same thing. But this may be enough--one does not have to hold that others be universally taught and encouraged to do the same thing.

Let us go back to the considerations that made it seem that it is unfair to break the law. It was said that it is dangerous to allow men to act all the time on private conscience, that a decision-procedure is needed to settle social policy, and that this can work only when people abide by that procedure, even when it goes against their own private judgment as to what is right and wrong. And this, it is felt, gives rise to a prima facie obligation to act against one's private conscience, even when it counsels acting correctly on a theoretical rule. It is felt that acting on such a rule is unfair, but I have looked at several arguments for this and found them unconvincing. I shall now give an alternative account of these matters that will do justice to this feeling without forcing us to conclude that there is a prima facie obligation to act against conscience when conscience judges correctly.

4.B. Objective and subjective right. Moral philosophers have often made a distinction between two 'senses' of right or duty, an objective sense and a subjective sense. In the objective sense whether an action is right or wrong depends on 'objective' and 'public' features of it or on its consequences or both. The motives and other psychological characteristics of the agent are not relevant to a determination of its objective rightness. In the subjective sense, the rightness of an act is determined solely by the goodness of an agent's motives and other psychological features, by such things

> as whether the agent sincerely believed he was doing his duty, whether the temptation to do what he did was so strong that only a person of unusual firmness of will would have succeeded in withstanding it, and whether the agent's action was impulsive and provoked, or deliberate and unprovoked.[9]

It is possible that an act be subjectively right and objectively wrong, if, for example, it is done from good motives but turns out to have very bad consequences. And it can be subjectively wrong and objectively right, if done from bad motives but turns out, unbeknownst to the agent, to have characteristics or consequences that are good.

It is commonly held that typical judgments about the rightness or wrongness of particular acts or of kinds of acts use the objective sense of right and that judgment using the subjective sense are not really about the moral value of acts at all, but about the moral worth of the agent's character. The classical statement of this point is made by Prichard:

> . . . in reality the rightness or wrongness of an act has nothing to do with any question of motives at all. For, as any instance will show, the rightness of an action concerns the action not in the fuller sense of the term in which we include the motive in the action, but in the narrower and commoner sense in which we distinguish the action from its motive and mean by an action merely the

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[9]Brandt, in MLC, p. 111.

> conscious origination of something, an origination which on different occasions or in different people may be prompted by different motives.[10]

I believe that these points are valid, that when we are concerned to find out what we ought to do, we are concerned with knowing what is right in the objective sense. It is easy to see this by imagining asking someone what we ought to do and being given advice using the subjective sense of right, being told, for example, to act sincerely on what we think is right, to consider the matter carefully before action and so on. This advice need not be unhelpful and it may encourage us to go figure out for ourselves what we ought to do, but it does not really answer the question we raised. It does not tell us what action we ought to do. I shall thus accept the common view that judgments using the subjective sense of right are not really about the moral value of acts but about the moral worth of the agent. Thus the question in this study as to whether there is an obligation to obey the law is a question framed in terms of the objective sense of obligation and our question is whether certain acts of disobedience to the law are objectively wrong.

4.C. Principles of subjective duty. Despite the fact that our question basically concerns the objective rightness of actions and that moral philosophers have generally been concerned with such questions, it is not implausible to think that we can develop what could be called an ethics of subjective duty. Such an ethics would consist of a set of principles that would tell us just when a motive is a good one, just how carefully a person should reflect on his actions beforehand, what

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[10]H.A. Prichard, "Does Moral Philosophy Rest on a Mistake?" in Moral Obligation (Oxford: Oxford University Press, 1949).

temptations he should especially try to resist and so on. The principles of such an ethics will often be parasitic on an ethics of 'objective duty.' Suppose, for example, it is claimed that in certain kinds of situation one should, even though convinced of the rightness of a certain act, rethink the matter several times before performing it. The justification of a principle like this may be that one is more likely to do an act which is objectively right if one adheres to it. Many--though not all--of the dictates of a subjective ethics will be of this sort.

Let us now look a bit at what could be said concerning one's subjective duties when one contemplates acting on conscience. Let us consider the following account of conscience:

> The conscience with which each man is born is nothing but a sense of right and wrong; it is not also already provided with the facts and the interpretation of facts necessary for its own exercise. If conscience then seems infallible, it is only because we are taking it in its abstract purity . . . a conscientious examination of conscience discloses that it has some unique disqualifications to rule on the world. As soon as it judges any particular matter of fact, it has descended into a domain where it loses its abstract majesty and looks like one more party to the quarrel, with incomplete information, faced with a diversity of equally plausible readings of what information it has, and finally resolving the whole thing by a pronouncement which inevitably reflects the personal situation and biases of the person whose conscience it is.[11]

This may be a bit overstated but is nevertheless, I think, basically sound. A conscientious man will realize that the conviction that he is morally right about something, no matter how firm it is, is never conclusive proof that he is right. There are diverse ways in which he could have gone wrong. He could be mistaken about the facts or not have given certain facts proper weight; he may not have calculated the consequences of his intended act correctly; his judgment might be a

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[11]William Earle, "Some Paradoxes of Private Conscience as a Political Guide," Ethics, Vol. 80 (July, 1970), pp. 307, 311.

way of rationalizing personal prejudices and so on. It does not follow from this that he should not act or that he should surrender his personal autonomy to some external authority who will tell him what to do. What he should do, of course, is to try as hard as he can to examine the facts carefully, to make the best possible calculations he can of the consequences, and make attempts to eliminate personal bias. This is his subjective duty and if he does this he will be a morally worthy agent even if his act turns out to be wrong; and if he does not, he will not have acted in a morally worthy manner even if his act turns out to have been justified.[12]

4.D. Subjective duty and the law. Now let us consider a man who is contemplating obeying his own private judgment when it conflicts with the law. Suppose he believes that a certain law treats him and others unjustly and that he and they are morally justified in breaking it.

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[12]As I am using the term "subjective duty" one has a subjective duty to do certain kinds of acts, acts of contemplating, considering, weighing, taking care and so on. I call the duty to perform these acts a subjective duty because a) they are acts of thought and contemplation, b) they are acts that one is supposed to engage in before doing other acts that can affect the interests of oneself and others, that is, they are 'acts' (in a broad sense) that one is supposed to do before one acts (in a narrower sense) and c) they are the kinds of acts the performance of which makes one a morally responsible agent, even if the acts one does 'after' these acts turn out to be objectively wrong.

It might be held, however, that the duty to perform these acts is just as much as objective duty as any other--the difference being only the kind of act that it concerns. One who says this may wish to use the term "subjective duty" such that an act conforms to one's subjective duties only if it is done from certain motives, or with certain attitudes, rather than being preceded by certain mental acts. For reasons I have given I do not feel it unreasonable to use the notion of subjective duty in the broader sense in which I use it. But if one objects and insists that I am really talking about another kind of objective duty, that is all right with me. I am about to argue that proponents of OL1 confuse an objective with a subjective duty, but this could just as well be put in terms of confusing one kind of objective duty with another.

Once again it is reasonable to say that before acting on this judgment he has a subjective duty to be as clear as he can about the facts and consequences and attempt to eliminate personal bias.

There are also special complexities with this case. First, the judgment that a law or policy is just or unjust will often involve deep ideological commitments, judgments about what kinds of alternatives are possible, which are dependent on 'super-beliefs'[13] about social reality and human nature. He ought to be aware of the limited resources any human being has in being able to have adequate reasons for making such judgments.

Secondly, he should be aware that society is a complex entity, comprising many different kinds of forces such that an act of breaking the law may have unwanted consequences he could not possibly foresee. It could damage the social fabric in ways he would not welcome. There are many lessons along these lines that history can teach us.

There are also special kinds of consequences that should be noted. Given the fact that a social decision-procedure whose results are generally obeyed is necessary for a society, and that people think there is an obligation to obey the law, it is likely that one who breaks the laws will be perceived as unfairly violating the conditions of the social contract, especially by those who disagree with the law-breaker's claim that the law he breaks is unjust. But the fact that his act will be perceived this way may defeat his own goals and not get his point a fair hearing. This is why it is sometimes better to obey the law and attempt to get it changed by legal means, or, if one breaks the law, to do so in a manner that will exhibit a general respect for

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[13]This is a phrase used by Henry David Aiken.

the law by, for example, breaking the law publicly, peacefully, being willing to take the penalty and so on. But if one is unable to make clear his intentions in breaking the law and if the public is hostile, his law-breaking could call forth various kinds of repression and the destruction of institutions he values. So one should be especially concerned as to whether one's law-breaking is really going to make things better, rather than worse.

It does not follow from what I am saying that one should not ultimately act on one's private judgment against the law. What one must do is to take all these considerations into account as carefully as he can; after doing so it is still possible to conclude that one ought to break the law and only then will one's act be subjectively justified, only then will it be the act of a morally worthy agent. In sum, then, we can say that there is a subjective duty not to break the law unless one has taken into account the considerations I have mentioned very carefully. The ultimate moral relevance of the fact that acting on private conscience can be dangerous is that one must take all the dangers carefully into account before one's breaking of the law can be an act of a morally responsible agent.

I conclude, then, that there are grounds for the 'feeling' that there is something wrong with violating the law in conformity to one's own judgment, for one who does this without careful consideration violates a subjective duty, even if his act turns out to be objectively right. The skeptic thus can say the following--there is no prima facie obligation to obey the law on grounds of fairness, because there is nothing unfair about disobeying a bad or unjust law when the consequences of doing so are good. But, due to the dangers involved in any instance of law-breaking and the ways that private conscience

can lead us astray, anyone who breaks such a law has a subjective duty to have considered the matter very carefully before he does. Thus, while there is no prima facie obligation to obey the law, breaking the law is not a matter to be taken lightly and never an action to be performed without due consideration. Those who say that there is an obligation to obey the law are correct about the seriousness of the issue. Their error is misconstruing a subjective duty as a prima facie obligation.

5. The Ideological Issue

In the last few sections I have been trying to show that premise 2 of our practical argument (section 2.B.) is false, that fairness does not require one to obey practical rather than theoretical rules. Let us now look again at premise 1, which holds that teaching people to act on the theoretical rule R'--Obey the law, except when it is bad or unjust--would have bad consequences, and that the simple rule 'Obey the law' is practically superior. I suggested earlier that this claim is essentially an ideological one in that it involves 'super-beliefs' about human nature. Premise 1 is thus a difficult claim to evaluate in a study that is essentially analytical and non-empirical, but I would like to suggest a few considerations against it.

I do not think that people are usually taught very much about their subjective duties, about the need for reflecting very carefully before making certain kinds of moral judgment. In fact people are generally taught that morality is a matter of following authorities or acting on 'feelings' of duty and not a matter for considering reasons and arguments at all. Now it may very well be that among a group of people who are not taught of the importance of careful reflection and

reconsideration, it would be disastrous to instill a rule like R'. But consider a people who consider these matters very gravely and recognize that a responsible moral agent does not act except after due reflection. In such a case it may not be at all bad that a rule like R' be taught. It may be that people are unable in general to develop these kinds of critical and reflective abilities I am talking about. But then again it may be that they can. Genuine moral education of this sort has rarely been tried.

Secondly, suppose the rule R' were taught. According to premise 1 the consequences of this would be intolerable and I have assumed this means that since people would break so many laws society would break down. But need the consequences be so dire? It is most likely true that a society in which R' is taught will be less orderly than one in which R is taught. More laws will be broken, including ones that ought not to be broken. But it may also be a juster society in certain respects, in that many unjust laws will not be effective. Now the dialectic between order and justice is an old one. The most orderly society can be utterly repressive; where people are granted the freedom to exercise a broad range of rights, there is bound to be less order. Once again, though, how much disorder one is willing to tolerate involves one's ideological commitments and conservatives and liberals break up along the customary lines. My main point, however, is that the difference between teaching R and R' may not be a difference between society and no society but between a more vs. a less orderly but perhaps fairer society. If this is so the claim that the simple rule 'Obey the law' is a practical necessity fails and the preference for it must be based on avowedly political and ideological grounds.

Lastly, let us raise the question as to just why men break the

law. Certainly people who are satisfied with the way things are will not feel the need to break laws. Consider the following:

> In general, anarchical tendencies are the result of perceived injustice. And perceived injustice is normally the result of actual injustice. A society composed entirely of principled disobedients like Henry Thoreau would be the most stable imaginable, provided the laws and institutions were perceived as just. Those who spend their energies in excessive worry about the threat of anarchy would be better advised to apply their imagination and energies to the remedy of injustice.[14]

If this is correct it again shows that the teaching of R' might not be so disastrous in a just society and that in an unjust one it may have salutory effects. But the general question of why people break the law is a complicated one, worth much psychological and sociological study. It is just not at all clear that the fruits of such a study would support premise 1.

I conclude then that there are reasons for thinking premise 1 false and certainly no conclusive reasons for thinking it true. Thus, even if I am wrong about premise 2 and fairness does require obedience to practical rules, it still does not follow that there is a prima facie obligation to obey the law, on grounds of fairness. The dispute, in such a case, would rest on empirical and ideological grounds.

6. Fair Play and the Just Society

6.A. The just society. Up to this point I have been examining OL1--the claim that any citizen of any state has a prima facie obligation to obey its laws--and I have concluded that this cannot be defended on grounds of fair play. Let us now look at OL2--a citizen of a just state has a prima facie obligation to obey its laws. What is meant by saying that a state is just? If it means only that all the laws are just, then

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[14]Arnold Kaufman, "Justice and Injustice in the Selective Service System," in Finn, A Conflict of Loyalties (New York: Pegasus, 1968), p. 253.

there will be a prima facie obligation to obey the laws of the state, but this will be based on their content. It will really be an obligation to obey just laws and will not carry over to unjust laws. Moreover, in this sense of 'just state,' there are no just states, for there are unjust laws in every state.

What the defender of OL2 more likely means by a just state is a state which has some 'global' character such that it is possible for a state to have that character and still have some unjust laws. To defend OL2, then, on grounds of fair play, it will have to be the case that every act of obedience to the laws of such a state by a citizen is an act of bearing the burdens of a cooperative scheme which causes a fairer distribution, from some aspect, than does disobedience. Is it reasonable to think that every act of obedience must have this feature?

To answer this, let us look more deeply at what it means to say that a state or society is just. It could mean that a reasonable degree of social justice has been attained in the society, eg. people are able to do most of the things they have a moral right to do, there is no great inequality of opportunity with respect to the things that are considered worthwhile, there are laws that establish reasonable schemes of social cooperation so that citizens may increase their welfare, there are peaceful channels available for getting bad laws changed, etc. It is difficult to see, however, how it <u>follows</u> from the fact that a society is just in this sense that obedience to the law will always cause a fairer distribution than disobedience. There will still be bad laws such that breaking them would seem to cause a fairer distribution than obeying them. The fact that the society has some 'global' feature of overall justice does not seem to change this.

A defender of OL2 must therefore show how it follows from the fact that a society is just that it is fairer to obey even its bad laws than to disobey them. To do this he may say that what is important about a just society is that its laws are the result of a just and fair decision-procedure. And what is meant by saying that a decision-procedure is fair is, very roughly, that decisions are not made until 'the widest possible range of interests' have been considered, that each person affected by the decision has had the opportunity to have his interests heard. To see that something like this is involved in the notion of a fair procedure, consider a society that is just in the sense of containing much social justice, but whose decisions are made by a benevolent dictator, whose word is law. It is difficult to see in such a case why a person is morally bound by his bad and unjust decisions. Suppose, on the other hand, that decisions are made only after a genuine attempt to take into account the interests of everyone. Then, it will be said, one should obey the decision because it has been reached by a fair procedure. A fair distribution is thus obtained when those who accept the benefits of a fair decision-procedure obey it even when they feel that a mistake has been made.

6.B. Democracy. Let us try to make this more precise and convincing. We have already noted that a social system must have some kind of decision-procedure to settle policy. Such a procedure is a "necessary political device to decide between conflicting legislative proposals."[15] Now, what is the best sort of procedure? Let us say that the legitimate function of government is, roughly, to protect and promote the rights and welfare of its citizens and to do this equally and fairly. The best

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[15]Rawls, in Hook, op. cit., p. 9.

decision-procedure is one that is most likely to bring about this outcome. It has seemed to many that this is most likely to come about if some sort of electoral procedure is used which requires a particular administration, if it is to stay in power, to take into account the widest possible range of interests. Let us call such a procedure a democratic one. Thus democracy requires that

> governors should periodically satisfy a majority of electors in order to remain in authority. But in practice, that usually means attending to a great variety of sectional claims, in the hope that out of the mass of individuals governed, enough will be satisfied with the treatment they have received to put the government back in power. The majority principle is important in a democracy mainly as a way of ensuring sensitivity to the widest possible range of interests. It is this sensitivity which distinguishes democracies from plebiscitary distatorships.[16]

To put this procedure into effect and to ensure that interests are really taken account of, universal suffrage is probably required, for 'an interest may be safely disregarded if it has no votes.'[17] Other institutional forms are also needed. People should be able to put forward alternatives to officially sponsored policy and this requires freedom of association:

> If the electoral system is to ensure wide sensitivity, any group of electors must be free to propose its own candidates if none others show any interest in it. This implies freedom to associate to sponsor candidates and canvass on their behalf.[18]

It is also necessary that voters not be kept ignorant of various alternatives and this requires not only the formal rights of freedom of speech and the press but it must also be the case that

> the means of mass communication must not be effectively monopolized by one group, interest or party and the resources of all parties must not be so unequal as to deprive any of a fair hearing.[19]

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[16]Benn and Peters, The Principles of Political Thought (New York: Collier-Macmillan, 1964), pp. 399-400. I have used their conception of democracy throughout this chapter.

[17]Ibid., p. 400. [18]Ibid. [19]Ibid., p. 401.

Along these lines we can also add that there must not be any groups united around a variety of interests that are powerful enough always to get their way, thus effectively denying the ability of counter-interests to get a hearing. And lastly, despite all these procedures, it is still possibility that majorities do not respect the rights of certain minorities. Thus the general acceptance of something like the Bill of Rights, which is seen as placing restraints on how far groups may go in pursuit of their interests, is also necessary.

This is a conception of pluralistic democracy, which could be developed in much greater detail, but I think for our purposes we can distinguish three central elements: 1) the conviction that decisions will turn out for the best when as many interests as possible have an effective say in the making of them, 2) a set of institutions that are essential for ensuring sensitivity to all these interests, and 3) a set of sociological conditions that are necessary for the institutions to function, such as toleration of minority rights, an educated populace, etc. When the institutions and sociological conditions exist and a wide range of interests is thereby taken account of, a social system is a democracy. And when these conditions exist, a fourth and very important condition will be said to follow: 4) while it is possible for a democratic decision to be a bad one, there is a genuine possibility that such decisions can be overturned through the normal workings of the system, through legal channels.

I do not wish to be taken as implying, incidentally, that any particular system of government is a democracy in this sense. The question is an empirical one and also an ideological one. To hold that a particular system is a democracy one must hold, among other things, that a wide range of interests are being taken account of and this is

the kind of question over which there will usually be intense ideological disagreement. The question can also be raised as to whether this kind of system ever really can exist, as to whether, for example, constitutional liberties are not a cloak for the exercise of the interests of one class in society as against another, as Marxists assert. I shall assume that this kind of decision-procedure would be the best, if it were to exist, and am concerned to evaluate the claim that one ought to be guided by its decisions even when they are a mistake.

6.C. Preserving democracy. What sort of argument, then, can be given for the claim that fairness requires obedience to the results of a democratic decision-procedure even when they are unjust? To answer this let us first note that, as I have presented it, the value of a democratic procedure seems to be essentially instrumental. It is the kind of procedure that is most likely to bring about just and efficient laws. If one is committed to the view that it is the best procedure then one certainly ought not to damage it or to break it down. In general we can agree with John Rawls that

> we have a natural duty not to oppose the establishment of just and efficient institutions (when they do not exist) and to uphold and comply with them (when they do exist).[20]

From this alone, however, it does not follow that we ought to obey the procedure when its result is unjust and disobedience will not damage the procedure. That is, it does not follow from the fact that we have an obligation to maintain and preserve such institutions and their decision-procedures, that we have a prima facie obligation to obey them all the time. Our obligation from this source is to obey them just as much as is needed to keep them operating.

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[20]Rawls, in Bedau, op. cit., p. 241.

To argue in this way, moreover, is not to base the obligation to support such institutions on fairness, but on the bad consequences that damaging the institution would bring. The same is true of the following more sophisticated argument, also by Rawls. We admit that the democratic procedure is the best kind. Now, if we are interested in a good society we must have such a procedure and we must make it work. To do this, however, we

> run the risk of suffering from the defects of one another's sense of justice; this burden we are prepared to carry as long as it is more or less evenly distributed or does not weigh too heavily . . . we are not required to accept the majority's view unconditionally and to acquiesce in the denial of our and others' liberties; rather we submit our conduct to the extent necessary to share the burden of working a constitutional regime, distorted as it must inevitably be by men's lack of wisdom and the defects of their sense of justice.[21]

But to submit our conduct to the scheme 'to the extent necessary' to maintain it does not entail being obligated to obey it all the time, for such an obligation is not necessary. It follows only that we have an obligation to obey it when disobedience would damage the procedure. Once again the appeal here is essentially a consequentialist or utilitarian one and like most consequentialist arguments, it cannot ground the claim that there is a prima facie obligation to obey the procedure in <u>every</u> instance--for the consequences of obedience are not always good.

6.D. <u>Democracy and the equal opportunity to be heard</u>. Can this be argued on the basis of fairness rather than utility? Let us consider the following two rules:

> D. Always obey the results of a democratic decision-procedure.
> D'. Obey the results of a democratic decision-procedure except

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[21] <u>Ibid</u>, pp. 245-46.

> when they are unjust and the procedure will not be damaged by disobedience.

It is tempting now to try to go the route we went before and hold that we ought to obey D rather than D' because of its practical superiority and the danger of teaching D'. But this will not work. We have been unable to find any convincing argument to the effect that practical rules take precedence over theoretical rules. We have seen that there are usually dangers in trying to act successfully on a theoretical rule and this suggests a subjective duty not to act on such a rule without careful consideration. But it does not follow from this that there is anything wrong about acting successfully on such a rule.

What has to be shown, then, is that D really is a fairer rule than D', that the distribution caused by everyone who benefits from a democratic decision-procedure obeying it is fairer than one caused by some disobeying it, and that D' consequently apportions exemptions unfairly. Now we might try arguing this on the basis of the claim that a democratic procedure is not only of instrumental value but also a procedure that is intrinsically fair. It is a procedure that takes into account everyone's interests in coming to a decision and it might thus be said that it is fair in the sense of giving everyone an <u>equal opportunity</u> to be heard and have a say in decision-making. It will then be argued that the fact that the procedure is fair entails that the distribution caused by universal obedience is fairer than the one caused by some people breaking unjust laws. Does the fairness of the procedure carry over to the 'obedience-distribution' as suggested?

Before trying to answer this, let us note that the question can be raised as to how it is even possible that the procedure treat everyone's interest fairly and still issue a decision which is unfair to

some of those interests. This is not an idle question. It is claimed, for example, that the United States is a democracy and that all its people, including its black citizens, have an obligation to obey its laws. But there are laws and social policies that exclude black people from equal rights. How can it be said that such people are having their interests fairly taken account of? It is difficult to see this--to see how a system can treat all interests fairly, when there is social injustice and inequality.

Given this difficulty, the claim that the procedure is fair can only mean that a certain process was gone through before the decision was made, a process in which every legitimate interest was listened to. This might mean that the interest was represented by a party or pressure group, had its views supported by newspapers, had a genuine chance of influencing legislators, etc. But the fact that this process was gone through does not guarantee that the outcome will be fair.

Is it correct to speak of the procedure as a fair one? This is not so obvious. It may be the best one, the one most likely to give a fair result, but it is not clear that this makes it fair. I will admit, however, that it is reasonable to call it fair, since it takes into account everyone's interests. But how does the fairness of the procedure entail that a distribution in which those who are treated unfairly by the outcome obey it is fairer than one in which they disobey it? Suppose that a decision is unfair to interest, A, but the views of interest A had been expressed and listened to before the decision was made. Does it follow on grounds of fairness that those who have interest A are obligated to abide by the decision? I can see no rationale for this. It is clear that those who are adherents of interest A ought not to destroy the procedure, and if breaking the law will

damage or destroy it, there will be good consequentialist reasons for obeying the law. Moreover, it may be necessary for them to accept the results this time in order for them to get a better decision the next time. Thus there might be good consequentialist reasons for them to abide by the results. But once again their obligations here are not based on fairness. It does not follow that there is anything unfair about breaking the law when doing so will not damage the procedure or have other bad consequences.

There is another sense in which a democratic procedure may be held to be intrinsically fair. It may be held that people have a natural right to participate in the decisions that affect their welfare and that democracy ensures this right by having an electoral procedure and institutions through which interest groups can have real power in influencing policy. Assuming that there is such a right and that democracy preserves it, the question still arises whether the fairness of the procedure carries over the obedience-distribution and I still see no rationale for this. One has the right to participate and again one should not destroy the system that allows this. But again it does not follow that there is something unfair about breaking an unjust law resulting from it when doing so does not damage the system. I conclude then that the fairness of the procedure, even if it is intrinsically fair, does not carry over to the obedience-distribution and that there is nothing unfair about breaking unjust laws when this does not hurt the system.

6.E. Democracy and consequences. I conclude, then, that there is no prima facie obligation to obey the law, based on considerations of fair play, in a democracy. On the other hand, I have suggested that there

are often consequentialist or utilitarian reasons for obeying even unjust laws in a democracy and that our feeling that we ought to obey the law in a democracy is based on these grounds. I shall now try to make this conclusion palatable with some further points.

First, a point about moral intuitions. It seems to me that, faced with actual instances of laws they believe to be unjust, people feel very little obligation to obey them. Consider, for example, laws that prohibit people doing that which affects only themselves or consenting parties. Let us take as a particular example the laws against smoking marijuana in the United States and let us assume, as the facts seem to warrant, that the socially bad consequences of this activity are minimal. It seems to me that those who want to smoke marijuana feel very little compunction about breaking the law in doing so, and will refrain only if they fear getting caught. They do not even feel that a prima facie obligation to obey the law has been overcome. The law simply strikes them as having no moral force whatsoever. And I think one will find this to be true of other laws of this kind, eg. laws prohibiting certain forms of sexual behavior or suicide.

Now it may be countered that this proves only that these people are morally irresponsible because they do not feel an obligation here. But, on the other hand, the interplay between moral principles and our moral intuitions is an important one, and where a principle does not square with our intuitions that is certainly a point against it.

The kinds of laws I have been discussing--laws against 'self-regarding' acts--are laws that can usually be broken in private, without bad social consequences. But consider now unjust laws that can only be broken in public, such as a law that requires black people to sit in the back of a bus. I believe that there is hardly a man who

would feel a prima facie obligation to obey that kind of law, if he is a member of the group singled out. The law denies people their humanity and I think that most people would feel no obligation to acquiesce in it. Nevertheless, since the breaking of such a law requires a public act, it can have bad consequences. It may cause hostility, violence, repression and so on, and I think this can deter people on moral grounds (of course, there are obvious prudential grounds) from breaking such laws. My point, then, is that we begin to feel an obligation to obey this kind of unjust law only when the consequences of disobedience will be bad and if there are no bad consequences, we do not feel such an obligation. And this is to be expected if my conclusions are correct.

Let us consider another claim that is often made about democracy, that before breaking the law one should attempt to get it changed through normal, legal channels. This is often delivered as an intuitive and indubitable truth, but let us test it against actual cases. When homosexuality is prohibited, should a homosexual try to get the law overturned before engaging in sexual activity? Hardly. Such a law should not exist and it is silly to require a man to practice abstinence while he is trying to overturn it. There are cases, however, in which attempting to get the law changed through legal channels is reasonable. This will be so when simply breaking the law could damage democratic procedures or have other bad consequences. In such cases one should try to get the law changed peacefully if that is possible. One should also follow legal channels if the only way to remove an oppressive law from the books is to protest its existence in respectable ways. In such cases simply breaking the law may be an indulgence that is not warranted. There are also, perhaps, aesthetic reasons for

feeling that one ought to try first to get the law changed through legal means--a democratic system is a good one and it may be aesthetically pleasing to make it work rather than violate a law. But this hardly gives rise to a moral obligation. The reasons behind this dictum, then, are aesthetic and utilitarian and they do not entail a moral obligation to obey the law when it is unjust and the consequences of breaking it will not be bad.

6.F. Democracy and civil disobedience. Another important consideration that accounts for the feeling that one ought not to break the law in a democracy is this. Theoreticians of civil disobedience have distinguished two kinds, direct and indirect. A person engaging in direct civil disobedience breaks a law he believes to be unjust, in itself or in its application, while a person engaged in indirect civil disobedience breaks a law that he believes is just in order to protest another law or social policy he believes to be unjust. In a society such as ours social injustice is rarely the result of the enforcement of explicitly unjust laws; it is more likely due to the fact that nothing is done about unjust social conditions. Or it may be the result of governmental policies that we cannot 'break,' eg. foreign adventures such as the Vietnam War. It may seem, then, that breaking certain good laws will have an effect in getting the social condition or the policy changed. Thus people have trespassed in government buildings to try to influence legislators to pass fair housing laws or to stop the war.

The important point is this: if one undertakes indirect civil disobedience, one breaks a law which one has a prima facie obligation to obey. It is a good law, it sets up a fair cooperative scheme or prohibits some intrinsically wrong act. Thus one has a prima facie

obligation to obey it. So there is something wrong about most of the kinds of acts of law-breaking one would contemplate in a social movement. And if one can get the policy changed through peaceful and legal means this would be better.

Moreover, the consequences of breaking such laws are dangerous, not only because the system can be damaged but because one is likely, in breaking such a good law, to violate someone else's rights. It is illegal, for example, to block the doorways of public buildings. If one blocks a doorway, one might make a point against war but prevent someone from going into the building who has a right to do so. Or consider a disruption on a college campus which prevents classes from being taught. There will be students who protest that their rights to attend the classes they paid for are being violated. And they are correct. If the disruption of a campus or the blocking of a doorway is to be justified, it must be because the good consequences brought about by such acts override the violation of rights that occur. And, needless to say, this is not always the case. My main point, then, is that many of the most controversial and policially relevant acts of law-breaking will be of this sort and will thus be prima facie wrong. They can be justified only if their prima facie wrongness is overridden by other features. People who break these laws without being aware of or carefully considering these facts are certainly not morally responsible agents, and violate a subjective duty, even if their acts turn out to have been justified.

Let us consider another claim often made about civil disobedience, that those who engage in civil disobedience in a democratic society have an obligation to accept the penalty for their act. This, too, like the claim that one must first work through legal channels,

is often put forward as an indubitable truth, but it, too, has at most a consequentialist justification. Many of those who engage in civil disobedience are eager to get a certain law or policy changed. They are more likely to get a fair hearing for their views if they can minimize certain very probable interpretations of their act. There will be a tendency, for instance, for people to see such acts as revolutionary ones and to reject them for that reason. But by taking the penalty a person can express his commitment to democratic procedures and show that his rejection is not of the system but of a particular law or policy. In this way he will get a better hearing. He will also reduce damage to democratic procedures that his act can cause.

Aside from these reasons it is difficult to see why one is obligated to accept the penalty. If one's act of breaking the law is justified taking the penalty only compounds the evil. But to see this, consider how we would feel if the penalties were much more severe than they usually are for typical acts of civil disobedience, eg. life imprisonment for trespassing. It is not so clear, in such a case, that one should submit willingly. This explains, I think, the reason why students who break the rules of a university are so quick to clamor for amnesty, for the penalty is apt to be suspension or expulsion, which removes them from the scene. I do not think students would be so quick to demand pardon if the penalty were a small fine.

Consider also what would be the case if one broke the law, not to appeal to the conscience of the populace, but to disrupt normal procedures so that a price must be paid for unjust policies. Such disobedience may not be 'civil' but it may sometimes be justified. In such a case it may not be necessary to take the penalty to fulfill the point of one's act. There still might be reason to do so, though, if

one remains committed to the preservation of the decision-procedure of the society, but the reasons are less cogent than if one is appealing to conscience. My point then is that the dictum about taking the penalty is not an intuitive truth but based on the function of one's act and on its consequences.

I have been trying to argue in this section that, while there is no prima facie obligation to obey the law in a democracy, the feeling that there is has much validity. It is likely that there will be good reasons for obeying any particular law because of its content and consequences. This kind of consequentialist account provides all the obligation to obey the law that is 'needed.'

7. Summary and Conclusion

In this dissertation I have looked at the kinds of general moral principles or moral theories that are typically appealed to in order to ground the claim that there is a prima facie or universal presumptive obligation to obey the law. I have looked in turn at Act-Utilitarianism, Rule-Utilitarianism, the Generalization Argument, the Institutional Theory of Obligation, and the Principle of Fair Play. In several cases, I have argued that the principle is not a plausible one, not a valid moral principle. And I have argued that from principles which are plausible it does not follow that there is a prima facie or universal presumptive obligation to obey the law in every society or in just societies. None of the OL-principles can be justified. I conclude, then, that there is no obligation to obey the law because it is the law. The fact that an act violates the law is not in itself a good reason for not doing it nor is it the case that when an act violates the law, there will always be, as a matter of fact, a good reason for not doing it.

There is sometimes nothing whatsoever against an act of law-breaking.

We have seen, however, that those who hold that there is such an obligation are not entirely wrong. There is, first, a prima facie obligation to obey good laws. Such laws either prohibit acts that are wrong in themselves or set up reasonable schemes of social cooperation. In the latter case, the obligation is based on considerations of fair play.

Secondly, we can say that there is a non-universal presumptive obligation to obey the law, that is, it is likely that there will be good moral reasons for doing most acts that are legally required. Most acts of disobedience are not done in a vacuum and can have very bad consequences, even if the law is unjust. Moreover, this presumptive obligation is especially strong in a democracy since special care must be taken not to damage what is a morally worthwhile decision-procedure.

Thirdly, given these facts, it follows that a person who contemplates breaking the law has a subjective duty to consider these matters very carefully before he does, so and if he does so on superficial reflection he will not act as a morally responsible agent, even if his act turns out right. In Kantian terms, he may act 'according to duty' but not 'out of duty.' One's worth as a moral agent is tested by how seriously one reflects on certain kinds of laws before disobeying or obeying them.

The proponents of the obligation to obey the law, then, are right as to the gravity of an act of law-breaking. But they are wrong in their essential claim which is this: the fact that an act breaks a law (or conforms to one) is an intrinsically good moral reason for not doing it (or doing it) or is universally connected with such a reason. This is not so.

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