OXFORD

Political Obligations

GEORGE KLOSKO

POLITICAL OBLIGATIONS

This page intentionally left blank

POLITICAL OBLIGATIONS

GEORGE KLOSKO

OXFORD
UNIVERSITY PRESS

OXFORD
UNIVERSITY PRESS

Great Clarendon Street, Oxford OX2 6DP
Oxford University Press is a department of the University of Oxford.
It furthers the University's objective of excellence in research, scholarship,
and education by publishing worldwide in
Oxford New York
Auckland CapeTown Dar es Salaam Hong Kong Karachi Kuala Lumpur Madrid Melbourne Mexico City Nairobi
New Delhi ShanghaiTaipeiToronto
With offices in
Argentina Austria Brazil Chile Czech Republic France Greece
Guatemala Hungary ItalyJapan South Korea Poland Portugal
Singapore Switzerland Thailand Turkey Ukraine Vietnam
Published in the United States
by Oxford University Press Inc., New York

First published 2005

British Library Cataloguing in Publication Data
Data available
Library of Congress Cataloging in Publication Data
Klosko, George
Political obligations / George Klosko
p. cm.
Includes bibliographical references (p.) and index.
ISBN 0–19–925620–9 (alk. paper)
1. Political obligation. I. Title.
JC329.5.K567 2005
320'.01'1—dc22
0199256209
Data available
ISBN 0-19–925620–9
1 3 5 7 9 10 8 6 4 2
Typeset by Kolam Information Services Pvt. Ltd, Pondicherry, India.
Printed in Great Britain
on acid-free paper by
Biddles, King's Lynn, Norfolk

For

MGK

This page intentionally left blank

Contents

Acknowledgments

Published articles form the basis of, or are otherwise drawn on, in many chapters of this work:

'The Natural Basis of Political Obligation,' *Social Philosophy and Policy*, 18 (2001) (in Chapters 2 and 3);

'Political Obligation and the Natural Duties of Justice,' *Philosophy and Public Affairs*, 23 (1994) (in Chapter 4);
'Samaritanism and Political Obligation: A Response to Christopher Wellman's "Liberal Theory of Political Obligation. " ' *Ethics*, 113 (2003) (in Chapter 4);

'Multiple Principles of Political Obligation,' *Political Theory*, 32 (2004) (in Chapter 5);

'Reformist Consent and Political Obligation,' *Political Studies*, 39 (1991) (in Chapter 6);

Mark Hall and George Klosko, 'Political Obligation and the United States Supreme Court,' *Journal of Politics* 60 (1998) (in Chapter 7); and

George Klosko, Michael Keren, and Stacy Nyikos, 'Political Obligation and Military Service in Three Countries,' *Politics, Philosophy, and Economics*, 2 (2003) (in Chapter 8).

I am grateful to the publishers for allowing me to reproduce this material here. I am profoundly grateful to Mark Hall, Michael Keren, and Stacy Nyikos, for allowing me to draw on our coauthored work, including sections that represent their own research. I am similarly grateful to my colleague, Dave Klein, for allowing me to draw on our coauthored paper, 'Political Obligation: The Empirical Dimension,' presented at the 2001 meeting of the American Political Science Association in San Francisco.

Portions of this work were presented at the George Washington University, the College of William and Mary, University College London, the Social Philosophy and Policy Center, the University of Virginia Political Theory Colloquium, and at several meetings of the American Political Science Association. I am grateful to the audiences at all of these sessions for valuable questions and comments, as I am to my students in one undergraduate (2003) and two graduate classes (2001 and 2003) on political obligation.

I would like to acknowledge my gratitude to the participants in the ten focus groups conducted in conjunction with this work, to Kate Wood, then of the University Center for Survey Research, for leading

the early groups and instruction on how this is done, to Dave Klein, for coleading two of the groups, and to Cathy Gentry and my daughter Caroline, for transcriptions. I am grateful to my brother, Steve Klosko, and niece, Tami Klosko, for helping to organize focus groups, to the National Endowment for the Humanities for a summer grant, and to the Department of Politics and Graduate School of Arts and Sciences at the University of Virginia, and the Henry L. and Grace Doherty Charitable Foundation for financial support necessary for this project.

I am greatly indebted to John Simmons, University of Virginia Philosophy Department, who has been a constant source of inspiration and arguments ever since I have been at Virginia. I have benefited from countless conversations with Dave Klein, my sometime collaborator on the empirical side of this project, and from always helpful criticisms and suggestions from my colleague, Colin Bird. Other friends and colleagues who have read and commented on portions of this work or contributed in other ways during the many years I have worked on it are too numerous to recall. These include Ernie Alleva, Lawrie Balfour, Talbot Brewer, David Brink, Richard Dagger, Dan Devereux, Joshua Dienstag, Alan Dugger, Jerry Gaus, Luc Gregory, Leslie Green, Caroline Klosko, Loren Lomasky, Fred Miller, Don Moon, Christopher Morris, Debra Morris, Mark Murphy, Jan Narveson, Ellen Paul, Peter Rinderle, Kelly Sarabyn, Micah Schwartzman, Steve Wall, Stephen White, and Jonathan Wolff. I am also grateful to Dominic Byatt, my editor at Oxford University Press, for overseeing this work, and to Tanya Dean, for seeing it through the press. Finally, I would like to acknowledge the editors and anonymous readers for the articles listed above and for Oxford University Press, from whose criticisms I have benefited enormously. All these people have contributed to making this a better book, although I have not always accepted their criticisms or followed their advice. For what is left to criticize, I am of course responsible.

Given what a noted political theorist refers to as 'the loneliness of the long distance writer,' I would like to acknowledge my dog Siggy, for companionship. As ever, I am deeply grateful to my wife, Meg, and daughters, Caroline, Susanna, and Deborah, for moral support.

1
Introduction

In this study I defend and extend the theory of political obligation based on the principle of fairness developed in my previous work.

[1] At present, many scholars argue that there are no general political obligations, that either a theory of obligation is unnecessary or that a satisfactory theory cannot be established on the premises of liberal political theory.[2] In order to contest this view, I undertake four tasks. First, I defend a theory based on fairness from criticisms that have arisen, and in the course of doing so, develop what I view as a stronger theory, which combines the principle of fairness and two other moral principles. This multiple principle (MP) theory is presented in Chapter 5.

[1] G. Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992; new edn., 2004) [Klosko, *Principle of Fairness*]; and see the list of articles by Klosko in the Bibliography.Throughout, I treat the question of political obligation as basically interchangeable with why people should obey the law. I also generally use the terms 'obligation' and 'duty' interchangeably; for discussion of these concepts, see R. Brandt, 'The Concepts of Obligation and Duty,' *Mind*, 73 (1964); J. Mish'Alanai, ' "Duty," "Obligation," and "Ought",' *Analysis*, 30 (1969); H. L. A. Hart, 'Legal and Moral Obligation,' in A. I. Melden (ed.), *Essays in Moral Philosophy* (Seattle: University of Washington Press,1958). In addition, I do not construe political obligations in a narrow sense, as necessarily grounded in voluntary actions. Strong moral reasons to obey the law would constitute an adequate theory of political obligation, whether or not these reasons stem from 'obligations' in the strict sense. For discussion, see A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principles*], Chs. 1–2; Klosko, *Principle of Fairness*, Ch. 1.

[2] Simmons, *Moral Principles*; M. B. E. Smith, 'Is There a Prima Facie Obligation to Obey the Law?' *Yale Law Journal*, 82 (1973); J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), Ch. 12; see also the literature discussed in Chapter 2.

Second, by way of demonstrating the need for such a theory, I criticize other theories of obligation that have been advanced, especially ones based on natural duties of justice and on so-called 'reformist' consent. Third is empirical examination of attitudes towards political obligations. I examine how the state itself views political obligations by looking at judicial decisions in three quite different liberal democracies and at ordinary people's views of political obligations, through focus groups and some survey research. I also present a series of arguments to establish the importance of such information for normative political theory. Although my empirical inquiries are somewhat preliminary, I hope to work further in these areas in the future, and that the studies presented here might inspire additional work.

The fourth task, with which I begin, concerns current scholarly views that moral requirements to obey the state are unnecessary. Although such views clash with our basic intuitions (on which, more below), they are widely advanced in the literature. In Chapters 2 and 3, I examine 'nonstate' theories, according to which the traditional state can be done without. Such theories rely on private provision of the services states generally supply, mainly through free-market mechanisms. As we will see, in opposition to such views, I present a 'public goods' justification of the state, according to which the state is necessary to provide a package of public goods, without which we cannot lead acceptable lives. Dependence on public goods, coupled with moral requirements based on equal distribution of benefits and burdens of social cooperation, yields political obligations based on the principle of fairness. In criticizing nonstate provision of public goods, these chapters are intended to establish factual parameters within which overall discussions of political obligation should be conducted.

Briefly, the plan of this book is as follows. In this introductory chapter, I review the principle of fairness as a basis for political obligations and discuss the criteria a theory of obligation should satisfy. As just indicated, Chapters 2 and 3 provide factual parameters for discussion of political obligation. Chapter 3 builds on criticisms of nonstate theories in Chapter 2, in order to counter the most important objection to political obligations based on the principle of fairness that has emerged.

Chapter 4 critically examines theories of obligation based on the natural duties of justice. I criticize John Rawls's attempt to ground obligations on a 'natural political duty' and Christopher Wellman's related theory, based on a principle of samaritanism. Having shown that a natural duty theory cannot by itself ground the full range of political obligations, I argue in Chapter 5 that a natural duty principle

can still play an important role in extending the reach of a theory of obligation based on fairness alone. Thus MP theory combines the principle of fairness, a natural duty principle, and what I call the 'common good' principle in a theory that is able to overcome problems with theories based on single principles. Chapter 6 criticizes an alternative theory based on 'reformist consent.'

The remaining four chapters examine different sources of evidence concerning political obligations. In Chapters 7 and 8, I examine the reasoning on questions of political obligation of the judiciaries of the United States (Chapter 7), and Germany and Israel (Chapter 8). Reasons for using this source of evidence are discussed in Chapter 7 and defense of this particular choice of countries in Chapter 8. Finally, in Chapters 9 and 10, I discuss attitudes towards political obligation of ordinary people. The importance of this source of evidence is discussed at the beginning of Chapter 9. I believe the result of all these empirical studies is to make a theory of obligation based on the principle of fairness more likely and to increase the burden of justification for proponents of other, different theories, especially those that are not grounded in the supply of important benefits by the state. Chapter 11 presents my conclusions.

Before proceeding I should note an important qualification of my claims. This work is a contribution to liberal political theory. For our purposes here, it is not necessary to discuss exactly what constitutes liberal theory or where borderlines should be drawn. Let it suffice to say that, as I view this, liberal theory is based on the primacy of the individual and places great weight on the value of freedom ('negative freedom').[3] Among the major theorists in the liberal tradition from Locke and Hume to Mill, Rawls, and Nozick, there are significant differences about central issues. But all these theorists agree about the need for the state, and I believe that need for the state is central to liberalism. Questions concerning whether the state is necessary and what kind of states we require are important to political obligation, because if the state is in fact not necessary, then it is difficult if not impossible to demonstrate that we have moral requirements to obey it. Accordingly, I address the need for the state in Chapter 2. My concern with liberal theory limits criticisms of the state that I consider. I generally confine attention to forms of anarchism—mainly libertarian

[3] I. Berlin, 'Two Concepts of Liberty,' in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969); G. MacCallum. 'Negative and Positive Freedom,' *Philosophical Review*, 76 (1967). For general historical background to liberal theory see G. Klosko, *History of Political Theory: An Introduction*, 2 vols. (Fort Worth, TX: Harcourt Brace Jovanovich, 1993, 1995).

and philosophical anarchism—that proceed from premises internal to the liberal tradition. I pay far less attention to other perspectives, including what we can call full-fledged anarchism.[4] Although I believe that all forms of anarchism are wildly implausible, I do not know how to demonstrate this, nor do I feel that this is necessary in this work. The libertarian anarchists discussed in Chapter 2 argue that the services provided by modern states could be furnished by voluntary, nonstate mechanisms. Closely related philosophical anarchism allows the existence of the state, but argues that citizens do not have moral requirements to obey it. Through the influence of these forms of anarchism and other related doctrines, it is now widely held that a defensible theory of political obligation cannot be established on the premises of liberal political theory. It is this opinion that I seek to overturn.

1. The Principle of Fairness

Before proceeding, there are two preliminary matters that should be discussed: background on the principle of fairness, and criteria a successful theory of political obligation should satisfy. I begin with the former. As I have noted, the argument of this work proceeds from fairness theory, as presented in my previous work. Thus by way of background, I should say something about the principle of fairness and how it can be worked up into a theory of political obligation.[5] However, as we will see in Chapters 4 and 5, fairness theory has significant weaknesses. These are acknowledged in *The Principle of Fairness and Political Obligation*; in the current work, I attempt to overcome them.

The principle of fairness was first clearly formulated by H. L. A. Hart in 1955:

> [W]hen 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 a similar submission from those who have benefited by their submission.[6]

The moral basis of the principle is mutuality of restrictions. Under specified conditions, the sacrifices made by members of a cooperative

[4] For example, A. Carter, 'Presumptive Benefits and Political Obligation,' *Journal of Applied Philosophy*, 18 (2001.).

[5] See the literature cited in n.1. Exposition here draws on Klosko, *Principle of Fairness*, especially Chapter 2.

[6] H. L. A. Hart, 'Are There Any Natural Rights?' *Philosophical Review*, 64 (1955), 185.

scheme in order to produce benefits also benefit noncooperators, who do not make similar sacrifices. According to the principle, this situation is unfair, and it is intended to justify the obligations of noncooperators. The underlying moral principle at work in such cases is described by David Lyons as 'the just distribution of benefits and burdens.' According to John Rawls: 'We are not to gain from the cooperative labors of others without doing our fair share.'[7]

The principle of fairness operates clearly in certain cases, concerned with what we can call 'excludable goods.' If we assume that three neighbors cooperate in order to dig a well, a fourth who refuses to share their labors but later goes to the well for fresh water is subject to condemnation by the cooperators. There are complexities here, which, for reasons of space I cannot explore, but it seems clear that when a person takes steps to procure benefits generated by the ongoing cooperative labor of others, he incurs an obligation to share the labor through which the benefits are provided.[8] However, the principle is of greatest interest as it concerns the supply of benefits that, because of their nature, cannot be procured, or even accepted. These benefits are important public goods produced by the cooperative efforts of large numbers of people, coordinated by government.[9] The clearest instances are public goods bearing on physical security, most notably national defense and law and order. Because public goods such as these are nonexcludable, and so must be made available to a wider population (or the entire population of some territory) if they are supplied to only certain members, there is an immediate problem in explaining how individuals who have not accepted them incur obligations. Certain scholars argue that, because public goods are not

[7] D. Lyons, *Forms and Limits of Utilitarianism* (Oxford: Oxford University Press, 1965), p. 164; J. Rawls, *A Theory of Justice* (Cambridge, MA.: Harvard University Press, 1971) [Rawls, *Theory of Justice*], p. 112. The underlying moral principle is analyzed by R. Arneson, 'The Principle of Fairness and Free-Rider Problems,' *Ethics*, 92 (1982); see also C. Strang, 'What if Everyone Did That?' *Durham University Journal*, 53 (1960).

[8] In such cases involving excludable goods, we can assume that the benefits in question can be withheld from A. It should therefore be his decision whether he should receive them at the specified price. Because liberty is a central value, the decision whether A will have his liberty curtailed by having to contribute to some cooperative scheme should be made by him rather than by the scheme members. I should note the close relationships in such cases between obligations based on the principle of fairness and on consent; for discussion, see Klosko, *Principle of Fairness*, pp. 145–7.

[9] The relevant public goods are discussed in Chapter 2.

accepted, they cannot generate obligations under the principle of fairness.[10]

This conclusion is supported by a series of examples presented by Robert Nozick. Suppose a group of neighbors join together to set up a public address system for the neighborhood. If there are 364 other neighbors and each runs the system for one day, is Grey obligated to take over the broadcasts when his day comes? Nozick assumes that Grey has benefited from the scheme by listening to the broadcasts, but he would prefer not to give up a day.[11] What if Grey's neighbors form a street-sweeping association? Must he sweep the street when his turn comes? If he refuses to sweep, must he 'imagine dirt' when he goes outside, so as not to benefit as a free rider?[12] Nozick does not believe that Grey can attain obligations of this sort simply by having benefits thrust on him: the principle of fairness does not 'serve to obviate the need for other persons' *consenting* to cooperate and limit their activities.'[13]

I believe that the force of Nozick's examples is blunted by examination of the specific benefits they concern. It is striking that these are of little value. If we substitute examples of cooperative schemes providing more significant benefits, the argument from fairness will be seen to be more effective.

The principle of fairness is able to generate powerful obligations to contribute to nonexcludable schemes if three main conditions are met. Goods supplied must be (1) worth the recipients' effort in providing them; (2) indispensable for satisfactory lives; and (3) have benefits and burdens that are fairly distributed.[14]

Roughly and briefly, if a given benefit is indispensable to Smith's welfare, as, for example (and most notably) physical security, then we can assume that she benefits from it, even if she has not sought to attain it. This is especially important in the case of public goods such as security, the pursuit of which is not required for their receipt. Because of the importance of such goods, unusual circumstances would have to

[10] The need to accept benefits is noted by Rawls, *Theory of Justice*, pp. 113–16; similarly R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) [Nozick, *Anarchy, State, and Utopia*], pp. 93–5; R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp. 192–3.

[11] Nozick, *Anarchy, State, and Utopia*, pp. 93–4.

[12] *Ibid.* p. 94.

[13] *Ibid.* p. 95; his emphasis.

[14] These obligations are not only powerful but enforceable; see Klosko, *Principle of Fairness*, pp. 45–8. For reasons of space, I discuss only (1) and (2) in this context. Full discussion of all three conditions, and other aspects of fairness theory, is found in Klosko, *Principle of Fairness*.

obtain for Smith not to benefit. Though the class of indispensable public goods is perhaps small, it undoubtedly encompasses crucial benefits concerning physical security, notably national defense and law and order, protection from a hostile environment, and central public health measures.[15] That we all need these public goods, regardless of whatever else we need is a fundamental assumption of liberal political theory. It is notable that liberal theorists generally view providing them as central purposes of the state.[16]

A strong case can be made that Grey incurs obligations from receipt of indispensable goods, even if he does not accept them or otherwise seek them out. Consider national defense. Because this is a public good, Grey receives its benefits whether or not he pursues them. In fact, because the benefits of national defense are unavoidable as well as nonexcludable, it is not clear how he could pursue them even if he wished to. Because the benefits of national defense are indispensable, we can presume that Grey *would* pursue them (and bear the associated costs) if this were necessary for their receipt. If we imagine an artificial choice situation analogous to a state of nature or Rawls's original position, it seems clear that under almost all circumstances Grey would choose to receive the benefits at the prescribed cost, if he had the choice. But in the case under consideration, Grey's obligation to the providers of defense does not stem from hypothetical consent—that he would consent to receive the benefits under some circumstances—but from the fact that he receives them.[17]

In order for the principle of fairness to establish political obligations, the benefits in question must be indispensable in *two* ways. Not only must (1) the subject require them for an acceptable life, but (2) he must require them *from the state*. A good deal of confusion in the literature results from failure to recognize (2) as well as (1).[18] Receipt of some benefit from the state is not enough to establish obligations, even if the benefit is indispensable, if the subject could provide it himself or in association with like-minded others. For instance, access to clean water is necessary for acceptable lives. Let us assume that there is a drought and Blue and her neighbors are running out of water. By supplying

[15] Though I will not discuss other possible members of this class, I do not rule them out.

[16] Extensive discussion of points in this paragraph is found in Ch. 2.

[17] Discussion here draws on Klosko, *Principle of Fairness*, Ch. 2, which also considers and counters other possible arguments against obligations in these cases.

[18] C. Carr, 'Fairness and Political Obligation,' *Social Theory and Practice*, 28 (2002); also A. J. Simmons, *On the Edge of Anarchy* (Princeton: Princeton University Press, 1993), 258–9.

water off tanker trucks, the state could generate obligations in regard to what is required to support this enterprise. But if Blue could dig a well and gain access to sufficient water in that way, then she could justifiably refuse to support state water.[19]

One rule of thumb for determining if fairness obligations are established in a particular case is to ask if Blue would be willing to generalize her own noncontribution.[20] If this would mean that particular indispensable goods were not supplied, then she could not allow general abstention from contributing. But if she could produce the good herself, then generalizing her failure to cooperate in state provision would not mean that the good was not produced and so could well be acceptable to her. Thus in order for provision of a given benefit to generate obligations, recipients must not be able to provide the benefit through other means.

Assessment of conditions under which people are and are not able to provide indispensable benefits without state assistance raises complex empirical questions. These are examined in detail in Chapters 2 and 3. Empirical aspects of political obligations are not always recognized. I believe that, if they were, this would push discussion in a certain direction—towards strong connections between political obligations and receipt of important benefits from the state.

An additional advantage of an argument along these lines is its ability to ground obligations to support a core of state functions that are, again, central to traditional views of the services states should provide. Most notable are law and order and national defense, which are discussed from different angles in Chapter 2. Because the benefits in question are public goods and so provided to all inhabitants of the relevant territories, all inhabitants can be presumed to have obligations.[21] As we will see, other principles of political obligation, notably a natural duty of justice, encounter difficulties in grounding obligation to core functions. We will return to this subject in Chapter 4.

However, serious problems with the argument as developed so far are encountered as we attempt to move beyond government's core

[19] See Chapter 3, pp. 67–8.

[20] This follows from one of Rawls's formulations of the principle: 'the duty of fair play…requires one to abstain from an advantage that cannot be distributed fairly to those whose efforts have made it possible.' ('Legal Obligation and the Duty of Fair Play,' in S. Hook [ed.], *Law and Philosophy* [New York: NYU Press, 1964], p. 17).

[21] This presumption is rebuttable, if a given individual can show that he does not actually benefit from some public good or other, but the burden of justification is on him to show it. For discussion, see p. 61.

functions. It is these problems that motivate the move to an MP theory. Very briefly here, since their first inception, governments have been responsible for much more than providing indispensable public goods. For instance, a basic function of government is building roads. But in themselves, roads are not indispensable to acceptable lives, and so would not appear to be supported by the principle of fairness. Innumerable other goods provided by government are also not indispensable and so also appear to fall beyond the fairness argument. I believe this objection can be dealt with to some extent through what I call the 'indirect argument,' presented in *The Principle of Fairness* and discussed briefly in Chapter 5, and then through developing fairness theory into an MP theory. Explanation of these matters can wait until Chapter 5.

2. *Standards of Success*

Turning to the question of criteria, we must establish guidelines for our inquiry. Standards of success can significantly affect the theory of obligation that one develops. Scholars differ over the criteria a theory should satisfy. I will avoid detailed discussion here and attempt to provide standards that are relatively noncontroversial, although one criterion must be discussed in some detail.[22]

In regard to criteria, it is important to recognize that principles of political obligation are particular moral principles that exist in the context of our other basic moral principles and must be consistent with them.[23] For obvious reasons, I will not attempt to fill in this moral background here. However, I draw upon it freely—unavoidably—in subsequent discussion. For instance, given the moral and political views of liberal citizens, I assume that an acceptable (legitimate) government must be democratic, must be tolerably just, and not engage in wholesale violations of rights. These are virtually self-evident features of our moral views.[24] Though closely related to principles of political

[22] For different views of criteria, see Klosko, *Principle of Fairness*, pp. 2–6; Simmons, *Moral Principles*, Ch. 2; J. Wolff, 'Political Obligation: A Pluralistic Approach,' in M. Baghramian and A. Ingram (eds.), *Pluralism: The Philosophy and Politics of Diversity* (London: Routledge, 2000), pp. 182–7.

[23] For discussion of reflective equilibrium or the coherence method in moral argument, see Klosko, *Principle of Fairness*, pp. 16–26, with further references; also see Chapter 7.

[24] Detailed discussion of the political views of liberal citizens is presented in G. Klosko, Democratic *Procedures and Liberal Consensus* (Oxford: Oxford University Press, 2000).

obligation, they are distinct from them, but also help to shape our views on questions of political obligation. The same is true of more general moral beliefs, such as that we should keep promises, tell the truth, and not cause unnecessary suffering. These are among our basic considered judgments.[25] A satisfactory theory of political obligation must be consistent with them and can draw on them for support.

As it seems to me, the relevant criteria can be identified by looking at a theory of political obligation based on consent. In the liberal tradition, political obligations have traditionally been viewed as stemming from consent, and consent is generally recognized as a particularly clear means of establishing them.[26] It seems that if the population of a given territory freely and unanimously consents to government X, then at least for them, the problem of political obligation will be solved. The current skepticism about political obligations in large part stems from awareness that most citizens have not expressly consented to government and cannot be shown to have performed other actions that constitute tacit consent.[27] In recent years, other theories have been subjected to similar scrutiny.[28] But if some other theory could ground obligations analogous to those based on consent, it too would solve the problem of political obligation.

If a situation of unanimous consent is clearly satisfactory, we can gain insight into appropriate standards by examining reasons for believing this. There are four criteria that I think are intuitively clear.[29] First, an acceptable theory must be able to establish the obligations of all or most members of society. Ideally, obligations of all would be established. But since this could well be impossible, this standard can be relaxed to a certain extent, although the question of exactly how many or what percentage of inhabitants must have obligations could be a matter of controversy. Following John Simmons, we can use the term 'generality' to express this requirement.[30] As we will see in Chapter 5, 'generality' does not entail that a single moral principle

[25] For 'considered judgments,' see Rawls, *Theory of Justice*, pp. 19–20, 47–8.

[26] As Locke says: '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.' *Second Treatise of Government*, Sect. 119, in P. Laslett (ed.), *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988). For discussion of consent theory, see H. Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987).

[27] See especially Simmons, *Moral Principles*, Chs 3–4.

[28] References in n. 2.

[29] These are presented in Klosko, *Principle of Fairness*, Ch. 1. Discussion here draws on this.

[30] Simmons, *Moral Principles*, pp. 55–6.

must establish the relevant obligations. The requirement can be met by a number of principles operating in tandem. It would of course also be met if all or most all citizens consented to government.

The second requirement is that political obligations should be of limited force. In the liberal tradition, it is generally held that obedience to government is not unconditional. Though we have significant moral requirements to obey, these can be overridden by countervailing factors. For instance, a government that becomes tyrannical can lose its right to be obeyed, while obligations to obey specific laws that are unjust can also be not binding.

Closely related to these considerations, obligations to obey specific laws are generally viewed as prima facie rather than conclusive.[31] Although we have moral requirements to comply, these may not hold when all relevant factors are taken into account. By describing an obligation as prima facie, we are not saying that it loses its character as a moral requirement in the face of conflicting factors. The obligation in question—for example, one generated by a promise—is still an obligation, although, because of the additional factors, it could actually be wrong to comply with it. For example, if I promise to meet a student after class to discuss a paper but it turns out that I can take an accident victim to the hospital and save her life, it would be wrong to meet the student and let the accident victim die. But the continued existence of the obligation generated by the promise is seen in the fact that I would owe the student an apology or explanation—while the fact that what I had done was right would be seen in the fact that the student would be wrong not to accept the apology. Accordingly, the political obligations discussed throughout this work will generally be assumed to be prima facie obligations, while it should also be borne in mind that political obligations can be dissolved by unacceptable injustice.[32] That these requirements too are satisfied by obligations based on consent is seen in Locke's theory, which is the *locus classicus* for political obligations being overridden or dissolved by governmental injustice.

The third requirement is one of range. All the Western democracies, the governments that we are most likely to regard as legitimate, take on wide-ranging responsibilities. In addition to providing defense and law and order, they intervene in the economy and provide extensive social welfare programs, including redistribution of income. They also play a major role in education and cultural life, providing public schools and

[31] For brief discussion with references, see Klosko, *Principle of Fairness*, pp. 12–14.

[32] I avoid the question whether if a given obligation commits one to do something unjust the obligation is overridden or void *ab initio*.

universities, and supporting museums and cultural institutions. Numerous, additional functions could be added. A fully adequate theory of obligation must account for the entire range of functions. As I have noted, fairness theory must be supplemented by additional moral principles in order to satisfy this requirement, although considerations of simplicity and economy of explanation suggest that a theory that relies on fewer, broader principles is preferable to a theory with a larger number of principles. For ease of reference, this requirement can be referred to as 'comprehensiveness.' It too is satisfied by consent. As Locke says, in consenting to government, one agrees to be 'concluded by the majority,' and so is bound to accede to whatever the government decides.

There is an important qualification here. Analysis could reveal that the state has no right to claim authority in particular areas, for example, delivery of health care or education. This would most likely imply that moral requirements to support the state in these areas could not be established either. Such an outcome would not tell against a given theory of obligation. We cannot prejudge the state's sphere of legitimate operation. An adequate theory must support whatever range of functions is legitimate. Aside from commitment to public goods viewed as indispensable and others supported by the 'indirect argument,' this study take no position on the services the state should supply, and so on disagreements between conservatives and liberals (as these terms are used in the United States).

The fourth requirement can be referred to as 'particularity.'[33] Most individuals feel strongly that they are bound especially closely to the societies of which they are citizens or within which they reside. An adequate theory of political obligation should account for this connection. Certain theories—for example, ones based on consent or the principle of fairness—appeal to special relationships in which individuals stand to given governments, for example, by consenting to or receiving benefits from them. Other theories appeal to more nebulous notions of 'association.' However a given theory explains this special relationship, in an adequate theory it should be explained.

Let us pause to sum up. The four criteria discussed so far would be satisfied by general consent. In no small measure, I believe, the plausibility of consent theory stems from its ability to satisfy these standards, while the plausibility of the critieria is increased by the fact that they are met by the theory of obligation that is traditionally accepted.

[33] Simmons, *Moral Principles*, pp. 31–5.

3. *Fit with Existing Beliefs*

In addition to these criteria, there is a fifth condition I believe a satisfactory theory of obligation should satisfy, although I no longer believe this is a criterion for success.[34] In order to coincide with what people generally think about their own political obligations, a satisfactory theory should explain why citizens of existing societies—including, most likely, readers of this book—have moral requirements to obey the laws of their societies. Whether we should obey and why are pressing practical questions, which a fully adequate theory should address. One reason questions of political obligation are so important is because they help us realize what we are to do. However, explaining our obligations to our governments cannot serve as an additional criterion. In view of widespread adherence to various doctrines of anarchism, according to which there are no moral requirements to obey the law, to require that a successful theory establish obligations to existing societies unfairly biases one's theory in favor of the state. If this requirement is allowed, then these anarchistic views are simply ruled out. Although I believe these views are indefensible, this must be demonstrated rather than assumed.

It is clearly desirable to develop a theory of obligation consistent with the beliefs of liberal citizens. What citizens in fact believe is a major subject of this work; reasons why we should take this seriously are discussed in Chapters 9 and 10. Briefly, as the evidence shows—although with complexities—most people feel strongly that they are bound to obey the laws of their societies. As with other moral subjects, one thing we want an account of political obligation to do is to provide order and grounding for our basic moral sentiments.[35] That most people believe they have political obligations is conceded by prominent opponents of political obligations. For example, in spite of what he views as cogent arguments against the main theories of obligation, Simmons accepts this, viewing it as a puzzle to be explained. His explanation rests on purportedly self-interested indoctrination by government officials.[36]

However, even if we accept that most citizens believe they have political obligations, it is not clear exactly what this amounts to. Leslie

[34] Cf. Klosko, *Principle of Fairness*, p. 5. For discussion of this point, I am indebted to Colin Bird.

[35] For references on reflective equilibrium, see n. 23.

[36] A. J. Simmons 'Philosophical Anarchism,' in *For and Against the State*, J. T. Sanders and J. Narveson (eds.) (Lanham, MD: Rowman and Littlefield, 1996); *Moral Principles*, p. 196.

Green argues for important discrepancies between what he terms the 'self-image of the state' and citizens' beliefs. According to Green, governments claim that all citizens have obligations of a particular kind: 'Political obligation is the doctrine that everyone has a moral reason to obey all the laws of his or her own state and that this reason binds independently of the content of the law.'[37] Independence of content means that Smith's moral requirement to obey a given law, L, stems from the fact that it is a law, rather than what it is about. Regardless of the content of L, if it is passed by the appropriate authorities, Smith has a moral reason to obey. If we accept the contention of Green and say that a given individual must hold a view such as this in order to believe he or she has political obligations, then it is not evident that many people believe they have them. Green's assessment that most people do not recognize 'an obligation to obey the law as it claims to be obeyed'[38] is probably correct. However, I believe that Green's standard is overly stringent.[39]

Briefly, as it seems to me, the standard we should accept depends on our view of what a theory of political obligation should achieve. In this book I have modest aims. A theory of political obligation should provide strong moral reasons to obey the law. It is not necessary that these be 'obligations' in the strict sense of the term—moral requirements that are self-imposed though voluntary actions.[40] Any strong moral reasons to obey would explain citizens' responsibilities and dispel the current skepticism among political philosophers. Because Green begins with the self-image of the state, he requires more than I believe is necessary. I do not believe it is mandatory that a given citizen, Smith, be clearly aware that her moral requirement to obey a given law, L, is independent of content for her to believe she has political obligations. We should view her as believing she has them simply if, confronted with L, she thinks she should obey it, that not obeying would require justification.

To be more precise here, while independence of content is necessary for political obligations, Smith does not have to be fully aware of this in

[37] L. Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), p. 309.; Green, 'Who Believes in Political Obligation?' in J. T. Sanders and J. Narveson (eds), *For and Against the State* (Lanham, MD: Rowman and Littlefield, 1996).

[38] *Ibid*., p. 310.

[39] On this point, I have benefited from M. Murphy, 'Philosophical Anarchism: False and Arrogant' (unpublished).

[40] See n. 1.

order to believe she has political obligations. Three distinct claims can be identified:

(a) Smith believes she has strong moral reasons to obey a given law, L.
(b) She believes she has moral reasons to obey all other laws, regardless of their content.
(c) She clearly recognizes independence of content, that her requirement to obey a given law stems from the fact that it is a law, rather than from its content.

Green and I agree that (a) and (b) are necessary in order for Smith to believe she has political obligations. Where we disagree is over (c), which I believe is unnecessarily strong. Though in order to believe she has political obligations, Smith must be committed to (c) and perhaps have some intuitive grasp of it, clear awareness is not required.

With a view comprised of (a) and (b), I believe, most citizens of liberal democracies conform. This amounts to the claim that people generally believe that they should take the law seriously, that they should defer to it, whether or not they clearly distinguish between reasons to obey that stem from the content of the law and reasons that stem from the fact that it is a law.[41] The evidence presented in Chapters 9 and 10 supports the contention that people generally hold beliefs along these lines.[42]

This contention can also be supported on conceptual grounds by looking briefly at beliefs about promising. There is no question that most people recognize their obligations from promises. We can present statements analogous to (a), (b), and (c):

(a^1) Blue believes she has strong moral reasons to keep a given promise, P.
(b^1) She believes that she has moral reasons to keep all her other promises, regardless of their content.
(c^1) She clearly recognizes independence of content, that her requirement to keep a given promise stems from the fact that she has made the promise, rather than from its content.

Once again, I think people recognize (a^1) and (b^1), though not (c^1). To require that they be clearly aware of (c^1) in order to believe they have obligations of promising, would disqualify most people from believing that they have them—though again, people are generally committed to

[41] (a) and (b) are similar to statements put forth by Green as commonly accepted; see 'Who Believes,' pp. 309–15.

[42] I should note that, as the evidence in Chapter 9 shows, people generally make exceptions in regard to certain kinds of laws.

(c^1) and aware of it on some level. But for the purpose of determining whether people believe in obligations of promising, requiring clear awareness of (c^1) is too strong.

Once again, I believe the current skepticism about political obligation can be answered by showing that people have strong moral requirements to obey the law, again, analogous to those they would have from general consent. Because most people believe they have such obligations, views according to which there are no political obligations constitute something of a paradox which must be explained. For instance, in Chapter 2, I examine various theories according to which states are legitimate; that is, they possess rights to take morally appropriate actions, though without rights to be obeyed. According to such views, in most cases, there are good reasons to obey the law, and we usually should obey.[43] But the fact that the state passes L creates no presumption that people should obey it. I believe that such a view clashes with most people's intuitions. To the extent such a view is based on the fact that the existing theories of political obligation have been found to have flaws, this does not suggest we should abandon existing theories but that we should attempt to revive them.

Accordingly, in addition to the four criteria of success I have outlined, one aim of this work is to explain the obligations of liberal citizens to existing states. Once again, I believe that citizens believe they have such moral requirements. Part of my task is to work out the moral principles that underlie their beliefs.

[43] Simmons, *Moral Principles*, pp. 192–5.

2
Bringing the State Back In

As noted in Chapter 1, important disagreements among scholars who work on political obligation can be traced back to differences in their fundamental starting points. Scholars are similar to other people in having widely different political views and seeing the world in different ways. Factors at work are characterized by Rawls as 'burdens of judgment.'[44] Given the complexity of many moral questions and factual matters they involve, it is almost inevitable that people with different life experiences and belief systems will disagree. However, I believe that disagreements about political obligations can be narrowed appreciably by establishing some basic starting points.

Within the liberal tradition, it is generally assumed that the state is necessary. Without the state, we would suffer from the 'inconveniencies' that Locke recounts,[45] while similar views are expressed by other major liberal figures. This contention is central to questions of political obligation, because if the state is in fact *not* necessary, it becomes difficult if not impossible to establish obligations to support it. However, the need for the state has been called into question by many scholars in recent years, and controversial assumptions about the state are invoked in discussions of political obligation. Providing parameters in regard to these matters could go a long way towards resolving central issues.

[44] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 54–8.

[45] J. Locke, *Second Treatise of Government*, Sect. 127; in P. Laslett (ed.), *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) [hereinafter cited as Locke, *Second Treatise*].

As we will see, the initial premises of these scholars are generally highly individualistic, allowing individuals to have rights, including property rights, anterior to society. There are good reasons to dispute such assumption.[46] But for the sake of argument, I will not do so in this work. I will proceed from the strongly individualist assumptions of political obligations' main opponents. My aim of course is to show that, even granting their starting points, their conclusions do not hold—although I should note that an additional result of this and the succeeding chapters is to raise severe problems for their starting points. For the sake of argument, I also examine various proposed mechanisms for delivering necessary services that strike me—and most probably will strike many readers—as far-fetched, for example, the consortium of gated communities discussed in 1.2.2. Discussion here is intended to establish their implausibility. I should note, however, that in discussions of politics, truth is often elusive, and my aim in this chapter is something less. I do not believe it is possible to *prove* we need the state. Rather, I attempt to make a strong case on grounds of common sense and plausibility. My hope is that enough can be established to create a heavy burden of justification for scholars who question the need for the state.

Establishing factual parameters is necessary here, because the main political obligations discussed in this work are based on state of supply of important public goods. A position such as this is immediately vulnerable to two counterarguments:

(a) States are not required to supply the benefits in question.
(b) Individuals do not need them.

Accordingly, I will argue that

(a^1) states (or statelike entities)[47] are necessary to provide certain benefits; and
(b^1) these benefits are necessary for acceptable lives in modern societies.

Obviously, (a^1) counters the first objection and (b^1) the second. My main concern in this chapter is (a^1); in the following sections, I will explore benefits commonly supplied by the state and the extent to which they could be provided without it or by nonstate entities

[46] See, for example, L. T. Hobhouse, *Liberalism*, in J. Meadowcraft (ed.), *Liberalism and Other Writings* (Cambridge: Cambridge University Press, 1994), Ch. 5.

[47] These are discussed throughout the chapter below.

(NSEs). But before turning to these matters, it is necessary to say something briefly about (b^1) and so 'acceptable' lives.[48]

Clearly, any claim concerning need for the state rests on presuppositions about the desires or interests of the people for whom it is said to be necessary. If someone finds life in a Hobbesian state of nature acceptable, she will not choose to enter civil society and so might not have political obligations. Similarly, if Grey prefers to live in the woods in Idaho or Montana, there is arguably little that he needs from the state, and so this would make it far more difficult to justify political obligations for him—as it would for someone who chooses to leave society in a different sense by emigrating to another country. Obviously, the idea of 'acceptable' lives is broad and vague, admitting different construals. Although it would take us far afield to explore this notion in detail, a few points can be made.

One of my governing assumptions throughout this study is that the overwhelming majority of inhabitants of moderns societies do not prefer to live in the woods or some remote outpost. By 'acceptable' lives I mean lives in modern industrial societies, as we know them. These societies are relatively safe, have functioning economies, and allow travel and a wide range of occupations, activities, and modes of life. 'Acceptable' lives are led by people who are integrated into such societies and take advantage of the amenities they provide. In order for these lives to be possible, different kinds of benefits or services must be available. One of our main concerns in this chapter is whether these must come from the state or whether alternative modes of provision are possible.

Focusing on lives of this sort is especially justifiable because recent critics of political obligation make similar assumptions. For instance, in his influential defense of philosophical anarchism, John Simmons argues that, without political obligations, things would not be enormously different, and so philosophical anarchism is not as implausible as it could be made out to be.[49] Similarly, libertarian anarchists and other critics of the state are at pains to demonstrate that, if their ideas were put into practice, services people need would still be delivered, though of course not by the state. In this chapter, I presume that some

[48] For discussion of this point, I am indebted to Ernie Alleva.

[49] A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principles*], pp. 192–5. Something similar is true of more radical anarchists, for example, D. Friedman, *The Machinery of Freedom* (New York: Harper and Row, 1973) [Friedman, *Machinery of Freedom*], who argue with varying degrees of plausibility for nonstate supply of a wide range of services.

divergence from contemporary societies would be acceptable—lest the argument be entirely circular. But change must be within reasonable bounds and the resulting societies acceptable to contemporary citizens with preferences much like those they currently have. As we will see, the resulting conception of the state must be similar to existing states in size and capacity, if it is to provide the services necessary for acceptable lives.

My assumption that people generally want lives of this sort obviously limits the applicability of this study. The claims established here do not apply to societies in which people live very differently. Whether people in such societies have political obligations and what these are or would be like are questions I will not explore, although I believe the arguments developed in this work could be suitably adapted and extended. Exploring obligations in contemporary industrial societies is a sufficiently ambitious undertaking, and I confine attention to that.

My main claims in this chapter are as follows. Because many benefits supplied by existing states that are necessary for acceptable lives are public goods and require sophisticated organization, individuals could not provide them themselves, and so must rely on the state. An argument along these lines can be referred to as a 'public goods' justification of the state. As we will see, similar arguments and critiques of them are staples of the contemporary literature. The main alternative to state supply of public goods is supply by other kinds of organizations, which resemble the state in certain respects though not in others. Since our concern is requirements to support the state, we will confine attention to alternatives that individuals are not required to support but are voluntary. These organizations are bound together by people's willingness to participate rather than by moral requirements to do so.[50] We can refer to different organizations of these sorts as non-state entities (NSEs). A variety are examined below. Because the NSEs under discussion are *voluntary* organizations, they could more properly be termed 'voluntary nonstate entities' (VNSEs), although to avoid this cumbersome locution, their voluntary character can be understood.

The main argument of this chapter is that NSEs would not be able to provide the public goods—*all* the public goods—necessary for acceptable lives. In order to do this, NSEs would have to change their essential nature, to evolve into nonvoluntary entities far closer to

[50] If they join such organizations, individuals most likely incur moral requirements to them. Key to the distinction between voluntary and nonvoluntary organizations is that individuals are free *not* to join the former, and if they do not, they ordinarily do not have moral requirements to support them.

traditional states. For instance, perhaps the most familiar NSEs in contemporary political theory are the mutual protective associations discussed by Robert Nozick.[51] However, as I argue below, by having his associations provide only personal protection, Nozick crucially distorts their logic; expanding the list of necessary functions would lead to the entities' collapse. I believe the need to supply indispensable public goods poses a severe challenge to different theories that attempt to dispense with political obligations.

It is necessary to begin by examining requirements of acceptable lives. After discussing the range of necessary public goods and various problems supplying them, in Section 1, I turn to different nonstate solutions, in Sections 2–4.

1. Justifying the State

In discussing the 'state,' I use the term to represent an institution that corresponds to Max Weber's standard definition, an agency that successfully claims a monopoly of legitimate force in a given territory.[52] According to this account, the state must be able to enforce its will throughout its territory, while individuals are able legitimately to use coercive force only with the state's permission, up to limits the state sets. In addition, by the 'state'—more fully, the 'traditional state'—I mean an entity that has a moral right to the obedience of the relevant population, be these its citizens, inhabitants of its territory, or members of society. As I have noted, because of our focus on political obligations, I locate the dividing line between states (and statelike entities) and nonstates as between entities which people have moral requirements to support and voluntary associations which they have liberty to join or not. Accordingly, one attribute of what I call 'traditional states' is general moral requirements to obey the law. For ease of use, we can say that an entity that is able to claim general obligations possesses 'authority,' that is, a claim right to the obedience of the

[51] R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) [Nozick, *Anarchy, State, and Utopia*]. I should note that Nozick's NSEs eventually compel nonmembers to join and so become states, although ultraminimal states.

[52] M. Weber, 'Politics as a Vocation,' in H. Gerth and C. W. Mills (eds. and trans.), *From Max Weber: Essays in Sociology* (Oxford: Oxford University Press, 1946), p. 78; For the history of the concept of the state, see Q. Skinner, 'The State,' in T. Ball, R. Hanson, and J. Farr (eds), *Political Innovation and Conceptual Change*, (Cambridge: Cambridge University Press, 1988).

relevant population.[53] As I use the term, a political entity is 'legitimate,' in contrast, if it is morally justified in acting, but not necessarily able to ground obligations to support it.[54] Accordingly, all 'traditional states' are 'legitimate,' although the class of legitimate entities includes more than traditional states. In various contexts, I use the term 'state' more loosely, in accordance with common usage. But where precision is required, the 'state,' with authority, is contrasted with different NSEs. As discussed below, the latter are of two main (overlapping) kinds: those that do not claim a monopoly of force in the relevant territory, and those that possess legitimacy but not authority.

Once again, throughout discussion here, I do not claim to present a knockdown argument for the state. The standard of proof is analogous to the preponderance of the evidence, the standard used in civil trials, as opposed to 'beyond a reasonable doubt,' the standard in criminal trials. We will look into the plausibility of nonstate supply of relevant services, as opposed to their conceivability. Many specific functions I discuss involve matters of considerable complexity, which cannot be discussed in detail. But even if a stronger case for nonstate provision could be made in regard to some or other of these, this would not greatly affect the argument of this chapter, unless plausible, nonstate scenarios could be developed for all or virtually all of them. Our question then is, all things considered, do the points advanced here amount to a commonsense case for the state?

And so, what functions does the state perform in modern societies? What do we need from it? Without attempting to provide a complete list, we can identify seven important functions.

1. The state provides immediate personal protection, defending us from other people.
2. The state provides protection as a public good, that is a secure overall environment, allowing us to travel and to take advantage of the amenities of a large society. Included here are domestic law and order, national defense, and other forms of protection we will discuss.
3. The state provides other public goods, provision of which is burdensome. Examples include the overall legal system, public

[53] On claim rights, see W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (New Haven: Yale University Press, 1919); for brief discussion, see D. Copp, 'The Idea of a Legitimate State,' *Philosophy and Public Affairs*, 28 (1999) [Copp, 'Idea of a Legitimate State'], 16–18.

[54] See the helpful discussion of A. Buchanan, 'Political Legitimacy and Democracy,' *Ethics*, 112 (2002) [Buchanan, 'Political Legitimacy'] (discussed in Section 4).

amenities provided through tax revenues, and environmental and public health restrictions. We can also include such activities as environmental conservation and preservation of endangered species.

4. The state provides other public goods that are not burdensome but require coordination. We can refer to this function as coordination and the relevant benefits as coordination goods. Examples are traffic regulations and uniform currency.

5. The state sets standards for, or regulates, a wide range of activities, for example, production of food and drugs and the performance of financial institutions. We can call this state regulation.[55]

6. The state provides a wide range of excludable goods, for example, cultural institutions, national parks, public schools, etc.

7. The state institutes redistributive programs to meet the needs of poor and unfortunate members of society.

Once again, this list is surely incomplete. But without attempting to extend it, we can assume that these functions are generally necessary for acceptable lives in contemporary societies, whether or not they must be performed by the state. Because I assume that they are performed adequately by at least some existing states, plausible alternatives to the state must also be able to perform them.[56] The inability of nonstate alternatives to work satisfactorily constitutes an indirect argument for the state. In discussing specific functions, I will repeatedly have to refer to other functions. This raises the important

[55] Functions 5 and 6 (and 7) are not always included among those that must be performed in modern societies. Since they are generally performed by the modern states we are most likely to view as legitimate, I include them and discuss them briefly. As we will see, nonstate provision of 5 and 6 would encounter few problems, while there is considerable debate about whether the state should provide 7. Including these functions has little effect on the argument of this chapter. In Chapters 4 and 5, 7 is considered further in a related but somewhat different light.

[56] According to (3), p. 6, one necessary condition for political obligations based on the principle of fairness is tolerably fair distribution of the benefits and burdens associated with given public goods. Difficult moral issues are encountered in specifying the appropriate standard, and difficult empirical issues in determining if the standard is met in specific countries. These issues I will set aside. Throughout this book, I assume that the appropriate standard can be identified and that it is met by at least some liberal democracies—though not necessarily by the United States. I do not rule out the possibility that significant amelioration of forms of inequality in different societies would be necessary before their citizens could have political obligations under the principle of fairness.

point that many state functions are interlinked. They could not be performed adequately by themselves but depend on other functions, which, as we will see, is itself an important consideration for the state.[57]

In order to assess specific functions, it should be helpful to introduce the term, 'regulated coordination.' According to a public goods justification of the state, state coercion is necessary to provide particular public goods. As we will see, NSEs are able to provide many of the relevant services. More resistant are goods that have certain characteristics. As I will use the term regulated coordination has three main features. In order to be provided, the goods in question:

1. require the efforts of large numbers of people;
2. these people must be organized in complex ways, according to set plans; and
3. these plans must be overseen by persons with effective means to assure compliance.

Briefly, because the goods in question require large-scale, complex cooperation, it cannot be assumed that people will organize themselves spontaneously. A general plan or planning agency must be able to issue commands and to assure compliance, if need be through coercion. Clear examples are military organizations. It is generally agreed that military organizations require complex coordination, overseen by general staffs, with coercive means to insure compliance. Other goods require similar patterns of activity.

Whether given goods require regulated coordination are empirical questions. While common opinion holds that this is true for many important goods, scholars have disputed this and I will examine many of their arguments.

Having dispensed with preliminary matters, we can discuss the list of services, one by one.

1.1. *Personal Protection*

This can be provided by protective associations, hiring of armed guards, etc. As Bruce Benson notes, at the present time in the United

[57] One possibility I will set aside is that enormous nonstate organizations might be able to provide given goods. Microsoft, General Motors, Bechtel, and the like are huge corporations, and given their power and wealth, could probably supply at least some services we discuss. However, reasons why these corporations would provide the goods are not clear. In addition, to the extent that corporations provide protection as one of their products, they will be similar to protective associations discussed in Section 3 and have similar problems.

States, there are many more private security guards than public ones.[58] It is, however, important to recognize that the relatively effective performance of private guards (if that is in fact the case) is greatly facilitated by the existence of public security forces on which they can call. It is unlikely that private security forces would work as well without the police to back them up. In any event, for the sake of argument, I will allow that voluntary means through which individuals hire protective services or join forces for mutual protection are plausible.[59] These are familiar to political theorists, especially because of the work of Nozick, although, I believe these agencies would encounter significant difficulties, as discussed in Section 3.

There are obvious problems with nonstate provision of protection. According to the Lockean tradition, in the absence of a state, individuals are in a state of nature, under natural law, and have rights of self-defense. Locke of course claims that the state arises from a general transfer of rights, first to the community and then to a legislature.[60] In the absence of a traditional state, individuals still require protection, and so it is commonly argued that they would combine forces in various kinds of voluntary associations, most notably the protective associations discussed by Nozick.[61] Protective associations are also justified by transfer of individual rights. For our purposes, the crucial respect in which they differ from traditional states is in not commanding the obedience of people who do not join, and so not encompassing all inhabitants of a given territory. Within the Lockean tradition, it is crucial to recognize, individuals who do not join protective associations not only need protection, but also have rights to provide this for themselves, through self-enforcement of moral rules.[62] We can assume that the basic logic of voluntary protective associations is as follows. If Smith joins protective association P, she transfers her rights of protection to it, thereby authorizing it to act for her. P's powers will

[58] B. Benson, *The Enterprise of Law* (San Francisco: Pacific Research Institute for Public Policy, 1990) [Benson, *Enterprise of Law*], pp. 2–4.

[59] There is considerable overlap between hiring protective services and mutual protective associations. Members of the latter would presumably frequently hire professional protective services. In either case, key points are the voluntary nature of protective mechanisms.

[60] Locke, *Second Treatise*, Ch. 8.

[61] Nozick, *Anarchy, State, and Utopia*; see also Benson, *Enterprise of Law*; Friedman, *Machinery of Freedom*; R. Barnett, *The Structure of Liberty: Justice and the Rule of Law* (Oxford: Oxford University Press, 2000) [Barnett, *Structure of Liberty*]; J. Sneed, 'Order Without Law: Where Will Anarchists Keep the Madmen?' *Journal of Libertarian Studies*, 1 (1977) [Sneed, 'Order Without Law'].

[62] Locke, calls this a 'strange doctrine,' *Second Treatise*, Sect. 9.

be a compilation of those of its members. But since P is a voluntary association, individuals who do not join do not have requirements to obey it. Once again, such individuals (and other protective associations) retain rights to defend themselves and to punish violations of morality according to their own views of these matters.

An immediate problem is that allowing individuals on their own to punish violations of morality runs the risk of chaos, the main 'inconveniences' on which Locke focuses. In order to present a plausible case that enforcement will work adequately in a situation of multiple individual enforcers and protective associations, one must provide convincing solutions to the difficulties Locke points out: the need for common standards (or interpretations of natural law), for impartial adjudication of disputes, for effective enforcement of decisions, and for means to deal effectively with predatory individuals who do not recognize or voluntarily abide by the dictates of morality. We can refer to these problems as *general enforcement problems*.

The absence of the traditional state does not entail the absence of institutions that resemble the state in important respects. Simmons and other theorists argue that, in the absence of political obligations, the 'state' is simply another moral actor in the state of nature, allowed (or perhaps, required) to punish violations of basic moral rules (although without a clear account of exactly what these rules are when people disagree about them). The second set of problems concerns the nature of such a nontraditional state. What are its reasons for behaving in this way? Who staffs it? How is it paid for? How are its policies determined? How is it controlled? Without requirements that individuals obey the law (e.g. tax law) and comply with state directives, how is this entity to function? We can call these *state-related questions*.

In general, throughout this study I assume that people act according to their interests. I do not make strong assumptions about human nature and wish to avoid controversial ones. I believe that people frequently, perhaps generally, behave morally. But if they stand to gain from violating rules, including moral rules, or from not contributing to public goods, many people will do (or not do) so and must be deterred through punishment. The general enforcement and state-related questions are largely concerned with how this is possible without the state.

A final problem concerns what happens to people who are not able to purchase protective services. If Blue is indigent, she still retains the right to defend herself. But what if she is unable to do this effectively? Protection could be provided to the needy through voluntary charity.

But what if such measures did not suffice? It is possible that libertarian anarchists would not view this as a significant problem.[63] I will leave open the question of the extent to which the suffering of others would prevent those better off from leading acceptable lives. But this implication of private protection—and the end of other state services—should be kept in mind.

In regard to personal protection, then, although at first sight this can be supplied readily through nonstate means, there are significant difficulties lying below the surface. A plausible regime of personal protection must deal adequately with the problems I have noted, which involve considerable complexity.

1.2. Secure Environment

There are a number of requirements here, including: (1) national defense, (2) law and order, (3) public health, (4) environmental protection, and (5) protection from natural disasters. In an overall sense, a secure environment is a public good—in which way it differs from personal protection.

For our purposes, public goods can be described as nonexcludable.[64] If such a good is provided to some members of a given society, it cannot be denied to others. For instance, if clean air is made available to some inhabitants of the Bronx, then it cannot be withheld from Grey, if he too lives in the Bronx. Circumstances are different in regard to what we can call 'excludable' goods, which can be withheld from given individuals relatively easily. For example, the benefits of a public park can be denied to Grey by not allowing him to enter.

Because public goods are nonexcludable, recipients have incentives not to pay for them. If the goods are going to be provided whether or not Blue contributes, it is in her interest not to. This is true even if the value of receiving the good outweighs the costs of contributing. If the goods are not going to be provided even if she does contribute, it is of course in her interest not to. The only circumstances in which it would be in her interest to contribute are those in which her contribution would make the difference between a given good being or not being provided. But in a large society, we can assume that the chances of this

[63] This is especially true of those theorists who do not shrink from allowing unwanted children to starve, for example, M. Rothbard (*The Ethics of Liberty*, Atlantic Highlands, N. J.: Humanities Press, 1982, pp. 99–100).

[64] The other main feature of public goods, nonrival consumption, need not be discussed here. For discussion of public goods, see J. G. Head, *Public Goods and Public Welfare* (Durham, NC: Duke University Press, 1974).

being the case are so small as not to merit discussion.[65] Public goods with these attributes are commonly referred to as having a 'prisoner's dilemma' or 'PD' structure.[66] These will be discussed in more detail in Section 2.

As we will see, security, the main public good under discussion in this section, requires large-scale, expensive organizations that are able to use coercive force. In the modern world, security is generally, if not universally, provided by the state. In theory, it is possible to provide many security services through private means. Instead of being furnished by the state, defense from foreign aggression could be contracted out and supplied by large private corporations. Mercenary armies are familiar throughout history, and, arguably, there is little difference between an army that a given populace hires and an 'all-volunteer' force, many members of which join largely for economic reasons. Other components of defense—armaments, intelligence, etc.—could be supplied similarly, thereby eliminating the need for the state in an area that is frequently central to arguments for its necessity. What is true of defense is true of other public goods, even those requiring similarly large-scale efforts, as they could be supplied by private entities, as long as they were of sufficient size. The problem with schemes of this sort is how they are paid for. Because the benefits in question are public goods, the logic of the PD obtains. Individuals will receive the benefits whether or not they contribute and so have incentives not to. In this chapter, I assume that this logic holds. I address attempts to overturn it in Section 2. In this section, I examine modes of benefit provision that individuals have incentives to support, especially market mechanisms that enable individuals to contribute to essential public goods while pursuing their own interests. And so we turn to how well different mechanisms would work.

1.2.1. Defense

For national defense, I submit, a state is necessary.[67] Individual or strictly voluntary measures will not do. Large-scale, complex coordination of many aspects of society is necessary,

[65] For discussion, see G. Klosko, *Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992; new edn, 2004) [Klosko, *Principle of Fairness*], App. 1.

[66] The 'prisoner's dilemma' is attributed to A. W. Tucker; see R. D. Luce and H. Raiffa, *Games and Decisions* (New York: Wiley, 1957), Ch. 5.

[67] Using 'national' in a loose sense; I believe that the points made here hold for any size autonomous community. For community under the principle of fairness, see G. Klosko, 'Political Obligation and the Natural Duties of Justice,' *Philosophy and Public Affairs*, 23 (1994), 260 n.19.

especially fielding armed forces and providing a sophisticated defense establishment, which includes adequate defense industries and scientific and technical education facilities necessary to maintain them. To give an example, according to John Erickson's authoritative history, the conflict between Germany and the USSR in World War II cost Germany 48,000 tanks, 167,000 guns, and almost 77,000 combat aircraft, not to mention approximately 10,000,000 men, killed, wounded, or missing. The USSR deployed more than 78,000 tanks and 108,028 combat aircraft.[68] These are extreme figures, given the magnitude of that particular conflict and how circumstances have changed in the nuclear age. But the point should be clear. In the modern world, national defense is a prime example of a necessary function that requires regulated coordination. Further complicating matters is the fact that specific services necessary to national defense have PD structures, as discussed below.

The need for national defense is rooted in what has been termed 'secondary state formation.'[69] Threats from other states require that one organize effective countermeasures, and so a state of one's own. Perhaps if there were no states, this would not be necessary. But there are states, and given the threats they pose, other groups must be organized similarly to counter them. It could be argued that significant external threats do not exist in certain geographical areas, and so, in regard to them, national defense might not require state countermeasures. I accept this as a valid response. In considering national defense, we must concentrate on the situations of actual states and the threats they face, or absence thereof.

Unfortunate recent events have unavoidably extended the reach of national defense. As things currently stand, in the developed world for most countries the threat of terrorism is probably a greater danger than direct attack by other nation-states. Terrorism too is unlikely to be countered without regulated coordination (i.e. state coordination), backed by coercive measures.

Consider a typical argument for airline safety measures as provided by market forces. If you fear terrorists and so want to fly in a safer plane, then you can pay more for increased security. One can envision a market with different carriers providing different levels of security, for different ticket prices. The problem, however, is that, as we have seen, airliners, loaded with thousands of gallons of fuel, are potentially

[68] J. Erickson, *The Road to Berlin* (London: Weidenfeld & Nicholson, 1983), p. ix.

[69] For brief discussion, with references, see C. Morris, *An Essay on the Modern State* (Cambridge: Cambridge University Press, 1998) [Morris, *Essay*], pp. 79–80.

highly dangerous to the public at large. Even if potential passengers are willing to accept the risk of flying on relatively unsafe planes for lower fares, the public cannot allow this. There must be strong general security measures, with which all airlines must comply.

Similar arguments can be made in regard to other possibilities of enormous disruption and destruction by individual acts, truck bombs, sabotaging water supplies, power plants, especially nuclear power plants, etc. Given the highly concentrated populations of modern cities, large-scale, highly coordinated, protective measures are essential. Once again, these must be supported by coercive force. Only by effectively retreating from modern society can individuals secure their own safety against such threats.

Thus I do not believe that defense and protection from terrorism can be provided through nonstate means. Nonstate theorists' proposals for alternative arrangements must be considered feeble.[70] The regulated coordination that defense requires a presumptive argument for the state.

1.2.2. Law and Order

To some extent, law and order is covered under personal protection (1.1). However, our concern here is providing an overall safe environment, on a large scale. This goes beyond physically protecting oneself or preventing people from invading one's home. A secure overall environment is necessary if people are to conduct their lives with the 'tranquility of spirit' that Montesquieu identifies as the essence of liberty.[71] Such an environment allows far more opportunities for everyone and so vastly greater possibilities in regard to what constitutes one's daily business. A secure environment is necessary for much of what constitutes an acceptable life in modern societies. This includes security to travel throughout the country, or countries, to conduct business, to lead an active life, taking advantage of the multiple opportunities of a complex modern society. If one wishes to argue that private entities can serve, then the state-related questions have to be dealt with, on a sufficiently large scale.

Some headway on these questions can be made by thinking aboutprivate protective services on the model of gated communities.[72]

[70] Friedman characterizes defense as 'the hard problem'; his suggestions are highly speculative (*Machinery of Freedom*, Ch. 34). Rothbard's suggestions are similarly improbable (*for a New Liberty* (New York: Macmillan, 1978) [Rothbard, *For a New Liberty*], 237–41; also Ch. 14). Barnett does not discuss defense (*Structure of Liberty*). Benson concedes the need for governmental defense (*Enterprise of Law*, p. 373).

[71] Montesquieu, *The Spirit of the Laws*, A. Cohler, B. Miller, and H. Stone (eds and trans.) (Cambridge: Cambridge University Press, 1989), Bk. 11, Ch. 6.

[72] Barnett, *Structure of Liberty*, pp. 222–4.

People who want a safe overall area can combine their resources and establish one. As Randy Barnett argues, such areas are often safer than public spaces in existing societies. Because they patrol private property, their security personnel can be less respectful of people's rights than police are ordinarily expected to be. Private security forces can remove people for acting suspiciously or simply for being undesirable. In existing society, greater concern with people's rights disallows such measures. It seems reasonable to believe that gated communities can provide extended security, although, again, we should bear in mind that one reason they appear to work well in existing society is that they are supported by police and other public protective services. Still, gated communities provide protection over limited areas. The secure region can be extended by combining controlled areas.[73] There are strong incentives for protected communities to combine. Only through combination can they provide security over regions akin to those of contemporary states or nation-states.

To realize these benefits, protective associations would have to work together. They would have to regularize their standards and procedures, and guarantee the security of members of other agencies in their own territories. According to nonstate theorists, the resulting consortium would have two primary advantages. First, the availability of private alternatives would free people from dependence on the state; they could purchase services from the agencies they preferred. An open protective system would also lead to more efficient provision. Because people could change organizations and new organizations could always arise, protective associations would have to be responsive to their members. Although Nozick famously argues that market forces would consolidate protection under one 'dominant protective association,'[74] other theorists envision a large number. According to David Friedman, in a territory as large as the United States the number would be 'nearer 10,000 agencies than 3.'[75] Friedman argues that one advantage of a large number is difficulty of collusion. However, his reasoning is disputable. The benefits of extended protection require collusion. In order to extend protection to a large area, this alternative to the state must take on central attributes of a state.[76] Because of the need for collusion, the consortium would exercise de facto control of the

[73] *Ibid.*, Chs 11, 13.

[74] Nozick, *Anarchy, State, and Utopia*, Pt I.

[75] Friedman, *Machinery of Freedom*, pp. 169–70.

[76] My argument here is indebted to T. Cowen, 'Law as a Public Good: The Economics of Anarchy,' *Economics and Philosophy*, 8 (1992) [Cowen, 'Law as a Public Good']; see n. 42.

market in protection and be able to prevent voluntarist alternatives to the state. The benefits of voluntary protection would also be lost.

How would the consortium work? Standardized rules and procedures could be enforced by withholding benefits of cooperation from agencies that did not adhere. This would presumably cause many of their members to move to agencies that did belong. The consortium would of course differ from traditional states in not possessing a monopoly of legitimate force. People who did not join would not be under its authority. But, again, if there were such a consortium, people who wanted extended protection would have to join a member organization. Individuals who joined would incur compliance requirements closely akin to political obligations. Although not a full state in the Weberian sense, the consortium could use its privileged market position to prevent rival agencies from organizing. It could deny extended protection to members of independent agencies, unless they joined, on its terms. Self-interested market actors would have strong incentives to behave in this way, while it is not clear that such conduct would violate moral rules. The consortium would not have to use force to overcome potential rivals. Its market power would be enough.[77] Accordingly, the more successful a consortium of protected communities was in providing extended protection, the more it would take on statelike attributes.

The consortium's market position would erase the advantages of open protection. Individuals would not be able to form their own protective associations. Even if they were displeased with existing alternatives, their association would have to join the consortium at threat of denial of extended protection. Since extended security is ordinarily viewed as indispensable to acceptable lives, their situation would not differ appreciably from those of individuals whose only option was protection from the state. Arguably, they could be worse off. In modern states, the form in which protection is provided is decided upon democratically, and so all individuals are bound by preferences of the majority. It is not clear how decisions would be made in the consortium. If the means were not democratic, then a majority of people could find themselves dominated by a minority.

The advantages of competition would also be lost. With new protective associations unable to organize, the consortium would be able to make full use of its market power. Once again, in the industrial democracies, the government's power is subject to democratic control. There is little reason to believe that control mechanisms in the

[77] Cf. Cowen's description of a 'law consortium,' 'Law as a Public Good,' n. 42.

consortium would function more effectively. Given the relative lack of attention to control mechanisms in the literature, one can worry that things would be worse. At a time when abuses of private corporations—Enron, WorldCom, Global Crossing, and the like—are the stuff of daily news stories, claims about the virtues of private enterprise should be taken at less than face value. Kant famously exclaimed in regard to political organizations, that out of the crooked timber of mankind, nothing can be made straight.[78] Something similar should be kept in mind in regard to private organizations and incentives to abuse their power. The criticisms of existing political arrangements by antistate theorists rest heavily on deplorable behavior of public personnel. Although the market has the considerable advantage of rewarding self-interested behavior, we cannot assume that shareholders in large private security apparatuses would be more successful in controlling their officials than are shareholders in existing corporations or citizens of contemporary states.

An additional difficulty concerns the rights of nonjoiners, especially those with limited resources. If protection must be purchased, once again, what happens to those unable to pay? Problems in providing protective services to the indigent would be exacerbated if separate associations combined forces. Surrounded by extended, controlled private areas, nonmembers could face severe restrictions in their freedom of movement. As Gerald Gaus argues: 'In the limiting case, a person might be hemmed in on all sides by neighbors who forbid access to their spaces.'[79] Even worse, to give people incentives to join, the consortium could have its members clearly identified, which would allow protection to be accorded only to them. With potential criminals aware of distinguishing marks, nonmembers could find themselves preyed upon with impunity. Once again, I leave open whether the suffering of others prevents the better-off from leading acceptable lives. But to the extent that it would, these consequences should be noted.

Thus I conclude that the idea of a 'gated state' makes for interesting speculation, and perhaps some aspects of such a plan could improve existing arrangements. But this is a long way from saying that such a plan constitutes a genuine voluntarist alternative to the state. Because of the need for collusion and its accompanying dangers, extended

[78] I. Kant, 'Idea for a Universal History with a Cosmopolitan Purpose,' in H. Reiss, (ed.), *Kant's Political Writings*, 2nd enlarged edn (Cambridge: Cambridge University Press, 1991), p. 46.

[79] G. Gaus, Review of Barnett, *Structure of Liberty*, *Criminal Justice Ethics*, 19 (2000), 41.

protection would require a statelike entity, which, in crucial respects, would be little different from and no better than contemporary states.

1.2.3. Public Health

Voluntarist alternatives fare similarly with other threats to general security, for example, public health dangers. To a large extent, private provisions could address health needs. Private health insurance firms could readily provide individuals with as much protection from disease and injury as they were willing to purchase. Medical care, through doctors, hospitals, and so on, could also be provided through such means. Medical research could be financed privately, on a for-profit basis. Drug regulation functions of the contemporary Food and Drug Association (FDA) could be taken over by private ratings agencies, along the lines of *Consumer Reports*. People who cared about drug safety could follow these guidelines and pay accordingly. Certain diseases could also be controlled through voluntary provisions, for example, cholera, which is spread through contaminated water. Foodborne diseases could also be controlled through market mechanisms. If one wanted food that was guaranteed safe, one would have to pay more for it, with the relevant certifications done by private inspection companies. For example, on such a system, meat could be graded on safety from disease, with safer meat more expensive. A court system, which would allow people to sue for damages and other compensation—for example, if food advertised proved to be unsafe—would greatly facilitate such a system.[80]

However, these measures do not deal adequately with general threats to public safety from epidemic diseases. In order to address these, nonvoluntary measures, for example, compulsory quarantine, are necessary. One could argue that private measures would work in this regard. If Grey, who has a communicable disease, takes actions that could expose others, he could be dealt with through private punishment, like any other violator of moral rules. However, added difficulties with such threats include difficulty of detection, especially when various diseases, for example, smallpox, are highly communicable before symptoms appear, and there would be considerable dangers to the particular people who tried to punish Grey. An unfortunate example, as I write, is the outbreak of SARS (sudden acute respiratory syndrome). Control of this dangerous and highly communicable

[80] For ease of discussion throughout this chapter, I assume that a court system able to deal satisfactorily with product liability and similar cases could be provided privately, funded by some percentage of the price premiums attached to covered products. For one possible arrangement, see Barnett, *Structure of Liberty*, Pt III.

disease requires large-scale, effective quarantine. Even if infected people care deeply about not exposing others, they could underestimate the risks they pose—not to mention how outbreaks of disease could affect behavior.[81] Thus voluntary disease control systems could be catastrophic. Effectively managing such situations appears to require regulated coordination and so the state. In addition to coercive quarantine, state agencies like the Center for Disease Control and the National Institute of Health provide public goods that are essential for public health and so for the functioning of modern societies.

1.2.4. Environmental Protection

Aspects of the environment can be dealt with effectively through private means. Prohibitions of harms and rights of self-defense extend to environmental injuries. Thus factories that pollute their environs, damaging the health of the resident population, are subject to retaliatory prosecution. This sort of reasoning is more readily applicable to water or ground pollution than to air pollution, but if a factory's discharges damage neighboring farms, action can be taken against it too. Similar logic holds for a factory that severely pollutes the air of a city. Recourse could be taken through class-action suits or similar mechanisms.[82] Worth mentioning in cases involving large-scale polluters are difficulties encountered in suing large organizations, although I will not explore these here.

More significant problems arise as environmental harms become more diffuse. While it is relatively easy to detect the harms caused by a factory that expels toxic wastes into a small river or stream, causal connections are more difficult to establish if wastes flow into one of the Great Lakes or the oceans. Libertarian theorists note that this problem could be addressed through establishment of property rights in these bodies of water.[83] But until such privatization measures become realistic, these problems will resist solution without state action. Similarly problematic are significant harms caused by large numbers of actors, each of whom causes insignificant or undetectable damage. Differences

[81] Perhaps the classic account is Thucydides' description of the plague in Athens during the Peloponnesian War (II, 47–55).

[82] Rothbard, *For a New Liberty*, pp. 257–8. Friedman makes similar points in his brief discussion (*Machinery of Freedom*, pp. 139–41). J. Narveson (*The Libertarian Idea* [Philadelphia: Temple University Press, 1988]) and Barnett (*Structure of Liberty*) have little or no discussion of means to deal with environmental problems.

[83] Rothbard, *For a New Liberty*, p. 256; Friedman, *Machinery of Freedom*, pp. 139–40; see also D. Schmidtz, *The Limits of Government* (Boulder, CO: Westview, 1992) [Schmidtz, *Limits of Government*], Ch. 2.

in pollution levels that result from my installing or not installing a catalytic converter in my car are undetectable by the most sensitive scientific instruments. But multiply this pollution by many millions and it could become a significant health hazard. Circumstances are similar in regard to using unleaded as opposed to leaded gasoline and many other instances one can name. Measures necessary to address such threats have the structure of PD public goods. Individuals have incentives not to bear the costs of cooperating or contributing, since the goods will (or will not) be provided whatever they themselves do. Given the difficulty of detecting noncompliance, especially without state agencies to monitor this, state regulation seems necessary for such cases.

1.2.5. Protection from Natural Disasters

Protection from natural disasters could be largely voluntary. Insurance schemes could protect people from floods, tornadoes, etc. However, the enormous scale of certain disasters could challenge the abilities of private agencies, and so major earthquakes and large hurricanes may well require state coordination.

To bring discussion in this section to a close, I believe these general security concerns represent the strongest argument for the state. All or virtually all of these services require regulated coordination enforced by a state or entity that closely resembles a state.[84] These contentions are consistent with common sense and the general tradition of Western political theory. With the possible exception of natural disasters, I believe it is unlikely that nonstate solutions to any of these concerns could be found, let alone to all of them. For all of them, I believe, it is far-fetched to envision people, dissatisfied with the state, organizing their own alternative provision. We should note once again that if it is proposed that a nonstate but statelike entity perform these services, the state-related questions must be dealt with. But because the goods in question are public goods and there is a large literature on provision of public goods, before concluding that nonstate provision is impossible, we will examine game-theoretic attempts to show that it is not. This inquiry will be conducted in Section 2.[85]

[84] Subsequent discussion omits this qualification, which is understood.

[85] The possibility of nonstate provision of common laws or standards has attracted much attention. This is an important subject, but because the problems resemble those discussed in reference to a 'gated state,' I will discuss it only in this note and provide references to some of the voluminous literature. Many theorists who reject general political obligations, arguing for legitimacy without corresponding obligations, do not deal or do not deal adequately with the need for common standards. These include Simmons, *Moral Principles*; W. Edmundson, *Three Anarchical Fallacies* (Cambridge: Cambridge University Press, 1998) [Edmundson, *Three Anarchical Fallacies*], and L. Green, *The Authority of the State* (Oxford: Oxford University Press, 1988) [Green, *Authority of the State*]. Morris does address the question, along lines similar to those suggested in this note (*Essay*, pp. 70–4). However, he does not consider the implications of these arguments in much of the remainder of his book. Buchanan, does consider the implications ('Political Legitimacy,' 713–18; see below, pp. 54–5); see also Barnett, *Structure of Liberty*, Part III.Scholars have mined historical records for examples of societies that successfully managed to settle their disputes without government. Examples are medieval Iceland, the Yurok Indians of California, and the Law Merchant, a system of voluntary medieval commercial law. The first two cases are discussed, respectively, in D. Friedman, 'Private Creation and Enforcement of Law: A Historical Case,' *Journal of Legal Studies*, 8 (1979) and W. M. Landes and R. A. Posner, 'Adjudication as a Private Good,' *Journal of Legal Studies*, 8 (1979). For excellent discussion of the whole subject, including the Law Merchant, see Benson, *Enterprise of Law*. Theorists have attempted to argue that common standards could be provided without the state; these include Benson, *Enterprise of Law*; Friedman, *Machinery of Freedom*; Barnett, *Structure of Liberty*; Sneed, 'Order Without Law'; cf. Landes and Posner, 'Adjudication as a Private Good,' 238–40. However, I agree with the well-known argument of Cowen that an agency (or network of agencies) able to provide common standards will approximate a state and be able to eliminate competition; see Cowen, 'Law as a Public Good'; see above, pp. 30–3. On this see D. Friedman, 'Law as a Private Good: A Response to Tyler Cowen on the Economics of Anarchy,' *Economics and Philosophy*, 10 (1994); T. Cowen, 'Rejoinder to David Friedman on the Economics of Anarchy,' *Economics and Philosophy*, 10 (1994).A provocative response to Cowen's argument is given by B. Caplan and E. Stringham ('Network, Anarcho-Capitalism, and the Paradox of Cooperation,' *Review of Austrian Economics* [forthcoming]), who argue that Cowen conflates cooperation and collusion. Organizations that are able to engage in the former are not necessarily able to engage in the latter. They support this claim with evidence about the behavior of credit card companies and banks. However, in discussing 'network industries in general' (p. 21), Caplan and Stringham do not pay adequate attention to distinctive features of protection as opposed to other goods. They note that some networks do succeed in moving from cooperation to collusion, for example, sports leagues, because of their particular features. I believe that protection too is distinctive. It must be supplied by enterprises that are local, while, as Nozick classically argues, there are strong incentives for individuals to turn to firms that are large (*Anarchy, State, and Utopia*, Pt I). Caplan and Stringham note that if a single network is able to reach a 'collusive outcome,' it might be able to deter future competition (p. 13). Because of considerations of size and location, firms providing protection are far more likely to reach this point than in other industries.

1.3. Other Public Goods

Other important public goods are also unlikely to be provided without the state. These are frequently enormously expensive, and so the logic of the PD obtains in regard to them. It is theoretically possible that the overall infrastructure of a modern society could be provided through private efforts. Specific components of this include roads, especially an interstate highway system, airports, railroads, harbors, other transportation facilities, and communication facilities. Conceivably these could be financed by user fees. But what might work reasonably well for airports or train stations becomes more unwieldy in regard to roads and highways, to say nothing of private streets and sidewalks.

Given the scale and complexity of the overall infrastructure, it is likely that it must be overseen by an agency with the power to coordinate its different components throughout society and address gaps or problems as they arise. Because of the enormous costs involved, this will most likely have to be financed through tax expenditures. It is conceivable that huge private corporations could undertake this task and coordinate their efforts. But once again, there are difficulties explaining how the services of such corporations would be paid for.

1.4. Coordination Public Goods

These public goods differ from those already discussed in that individuals do not have incentives not to comply in their provision. Many

of these involve services that make important contributions to functioning societies and so to acceptable lives. Prominent examples include standard currency and traffic regulations. These could well be provided through voluntary measures. For example, once it is decided that people will drive on the right hand side of the road, it is in Grey's interest to comply and he need not be forced to. For coordination goods, there are obvious problems in securing initial agreement on general regulations, but I assume that these are manageable.

However, the dividing line between coordination and noncoordination goods is fluid, as individuals can often have incentives to undermine the former. For instance, counterfeiters have obvious incentives to pass fake currency. If caught, they can be punished through private means, but for practical reasons, prevention would most likely require large-scale agencies, akin to the state. Similar enforcement problems are encountered in regard to traffic safety—which can be classified as a

component of 1.2, a safe environment. Individuals have incentives to violate specific rules, for example, concerning red lights and speed limits, and must be prevented from doing so.

Problems for private enforcement are especially difficult when there are no identifiable victims. For example, drunken drivers, speeders, and other violators of traffic laws represent general threats. If a drunken driver causes an accident, then his victim can pursue compensation. But it would of course be preferable to keep drunken drivers off the road. Private mechanisms could be envisioned. Perhaps there could be a bounty system, with the person apprehending the violator receiving the fine. But such measures would encounter a range of enforcement questions, especially, in this kind of case, protecting the rights of the accused from unscrupulous bounty hunters. Perhaps these matters could be taken up by the accused and the bounty hunter's protective associations. Circumstances are similar with many coordination goods. When individuals have strong incentives to violate provisions, general enforcement problems must be addressed.

1.5. Regulation

States commonly regulate many different products and activities, from food and drugs to advertisements. Much of this could be taken over by private agencies, with relatively little difficulty. The necessary mechanisms could be modeled on ones that are widely used in existing societies. As noted above in regard to drugs, institutions along the lines of *Consumer's Report* could evaluate different products, with their assessments publicized and considered by potential consumers. The same is true of regulation of food, as discussed above, as long as market incentives would lead private regulatory agencies to function impartially and with care. But this is not unlikely.

1.6. *Excludable Goods*

Examples are schools, museums and other cultural facilities, national parks, and recreation areas. Access to these facilities can be controlled, and so for the most part they can be provided through user fees, although the fact that such a system would deny the poor access raises troubling equity questions. I should note one problem with national parks and conservation programs. Who owns the resources in question and therefore must authorize the relevant individuals to appropriate and/or manage them?

1.7. Redistribution

Concerns here center upon meeting the needs of poor and otherwise needy members of society, the severely handicapped, orphans, etc. I presume throughout this work that people have strong moral requirements not to allow the unfortunate to starve or otherwise suffer unnecessarily.[86] A strong case can be made that these functions can be performed by private charities. However, difficult empirical questions are encountered in regard to the functioning of such institutions. If private means will not meet the needs of all potential recipients, then state action could well be required. The moral requirement in question is for individuals actually to make sure that the unfortunate do not suffer, rather than to attempt to alleviate their suffering in whatever ways they think best.[87] Accordingly, Simmons argues that individuals have moral requirements to cooperate with the state in regard to this function, although he does not require cooperation with other kinds of laws.[88] Whether uncoordinated actions would actually be adequate is a subject that cannot be explored here, although the existence of extensive state welfare functions in all developed societies suggests the likelihood that nonstate solutions have been found to be inadequate.[89]

Strictly speaking, state welfare services are not public goods, in that they can readily be denied to specific potential recipients. However, from the standpoint of potential contributors, welfare services are analogous to public goods. If the needy, whom Smith would otherwise be required to help, have their needs met by state agencies, then the moral benefits provided by the agencies are nonexcludable in regard to her. She has incentives not to support the agencies and could well have to be compelled to. Finally, if welfare functions must be financed through tax revenues, once again, the tax system is a public good that people have incentives not to support, and so we encounter compliance problems.

1.8. Conclusions

From our discussion, it seems that nonstate performance of certain functions is plausible. I do not dispute these claims and have discussed

[86] These requirements are discussed in Chs. 4 and 5.

[87] D. McDermott, 'Natural Duties and State Legitimacy,' paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.

[88] A. J. Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992), pp. 343–52.

[89] Cf. D. Schmidtz and R. Goodin, *Social Welfare and Individual Responsibility* (Cambridge: Cambridge University Press, 1998).

these functions only briefly. Libertarians and anarchists have incentives to focus on these functions and it is not surprising that there is extensive literature on topics such as regulation and provision of excludable goods. But the burden antistate theorists must meet is considerable. If the state is to be dispensed with, then all the functions we have seen must be taken up. What is more, the state not only performs all these services but does so simultaneously. Without the state, we not only confront all the problems I have noted, but all of them at the same time. In the literature, theorists generally examine the problems individually.[90] But difficulties are compounded enormously if they occur together.

We see from the above survey that the strongest arguments for the state rest on 1.2 and to a lesser extent 1.3 (security and other burdensome public goods, respectively). Once again, this is not surprising and fits well with much traditional opinion. Redistribution (1.7) also provides a strong argument for the state, if we accept the existence of strong moral requirements to aid others in need. There is little doubt that to provide these benefits, states are necessary. In contemporary societies, sizable organizations are required. Especially if the entity in question must be sufficiently large to met the needs of a modern society, it must be similar in scale to existing states.

As I have noted, if a given agency is large and removed from the experience of ordinary citizens, there can be severe problems controlling it. The larger the entity, the more severe the problems. In the modern world, it has been generally decided that adequate control requires large-scale participation and other institutions and forms of modern democracy. This is an important argument for democracy as a form of government.[91] In addition, given the complexity of modern society, there is clear need for a mechanism to deal with problems as they arise. The organized force of society, in the form of the state, able to be channeled in different directions, is itself arguably indispensable to acceptable life.[92]

However, the conclusion that the state is necessary should not be considered firmly established before we have examined nonstate measures in more detail. We will consider three approaches. First are

[90] For example, Friedman, *Machinery of Freedom*.

[91] J. Schumpeter, *Capitalism, Socialism, and Democracy* (New York: Harper and Row, 1976); another argument for democracy is sketched briefly below, pp. 58–9. See I. Shapiro, *The State of Democratic Theory* (Princeton: Princeton University Press, 2003), Ch. 3, for a sophisticated update of Schumpeter's theory.

[92] I am grateful to Dave Klein for discussions on this issue. See discussion of the 'common good' argument, in Ch. 5.

game-theoretic, technical solutions to N-person PDs. Second are voluntary alternatives to the traditional state, associations that have many of the state's attributes, though they do not exercise a monopoly of legitimate force (or have effective, de facto, market control of the means of force). Finally, we will examine political organizations that are 'legitimate' but do not have claim rights to their subjects' obedience.

2. Technical Solutions to N-person Prisoner's Dilemmas

From a game-theoretic perspective, individual incentives in regard to many public goods have the structure of N-person PDs. Once again, because Blue will receive public good G if N others cooperate and will not if N others do not, regardless of what she does, it is not in her interest to contribute. Because we can assume that other people's incentive structures are similar to Blue's, if they reason similarly, they too will not cooperate. G will not be provided, leaving everyone worse off than they would be through general cooperation.

An entire list of public goods we have discussed are affected by this logic. National defense, security against terrorism, and environmental and public health protections are all prime examples of PD public goods. It is widely believed that difficulties providing these constitute the strongest argument for the state. By using its coercive power to compel general cooperation—'mutual coercion mutually agreed upon,' in Garrett Hardin's famous formulation[93]—the state overcomes PD logic. Michael Taylor refers to this as the 'most persuasive justification of the state.' According to Jon Elster, 'politics is the study of ways of transcending the Prisoners' Dilemma.'[94]

Theorists have worked out different means to avoid this conclusion. Taylor argues that the above PD formulation is inadequate. Under many conditions, we should interpret public goods provision as iterated PD games (or supergames). Taylor maintains that traditional analysis of public goods incentives is flawed, because it is 'entirely static.' In the classic analysis of Mancur Olson, 'the individual is supposed in effect to make just one choice, once and for all, of how much to contribute to the public good.'[95] But the fact that political

[93] G. Hardin, 'The Tragedy of the Commons,' *Science* 162 (1968): 1247.

[94] M. Taylor, *The Possibility of Cooperation* (Cambridge: Cambridge University Press, 1987) [Taylor, *Possibility of Cooperation*], p. 1; Elster, quoted by Taylor, p. 19.

[95] Taylor, *Possibility of Cooperation*, p. 12.

relationships are continuous opens the way for conditional cooperation. Smith can realize the advantage of a strategy of conditional cooperation, cooperating only if Grey does so as well. Because Grey should reason similarly, it is possible that they could find their way to joint cooperation. It is conceivable that a player could adopt a strategy of unconditional noncooperation, that is, refusing to cooperate regardless of what the other player does. But since mutual cooperation is in everyone's interest, this would not be rational. Conditional cooperation is frequently referred to as 'tit for tat.' Knowing that joint cooperation is in Grey's interest as well as her own, Smith can rationally take the first step by cooperating. If Grey takes advantage of her by not cooperating in response, he will gain in this single transaction. However, his payoffs in the many subsequent transactions, based on joint noncooperation, will be lower than they would be through joint cooperation. Thus he should forego the immediate advantage of noncooperation in favor of cooperation, to which Smith will respond by cooperating further, and so forth.[96] Extending this logic to an N-person PD game could result in a situation in which each person cooperates conditionally. Because general cooperation is preferable to general noncooperation, conditional cooperation could result in the production of desired public goods.[97]

In one sense, this argument is convincing. Political interaction is not a one-shot process. But closer examination reveals significant problems in moving from a two-person model to an N-person. As Taylor recognizes, successful conditional cooperation depends on each participant knowing about the behavior of other participants in each previous stage of the game.[98] This condition is satisfied far more easily in the two-person scenario than in the N-person. Olson notes that solutions to PD problems become increasingly difficult as the group in question increases in size.[99] One reason for this is relevant here. To use Olson's term, a group can be described as 'large' if the burdens of any one person's contributions are not affected by whether another individual does or does not contribute.[100] In a modern nation-state, this is true in regard to many requirements. Whether or not Grey pays his

[96] *Ibid*., Ch. 3, for discussion, including complexities concerning discounts on future payoffs, omitted here.

[97] See also A. de Jasay, *Against Politics* (London: Routledge, 1997), pp. 206–8, 215–16.

[98] Taylor, *Possibility of Cooperation*, p. 61.

[99] M. Olson *The Logic of Collective Action* (Cambridge, MA: Harvard University Press, 1965), pp. 36, 48.

[100] *Ibid*., p. 12.

taxes will not detectably affect the payments required of other people, or the federal budget deficit (or surplus).[101]

As a society becomes increasingly large, feasibility considerations become increasingly problematic. The information requirements of conditional cooperation become more difficult to satisfy. Given the likelihood that other people will not know whether or not Grey has contributed—paid his taxes, cooperated in some environmental conservation policy, signed up for military service, etc.—especially if there are no state agencies to monitor compliance, the connection between his cooperation and general cooperation is broken. The traditional logic of the N-person PD will be in effect, and it will not pay for him to cooperate.

Therefore, one must conclude that the iterated PD is unlikely to yield satisfactory solutions to problems of alternative provision.[102] Complex variations on this approach can produce solutions in the highly artificial framework of two-person (or other small number) interaction. However, if we increase the number of players or factor in other real-world impediments, it is unlikely that such constructions would work.[103]

[101] For complexities here, see Klosko, *Principle of Fairness*, App. 1.

[102] Briefly, there are other possible solutions, but I believe there are problems with them as well. Analysis of public goods problems on the model of the game of chicken does not overcome these problems; see Taylor, *Possibility of Cooperation*, Ch. 2. Briefly, two difficulties are as follows: first, the requirement that one subgroup be able to supply the good in question generally does not hold for the public goods that interest us. Second, one must explain the incentives of individuals in these subgroups, which would appear to conform to those in a typical N-person model. In *Against Politics*, de Jasay deals only with performance and nonperformance of contracts, as opposed to wider forms of noncompliance, including noncontribution to necessary public goods, in regard to which noncompliance can be far more difficult to detect, and raises problems that de Jasay's argument does not address. For example, in many public goods cases, a given individual's incentives to enforce another individual's compliance are significantly different from those in a contract situation. In a public goods case, under common circumstances, A's defection causes no detectable damage and so does not harm B or affect the costs associated with his own compliance.For problems with 'assurance contracts,' as advocated by Schmidtz (*Limits of Government*, Chs. 4–6), see D. Miller, 'Public Goods Without the State,' *Critical Review*, 7 (1993); Klosko, 'Review of Schmidtz *Limits of Government*', *Political Theory*, 20 (1992).The experimental evidence supporting nonstate solutions to PD problems contains severe problems, concerning small size of experimental groups and artificially low costs and benefits of cooperation. See H. Harriott, 'Games, Anarchy, and the Nonnecessity of the State,' in *For and Against the State*, Sanders and Narveson (eds) (Lanham, MD: Rowman and Littlefield, 1996) pp. 131–4.

[103] The problems with game theory are epitomized in theorists' inability to deal with defense. In the thirteen articles in Sanders and Narveson's collection on the practical and moral necessity of the state, almost all employing game-theory approaches, the problem receives no serious attention (*For and Against the State* See also, n. 27.

Empirical evidence supporting this analysis is supplied by Elinor Ostrom.[104] Ostrom examines long-lasting associations in which participants are able to cooperate in the use of 'common-pool resources,' without authoritative interference, through what she describes as 'self-organized and self-governed enterprises.'[105] Examples include use of high mountain meadows in Switzerland, use of common land in rural Japanese villages, and irrigation arrangements in Valencia, Spain. Successful avoidance of free-riding in these and other instances could be thought to give the lie to the traditional logic of collective action, as described above. However, Ostrom carefully delineates the special conditions that allow these arrangements to succeed.

Central to successful cases is that 'individuals repeatedly communicate and interact with one another in localized physical settings.'[106] Repeated interaction reduces crucial problems of accumulating information and monitoring compliance with association norms. Among the conditions Ostrom identifies as making for successful cooperation are that groups are 'relatively small and stable' and that participants 'face relatively low information, transformation and enforcement costs.'[107] The problem of course is that associations able to provide the essential public goods that concern us do not generally possess these attributes. Ostrom notes that '[w]hen individuals who have high discount rates and little mutual trust act independently, without the capacity to communicate, to enter into binding agreements, and to arrange for monitoring and enforcing mechanisms,' they are unlikely to choose cooperative strategies.[108] Once again, it would be difficult for proponents of alternative supply of public goods to show that their

[104] E. Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge: Cambridge University Press, 1990) [Ostrom, *Governing the Commons*]. Conclusions similar to Ostrom's are presented by R. Ellickson, *Order Without Law* (Cambridge, MA: Harvard University Press, 1991).

[105] Ostrom, *Governing the Commons*, p. 25.

[106] *Ibid.*, pp. 183–4.

[107] *Ibid.*, pp. 211.

[108] *Ibid.*, p. 183.

arrangements are feasible when the conditions Ostrom identifies are not in evidence.

The analysis here reinforces our conclusion Section 1 that the state is necessary for the provision of important public goods. What Taylor refers to as 'the most persuasive justification of the state' poses a formidable obstacle to theorists who question the need for the state. If we grant the necessity of the public goods we have discussed, the case for the state remains powerful, in spite of recent attempts to circumvent this logic.

3. Voluntary Protective Associations

Probably the best known account of a nonstate political form is Nozick's discussion of mutual protective associations.[109] Nozick of course presents individuals in a Lockean state of nature. He argues that, in the absence of a state, individuals will combine forces for purposes of protection, while market forces will cause a single, dominant protective agency to arise—to which Nozick refers as the 'ultra-minimal state' (ultraminimal because nonmembers would still have rights to punish violations of morality themselves). Nozick argues that the dominant protective agency has no more right to impose its solutions to general enforcement problems than do individuals. But because it has greater power, it is able to force its solutions on nonmembers.[110] We can accept Nozick's claim that, in a new state of nature, individuals would have strong incentives to join non-state entities. But I will set aside Nozick's invisible hand argument for the emergence of a single dominant protective association. I will assume the continued existence of multiple associations. (The argument here would be little affected by a single, though still purely voluntary, dominant association.) I assume that multiple associations remain possible and that each is sufficiently large and adequately powerful to fulfill the functions its members assign it.

A central feature of mutual protective associations is that they do not claim a monopoly of legitimate force. If a given individual wishes to remain in the state of nature, that is her concern. Political obligations must be based on consent. If an individual does not join an NSE, she has no obligation to obey its rules, although she is still required to behave morally. We can assume that violators of moral rules do not have rights not to be punished. And so an NSE that generally punishes

[109] Nozick, *Anarchy, State, and Utopia*, Pt I.

[110] *Ibid.*, pp. 108–10.

in accordance with morality has a right to do so and can be considered legitimate.[111]

Given our list of necessary functions, it is important to recognize that adequate NSEs must be quite different from those Nozick discusses. In order to allow acceptable lives, NSEs must go far beyond providing direct personal protection. If we assume that necessary public goods require organization, then many of the functions discussed in Section 1 must be taken over by NSEs, which must therefore impose demanding requirements on their members.[112]

In certain respects NSEs are able to provide answers to questions we have seen, notably the state-related and general enforcement questions. In response to the former, a given entity is controlled by the members, who would presumably institute democratic safeguards, including separation of powers and checks and balances. The entity would be financed by fees paid by its members. Its main functions would be protecting its members and providing other services that they required or desired and were willing to pay for. It would also be justified in punishing violations of morality that did not affect its members, although there are difficult questions about its ability to tax its members to pay for this.

By imposing and enforcing common standards on their members, NSEs largely solve the general enforcement problems. But because an NSE claims a monopoly of force only over its members, enforcement questions arise concerning relationships between different NSEs and between an NSE and nonmembers. Relations between NSEs should cause few problems. I assume that these will resemble relationships between sovereign states in the modern world. Treaties can be negotiated and so disputes between them settled in an acceptably amicable way.

Relations between NSEs and individuals who are not members are more troublesome. We will focus on two problems. As long as sufficient numbers of people join NSEs, the latter could well fulfill most of the functions on our list. But I assume that not everyone will join. And so, first, could NSEs allow nonmembers not to comply with their statelike requirements and regulations? Second and more important,

[111] To ease discussion here, I will not consider general enforcement questions concerning identification of proper moral standards, although they create additional, severe difficulties.

[112] I assume that only NSEs are able to provide the relevant public goods. If these agencies do not provide them, there seems to be no other way in which they will be provided, and individuals will not lead acceptable lives.

given the incentives of nonmembership, would sufficient numbers join? We will consider these questions in turn.

Assume circumstances in which Grey, a nonmember, believes he has been wronged by Blue, a member of *NSE*, a functioning NSE. Under these circumstance, he is likely to wish to do something about the perceived violation. Clearly, *NSE*'s obligation to protect its members will cause it to prevent him from taking action against her. But because *NSE* and its members are required to behave morally, they are required not to prevent Blue from being punished, if they find that she is in the wrong. Thus violations of nonmembers' rights will not go unpunished, but whether and how they are punished will be *NSE*'s determination.[113] Without accepting Nozick's argument that such a system is morally justified, I believe he is correct that, in disputes between an NSE and nonmembers, the nonmembers will have to accede to the norms of the entity. Because of the gross disproportion of power, nonmembers will have little choice. If Grey finds this situation unacceptable, he can always join a protective association himself, which is a strong reason to do so.

As in Nozick's theory, then, nonmembers' ability to take actions against *NSE* members will be strictly limited. In other respects nonmembers will be free to act, but only against other nonmembers. However, if nonmember enforcement becomes dangerous or disruptive either to *NSE*'s members or to social order, it will be justified in curtailing it.[114]

More serious problems concern public goods. Clearly, for reasons of self-protection, *NSE* must compel nonmembers to cooperate in the provision of public goods bearing on security. A plausible rule of thumb is that nonmembers will be compelled to cooperate when noncooperation would create direct danger to *NSE*. Clearly, they may not violate rights of members and may not disrupt general security, which is necessary for all. Nonmembers will also have to comply with measures intended to protect the environment and public health. Clearly, nonmembers will not be allowed to pollute rivers or, say, not comply with general rules intended to clean up the air. If they are ill with highly communicable diseases, *NSE* will take measures to ensure they abide by quarantine and similar restrictions. But for the sake of argument, I assume that *NSE* will not be able to compel nonmembers

[113] This situation generally corresponds to Nozick's account, though without introduction of a principle of compensation.

[114] The extent to which *NSE* would have to compensate nonmembers for depriving them of this right is a question we need not address here.

to contribute to defense.[115] The reason for different treatment of defense is that, while noncooperation with defense could contribute to *NSE*'s vulnerability and so indirectly endanger its members, with the other public goods, noncontribution constitutes a direct danger. And so in regard to defense, nonmembers can be assumed to be able to free ride.

It seems that *NSE* will be justified in forcing nonmembers to contribute to redistributive programs, if morality requires all individuals to aid those in need. The fact that nonmembers are outside *NSE* does not exempt them from this requirement, although *NSE* will have to present strong arguments that private contributions are ineffective to justify forcing them to comply with its designated programs.

In these respects, the functioning of NSEs seems reasonably clear and plausible. But in order to function effectively, NSEs require adequate membership. The second question is whether enough people would join. The obvious counter to a claim that people might not is that, unless they sign up, they will be unprotected and so at the mercy of predatory others. Once again, let us assume the existence of *NSE* and Grey, a nonmember. Because of the precariousness of his unprotected condition, Grey has strong incentives to combine forces with similarly situated others. But while such considerations could lead Grey to join *NSE*, there is another possibility. Grey can form what we can call a *gang* (the *Greys*), the members of which can agree to provide joint protection (direct physical protection, as discussed above). This could well be sufficient to allay immediate concerns about Grey's (and the other *Greys*') safety. Grey could also ensure his safety by joining *NSE*. But if he did so, he would be required to contribute to the wide range of public goods it provides. By not joining, he would be able to receive the benefits of these public goods without contributing. The only public good he might not enjoy is personal protection over an extended area. His ability to travel freely could be restricted, to some extent, but only if enough people joined *NSE* and its affiliates to hem him in.

The fact that Grey does not join *NSE* does not license its members to prey upon him. Both *NSE* itself and its members are required to abide by the dictates of morality. Unless the fact that Grey does not cooperate in producing the relevant public goods is morally wrong, this does not justify their forcing him to contribute. The most likely reasons for believing that noncontribution is a serious wrong stem from the

[115] If such contributions can be required, the dividing line between *NSE* and a traditional state will be seriously eroded.

principle of fairness or some similar moral principle. However, if the principle of fairness were able to require Grey's contribution, this principle would provide a moral basis for general political obligations, which would undermine the justifiability of NSEs as opposed to traditional states, which individuals have moral requirements to support. Unless other reasons are forthcoming, *NSE*'s members will have no grounds to complain about Grey's receiving their public goods cost-free.[116]

Faced with this situation, one might respond that Grey has another reason to join. If enough people refuse to do so, essential public goods will not be provided, and he will not be able to lead an acceptable life. However, the counter is obvious. Grey's circumstances correspond to those in a traditional N-person PD. If an adequate number (N) of other people comply with the necessary measures, it is not necessary for him to do so. The relevant public goods will be provided without his cooperation and he has strong incentives not to cooperate. If N others do not comply, then the goods in question will not be provided, and Grey has little reason to comply. As we have noted, in a large society, his compliance or noncompliance will not determine whether they are provided, and will most likely make an imperceptible difference.

Of course, other people in the state of nature are situated similarly; the logic of their positions is also similar. If significant numbers of people opt out of joining NSEs, this will raise the costs of members in providing public goods, which will cause additional people to opt out, which will lead more people not to join, and so propel a spiral towards collapse. Under these circumstances, adequate numbers of people are not likely to form functioning NSEs. More likely, the state of nature will give rise to a number of gangs, to mutual protective associations, along the lines described by Nozick. But these will not be able to provide essential public goods and people will not be able to lead acceptable lives.

Thus we see that, unless nonmembers, who benefit from the production of essential public goods, have moral requirements to cooperate in their provision, they will not join NSEs, with the eventual consequence that the relevant public goods will not be produced.

Other ways around these problems are not likely to work. Given the size of the relevant population, technical solutions to N-person PDs will not succeed. Once again, 'tit for tat,' the most prominent technical solution, requires a population sufficiently small to allow it to be

[116] I view the collapse of NSEs, as argued here, as an indirect justification of political obligations under the principle of fairness.

generally known whether a given individual is complying. Since this size constraint does not hold, this solution will not work. But before concluding that traditional states are necessary, we should examine an additional nonstate solution.

4. Authority and Legitimacy

In recent years a number of scholars have argued for a particular form of nontraditional states, states that would be able to function adequately without political obligations. Although their arguments differ in various ways, these scholars generally distinguish 'legitimacy' and 'authority,' calling into question the possibility or the need for the latter.

The situation in regard to these arguments is complex. The legitimacy theorists (as we can refer to them) do not condemn political obligations or claim that they are inconsistent with deeply held moral beliefs.[117] In general, they claim something milder, that the existence of political obligations cannot be established. Their focus on states that are legitimate without obligations is intended to show that such states are possible, that their operation would sufficiently resemble that of traditional states—that is, ones with obligations—and that they should not be rejected out of hand. A successful argument for the existence of political obligations would render the overall position of the legitimacy theorists irrelevant, and so in large part, this entire book can be viewed as attempting to accomplish this.[118] My purpose in this section is narrower. As part of my survey of nonstate solutions, I examine empirical claims legitimacy theorists make. My intention is to show that states without obligations are more problematic than they allow. Although legitimacy theorists claim to eliminate the need for authority, I believe authority can be shown to be necessary in large areas of these institutions' operations. Although my argument will support something less than traditional states that claim rights to

[117] On this point, I benefited from M. Murphy, 'Philosophical Anarchism: False and Arrogant' (unpublished).

[118] These scholars devote different amounts of attention to demonstrating the nonexistence of political obligations. Simmons, *Moral Principles*, of course, criticizes the most important arguments in detail. Edmundson also provides detailed criticism, though he concedes that he does not have a strong argument against fairness (*Three Anarchical Fallacies*, pp. 33, 112). Buchanan ('Political Legitimacy,' p. 696) and Morris (*Essay*, p. 214) do not examine the arguments, referring to the authority of what they view as general consensus in the literature.

their subjects' obedience to all laws,[119] a public goods argument can demonstrate the need for significant authority.

In general, as these theorists use the term, a political entity that is 'legitimate' is able to take morally appropriate action, while the relevant population may or may not have obligations to obey its dictates. If the population has political obligations, then the entity can be described as having authority.[120] More fully, on this account, if Grey has political obligations to state X,[121] then he should obey the law because it is the law. On subjects on which the state legislates, he should substitute its judgments for his own.[122] On these subjects, Grey's moral requirements are 'independent of content.' He should not examine the particulars of each case but should follow the dictates of the state, because they are so dictated. Like all political obligations in a liberal polity, the obligations in question do not bind absolutely. They are prima facie obligations, which are subject to being overridden by other moral requirements. But when a given political obligation is in force, there is a presumption that Grey should obey. The burden of justification is on him to explain why he should not.

In the case of an entity that lacks political obligations, the subject is in a different position. She may well obey the law on specific occasions—or most occasions. But her reasons for doing so will depend on the specific factors present in each situation and will be peculiar to each. In other words, each time the state wants her to obey a particular law, it will have the burden of explaining why she should do so. Even if it is generally able to meet this burden, the state will not have a presumptive claim to her allegiance. I view this as the core of the situation with legitimate states that lack authority.

In accordance with terminology discussed above, a political body that has authority should be viewed as a traditional state. An entity that lacks authority and has only legitimacy falls under the category of a

[119] The implications of these conclusions for theories of political obligation are pursued in Chapter 11.

[120] Buchanan, 'Political Legitimacy'; see above, pp. 21–2. Similar positions are put forward by Simmons, *Moral Principles*, Ch. 8; Green, *Authority of the State*, pp. 242–3; Morris, *Essay*, pp. 213–17; Edmundson, *Three Anarchical Fallacies*; Copp, 'Idea of a Legitimate State.'

[121] These obligations can be construed as owed either to the state or to the community. If the state is construed as representing the community, the distinction should make little difference.

[122] This is following J. Raz's account of authority ('Authority and Justification,' *Philosophy and Public Affairs*, 14 [1985]).

nontraditional state or an NSE.[123] This distinction between traditional states and NSEs is complicated by the view—widely held by scholars—that at the present time no theory of obligation is able to generate 'comprehensive' political obligations, moral requirements to obey all laws. As we will see below, accomplishing this will require different principles of obligation working in tandem. Still, the possibility remains that a given principle of political obligation could generate moral requirements to comply with a certain range of laws, especially in regard to particular areas of state function, without being fully comprehensive. If this is the case, then *in regard to these areas*, there will be a presumption that Grey should obey, and the burden will be on him to demonstrate why he should not. In regard to whether we should identify an entity able to ground obligations in limited areas as a traditional or nontraditional state, I believe it depends on the reach of the presumption. As the areas in question become increasingly large, the claim that the political body has legitimacy but lacks authority loses significance. Though precise dividing lines are difficult to identify, an entity that is able to justify obligations in large and significant areas of state function verges on being a traditional state, although we should of course bear in mind that it might not be able to ground comprehensive obligations and so would not actually be fully traditional.

For our purposes here, it is enough to show that political entities necessary for acceptable life must have significant authority. Although I believe comprehensive obligations, and so full authority, can be established, I postpone discussion of this subject until Chapter 5. Rather, it is enough to show that legitimacy alone does not suffice.

A sophisticated account of states that possess legitimacy but not authority is presented by Allen Buchanan.[124] The core of Buchanan's position is that political authority cannot be justified, but that this is of little consequence. He does not present a detailed defense of the former contention, citing the important work of Simmons and what he views as a consensus in the literature (p. 696). Nonexistence of authority will make little difference, because, even without obligations to the government, individuals can have strong reasons to obey the law. These

[123] For the sake of simplicity, I assume that if an entity has authority, this will preclude individuals or other entities from using force on their own, and so it will have a monopoly of legitimate force. If an entity has only legitimacy, I assume that this will not rule out other entities also being able to exercise force.

[124] Buchanan, 'Political Legitimacy' (hereafter unaccompanied page references in the text are to this article).

can be of various kinds: prudential, religious, and moral. The last are particularly important, as the law generally codifies sound moral judgments (e.g. prohibitions on killing and theft). Prudential concerns figure in because people can be punished for violating such rules. Especially important to Buchanan is what he calls a 'Robust Natural Duty of Justice,' which requires that we aid other people by complying with and helping to set up just governments that protect their basic rights (pp. 703–9). Finally, Buchanan supplements these reasons with additional ones that stem from democratic institutions. The results of democratic deliberations should be complied with—in regard to both the individuals chosen to wield political power and the content of their decisions (as embodied in the laws)—as a requirement of showing one's fellow citizens equal concern and respect (pp. 710–14). Combine these last considerations with the others we have noted and the result is a powerful set of reasons to obey the law. At one point Buchanan describes people as having 'weighty obligations' to obey (p. 697). But these are still not political obligations in the strict sense, in that government does not have presumptive claims to obedience.[125]

Although Buchanan makes an impressive case, I believe it falls short in crucial respects. His position, like those of proponents of other forms of NSEs, appears to work well in regard to certain government services, especially personal protection. But it also has problems dealing with essential public goods. As we have seen, nonstate supply is unlikely to work. At first sight, this criticism might appear not to apply to Buchanan, since he purports to analyze a form of state entities rather than NSEs. Moreover, in calling attention to the central role democracy plays in his state, Buchanan goes some way towards clearing up the general enforcement and state-related questions. For instance,

[125] Buchanan puts this in terms of people having obligations *to* government, and so government having claim rights to obedience (pp. 691–2), but differences between these specific formulations and other similar ones should not affect the argument here. However, a troubling point that Buchanan does not examine is that (all?) individuals apparently retain rights to enforce morality themselves. Although individuals have moral reasons to obey legitimate political institutions, Buchanan's position does not explain why they must cede rights to self-enforcement and so does not explain how the state exercises a monopoly of legitimate force. Since I view the differences between obligations to government and to the community as of little significance, Buchanan's view differs from traditional theories of obligation mainly in regard to the absence of a monopoly of force. Practical difficulties resulting from this include the general enforcement questions noted above and should be addressed. For helpful discussion of points in this note, I am indebted to Luc Gregory.

democratic deliberations about the law provide a solution to the problem of common standards.

However, the absence of state authority and so political obligations raises problems for PD public goods similar to those encountered in previous sections. At first sight, the Robust Natural Duty of Justice (RNDJ) appears to overcome the logic of the PD. We can assume that Grey prefers not to contribute to defense. In a large society, his unwillingness will not have detectable consequences, and so he cannot be forced to comply on the grounds that he is hurting other people. However, according to the RNDJ, he is required to do more than refrain from harm. He is required to support just institutions, 'to help ensure that all persons have access to institutions that protect their basic human rights' (p. 703). Because essential public goods such as defense are necessary for this purpose, the RNDJ appears to mandate Grey's cooperation and licenses the state to punish him for noncompliance.

There are two problems with this argument. The first concerns the force of the RNDJ. I view it as a fact of political life that supporting government can be costly. Because moral principles such as RNDJ cannot justify costly compliance, Buchanan does not succeed in establishing the necessary moral requirements. I will not argue for these claims here. Problems with the costs of natural duties is a central theme of Chapter 4, where we return to natural duty theories.

Second, assume for the sake of argument that RNDJ is of sufficient force. Still, we must ask how it will dictate support for the necessary public goods. The question here is the precise nature of the requirement to support just institutions. Even if Grey is required to support the provision of defense in territory X, his contribution can assume different forms. Who has authority to determine the form this should take? Because liberty is a central value, the burden of justification is on defense providers to demonstrate that Grey must accede to their judgments of what is required. But it is important to recognize that they must be able to do so, if defense is actually to be provided. We can assume that Grey recognizes an RNDJ to contribute but disagrees with the providers about the form his contribution should assume.[126]

[126] It could be argued that, in disagreeing, Grey would be remiss in regard to his duty to show other members of society equal concern and respect. Since government policies are the result of democratic deliberations, refusing to subordinate his own judgment to that of the majority is a form of disrespect. However, such an argument from democracy suffers from a weakness analogous to that of an argument from consent. Grey would be remiss only if he had participated in the deliberations. If he did not participate, this argument would not obtain. It could be argued in response that even if Grey did not participate, for him to hold his own opinions as superior to those of his fellows is another form of disrespect. But this response too would cause difficulties for Buchanan. As noted Buchanan follows the current consensus in the literature against political obligations, including, I assume, arguments against the principle of fairness. As things presently stand, the most important argument against fairness obligations is that many recipients do not 'accept' the relevant public goods, if they object to the form in which they are provided (see p. 62). In denying such a claim and asserting that people benefit to the requisite extent regardless of what they think, the proponent of fairness would be guilty of paternalism (C. Wellman, 'Toward a Liberal Theory of Political Obligation,' *Ethics*, 111 [2001], 737–8). The implication here cuts against Smith's lack of respect for her fellow citizens. If it is not disrespectful for her to object to the form in which goods are provided, in spite of the fact that this is the result of democratic deliberations, then it should also not be disrespectful for her not to accede to the judgment of the majority in regard to the goods government should provide and at what cost. If a theorist contends that Smith must accept the majority's claim to the superiority of its preferred method of providing defense, then it would be difficult for the critic to defend Smith's right not to 'accept' given benefits because she objects to the form in which they are provided. The result is a dilemma: either Smith is not disrespectful, or if she is, then she also has political obligations under the principle of fairness.

If this response is accepted and circumstances are similar for large numbers of other X-ites, it will mean that defense will not be supplied. As indicated above, it is a fact of modern life that provision of security in territory X requires regulated coordination by its government. If we grant this, then in order to meet society's needs, the members of X must not only be required to contribute, but they must be required to contribute what the government of X says they should. Because of the scale and complexity of defense—and other complex, indispensable public goods—the government of X must be able to substitute its opinions for those of the relevant population in a large area of its operations.[127] Accordingly, once Grey concedes the need for defense, he must also concede a presumption that he will accede to the state's demands in that area.

The position we are left with, then, is that RNDJ requires Grey to accede to the authority of the state in crucial areas of its operation.[128]

[127] It appears that the main thrust of RNDJ, the requirement to help provide people with institutions that they need in order to secure their rights, will overlap closely with moral requirements to support the areas of state operation under discussion in this chapter, which are concerned with the supply of indispensable public goods. Were this line of argument pursued further, I believe RNDJ would be shown to verge on establishing authority as well as legitimacy.

[128] As presented here, this requirement holds only in regard to the provision of essential public goods that require regulated coordination. But many goods discussed in Section 1 require this, while a wider range of goods will also be covered through the 'indirect' and 'common good' arguments discussed in Chapter 5.

Because he must substitute its judgment on crucial matters for his own, his moral requirements in these areas are tantamount to political obligations. Although these considerations have not been shown to ground obligations that are fully comprehensive, they do show that, in extensive areas of its operation, the state requires authority. Legitimacy is not enough.

5. Conclusion

In closing, I emphasize the importance of nonstate provision of all the requirements of acceptable lives I have discussed. As it seems to me, one respect in which discussions of NSEs and other voluntarist alternatives are generally defective is in not recognizing the full complexity of the task. Proper assessment of political obligations requires that we address the entire range of necessary state services and problems in providing them.

As we have seen, voluntarist solutions have problems that are especially acute in regard to PD public goods. In the liberal tradition, the most familiar justifications of political obligations proceed from individuals in the state of nature, who construct political relationships through voluntary consent. In this chapter, we have explored a host of reasons why this does not work. The logic of the PD casts a long shadow over voluntary consent. To paraphrase Hilary Clinton, it takes a community to provide essential public goods. Even more, as we have seen, it takes a state. Because we all need public goods the state provides, we are by nature (as Aristotle would say[129]) political animals. In discussions of political obligation, it is common for theorists to assume highly voluntarist starting points, which of course makes political obligations more difficult to establish. But our need for public goods gives the lie to such assumptions. As I argue, in Chapter 5, our need for public goods makes us members of the communities that supply them. The standpoint of the community should figure in assessment of our political obligations.

Somewhat schematically, a *public goods justification for a traditional state* (i.e. one possessing authority as well as legitimacy) is as follows:

[129] *Politics*, Book I, Ch. 2.

P.1 A number of PD public goods are required for acceptable lives.
P.2 Private or nonstate provision of these goods will not work adequately.
P.3 Provision by nontraditional states (lacking either a monopoly of force or authority) will also be unsuccessful.
P.4 Therefore traditional states (possessing both authority and a monopoly of force) are necessary for acceptable lives.

The nature of people's obligations to such states remain to be discussed. We turn to this subject in subsequent chapters.

To summarize briefly, we saw in Section 1 that voluntary provision of public goods is unlikely to succeed. In Section 2, we saw that technical solutions to N-person PDs rest on specific conditions that are not present in large modern societies. Related problems crop up in discussions of NSEs. To the extent that Nozick's invisible hand argument is convincing, it depends largely on the limited functions of his minimal state. Because his protective agencies provide only direct protection, potential participants have strong incentives to join. But recognizing the need for state provision of indispensable public goods other than protection significantly alters the incentives for potential participants, doing severe damage to the plausibility of NSEs. As we have just seen, similar problems plague Buchanan's argument for a legitimate state without political obligations. If essential public goods are to be supplied, in significant areas of its operation, the state requires authority.

Accordingly, I conclude that NSEs will not succeed in providing essential public goods and so will not allow acceptable lives. A plausible argument for a nontraditional state or other NSE must defuse the questions we have examined. Unless it is able to do so, we should conclude the need for a traditional state, and with it, obligations for all alike to comply with its provisions.

The argument here has further implications in regard to the structure of the state.[130] Our review of requisites for acceptable lives indicates that state provision requires institutions that are large in scale and able to coordinate many complex tasks. Because of the high value liberal political theory places on autonomy, individual preferences should be respected in regard to exactly how the relevant services are provided,

[130] Cf. Morris' interesting discussions of alternatives to the state, especially smaller, more localized entities (*Essay*, Ch. 8). But according to the argument of this chapter, these alternative mechanisms must be able to supply the full range of indispensable public goods in their own territories and so must resemble traditional state in having political obligations.

although it is likely that people will disagree about preferred means. Because each individual is only one member of necessarily large organizations, decisions should be made collectively, in ways that respect the preferences of all individuals equally. Thus the large-scale, highly coordinated nature of the institutions necessary for acceptable lives also requires democratic decision-making mechanisms, as are found in all acceptable contemporary states.[131]

[131] An argument along these lines is given by T. Christiano, 'Justice and Disagreement at the Foundations of Political Authority,' *Ethics*, 110 (1999).

3
Alternative Supply and Alternative Preferences

Even if we grant that Chapter 2 presents a strong case for the state, this does not establish the existence of political obligations. The need for state services does not in itself entail that individuals are required to contribute to them. Obligations remain to be justified.

The fact that individuals require state services in order to lead acceptable lives suggests that moral requirements to obey the state are grounded in benefits it provides. On this account, obligations to obey the law are bound up with our need for the law, or, more precisely, with our need for the services that are provided through the law. As in Chapter 2, discussion of this contention involves empirical claims about how public goods are (or can be) provided. Briefly, a central contention of this study is that, because of the need for regulated coordination, indispensable public goods require that we accede to the state's authority concerning their provision.

If moral requirements to support the state are rooted in the need for state benefits, this indicates that the moral principles in question are principles of reciprocation. According to Larry Becker:

> Reciprocity is a moral virtue. We ought to be disposed, as a matter of moral obligation, to return good in proportion to the good we receive, and to make reparation for the harm we have done.[132]

There are a number of different moral reasons why benefits should be reciprocated. For instance, according to a principle of exchange, A agrees to give B something in return for what B provides. According

[132] L. Becker, *Reciprocity* (London: Routledge and Kegan Paul, 1986) [Becker, *Reciprocity* Routledge, and Kegan Paul], p. 3.

to a principle of gratitude, A should give B something of value as an expression of goodwill towards B for benefits received.[133] The particular principle I believe is most suited to reciprocity as it bears on political obligations is the principle of fairness (see Ch. 11): that it is wrong for A to profit from the cooperative labors of others without doing his fair share to support their efforts. Having discussed the state in Chapter 2, we turn to individual requirements.

1. Alternative Supply

We should begin by briefly discussing burdens of justification. Since it grounds political obligations on state supply of benefits, proponents of the principle of fairness must meet a heavy burden. If they present plausible arguments, then they establish a presumption that recipients have the relevant obligations. They must be able to demonstrate that the three necessary conditions hold, that benefits are worth their costs and indispensable, and that the benefits and burdens of cooperating with the state are fairly distributed. This presumption is rebuttable. If Brown is able to show that some condition or other does not apply to her, then she may be absolved of obligations she would otherwise have. For example, she could have physical disabilities that make it impossible for her to comply. This would not put an end to the matter, as the state could argue for other obligations, while she would be able to respond, and so on.[134] In other words, the establishment of obligations can be likened to a dialogue between the state and a given subject. Each time one side satisfies the demands of its role, the burden shifts to the other. Under the assumption that this brief account is acceptable, in this chapter I attempt to clarify demands a given side must meet. In particular, I am interested in establishing a rough standard of plausibility for certain arguments against obligations.

In recent years, the most powerful objection to the principle of fairness that has been developed concerns the *form* in which benefits are provided. Even if some benefit, for example, defense, is ordinarily viewed as worth its cost, this does not rule out the possibility that Grey

[133] On political obligation and gratitude, see A.D.M. Walker, 'Political Obligation and the Argument from Gratitude,' *Philosophy and Public Affairs*, 17 (1988); G. Klosko, 'Four Arguments against Political Obligations from Gratitude,' *Public Affairs Quarterly*, 5 (1991).

[134] For discussion, see G. Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992; new edn., 2004) [Klosko, *Principle of Fairness*], pp. 48–9.

might not agree, because he objects to the form in which it is provided. A sophisticated version of this objection is presented by Simmons.[135] Simmons defends a highly voluntarist, Lockean conception of political society, according to which free consent is a necessary condition for legitimate political relationships.[136] His main objection to the principle of fairness is that it could lead to the imposition of obligations on an individual 'who genuinely does not want the goods some cooperative scheme is providing or who would genuinely prefer to do without those goods rather than pay the price demanded for them.'[137] Once again, because the goods are necessary, we can assume that Grey wants them. But must he want them in the form the state dictates? I quote Simmons:

> [T]here are no public goods produced by cooperative schemes that are needed or indispensable simpliciter, and so there is no product of a cooperative scheme that can be said to be on balance a benefit (presumptively beneficial) for anyone without further qualification. Goods are only benefits to persons on balance if their costs and the manner in which they are provided are not sufficiently disvalued by those persons. Even a good like physical security…may be reasonably regarded by an individual as on balance a burden if it is provided at a prohibitive cost…or in a manner that is unnecessary and objectionable.[138]

In responding to Simmons, I will stipulate that under ordinary circumstances many state benefits are and should generally be viewed as worth their costs. But, once again, what if Grey has strong objections to the form in which they are provided? Simmons notes that 'many public goods supplied by the state can be provided by alternative, private means, often at a lower cost and without the imposition of oppressive or restrictive conditions.' Someone 'who prefers to try to provide [some indispensable] good privately, can hardly be accused of unfairly taking advantage of a group that unilaterally foists that good upon her on their own terms.'[139]

[135] A. J. Simmons, *On the Edge of Anarchy* (Princeton: Princeton University Press, 1993), pp. 256–60.

[136] Simmons characterizes such an account of political bonds as 'probably the single most influential in the history of political thought' (*ibid.*, p. 5).

[137] *Ibid.*, p. 256.

[138] *Ibid.*, p. 258.

[139] *Ibid.*, both quotations from p. 258. Simmons's argument here represents a departure from his position in *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979). In that work, he is within the liberal tradition, as he does not question state supply of central benefits. The essence of his argument for 'philosophical anarchism' is that, without questioning state supply, none of the basic arguments for political obligations survives scrutiny. In *On the Edge of Anarchy*, in contrast, he departs from mainstream liberalism and is in effect an anarchist in a more conventional sense, in that he is committed to the nonliberal factual claim that voluntary association can provide (all?) indispensable benefits.

In responding to this objection, I will distinguish (a) the possibility that Grey does not want to receive the goods in question from the state and (b) that he objects to the particular form in which the state provides them. We will address the former, 'alternative supply'—which depends on nonstate provision—in this section. As one can see, discussion in Chapter 2 is relevant to this objection, and it was largely for this reason that the subject was examined there. In Section 2 (b), to which we can refer as the objection from 'alternative preferences,' is discussed.

In order properly to assess alternative supply, we require a clear idea of the means through which various goods could be provided Simmons does not discuss these in detail, but it is important that we do so, to which end we will draw on Chapter 2. As I have indicated, what must be established here are burdens of justification. Clearly, to justify its monopoly of legitimate force the state must demonstrate that its way of providing indispensable public goods is workable and that the goods in question are necessary for acceptable lives. Thus I view something like portions of the argument in Chapter 2 as basic to the state's task. The need for the state to do this is supported by the great weight liberal political theory places on the value of liberty. An assumption along these lines underlies Simmons's position. But I believe that such a Lockean starting point is effectively neutralized by establishing the indispensability of certain public goods supplied by the state. Once this burden has been met, it is up to the proponent of alternative supply to rebut the presumption of obligation and show that she is an exception. In particular, in order to be absolved of obligations she would otherwise have, the opponent must give a plausible account of how the necessary benefits would be provided without the state.

The reasoning behind a plausibility requirement is straightforward. Brown should not be freed of obligations generated by state supply of essential public goods, unless she does not need them. Because the goods in question are public goods, she will continue to receive them whatever her feelings about them. Because they are indispensable and she cannot claim that she does not need them, her obligations will be obviated only if she does not need them *from the state*, a condition that can be satisfied only if her preferred alternative mechanism will work. If it will not work, Brown will continue to receive state benefits that she cannot do without and so should have obligations on that basis. A strong case can be made that if a given alternative mechanism, instead

of the state, does provide Brown's indispensable goods, then she should not have obligations to the state. But things are more complicated if the alternative mechanism is not yet in existence. It would seem unfair not to allow Brown a reasonable opportunity to set it up. But until it is up and running, at the very least, its proponents must provide good reasons that it is likely to work, before obligations they would otherwise have are waived. The alternative to such a plausibile condition is allowing Brown to be free of her political obligations, not because she does not need defense, law and order, or other public goods, but merely because she claims that she would prefer not to receive them from the state—without having to describe these other means or how they would work.

Although necessarily somewhat vague, the plausibility condition can be filled in.[140] We can identify at least three basic requirements that a proposed alternative arrangement must meet. Obviously, first and most important is feasibility. The mechanism must be able to provide necessary services in recognizably effective ways. If Brown argues that large-scale law and order can be provided privately, she must explain how this will work. Simple appeal to voluntary protective associations is not enough, unless she can explain how these will interact, deal with nonmembers, and address the other problems discussed in Chapter 2. If defense from outside aggressors is necessary, once again, proposed mechanisms must be explained. Clearly, satisfactory defense requires modern armaments. It is not enough to rely on loosely organized citizen-soldiers and their hunting rifles.[141] An important addendum here is that alternative supply of a single indispensable public good is not enough. As noted in Chapter 2, a fully adequate account must explain how all necessary public goods can be provided simultaneously.

Secondly and closely related, are reasonable background conditions. In order not to be obviously utopian, the arrangement should not rely

[140] I am grateful to Colin Bird for discussion on this point.

[141] It could be argued that, from a Lockean perspective, the individual himself should be the judge of feasibility. However, although I agree that there is a presumption in favor of the individual's judgment, this is not without limits; some standard of reasonable plausibility should be invoked here as well. For example, as Richard Arneson argues, the fact that someone believes that 'national defense is manna from heaven,' does not free him from obligations he would otherwise have. In a case such as this, the individual has an obligation to acquaint himself with the morally relevant facts of the situation ('The Principle of Fairness and Free-Rider Problems,' *Ethics*, 92 [1982], 632). When her alternative measures do not satisfy a reasonable standard of plausibility, the presumption that she should judge for herself is overruled.

on improbable, large-scale changes in the human condition. For instance, the anarchistic end-state described by Lenin depends on such conditions: it 'presupposes not the present productivity of labour and not the present ordinary run of people.'[142] The main role of the background provision is to restrict the range of mechanisms that can be put forth as feasible.[143]

The final requirement bears on the transition from existing to alternative arrangements. At minimum, acceptable arrangements must be able to be constructed without significant violations of rights.[144] There must be a critical mass of people committed to the new arrangements, or at least the possibility of interesting sufficient numbers of people, without resort to unacceptable means. The persons in question must not have to be 'forced to be free.'

A good deal more could be said about requirements of plausible alternative arrangements. But in order to avoid controversy, we can confine discussion to these points that strike me as straightforward and so in combination constituting a minimal threshold of acceptable plausibility.

It is apparent that the plausibility condition will fare differently with different kinds of state services. Roughly, if the benefits in question are excludable, if they can be supplied by a relatively small number of people, or if they require little coordination, then stronger cases can be made. Obviously, most difficult will be the large-scale public goods that require regulated coordination discussed in Chapter 2. When a given alternative mechanism is able to satisfy the plausibility requirement, it would seem reasonable to allow Brown to pursue some benefit through it rather than the state. In regard to such benefits, appeal to preferred alternative supply could well be effective and the principle of fairness would not be able to establish political obligations. To become clear on these matters, we can look at a number of schemes that provide

[142] V. I. Lenin, *The State and Revolution*, in R. Tucker (ed.), *The Lenin Anthology* (New York: Norton, 1975), p. 380.

[143] David Friedman on national defense is an example of a theorist who makes implausible assumptions (*The Machinery of Freedom* [New York: Harper and Row, 1973], Ch. 34). Alan Carter's argument against presumptive benefits rests on similarly implausible assumptions ('Presumptive Benefits and Political Obligation,' *Journal of Applied Philosophy*, 18 [2001]).

[144] Although not discussed in this paper, a set of acceptable rights is presupposed in fairness theory; see pp. above, pp. 9–10. Defining the boundary between acceptable and unacceptable violations of rights raises complex issues, which cannot be discussed here. But at the very least, the transition from existing society cannot cause *greater* violations of rights than setting up alternative mechanisms would alleviate. For discussion of this point, I am grateful to David Brink.

public goods, without confining discussion to goods that are necessarily indispensable. Consider state services bearing on sanitation:

> Case 1: Brown and her neighbors are willing and able to pick up trash and otherwise provide for acceptable sanitation on their street

In this case, there is little reason not to allow them rather than some state agency do this—barring strong countervailing arguments from the state. In general, because of the value of liberty, individuals should be able to provide their own services as they please. To the extent that garbage collection is necessary for public health, it is a public good and requirements that people dispose of their garbage can be justified. Various alternative systems could readily satisfy the feasibility, background, and transition requirements. The fact that garbage collection is largely an excludable good would make it much easier for Brown to make her case—and much harder for the state to argue for one exclusive system. Things become more interesting if greater coordination is needed for producing the public good.

> Case 2: Blue and her neighbors are willing and able to take measures necessary to provide themselves with an adequate supply of fresh water.

Consideration of these two cases shows the importance of what we can call 'exclusivity,' the requirement that, in order to satisfy the feasibility requirement, some good must be provided by a single agency. In general, the need for regulated coordination will provide the strongest basis for this claim. A goods-provider that makes it must present convincing evidence. Again, because of the value of individual liberty, Blue and her neighbors should ordinarily be allowed to provide their own benefits—public goods and otherwise—unless the need for exclusive state supply can be demonstrated. Consider an additional example.

> Case 3: As things stand, educational or entertainment broadcasts are provided by the government. White and her neighbors are willing and able to set up an alternative system along the lines of the one discussed by Nozick.

The benefits here are public goods. But the need for exclusive supply cannot be demonstrated, as long as the broadcast spectrum can handle more than one channel. In cases such as this, in which nonexclusive or multiple supply is obviously feasible, there seems to be little justification for preventing interested parties from establishing their own system rather than contributing to state radio. In addition, as noted in Chapter 1, one reason it is difficult to generate political obligations from supplying public goods such as neighborhood broadcasts is that they are of relatively little value. If White could easily do without a

given benefit altogether, there seems to be little justification for not allowing her to refuse to do her share in the relevant cooperative enterprise, that is, to opt for nonsupply instead of state supply.

Identifying salient aspects of alternative schemes helps us to defuse possible arguments against the principle of fairness. For instance, David Copp criticizes the principle's ability to establish political obligations on the grounds that subjects might not want goods the state provides, even if they benefit from the goods:

> The argument sees the state as analogous to a community garbage collector who establishes a service from which all benefit, and comes to ask for payment.…But I don't see that I would be wrong to refuse to pay on the basis that I would have liked to refuse the benefit.[145]

It appears that Copp's reasoning resembles what we have seen in regard to Nozick's public address system, that is, that the benefit in question is of relatively low value. However, for an obligation to support garbage collection to obtain, exclusivity would also have to be established.

Problems raised by Simmons can be dealt with along similar lines. Although Simmons does not discuss alternative provision in detail, it appears that the mechanisms he has in mind are similar to garbage collection in requiring little coordination and so not requiring exclusivity. In his most recent discussion of the principle of fairness, responding to nonvoluntarist construals of the principle, Simmons defends alternative supply, with an example similar to Case 2, although with circumstances not requiring exclusivity:

> Suppose there is a severe drought in my rural neighborhood, where we are all dependent for water on our wells, wells that are now drying up. I am hard at work, successfully digging a new, much deeper well in my backyard to supply my family. But my neighbors, instead of doing the same, opt to dig a long trench along our neighborhood road and beyond, diverting water from a river several miles away, so that all will have access to running fresh water in front of their homes. If I decline to participate in my neighbors' scheme, have I breached an obligation of fair play by benefiting as a free rider?[146]

I believe Simmons is correct, that in this particular case, he would not be a free rider and that his plan for alternative supply is unobjectionable. The plan clearly satisfies the plausibility conditions. But the fact that it does so easily indicates that it is not a telling example. Once again, the state benefits that are of greatest concern for questions of

[145] D. Copp, 'The Idea of a Legitimate State,' *Philosophy and Public Affairs*, 28 (1999), 35.

[146] Simmons, 'Fair Play and Political Obligation: Twenty Years Later,' in *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), p. 34.

political obligation are indispensable public goods that individuals cannot easily supply by themselves. Because such public goods require the cooperation of large numbers of people, mechanisms of alternate supply must be similar in these respects.

To return to Case 2, let us stipulate that fresh water is necessary for acceptable lives. But let us alter the circumstances so that a given group of individuals cannot simply dig some wells and provide their own supply, but that this requires regulated coordination and the efforts of large numbers of people. Accordingly, assume that all wells have dried up and so the trench Simmons mentions is necessary and digging it will take 10,000 people. Call this Case 4. In such a case, the question whether a given individual should be required to contribute would turn on factual considerations concerning exclusivity, that is, whether provision was feasible only through this mechanism or whether Gold could make do some other way. If the water-providers could demonstrate the need for exclusive supply, then for Gold to be absolved of obligations to contribute, the burden would shift to him to defend his alternative proposal.

As one can imagine, while it might be possible to envision conditions under which state supply of fresh water is the only option, stronger cases can be made for the essential public goods discussed in Chapter 2. The argument there should demonstrate the difficulty of providing many of these by oneself or in voluntary association with like-minded others. For an individual to be relieved of fairness obligations, he must show that the analysis in Chapter 2 is incorrect, that his preferred alternative mechanisms are plausible.

The additional requirements of the plausibility condition make it still more difficult to do this. In discussing provision of central public goods such as defense, a secure overall environment, and environmental protection, it is natural to regard these as provided in a given territory. I assume that, as a factual matter, these and other important public goods must be provided exclusively in individual territories and require territorial control. I will not argue for this claim, as it seems overwhelmingly clear, especially for benefits such as defense and law and order.[147] Accordingly, if a group of individuals wish to opt out of

[147] Because this claim is central to liberal theory, a scholar who argues against it should be required to present a plausible account of how nonterritorial provision of these benefits—again, all these benefits—would work. That the territorial basis of state services is a problem for consent theory is seen in H. Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987); for discussion, see A. Buchanan, *Secession: The Morality of Political Divorce* (Boulder: Westview Press, 1991), pp. 70–3.

government provision of these benefits, their alternative mechanism will not be acceptable unless it is able to exercise exclusive control over their territory or some other.

The territorial provision raises problems for proponents of alternative supply. I will not dwell on questions concerning minimum size of a viable territory. It is likely that both direct physical protection and law and order can be provided in small communities. However, with defense and environmental protection, problems of size are more formidable and could well render alternative supply impossible.[148] Setting these issues aside, we confront significant difficulties in explaining how Grey and his associates are to gain exclusive control over a territory, whether their own or some other. Under the most likely scenario, plans for alternative supply raise issues of secession. Among the many difficulties encountered here is that, as stated above, the transition requirement rules out significant violations of rights. This is reinforced by the voluntaristic premises of Simmons's position. Inhabitants of the territory in question who do not wish to join Grey and his associates must not be forced to do so. If they wish to remain citizens of the existing polity and so under existing authorities, constructing the alternative mechanism will contravene the need for exclusivity. In other words, not only must Grey and his associates control a territory, but all or virtually all inhabitants must agree with them on how its public goods should be supplied. These problems make alternative supply even more unlikely.

In regard to this last condition, one can ask why Grey is enjoined from imposing his preferred mechanism on unwilling others. After all, examination of the historical record indicates the likelihood that existing governments achieved their position through acts of conquest or other injustice.[149] In other words, they fail to satisfy the transition requirement, and so why must Grey support them? There is a ready reply. As things stand, the inhabitants of X have their rights protected, including democratic rights that allow them to change the ways in

[148] It could be argued that small territories like Monaco or Lichtenstein shelter under the protective umbrella provided by the great powers, and so, for this reason, would have political obligations to them. For brief discussion, see G. Klosko, 'Political Obligation and the Natural Duties of Justice,' *Philosophy and Public Affairs*, 23 (1994), 260 n. 18.

[149] I quote Hume: 'Almost all the governments, which exist at present, or of which there remains any record in story, have been founded originally, either on usurpation or conquest, or both, without any pretence of a fair consent of voluntary subjection of the people.' ('Of the Original Contract,' in E. Miller (ed.), *Essays: Moral, Political and Literary*, rev. edn. [Indianapolis: Liberty Classics, 1985], p. 471).

which public goods are supplied, if they so desire. Among the possibilities that they could adopt are those proposed by Grey, and he is free to attempt to persuade them to adopt his ideas. But he is not free to violate their rights in order to pursue policies he prefers. As long as the existing government is reasonably just and supplies the public goods in question fairly, questions of origins are largely irrelevant. Various conditions must be satisfied if Grey is to have political obligations to the government of X, including that X is democratic, thereby allowing the majority to provide public goods as they prefer.[150] If Grey's ideas were supported by a majority of his fellow citizens, they then could adopt them; he would not have to impose them.

To sum up here, if arguments from alternative supply are to be convincing, proponents must successfully maintain either that they would prefer not to receive particular public goods or that they could provide them themselves. With the first alternative closed off by indispensability, proponents' best hopes lie in the second. But for many of the public goods discussed in Chapter 2, presenting plausible arguments promises to be no easy task.

2. Alternative Preferences

Grey still has a possible reply. He objects strongly to the way X is supplying the benefits in question and would greatly prefer that it employ other means. The fact that he cannot make a plausible case for how he could provide the goods himself does not remove his objection to the form in which they are provided. According to the principle of fairness, obligations generated by public goods are obviated by morally relevant differences between recipients.[151] The question, then, is whether Grey's alternative preferences constitute an adequate morally relevant difference.

Not surprisingly, I believe they do not. Although the public goods that concern us are necessary for acceptable lives, questions concerning the beliefs of recipients cannot be set aside. It is commonly recognized that certain beliefs could well relieve their possessors of political obligations they would otherwise have. For instance:

[150] The moral context and additional requirements not mentioned here are discussed in Klosko, *Principle of Fairness*, Ch. 3.

[151] I will not discuss whether these obligations are dissolved or not constituted at all, though I believe that the latter is more likely.

Case 5: Assume that Black is a devout pacifist and so opposed to war. His belief in turning the other cheek is so strong that he would prefer to be conquered by an enemy power than to take up arms for self-defense.

In cases of this sort, it is widely argued that Black should not be required to serve. For our purposes, the complexities of conscientious objection and how it is dealt with in different countries need not be addressed.[152] We can accept the existence of a class of reasons, presumably rooted in subjects' deeply held moral convictions, that would free them from obligations they would otherwise have. However, alternative preferences as to how goods should be supplied do not fall into this class.

The dividing line between beliefs that do and do not remove obligations (to which we can refer, respectively, as 'principles' and 'preferences') is not entirely clear, but a few points can be made. One will note that in Case 5, Black would genuinely prefer not to receive the benefit in question. Defense provided through the usual means entails violence and so runs counter to beliefs at the core of his personality. I believe that other disqualifying beliefs must be similar. In order to absolve Grey of obligations he would otherwise have, the way in which a given public good is provided must contravene his basic moral principles.[153] Circumstances clearly fall short of this standard if Grey wants defense but disagrees with existing policies. For instance, he might disagree about where military bases are to be built or whether a new generation of fighter planes is to be funded. However, disagreements along these lines would not absolve him of obligations, unless placing a base in one location rather than another or building a particular type of fighter plane would somehow violate his core beliefs. Case 4 is along similar lines. We can presume that Gold wants the water. But let us assume that he would prefer to dam the river—which would also require the labor of ten thousand people—rather than dig a trench. His preference for the dam would not free him of obligations, unless water from a trench

[152] See C. Moskos and J. Chambers (eds) *The New Conscientious Objection* (Oxford: Oxford University Press, 1993).

[153] Compare language of the US Supreme Court on conditions a belief should satisfy to justify conscientious objector status: 'If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by…God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under S.6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions.' *Welsh* v. *United States*, 398 U.S. 333 (1970), at 340.

as opposed to a dam would violate his core convictions. The same is presumably true of Simmons's example. His protagonist clearly wants the water, but receiving it from a trench rather than from wells would free him of obligations only if this somehow violated his core moral principles—though once again, there are problems with this example because of the ease of proposed alternative supply.[154] As these cases illustrate, mere preferences that goods be provided through other means does not have the necessary effect.

The dividing line between principled objections and alternative preferences is complicated by cases along the following lines:

> Case 6: Red has so strong a belief in personal autonomy that he is in principle opposed to accepting public goods provided in forms other than those he prefers. (Perhaps his strong commitment to autonomy is along the lines of that posited by Robert Paul Wolff.)[155]

For ease of reference, we can refer to this argument against political obligations as the 'autonomy objection.' In such a case, Red would ordinarily want the public good in question, but he would prefer not to receive it because of the implications for his autonomy. If the good in question is necessary for an acceptable life, his choice entails sacrificing this in order to preserve his autonomy. But perhaps he is like the pacifist in Case 5, willing to bear the consequences. In a case of this sort, Red's disagreement with the providing agency would arguably be principled as opposed to preference-based.

Formidable difficulties are encountered in determining whether commitment to personal autonomy constitutes the kind of core conviction that is able to dissolve obligations and, if so, the point at which it has this effect. But for the sake of argument, I will concede that at some point belief in autonomy plays this role, although I believe that the threshold is high. Commitment to autonomy as a value is not enough; the commitment must be at the heart of the persons' being. It must be a core conviction, along the lines of a pacifist's commitment to nonviolence. Like a pacifist, a subject with such a commitment—to what we can call 'strong autonomy'—would genuinely prefer not to receive the public goods in question and so not to lead a life he otherwise finds acceptable, rather than to have his autonomy violated

[154] I agree that, in Simmons's example, it would be wrong to compel his agent to cooperate in digging the trench rather than his own well. But the wrong would lie in preventing him from pursuing a readily plausible alternative rather than forcing him to do something that violated his core convictions.

[155] R. P. Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970.); for criticism of Wolff's view, see Klosko, *Principle of Fairness*, pp. 75–7.

through provision of the goods in an objectionable form. Like true pacifists, we can concede, proponents of strong autonomy should be absolved of political obligations they would otherwise have. But because of the degree of commitment required, I assume that members of this group will be relatively few in numbers.

Although in practice it might not be easy to specify the point at which a belief in what we can call 'common autonomy' leaves off and becomes commitment to strong autonomy, we can assume for the sake of argument that such a point can be identified. Without such a point, proponents of strong autonomy would not be able to distinguish themselves from supporters of common autonomy and so to argue that their obligations should be waived. However, once we grant clear identification of such a point, the autonomy objection can be dispensed with. Granted this demarcation, we can distinguish two classes of proponents of autonomy: a relatively large group who subscribe to common autonomy (the 'common' group) and a much smaller 'strong' group, believing in strong autonomy. The problem for the autonomy objection is that, as we have noted, members of the common group still have their obligations. While members of the strong group are absolved, there will be few of them, and so as with extreme pacifists, questions concerning their obligations can be set aside until after the obligations of the majority have been established—as obligations of conscientious objectors are generally dealt with. The number of individuals concerned are likely to be so small as to be largely irrelevant for general political obligations.

There is no indication that the subject in Simmons's example believes in strong autonomy. There is no indication that he would genuinely prefer to go without water rather than to live with arrangements he does not prefer. Unless Simmons's subject has such commitments, his preferences for alternative arrangements would not free him of obligations. If Simmons does in fact intend for the subject to subscribe to strong autonomy in spite of appearances to the contrary, then the subject's obligations could perhaps be dissolved. But once again, such beliefs would make the subject an exceptional case.

Granted the distinction between disagreements over preferences and over principles, there are strong reasons to allow only the latter to free people from political obligations. In a large modern society, disagreements about how public goods should be provided are inevitable. Some people might prefer that defense be provided by a standing army, while others might prefer a draft. Some might prefer defensive strategies, though others support preemptive wars. But if effective defense is to be provided, this must be in some form. According to the exclusivity

provision, it must also be in one form. If differences over preferred forms absolved people of their political obligations, indispensable public goods would not be provided, and acceptable lives would be impossible. Part of the costs, then, involved in providing essential public goods is acceding to the preferences of the majority as to how they should be provided. In view of the likelihood that many individuals would prefer that a given good be provided through some other means, the fact that a given individual would prefer an alternative form does not constitute a morally relevant difference between him or her and other X-ites.[156]

The fairest way to settle differences about manner of provision is to allow people to support their own preferences through a fair democratic political system. As long as people have reasonably equal access and the other necessary conditions of fair democratic procedures are satisfied, people should accept the decisions of the majority—provided that they can be defended with strong, reasonable arguments. Thus as indicated in Chapter 2, the need for exclusive supply of particular indispensable public goods implies democracy.[157] Once these conditions have been laid out, it could be argued that existing democratic societies are not acceptably fair, that the majority in fact does not determine how services will be provided. This is a formidable objection, and assessment of particular governments raises difficult normative and empirical questions. We must identify appropriate standards of fairness governments must meet, and gather data necessary to determine if they meet them. Once again, I do not rule out the possibility that various governments—including that of the United States—fall short. But I think it is more likely that at least certain governments, possibly including that of the United States, would be deemed acceptable. In any event, for the sake of our inquiry into moral bases of political obligations, I assume that the hypothetical government under discussion is acceptably fair. If this is the case, then the fact of alternative preferences will not free an individual of obligations he or she would otherwise have, unless his or her preferences satisfy conditions we have discussed.

[156] Various safeguards are assumed here, for example, fair democratic procedures, a requirement for strong reasonable arguments in support of the outcomes of decision processes, no unacceptable violations of rights, etc. For discussion, see Klosko, *Principle of Fairness*, Ch. 5.

[157] The principle of fairness also holds that the requirement that indispensable public goods be provided fairly implies that decisions as to fair distribution should be made by reasonably fair democratic procedures. For discussion, see *ibid.*, Ch. 3.

4
Political Obligation and the Natural Duties of Justice

In Chapter 5, I address an important shortcoming of a theory of obligation based on the principle of fairness. In this chapter, I discuss an important preliminary matter. As noted in the Introduction, one problem with fairness theory concerns its ability to ground obligations to support the entire range of state services. While indispensable state services cause relatively few problems, the situation is more severe with other benefits. As we will see, in order to establish obligations in regard to these, the principle of fairness must be supplemented with other moral principles, giving rise to an MP theory of obligation. As we see in Chapter 5, a natural duty of justice plays an important role in such a theory. However, in the literature, it is argued that the natural duty by itself can be developed into a full-fledged theory of obligation. If this were the case, it would make little sense to employ the natural duty as part of an MP theory. Accordingly, we must examine different natural duty theories, in order to ascertain what they can and cannot accomplish. Criticism of what we can call a full natural duty theory will set the stage for the partial theory employed in Chapter 5.

Discussion in this chapter is in four sections. In Sections 1 and 2, I examine the natural duties of justice, as discussed by John Rawls, and criticize Rawls's attempt to use a natural duty to support just institutions as a basis for political obligations. Briefly, I argue that the natural political duty cannot be defended successfully from the 'original position,' the distinctive standpoint of Rawls's theory. Either the duty will not be sufficiently strong to ground moral requirements akin to political obligations, or if it will be, it will not be a 'natural' duty. The argument here raises questions about the force of natural duties, which can be seen to be damaging to other versions of the theory as well. In Section 3,

I criticize the alternative natural duty view of Christopher Wellman, which is based on a requirement to come to the aid of other people who are in need, and does not proceed from the original position. The principle in question is commonly referred to as a duty of mutual aid or, as Wellman prefers, 'samaritanism.' It too is beset by problems caused by limitations on its force. Section 4 provides a brief conclusion.

Since our inquiry focuses on the force of natural duties, it should be helpful to begin by clarifying the notion of a moral requirement's force. Two different aspects of the force of obligations can be distinguished. The first bears on the circumstances under which the obligation holds. As noted in the Introduction, prima facie obligations are taken to bind under ordinary circumstances. Alter the circumstances and the requirement can be overcome. Thus the requirement to meet with a student after class can be subordinated to the duty to rescue a person in need, if circumstances so dictate. Obligations, like other moral norms, can be viewed as containing tacit *ceteris paribus* clauses; they bind 'other things being equal,' and when other things are not equal, may cease to bind. Force in the second sense bears on the *content* of the obligation, the nature of what is required. If I drop my newspaper and someone picks it up for me, ordinarily, I owe that person a debt of gratitude. But because of the perfunctory nature of the service my benefactor performed, this would generally be viewed as a weak requirement, which could be discharged by a simple thank you. An obligation of this sort clearly differs in force from what I would owe someone who saved my life, at great risk to himself, or the lives of my children. In such cases, a perfunctory thank you would not be enough; more is required.[158] Along similar lines, certain kinds of promises are thought to bind especially tightly, for example, solemn oaths and deathbed promises. Making these can commit one to great sacrifices or lifelong commitments. In other words, they can require more in terms of the content of the obligation. Even moral requirements of this sort can be dissolved under unusual circumstances. For instance, assume that you promised your dying mother to buy your brother a new car. If he becomes a drug addict and spends every cent he can get his hands on, on heroin or cocaine, and you know he will immediately sell the car, then ordinarily, you should not give it to him.[159]

[158] For discussion of the force of obligations of gratitude, see G. Klosko, 'Four Arguments against Political Obligations from Gratitude,' *Public Affairs Quarterly*, 5 (1991).

[159] Circumstances envisioned here resemble those in Socrates' example in Book I of Plato's *Republic* (331c) of having to return a sword to someone who has subsequently gone crazy, although that obligation is less strong.

I will not explore interesting questions concerning the relationship between these two aspects of an obligation's force. For our purposes, it is enough to recognize what I mean by force in regard to what an obligation can require, as we will focus on this. In subsequent discussion, mention of the force of obligations should be interpreted in this sense. This is not to say that force in the prima facie sense is not important. Central problems of political obligation turn on the prima facie character of moral requirements and when they are overcome. Especially important are circumstances under which a government's behavior ceases to be acceptably just and requirements to obey run out. We are directly concerned with force in the second sense, because requirements to obey the law grounded on different moral principles may be of different moral force.

Especially important for our purposes are questions of force in regard to natural duties. The nature of these moral requirements will be discussed directly. What we should note here is that their force is ordinarily limited; such a requirement holds only if it will not be too costly. This limitation is supported by our intuitions. Other things being equal, Smith would be subject to severe condemnation if, seeing a child drowning in a swimming pool, she walked by and allowed the child to drown. The same would be true if rescuing the child would require Smith to get her clothing wet, even to ruin her expensive outfit. But ordinarily, we would not say that Smith's duty to assist the child would require her to assume significant risk, for example, if she had to rush into a burning building that might collapse any time. Once again, force limitations in this sense are distinct from those that bear on the prima facie character of the natural duty. Like other moral principles, it is subject to being overridden by unusual factors. For example, the duty to aid the child should ordinarily not be complied with under circumstances in which it was possible to rescue two or more drowning children in another pool instead.

1. The ‘Natural Political Duty’

Both the natural duties of justice and their role in grounding moral requirements to obey the law first came to prominence in Rawls's *Theory of Justice*.[160] In examining Rawls's account, we must recognize the distinctive manner in which he approaches the natural duties. In

[160] J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), cited hereafter in the text, as *TJ*.

Theory of Justice, Rawls attempts to establish moral principles on the grounds that they would be chosen by representative individuals behind a veil of ignorance in the 'original position.' The veil prevents people from knowing about their particular characteristics, for example, age, income, religion, level of intelligence or talent, the societies to which they belong, and even their generations, although they are allowed to know generally accepted facts about societies and how they work. The representative individuals choose those moral principles that best advance their interests, defined in terms of different possible packages of 'primary goods,' things anyone would want, regardless of his or her particular characteristics. Thus Rawls's argument for the natural duties is crucially bound up with the contention that they would be chosen by the representative individuals. As we will see below, Rawls's defense of the natural duties runs together arguments from within and outside the original position. While the arguments he presents *should* be developed from the point of view of the representative individuals, this turns out not always to be the case. I will attempt to reconstruct the justificatory arguments that the representative individuals properly could develop—and, I believe, would develop—which, as we will see, leave us with a version of the principle of fairness, a position quite different from what Rawls himself advances. In Sections 3 and 4, we examine the natural duties as moral principles in their own right, without regard to the original position or other elements of Rawls's theory.

According to Rawls, natural duties are moral requirements that hold generally and so can be contrasted with obligations. Rawls defines the latter narrowly, as moral requirements incurred through voluntary actions (*TJ*, p. 113). Consider a typical obligation established by a promise. If A promises B to do C, the moral requirement is generated by A's performance, typically by his uttering a familiar formula such as 'I promise' or 'I swear.' More important for our purposes, the moral requirement to do C is owed only by A and only to B. Other people who have not made similar promises, incur no such requirements to do C, while people to whom such promises have not been made are not owed performances of C.

Natural duties, unlike obligations, apply without regard to voluntary actions.[161] They also hold for persons generally, as opposed to specific groups, for example, individuals cooperating together in

[161] Rawls appears to assume the conventional distinction between obligations and so-called 'positional duties,' moral requirements attached to specific positions, statuses, or offices (see *TJ*, p. 113; on duties, see the literature cited in p. 1, n. 1). Thus he apparently believes in duties of two kinds: positional and natural. But because the former are often assumed through voluntary actions (e.g. those of a husband by marrying), Rawls does not give them much attention.

particular social arrangements (*TJ*, p. 115). Natural duties are owed by all individuals to all individuals, regardless of differentiating characteristics.

Several of Rawls's natural duties are familiar, intuitively clear moral principles. These include the duty of mutual aid, 'the duty of helping another when he is in need or jeopardy, provided that one can do so without excessive risk or loss to oneself' (*TJ*, p. 114); the duty not to harm or injure others (*TJ*, p. 114); and the duty to show others the respect due to them as moral beings (*TJ*, p. 337).[162] However, as noted, the status of the natural duties in Rawls's theory does not rest on their being familiar or intuitively clear, but on the fact that they would be adopted by the representative individuals in the original position and so must be shown to be in their interest. For many this is easily demonstrated. For instance, the overall benefits of a general rule of mutual aid clearly outweigh its costs. The gains to the person in need far outweigh the costs to those who help him, while it is almost as likely that one will be a beneficiary some time as a benefactor (*TJ*, p. 338). Similarly, the benefits of living in a society in which individuals treat each other with mutual respect outweigh the costs of having to show others respect (*TJ*, pp. 337–8). Important to Rawls in these cases are the intangible effects on one's sense of self-worth of living by rules that affirm one's value as a moral person (*TJ*, pp. 337–9).

The reasoning behind these natural duties and some others Rawls mentions is on the whole persuasive, and so the lack of detailed discussion is not clearly felt. But the situation is more complex when we turn to the particular natural duty upon which Rawls grounds moral requirements to obey the state. The natural duty 'to support and to further just institutions' is as follows:

> From the standpoint of the theory of justice, the most important natural duty is that to support and to further just institutions. This duty has two parts: first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves. (*TJ*, p. 334; similarly, p. 115)

For ease of reference, I will refer to the first part, which is our primary concern, as the 'natural political duty.' I do not include the duty to help establish just institutions in the natural political duty. The two duties

[162] Additional natural duties are discussed in *TJ*, Sect. 51.

together can be referred to as the 'political duties.' On the whole, the second duty will be of little concern, though I discuss it briefly below.

Because the natural political duty is not a familiar moral principle, we require a convincing account of exactly what it entails and why the representative individuals would adopt it. But Rawls does not explain these matters. The lack of a detailed account makes his view difficult to construe, while as we will see, there are problems with the points he does make.

One apparently odd feature of the natural political duty is easily explained. The other natural duties are clearly owed to persons, for example, a duty to come to their aid. Judging from Rawls's language, the duty to comply with and support just institutions could appear to be owed to institutions rather than persons. However, this is not the case. Rawls subscribes to methodological individualism, and so views an institution as reducible to a number of roles, defined by rules, in accordance with which their occupants behave (*TJ*, p. 55). The most plausible construal of supporting and furthering just institutions is that we are to support and comply with the requirements of the individuals whose rule-governed behavior constitutes just institutions because this will benefit the people served by the institutions.[163] However, because of the set up of the original position, the representative individuals will adopt the political duties only if the costs of supporting other people in the relevant respects are outweighed by benefits. We can call this the 'benefit condition.'

The requirement that the political duties satisfy the benefit condition raises an important question concerning their force.[164] As presented by Rawls, a number of natural duties are qualified by explicit limits on their force. This is true of the duty of mutual aid, which is to help others when they are in need, 'provided that one can do so without excessive risk or loss to oneself' (*TJ*, p. 114). The duty to bring about a great good holds 'only if we can do so relatively easily' (*TJ*, p. 117). The second political duty, the duty to help establish just institutions, is similarly qualified (see p. 79; also *TJ*, p. 115). It is interesting that in

[163] It appears that, though Rawls's discussion is in terms of just institutions, this can be translated as just *governments*. The natural political duty plays a role in Rawls's theory functionally equivalent to that of political obligations in traditional theories. Thus in more familiar terms, 'to comply with and to do our share in just institutions' is to comply with the requirements of just governments, generally to obey the law. But in discussing the natural political duty, I will generally retain Rawls's language.

[164] To be clear, force as discussed here and throughout is in the second sense, in regard to the content of duties.

both passages in which it is presented (*TJ*, pp. 334, 115), this duty is explicitly qualified in regard to cost, while the duty to comply with existing institutions is not.[165] But Rawls provides no explanation. At one point he appears to indicate that all natural duties are so qualified (see *TJ*, p. 117). But we cannot say for certain what his position is, and I will leave this question open. For ease of reference, we can refer to a natural duty or other moral principle that is qualified in regard to cost as a 'weak duty' or a 'weak principle,' and to one that is not so qualified as a 'strong' duty or principle.

For several natural duties, the reasons for the cost qualifier are clear. As we have noted, the duty of mutual aid is in our interest because the benefits to the person aided far outweigh the costs to the one who gives aid. Apparently, Rawls believes that, in order for this duty generally to satisfy the benefit condition, the costs of giving aid must be low. If we were required to aid accident victims, even at the cost of substantial sacrifice, the duty could well not pay and so not be adopted by the representative individuals.

However, for Rawls to put forth a natural political duty that, like the other natural duties, is only a weak principle would raise severe problems. I take it to be a basic fact of political life that the requirements of complying with and doing our share in just institutions are often onerous. Central burdens of citizenship include requirements to obey the law, to pay taxes, and to provide military service under circumstances that could cost one his or her life. Impinging in serious ways on many aspects of individuals' lives, these requirement go well beyond what can be demanded by weak principles. Because the representative individuals can be presumed to know this, if the natural political duty is to require obeying the law, it must be a strong principle, to be complied with even if this greatly inconveniences or harms the subject. It is perhaps reasoning such as this that leads Rawls to formulate the natural political duty without the cost qualifier included in the duty to help establish just institutions. But as we have also seen, it is not entirely clear that this is Rawls's position.

Presenting the natural political duty as a strong principle raises other problems. It is far more difficult to justify a strong principle in the original position. For instance, the duty of mutual respect would be

[165] A. John Simmons, for one, appears to attach the cost qualifier to both political duties (*Moral Principles and Political Obligations* [Princeton: Princeton University Press, 1979] [hereinafter cited as Simmons, *Moral Principles*], p. 193; also see, p. 154); Jeremy Waldron does not discuss the question of costs in 'Special Ties and Natural Duties,' *Philosophy and Public Affairs*, 22 (1993) [Waldron, 'Special Ties'].

adopted because everyone would benefit if it were generally upheld, while the 'cost to self-interest is minor in comparison with the support for the sense of one's own worth.' (*TJ*, p. 338) The other natural duties are supported by similar reasoning. Although the natural duties are not instances of a single principle, 'similar reasons no doubt support many of them' (*TJ*, pp. 338–9). But as we noted in regard to mutual aid, such reasoning holds clearly only when adherence is not costly. Rawls notes the desirability of a natural duty to bring about a great good. But this obtains only 'if we can do so relatively easily.' We are released from this duty when compliance costs are considerable, in which cases, compliance is supererogatory (*TJ*, p. 117). The fact that Rawls does not discuss how the natural political duty is justified suggests that he views it as an application of his basic reasoning. But because this is a strong principle, it cannot be justified simply along these lines. If this is true, however, the question arises how it can be justified. In particular, we must ask why the representative individuals would endorse a strong natural political duty if this requires substantial risk or loss.

In keeping with the central tradition of liberal political theory, we can approach this question by imagining circumstances in which the duty does not hold. I will argue here from the standpoint of the representative individuals, taking into account their goals and what they can be presumed to know about society. Two central claims on which the resulting principle rests are the need for government to provide a range of essential public goods and that this requires general obedience to the law.

In the original position, the representative individuals possess basic information about how societies function (*TJ*, pp. 137–8). According to Rawls, they know they require certain services provided by government as a necessary condition for satisfactory lives. His reasoning is similar to that seen in Chapter 2, although Rawls does not examine possible nonstate, alternative provision.[166] In order for a system of rights and liberties to exist, society must be stable and orderly; the individual citizen must be free from coercive interference, and the populace safe from foreign aggressors. Similarly, a functioning property system requires law and order. The need for these and other attributes of society are basic assumptions of liberal political theory and therefore known by the representative individuals. Though Rawls does not discuss these

[166] In keeping with his general institutional conservatism, Rawls would most likely find these unconvincing. For instance, although he believes the nuclear family is a source of undesirable inequality, he does not consider alternative arrangements (pp. 511–12, 74); note also his adherence to private ownership of the means of production (pp. 270–4).

points in the context of political obligations, they arise elsewhere in *Theory of Justice*. Thus he says that 'everyone agrees' that liberty of conscience is limited, 'by the common interest in public order and security.' The reasoning for this limitation is as follows:

> This follows once the maintenance of public order is understood as a necessary condition for everyone's achieving his ends whatever they are.…The government's right to maintain public order and security is an enabling right, a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them. (*TJ*, pp. 212–13)

Along similar lines, Rawls notes the need for conscription, when the defense of the system of liberties as a whole is at stake, though this is a severe infringement on liberty (*TJ*, p. 380). Thus we can assume that the representative individuals are aware of the overriding need to maintain public order and security.

Rawls also subscribes to the view that state benefits require general political obligations, binding on all or nearly all members of society. It is because of the need for such general moral requirements to obey that Rawls turns to the natural duty of justice. In a well-known article published in 1964,[167] Rawls argued for political obligations based on the principle of fairness. But since he viewed the principle of fairness as requiring acceptance of benefits (*TJ*, pp. 111–12), he eventually came to believe that it could not ground the obligations of all citizens (*TJ*, p. 114). Therefore, the principle of fairness had to be replaced by a different moral principle, which could establish the obligations of everyone.

In *Theory of Justice*, the representative individuals work out a position along these lines. Among the facts about society that they possess is that essential state benefits must be provided by general cooperative efforts. Many of these benefits are public goods—and in many cases not only nonexcludable but unavoidable and so must be received. Accordingly, Rawls notes that people have a tendency to avoid contributing their shares. Because general cooperation is required, collective agreements must be imposed in regard to 'essential public goods'; binding rules must be implemented and enforced by the state (*TJ*, pp. 267–8). Rawls notes that the representative individuals might wish to ground these on specific voluntary actions, for example, accepting benefits from the state or making particular promises to the

[167] J. Rawls, 'Legal Obligation and the Duty of Fair Play,' in S. Hook (ed.), *Law and Philosophy* (New York: NYU Press, 1964) [Rawls, 'Legal Obligation'], p. 7.

institutions. Though at first sight this might seem to accord with the contractarian character of justice as fairness, considerations of generality tell against it:

> [T]here is every reason for the parties to secure the stability of just institutions, and the easiest and most direct way to do this is to accept the requirement to support and to comply with them irrespective of one's voluntary acts. (*TJ*, p. 336)

Accordingly, Rawls makes the requirement to support just government a natural duty, pertaining to all persons, rather than an obligation, incurred by voluntary actions. This is as far as Rawls goes in providing a full justification for the natural political duty.

With Rawls's grounding the obligation to obey the law on a duty (in this sense) I have no quarrel. But the additional step of making it a *natural* duty is questionable. As I have noted above, natural duties differ from obligations not only in not being self-assumed through voluntary acts, but also in not being owed by or to specific individuals. These requirements 'hold between persons irrespective of their institutional relationships; they obtain between all as equal moral persons.' (*TJ*, p. 115). In regard to the recipients of natural duties, Rawls writes:

> [T]he natural duties are owed not only to definite individuals, say to those cooperating together in a particular social arrangement, but to persons generally. This feature in particular suggests the propriety of the adjective 'natural.' (*TJ*, p. 115)

If natural duties are interpreted in this way, it is unlikely that a suitably strong political duty can also be 'natural.' We can refer to a strong duty to support and comply with just institutions as a *strong political duty*. Because this is a strong principle, weighty considerations are required for it to apply. Since Rawls believes general requirements to support the state are rooted in the need for public goods, it is likely that the representative individuals would appeal to similar considerations. But if we adopt such an argument, the resulting strong political duty will not be owed to people or governments generally, but only to those that provide a subject with essential services. It is possible that Rawls wishes to qualify the natural political duty he presents in some similar sense. According to him, this holds in regard to just institutions that 'apply to us,' although he does not explain what this means.[168] But whatever it means exactly, this obviously distinguishes the particular set of institutions one should support from the general class of just institutions. However, limiting the natural political duty in this way

[168] See Simmons, *Moral Principles*, Ch. 6; see also Waldron, 'Special Ties.'

does not overcome the problems we have seen, unless the fact that the duty binds for only certain just institutions somehow increases its force. Rawls does not explore these connections. If the natural political duty is construed as a strong principle, limiting it this way does not overcome problems with its status, because it is not clear how such a limited political duty can still be 'natural' in the relevant sense. For instance, if the only governments that 'apply' to us are those that supply us with essential benefits, then our duty to support just governments is owed to these, rather than to governments generally.

We can make sense of limiting a natural political duty to institutions that 'apply' to us from the representative individuals' point of view. Because supporting a given government could be costly and so requires strong justificatory considerations, the only governments an individual should support are those that supply him with essential benefits.[169] Unless the costs of supporting a government can be justified on some other basis, it follows that a suitably strong natural political duty is not 'owed to persons generally,' and so is not a 'natural' duty.

Similar points hold in regard to the strong political duty's bearers. Natural duties such as mutual respect and mutual aid are owed by all individuals without regard to voluntary actions or institutional relationships. Presumably, this too is an important reason for the appellation 'natural.' But according to the line of argument developed here, the strong political duty is generated by the receipt of benefits and so owed only by recipients, not by people generally.

It appears, then, that far from being a moral requirement owed by everyone to everyone, a workable political duty is owed by recipients of essential state benefits to their fellow citizens who provide them. In moving illicitly from the fact that the natural political duty does not rest on voluntary actions—and so is a duty—to the fact that it is a natural duty, Rawls appears to confront a dilemma. If the natural political duty is a strong principle, as is clearly necessary for his political theory, then it must be rooted in the receipt of indispensable benefits from the state. But the consequence here is that it is not held by everyone in regard to everyone. A weak principle, on the other hand, may be general in the relevant sense. This appears to be true of Rawls's second political duty. The duty to help create institutions that do not yet exist can bind everyone. Justification of this duty seems to be consistent with Rawls's general reasoning. We all benefit from a world

[169] In keeping with the discussion in Ch. 3, we should limit these to governments that supply him with essential benefits that are not available to him through other means.

in which more governments are just, but ordinarily, a requirement to promote them would not justify requiring significant sacrifices. Such a duty that pertains to all potential just institutions cannot rest on benefits received from them, and so can be properly regarded as a natural duty. But this does not salvage the natural status of the natural political duty. The dilemma, then, is that a workable duty to support and comply with just institutions must be either strong and not natural, or weak and possibly natural, but not able to fulfill its essential political role.

The fact that a workable political duty must be strong and not natural, while the duty to help create just institutions is weak but natural, indicates that these two political duties differ in important respects and so might also be justified differently.[170] Rawls does not seem to be aware of these differences, though the fact that he explicitly attaches a cost qualifier to the second duty but not to the first suggests some discomfort lumping them together. We have seen that Rawls appears to assimilate the two political duties to other duties we have simply as moral beings. But while this might justify the duty to establish just institutions, there are problems defending strong duties in this way. Rawls's difficulties suggest that a moral requirement to support the state's central functions must have some other basis. This supposition is supported by the fact that Rawls recognizes connections between such a requirement and essential state benefits. As we see in Section 2, the representative individuals could develop a suitable argument along these lines.

2. *The Natural Political Duty and the Principle of Fairness*

We have seen that a weak natural political duty is inadequate and the likelihood that deriving an acceptable political duty from the standpoint of the original position would likely require grounding it on state supply of essential benefits. If we look more closely at the original position, we can see that the political principle it actually supports and that Rawls *should* have employed in *Theory of Justice* is a variant of the principle of fairness.

The strong political duty developed in Section 1 can be summarized roughly as follows: all people who receive essential benefits from institutions should support and comply with the institutions—even if

[170] I am grateful to the anonymous readers for *Philosophy and Public Affairs* for this suggestion.

this is costly to themselves.[171] The strong political duty appears to be similar to the principle of fairness. Once again, in Hart's words:

> [W]hen 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 a similar submission from those who have benefited by their submission.[172]

For Hart, as for the strong political duty, what is central to the obligations in question is receipt of benefits from the joint contributions of other people, with those who receive the benefits incurring obligations to accept restrictions similar to those borne by the contributors. Because fairness obligations require doing what is necessary to provide the benefits in question, they are strong principles, binding without immediate regard to costs of compliance, as long as benefits outweigh costs. However, because they rest on benefits received, these principles are not natural duties. In his 1964 article, Rawls formulates the principle of fairness as follows:

> Suppose there is a mutually beneficial and just scheme of social cooperation, and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that 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 any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating.[173]

The strong political duty is similar to the principle of fairness in Hart's and Rawls's formulations. In each case obligations to support institutions that supply benefits are generated by their receipt. Thus one wonders why Rawls rejects the principle in *Theory of Justice*, especially because his alternative is both vague and ridden with flaws. Reasons of philosophical economy also support retention of the

[171] Because of the benefit condition, the benefits in question must also outweigh their costs, while general features of Rawls's theory require other conditions.

[172] H. L. A. Hart, 'Are There Any Natural Rights?' *Philosophical Review*, 64 (1955), 185.

[173] Rawls, 'Legal Obligation,' pp. 9–10; similar formulations are found in *TJ*, pp. 111–12, 342–3. In subsequent discussion, I will assume that the requirement that the institutions in question be just is met.

principle. Rawls believes that all *other* obligations are rooted in the principle of fairness (*TJ*, pp. 113–14).

The problem of course is that Rawls requires recipients of benefits to accept them in order for obligations to be generated. Because most recipients of state benefits do not accept them, Rawls argues that the principle of fairness is not able to create general political obligations and so rejects it. Problems with this criticism of the principle of fairness need not be repeated here.[174] In reference to *Theory of Justice*, we must ask whether this criticism would be accepted by the representative individuals in the original position.

We have seen that the representative individuals believe in the need for a state, and that this requires general obedience to the law. We have also seen that Rawls believes this is in the interest of everyone. For instance, in the passage on liberty of conscience quoted above, this is stated explicitly, twice. Under these circumstances, when the representative individuals confront the question of how the costs of supporting essential state services should be distributed, they will obviously decide that everyone who benefits should contribute. *Everyone* should support and comply with just institutions; everyone should obey the law.

It will be hard for the representative individuals to justify exceptions to a general requirement. To allow a given individual, Grey, to enjoy essential services without cooperating would be to create an unjustified inequality, an injustice, as in Rawls's view injustices are 'simply, inequalities that are not to the benefit of all' members of society (*TJ*, p. 62).[175] An important concern throughout *Theory of Justice* is presenting moral principles that can be publicly acknowledged and generate their own support (*TJ*, pp. 138, 177–83). Thus the burdens associated with services supplied by government X should be distributed without unjustifiable exceptions. Rawls believes that Grey's belief that others are not providing their fair shares will make him less likely to do his (*TJ*, pp. 240, 336). A principle of general sacrifice, each contributing a fair share of what is needed for essential goods, will have the desired social effects, and also reinforce the X-ites' sense of

[174] See above, pp. 5–7.

[175] In keeping with the discussion on p. 61, above, exceptions should be made for those individuals who do not benefit from receipt of the goods in question, or who benefit so much less than other individuals as to constitute unjust treatment in their regard. The presence of these factors would enable these individuals effectively to respond to the charge of unjustified exceptions. Once again, however, because of the nature of the public goods in question, such individuals should be rare.

self-worth. Of course, if there are significant morally relevant differences between Grey and other X-ites, for example, if he is unfit physically for the rigors of military service, he need not be required to serve. But because the veil of ignorance will eliminate knowledge of exactly who possesses such characteristics, the representative individuals will decide that everyone who benefits from essential public goods should be required to do his part in providing them—with exceptional cases to be dealt with accordingly.[176]

In actuality, as Rawls notes in his presentation of the principle of fairness, because the supply of essential public goods depends on large scale but not universal cooperation, the representative individuals should choose a modified principle of general cooperation. Because universal cooperation is not necessary, all should be bound to cooperate, with advantages of justifiable noncooperation distributed through some fair mechanism, as for example through a draft lottery. Because the veil of ignorance prevents the representative individuals from knowing if, in the absence of a fair mechanism, they would be successful free riders or ordained to bear the burdens of cooperation without any possibility of relief, they should attempt to minimize their burdens by spreading the advantages of justifiable noncooperation as widely as possible throughout society.

As things stand in *Theory of Justice*, Rawls would reject this line of argument, because he holds that benefits supplied by cooperative schemes must be accepted for fairness obligations to be generated. However, from the point of view of the representative individuals, this condition is not defensible, and Rawls makes no attempt to defend it.[177] The representative individuals have good reasons to reject the claim that 'acceptance' or 'nonacceptance' of essential state services creates morally relevant differences between individuals and so justifies differences in their burdens. Because essential public goods are provided to all alike, they are not ordinarily pursued or otherwise 'accepted,' while, because they are indispensable, all individuals can be presumed to benefit greatly from their receipt, regardless of their voluntary actions in reference to them. Thus even if Smith, declares

[176] I assume that the principles of distribution adopted here must be consistent with Rawls's two principles of justice.

[177] It has been suggested that one possible justification for this requirement is that 'acceptance' of public goods indicates the subject's belief that he benefits sufficiently from state services to justify the imposition of political obligations. This interpretation is improbable, given that the natural political duty requires all alike to support the state, with no concern for whether or not subjects believe they benefit sufficiently.

that she would prefer not to receive the benefits of national defense and law and order, she will continue to receive them, while the representative individuals would question the rationality of her professed desire not to. If Smith could be placed in a hypothetical situation in which she could somehow choose whether or not to accept these goods at the cost society requires, she would choose them, in all but the most unusual circumstances.

The possibility remains that Smith might reject the goods in question because she objects to the form in which society supplies them. As we saw in Chapter 3, part of the cost of certain public goods is being prevented from pursuing other means of providing them. Perhaps Smith cares deeply about individual liberty and would prefer to receive protection by joining a mutual protective association rather than from the state. We have examined the feasibility of such arrangements in Chapter 2. Presumably, the representative individuals would share our skepticism. Another possibility is that Smith strongly prefers that essential public goods be provided in some particular form rather than others. Perhaps she prefers general conscription to an all volunteer army. Given the parameters of Rawls's *Theory of Justice*, it is likely that specific knowledge of this kind would be eliminated by the veil of ignorance, as is the case with individuals' knowledge of their conceptions of the good (*TJ*, p. 137). Even if such knowledge were not eliminated, diverging preferences should be dealt with democratically. As noted above, since national defense requires regulated coordination and so has to be provided in some particular form, this form should be decided on by fair decision procedures which afford equal opportunities for all to participate.

It could, perhaps, be objected that to impose obligations on Smith to contribute to a given essential service the benefits of which she has not 'accepted' would be to violate her autonomy. This view is supported by the liberal belief that people are naturally free and can surrender their freedom to political authorities only through their own consent. Some such sentiment perhaps lies behind Rawls's demand that individuals accept benefits before they incur fairness obligations.

But this line of argument would not be accepted by the representative individuals. Though Rawls is of course deeply concerned with autonomy, he believes this is actually promoted by adherence to the moral principles chosen in the original position. To act autonomously is to act 'from principles that we would consent to as free and equal rational beings' (*TJ*, p. 516). If the representative individuals would conclude that it is necessary for all individuals to do their parts in supporting state provision of essential public goods, then this would

not impinge upon autonomy, even though it would limit the range of permissible behavior. Moreover, as we have seen, concerns of public security must limit individuals' freedom of conscience when this would pose a threat to society, and also justify the severe burdens of conscription. The natural political duty of course requires that individuals support their institutions, without reference to whether they 'accept' the benefits the institutions provide. As long as essential public goods cannot be provided through means other then general cooperation, moral requirements to support their provision must be general. Thus Rawls's insistence on voluntary acceptance of benefits for the generation of fairness obligations does not rest well with central features of *Theory of Justice*.

The conclusion of this section, then, is that the representative individuals would endorse a version of the principle of fairness, without requiring acceptance of benefits. Such a moral principle is able to ground general obedience to the law without the problems of a natural political duty.

As Rawls's presentation suggests, the primary attraction of a natural duty view is intuitive clarity. There are certain duties we appear to have to all other moral beings. Duties of mutual aid and not to inflict unnecessary suffering are clear instances, as is a general duty to promote justice, which can apparently be extended to a duty to support just governments. If the class of natural duties can be so extended, this appears an attractive way to establish general moral requirements to obey the law. But as we have seen, one reason the natural duties are intuitively clear is that they are relatively inconsequential. As weak principles, they do not drastically impinge on personal liberty. But weak principles are not adequate bases for political obligations.

Rawls is not alone in having problems with natural political duties. Among the accounts of political obligations Simmons criticizes in *Moral Principles and Political Obligations*, is one based on the natural duties of justice, as Rawls formulates them. In his concluding chapter, Simmons upholds nonparticularized moral requirements to support just governments. One principle to which he appeals is a natural political duty, along the lines of Rawls's, but which he does not attempt to derive in an original position, apparently regarding the duty as intuitively clear:

> For instance…we have a duty to support and further just government, at least when this involves no great cost to ourselves (as well as a duty to fight injustice). Thus, if our government is just, we will have good reason to support it (and any other just government) even if we have no political obligations. And the other virtues which a government can possess will also

be instanced occasionally, providing other reasons for supporting governments possessing them.[178]

At this point the problems with Simmons's formulation should be apparent. A weak duty to support government will not uphold central state services. And so in Simmons's case, the consequences of jettisoning the traditional theories of political obligation are more serious than he believes.

3. The Duty of Samaritanism

A reformulated natural duty view is offered by Christopher Wellman, who attempts to support political obligations on the basis of a principle of samaritanism.[179] Roughly and briefly, Wellman appeals to the familiar idea that people have strong moral requirements to come to the aid of others who are in peril or dire need. As Wellman sees things, the dangers in question are those of a Hobbesian state of nature, which people would generally confront, if not for benefits provided by the state, especially the rule of law. Wellman believes that the dangers can be alleviated only by state coordination, supported by coercion, and so citizens can justifiably be forced to obey the law. Like theories based on gratitude and fairness, samaritanism grounds political obligations on state benefits. But unlike these other theories, Wellman's turns on benefits provided to other people: 'the perils that *others* would experience in a state of nature' can justify impinging on moral rights people would otherwise have (p. 744; emphasis in original).[180]

Wellman supports his claims with two examples. First, Alice and Beth are walking together when Beth suffers a heart attack. Unless Alice can get her to the hospital immediately, she will die. Carolyn's unlocked car is in the vicinity. According to Wellman, the circumstances justify Alice's appropriation of Carolyn's car to take Beth to the hospital. Under these circumstances, moral reasons grounded in Beth's situation outweigh Carolyn's usual claim rights to her car.

[178] Simmons, *Moral Principles*, p. 193; Simmons provides little argument for the natural political duty, though it should be noted that he considers it as moral principle in its own right rather than from the point of view of the original position (pp. 143–4).

[179] C. Wellman, 'Toward a Liberal Theory of Political Obligation,' *Ethics*, 111 (2001). In this section, unaccompanied page references are to this article.

[180] For additional problems with theories based on the need to help others, see G. Klosko, 'Duties to Assist *Others* and Political Obligations,' *Politics, Philosophy, and Economics*," 3 (2004).

Wellman says: 'the moral dynamics of state coercion are analogous to those of Alice, Beth, and Carolyn': 'the state is at liberty to coerce individuals in a way that would ordinarily violate their rights only because this coercion is necessary to rescue all those within the state's borders from peril.' (p. 745)[181]

Wellman believes that a second scenario is more descriptively faithful to the circumstances of actual political obligations. States provide benefits through the coordinated efforts of large numbers of citizens. Wellman envisions a situation in which a group of people need a bus to escape from peril. If Alice, Beth, and Carolyn each has part of a bus, a mechanic would be justified in taking their parts to assemble the bus and rescue them. The state would also be justified in forcing the three of them to contribute their parts. Of the two examples, Wellman says: 'In each case, coercion is permissible because the peril of others generates weightier moral reasons than the presumption in favor of each individual's dominion over her own affairs.' (p. 746).

Wellman believes that a theory of political obligation based on samaritanism has clear advantages over other theories. While samaritanism is similar to a theory based on a natural duty of justice, it is a familiar moral principle, applicable in different contexts. In contrast, Rawls's natural political duty is not intuitively clear and is discussed only by theorists attempting to explain political obligations (p. 751 n. 18). There is a close relationship between Wellman's samaritanism and theories based on the principle of fairness. With complex coordination required for state provision of benefits, each citizen has an obligation to obey the law as her share of the overall samaritan task (p. 749). But there is an important difference. According to Wellman, because the principle of fairness generates political obligations by providing the subject himself with state benefits, it is flawed. Because recipients of public goods are not able to accept them, fairness is tainted by paternalism. Individuals incur political obligations because of benefits the state believes they need (pp. 737–8). This problem is avoided by samaritanism, which generates Grey's obligations from benefits the state confers on other people rather than on Grey himself.

Having presented a brief account of Wellman's position, I now move on to criticize it. As we saw in previous sections, a fundamental problem with a natural duty theory of political obligation is that natural duties to help others are weak principles, qualified in regard to cost. Wellman too notes that duties of samaritanism are of limited

[181] Wellman argues that, on empirical grounds, only action by the state is able to alleviate the peril in question.

force: 'The common understanding of samaritanism is that one has a duty to help a stranger when the latter is sufficiently imperiled and one can rescue her at no unreasonable cost to oneself' (p. 744). The same point is made at least twice more, in other contexts (pp. 748, 752 n. 21). The implications here are similar to what we saw in preceding sections. As was the case with Rawls's position, construing samaritanism as a weak principle severely lessens its ability to ground political obligations. Because weak principles cannot generate requirements to comply with costly laws, it does not seem that a samaritanism theory could require cooperation in providing central state benefits.

If we grant that samaritan duties are qualified by cost, then this poses an insuperable problem for samaritanism theories of political obligation. Wellman's examples avoid the problem. In the first example, Alice takes Carolyn's car. But Wellman notes that she returns it, leaving an apologetic note. Circumstances would clearly be different if the car were not returned. Does Beth's peril require so substantial a sacrifice from Carolyn? At the very least, the intuitive clarity of the example would be clouded. In the second example, what is taken from the three women are presumably useless parts of a bus. Once again, what if their contributions were more weighty? Wellman recognizes this problem and addresses it, though only briefly and in a footnote. His main point is as follows:

> [F]or now, let me quickly emphasize that while the costs of citizenship are frequently substantial, the benefits are considerably greater. That is, compared to the benefits derived from political community, the costs of citizenship are also relatively trivial. Thus, just as the person forced to surrender her bus part is given a much more valuable seat on the bus, coerced citizens are extended benefits which far outweigh the costs of contributing to political stability. In short, once one subtracts the benefits of citizenship from the costs, it is no longer plausible to regard the latter as unreasonably costly. (p. 746 n. 11)

The argument here is flawed. In order to defend the required sacrifices, Wellman appeals to the benefits that 'coerced citizens' themselves receive. In other words, in this note, he moves beyond the ambit of samaritanism, which depends on duties to others, to invoke benefits received by contributors themselves.

Appeal to benefits 'coerced citizens' receive causes severe problems for Wellman's argument. As we have seen, he argues that for the state to provide benefits to a given citizen and then demand payment would violate the citizen's autonomy. In discussing the principle of fairness, Wellman refers to 'the liberal premium upon individual autonomy

[which] entails that one may not justify one's coercion of another by merely citing the benefits for the coercee' (p. 738). But in the footnote, he defends the obligations of coerced citizens by citing the benefits they receive. The argument of the footnote raises the problems of paternalism that elsewhere led Wellman to reject theories of political obligation based on the principle of fairness. Unless a defender of samaritanism is able to justify moral requirements that are of significant force, one must conclude that samaritanism, although attractive in important ways, is unable to ground central political obligations.

4. Conclusion

To conclude this chapter, I will offer a brief suggestion about what I take to be the proper role a principle of samaritanism or a natural duty of justice can play in theories of political obligation. This suggestion will be developed at greater length in the next chapter. As Wellman notes, a samaritanism principle is more intuitively plausible than a natural duty of justice. The fact that it is unable to ground costly political obligations does not mean that it cannot make a significant contribution.

Important theories of political obligation based on gratitude and the principle of fairness depend on benefits received. If we require that a principle of political obligation be able to ground comprehensive obligations, that is, to support the entire range of state functions, then reciprocation principles fall short. Because they are based on benefits received, they cannot cover obligations to serve or to help people who do *not* benefit one, and so social welfare functions, which are of course central to the role of the modern state. However, if supplemented with a samaritanism principle, a theory of political obligation based on reciprocation can have much wider range.[182] Thus the proper role of a principle of samaritanism is as part of an MP theory of obligation, as we will see in Chapter 5.

5. Appendix

The legal systems of many countries have mandatory duties to rescue, which, in general are limited in regard to cost. On the whole, however, variations between countries provide mixed support for the intuitive

[182] Wellman combines fairness and samaritanism in a different way (p. 749).

plausibility of enforceable moral requirements to rescue. My assumption is that the existence of laws against a given practice in all or virtually all countries (or virtually all countries that have what we regard as appropriate legal systems) supports the idea that the practice is morally wrong.[183] Examples, of course, are laws against murder, rape, theft, and so on. Laws against failure to rescue approach similar universality but fall short.

Duties to rescue are present in most European legal systems, although, with few exceptions, they are not found in either the civil or criminal law of English-speaking common-law countries.[184] Various reasons are proposed to account for this difference. Michael Menlowe argues that the differences between the two classes of countries stem from philosophical problems establishing such duties, especially that, on consequentialist reasoning, it is difficult nonarbitrarily to limit the application of these duties.[185] In contrast, Alberto Cadoppi argues that differences can be traced back to how common law and civil law legal systems operate. The introduction of such a law in a common law country 'would have compelled a judge to decide on his own authority that bystanders were responsible for the deaths of others.'[186] In civil law countries, which provided opportunities to rethink overall system of criminal law, bad samaritan statutes were generally implemented.[187]

Bad samaritan laws generally contain cost qualifiers. Cadoppi notes that in most criminal codes the offense is waived when the rescuer runs any risk of danger.[188] In some countries (e.g. Germany, Portugal, Belgium), it is waived for serious dangers, while there are four countries in which risks for the rescuer are ignored (Italy, Turkey, San Marino, and Panama).[189] Laws that are harsh and demanding, in both penalties and

[183] See Ch. 7, for discussion.

[184] M. Menlowe, 'The Philosophical Foundations of a Duty to Rescue,' in *The Duty to Rescue: The Jurisprudence of Aid*, M. Menlowe and A. Smith (eds) (Dartmouth: Aldershot, 1993), p. 5. For failure-to-rescue laws in thirty-one different countries, see F. Feldbrugge, 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue,' *American Journal of Comparative Law*, 14 (1965–6). For the history of these laws in many countries, see A. Cadoppi, 'Failure to Rescue and the Continental Criminal Law,' in M. Menlowe and A Smith (eds), *The Duty to Rescue. The Jurisprudence of Aid* (Dartmouth: Aldershot, 1993) [Cadoppi, 'Failure to Rescue'].

[185] For discussion, see S. Kagan, *The Limits of Morality* (Oxford: Oxford University Press, 1989).

[186] Cadoppi, 'Failure to Rescue,' p. 93; also p. 115.

[187] *Ibid*., pp. 115–16.

[188] *Ibid*., p. 107; he lists seventeen countries (p. 125 n. 36).

[189] *Ibid*., p. 107.

requirements of bystanders, can be traced to totalitarian countries (the statutes of which were also imitated by other countries), with their increased emphasis on community and lesser emphasis on the value of the individual.[190] Difficulties in altering established laws in criminal codes probably explain their continued existence long after the demise of the specific regimes that established them.[191]

Thus most countries have laws requiring rescue, but only when this would not be costly. But given exceptions to this rule, duties to rescue as weak principles fall short of general implementation.

[190] *Ibid.*, pp. 112, 116.

[191] *Ibid.*, p. 116.

5
Multiple Principles of Political Obligation

In spite of its strengths, a theory of political obligation based on the principle of fairness has important limitations. In order to address them, I will attempt to work out 'an MP' theory of obligation. Instead of being based on a single principle—for example, consent, gratitude, fairness—this will combine several principles in a single theory. An approach along these lines departs from others in the literature. But although it might at first sight seem odd, there are strong considerations in its favor.

In order to appreciate the logic of an MP theory, it is necessary to consider what a 'theory' of political obligation actually is. In the literature, scholars commonly appeal to 'theories' of political obligation based on particular principles. Throughout this work I have discussed a theory of obligation based on the principle of fairness. Harry Beran has worked out a 'consent theory of political obligation.'[192] Christopher Wellman claims that his samaritan construction, looked at in Chapter 4, can fill the need for 'a liberal theory of political obligation.'[193] If we pause to think about what scholars mean by these locutions, we will see that a 'theory' of political obligation is a set of linked considerations intended to provide answers to questions concerning whether we should obey the law. Different positions are identified as 'consent theory,' 'gratitude theory,' or 'fairness theory,' because the reasons in question center upon the eponymous moral notions.

[192] H. Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987).

[193] C. Wellman, 'Toward a Liberal Theory of Political Obligation,' *Ethics*, 111 (2001) [Wellman, 'Toward a Liberal Theory'].

The goal of such theories is of course to provide reasons why we should obey. A successful theory establishes a strong presumption in favor of obedience, placing a burden of justification on people who claim that they need not obey. This much is fairly clear. However, we should also recognize that appeal to one of the moral notions indicated should not ordinarily rule out appeal to others. In most cases, there will be no incompatibility between, say, reasons to obey the law based on consent and on gratitude or a natural duty of justice. If a theory based on a single principle is successful, one will generally not feel a need to move beyond that principle. For example, if a theory based on consent is thought to provide satisfactory reasons, one will not appeal to gratitude as well.

I believe, however, that discussion of these matters has developed in an overly rigid manner. In the literature, the different theories of obligation are often treated in somewhat reified form as independent 'theories.' Each is assessed as if it alone is to provide satisfactory answers to the full range of questions. When a given 'theory' is found deficient in some respect, it can be labeled unsatisfactory and rejected. The critic can then move on to assess the next 'theory' on his list. In the literature, such procedures of 'divide and conquer' are followed by many important scholars.[194] Their conclusions are largely responsible for the currently widespread view that there is no satisfactory theory of political obligation.

That divide and conquer is flawed becomes apparent if we recognize that many different moral considerations can be relevant to questions of political obligation.[195] The fact that no single moral principle is able to

[194] A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principle*]; M. B. E. Smith, 'Is There a Prima Facie Obligation to Obey the Law?' *Yale Law Journal*, 82 (1973); J. Raz, *The Authority of Law* (Oxford: Oxford University Press, 1979), Ch. 12; R. Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986) [Dworkin, *Law's Empire*], Ch. 6.; W. Edmundson, *Three Anarchical Fallacies* (Cambridge: Cambridge University Press, 1998); and Wellman, 'Toward a Liberal Theory.'

[195] It bears mention that there is a similar disconnect between ordinary moral reasoning and the implications that scholars draw from divide-and-conquer arguments. According to Simmons, in the absence of political obligations, each time a citizen is confronted with a requirement to obey, she should assess all relevant moral facts and decide whether obedience is warranted. (Simmons, *Moral Principles*, pp. 192–5). Key here is appeal to 'all relevant moral facts.' If in the absence of political obligations citizens are to consider all relevant moral considerations that bear on assessing particular laws, then it stands to reason that all considerations should also be involved in assessing wider questions concerning the existence of general obligations. On neither level should one confine attention to a single set of moral concerns.

generate all required answers does not rule out the possibility that, by bringing other considerations to bear, better answers can be developed. It is possible that, by combining two (or more) theories, we can construct a position that is stronger than any of the original theories on its own.[196]

I believe there is an element of truth in many different theories of obligation. Even if a theory based on a single principle—for example, gratitude or a natural duty of justice—is not able to overcome all difficulties and so to give rise to a theory that is fully satisfactory, this does not mean that it is not able to account for at least some requirements to obey the law. Once again, there can be numerous reasons to obey particular laws; many political obligations are overdetermined. While this complicates the task of laying out an MP theory, such a theory allows us to see the interaction of different principles in regard to certain laws, while the full range of laws could well be covered by the crosshatch of different principles. Moreover, because principles of obligation are generally not mutually exclusive, principles in addition to those discussed in this chapter could well explain at least certain political obligations, further complicating a full MP theory, but providing further grounds for general moral requirements to obey the law.

In working out an MP theory, I attempt to satisfy two main requirements of a theory of obligation: (1) ability to ground obligations of all or virtually all citizens, and (2) to support a full range of governmental functions. In Chapter 1, I referred to the former as 'generality,' and the latter as 'comprehensiveness.'[197] In *The Authority of the State*, Leslie Green explicates what he calls 'the self-image of the state.'[198] As we have seen, Green believes that the state's self-understanding is that citizens are bound to obey any law that is properly passed, regardless of

[196] Simmons explicitly rejects the 'universality' requirement, that a single principle must account for all political obligations (*Moral Principles*, p. 35). The main previous work with a 'multi-principle' approach is by J. Wolff ('Political Obligation*:* A Pluralistic Approach, in M. Baghramian and A. Ingram [eds], *Pluralism: The Philosophy and Politics of Diversity* [London: Routledge, 2000]), to which I am indebted. The approach is suggested in G. Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992; new edn., 2004) [Klosko, *Principle of Fairness*], pp. 98–9; see also C. Gans, *Philosophical Anarchism and Political Disobedience* (Cambridge: Cambridge University Press, 1992) [Gans, *Philosophical Anarchism*], which does not work out the details of the position.

[197] For reasons of space, I cannot discuss additional requirements, although I believe the position developed here could address them.

[198] L. Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), Ch. 3.

content. In this chapter, generality does not receive much attention, because I believe the considerations advanced in Section 1 are able to ground political obligations for virtually all citizens. Generality still plays an important role in the argument, as it is necessary to raise what I believe are insuperable problems for obligations based on consent. With generality satisfied, I devote most of my attention to comprehensiveness.[199]

The principles I will examine interact in three ways. First, is what we can call *cumulation*. Different principles can cover different services provided by the state, and so by combining principles, a larger range of state services can be accounted for. Second, is what can be referred to as *mutual support*. In regard to certain state functions, if a given principle on its own cannot justify compliance, the problem might possibly be overcome by more than one principle working in tandem. The third way is simple *overlap*.[200] The intuition here is that, while requirements to obey given laws could be relatively weak, these can be strengthened by support of additional principles. Through the combination of these three kinds of interaction, I believe, a theory of obligation can be

[199] My focus on the comprehensiveness requirement might seem unusual, because we might simply assume that a theory of obligation will explain obligations to obey the law across the board, rather than only some laws, with additional principles required for other laws. The problem, however, is that at the current time no theory is generally viewed as able to do this. Under one interpretation, the principle of fairness gives rise to a comprehensive theory. On this account, society as a whole is a cooperative scheme, the benefits of which are deeply integrated into the individual's personality. For this view, see R. Dagger, *Civic Virtues* (Oxford: Oxford University Press, 1997), Ch. 5. Whether or not this view is plausible, I do not pursue it here, because it departs from the individualist premises from which opponents of political obligation generally work (see above, p. 18; for Dagger's rejection of Simmons's premises, see pp. 75–7). On an alternative construal, the law as a whole is viewed as a cooperative enterprise from which citizens benefit and so should support. The problem with this construal is that it depicts the law as a 'seamless web,' with all parts thoroughly implicated in one another. Given the breadth of the legal systems of modern countries, I believe this view does not correspond to the facts. For what I view as proper construal of the relationship between individual laws and the overall legal system as this bears on political obligations, see G. Klosko, 'The Moral Force of Political Obligations,' *American Political Science Review*, 84 (1990). MP theory, even with its unconventional approach to comprehensiveness, appears to be the only alternative to no satisfactory theory at all.

[200] Mutual support and overlap are closely related. But in cases that involve the former, a single principle is not able to generate a given moral requirement without the help of another. With overlap, both principles A and B are able to generate independent moral requirements, which are strengthened by having the same (or closely similar) application.

worked out that is able to satisfy the two requirements—and the others discussed in Chapter 1—although considerations of space rule out discussion of other requirements here.

Before proceeding, I should note that, because of the number of principles involved and complex considerations in regard to each, discussion here must be somewhat cursory. It is not possible to examine many issues in the detail they require. Discussion is in four sections. In Section 1, I discuss the ability of the principle of fairness to ground obligations to support central state functions. Contributions of a natural duty of justice are discussed in Section 2, and then of a 'common good' (CG) principle in Section 3. Section 4 presents brief conclusions.

1. The Range of the Principle of Fairness

As I have noted, within the liberal tradition, political obligations have commonly been believed to rest on consent. Consent theories, however, have been severely criticized, on grounds of generality. Adequate numbers of citizens have not expressly consented to government, while if formulated carefully, an argument from tacit consent has the same problem. For theories of obligation, these difficulties are doubly unfortunate. Not only is consent an especially clear and convincing ground for political obligations, but a great advantage of consent is comprehensiveness. If Smith consents to the government of territory X, a plausible case can be made that this applies to the entire range of government actions. For instance, according to Locke, when Smith leaves the state of nature and consents to join the community, she agrees 'to submit to the determination of the majority and to be concluded by it.'[201] She thereby incurs an obligation to comply with all measures the community legitimately undertakes.

The principle of fairness, in contrast, establishes political obligations that are general but not comprehensive. As we have seen, this principle is able to ground general obligations to support state provision of central public goods, but this of course encompasses only limited government functions. As noted in Chapter 1, the range of the principle is extended by the 'the indirect argument.' If the state is to provide certain indispensable goods, the society must possess a basic infrastructure—for example, transportation and communication facilities. There cannot be adequate law enforcement or national defense,

[201] J. Locke, *Second Treatise of Government*, Sect. 97, in P. Laslett (ed.), *Two Treatises of Government*, (Cambridge: Cambridge University Press, 1988).

unless there are adequate roads, bridges, harbors, etc. Filling out the indirect argument would involve many complexities that cannot be addressed here.[202] We can confine attention to two points. First, the specific package of services in country X, required contributions to which can be grounded on the principle of fairness, depends on the specific indispensable goods the government of X provides. For ease of reference, we can call a good that a government might provide that is not indispensable a 'discretionary' good. According to the indirect argument, Grey can be required to contribute to a given discretionary good if it can be shown to be part of a package of such goods that is required if government X is to be able to provide a given public good that is indispensable to his welfare. For instance, in the contemporary world, adequate defense requires sophisticated industrial and scientific infrastructure. Obligations to support provisions for the relevant industries to function effectively can be justified, as can similar requirements in regard to facilities for various kinds of research and resources for scientific education. Law enforcement, requires adequate roads and communication facilities and what is necessary to support these. And so obligations in regard to these can be justified as well. There is great complexity in determining the specific discretionary goods that can be justified in a given country. Discussion of such questions is difficult on an abstract level, as the specific discretionary goods depend on the details of the indispensable goods the government provides.

The problems in determining the precise contents of a given package of discretionary goods are compounded by the pluralism and diversity of modern liberal societies. Under these circumstances, there are legitimate disagreements about the precise forms in which indispensable goods should be provided and paid for. In keeping with discussion throughout this study, because production of many goods involves complex systems in which large numbers of people are involved, people should be treated equally in regard to their preferences, and so determinations should be made through acceptably fair democratic procedures, subject to the added check that the products of such procedures should be able to be defended by strong reasonable arguments.[203] If we grant these claims, the principle of fairness is able to establish obligations to support a range of indispensable goods and a package of discretionary goods that is indirectly necessary for the former's provision, as determined in this manner.

[202] See Klosko, *Principle of Fairness*, Ch. 4.

[203] *Ibid.*, Ch. 3.

A significant advantage of this line of argument is that, unlike natural duty views, it is able to justify substantial sacrifices on the part of recipients of indispensable goods. Once again, I take it as apparent that governments require such sacrifices, as seen most clearly in tax burdens and requirements of military service. The principle of fairness is able to justify obligations to make such sacrifices. Because the benefits government provides are indispensable, recipients must have them. As long as the former continue to outweigh costs, sacrifices of individuals can be required—and are in their own interest.[204]

The second point, however, is that the resulting services governments can require still fall far short of comprehensiveness. By itself, the principle cannot ground requirements to support services that are not indispensable for satisfactory lives or required by other services that are. Many government activities are intended to make for more pleasant and productive societies and fall into this category. Notable examples are regulating the economy and supporting education, beyond a minimum. I believe obligations to support various requisites of democratic decision-making can be justified. Democracy is necessary to determine the form of government services. Thus some level of general education, especially civic education, is also required throughout society. Arguably, justifiable education measures could include a system of public broadcasting, and so something like Nozick's public address system, if it were part of such a package.[205] But governments generally go far beyond this. They typically support cultural activities: libraries, museums, operas, symphonies, play houses, and ballet companies. They also provide public parks, recreational facilities, and preserve wilderness areas and the beauty of the environment. It is difficult to maintain that any of these is indirectly necessary to the provision of essential public goods. An additional problem is that many of these benefits are not public goods. Libraries, museums, and public parks are excludable. Their benefits can be withheld from specific people relatively easily through admission charges and the like. Thus it is not clear if the principle of fairness can justify requirements for people who do not choose to make use of them to support them.

[204] Military service might appear to pose a problem. But the relevant costs are those of undertaking military service in a broad sense, with attendant risks, as opposed to the specific risks associated with particular situations, after people have entered the military and been given specific assignments. This is on the assumption that the overall military endeavor is worth its costs; see Klosko, *Principle of Fairness*, pp. 54–7.

[205] See *ibid.*, pp. 86–95.

Additional problems are encountered in regard to crucially important social welfare programs. The principle of fairness grounds obligations on receipt of benefit by subjects themselves. Grey is required to contribute to the provision of indispensable goods, P, Q, R, and associated discretionary goods, A, B, C, because they are beneficial to him.[206] But fairness cannot establish obligations to support services that benefit *other* people. Most notable here are social welfare services that support the poor, handicapped, or otherwise disadvantaged.[207] Up to a point, such services can be viewed as public goods. To the extent that they keep the poor minimally satisfied and so not disruptive of public order, they contribute to the overall environment of law and order that is beneficial to everyone. But welfare functions ordinarily go far beyond this, and to the extent that they benefit only recipients, they require justification by other moral principles. To the extent that a theory of obligation based on the principle of fairness is not able to ground obligations to support these services as well, it falls short of being an adequate theory.

2. Contributions of a Natural Duty Principle

Although the principle of fairness has difficulty establishing obligations in the areas we have noted, other principles can fill the gap. I will discuss two other principles, a duty of mutual aid, which requires people to help others who are in severe need or distress, and what I call the 'common good' (CG) principle. In accordance with the main theme of this chapter, the two principles not only do not exclude one another but are mutually supporting. A theory employing both along with the principle of fairness is stronger than a theory that employs only one of these principles.

In the literature, the duty of mutual aid is most commonly discussed in connection with the 'natural duties of justice,' especially as presented by Rawls in *Theory of Justice*. As we saw in Chapter 4, natural duties are unlike obligations in that they bind all people without regard to their voluntary actions. For example, all people have duties of mutual aid to assist anyone who is in need or distress. Other natural duties were discussed in Chapter 4. As we saw, in Rawls's theory, the status of the natural duties rests on the fact that they would be adopted

[206] See R. Arneson's discussion of the 'self-benefit principle' ('The Principle of Fairness and Free-Rider Problems,' *Ethics*, 92 [1982]).

[207] The claim here is not that such services must necessarily be provided by the state but only that, if the state does provide them, this can be justified.

by the representative individuals in the original position. However, setting aside the details of Rawls's arguments, I view the natural duties as intuitively clear moral principles, which can be assumed to hold.[208] This is true of the duty of mutual aid, or as Wellman calls this, a principle of samaritanism.[209] I take it as obvious that we recognize this principle as a general moral requirement, binding on all people.[210] Other things being equal, for Smith to walk by and not aid a child drowning in a swimming pool would subject her to severe moral condemnation. By extension, this principle requires one generally to help other people who are in need or distress, and so to aid society's unfortunate members, for example, orphans, the mentally ill, the handicapped, and others who cannot care for themselves.

Because the natural duties hold generally, there are obvious advantages in using them to establish political obligations. Such was Rawls's intention in discussing the natural political duty in *Theory of Justice*. But we have seen in Chapter 4, the natural duties are weak principles and so unable to ground central requirements to support the state. However, even if we grant this contention, the natural duties, especially the duty of mutual aid, are able to support social welfare and other similar programs, as long as these pose relatively light burdens. One reason requirements along these lines are permissible is that they generally entail only financial contributions. Requiring that Smith contribute money to a homeless shelter is obviously less burdensome than requiring that she spend time there, for example, making beds or counseling clients. As long as financial contributions are reasonably light, the principle of mutual aid should be able to generate requirements for many programs. In the abstract, it is difficult to draw the line between acceptably light and objectionably heavy burdens. Perhaps something along the lines of the 10 percent tithe that many religions impose (or suggest) is acceptable. Perhaps the level is lower, only 2 percent or 3 percent, while the amount that can be required will depend to some extent on the level of need and the kind of services that can be provided.[211] Whatever the difficulties in identifying precise lines here, especially in the abstract, the thrust of the principle is clear, while even

[208] Simmons also divorces the natural duties from the context of the original position (*Moral Principles*, pp. 143–4).

[209] Wellman, 'Toward a Liberal Theory.'

[210] For an excellent defense of a duty of mutual aid, see J. Feinberg, *Harm to Others* (Oxford: Oxford University Press, 1984), pp. 126–86.

[211] For levels of social spending in different countries, see W. Adema, 'What Do Countries Really Spend on Social Policies? A Comparative Note,' *OECD Economic Studies*, 28 (1997).

if we cannot draw precise lines, we can identify instances falling clearly on either side of it. Thus a theory of political obligation that combines the principle of fairness and some variant of the duty of mutual aid can be stronger than a theory built on either of these principles taken separately.

But before we can accept this position fully, we must address two problems with natural duties: establishing government's role in fulfilling citizens' obligations, and the 'particularity' of obligations under natural duty. To begin with the former, if there is a moral requirement to help people who are in distress, why cannot individuals do this themselves, instead of having to contribute to government programs? If Smith is morally required to contribute 2 percent or 5 percent of her income to such causes, why can she not select the charities of her choice, instead of having to subordinate her preferences to those of the government, which would mean subjecting her efforts to the bureaucratic inefficiency for which governments are known? This is a difficult question, and I do not dispute the contention that government programs are oftentimes inefficient. Still, the reasons government programs are necessary center on effectiveness. I view it as an empirical truth that, in a large society, the needs of the many and different people in distress can be met effectively only by highly coordinated mechanisms. This of course is not to denigrate the desirability or moral commendability of private charities. But while private efforts might be sufficient in a small community, in a large or heavily populated modern political body, the demands of reaching all the needy require a degree of coordination that is beyond the ability of private individuals. It might be possible for the necessary coordination to be supplied by private agencies working together—along the lines of the United Way—in which case, people could contribute to that. But it is highly unlikely that even such agencies could successfully meet the needs of all the underprivileged in a large country. If the natural duty requirement is actually to help people in distress, as opposed to *trying* to help them in some way that one prefers, then the requirement must be met by contributing to state-run efforts.[212] Although a state-coordinated system would prevent people from giving aid as they prefer, their preferences should be respected, although collectively. Because the necessary services can require highly coordinated mechanisms, participants should have equal say about precise programs.

[212] See D. McDermott (2001), 'Natural Duties and State Legitimacy,' paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.

Decisions should be made through the political institutions of democratic societies.

In generating moral requirements of this sort, the natural duty argument is reinforced by considerations of fairness. From the point of view of people not in distress, aiding those who are is a public good—a moral public good. If we all have requirements to help people in need, actions by others that lessen the degree of need are beneficial in a general sense. Smith could free ride in regard to her duty of mutual aid by standing back as other people addressed the needs of those in distress. If this is true, then it would be unfair for Smith to benefit from such moral public goods, unless she too did her share.[213]

The second problem bears on the particularity requirement (see above, p. 12). An acceptable principle of political obligation must account for the strong connection between the individual and a specific political body, of which he is generally a citizen. However, this poses problems for a duty of mutual aid. If Grey is required to help people in distress, why must these be his fellow citizens, as opposed to allowing him to fly off to Africa or Latin America where people are likely in far greater distress? If, in accordance with Rawls's natural political duty, we claim that people should comply with and support just institutions 'when they exist and apply to us', then it has to be explained why Grey must comply with the institutions of one country rather than another. Even though he lives in Great Britain, which we can assume possesses just institutions, Sweden, Canada, and Belgium can also be assumed to have just institutions. Why must he comply with the British government, rather than the governments of these countries? This problem seems to be addressed in Rawls's formulation as the duty to support just institutions when they 'apply' to us. But this of course raises the question of how institutions 'apply' to one.[214]

An argument along these lines is presented by Martha Nussbaum, who questions favoring one's fellow countrymen, because the moral principles that apply to them also apply to people beyond the 'morally arbitrary boundary' of one's nation:

> For one thing, the very same groups exist both outside and inside. Why should we think of people from China as our fellows the minute they dwell

[213] For an argument along these lines, see Wellman, 'Toward a Liberal Theory.'

[214] In *Moral Principles*, Ch. 6, Simmons argues that, in order to account for how a principle 'applies' to Grey, one would have to introduce additional moral principles—for example, based on consent or receipt of benefits. According to Simmons, this would collapse the natural duty view into one based on the additional principle or principles, thereby rendering the natural duty of justice otiose.

> in a certain place, namely the United States, but not when they dwell in a certain other place, namely China? What is it about the national boundary that magically converts people toward whom we are both incurious and indifferent into people to whom we have duties of mutual respect?[215]

I agree with Nussbaum that recognition of our common humanity also generates recognition of our duties to alleviate the suffering of other people. As Nussbaum says, the fact that life expectancy at birth is more than seventy-eight years in Sweden and Hong Kong and less than thirty-nine years in Sierra Leone, creates a requirement to improve the lot of people in Sierra Leone.[216] To sit back and allow so much of life prospects to be determined by accidents of birth is unconscionable. Accordingly, whatever our moral requirements towards our fellow citizens, duties of mutual aid require that we also contribute to alleviating the plight of people in poor and otherwise suffering societies, especially if our own society is well off.

And so, what special requirements do people have towards their compatriots? In the literature, various means have been proposed to overcome the particularity problem. According to one line of argument, Smith's duty to assist fellow citizens is rooted in concerns of efficiency.[217] A problem here, however, is that these considerations tell more strongly in favor of assistance coordinated by *a* government than by Smith's particular government. With her requirement to assist others discharged by financial contributions, it will oftentimes not be true that money sent to her own country (which 'applies' to her) will be used more effectively than money sent elsewhere.

More convincing reasons are rooted in reciprocity.[218] One advantage of combining different moral principles is that this can provide means to identify the political community of which one is a member and so the institutions that apply to one.[219] The argument of Chapters 2 and 3

[215] M. Nussbaum, 'Patriotism and Cosmopolitanism,' in J. Cohen (ed.), *For Love of Country* (Boston: Beacon Press, 1996), p. 14. Nussbaum justifies some preference for compatriots, as the most effective way of doing good (pp. 13–14; 135–6), but an argument along these lines is vulnerable to the objections noted later.

[216] *Ibid.* p. 135.

[217] See, for example, R. Goodin, 'What is So Special about Our Fellow Countrymen?' *Ethics*, 98 (1988), esp. 685.

[218] Other moral reasons are proposed by C. Wellman, 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?' *Ethics*, 110 (2000). For problems with these arguments, see C. Coons, 'Wellman's "Reductive" Justifications for Redistributive Policies that Favor Compatriots,' *Ethics*, 111 (2001).

[219] In *Philosophical Anarchism*, Gans attempts to solve the particularity problem by combining natural duty and 'communal' (association) principles (pp. 81–2).

is relevant here. Because individuals could not lead acceptable lives without indispensable benefits provided by the community, it is misleading to think of them as isolated individuals in the equivalent of a Lockean state of nature. Grey, rather, is 'naturally' a member of a community, the community that supplies him with indispensable goods. The institutions that 'apply' to him are those that provide these goods, and he has special responsibilities towards his fellow citizens, because of their contributions. Only through the efforts of his fellow citizens, including unfortunate ones, does Grey receive benefits of national defense, public health, environmental measures, and the like. Moreover, only if the poor and unfortunate members of his society regularly obey the law can there be an overall atmosphere of law and order that is essential to his own well-being. Thus as Richard Miller argues, special concern for Grey's fellow citizens is also warranted because of the need to provide them with adequate incentives to obey the law and to increase their level of public trust.[220] Accordingly, not only must Grey fulfill his duty of mutual aid by working through the highly coordinated mechanisms of a government, but the particular government he should support is that of his own territory.[221]

In her arguments, Nussbaum fails to take these factors into account. In focusing on an abstract sense in which we are all citizens of the world, she neglects the concrete benefits we receive from particular societies, which generate requirements to contribute to them. To turn around a point made above, the fact that we have duties to aid people in suffering societies other than our own does not reduce what we owe our fellow citizens.

Construed along these lines, the duty of mutual aid can justify extensive state programs. These include providing the unfortunate with obvious necessities, for example, food, shelter, clothing, and health care. By extension, programs that provide aid to dependent children can be justified, if it is necessary to support parents in order to make sure the needs of their children are met. In order to alleviate the distress of the poor, a significant range of benefits can be provided.

Let us return to the comprehensiveness requirement. Combining the argument of this section with that of Section 1, we are able to fill a significant gap in fairness theory. While fairness primarily justifies requirements that pertain to programs that are beneficial to individuals

[220] R. Miller, 'Cosmopolitan Respect and Patriotic Concern,' *Philosophy and Public Affairs*, 27 (1998).

[221] See also D. Miller, *On Nationality* (Oxford: Oxford University Press, 1995), Ch. 3, esp. pp. 65–73; M. Blake, 'Distributive Justice, State Coercion, and Autonomy,' *Philosophy and Public Affairs*, 30 (2002).

themselves, the duty of mutual aid can require citizens to support government programs that aid the distressed, as long as the programs are not overly burdensome. By supplementing the functions covered by fairness, mutual aid greatly extends the reach of citizens' moral requirements. Through its focus on joint production and consumption of essential state benefits to defuse the particularity problem, fairness in turn plays an essential role in the working of mutual aid. Through two of the mechanisms noted at the beginning of this chapter, cumulation and mutual support, a theory of political obligation that combines fairness and a duty of mutual aid is more powerful than a theory of obligation based on either principle working by itself.

3. The 'Common Good' Principle

The theory of political obligation developed thus far still falls short of the comprehensiveness requirement. In addition to providing indispensable public goods and seeing to the needs of the unfortunate, the state claims to be able to perform a large range of other services I have noted. These include regulating the economy to keep inflation and unemployment in check, supporting public education, museums, symphonies, and national parks. An additional consideration concerns the existence of a standing mechanism to take measures for the common good.[222] States claim such a general power. Arguably, such a mechanism is itself indispensable. But even if we do not go so far, we can recognize that a society with such a mechanism is clearly better off than one without. And so the question is whether MP theory can be extended to justify these activities.

I believe this problem can be addressed through an additional, principle, which I call the CG principle. According to this principle, the mechanism in place in society X to provide indispensable and other necessary public goods and to aid the unfortunate can also take reasonable measures to promote the common good in other ways. The principle combines elements of fairness and consequentialist principles of political obligation.

> CG principle: The government of society X, which provides indispensable (and necessary discretionary) public goods and basic social welfare services may take reasonable measures to promote the common good in additional ways, with citizens required to do their fair shares to support its efforts.

[222] For discussion of this point, I am indebted to David Klein.

Since the CG principle is not a familiar one, it must be discussed in some detail.

The main thrust of the CG principle follows from the fact that supply of indispensable public goods under the principle of fairness creates a community. As I have noted, the independent, Lockean individual in the state of nature is a fiction. Because Grey and other inhabitants of society could not lead acceptable lives without public goods supplied by joint cooperation, they should be viewed as members of the community that furnishes them. In addition, in order to provide necessary public goods (and an infrastructure of discretionary goods),[223] Grey and other members of community X must develop effective decision-making institutions. So associated, Grey and other X-ites can employ these institutions to advance their interests. The existence of a standing mechanism to deliberate about and promote the common good is of enormous value. As Hume says, once government has been established, it is able to take on additional tasks. Although certain projects are clearly in the public interest, they are often too large for one or a few persons, while, without government, it is difficult to marshal the efforts of the necessary numbers. Government is able to get things done, and so to provide great benefits for the community: 'Thus bridges are built, harbours open'd, ramparts rais'd, canals form'd, fleets equip'd,' and other ends accomplished, which would not have been possible without government intervention.[224] Each of these projects might not be either indispensable or necessary for the provision of indispensable goods. But because each one contributes to society, the CG principle justifies them, and others. A policy of providing these services should on the whole benefit all members of the community. It follows from the principle of fairness that if Grey benefits from the joint efforts of his fellows in regard to these measures, then he can have moral requirements to do his fair share in providing them. For ease of reference, we can refer to the entire range of programs the CG principle supports as 'common provisions.'

Justification for government to take such measures is clearly along consequentialist lines. There is little doubt that governments are justified in providing for the health and welfare of their populations,

[223] For convenience, in various contexts below, I will not mention supply of necessary discretionary goods covered by the indirect argument along with goods that are themselves indispensable. Their inclusion can be assumed.

[224] D. Hume, *A Treatise of Human Nature*, E. Mossner, (ed.) (Harmondsworth: Penguin, 1969), III, ii, 8, p. 590. Although the examples that Hume provides are public goods, 'common provisions' under the CG principle also include excludable goods, if these satisfy the conditions discussed on p. 115, below.

regulating their economies, and taking other measures that are clearly in the public interest. We would be likely to raise questions about a government that did not take obvious measures to improve the lives of its citizens. In a democratic country, the government is no more than a mechanism that represents the collective citizenry, and so parallel considerations require that individual citizens support such measures. In general, their main responsibilities here are paying taxes. The programs in question cost money, and citizens have moral requirements to contribute their fair shares. In order to be clear about their requirements, imagine that tax payments were clearly divided so that the amount each citizen pays for each program could be readily identified. Under such circumstances, Smith would be required to contribute the requisite amount to each reasonable program, again, because of consequentialist and fairness considerations. She can be morally required to do her fair share to advance the good of the community of which she is a member.

Although the CG principle might appear to be an extension of the principle of fairness rather than a separate moral principle, this is not the case. Of course, for our purposes here, the separateness of the CG principle is relevant to the need for MP theory rather than simply a theory based on the principle of fairness alone. We saw above that the latter is not a defensible possibility. Along similar lines, although the CG principle draws on the principle of fairness, it must also draw on consequentialism. As we have noted, the principle of fairness is able to justify obligations only in regard to cooperative efforts that benefit the obligee himself (see p. 105). The CG principle grounds wider obligations to support efforts *that are beneficial to society*. This is in accordance with consequentialist requirements to promote the public good.[225] Only if the individual is required to support specific programs that are not necessarily beneficial to him, can the CG principle extend the reach of people's political obligations.

A related objection is that, if the CG principle can be established along these lines, it might appear to be too successful. Provision of indispensable public goods and necessary discretionary goods may be viewed as clearly in the public interest as may programs to aid the unfortunate. If the community votes to supply them, then they will appear to fall under the CG principle. If this is true, then the CG principle itself may satisfy the comprehensiveness requirement, thereby making MP theory unnecessary. However, the CG principle by itself is not able to fulfill this role. The CG principle requires prior

[225] I am grateful to an anonymous reader for discussion of this point.

identification of one's community, which is provided by joint production and consumption of indispensable public goods under the principle of fairness. Without this, it is not clear exactly what makes Grey a member of a specific community and why he must support efforts to advance its interests.

Because of its connections to community membership, the CG principle is closely related to currently fashionable theories of political obligation grounded on principles of association.[226] According to such theories, people are morally required to obey the law because they are members of particular communities. A number of association theories have been advanced, none of which is entirely satisfactory.[227] Among problems with such theories is explaining exactly what we mean by 'association' or 'membership' and why this gives rise to moral requirements. In perhaps the most sophisticated association theory, John Horton appeals to familiar feelings of shared political identity and collective political responsibility that are common features of political life and argues that the binding force of association requires no independent justification. In Horton's words: 'My claim is that a polity is, like the family, a relationship into which we are mostly born; and that the obligations which are constitutive of the relationship do not stand in need of moral justification in terms of a set of basic moral principles of some comprehensive moral theory.'[228] Theorists are likely to say that, in order to ground obligations, the feelings of identity to which Horton appeals must themselves be explained. Horton counters:

> If such thoughts and feelings are shown to be morally intelligible in the context of a shared identity, constituted by membership of a particular polity, why is more necessary? Why do such thoughts and feelings have to be shown to be justified in terms of consent, the principle of fairness, utilitarianism or some other preferred moral theory?[229]

In response to Horton, however, saying that no explanation is necessary does not constitute an explanation. We still require an account of why the fact that an individual has certain feelings in regard to a

[226] Dworkin, *Law's Empire*, pp. 196–216; J. Horton, *Political Obligation* (London: Macmillan, 1992), Ch. 6; also M. Gilbert, 'Group Membership and Political Obligation,' *Monist*, 76 (1993).

[227] See A. J. Simmons, 'Associative Political Obligations,' *Ethics*, 106 (1996); but see the response of Horton, 'Political Obligation, Identity, and Political Community,' paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.

[228] Horton, *Political Obligation*, p. 150.

[229] *Ibid.*, pp. 154–5.

particular community in itself entails particular moral requirements in regard to it.[230]

The argument here makes clear both the nature of a person's community and the moral requirement to support it. Community is constituted by joint production and consumption of indispensable public goods. Because people require these for acceptable lives, as noted in Chapter 2, they are 'naturally' members of the community and have requirements to support the community's effort to promote the common good, as the community sees this.

Although the CG principle appears to be a sweeping principle, and so potentially dangerous, it is circumscribed by the fact that measures taken must be reasonable. Cashing this notion out gives us three conditions that must be satisfied:

1. the government services or provisions in question must actually be in the public interest; that is, benefits must outweigh costs;
2. the provisions must be distributed fairly; and
3. decisions in regard to these benefits must be made democratically, with all individuals having a fair say.

According to (1), society will be able to generate obligations through the CG principle only if policies actually are in the public interest. Not any decision will create binding moral requirements. In addition to being fairly decided on, there must be a strong case that the resulting package of provisions benefits society. The same holds for individual programs or provisions. Each of these must be able to be shown to be in the public interest, and it must be shown that benefits outweigh costs.

An obvious objection is that this standard fails to be satisfied in the real world. The requirement that each specific program or policy be beneficial is obviously inconsistent with omnipresent special interest legislation. Requiring individuals to be concluded by determinations of the majority invites abuse. Democratic safeguards do not prevent the majority from compelling the minority to support its own favored programs. In the words of Joseph Kalt:

> [G]iven standard realistic assumptions, the individuals who effectively are the state at any time…would act to promote their own welfare at the expense of non-controlling individuals.[231]

[230] For how a theory based on the principle of fairness overcomes problems in association, see R. Dagger, 'Membership and Fair Play,' *Political Studies*, 48 (2000).

[231] J. Kalt, 'Public Goods and the Theory of Government,' *Cato Journal*, 1(1981), 580.

Any working majority can be tempted to pursue its own interests while adhering to the letter of the law. The use of public power to benefit special interests is too familiar an aspect of democratic politics to require comment.

This is a formidable difficulty, but we should recognize that the CG principle does not justify all government enactments that purport to be in the public interest. The principle legitimizes only those that actually do promote the common good. Beyond a certain point, a government that is used by the majority to exploit the minority becomes illegitimate. It would be wrong, however, to expect governments to be perfect, or even to meet demanding standards of justice. The appropriate standard is tolerable or reasonable justice. Government's actions must be on the whole defensible, though exceptions should be accepted. In regard to common provisions, it must be borne in mind that they are components of overall packages of benefits that government provides. Unfair distribution of common provisions, or of specific components of the package of common provisions, is of course deplorable but not sufficient to dissolve Grey's political obligations, as long as the overall package of benefits he receives is worth its costs—and the other necessary conditions both for common provisions and overall legitimacy of government are met.[232]

In addition to being beneficial for society, common provisions must be distributed fairly. If city A receives extensive benefits, then city B should be treated similarly. Criteria for allocating resources should be reasonable and neutral between geographical and cultural areas. Because obligations under the CG principle draws on prior obligations under the principle of fairness, it is essential that common provisions not upset these balances.[233]

Grey can of course disagree with other members of society about the specific goods necessary to advance the public interest, and could well believe that none are necessary at all. In diverse societies disagreements are expected; there will be an enormous range of opinions about what society requires. Thus the third condition: such decisions must be made through democratic procedures, which provide all members equal say. As in regard to other issues, with people disagreeing about

[232] A possible problem with the CG principle is that common provisions are frequently not public goods but excludable. This implies that, ordinarily, they should be funded through user fees, although considerations of social justice could require that economically disadvantaged members of society have access. Exploration of these issues is beyond the scope of the current work.

[233] On determinations of fair benefits and burdens, see Klosko, *Principle of Fairness*, Ch. 3.

steps that should be taken to advance the general interest, their differences should be discussed and voted on, according to recognized procedures. Grey will not be alone in being dissatisfied with aspects of the resulting programs. The compromises required in a diverse society should be to some degree unsatisfying to everyone alike. However, regardless of departures from their preferences, all individuals have obligations to support the result, as long as it is determined fairly and can be defended as beneficial to society with strong reasonable arguments.[234] The CG principle, in effect, leaves all members of society subject to common determination of what is in the public interest. But the obverse side of this is that all inhabitants are able to attempt to persuade the majority to realize their own views of what is beneficial.

The third condition also bears on questions of fair distribution. Widespread differences as to what constitute appropriate principles of distributive fairness also must be addressed through fair procedures.[235] Fair democratic procedures must be used to select appropriate principles from the class of acceptable principles of distribution, and to determine standards of fair distribution. If procedures work properly in these regards, the resulting distribution of common provisions should be acceptably fair and so consistent with political obligations under the principle of fairness. Moreover, it bears mention that democracy also helps preserve fairness, in allowing decisions to be revisited. With democracy in place, if specific decisions are objectionable, means are in place to reverse them.

Even with these safeguards, one can still object. For instance, Locke requires that people *agree* to subject themselves to the judgment of the majority, whether or not they have rights to participate in its deliberations. As Simmons notes, one advantage of requiring express consent is the protection from tyranny it affords.[236] The CG principle, in contrast, is not accepted. But as I have noted, requirements to support the common good stem from membership in communities. The three conditions insure that people's rights and interests are respected. Still, Blue can contend that, because the goods in question are not indispensable to her welfare or required to aid other people in distress, she should not be required to support their provision. We can hypothesize that she benefits relatively little from them and so they are not worth

[234] On these requirements, see *ibid.*

[235] Empirical evidence suggests that there is greater agreements on fair procedures than on fair distribution; for discussion see G. Klosko, *Democratic Procedures and Liberal Consensus* (Oxford: Oxford University Press, 2000), Ch. 8.

[236] Simmons, *Moral Principles*, pp. 65–8. As is clear in the philosophy of Rousseau, rights to participate by themselves do not provide adequate safeguards.

their costs *to her*. The response is that the CG principle is not intended primarily to benefit her. The requirement is that Blue support efforts to promote the general good. The three conditions serve as safeguards to insure that she is not exploited by self-interested majorities. In addition, as we have noted, even though given common provisions need not benefit her, they cannot render the overall package of benefits she receives from society not worth its costs to her.

Because Blue is a member of society and has moral requirements to promote its interests, defenders of common provisions can reply to her that a common way of conceptualizing her situation is doubly incorrect—wrong in two different respects. In objecting to having to support common provisions, Blue is likely to construe the situation as whether she as a distinct individual is morally required to contribute to a distinct set of government benefits. But for reasons we have seen, Blue is not a distinct individual; she is a member of society, while the common provisions she receives are not a distinct set of benefits but part of an overall package of benefits that society provides through a process of deliberating about appropriate means to promote the general good.

Consider once again Nozick's example of the public address system. Even though Blue prefers not to take her turn, she should realize that the public address system does not stand by itself. It is part of a package of benefits that is viewed as in the general interest by the community itself, of which she is a member and in the deliberations of which she has rights to participate. Because of X's democratic institutions, Blue is like other X-ites in having the ability to attempt to influence her fellow citizens to utilize public resources to promote what she believes to be the common good.

It could be objected that since the public address system is a detachable part of society X's overall package of benefits, then X is not justified in extending the obligations Blue has in reference to other goods to the public address system as well. As Simmons argues, if a provider of a given set of goods extends his provision to include additional goods, 'this should be at his own risk. He should either provide them free or try to make them excludable; what he may *not* do is impose them on others at a price set by him.'[237]

But although individual components of the package can be detached and provided separately, what links them is that all are specific applications of society's general effort to advance the common good.

[237] A. J. Simmons, 'The Anarchist Position: A Reply to Klosko and Senor,' *Philosophy and Public Affairs*, 16 (1987), 274 (emphasis in original).

Viewed in this light, the public address system is part of an overall process that is generally beneficial and so Blue has moral requirements to support it. Even if she does not benefit from the process in some particular case, in all likelihood she will benefit from other aspects of the package, while she is also protected by the safeguards we have noted. If obligations to support particular elements could be ruled out simply because given individuals did not benefit from them, the mechanism could accomplish almost nothing (beyond providing goods discussed in the previous sections), and all would be far worse off. Even if her compliance or noncompliance with the mechanism would go undetected, Blue has moral requirements to do her fair share in supporting the decision-making process of society of which she is a part.

If we assume that the CG principle is able to deflect the criticisms we have explored, an important objection still remains, that the principle does too much. Since it justifies requirements to comply with all laws that support the common good, by itself, it could generate requirements to obey all laws, thereby once again making MP theory otiose. We have seen that a strong form of this objection fails, because the CG principle requires the support of the principle of fairness in order to establish the relevant community.[238] But once this is done, the CG principle is arguably capable of grounding all other obligations—making both further work by the principle of fairness and the natural duty principle unnecessary.

Although I believe that the CG principle does establish moral requirements to support the full range of governmental actions, I also believe that MP theory is more convincing with the additional principles than without them. To begin with, there is no reason to view the different principles we have discussed as incompatible. Because political obligations are most likely overdetermined, overlap of multiple principles most likely conforms to this fact, while obligations generated through the overlap of different principles are stronger than they would be otherwise. Appeal to the other principles allows the CG principle to do less moral work. If all political obligations beyond those that support essential public goods were grounded only in the majority's belief that the relevant services were in the public interest, defenders of the principle would have a relatively hard time responding to complaints of abuse. As our discussion indicates, this is an inherent

[238] The CG principle also works reciprocally to establish obligations in regard to indispensable public goods, though I of course view this as a strength rather than a weakness of MP theory.

problem with the CG principle. Support for supply of indispensable public goods is required by the principle of fairness as is support of social welfare functions by the natural duties of justice. In regard to these areas of government function, the CG principle does not stand alone. Because requirements to help supply these goods are based on other moral principles, political obligations grounded on the CG principle alone begin only after these other principles leave off, and so encompass only provisions that are not necessary for indispensable goods and do not aid the needy. Although this is not an inconsiderable range of programs, it most likely involves a relatively small percentage of what an individual is required to contribute to the state.[239]

4. Conclusion

If we grant the arguments in the previous sections, then the result is a theory that satisfies the requirements presented at the beginning of this chapter. MP theory is both general, grounding obligations for most or all citizens, and comprehensive, corresponding to the self-image of the state. As we have seen, the three principles we have discussed work in tandem in two ways, covering state services not addressed by other principles, and supporting the working of the other principles in regard to the same services. With its three moral principles overlapping and working in tandem, MP theory takes on a certain complexity. It becomes difficult to determine exactly where the contributions of one principle leave off and those of another begin. The fact that this view depicts many political obligations as overdetermined, grounded by more than one principle, is perhaps disconcerting at first. But this is consistent with the initial intuitive plausibility of many different theories of political obligation and corresponds to the highly complex nature of contemporary societies.

Throughout this chapter, for purposes of argument, we have discussed indispensable and discretionary goods in isolation from one another, and from social welfare services supported by natural duties and other services justified as promoting the common good. But in practice, these different functions overlap, with the workings of one affecting others, which in turn impact on others, and so on. The high degree of interpenetration is seen clearly in government's function of

[239] It is worth noting that an additional advantage of increasing the number of principles involved in MP theory is that, if one principle is refuted, the theory could still ground comprehensive general political obligations through operation of the remaining principles.

advancing the common good—much of which will overlap with functions justified by the other principles. This complex interweaving of moral principles corresponds to the complex, interconnected character of modern life. To have a safe and secure environment, an economy that functions healthily, efficient transportation and communication and other 'essential services,' in addition to amenities that make for more pleasant and interesting lives, require a high degree of efficient coordination. The interdependence of different systems is readily seen when an element is not working smoothly—be it a power failure, a transportation workers' strike, a natural disaster, or a threat to public safety. There is room for disagreement as to whether the resulting disruptions are compatible with what we would view as 'acceptable' lives. Disagreement over what constitutes acceptable lives makes this determination controversial. If the overall smooth functioning of society is indispensable, then preserving the necessary cooperation will be supported by the principle of fairness. But whether or not we accept its indispensability, the smooth functioning of society as a whole is clearly beneficial to all concerned and so should be supported by the CG principle.

6
Reformist Consent and Political Obligation

In discussions of political obligation, it is now generally recognized that a workable theory cannot be based on consent. Adequate numbers of people have not consented to their governments, either expressly or tacitly.[240] While consent still has an important role to play, in the form of 'hypothetical consent,'[241] this is not able to ground political obligations.[242] In recent year, in recognition of these difficulties, certain theorists have turned to 'reformist' consent, arguing that consent theory could be rescued if political institutions were reformed to allow the possibility of widespread consent. In this chapter, I examine various possible reforms and show them to be inadequate. This argument is an extension of the public goods argument in Chapter 2. Although reformist consent is not a nonstate doctrine like the ones examined above, it is like those views in being based on voluntary choice. As in previous chapters, we will see that the need to provide essential public goods causes insuperable difficulties for voluntary political relationships.

[240] For the distinction between 'express' and 'tacit' consent, see J. Locke, *Second Treatise of Government*, Sects. 119–22, in P. Laslett (ed.), *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988) [Locke, *Second Treatise*].

[241] Especially H. Pitkin, 'Obligation and Consent, I' *American Political Science Review*, 59 (1965), 60 (1966); J. Waldron, 'Theoretical Foundations of Liberalism,' *Philosophical Quarterly*, 37 (1987).

[242] To quote Ronald Dworkin: 'A hypothetical contract is not simply a pale form of an actual contract; it is no contract at all.' (*Taking Rights Seriously* [Cambridge, MA: Harvard University Press, 1977], p. 151).

1. ‘Consent or Leave’

In order properly to examine consent theory, we should begin by discussing certain distinguishing features of an act of promising. The basic nature of a promise is of course clear. If Brown promises Grey that she will give him $5 she has a strong moral reason to give him the money.[243] However, considerable complexity is encountered in regard to conditions that must be satisfied for a promise to be successfully completed. For our purposes, two conditions are especially important: the promisor must be aware of what she is promising and she must not be forced to make the promise. These conditions can be described as ‘defeating conditions’ which must not be present if a binding promise is to be completed. Various additional conditions could be noted but need not be discussed here.[244] In general, if Brown makes some promise to Grey, we can presume that the promise is valid, unless it can be shown that Brown is either ignorant or coerced. It is often a complex matter to decide if one or other of these conditions is present, but in many cases there is little doubt that the promise in question is not binding.

If political obligations are to be based on consent, then most individuals must make promises to obey their governments that satisfy the conditions of valid promises; they must be made voluntarily, with promisors aware of the implications of their actions. Scholars have shown that these conditions are not generally satisfied in existing societies. It is only reasonable that they not be satisfied, in view of the generally involuntary character of political relationships.

Confronted with the problems of consent theory, in recent years some defenders of the doctrine have employed a new approach, exploring the possibility that political institutions could be reformed to allow more individuals to consent freely. ‘Reformist’ versions of consent theory, have been presented by Michael Walzer and Harry Beran.[245]

[243] These points should be compatible with different accounts of why promises bind. For different analyses, see H. A. Prichard, ‘The Obligation To Keep a Promise,’ in *Moral Obligation* (Oxford: Oxford University Press, 1968); the exchange between J. Raz and N. MacCormick, ‘Voluntary Obligations and Normative Powers,’ *Proceedings of the Aristotelian Society, Supp.*, 46 (1972); and T. Scanlon, ‘Promises and Practices,’ *Philosophy and Public Affairs*, 19 (1990).

[244] For a good brief discussion, see H. Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987) [Beran, *Consent Theory*], Ch. 1.

[245] M. Walzer, ‘Political Alienation and Military Service,’ in *Obligations* (Cambridge, MA: Harvard University Press, 1970) [Walzer, ‘Political Alienation’]; Beran, *Consent Theory.*

I will review their proposals along with various alternative possibilities to see how well they would work. We begin with the mechanism that is perhaps the most intuitively appealing, which we can call 'consent-or-leave.'

We can imagine various institutional changes that would allow more individuals to consent to their governments. Most simple would be some mechanism through which citizens could be given the opportunity to consent upon reaching a certain age, such as that of legal majority. Various political systems have had such mechanisms, among them Ancient Greek cities. The most familiar example is Athens, where upon reaching the age of 17 an individual was able to apply to be enrolled as a citizen and so acquire rights to the judicial and legislative privileges of adult Athenians. For instance, unless one was a citizen, one could not take part in legal proceedings; one could not bring a case to court and in all legal matters one had to be represented by a father or guardian. The details of the Athenian process need not concern us, though we should emphasize that citizenship was not something that an Athenian simply received. Under certain circumstances an individual whose application was rebuffed could be sold into slavery.[246]

Similar practices lie at the heart of reformist consent theories. Setting up a suitable mechanism in a modern society would appear to pose few problems. For example, individuals could be required to apply for formal citizenship at the age of 18, the age at which men are presently required to register for military service in the United States. An oath of allegiance to the government and/or constitution could be part of the process, with all inhabitants made to understand that consent is a necessary condition for the privileges of citizenship, such as voting, running for elective office, and serving on juries.

At first sight it might appear that obligations as well as privileges could be made to rest on a similar practice: individuals who did not consent to the government would not have them. But there are two problems here, different versions of which will crop up repeatedly throughout this chapter. First, the mechanism in question must be so constituted both that consent is voluntary and that all or virtually all individuals are willing to consent. Secondly, suitable means must be devised for dealing with those who do not consent.

Under a simple 'consent-or-leave' mechanism, at the age of 18, individuals must either consent to the government or leave the country. There is a certain attractiveness to this procedure, as individuals who

[246] A good brief discussion with further references is found in R. Kraut, *Socrates and the State* (Princeton: Princeton University Press, 1984), pp. 154–7.

refuse to consent to country P and so emigrate to Q would clearly not have political obligations to P. Because of the close relationship between residence in a given country and obligations to its government, if obligations are not to be assumed, it would be helpful to sever the tie of residence.

Connections between residence and political obligations have been discussed repeatedly in previous chapters in regard to provision of public goods. In the tacit consent tradition, residence has been viewed as creating a basis for political obligations, most commonly as in Locke's view that it constitutes tacit consent. However, it has been clear since the time of Hume that in most cases the 'decision' to stay in country P rather than to leave for some other cannot be described as voluntary.[247] Even if country P will allow Grey to leave and he has the resources to do so, another country must be willing to accept him. Moreover, the costs of emigration can be high. These can be financial, even if one is allowed to take one's property. Emigration can easily harm one's career, as in the case of a college professor who might be forced to surrender his tenure. In addition, much of what is precious in life—one's attachment to a given home, family, neighborhood, culture, and society—cannot be packed up and taken away.[248] Thus, in many cases, Grey's decision to stay in country P could be more accurately construed as a decision to avoid some or all of these unpleasant consequences, rather than a decision tacitly to consent to P's government.

If this line of argument is accepted, it will tell strongly against any mechanism that forces individuals to choose between consent and emigration. If forced emigration is not a free alternative to tacit consent, then it would not appear to be a free alternative to consenting under a consent-or-leave scheme. Because in many cases the decision not to leave P and so to consent to its government could not be described as voluntary; such consent would not generate political obligations.

Consent-or-leave mechanisms have been defended by Beran, who argues that the decisions they impose are sufficiently voluntary to generate political obligations. He supports this claim with two examples, which can be restated as follows:

[247] D. Hume, 'Of the Original Contract,' in E. Miller (ed.), *Essays: Moral, Political and Literary*, rev. edn. (Indianapolis: Liberty Classics, 1985).

[248] A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principles*], pp. 99–100; also A. Woozley, *Law and Obedience: The Argument of Plato's Crito* (Chapel Hill: University of North Carolina Press, 1979), pp. 106–8.

> White has an illness which will be fatal unless she receives treatment in a hospital. Hospitals have rules requiring certain behavior of their patients, with which patients must promise to abide as a condition of admission. According to Beran, though White dislikes being in a hospital and objects to following rules that she has had no say in making, her decision to seek treatment commits her to obey the rules, although the alternative to the decision is certain death.
>
> Black, although innocent, is charged with murder. He will be convicted unless he engages an expensive lawyer. Although he would prefer not to have to pay a lawyer a large sum of money, Beran holds that his decision to engage one would commit him to paying, even though the only alternative is conviction for a crime he did not commit.

Beran believes that the promises in these two examples should not be viewed as coerced and so are able to generate obligations, because in each case the promise is to the maker's advantage:

> In short, being able to place oneself under a promissory obligation even when one does not want to and when the only alternative involves a high cost, may still increase the options available to one in a problem-situation. Therefore, in the sense of 'free' in which the more options one has the more free one is, being able to place oneself under a promissory obligation in situations such as those discussed increases one's freedom.[249]

Beran's argument does not hold. Although the promises in his two examples should be viewed as binding, they differ in an important respect from that associated with a consent-or-leave mechanism.

Beran's examples show that certain promises made under unpleasant circumstances need not be coerced. There is a sense in which White and Black make 'coerced' promises; were they not faced with problem-situations, with the threat of dire consequences, they would not agree to abide by the unpleasant alternatives. However, this sort of 'coercion' is not the object of our present inquiry. The prospect of unpleasant circumstances if A does not make a given promise is a necessary, though not a sufficient, condition for a coerced promise. The problem-situation must not only exist but it must also be caused by the party to whom the promise is made, in order to induce the promisor's promise.[250]

Consider a clear example of a coerced promise. A gunman holds Blue up and says that he will shoot her unless she promises to bring him

[249] Beran, *Consent Theory*, p. 105.

[250] On coercion, see A. Wertheimer, *Coercion* (Princeton: Princeton University Press, 1987) [Wertheimer, *Coercion*]; R. Nozick, 'Coercion,' in S. Morgenbesser, P. Suppes, M. White (eds), *Philosophy, Science and Method: Essays in Honor of Ernest Nagel* (New York: St Martin's, 1969) [Nozick, 'Coercion'].

$10,000 the next day. There can be little doubt that this promise is coerced and so does not create a binding obligation.[251] This is in spite of the fact that making the promise undoubtedly increases Blue's options, her 'freedom,' as Beran would have it, as the alternative to making the promise is being shot. In this case Blue is not only faced with a problem-situation but it has been caused by the gunman, the individual to whom the promise is made, in order to secure the promise in question.

The problem-situations in Beran's examples are importantly different. White has contracted a serious illness and is forced to seek help from a hospital. Black is wrongfully charged with murder and is forced to seek help from a lawyer. The promises in question will help White and Black overcome serious potential harms. What is crucial here is that in both cases the problem-situations exist independently of actions by the promisees. We can call this condition 'independence.' Roughly, a problem-situation is characterized by independence if the individuals to whom one can turn for help have not created it in order to secure the promisor's promise.[252] This is most clearly seen when problem-situations exist without any input from promisees. Things can become complex when promisees have contributed to problem-situations but without intending to exact promises. It is reasonable to construe such actions broadly, viewing as nonindependent actions that are bound up only loosely with the promisee's eventual demands. We will attempt to avoid such complexities as much as possible, as well as questions concerned with deciding whether a given individual has actually contributed to some problem-situation. I take it as obvious that the hospital to which White turns has had no role in causing her illness and that the lawyer has had no role in bringing about Black's accusation.

That independence is necessary for the validity of a promise can be seen if we alter the circumstances in the first example. An agent of Hospital H infects White with a deadly virus, which can be cured only if she seeks expensive treatment at Hospital H, the only hospital able to

[251] It is worth noting that Hobbes disagrees (*Leviathan*, Ch. 14, R. Tuck [ed.] [Cambridge: Cambridge University Press, 1991], pp. 97–8).

[252] For the distinction between causing a problem-situation and taking advantage of one, see Wertheimer, *Coercion*, pp. 39–41 and Ch. 2 generally. I will avoid discussing such complex possibilities as if the party to whom the performance is owed is not the one to whom the promise is made. For present purposes it seems safe to say that for a promise to be independent, neither the party to whom it is made nor to whom the performance is owed can have contributed to the problem-situation.

help her. White agrees to this even though she is required to sign over half her income for life. In this case the promise is obviously coerced and so invalid. In creating the problem-situation that forces White to make a promise to it, Hospital H is behaving like the gunman in the hold-up example.

A consent-or-leave promise is also characterized by a lack of independence. In this respect, it is more similar to the hold up than to the predicaments of White and Black. According to a consent-or-leave mechanism, at some specified point the state alters its preexisting relationship with a given individual, Gold, and demands that he either consent or emigrate, thereby creating a severe problem-situation for him, with the intention of forcing him to make the promise in question. The situation here is complicated by the fact that the state can be assumed to have had previous interaction with Gold. In this sense it is unlike the gunman, who (we can assume) never saw his victim before. We can assume that the state has provided Gold with important benefits for many years and that the aim of the demand that he consent or move elsewhere is to secure his agreement to contribute to their provision.

In order to facilitate discussion we can call the situation in which an individual exists prior to any intervention by the proposed promisee that is intended to have him make a given promise the 'baseline.' Because the baseline exists independently of disqualifying actions by the prospective promisee, promises made in order to avoid it satisfy the independence condition (by definition) and so in this respect are noncoercive. In the hold-up example, the baseline is Blue's ordinary existence from which the gunman wrests him. Promises made to avoid this are obviously voluntary.[253]

In regard to consent-or-leave mechanism, Gold's problem-situation is created by the state and is distinct from the baseline, his situation prior to the demand that he consent or leave. There are complexities here because of the state's prior relationship to Gold. It is not entirely clear where along the continuum of benefit provision the baseline should be located. We can assume that the state has no duty to provide Gold with its benefits whether or not he consents, and so we can locate an acceptable baseline as the situation before the state had any relationship with him.[254] Thus threatening to return him to this condition will satisfy the independence condition—as will also a situation in

[253] On 'baselines,' see Nozick, 'Coercion'; Wertheimer, *Coercion*, Chs 12–13.

[254] I set the baseline here rather than with the state having to give Gold benefits, since this would mean his fellow citizens were required to do this, and so we would require strong reasons why they were so required.

which the state supplies him with some or all of its usual benefits without requiring his consent. In traditional social contract theory, a condition devoid of state benefits is generally referred to as the 'state of nature.' Although the state of nature is fictitious, it allows us clearly to see that 'consent-or-leave' does not satisfy the independence condition. With consent-or-leave mechanism, the state not only denies Gold the benefits it supplies, but in forcing him to move, causes him to lose benefits of friends, family, neighborhood, and culture, all of which it had not supplied. If the state wishes to confront Gold with an alternative that does satisfy the independence condition, then it should deny him only the benefits it produces and so offer to return him to the state of nature.

Because the state of nature is fictitious, the state confronts obvious problems threatening Gold with it. But this does not mean that the state has no other recourse than to continue to provide him with its benefits, whether or not he accepts political obligations. A situation in which the state denies Gold some or all of its benefits does not precisely coincide with the state of nature. But if the essence of the state of nature is the absence of state benefits, depriving Gold of some or all of these would return him to a condition that is normatively 'prior to' state intervention and so able to satisfy the independence requirement. In this respect at least, benefit deprivation schemes can serve as acceptable alternatives to consenting. As we shall see, because the major benefits supplied by the state are public goods and so not easily withheld from specific individuals, it is not easy to imagine how an acceptable scheme would work. It is likely that much of consent-or-leave's appeal is that it provides a clear way of denying these benefits to nonconsentors. But if consent-or-leave is unacceptable we must look elsewhere.[255]

[255] In *Consent Theory* Beran presents additional alternatives to consent that are closely related to consent-or-leave, mainly the options of secession and emigration to a 'dissenters' territory' (esp. pp. 31–2, 37–42). The latter alternative merits little discussion. First, Beran provides little information about exactly what dissenters' territories would be like and so whether individuals would voluntarily choose to go to them. More important, because this alternative to consent appears to preserve all the disadvantages of consent-or-leave, with the additional stigma of forcing one to live in a dissenter's territory, it would not be able to generate binding obligations. The option of secession is open only to 'territorially concentrated' minorities (p. 32), and so presents an acceptable alternative to consent only when: (1) the individual lives in the midst of such a group; (2) though he finds the existing government objectionable, he would willingly consent to a secessionist government; (3) a majority of the members of this group wish to secede. A mechanism providing secession as an alternative to consent is an attractive means of dealing with problems associated with perceived discrimination against minority groups, for example, religious, racial, and ethnic minorities. However, because it applies only to the relatively small number of individuals for whom the above conditions are satisfied, it cannot provide a basis for general consent. Beran briefly mentions the possibility of allowing individual persons or families to secede but does not find the possibility worth exploring (p. 32). He also mentions alienage mechanisms but does not discuss these, referring the reader to Walzer's account (p. 32); see Section 2.

2. *'Alienage Mechanisms'*

If nonconsentors cannot be forced to leave society, we must examine whether other means can induce them to consent while allowing them to remain. A variety of measures can be imagined, which we will discuss in turn, proceeding from mildest to harshest. One possible solution resembles the Athenian model. Upon consenting to the government, individuals would become eligible for privileges that they would not otherwise receive. As long as the penalties for nonconsent are confined to privileges that come into existence with government, failure to consent will satisfy the independence condition and so be noncoercive. Arrangements of this sort can assume a variety of forms, involving different combinations of obligations and privileges. Common to all forms is the result that the population is divided into different classes: full citizens, who have consented to the government and so assumed political obligations, and lesser citizens, who have refused to consent and so are without political obligations, but also without at least some privileges of full citizenship.

Mechanisms of this sort are discussed by Walzer, who believes that an interesting parallel can be drawn between the status of aliens who permanently reside in certain societies and that of individuals who do not fully consent to their governments.[256] He notes that in the eighteenth and nineteenth centuries it was a common principle of international law that the obligations and privileges of citizens and resident aliens differed. As stated by William Edward Hall (in 1890), the doctrine is as follows:

> Until a foreigner has made himself by his own act a subject of the state into which he has come, he has politically neither the privileges nor the responsibilities of a subject…He is merely a person who is required to conform himself to the social order of the community in which he finds himself, but who is politically a stranger to it, obliged only to the negative duty of abstaining from acts injurious to its political interests or contrary to its laws.[257]

[256] Walzer, 'Political Alienation.'

[257] W. E. Hall, quoted in Walzer, 'Political Alienation,' p. 103.

Hall goes on to note that 'aliens may be compelled to help maintain social order, provided that the action required of them does not overstep the limits of police, as distinguished from political action.'[258] Maintenance of the social order includes the obligation to obey the law and to provide military service when the safety of the political system is threatened by an 'invasion likely to entail serious disruption and devastation,' in Walzer's words.[259] Walzer notes that in many countries obligations to provide military service were restricted in accordance with a distinction similar to that between aliens and citizens. For example, he notes that, in ancient Athens, metics (resident aliens) were organized into special military units that were used only for the defense of the city.[260]

From this and other similar material Walzer paints a hypothetical picture of two classes of inhabitants of modern states with different obligations and privileges. Individuals who enjoy the privileges of citizenship are obligated to serve and so to support the state's military policies. (Obligations to provide military service are Walzer's main focus in his paper.) Resident aliens, who lack the entire range of privileges, have only negative obligations. They must obey the law and support domestic tranquility. If the state is threatened they must defend it, but their military obligations extend no further.[261]

Walzer's version of reformist consent centers upon this distinction. He believes that political obligations are rooted in consent and that individuals consent to government through various forms of participation in the political system.[262] Individuals who do not participate can be said to consent only tacitly and Walzer likens them to 'resident aliens at home.' He believes that, like traditional resident aliens, these citizens should have limited military obligations:

> We must at least consider the possibility that they be allowed, like aliens again, to avoid the draft and continue their residence, that is, to become *resident aliens at home*, acknowledging their obligations to defend society against destruction, but refusing to defend or aggrandize the state.[263]

[258] *Ibid.*

[259] Walzer, 'Political Alienation,' p. 105.

[260] *Ibid.*, p. 106. As Walzer notes, this claim is disputed by some historians, for example, A. H. M. Jones, *Athenian Democracy* (Oxford: Blackwell, 1957), p. 164.

[261] Walzer, 'Political Alienation,' p. 106.

[262] *Ibid.*, pp. 111, 113–14. On Walzer's view of consent more generally, see pp. x–xvi, 7–10. It should be noted that Walzer simply assumes that political obligations stem only from consent (p. x) and does not attempt to counter the criticisms of consent theory found in the literature.

[263] *Ibid.*, p. 112 (emphasis in original).

Reformist consent comes in through Walzer's belief that citizens could be permitted the same choice as resident aliens:

> They could be invited at age nineteen or twenty either to declare their intention of becoming citizens, thereby accepting conscription, or to become resident aliens at home, losing forever their political rights and avoiding military service, except in specified conditions of social emergency.[264]

Walzer's reformist mechanism, which I will refer to as an 'alienage mechanism,' is less drastic than consent-or-leave. If Grey refuses to consent he must renounce full citizenship and its privileges to live permanently as a resident alien at home. This alternative satisfies the independence constraint and so is immediately preferable to consent-or-leave.

Nevertheless it does not seem that an alienage mechanism could successfully ground general obligations. As we have noted, obligations of citizenship are often burdensome; they require one to pay taxes, to obey the law, and to provide military service in times of national emergency. We can assume that many citizens would prefer to avoid these, if at all possible. If there are no moral requirements to assume these burdens that do not stem from consent, so that individuals who do not consent do not have moral reasons to bear them, we can assume that large numbers of citizens will not bear them. This is to assume that other moral principles do not ground the obligations in question. But such an assumption is central to consent theory. One could reply that there is a price for not consenting—permanent alien status and renunciation of the privileges of citizenship. To many people, however, the price may not seem very high. In the modern nation-state, the privileges of citizenship do not amount to much. The major privileges are participatory, mainly voting and serving on juries. As things presently stand, approximately half of eligible US citizens do not bother to vote in presidential elections, while turnout is substantially lower in off-year elections. In addition, many citizens regard jury service as a chore, to be avoided whenever possible. One can easily imagine that rates of participation would decline still further if people were required to pay a steep price in obligations assumed in order to be eligible. Thus the low price an alienage mechanism exacts could render it inoperable.

An alienage mechanism falls before an additional criticism as well. According to consent theory, political obligations rest on consent alone, but in regard to an alienage mechanism this view has troubling moral and practical implications. The moral difficulty stems from the

[264] Walzer, 'Political Alienation,' p. 116.

fact that the major benefits of government, discussed throughout this work, are public goods and so would be received by consentors and nonconsentors alike. Reformist consent would result in society divided into two classes of individuals, both of whom receive the major benefits of the state, although all costs associated with their provision are borne by consentors alone. Thus the outcome here would resemble what we saw in regard to protective associations in Chapter 2. It is obviously unsettling to have a body of people who enjoy the major benefits of government but are not bound to contribute to them. Moreover, if, as the theory dictates, nonconsentors do not have obligations to bear these burdens, their status may well come to seem a good deal to many other inhabitants. The practical problem is that large numbers of inhabitants would be tempted to opt for nonconsentor status. The situation would be compounded as more and more inhabitants decide to cast off the burdens of citizenship, which would make the burdens of the remaining inhabitants even more severe, causing larger numbers of defectors and so a spiral into social collapse.

It is not surprising, then, that many of the authorities to whom Walzer appeals in his discussion of resident aliens believe that aliens have certain political obligations. Thus, according to Hall, although the obligations of resident aliens are limited, they include the 'negative duty of abstaining from acts injurious to [their resident country's] political interests or contrary to its laws.'[265] In addition, Hall believes that aliens have 'police' rather than 'political' obligations, which include the duties to help maintain the social order by paying taxes, serving in various police capacities (such as police officers and in fire brigades) and, although military obligations of resident aliens are limited, these include the duty to serve when one's country is threatened by invasion.[266] Similarly, in ancient Athens, the military obligations of metics were limited but these included the duty to serve in defense of the home environs.[267] Walzer, too, repeatedly states that resident aliens at home should have the obligation to provide military service when it is necessary to defend society against destruction[268] and clearly implies that they must obey the law and pay taxes.[269] Thus Walzer and these authorities believe that the resident aliens and Walzer's resident aliens at home, whose status is analogous to those of resident aliens, have central political obligation. For ease of discussion,

[265] Hall, quoted by Walzer, 'Political Alienation,' p. 103.

[266] Walzer, 'Political Alienation,' p. 103.

[267] *Ibid.*, p. 106; see above, n. 21.

[268] *Ibid.*, pp. 112, 116–17.

[269] *Ibid.*, p. 103.

the political obligations of resident aliens at home can be referred to as 'residual obligations.'

For proponents of reformist consent, residual obligations are a problem. Walzer believes that political obligations are rooted in consent, but if resident aliens at home have residual obligations, then he is also committed to the view that individuals who *explicitly refuse to consent* have the important obligations we have noted. Where these obligations come from is a question he does not adequately explore.[270] If we follow him and his authorities, we are left with the view that one can have central political obligations whether or not one consents, even if one explicitly refuses to consent. This strikes at the heart of any theory that roots political obligations in consent.

The fact that Walzer and his authorities believe that resident aliens and resident aliens at home have political obligations, even if they have not consented, suggests their perhaps unconscious underlying assumption that these are obligations of reciprocity, and in return for benefits received.[271] Locke too appears to subscribe to this assumption—at least at times—as, in discussing tacit consent, he repeatedly shifts from residence or holding property to 'enjoying privileges and protection' from the government in question.[272] It should not be surprising that consent theorists tend to fall into this line of argument. Exchange of political obligations for state benefits is central to the movement out of the state of nature into civil society in social contract theory. It therefore stands to reason that in order for Grey to return to a situation in which he does not receive the benefits for which he left the state of nature and so clearly does not have political obligations, it is not enough for him not to consent to government. He must also leave the community—to return to the state of nature as in Locke or go to another country as in practices of consent-or-leave.[273] But with an alienage mechanism one remains in the community and receives the crucial benefits. Accordingly, in addition to the fact that alienage mechanisms would not be able to generate widespread obligations,

[270] Presumably, Walzer roots these in tacit consent (see n. 23), but he does not defuse the problems of tacit consent. Nor does he appear to be bothered by the anomalous situation (for a consent theorist) in which individuals who explicitly refuse to consent still have central political obligations.

[271] Walzer's language supports the view that political obligations also stem from the receipt of benefits rather than consent; see 'Political Alienation,' pp. 100–1.

[272] Locke, *Second Treatise*, Sects. 119–22; this point is made by Simmons, *Moral Principles*, pp. 88–91;

[273] This perhaps explains why the only alternatives to consent-or-leave that Beran seriously entertains require nonconsentors to leave their home territories; see n. 16.

they leave us with a dilemma: either benefits without obligations or obligations without consent.

3. 'Benefit Deprivation Schemes'

Although depriving nonconsentors of the privileges of citizenship would probably not generate the necessary level of consent, perhaps more successful measures would deprive citizens of government benefits.[274] Benefit deprivation schemes ('deprivation schemes' for short) can assume different forms as different combinations of benefits are denied to nonconsentors. One crucial distinction is between excludable and nonexcludable benefits. Since nonexcludable public goods are not easily withheld from particular members of a community if given to others, the most manageable benefit deprivation schemes would center upon excludable goods. We can imagine a severe deprivation scheme that would deny nonconsentors all excludable benefits, as well as the privileges discussed in Section 2. Nonconsentors would be declared ineligible for access to public parks and recreation facilities, various financial aid programs, such as student loans, agricultural subsidies, and social security payments, as well as use of public institutions, such as state schools. Because of the enormous range of functions performed by modern governments, an impressive list of services could be drawn up, the potential loss of which could well induce most people to consent. In addition, because nonsupply of these benefits satisfies the independence constraint, their threatened loss is noncoercive.

Despite their initial attractiveness, deprivation schemes are subject to two immediate objections.[275] First, certain governmental services are not intended for the sole benefit of their recipients. Welfare payments, for instance, are necessary for the support of recipients' children as well as recipients themselves. If the children or other dependants of a would-be recipient were harmed by his ineligibility, to deprive the recipient of his benefits could constitute a serious injustice. Deprivation schemes should therefore make exceptions for programs that affect dependants. This is potentially a large number of programs, including welfare, child care, and health programs. Allowing access to affected nonconsentors would reduce the severity of deprivation

[274] Benefit deprivation schemes can also include deprivation of privileges. I assume that the schemes discussed in this section include this provision.

[275] For some points made in this and the following paragraph, I am indebted to John Frazer ('Citizenship and Rules of Consent' [unpublished]).

schemes, but we can assume that loss of the remaining programs would still constitute a severe sanction.

Deprivation schemes could involve an additional injustice as well. If Grey refuses to consent to government X, he will be deprived of all excludable services the government provides, with the exceptions we have noted. The problem here is that a deprivation scheme must not require that people pay for services they do not receive. To require this would violate the independence constraint. And so a deprivation scheme must allow nonconsentors to pay lower taxes. However, if this line of argument is accepted, it would appreciably reduce the penalties of deprivation schemes, perhaps preventing them from garnering widespread consent. One could well imagine individuals with libertarian leanings choosing not to consent in order to avoid receiving and paying for services they believe it is not the business of government to provide.

In addition, although it seems clear that government X can rightfully deny access to certain benefits to nonconsentors, it does not appear that it can rightfully prevent them from seeking alternative supply. This can assume the form of access to government facilities for the payment of user fees, perhaps fees that are higher than the tax payments of consentors—along the lines of out-of-state tuition at US state universities. Or nonconsentors could be allowed to set up alternative services in certain cases, such as alternative health, recreation, and transport services. The requirement that the state permit such alternatives is clear against the state-of-nature baseline, in which individuals do not receive governmental benefits but are not prevented from fending for themselves.

Once we begin considering groups of individuals voluntarily combining forces to provide preferred alternatives to state services, we begin to encroach on territory familiar from Chapter 2. This is not surprising, as also central to the NSEs examined there are requirements of voluntary membership. There is a close relationship between supporters of NSEs and adherents of consent theories of political obligation. But as we return to familiar ground, we also revisit problems we have seen. As we saw in regard to mutual protective associations, unless recipients of public goods are somehow required to pay for them, deprivation schemes could lose their unattractiveness, and so ability to inspire widespread consent. They could become so popular as to threaten society with collapse.

Alternatively, individuals who accept deprivation schemes could be required to pay for public goods. But we must of course account for these residual obligations. Once again, for them not to have such

obligations could have severe consequences. As long as Grey continues to reside in territory X and X has a functioning government, even if he refuses to consent, he will still receive the important public goods we have repeatedly seen, such as defense, law and order, and environment and public health protections. Ordinarily, Grey will receive these whether or not he is deprived of excludable benefits and the privileges of citizenship, a status that could well be attractive to other people, who would also have incentives not to consent. For consentors, the cost of providing public goods would rise, along with increased defections, causing additional defections, and so on. It seems that a benefit deprivation scheme can work only if it is designed somehow to deny nonconsentors nonexcludable as well as excludable benefits. Despite the initial air of paradox here, one can imagine mechanisms that would deny nonconsentors at least certain public goods.

While law and order, for instance, is generally distributed to all members of society, it is still possible to deny it to specified individuals, to a large extent. Although as long as Gold resided in territory X he would still benefit from law and order if the society as a whole was law-abiding—as he would also benefit from such public goods as national defense and a pollution-free environment—arrangements could be made to deny him police protection. If criminals stole his property, the police would ignore his call. The police would also not intervene to protect his person. In other words, nonconsentors could be made fair game for criminals, even in law-abiding societies. Perhaps a means could be devised to allow the police to distinguish between consentors and nonconsentors; perhaps the latter could be required to identify themselves as nonconsentors if they summoned help and to wear special clothing so that the police—or other citizens—would not come to their aid in times of need. Of course criminals would soon come to recognize this clothing and begin to focus on nonconsentors as easy targets. Under such conditions, nonconsentors would truly experience life without law and order in their own private states of war.

The kind of mechanism envisaged here would offer Gold the choice of either consenting or giving up all excludable benefits of government (with the exceptions noted above) and the ordinarily nonexcludable benefit of protection, to the extent that this could be denied to him. We can refer to this mechanism as ‘Hobbes's choice.’ Its great advantage is that its sanction could be sufficiently severe to induce widespread if not unanimous consent. In addition, despite the harshness of the sanction, it appears to satisfy the independence constraint and so is noncoercive. Because at first sight Hobbes's choice could lead many, perhaps most, inhabitants to consent, it could fulfill the major function of reformist

consent. However, we cannot assume that all citizens would make this choice and severe difficulties are encountered in regard to those who would not.

There are three problems with even this arrangement. First, again, is the fact that under this plan as well, people would receive important public goods without paying for them. Once again, the obvious disparity between those who paid for defense, environmental protections, etc. and those who received them without paying would give the former incentives not to pay as well. This arrangement could work only if the disadvantages outweighed the advantages of being able to free ride in regard to these benefits. One must ask if this would in fact be the case, and so the second problem concerns making sure the disadvantages would be severe.

As noted above, the state-of-nature baseline allows the state to deprive Grey of given benefits, but it does not allow it to prevent him from pursuing alternative supply in his preferred manner.[276] If Grey was afraid that he would be preyed upon by unscrupulous others in this new state of nature, he would have strong incentives to join forces with people who were similarly situated. As we saw in Chapter 2, he could consent to the state, which would be ideally situated to protect him. But as we also saw, if he did this, he would have to pay his share of the costs of state-supplied public goods. A preferable strategy for Grey would be to join a more limited protective association, a 'gang.' If Grey and his fellow gang members were sufficiently vigorous in defending themselves, the special clothing they wore could eventually come to resemble 'gang colors,' and so serve as a warning to potential predators rather than an invitation. It is possible that this arrangement would be less effective than the state in certain respects. In particular, it would probably be localized. Perhaps Grey would be safe in his own neighborhood but vulnerable outside it. Then again, different gangs could form alliances to extend their reach—as a miniature version of the consortium discussed in Chapter 2. In any event, if the arrangements were reasonably successful, the major disadvantages of being deprived of direct protection would be largely counterbalanced. Once again, because Grey and his fellows would still receive other public goods without having to pay for them, their position would likely seem a good deal to those who did have to pay and could well be attractive enough to trigger a spiral of withdrawal of consent and collapse. Perhaps additional public goods could be withheld from Grey, although it is not immediately clear what

[276] Complexities here constitute the third problem.

these would be. Still, I assume that circumstances in regard to these other goods would be similar to protection. In order to be withheld from Grey while still supplied to other members of society, these public goods would have to have localized components, as opposed to far more generalized public goods such as defense or clean air. Thus if there were such goods, because of the localized element, Grey and like-minded others would be able to furnish them for themselves, while still not contributing to other public goods, thereby preserving their incentives not to consent to the state.

The final problem concerns whether the state could allow such private protective associations. According to a strong tradition in liberal political theory, the state must maintain a monopoly of legitimate force and thus not allow citizens freely to take the law into their own hands. According to this line of thought, the state's responsibility to protect its citizens entails that it not allow nonconsentors' wide discretion in defending themselves. They must not be allowed to band together without state supervision; in the state's eyes vigilante groups are unacceptable. Left to their own devices, individual nonconsentors would be likely to defend themselves with vigor, perhaps launching preemptive strikes against would-be assailants. But the state cannot allow this. Like consentors, nonconsentors must be limited to using force only to repel imminent dangers and only as much as is immediately necessary, although such restrictions could leave them vulnerable to criminals. In the event of disagreements between Grey and his cohorts and the state over circumstances in which self-defense was justified and the interpretations of specific situations as to whether they qualified, the state would obviously have to insist that its interpretations were the ones used.[277] Even if Grey and his followers were allowed to defend themselves, this could only be on terms set by the state.

If this line of argument is accepted, then Hobbes's choice would face an insuperable dilemma. We have identified the state of nature as an acceptable baseline because it exists prior to state intervention in nonconsentors' affairs. Because the government of X cannot allow nonconsentors free rein in defending themselves, it cannot permit a pure state of nature. If it intervened to curtail self-defense, it would fall before the independence constraint. The dilemma is that the government must either be coercive or allow nonconsentors discretion

[277] Cf. R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 108–10.

in defending themselves. Because both alternatives are unacceptable, Hobbes's choice cannot work.

Although this third objection would probably be accepted by many liberal political theorists, I will not insist on the major premise here. Although I believe that self-authorized use of force by nonstate groups must be forbidden or at least carefully regulated by any government we are likely to regard as legitimate, for the sake of argument, I will give libertarian opponents of the state benefit of the doubt and assume that the requisite private use of force is not unacceptable on its face. Perhaps the private associations could negotiate reasonable agreements about procedures without the state and so could be allowed to operate. But in any event, these considerations need not be pursued further in this context. I view the second objection as decisive. Since many of government's most important benefits are nonexcludable, with Hobbes's choice also, nonconsentors must be allowed to receive these without paying for them or else have political obligations even though they explicitly refuse to consent. Either alternative is unacceptable. To make matters worse, the more effective gangs are, the more attractive they will be. As in Chapter 2, massive defections to private associations would mean that the state would no longer be able to function effectively. Essential public goods would not be provided, and acceptable lives would be denied to all. The success of gangs depends on necessary public goods being provided by the state. But if they were too effective, the public goods would no longer be provided.

Once again, then, the indispensability of state-supplied public goods gives the lie to reformist consent. Reforming existing institutions to allow political obligations to be based on consent would lead either to nonprovision of essential public goods or the imposition of requirements to contribute upon individuals who had explicitly refused to consent.

7
Political Obligation and the US Supreme Court

[278]In chapters 7–10 I discuss empirical studies of political obligation. I believe it is important to test a normative theory based on fairness against the beliefs of ordinary people and other sources of empirical evidence. The appeal to empirical sources is unusual in the philosophical literature, and so I will attempt to justify it, before turning to the sources themselves. In Chapters 7 and 8, I discuss reasons for political obligations given by three actual governments: the United States, in this chapter; and Germany and Israel, in Chapter 8. In Chapters 9 and 10, I discuss studies of attitudes towards political obligation held by ordinary people, on the basis of focus groups and some survey research. These sources of evidence allow us to see views of political obligation held by both the state itself and its subjects. For reasons I discuss, to the extent that a normative theory is consistent with these sources of evidence, we have reasons to take it more seriously. Throughout discussion here, it is important to bear in mind that the findings I report are preliminary. One reason for discussing them is hope that other scholars will take up some of these subjects and make further progress.

1. The Relevance of the Empirical

My starting point is belief that what nonphilosophers think about questions of political obligation has some bearing on theoretical

[278] This chapter is based on M. Hall and G. Klosko, 'Political Obligation and the United States Supreme Court,' *Journal of Politics* 60 (1998); first-person plural language is generally in reference to this.

debates. Two separate lines of argument are relevant here, philosophical and practical, though practical reasons may be put off until Chapter 9.

With scholars widely divided about questions of political obligation, additional evidence could tilt opinion in certain directions and away from others. In regard to this subject, I will examine two separate sources of evidence, judicial opinions and the views of average citizens, thus allowing us to view these matters through both the eyes of the state itself and of people asked to submit to it. I believe it is striking that, while political philosophers have devoted considerable attention to political obligation, they have paid little attention to the reasoning of actual states as to why people should obey their laws. Accordingly, in this and the following chapters, I explore the 'self-image of the state'[279] on this subject. The reasoning of the state is found in materials such as legislative debates, executive pronouncements, and the decisions of judicial bodies. Ideally, all these sources could be examined. However, given limited time and resources and in order to keep discussion manageable, I concentrate on judicial decisions. Reasons for this focus are discussed below.

Before turning to empirical sources, I must address difficult questions about what we are to make of this material. I do not believe these questions can be settled in the abstract. To some extent, how we should interpret the evidence depends on the circumstances. If there is consensus among political philosophers on some issue, based presumably on the force of arguments, then we will normally have little reason to look farther, and judicial opinions and other empirical sources will be of relatively little interest. However, if there is entrenched disagreement, we can presume that the positions advanced have different strengths and weaknesses, which are weighed differently by different theorists—perhaps for reasons akin to Rawls's 'burdens of judgment.'[280] Under such circumstances, additional considerations could well be taken into account, including the empirical sources I have mentioned. On the questions that interest us, the present situation is one of disagreement, and so I believe empirical evidence could be helpful. The strategy I pursue in this and the following chapters is based on overall convergence. To the extent that different sources of evidence point consistently in specific directions, we have reasons to take them seriously, with the degree of attention depending on consistency, and other qualities I will discuss.

[279] L. Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), Ch. 3.

[280] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 54–8.

The relevance of empirical studies can be seen most clearly in regard to 'wide reflective equilibrium.' Rawls's method of reflective equilibrium begins with the belief that moral argument is not able to proceed from first principles that are known with certainty, as for example, Plato's Form of the Good.[281] Thus Rawls argues that principles must be justified on the basis of our moral experience. According to reflective equilibrium, we should proceed from considered judgments: moral judgments in which we have greatest confidence.[282] Extracting the principles that underlie these, we apply them to additional cases. To the extent that the principles support our opinions about these other cases, we gain confidence in them. But as Rawls, says, moral theory is 'Socratic.'[283] Principles will most likely have to be revised to accommodate new cases, while our intuitions concerning particular cases will likewise have to be revised to accommodate our moral principles. By working back and forth between our principles and specific judgments, modifying each more closely to accord with the other, we can approach the ideal of consistency in our moral thinking. To increase confidence in our principles, we should compare them with other moral principles to which we subscribe, and others enunciated by important moral authorities, for example, Kant and biblical teachings. Discovery of consistency between our moral intuitions and such principles should strengthen our faith in this overall moral structure. As Rawls says, 'justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.'[284]

In keeping with the idea of 'wide reflective equilibrium,' I believe that sources of evidence such as those discussed in this and the following chapters are additional factors to be taken into account. According to Norman Daniels, wide reflective equilibrium attempts to produce coherence in three levels of beliefs. In addition to the sets of considered judgments and moral principles I have noted, wide reflective equilibrium appeals to 'a set of relevant background theories,'

[281] On reflective equilibrium, see J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) [hereinafter cited as Rawls, *Theory of Justice*], pp. 19–21, 46–53, 578–86; and Rawls, 'Outline of a Decision Procedure for Ethics,' *Philosophical Review* 60 (1951): 177–97; N. Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics,' *Journal of Philosophy* 76 (1979) [Daniels, 'Wide Reflective Equilibrium']: 256–82. A brief account of the method is found in G. Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992; new edn., 2004) [Klosko, *Principle of Fairness*], pp. 16–26, with further references.

[282] On considered judgments, see Rawls, *Theory of Justice*, pp. 19–20, 47–8.

[283] *Ibid*., p. 49.

[284] *Ibid*., p. 21.

which are used to help assess the adequacy of competing sets of principles.[285] Moral structures will evince different degrees of compatibility with various nonmoral theories. For example, in the case of Rawls's justice as fairness, Daniels notes its relationship to theories of the person, of procedural justice, and the role of morality in society.[286] If we can agree about theoretical matters such as these, they could help us to choose between overall sets of considered judgments and moral principles.

My task in this and the following chapters is to introduce into wide reflective equilibrium the views of the state itself, as expressed in judicial decisions. There are several reasons why appeal to these sources could be significant. Once again this is of greatest concern when, as with political obligation, the philosophical community is split and there are strong arguments for different sides. Obviously, in such a case, the fact that judicial authorities strongly favor one position over others could well be worthy of note. Of course, the amount of attention we accord judicial opinions depends on a variety of concerns, for example, how clearly views are articulated and, especially, how consistently they are maintained. Other things being equal, the fact that a particular theory of obligation is consistently advanced – and in different countries–gives us reason to take it more seriously.

It is especially important to appeal to background evidence, because, as things stand, theories of political obligation are based on the intuitions and moral views of political philosophers alone. Relying solely on their views is objectionable for two reasons. First, philosophers are few in number and are likely to lack the diversity of the society from which they come. It cannot be taken for granted that their intuitions accurately reflect those of the larger society; we cannot rule out the possibility that a view commonly held among political philosophers is largely rejected in the wider world. Second, philosophers are less likely than other people to be impartial in regard to normative theories. Among the requirements for a considered judgment is that the subject should not have a direct interest in the case at hand. For many issues that concern us, this is not true of philosophers who are invested in their own theories. There are obvious advantages in broadening our inquiry to encompass the views of judges and other people who have little or no stake in debates over philosophical theories.

As I have said, my strategy in this and the following chapters is one of overall convergence. In his *Prolegomena to The Law of War and Peace*, Hugo Grotius appeals to the practice of actual peoples to help

[285] Daniels (1979), 'Wide Reflective Equilibrium,' p. 258.

[286] *Ibid.*, p. 260.

establish the law of nature. Claiming that examples of this sort 'have greater weight in proportion as they are taken from better times and better peoples,' Grotius focuses on the Greeks and Romans.[287] Though our concern in this study is not with the law of nature, I follow Grotius's strategy in a certain sense. In regard to the testimony of philosophers, historians, and other writers, Grotius argues that, 'when many at different times and in different places affirm the same thing as certain, that ought to be referred to a universal cause.'[288] I contend that something similar holds in regard to the judgments of judicial authorities in different liberal societies. If their moral reasoning on questions of political obligation is similar, in spite of important differences in their societies, this is something that proponents of different principles should be called upon to explain, while this obviously strengthens the position they support.

There are strong reasons to regard judicial opinions as an especially important source of evidence. Although judges are political actors rather than moral philosophers, under certain conditions, they can assume the latter role. Judges are generally entrusted to apply existing statutes or constitutional provisions, rather than to make moral arguments. However, especially in difficult cases, when legal provisions do not afford clear guidance, judges can support their decisions with appeals to moral reasons. This is especially true of highest—supreme—judicial bodies, and I will confine attention to these. Judges, especially on high courts, can also be presumed to possess central attributes of reliable moral reasoners. They can be presumed to be intelligent, well-informed, without personal interests in cases at hand, and with adequate time and resources to deliberate properly.[289] These conditions approximate the requirements of reflective equilibrium, while judicial opinions approximate Rawlsian-considered judgments.[290] In addition, because the state has an interest in advancing the most persuasive arguments possible to support its claims, the fact that its agents argue along certain lines rather than others is a consideration in favor of the arguments they present. Because judicial decisions are reexamined by future courts, the fact that a ruling stands and is

[287] H. Grotius, *Prolegomena to the Law of War and Peace*, F. Kelsey (trans.) (Indianapolis: Bobbs-Merrill, 1957), para. 46.

[288] *Ibid*., para. 40.

[289] On the general quality of supreme court justices see H. J. Abraham, *Justices and Presidents*, 3rd edn. (New York: Oxford University Press, 1993).

[290] Cf. the method used by A. Wertheimer (*Coercion* [Princeton: Princeton University Press, 1987] [Wertheimer, *Coercion*]) who influenced our thinking.

cited in subsequent decisions is an important additional consideration in its favor.

I do not claim that judicial opinions have direct relevance for moral truth. The fact that the state argues according to theory X of course does not itself prove that X is valid. But I believe that this should carry some philosophical weight. Once again, there is no hard-and-fast rule about the amount of weight; intuitively, this will depend on factors such as those I have mentioned. When these considerations hold in regard to a particular moral principle, this increases the burden of justification for proponents of different principles. In addition to defending the purported weaknesses in their own theories, theorists should explain why supreme court judges with the qualities noted consistently find competing arguments more persuasive. Once again, I do not claim that supreme court justices are moral philosophers. But in those instances in which there is strong consensus among different courts in different countries, the burden of justification for those who differ could well increase significantly.

2. US Supreme Court Cases

We begin with decisions of the US Supreme Court. Decisions in Germany and Israel are discussed in Chapter 8. Once again, I of course do not claim that Supreme Court opinions should be accepted as moral truth. Two immediate problems bear mention. First, as I have noted, justices usually defend their opinions on the basis of statutory or constitutional interpretation and seldom present moral arguments. However, the Justices do on occasion invoke moral principles to support their opinions, especially in difficult cases. The range of cases that most interest us generally concern onerous requirements individuals are asked to bear, especially military service, which could cost them their lives. When principles that different Justices invoke in such cases survive critical scrutiny and are appealed to in subsequent decisions, they have a legitimate claim to our attention.[291]

The second problem is that the Court is not a monolithic entity. Obviously, its composition changes over time. Individual Justices have their own political and philosophical views, which have differed enormously throughout the Court's history. Because the Court is not a

[291] The philosophical implications of judicial decisions are developed in Wertheimer, *Coercion*. See also H. Pohlman (ed.) *Political Thought and the American Judiciary* (Amherst, MA: University of Massachusetts Press, 1993).

univocal body, any claims concerning 'its reasoning' are necessarily selective. However, we do not believe such skeptical claims should be accepted without limits. The cases that we discuss are the ones in which the Court has addressed questions of political obligation most directly and most clearly articulated underlying moral principles. We have been unable to locate other cases that clearly present opposed views. As we will see, one case on which we draw heavily, *Arver* v. *United States*, one of the famous 'Selective Draft Law Cases,' 245 U.S. 366 (1918), is an important precedent, referred to repeatedly in subsequent decades, when similar questions were before the Court.

Although the composition of the Court changes, the Justices have been surprisingly consistent when they address the question of why specific citizens have obligations to obey specific laws. This is especially true in regard to requirements of military service. Looking at decisions in this area is particularly useful, not only because of the burdensome nature of military service, but because it is opposed to some people's religious beliefs and so is especially controversial. In dealing with these issues, the Court has consistently appealed to principles of a particular kind. Subsequent decisions invoke similar principles and have upheld earlier decisions, which are cited as precedents.

3. Political Obligation and Court Cases

Throughout the following discussion, I assume that the working of different moral principles thought to underlie political obligations are reasonably clear. This should be true of theories based on consent and natural duties, which I have discussed.[292] Gratitude theories have not been discussed in this work, and so brief discussion is advisable. The concept of gratitude is familiar.[293] It holds that if Jones provides Smith

[292] I also assume that consequentialist theories are reasonably clear; for discussion, see Klosko, *Principle of Fairness*, Ch. 6, App. 1.

[293] For the concept of gratitude, see F. R. Berger, 'Gratitude,' *Ethics* 85 (1975); A. D. M. Walker, 'Gratefulness and Gratitude,' *Proceedings of the Aristotelian Society* 81 (1980–1); P. Camenisch,'Gift and Gratitude in Ethics,' *Journal of Religious Ethics* 9 (1981) [Camenisch, 'Gift and Gratitude]'; C. Card, 'Gratitude and Obligation,' *American Philosophical Quarterly* 25 (1988). For political obligations and gratitude, see A. D. M. Walker 'Political Obligation and the Argument from Gratitude,' *Philosophy and Public Affairs*, 17 (1988) [Walker, 'Political Obligation']; for criticisms, A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principles*], Ch. 7; G. Klosko, 'Four Arguments against Political Obligations from Gratitude,' *Public Affairs Quarterly*, 5 (1991) [Klosko, 'Four Arguments'].

with some benefit, Smith should express her appreciation to Jones and make an appropriate return, in order not to treat Jones merely as a means to her own ends. Extended to the state, a gratitude account would have Jones incur a moral requirement to obey the law in order to express his gratitude to his fellow citizens and not use them as means to his own ends. Although intuitively appealing, such theories have confronted strong objections and are not widely held among contemporary philosophers.[294] The main problem is that, although the provision of benefits may generate an obligation for Grey to make *some* appropriate response, it follows from the expressive nature of gratitude that it is up to him to determine exactly what this response should be. This is problematic, because the state does not require just any suitable response for the protection it provides. It demands specific responses, that, for example, Jones serve in the military, under conditions which it, rather than he dictates.[295] By contrast, obligations of gratitude are like gifts. If Smith gives Jones a gift, it is up to her (the giver) rather than Jones (the recipient) to decide what the gift will be.[296]

Another possible ground of obligations we must consider is based on reciprocity. Although such a view is not widely discussed in the literature, in the Court decisions we examine, we frequently encounter appeals to 'reciprocal obligations.' Exactly what the Court means by these will be discussed, while it could be the case that the Justices have in mind some basic concept of reciprocity as an inherently binding moral notion. Once again, reciprocity is a moral virtue based on making reparation for good or harm one receives. According to an account of political obligation based on this notion, Grey would be morally required to make appropriate return for the benefits he receives from the state, because he receives them. Such an argument has strong advantages over alternative positions. Unlike a formal contract, reciprocity does not require that the recipient make return only for benefits he accepts. His reception of them is enough to create an obligation to obey the state.[297] Accordingly, the fact that Grey has not consented to obey government in return for the benefits it provides does not undermine the argument from reciprocity. In addition, as Lawrence Becker says, the requirement of reciprocity is to make a return that is 'fitting and proportional' to what one has

[294] See Simmons, *Moral Principles*, Ch. 7; Walker, 'Political Obligation'; and Klosko, 'Four Arguments.'

[295] The best attempt to get around this problem in the literature is Walker, 'Political Obligation'; this is discussed in Klosko, 'Four Arguments.'

[296] Camenisch, 'Gift and Gratitude.'

[297] L. Becker, *Reciprocity* (London: Routledge and Kegan Paul, 1986) [Becker, Reciprocity], pp. 124–30.

received.[298] Thus if Grey receives protection from his fellow citizens, he has an obligation to contribute to protection himself—by serving in the military.[299] This line of argument, then, is able to circumvent the main problem with gratitude theories of political obligation.

As we will see, the Court's language is often consistent with a reciprocity explanation. While the Court does not speak of obligations of consent or gratitude, it does discuss reciprocal obligations. Because the Justices make little effort to explain the precise nature of these obligations, it is possible that they have viewed them as inherently binding. But we believe that the concept of reciprocity cannot alone ground political obligations.

Although I will avoid detailed discussion of the concept of reciprocity here, one point should be noted briefly. One reason not to view reciprocal obligations as inherently binding is that this could make other moral principles otiose. If the fact that A gives B an important benefit generates an obligation of reciprocity for B to make an appropriate return, it is not necessary to invoke concepts of consent, gratitude, or fairness to explain B's obligation to return the benefit. However, because it is unusual not to appeal to one of these other principles, either instead of or along with reciprocity, it seems that reciprocity alone does not explain particular moral requirements.

We believe that, rather than being an inherent moral notion, reciprocity is actually a family of moral requirements, each of which centers on returning benefits for benefits received. The principles underlying different requirements are the ones we have noted: consent, gratitude, fairness—and perhaps others. Not only do different forms of reciprocity rest on different moral principles, but unless one of these is also in effect, an obligation of reciprocity will not obtain. In other words, in any given case in which an obligation of reciprocity can be identified, it actually rests on one of these principles rather than on reciprocity *simpliciter*.

The limitations of reciprocity are clear in regard to public goods. If Smith does a favor for Jones, the latter might decide on an appropriate response with little difficulty. But things are far more complex in regard to benefits that are jointly produced, especially public goods.[300] If a large group of people supplies Jones with the benefits of national defense, how should he respond? He cannot make an appropriate return to each of his benefactors individually. As Becker says, because important, jointly produced goods are generally products of ongoing institutions, the appropriate response is 'reciprocal participation' in the

[298] *Ibid.*, pp. 105–24.

[299] *Ibid.*, pp. 413–17.

[300] See *ibid.*, pp. 111–27.

institutions from which benefits derive.[301] Becker identifies Jones's 'fair share' as contributing roughly what the average benefactor contributes.[302] Accordingly, in not contributing, Jones would be free-riding, not doing her fair share. In cases of this sort, obligations of reciprocity become virtually indistinguishable from obligations under the principle of fairness. Once again, the latter are distinctive in requiring that one do one's fair share, one's proportion, in cooperative institutions that provide benefits, with 'fair share' construed as bearing burdens similar to those of other members of the institution.

Because obligations to reciprocate for public goods require appeal to notions of fairness, it is not clear how basic they are. In his account of reciprocity, Becker says: 'Grounding a judgment is putting a non-arbitrary stop to the endless process of reason-giving – to the endless process of "proving" the judgment.'[303] On this criterion, however, appeals to reciprocity in regard to institutions that provide public goods do not ground reciprocal obligations. In the cases he considers, the reciprocal obligation in question may be traced back to the principle of fairness, which is more likely to be grounded in Becker's sense.

4. Supreme Court Opinions

While Supreme Court opinions address questions of political obligation, the Justices generally skirt an important philosophical issue. They generally assume that the laws they apply are binding, although they explore important questions concerning the limits of legal obligations and how these interact with other moral precepts. It is therefore unlikely that the Court's reasoning would satisfy a philosophical anarchist, who doubts that there are moral requirements to obey the laws,[304] but we will set this question aside. If—along with the Court—we assume that citizens have obligations to obey the law, we can see that, in spite of different times in which it addressed these questions and the different Justices who authored opinions, the Court's reasoning consistently tends in a certain direction.

Throughout the course of its history, the Court has referred to numerous principles of obligation—sometimes even in the same case. For instance, in *The United States* v. *Rice*, 4 Wheaton 246 (1819), Justice Story stated that Americans living in British occupied Maine

[301] Becker, *Reciprocity*, p. 114.

[302] *Ibid.*, p. 115.

[303] *Ibid.*, p. 62.

[304] We are indebted for this point to Ernie Alleva.

during the War of 1812 did not have to pay US duties because 'where there is no protection or allegiance or sovereignty, there can be no claim to obedience' (254). Though Story's exact meaning is unclear, it seems that, in a single sentence, he appeals to 'allegiance'—based perhaps on consent—as well as to an exchange between obedience and protection (on which, more below). Accordingly, we do not claim that the Court has appealed to only one moral principle to justify political obligations. In some cases the Court does not appeal to any moral principle at all, while in cases in which it discusses general obligations to obey the law, it frequently refers to commonsense notions of consent or utility. However, evidence shows that, when the Court is asked to justify the *particular obligations of identifiable individuals to obey specific laws*, it relies on more sophisticated moral arguments, which put forth a set of moral principles that are consistent from case to case.

As we have noted, according to the central tenets of liberal political theory, political obligations rest on consent. People have strong moral requirements to obey the law, because they have consented to do so. But as we have also seen, because few citizens have actually consented to their governments, consent is generally rejected as a basis for political obligations. This conclusion is supported by the Court, albeit in a qualified way. Although it has espoused the general idea that government rests on consent, the Court has not argued that the *particular obligations of identifiable individuals* are based on their consent. In other words, the Court has argued from consent only on an abstract level. When it has addressed the obligations of particular individuals, its reasoning falls more in line with that of current political philosophers. For example, in the important case, *Chisholm* v. *Georgia*, 2 U.S. 419 (1793), James Wilson said in dicta: 'The only reason, I believe, why a free man is bound by human laws, is, that he binds himself' (456). In addition, 'the basis of sound and genuine jurisprudence; laws derived from the pure source of equality and justice must be founded on the CONSENT of these, whose obedience they require' (458).[305] While these statements are not unimportant, they are not essential to the substantial holding of the case—that a state may be sued by a citizen of another state. More important, these points were not expressed in order to account for specific moral requirements of specific people. It would have been difficult for the Court to argue along these lines when

[305] For further examples see *McCulloch* v. *Maryland*, 17 U.S. 316 (1819) at 402–5 and *US Term Limits Inc.* v. *Ray Thornton*, 63 U.S.L.W. 4413 (1995) especially 4,425 and 4,432.

specific individuals could not be shown to have consented. Because of the prominence of consent theory, the possibility that political obligations do rest on consent was probably considered by many Justices. The fact that they have not made this argument in regard to particular persons constitutes something akin to rejection of consent theory. Along similar lines, the fact that we have found no case in which the Court argues that particular individuals are required to serve in the military out of gratitude for the benefits they receive tells strongly against the plausibility of such a claim.

Our conclusion is similar in regard to the Court's use of consequentialist language. To the unwary reader, appeals to the 'common good' or the 'good and welfare of the commonwealth,' as in the compulsory vaccination case, *Jacobson* v. *Massachusetts*, 197 U.S. 11 (1905) (at 26, 27), might indicate consequentialist reasoning. Further, at a more sophisticated level, arguments based on 'contagion' or 'snowball effects' appear in decisions. According to this line of argument, Jones should obey a given law for fear that, if he does not, large numbers of other people will not do so either. In *United States* v. *Macintosh*, 283 U.S. 605 (1931), Justice Sutherland appears to invoke such reasoning: 'if all or a large number of citizens oppose such defense, the "good order and happiness" of the United States can not long endure' (260). However, in these cases and others like them, the Justices do not attempt to establish connections between the behavior of specific individuals and that of all or large numbers of other people. Such connections must be made if a decision can be said to justify political obligation on consequentialist grounds.[306] Unless such connections exist, consequentialist reasoning may well require that one disobey given laws.[307]

The fact that the Justices generally have not made clear consequentialist arguments to justify the political obligations of particular individuals is not surprising, given the weakness of such arguments. Outside of unusual circumstances, it is generally not the case that Jones's behavior will influence large numbers of other people. It appears that the Court has ordinarily used the idea of 'common good' as a starting point for arguments that ultimately depend on principles of reciprocity or fairness. And so it has moved beyond weak consequentialist reasoning to more defensible arguments based on these principles. Accordingly, as we will see below (p. 160), a case such as *Jacobson* v. *Massachusetts*, which at first glance seems to make a

[306] For snowball arguments in the reasoning of ordinary people, see Ch. 9.

[307] For discussion, see Klosko, *Principle of Fairness*, Ch. 6, App. 1.

consequentialist argument, is better understood as justifying political obligation on the basis of fairness.

A prominent theme in the Court's reasoning about the political obligations of identifiable individuals is that people have 'reciprocal obligations' to government in return for important benefits government provides, mainly protection. The idea that political obligations are 'reciprocal obligations' was first clearly expressed in the 1875 case, *Minor* v. *Happersett*, 88 U.S. 162 (1875), and has been used by the Court ever since.[308] This case deals with the question of whether the Fourteenth Amendment gave women the right to vote. The first issue the Court addressed was whether women are citizens, to which it answered in the affirmative. In discussing citizenship, Justice Morrison Waite wrote, for the unanimous Court:

> The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance. (165–6)

The central idea here is apparent. The citizen owes the state allegiance, while it in turn owes him protection.

Connections between citizenship, membership, and reciprocal duties were clearly presented in the immigration case, *Luria* v. *United States*, 231 U.S. 9 (1913):

> Citizenship is membership in a political society, and implies a duty of allegiance on the part of the member and a duty of protection on the part of the society. These are reciprocal obligations, one being a compensation for the other. (22)

The idea that the nature of citizenship is found in the exchange between allegiance and protection predated *Minor* v. *Happersett* by almost a century—although the term 'reciprocal obligation' was not used. In the early expatriation case, *Talbot* v. *Jansen*, 3 U.S. 133 (1795), Justice

[308] The phrase 'reciprocal obligation' is used in five Supreme Court decisions prior to this, but in the context of contract law or treaties. See, for instance, *Cherokee Nation* v. *State of Georgia*, 30 U.S. 1 (1831) and *Rutland Marble Co.* v. *Ripley*, 77 U.S. 339 (1870). In *Republica* v. *Chapman*, 1 U.S. 53 (1781) the phrase was, for all practical purposes used by Chapman's attorney, when he argued that 'protection and allegiance being political obligations of a reciprocal nature' (53). However, this is not a Supreme Court decision or even the Pennsylvania Supreme Court's decision.

James Iredell, in his seriatim opinion, denied that citizens can simply renounce their citizenship at any time. He noted that:

> It is not the exercise of a natural right, in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect; he, in his turn, is under a solemn obligation to discharge all those duties faithfully, which he owes, as a citizen, to the society of which he is a member, and as a man to the several members of the society individually with whom he is associated. (162)

In *United States* v. *Wong Kim Ark*, 169 U.S. 649 (1898), Justice Gray argued along similar lines. This case held that children born to noncitizens in the United States automatically become citizens. On the basis of a lengthy exploration of English common law, Gray concluded: 'Such allegiance and protection were mutual—as expressed in the maxim *protectio trahit subjectionem subjectio protectionem*—and were not restricted to natural born subjects and naturalized subjects' (655). Gray proceeded to argue that US authorities have supported this common-law doctrine, that Congress had never rejected this view, and that the Fourteenth Amendment enshrines it (652–705). Though Justices Fuller and Harlan dissented, arguing that the United States is not bound by English common law, they did not question the essential connection between citizenship and protection (705–32).

Minor v. *Happersett* and *Talbot* v. *Jansen*, along with many other cases, are important in describing the nature of the state to which individuals owe allegiance. It is an 'association of persons for the promotion of their general welfare.' According to this conception, each individual is one member of an association of similar individuals, working together in their joint interest. The main benefit, as we have seen, is mutual protection. This is produced by the joint efforts of the group, and in return for this, each individual owes allegiance to the other members of the group. In return for protection, the individual owes allegiance 'to the several members of the society' who provide it.

The nature of the individual's obligation to this political association was the subject of numerous cases, several of which concern the obligation to provide military service. In ruling on different aspects of military obligation, the Justices have generally held that Americans have reciprocal obligations to obey the government in exchange for protection. During World War I, the Court addressed the extent to which the state can require individuals to fight in a war. In *Arver* v. *United States*, the constitutionality of the draft was challenged. A number of issues were raised, but the most important was the contention that 'compelled military service is repugnant to a free government

and in conflict with all the great guaranties of the Constitution as to individual liberty' (378).

Chief Justice Edward D. White, for a unanimous Court, rejected this claim. He declared that the 'premise of this proposition is so devoid of foundation that it leaves not even a shadow of ground upon which to base the conclusion' (378). He claimed:

> It may not be doubted that the very conception of a just government and its duty to the citizen includes the reciprocal obligation of the citizen to render military service in case of need and the right to compel it. (378)

While the government may choose to excuse certain people from this obligation, as it did ministers and members of pacifistic religions, it is not required to do so.

According to the Court, not only does the individual have an obligation to defend the state, but he must submit to the government's definition of how this obligation must be fulfilled. This position is clearly stated in *Jacobson* v. *Massachusetts*. Here the Court upheld a law requiring vaccinations even for individuals opposed to them. Justice John Marshall Harlan, for the Court, held that 'upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members' (27).

The common good is, after all, the reason societies are organized in the first place. How is the common good determined?

> In a free country, where the government is by the people, through their chosen representatives, practical legislation admits of no other standard of action; for what the people believe is for the common welfare must be accepted as tending to promote the common welfare, whether it does in fact or not. (35)

Thus government may even compel a man 'by force, if need be, against his will and without regard to his personal wishes or his pecuniary interests, or even his religious or political convictions, to take his place in the ranks of the army of his country, and risk the chance of being shot down in its defense' (29).

This principle applies to national defense insofar as the Court has held that society, acting through its elected representatives, may determine what sort of duties citizens must fulfill. For instance, the Court has held that pacifists may be required to swear that they will defend the United States with arms as a condition of citizenship. This was true even though in one case the defendant was a 50-year-old woman who would realistically never have been asked to serve in the military

(*United States* v. *Schwimmer*, 279 U.S. 644 (1929)). In later cases the Court upheld this principle, even for a person whose pacifism was firmly based on religion, and was therefore arguably protected by the First Amendment. For instance, in *United States* v. *Macintosh* the Court refused to exempt Douglas C. Macintosh, a Baptist professor at Yale who had served as a chaplain in the Canadian army in World War I, from the requirement that immigrants swear unconditionally to use arms to defend the United States. Justice George Sutherland, for the majority, firmly explained that any exemption made for conscientious objectors was a privilege granted by Congress, not a constitutional right. To claim otherwise, he noted:

> This, if it means what it seems to say, is an astonishing statement. Of course there is no such principle of the Constitution, fixed or otherwise. The conscientious objector is relieved from the obligation to bear arms in obedience to no constitutional provision, express or implied; but because, and only because, it has accorded with the policy of Congress thus to relieve him. (623)

Sutherland argued that one cannot appeal to a higher law to avoid an obligation to defend the United States. Permitting this would allow a person to put 'his own interpretation' of the will of God above that of the country.

The Court has thus firmly held that Congress has an essentially unlimited right to require military service. Even relatively liberal Courts at the height of the Vietnam War, in a well-known series of conscientious objector cases, did not hold to the contrary.[309] The Court has also ruled that Congress has virtually unlimited authority to dictate how the military should be organized and run.[310]

5. Interpretation of the Cases

Identifying obligations to obey the law as reciprocal obligations based on receipt of protection does not exhaust what we can say about them. The concept of a reciprocal obligation is not entirely clear, and we will examine additional decisions to see what the Court has meant by this. We are especially interested in the underlying moral bases of reciprocal obligations, that is, the moral principles on which the Court has relied

[309] Most prominent among these are *United States* v. *Seeger*, 380 U.S. 163 (1965); *Welsh* v. *United States*, 398 U.S. 333 (1970); and *Gillette* v. *United States*, 401 U.S. 437 (1971).

[310] See, for instance, *Goldman* v. *Weinberger*, 475 U.S. 503 (1986) and *Parker* v. *Levy*, 417 U.S. 733 (1974).

in explaining their binding force. It is possible that all decisions on political obligation do not reflect a single set of underlying moral principles. Because the Court has not developed full-fledged philosophical arguments, it is not possible to decide with certainty in favor of one particular principle, although we believe that the most likely underlying principle is fairness. However, because the evidence is not definitive, it is possible that reciprocal obligations rest on a somewhat weaker basis, the idea of reciprocity as a moral principle in its own right. It is also possible that different decisions are based on either of the two ideas.

Keeping these qualifications in mind, we believe there is significant evidence that the Court has gravitated towards fairness. To begin with, as we saw in Section 4, the Court has grounded political obligations on society's provision of essential benefits, especially protection. Moreover, the Court has also frequently depicted society as a cooperative venture for mutual benefit, and the benefits stem from citizens' joint efforts. These points are central to the view of society discussed in connection with the fairness and CG principles, in Chapter 5. But in themselves, these points do not necessarily indicate a fairness view of obligations. In spite of the difficulties we have seen in grounding obligations to help supply public goods on reciprocity alone (pp. 149–50), it is possible that the Justices have not been aware of these and so have interpreted the obligations as simply reciprocal. In order to identify the obligations in question as rooted in fairness, the Court must clearly conceive of society as an association in which mutual benefits result from each person *doing his share* in the collective effort.

These crucial points were appealed to by the Court in the most important draft case, *Arver* v. *United States*. Upholding selective service legislation, Chief Justice White wrote:

> In fact, the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the Constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: 'That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto.' (Art. 8) (at 380)

The language here clearly implies that the obligation in question is one of fairness. The citizen is not required simply to serve in return for protection, as would be consistent with the idea of reciprocity as a basic moral notion. Rather, his obligation is to contribute *his*

proportion toward the costs of protection. In *Arver* v. *United States* the Court conceived of society as an association in which 'every member' contributes his share to the expense of common benefits. This conceptualization of society is also explicit in the Government's arguments before the Court in the *Arver* v. *United States* case, which the Court apparently adopted: 'Compulsory military service is not contrary to the spirit of democratic institutions, for the Constitution implies equitable distribution of the burdens no less than the benefits of citizenship' (*Arver* v. *United States*, at 371). Thus the Court has suggested that, with all other people contributing their proportions, it would be unfair of the citizen in question not to contribute his.

Arver v. *United States* presents additional evidence for a fairness conception of obligation. White refers to 'at least nine' state constitutions that provide for compulsory military service. Perusal of these indicates that Pennsylvania was not alone in using the language of fairness. Although all the constitutions (and other sources) White cites do not employ similar language, constitutions of the following states unmistakably do:[311]

> Vermont (1777, Ch. 1, Art. 9): That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore, is bound to contribute his proportion towards the expense of that protection, and yield his personal service, when necessary, or an equivalent thereto;…
>
> Massachusetts (Bill of Rights, 1780, Art. 10): Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary:…
>
> New Hampshire (1784 pt. 1, Bill of Rights, Art. 12): Every member of the community has a right to be protected by it in the enjoyment of his life, liberty and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary, or an equivalent.

The language of all these articles is obviously closely related to that of the Pennsylvania Constitution. In all cases, the authors of the constitutions appear to have drawn upon basic ideas of fairness. They did not present reciprocal obligations as inherently binding. In all cases, obligations were traced back to an underlying moral idea that each person should do his fair share in providing society's collective benefits.

[311] The states cited by White for authorizing compulsory service but which do not use similar language are New York, Delaware, Maryland, Virginia, and Georgia.

It bears mention that in none of these constitutions is language of 'reciprocal obligations' used. State constitutions conceived political obligations in terms of fairness long before language of reciprocal obligations was employed in Supreme Court decisions. This is evidence that, in incorporating the principles evoked in these constitutions into *Arver* v. *United States*, the Court was arguing from fairness rather than reciprocity.

The evidence in *Arver* v. *United States* takes on added weight because of the role this case has played in US constitutional law. It should be noted that *Arver* v. *United States* was decided by a unanimous Supreme Court and that its basic holding and justification have never been questioned by a single Supreme Court Justice. Although four Justices (Cardozo, Brandeis, Stone, and Douglas) suggested at different times that the case does not necessarily give Congress the power to draft men in the absence of a declared war, even these Justices did not say that it definitely prohibits this practice (See *Holmes* v. *United States*, 391 U.S. 936 (1968) (at 936–8)). Further, the case has been cited as an authoritative precedent in over 47 US Supreme Court opinions and in over 300 federal lower court and state supreme court opinions. Of particular interest to us is the fact that it has been relied upon by the Supreme Court to justify Congress' requiring military service in foreign countries (*Cox* v. *Woods*, 247 U.S. 3 (1918)); forcing immigrants to swear to use arms to defend the United States (*United States* v. *Schwimmer*, 279 U.S. 644 (1929) and U.S. v. *Macintosh*, 283 U.S. 605 (1931)); and carefully regulating conscription practices and exceptions (U.S. v. *Seeger*, 280 U.S. 163 (1965), *United States* v. *O'Brien*, 391 U.S. 367 (1968), *Gillette* v. *United States*, 401 U.S. 437 (1971), and *Wayte* v. *United States* 470 U.S. 598 (1985)). Thus *Arver* v. *United States* has been repeatedly relied upon by different Justices at different times to support Congressional requirements for specific individuals to obey specific laws—frequently onerous laws.[312]

Although other cases draw less explicitly on fairness, this can be seen to underlie additional arguments. We have noted the intuitive plausibility of linking political obligations and the common good. But as we have also seen, reasoning of this sort is defective unless clear connections can be established between imposing specific requirements on a

[312] On the importance of *Arver* v. *United States*, see M. Malbin, 'Conscription, the Constitution, and the Framers: An Historical Analysis,' *Fordham University Law Review*, 40 (1972). It bears mention that *Arver* has also been cited to justify regulating industry and private property during time of war (*McKinley et al.* v. *United States*, 249 U.S. 398 (1919), *United States* v. *Bethlehem Steel*, 315 U.S. 289 (1942), and *Lichter* v. *United States*, 334 U.S. 742 (1948)).

given individual and the public good. When it has been forced to connect individual behavior and the public good, the Court has appealed to fairness.

For instance, in *Jacobson* v. *Massachusetts*, Henning Jacobson refused to be vaccinated as required by a Cambridge, Massachusetts law. In supporting the right of the state to delegate the power to pass such a law to a city, the Court emphasized that such laws were enacted for the 'common good' and the 'good and welfare of the commonwealth' (26, 27). Yet the Court did not directly proceed from this premise to Jacobson's requirement, as would be consistent with consequentialist reasoning. Rather, Justice Harlan argued that Jacobson could not refuse to contribute to the important benefit of public health by refusing to be vaccinated unless he could demonstrate a morally relevant difference between himself and other citizens. In other words, all citizens alike must do their part to promote the common good, unless there are significant morally relevant differences between them (39). The principle underlying this argument, that individuals have equal responsibilities to contribute to the common good, is best understood as fairness.

Similarly, in *Lichter* v. *United States*, 334 U.S. 742 (1948), the Court held that if Congress has the power to conscript individuals for military service, then Congress can also require civilians to contribute toward the war effort:

> In total war it is necessary that a civilian make sacrifices of his property and profits with at least the same fortitude as that with which a drafted soldier makes his traditional sacrifices of comfort, security, and life itself. (754)

Once again, the underlying principle here is fairness. All individuals alike have obligations to contribute to the war effort, although their specific roles may differ. As noted above, it is up to the government to say exactly how each individual's obligation must be met. This decision, which relies on *Arver* v. *United States* as central authority, is therefore consistent with other decisions requiring all citizens to contribute to the public good unless there are morally relevant differences between them (756, 758).[313]

[313] See also *Northern Pacific Railroad Company* v. *North Dakota*, 250 U.S. 135 (1918); *United States* v. *Bethlehem Steel Corp*, 315 U.S. 289 (1942); *Yakus* v. *United States*, 321 U.S. 414 (1944); *Bowles* v. *Willingham*, 321 U.S. 503 (1944).

6. Conclusion

It could be argued that examination of the relatively small number of Supreme Court decisions that we have discussed (plus those cited in the notes) proves little about the Court's reasoning, or provides little support for a theory of political obligation based on fairness. However, the cases we discuss are the ones in which the Court has tackled the question of political obligation most directly, while *Arver* v. *United States* in particular is an important precedent, cited repeatedly in subsequent decades. Though other notions—consent, reciprocity, consequentialism—have been appealed to in different cases, we have seen that this has not been to support specific requirements of particular individuals. When the Court has been forced to justify such requirements, it has most often appealed to reciprocal obligations, and, when these are examined carefully, to fairness. The best examples of the Court's reasoning are cases requiring individuals to contribute toward society's protection. In these cases, the Justices have most often upheld requirements for specific individuals to serve in the military, or to make related contributions, on the basis of fairness. Each individual must contribute his or her share to the common good; it would be unfair for them not to contribute unless they could produce strong moral reasons why they need not do so.

In addition to the evidence supporting the principle of fairness, it bears mention that the Court provides indirect evidence against other theories of political obligation. It has not argued from familiar principles of consent, gratitude, or a natural duty of justice. I believe that the fact that the Court has consistently traced obligations to obey the state back to protection the state provides is fully in keeping with the view of political obligation presented in this book and also tells strongly against currently popular views of political obligation as rooted in other kinds of principles, for instance, a principle of association. Rather, as we have seen, obligations have been grounded on different, more commonsense notions, concerning the exchange between obligations and protection, and each person's requirement to contribute his share or proportion to the common good.

8
Political Obligation and Military Service in Germany and Israel

[314]In this chapter, we attempt a comparative check on the conclusions in Chapter 7. Having looked at the grounds for political obligations expressed in judicial decisions in US courts, we turn to decisions in other countries. As we have seen the US Supreme Court's reasoning concerning political obligation is most apparent in cases concerning obligations to perform military service. Because cases in this area involve severe burdens and also raise troublesome issues of conscientious objection, US judges have found it necessary to appeal to moral principles, especially the principle of fairness. Thus we are interested in how courts in other countries address similar issues. If the principles appealed to in other judicial systems, especially in systems quite different from that of the United States, are similar, this should provide additional support for the reasoning of the US Supreme Court. Accordingly, we examine the major judicial decisions on obligations to provide military service in Germany and Israel, and compare this to the reasoning of the US Supreme Court.

There are several reasons for this choice of countries. One method of selecting countries would be to choose those most similar to the political system and history of the United States, such as Canada and Great Britain. But such a selection would obviously be of limited value for purposes of comparison. Hence, we chose countries that are more distant cousins to the United States. These countries share the

[314] This chapter is based on G. Klosko, M. Keren, and S. Nyikos, 'Political Obligation and Military Service in Three Countries,' *Politics, Philosophy, and Economics*, 2 (2003). First-person plural language is in reference to this. Michael Keren did the research on Israel and translated quotations from Israeli cases; Stacy Nyikos did the research and translations for German cases.

attributes of stable democracy, Western European culture, and the employment of a supreme and final court of arbitration, and yet differ in age, their political and legal cultures, and type of legal system. Although many countries fit this profile, Germany and Israel seem particularly appropriate, and we decided on them. Our hope is that future research can examine additional countries, of widely different kinds. Along with the United States, Germany and Israel have developed legal and judicial systems in which supreme court judges, generally highly regarded legal scholars, have considerable leeway in interpreting legislation and major responsibilities for protecting human and civil rights. In all three countries, the supreme courts have, for historical reasons, high prestige. Although in all three countries the supreme courts operate under diverse political pressures, their landmark decisions are strongly anticipated and studied with interest.

This chapter is not an exercise in comparative sociology of law, and we do not assess possible causal factors that led the different courts to reason as they did. Our interest is in moral arguments, which we compare for the reasons stated earlier. But in keeping with the 'Grotian' argument discussed in Chapter 7, it is important to note the similarities in the courts' reasoning in spite of important differences in their countries' legal and political systems. In regard to political systems, the United States has a presidential system, while Israel and Germany have parliamentary systems; Germany and the United States are federal Systems, while Israel is not. More to the point, the Israeli and US legal systems are case-driven, based on British common law, while Germany's is more highly centralized and deductive, based on old Germanic and Roman law.[315] In spite of these differences, in all three countries, supreme courts are heavily involved in constitutional deliberations. This is as true of Germany, with its strict insistence on legislative supremacy, as of the United States and Israel. Moreover, although Israel, in contrast to the United States and Germany, lacks a written constitution, the Israeli Supreme Court oversees the

[315] K. Zweigert and H. Kotz, *Introduction to Comparative Law*, second rev. edn., T. Weir, (trans.) (Oxford: Oxford University Press, 1992). The Israeli legal system inherited its basics from the Mandatory legal system. Since the establishment of the state of Israel a system has evolved, which combines common law as well as some continental basics and Israeli heritage, see A. Barak, 'The Israeli Legal System: Heritage and Culture,' *Hapraklit* 40 (1992). The German BVerGE often follows previous case law, but is not bound by its previous decisions in the same manner as the US Supreme Court. Accordingly, the repetition of, and use by, the Court of previous decisions stresses the importance of their arguments. See H. Boldt, *Deutsche Verfassungsgeschichte*, 2. Bde. (Muenchen: Deutscher Taschenbuch Verlag, 1990).

constitutionality of parliamentary legislation in light of standards of higher law.[316]

In all three countries, the supreme court is the main forum for deliberating normative legal issues, including questions of political obligation and conscientious objection. In contrast to England, where conscientious objection is a recognized right, or Russia, where it is not recognized at all, in all three countries, legislatures have taken somewhat vague positions, leaving large leeway to the courts.[317] Thus in all three countries, court decisions could shed important light on the country's justification for requiring citizens to serve in the armed forces.

Argument here is conducted in three sections. Sections 1 and 2 are devoted to decisions in Germany and Israel, respectively. As we will see, while decisions in the United States and Germany are strikingly similar, reasoning in Israel is somewhat different, although an important recent case closely approximates those in the United States and Germany. We attempt to account for the distinctive features of the Israeli cases. Section 3 presents brief conclusions.

1. German Cases

Turning to German public and constitutional law, we find that evidence of fairness as the ground for obligations to provide military service receives even more explicit support from the German Constitutional Court, *Bundesverfassunggericht* (BverGE), than from the US Supreme Court. The former relies upon legal theory, as well as events that trace their origins back to the French Revolution, thereby incorporating not only present German law but two hundred years of legal development into its justification for mandatory military service.

Decisions of the German Constitutional Court in this area have centered on the rights and obligations of conscientious objectors. When the German Basic Law, the *Grundgesetz* (GG), was adopted, in 1948, no provisions in the text provided for military units of any

[316] A. Shapira, 'Judicial Review without a Constitution: The Israeli Paradox,' *Temple Law Quarterly* 56 (1983): 425.

[317] For Israel, see M. Keren, 'Justifications of Conscientious Objection: An Israeli Case Study,' *International Journal of the Sociology of Law* 26 (1998); Y. Peri, 'Israel: Conscientious Objection in a Democracy under Siege,' in C. Mcskos and J. C. Whiteclay (eds), *The New Conscientious Objection: From Sacred to Secular Resistance.* (New York: Oxford University Press, 1993).

kind or a period of mandatory military service.[318] The German military, *Bundeswehr*, was eventually created by means of three *Grundgesetz* amendments and the passage of the Military Service Law (July 21, 1956). These enactments gave the national government exclusive power over conscription, and made military service a basic duty. The institution of mandatory conscription was followed by a series of court cases regarding rights of individuals not to serve in the armed forces. A number of constitutional rights cases were brought before the German Constitutional Court concerning the breadth of conscientious objection. The first–and seminal case–was decided in 1960. The plaintiff was a 20-year-old male who had applied for conscientious objector status. To support its position, the Court invoked reasoning closely related to the idea of 'reciprocal obligations' seen in US law:

> Mandatory military service is compatible with the legal and philosophical–political principles that are the basis of the *Grundgesetz*. The *Grundgesetz* is a value-bound structure that recognizes protection of freedom and human dignity as the highest goals of all law. The concept of the human being represented in the Basic Law is not that of an autocratic individual but rather of the *citoyen*—the individual as a member of society and his many duties. It cannot be unconstitutional to enlist citizens to provide for the protection and defense of the rights of society, of which they themselves are direct benefactors.[319]

In a 1974 decision, the *Bundesverfassungsgericht* argued that mandatory military service is rooted in the state's need to provide protection, to which each individual must contribute his part. This decision makes explicit appeal to a norm of equal treatment:

> The justification for universal military service is to be found in the fact that the state is able to fulfill its constitutionally-based obligation to protect its citizens only through the aid of those citizens, including their protecting the very existence of the Federal Republic of Germany. The claim to protection of the individual corresponds to his obligation to stand up for the interests of the community as well as to do his part [*seinen Beitrag…zu leisten*] in protecting that community, the protection of which the constitution itself is aimed.

[318] T. Maunz and R. Zippelius, *Deutsches Staatsrecht*, 27th edn. (München: C.H. Beck'sche Verlagsbuchhandlung, 1988). For background on German laws concerning military service, see R. Zippelius, *Allgemeine Staatslehre*, 11th edn. (München: C. H. Beck'sche Verlagsbuchhandlung, 1991); G. Wollstein, 'Die preußische Reformzeit—Das Landwehrkonzept,' in K. Kodalle (ed.), *Tradition als Last? Legitimitätsprobleme der Bundeswehr* (Köln: Wissenschaft und Politik, 1981); D. Kommers, *The Consitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989).

[319] BVerGE 12 (1960) 50–1.

> Universal military service is the expression of the general principle of equality [*Gleichheitsgedanken*].[320]

Thus the reasoning here parallels that in the US cases. The 1960 decision defends the state's right to require individuals to provide protection and defense, from which they themselves benefit. The 1974 decision elaborates upon the nature of this requirement. Each male citizen must 'do his part' to provide protection, in accordance with the general norm of equality (*Gleichheitsgedanken*), which furthermore encompasses in it, when used by the German Constitutional Court in this context, the principle of fairness. It is not simply that all men are equal before the law and for this reason must serve in the military. Rather, the principle of military obligation is based upon an equality that is directly connected to benefits and obligations. The reciprocal obligation of military service for the benefit of protection offered by the state is not based on consent or formal exchange, gratitude, or some other basis. Rather, it is based on the concept of fairness: if all benefit, then all must share equally in the burdens of contributing.

The role of the principle of equality in military obligations is confirmed by further cases. In 1977, the two houses comprising the German parliament, the *Bundestag* and *Bundesrat*, passed a new law regulating the process of conscientious objection. The CDU/CSU opposition within the Bundestag called upon the *Bundesverfassungsgericht* to determine the constitutionality of the new law. When the Court handed down its decision, it reiterated many of the reasons seen in previous cases. It is notable that in these cases, the opponents of the law, too, argued according to 'the general principle of equality,' which they contended had been violated by the unfairly lax burdens required of conscientious objectors.[321]

In its decision, the Court appealed to recognizable ideas of both reciprocal obligations and a principle of equal burdens of citizenship:

> The legislator decided for the introduction of universal military service with the passage of the Universal Military Service Act. This law is based upon a free-democratic tradition that goes back to the French Revolution of 1789 and the reform period in Germany beginning in the nineteenth century. The basis of this tradition is that it is the duty of all male citizens to stand up for and serve for the protection of freedom and human dignity as the highest rights of the community, from which they themselves benefit. This tradition finds its justification in the fact that the state recognizes and protects human dignity, life, freedom and property as basic civil rights, and is able to fulfill its constitutional obligation to protect these rights only through the help of its citizens

[320] BVerGE 38 (1974) 154.

[321] BVerGE 48 (1978) 143.

> and their further protection of the very existence of the Federal Republic of Germany. In other words, the individual basic right to protection and the community duty of the citizen to provide for the protection and safety of a democratic constitutional state and its constitutional order correspond to one another.[322] It follows from the constitutional moorings of universal military service that a national law which introduces a duty in the form as seen in Art 12a Abs.1 GG, not only does not go against the constitution but also actualizes a basic decision, which is a part of the text.…[Yet t]he more depositions handed in which employ 25a Abs.1 WplfG [*Wehrpflichtgesetz*], the more the possibility that those who do not declare conscientious objector will be called to serve increases, whereas the exact opposite occurs for objectors. Their possibility of serving civil duty becomes increasingly smaller. Thus, the basic principle of equality is violated.[323]

Parliament was, therefore, forced to create another reform to the laws governing the process for determining conscientious objection and civil service. In 1983, these laws were complete and once again brought before the Constitutional Court in order to determine their compatibility with the Basic Law. The main contention of the opponents of the new law was that it had increased civil service beyond the normal period spent in mandatory military service. They argued that this difference was incompatible with the principle of equality, as well as the principle of the rule of law.[324] In keeping with previous decisions, the Court argued according to ideas of reciprocal obligations and equal distribution of the burdens of citizenship.

> In the constitutional makeup of the *Grundgesetz*, the individual basic right to protection corresponds with the communal duty of each citizen to do his part in protecting this constitutional order (s. BVerGE 48, 127 [161]). Mandatory military service, the enforcement of which is contained in Art.3 Abs.1 GG (BVerGE 48, 127 [162]), is an expression of the principle of equality. Its fulfillment is democratic normality.[325]

[322] 'Mit anderen Worten: Individueller grundrechtlicher Schutzanspruch und gemeinschaftsbezongene Pflicht der Bürger eines demokratisch verfassten Staates, zur Sicherung dieser Verfassungsordnung beizutragen, entsprechen einander (vgl. BVerGE 12, 45 [51]; 38, 154 [167]).'

[323] BVerGE 48 (1978) 161 and 175.

[324] BVerGE 69 (1985) 1–3.

[325] BVerGE 69 (1985) 22: 'In der demokratischen Verfassungsordnung des Grundgesetzes entsprechen einander der individuelle grundrechtliche Schutzanspruch und die gemeinschaftsbezogene Pflicht der Bürger, zur Sicherung dieser Verfassungsordnung beizutragen (vgl. BVerGE 48, 127 [161]). Die allgemeine Wehrpflicht ist Ausdruck des allgemeinen Gleichheitsgedankens. Ihre Durchführung steht unter der Herrschaft des Art.3 Abs.1 GG (BVerGE 48,127 [162]); ihre Erfülllung ist demokratische Normalität.'

In defending provisions for extended nonmilitary service as an alternative to military service, the Court explicitly appealed to a principle of equal burdens:

> The normative goal of Art. 12a Abs. 2 S. 2 GG is to secure a balance of the burden of military and civil service.[326]

Finally, regarding the principle of equality and the conscientious objector status procedure in cases of uncertainty, the Court argued:

> The general principle of equality [Art. 3. Abs. 1 GG, *Alle Menschen sind vor dem Gesetz gleich.*] has not been defied because the application for acceptance as a conscientious objector must either be rejected due to a lack of unity amongst the reasons listed (6 Abs. 1 Satz 1 KDVNG) or must go before a committee for conscientious objector status if there is doubt regarding the truth of statements/facts rendered by the applicant (7 Sätze 1 & 2 KDVNG).[327]

The central role of the principle of equal treatment in this entire debate is seen in the fact that proponents of conscientious objection appealed to it. In 1988, two men who had applied for conscientious objector status after already having fulfilled fifteen months of basic military service had their case heard by the High Court. After they received conscientious objector status, they were required to fulfill five months of civil service, since civil service requires twenty months' service, although military service requires only fifteen months. Appealing to a principle of equal burdens for all citizens, the Court supported the conscientious objectors' arguments:

> 22 Satz 1 ZDG, in its regards for military justice/fairness, violates the constitutional law requiring that an equal burden be placed upon all citizens [*Staatsbürgerlichen Pflichtengleichheit*] (Art. 3 Abs. 1 GG), because this paragraph results in a situation in which conscientious objectors who have served some or all military time are worse off than those who have not.[328]

In these decisions, we clearly see the central role a norm of equal treatment plays in obligations to provide military service in Germany. In this area, the overall logic of the German Constitutional Court is strikingly similar to that of the US Supreme Court. Mandatory

[326] BVerGE 69 (1985) 30: 'Das normative Ziel des Art. 12a Abs. 2 Satz 2 GG besteht darin, ein Gleichgewicht der Belastung von Wehr- und Ersatzdienstleistenden sicherzustellen.'

[327] BVerGE 69 (1985) 47.

[328] BVerGE 78 (1988) 367: '22 Satz 1 ZDG verstoe gegen das Verfassungsgebot der staatsbürgerlichen Pflichtengleichheit in Gestalt der Wehrgerechtigkeit (Art. 3 Abs. 1 GG), weil er dazu führe, daß gediente Kriegsdienstverweigerer stärker belastet würden als ungediente.'

military service is justified as necessary for the provision of essential state benefits, which can be provided only through the efforts of the citizens. The protection the individual citizen receives from the state corresponds with his duty to do his part in providing it, while even those who are exempted from service on grounds of conscientious objection must bear equal burdens. There can be little doubt that the arguments of the German Constitutional Court in this area correspond closely to the principle of fairness. The Court has consistently upheld ideas along these lines, basing them on a tradition dating back to the French Revolution and found at various points in German history from 1813 to the present.

2. Israeli Cases

Turning to obligations to provide military service in Israel, we see that decisions are both similar and different in important ways. In Israel, there is mandatory military service for Jewish men and women, although some differences in requirements of the sexes.[329] Conscription is regulated by the Israeli Defense Service Law, legislated in 1949 and amended in 1959 and 1986. The law has no provision for conscientious objection by men but does allow this for women.[330] However, the law leaves some room for exemption of male conscientious objectors by entitling the Minister of Defense, in Section 28-c, to exempt persons for a variety of reasons, including 'other reasons.'[331] In the early years of statehood, the number of males demanding exemption as conscientious objectors was extremely low, and the ministry preferred to find pragmatic solutions in individual cases. Intervention by the Courts was unusual.

One exception occurred in 1951 when the Supreme Court considered the case of Haim Steinberg, who, in 1949, was convicted by a lower court for refusing to serve in the newly formed army because of his religious convictions. He was a member of the ultraorthodox Neturey-Karta sect, which objected to the formation of a Jewish state in the Holy Land. The Court recognized him as a conscientious objector and called upon the legislature to regulate the matter of conscientious objection by law, but dismissed his appeal on the ground

[329] Defense Service Law (1949), paras 11, 12.

[330] Section 30 of the law exempts from service the mother of a child, a pregnant woman, a married woman, and allows women exemption for reasons of conscience or religious lifestyle (Defense Service Law [Consolidated Version] 1986).

[331] *Ibid.*

that Steinberg did not object to military service per se but to the very authority of the secular state and its laws, a position which, it said, no court could accept.[332]

One reason the Steinberg case was unusual is that in Israel the problem of conscientious objection had been addressed on the political level. During the War of Independence of 1948, Prime Minister David Ben-Gurion, who also served as Minister of Defense, was confronted by religious leaders demanding exemption of students in religious seminaries (*Yeshivot*), whose religious studies were perceived as contributing to the survival of the Jewish people in another way, in light of the destruction of Yeshivot in Europe during the holocaust. Ben-Gurion agreed and this arrangement was instituted.

With religious citizens who wished to be so exempted, the main cases of conscientious objection reaching the Israeli Supreme Court concerned secular men whose refusal to serve was generally selective. They stemmed not from all-out pacifism, which has been quite rare in Israel, but from objections to serving in the territories occupied by Israel since 1967, or to the invasion of Lebanon in 1982. The two landmark cases were *Elgazi* v. *Minister of Defense and others*, 1980, and *Shain and the Israeli Association for Civil Rights* v. *Minister of Defense and Chief of Staff*, 1984.[333]

Gad Elgazi was one of a group of twenty-seven high school seniors who, in 1979, published a letter objecting to the occupation of the West Bank and Gaza Strip and stating that, when called to military service, they would refuse to serve in the occupied territories. They added that by so refusing they believed they contributed to peace in the Middle East. Adhering to its pragmatic policy, the Ministry of Defense allowed members of the group, when drafted, to serve within the 'green line' separating Israel from the occupied territories. But Elgazi's case caused a change in that pragmatic policy. Elgazi was driven by deceit to the occupied territories, refused orders, and was subsequently subjected to a number of military trials. He filed a petition with the Supreme Court claiming discrimination in light of former exemptions given by the Ministry of Defense.[334]

The Supreme Court left no question where it stood in regard to the individual's obligation to provide military service: 'no military organization can tolerate the existence of a general principle according to

[332] *Steinberg* v. *Attorney General of the State of Israel*, C.A. 5, 195 1.

[333] Two less important cases which reached the Supreme Court were *Epstein* v. *Minister of Defense and others*, 1995, and *Baranowski* v. *Minister of Defense*, 1996.

[334] Y. Shachar, 'The Elgazi Trials—Selective Conscientious Objection in Israel', in *Israel Yearbook on Human Rights* 12 (1982).

which individual soldiers can dictate their place of service, be it for economic or social reasons, or for reasons of conscience.'[335] Although Justice Cohen, who wrote a separate opinion, expressed dissatisfaction with the lack of a clear policy by the army regarding service in the occupied territories, all three Justices agreed that this was no reason to consider as discriminatory the change of practice according to which soldiers were now compelled to serve in the occupied territories. The principles to which Justices Levin and Beiski appealed were essentially consequentialist, especially the need to leave questions of military policy to the army: 'we believe we had better refrain from stating an opinion as to the utility-calculations of the authority when it implements its policy; this is a matter for the respondents and their experts to handle and we see no legal reason to contradict its calculations.'[336]

Consequentialist arguments are also dominant in the case of Yacov Shain. In 1983, the war in Lebanon gave rise to a wave of civil disobedience. Shain refused reserve duty in Lebanon. While in military prison, he was summoned again to reserve duty there. He filed a petition with the Supreme Court claiming that the second summons was not in line with 'military needs,' as specified in the Defense Service Law, but was inflicted on him as a punishment. The state attorney claimed in response that the practice of calling objectors to duty after they had been punished for their refusals stemmed from the need to overcome the phenomenon of refusal to serve in Lebanon, which severely jeopardized the foundations of military discipline and the morale of soldiers serving there.

The Supreme Court rejected Shain's claim that his second summons was not in line with military and security needs, and that the military instructions, updated in 1983, to summon objectors who had already been punished were illegal. The decision, written by Justice Elon, argued on consequentialist grounds: 'The purpose of the updated instructions is to see to it that *every* reserve soldier fulfills his duty and provides military service in accordance with the military and security needs of the Israeli Defense Force (IDF), needs which are determined by consideration of the IDF's authorities.'[337]

Although the word 'every' had been underlined, which indicates awareness by the judge that the refusal by one soldier must be considered in reference to others, Justice Elon made no direct reference to concerns of equal burdens, of each individual having to do his part, and

[335] 49. *Elagazi* v. *Minister of Defense and Others*, H.C. 470/80, p. 5.

[336] *Ibid*., p. 6.

[337] *Shain and the Israeli Association for Civil Rights* v. *Minister of Defense and Chief of Staff*, H.C. 734/83, p. 399.

so to grounds of fairness. His concern was to make sure that the objector's alternative service did not leave him with burdens lighter than those of people who served. And so concerns of equal treatment were implicit in this regard. But by far, the main emphasis was upon specific additional costs that others would have to bear in a situation in which one soldier's exemption entailed higher burdens for others. Although Elon was concerned with the additional costs inflicted upon others, he did not assess these against a norm of equal treatment:

> It is a definite rule that this court does not replace with its judgment the judgment of the formal authority, and this rule applies even more when it concerns the control of this court over professional-planning decisions by the military authorities. It is unthinkable that the IDF—or any other military system—could accept a phenomenon in which soldiers, by willing to be sentenced for refusal to obey an order of the above kind and serve a term of detention or arrest, would totally foil the execution of the order regarding the place of their service and 'serve' every year a term in prison in lieu of the common reserve service. Accepting it would not only be opposed to the legislator's order, that the soldier must serve at the designated 'place and time'…but it may jeopardize the deployment, training and preparedness of the IDF and the execution of its missions, and what is no less severe, the morale of comrades in arms, harnessed to yoke and danger, while their associates are free to go to their home and to their 'prison.' Moreover, the head of the manpower department is right in pointing out…that not only isn't the call to reserve duty of those who refused to serve in Lebanon and were subsequently sentenced to a prison term intended to discriminate and punish them, but 'the completion of the days of service comes to equalize between reserve soldiers and [to see to it that] soldiers who do not fulfill their duty to serve would not benefit from their refusal to serve.' Abstention of part of the soldiers, even if a small part, from their military unit, will result in the rest of the soldiers being forced to fulfill these tasks themselves, or the unit would have to be reinforced by soldiers from another unit. However that may be—the 'protest' of those is done on account of their comrades who will be more busy, will engage in more duties by rotation, will be more on guard, will go less on vacations etc.[338]

Elon insisted that it was not the Court's task to interfere in decisions by the military authorities and added that the petitioner was not entitled to determine military policy and to decide what the army's security needs were. He surveyed responses to selective conscientious objection, that is, objection to serving in a specific war for ideological reasons, in England and the United States, where this was seen as

[338] *Ibid.*, pp. 399–400.

infringing upon the process of democratic decision-making and as constituting a real danger of applying unequal criteria in military recruitment. He agreed that this danger existed in the case before him, but made sure to differentiate the Israeli context, with its higher stakes and different utility considerations, from those of other countries:

> This big and complicated issue of law on the one hand and conscience on the other hand, of the duty and need to maintain military service in order to defend the sovereignty of the state and the security of its inhabitants on the one hand, and refusal to go out to war for reasons of personal conscience on the other hand, must be dealt with in accordance with the special local and temporal circumstances, and the hard security situation of the state of Israel does not resemble the security situation of other countries living in peace within their borders.[339]

Nowhere were such consequentialist considerations more apparent than in the Supreme Court decision on the petition by Attorney Yehuda Ressler and others demanding to abolish the exemption of Yeshivot students from military service. The petitioners claimed that this abolition would shorten their own periods of service in the reserves. Affidavits by military officers confirming this calculus allowed their case to be heard before the Supreme Court, which had rejected similar pleas in the past, on the ground that the matter was political rather than legal. Interestingly, the eighty-page verdict does not hint even once at considerations of fairness. Although Chief Justice Shamgar said that the exemption was unthinkable and hard to accept from the normative, national, and human points of view, which presumably stemmed from his realization how unfair it was, he and his colleagues did not elaborate on this theme any further. They accepted the legality of the exemption, because it could be seen as falling into the category of 'other reasons' allowing exemptions in the Defense Service Law.[340]

In evaluating the reasonableness of the Minister of Defense's decision to grant exemption to thousands of religious students who, according to one affidavit, would fill five armor regiments or two infantry regiments, the Court asked only one question—the degree of harm inflicted upon national security as a result of this decision. The Court demanded a written declaration by the Minister on this matter and received an answer that the cost of recruiting these students could outweigh the benefits. The minister claimed that, because of the extreme religious lifestyle of these students, they might not adjust to the alien culture of the army and might have difficulties upholding their religious rites there. Their special upbringing might also make

[339] *Ibid.*, p. 403.

[340] *Ressler and others* v. *Minister of Defense*, H.C. 910/86.

their service inefficient. The Court, however reluctant it may have been, accepted this consequentialist argument. Commenting on the minister's declaration, Justice Barak wrote that 'the Minister of Defense did not ignore the implications the postponement of service for Yeshivot students has on the number of regular and reserve forces of the IDF, and on the deployment for the State of Israel's security purposes, but came to the conclusion not to recruit to the IDF the category of these candidates for service.'[341] He quoted Justice Cohen's statement on a former occasion, according to which 'nobody can predict whether the recruitment of thousands of Yeshivot students, who would consider their recruitment to the army a blow to the foundation of their belief, according to which the study of the Torah precedes the duty to serve in the army, will add to the fighting strength of the IDF or, God forbid, infringe on that strength. There is no confidence that such recruitment, even if it increases the strength of the army quantitatively, would not have long-ranging negative implications on the internal and external survival-power of the state.'[342]

Barak added that the Minister of Defense could have reached a different conclusion, one suggesting that the number of Yeshivot students receiving exemptions is too high, and that it is necessary to change the policy in this matter. But the dominant consideration in any calculation the Minister makes, wrote Barak, must be national security:

> In balancing between the different considerations which stand at the foundation of the Minister of Defense's calculation according to section 36 of the law, the decisive calculation must be the security consideration…it is only natural that the weight of the extra-security considerations, such as considerations of education, family and other reasons, is relatively light, and only if their harm to security is light, is it possible to take them into account. Therefore, in the last account, the number of Yeshivot students whose recruitment is postponed is important. There is a limit which a reasonable Minister of Defense is not allowed to exceed. Quantity makes quality. In this regard, the petitioners have not [succeeded] in demonstrating that the damage to security is not light.[343]

Barak concluded by proposing that the postponement of service to these students be occasionally reevaluated in light of the changing security needs of the country.

If we were able to bring our discussion of Israeli cases to a close at this point, our analysis would be relatively straightforward. One will note that, in the Israeli cases, concerns of fairness have been

[341] *Ibid.*, p. 456.

[342] *Ibid.*, p. 499.

[343] *Ibid.*, p. 505.

overshadowed by consequentialist considerations bearing on national security. There are three main reasons for this. First and most obvious is the 'hard security situation' of Israel, to which Justice Elon refers (p. 173). This undoubtedly made issues of security more salient. Although we may assume that the Israeli court shares with the US and German courts the view that fairness is a fundamental value, and Israel's highly respected supreme court judges are familiar with notions of fairness in the world literature, their decisions are apparently strongly influenced by what Judith Karp, a former prosecutor at the Attorney General Office, defined as a view of Israel as a 'self-defending democracy.'[344] As she puts it, the core of this doctrine regards the value of national security and continued existence of the state as a superconstitutional premise against which legislation is interpreted and which every authority is bound to respect and enhance. Underlying this doctrine are the concepts (which Barak, Elon, and others often referred to in their decisions) that a state is not bound to agree to its elimination, its judges should not sit idle when confronted with a request for remedy, and no state institution should serve as a tool for those who are out to destroy it. This is the main reason why, we believe, it is hard to find appeals to fairness, however desirable in principle, in the Israeli cases, in separation from practical security considerations.

Second and more important from our point of view, individual cases in Israel applied readily to large numbers of other people. Even when the particular case under consideration concerned a specific individual, such as Yacov Shain, security considerations were still paramount, since granting an exemption for him had significant implications for a large class of additional potential exemptees. We see this with Shain, while it is even more clear in regard to the religious exemption for Yeshivot students.

In important respects the situation in Israel differs from those in other countries, as noted by Justice Elon. According to the logic of collective action, it is often unnecessary for a given individual to contribute to a collective good, because his contribution or noncontribution would make no detectable difference. In the United States and Germany, this logic holds for individual conscientious objectors, even if exemptions for them imply similar treatment for large numbers of like-minded others. In a country of tens or hundreds of millions, ordinarily, how such a class is treated will have at most extremely minor effects, and so norms of fairness and equal treatment must be invoked to justify requiring the contributions of given individuals.

[344] J. Karp, 'Finding an Equilibrium,' *Israeli Democracy* (1990): 29–31.

Because of its small size and condition of permanent threat, the situation in Israel is different. If exempting a given individual would be generalized to affect thousands of others, there could well be significant implications for national security. And so judges could refer directly to these, without appeal to fairness.

There is also a third consideration. The salience of fairness as a value in Israeli society is considerably lessened by divisions in society. Israeli supreme court judges realize that they face two different conceptions of community—one shared by secular Israelis who believe in the relation between citizens' benefits and duties and the other by orthodox Israelis to whom 'community' relates to a religious state of existence which entails no obligations to the secular state (whose very existence may even be considered a hindrance to the coming of the messiah). Therefore, for this reason as well, even Israel's chief justice may be expected to refrain from invoking notions of fairness in judicial decisions.[345]

However, the evidence of a recent decision shows that more than consequentialist concerns have motivated Israeli courts. The decision in question concerns two petitions: Supreme Court Decision 3267/97 *Rubinstein and others* v. *Minister of Defense*; Supreme Court Decision 715/98 *Ressler and others* v. *Minister of Defense*. In light of the importance of the issue, eleven Justices of the Supreme Court were on the bench. Their decision, written by Chief Justice Aharon Barak, was unanimous. (One Justice, while joining the decision, added a minority opinion.)

Barak noted that since the Ressler decision of 1986 (discussed earlier), the number of Yeshivot students receiving exemptions had risen to 28,772 (as of August 1997) which constituted 8 per cent of all recruits to the IDF. 'The societal implications of the arrangement are far-reaching: a deep gap has been created in Israeli society, side by side with an increasing feeling of inequality.' Referring to his 1986 decision, Barak asked whether 'quantity' had now turned into 'quality' and concluded that it had. The Court declared the Minister of Defense's exemptions of so many students illegal, and called upon the Knesset (Parliament) to pass a law within one year to provide a solution to the matter.[346]

As the above reference to 'inequality' indicates, with this decision, considerations of equality or fairness were finally brought into the

[345] See Keren, *Zichroni v. State of Israel: The Biography of a Civil Rights Lawyer* (Lanham, MD: Lexington Books, 2002), Ch. 6.

[346] Supreme Court Decision 3267/97 *Rubinstein and others* v *Minister of Defense*, Supreme Court Decision 715/98 *Ressler and others* v. *Minister of Defense*.

forefront of discussion of military service requirements in Israel. However, it is important to note that in this instance, reference is not primarily to inequality per se but to a 'feeling of inequality' and its adverse implications. In other words, here too considerations of fairness are subordinated to consequential concerns to some extent. The same is true of the decision's second reference to fairness. Examining reasons for continuing the policy of exemptions, the Court quoted the lawyer for the claimant. The Court noted that claims concerning the adverse consequences of having Yeshivot students serve had not been investigated, while, the lawyer added, the existing system of exemptions involved a significant harm to security needs: 'the feeling of solidarity by the people is part of the security doctrine.' Here too, then, the claimants appealed to fairness, but only in reference to its contribution to a feeling of solidarity, and so, again, to national security.

However, as he continued, Barak made a clear and unequivocal appeal to a principle of equality, like those invoked in the United States and Germany:

> On the one hand there exists the principle of equality, according to which all members of society ought to contribute in equal manner to its security. The present situation, in which substantial parts are not endangering their lives for the security of the state, creates strong discrimination, and a feeling of deep injustice.

Barak mentions that the principle of equality is a central norm in Israel's system of justice, a norm defining the character of the state and of every democratic society. He quotes a former decision he had authored in which he had argued as follows:

> [T]he individual joins in the overall network of society knowing that others are doing the same. The need to assure equality is natural to Man. It is based on calculations of justice and fairness. He who asks for recognition of his right, must recognize another person's right to ask for similar recognition. The need to maintain equality is crucial to society and to the social contract on which it is built. Equality guards against arbitrary rule. Indeed, there is no more destructive element for a society than the feeling of men and women in it that they are treated in a discriminatory manner. It harms the integrating forces of society, it harms the self-identity of the individual.[347]

[347] *Poraz* v. *Tel-Aviv–Jaffa Municipality*, H.C.953/87, 42 P.D.(2) 309. Poraz, a member of the Tel-Aviv–Jaffa city council, challenged a decision, forced on the city by the Minister of Religious Affairs, not to include women in the selection committee selecting the city's Religious Council. Barak ruled in favor of Poraz and referred to the need to maintain equality between men and women.

In this decision, then, Barak appeals not only to feelings of injustice engendered by departures from fairness—which, once again, subordinate fairness to consequential concerns—but also to the norm itself, which he identifies as a central democratic principle. The 'principle of equality, according to which all members of society ought to contribute in equal manner to its security' is obviously closely related to the principle of fairness. On the face of it, the identification of equality and fairness is not obvious. A claim that the burdens of citizenship should be equal is one thing, while the principle of fairness makes this contingent on equality of benefits, and there is apparently nothing in Barak's words to suggest such a dependence. This, however, seems to stem from the deeply rooted assumption throughout Israel that security threats are shared by all citizens alike—random terror, for instance, may hit anyone anywhere—and thus all citizens benefit from security provided by the state, whether they admit it or not. Thus, in view of the implicit assumption that the indispensable benefit of defense is enjoyed generally, Barak's reference to equality may be seen as tantamount to fairness. The invocation of this norm is a significant departure from previous decisions, although in this context too, Barak drifts back into consequential concerns. In the later part of the opinion, he notes again that the principle of equality carries relatively little weight with religious members of Israeli society, because it clashes directly with considerations of religious freedom for the Yeshivot students.[348]

Thus we see that the reasoning in the Israeli cases differs from that in the US and German cases in the relative unimportance of appeals to norms of fairness or equality. Though the principle of fairness is invoked in the recent deferment case, in the Israeli cases, this is the exception rather than the norm. Once again, this important difference can be explained by the tangible security implications of individual cases before the Israeli Court, when generalized, as they readily would be.

4. Conclusions

We have seen that, in spite of the differences between grounds for obligations in Germany, the United States, and Israel, in all three countries, military obligations are defended along particular lines. Justices do not say that individuals should serve because they have

[348] *Rubinstein and others* v. *Minister of Defense*, H.C. 3267/97; *Ressler and others* v. *Minister of Defense*, H.C. 715/98, December 9, 1998.

promised to obey or because of a natural duty of justice. The fact that particular grounds are regularly *not* appealed to indicates their irrelevance to questions of obligation. Thus it is striking that the justices regularly connect up specific obligations with correlative benefits individuals receive. An idea of reciprocal obligations is central to arguments in all three countries. Individuals should serve because they benefit from protection the state provides. This is explicitly stated in the US cases and all but explicitly in the German. Though in Israel, this notion is not put forth explicitly, it generally underlies the Court's consequentialist reasoning, which repeatedly ties people's service to provision of defense. We have also seen that in all three countries, the individual's requirements to contribute are supported by norms of equality or fairness. Reasons why this receives relatively little emphasis in Israel have been discussed.

The similarities in the cases support an overall connection between political obligations and receipt of state benefits. In this sense, political obligations are deeply commonsensical. Individual compliance is necessary because particular state benefits are necessary. Were the benefits not necessary, it would be all but impossible to justify requiring compliance. The general principle that is involved—equality or fairness—is directed towards the need to distribute the costs of state services equitably. To some extent, this mode of reasoning is influenced by the nature of judicial decision-making. Particular laws are called into question and so judicial authorities focus on them. Discussion remains focused on particular state benefits and does not rise to the level of general doctrines or deductive appeals. But in spite of this, the moral reasoning of the courts is clear.

As we have seen, in the United States and Germany, connections between state service and individual compliance are directly mediated by the principle of fairness. On this line of reasoning, Jones must comply because it would be unfair of him not to do so. In all likelihood, fairness is invoked in such cases because it is logically required. In a large society, provision of state services does not demand that *all* individuals cooperate; the requisite benefits require general but not universal cooperation. With the compliance of a certain number of individuals *not* required, it would not be possible to argue that any given individual must cooperate, without appealing to a principle of fair distribution of burdens. With most people required to serve, Jones must do so, unless he can demonstrate significant, morally relevant differences between himself and his fellows. For him not to do so would contravene a norm of equal treatment. The role of fairness is circumscribed in the Israeli cases because of the factors already

discussed. Most significant, with military service of large groups directly at issue in particular decisions, security implications were real and so mediation by the principle of fairness less needed. But again, in the Israeli context, concerns of fairness were also present, if less salient.

Thus I believe that there is a large element of similarity between the reasoning of the Israeli and other courts. In all cases, military obligations are of reciprocity, bound up with national security and individual protection. In all cases, these considerations are supplemented by considerations of fairness, strongly in the United States and Germany, although less strongly in Israel, for reasons we have seen. Accordingly, the reasoning of the courts supports the line of argument developed in this work. I return to these similarities in Chapter 11.

In closing, we should note an obvious problem with the argument of this chapter and Chapter 7. Any far-reaching conclusions one would draw require generalization in two senses: we look at only three countries, and at only one particular area of law in each. But as noted above, the three countries are different in important ways and so allow interesting comparisons. Our main justification for looking at military obligations is that they seem to be the most obvious area in which to examine the kinds of moral considerations that interest us. As we have seen in the previous chapter, exhaustive analysis of US Supreme Court decisions shows that this is not only the main area for discussions of political obligations but for all intents and purposes the only one. Still, any conclusions we would draw concerning how the state supports the political obligations of its citizens must have the status of hypotheses, until they have been examined further in other countries and other areas of law.

9
Popular Opinion

Having examined judicial opinions in three different countries, I turn now to another source of evidence, the beliefs of ordinary citizens. Although the moral attitudes in question are complex and resist inquiry through surveys, it is possible to gain insight into how people think through focus groups, backed up by particular survey questions. Appealing to this evidence raises significant problems, both in regard to what we are to make of the evidence itself and its significance. I will present three separate justificatory grounds: (1) that such evidence can contribute to normative arguments; (2) that it can increase government's legitimacy; and (3) that it can have significant practical uses in helping governments increase compliance with the law. The first is the most important for our purposes, and I will concentrate on it in Sections 2 and 3. In Section 1, (2) and (3) are treated more briefly.

This chapter examines questions of a somewhat general nature, whether people believe they have general political obligations and their reasoning for their positions. Chapter 10 presents more particular considerations, concerning the assessment of specific examples used in moral/political arguments. The use of carefully crafted examples is omnipresent in these areas. We will examine particular examples from the political obligation debates and how evidence of popular opinions should affect our interpretation of arguments they contain. I begin with justificatory grounds.

1. Practical Contributions

There are immediate practical reasons for inquiring into people's attitudes on political obligation. Evidence concerning people's beliefs can

contribute to democratic legitimacy and also have significant practical effects.

Many theorists argue that political authorities must be able to justify their use of coercion.[349] The requirement that government provide appropriate reasons, which could be accepted by each citizen at the bar of his or her own reason, is closely related to the idea that government rests on the consent of the governed, that is, hypothetical consent.[350] In spite of the disrepute into which consent theories of obligation have justifiably fallen, this is probably one reason for their continuing appeal. According to John Rawls, the 'liberal principle of legitimacy' is as follows:

> [O]ur exercise of political power is proper and hence justifiable only when it is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in the light of principles and ideas acceptable to them as reasonable and rational. This is the liberal principle of legitimacy.[351]

Rawls's conception of liberal legitimacy is bound up with public justification. The moral principles according to which society is conducted should be able to be stated openly and widely accepted. In his first foray into social contract theory, in 'Justice as Fairness,' written more than forty years ago, Rawls rooted his conception of justice in a conception of public justification along these lines: 'the possibility of mutual acknowledgment of principles by free persons who have no authority over one another.'[352] When this condition is satisfied, people will be able to 'face one another openly and support their respective positions, should they appear questionable, by reference to principles which it is reasonable to expect each to accept.'[353] The idea of a society in which all can publicly acknowledge basic political principles is central to Rawls's conception of 'stability' in both *A Theory of Justice* and *Political Liberalism*.[354]

[349] The argument here is indebted to D. Miller, *Principles of Social Justice* (Cambridge, MA: Harvard University Press, 1999), Ch. 3.

[350] See H. Pitkin, 'Obligation and Consent, I,' *American Political Science Review*, 59 (1965); J. Waldron, 'Theoretical Foundations of Liberalism,' *Philosophical Quarterly*, 37 (1987).

[351] J. Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) [Rawls, Political Liberalism], p. 217.

[352] J. Rawls, 'Justice as Fairness,' *Philosophical Review*, 67 (1958): 179.

[353] *Ibid*., p. 178.

[354] J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) [Rawls, *Theory of Justice*], pp. 177–80; *Political Liberalism*, pp. 35–40, 65–6; see also G. Klosko, *Democratic Procedures and Liberal Consensus* (Oxford: Oxford University Press, 2000) [Klosko, *Democratic Procedures*], Ch. 1.

The principles of justice Rawls develops are intended to be implemented in society as a whole and generally accepted. Part of his argument for his particular principles is that, publicly known, they will be more successful in generating public support than other possible principles.[355] I believe that a similar publicity condition should hold in regard to principles of political obligation. These too should be publicly known and capable of generating support. Other things being equal, particular principles will be more successful if they better coincide with moral views that people already hold. This claim should be qualified, in that public principles should not reflect just any beliefs that people hold. As Rawls argues, liberal principles should reflect 'reasonable' beliefs, though I construe this notion more broadly than Rawls does.[356] In addition, the beliefs in question should be consistent and systematically developed, in accordance with the method of reflective equilibrium, as discussed in Chapter 7.

If we accept contentions along these lines, then we should see how knowing the public's beliefs is beneficial to governments. This could help them craft arguments to which the public would respond. An extensive range of beliefs and attitudes about political obligation and other similar moral subjects are expressed in the literature. But on the whole, these are based on views of philosophers alone, which, for the purpose of public justification, are not enough. As I have noted, as a group, philosophers are few in number and not representative of society as a whole. It cannot be taken for granted that their intuitions accurately reflect those of the larger society. We cannot rule out the possibility that views commonly held in the philosophical community are largely rejected in the wider world.

As part of its task of publicly justifying moral principles, then, governments should go beyond the beliefs of philosophers and attempt to find out what people actually believe. In *Political Liberalism* Rawls argues that justification should proceed from a core of 'intuitive ideas' present in the public culture of liberal societies. Rawls, however, is subject to criticism for not firmly grounding his theory in the actual facts of such societies.[357] Questions about the particulars of Rawls's method notwithstanding, I believe it is important to connect specific normative principles of political obligation and other moral

[355] Rawls, *Political Liberalism*, pp. 177–80.

[356] See Klosko, *Democratic Procedures*, Ch. 2.

[357] *Ibid.*, Chap. 7.

subjects to the beliefs of democratic citizens. Construals of what 'we' think presented by political philosophers are not an adequate substitute.

Knowing what people think about their moral requirements to obey the law can also help increase their willingness to obey, by helping governments to appeal to them. This connection is especially clear in regard to reasons why people pay their taxes, perhaps the most onerous demand of modern liberal citizenship. If it could be established that people generally believe they should pay their taxes for specific reasons, governments could appropriately tailor their communications. In addition and perhaps more significant, if a given government falls short in some area that is important to people, it could modify its policies to correct the problem.

Tax compliance has been extensively studied.[358] Scholars have mainly been interested in factors influencing decisions to pay or not. While moral principles to which people adhere have received little direct attention, studies have cast some indirect light on them as well. Throughout the literature, it is generally believed that fear of punishment is the primary determinant of tax behavior. This is viewed as a self-evident truth, simply assumed by many scholars. But it has also been confirmed by empirical studies.[359] Among additional factors influencing compliance, moral concerns are significant. People have been consistently found to be more willing to pay their taxes if they believe that the system is fair and that other people are also paying. For instance, a 1974 poll conducted by Spicer and Lundstedt showed strong connections between propensity to resist paying taxes and perceptions of inequity, especially of extensive tax avoidance by the affluent.[360] These results were confirmed by Spicer and Lee Becker's finding that people who believe they are victims of fiscal inequity are more likely to try to avoid paying taxes than people who believe they benefit from inequity.[361] The effects of perceptions of fairness and unfairness are summed up by John Carroll: 'the sense of fairness is very important for maintaining the legitimacy of taxpaying.' When people think the tax system is unfair they are far less compliant than

[358] For a useful overview, see J. Andreoni, B. Erard, and J. Feinstein, 'Tax Compliance,' *Journal of Economic Literature*, 36 (1998).

[359] For example, P. Webley et al. *Tax Evasion: An Experimental Approach* (Cambridge: Cambridge University Press, 1991).

[360] M. W. Spicer and S. B. Lundstedt, 'Understanding Tax Evasion,' *Public Finance*, 32 (1976).

[361] Spicer and L. Becker, 'Fiscal Inequity and Tax Evasion: An Experimental Approach,' *National Tax Journal*, 33 (1980).

when they believe the system is fair.[362] Along similar lines, researchers have noted consistent correlations between people's own behavior and their perceptions of the behavior of others; those who comply with the law are more likely to believe that other people do so as well.[363]

Although these findings cast little direct light on citizens' moral principles, the policy implications are important. In order to bolster compliance with largely voluntary income tax systems, governments must reform their systems to counteract widespread perceptions of unfairness. According to a 1986 US Treasury Department report supporting extensive tax reforms, the system was 'perceived to be so unfair that taxpayer morale and voluntary compliance have been seriously undermined.'[364]

The implications here can be extended. Evidence concerning specific moral principles to which citizens of a given country adhere can also contribute to shaping government policy. For instance, if it is found that taxpayers apply norms of fairness in reasoning about how they should behave, this could lead officials to make sure their tax system is more fair—or at least, can be made to appear so. If, in accordance with the principle of fairness, taxpayers are found to reason that they should not be required to comply if other people are not doing so, then again, governments may be encouraged to enforce general compliance—or at least the appearance of it.

2. Contributions to Normative Arguments

We turn now to the important subject of what knowledge of people's opinions can contribute to normative arguments. I should begin by noting that this is an area without hard-and-fast rules. The implications of such evidence cannot be settled in the abstract; in large part, what we should make of it depends on circumstances. If there is consensus among political philosophers on some issue and there is little reason

[362] J. Carroll, 'How Taxpayers Think about Their Taxes: Fairness and Values,' in J. Slemrod (ed.), *Why People Pay Taxes: Tax Compliance and Enforcement* (Ann Arbor: University of Michigan Press, 1992), p. 47.

[363] Y. Song and T. Yarbrough, 'Tax Ethics and Taxpayer Attitudes: A Survey,' *Public Administration Review*, 5 (1978); Carroll describes this as 'one of the most consistent findings in survey research about taxpayer attitudes and behaviors' (*ibid.*, p. 47).

[364] US Department of the Treasury, *Tax Reform for Fairness, Simplicity, and Economic Growth, the Treasury Department Report to the President, Summary of Proposals* (Washington, DC: n.d.), p. 1. Unfortunately, the reforms implemented in connection with this report have since largely been undone.

to think that the wider public disagrees, then we will normally have little reason to look beyond the views of philosophers, and evidence of ordinary people's beliefs—to which I will refer, nonpejoratively, as 'ordinary opinions'—will be of relatively little interest.[365] However, if there is entrenched disagreement in the philosophical community and/or reasons to believe that the views of philosophers are at odds with those of the public at large, then ordinary opinions could well become relevant. At the present time, there is of course widespread disagreement about political obligation. Positions advanced have different strengths and weaknesses, which are presumably weighed differently by different theorists. Under these circumstances, knowledge of ordinary opinions can contribute on a number of fronts.

Appeals to ordinary beliefs or intuitions appear to function in philosophical arguments in two main ways. Consider a recent remark by Martha Nussbaum in a commemorative essay on Rawls: 'Both in *A Theory of Justice* and in subsequent work, Rawls, like Kant, has held that the moral judgments of ordinary people are an essential starting point for good political deliberation.'[366] As a claim about Rawls's procedure, I take this to be obviously true and believe we should distinguish two ways in which appeals to common beliefs function: (1) in reference to areas of agreement within which moral arguments can be developed; (2) as considerations supporting particular conclusions. As it seems to me, the sense that Nussbaum has in mind is (1), which is consistent with Rawls's practice. Rather than basing his arguments on claims about what people in general believe, Rawls is interested in being persuasive to his individual readers. He argues that moral justification must proceed from premises that different parties to a given discussion accept.[367] But he more or less assumes that a full account of the intuitions of one individual will coincide with those of others, and so that his own intuitions will be shared by his readers. He says that he 'shall not even ask' whether the principles of justice he outlines would be the same as those put forth by other people.[368] Thus I believe 'the moral judgments of ordinary people' are important to

[365] This is not to say that such information would be valueless. But given limited time and resources, collecting it would be a relatively low priority.

[366] M. Nussbaum, 'The Enduring Significance of John Rawls,' *Chronicle of Higher Education*, July 20, 2001, B8.

[367] J. Rawls, 'Justice as Fairness: Political Not Metaphysical,' *Philosophy and Public Affairs*, 14 (1985), 229; 'The Idea of an Overlapping Consensus,' *Oxford Journal of Legal Studies*, 7 (1987): 6; *Political Liberalism*, p. 9.

[368] Rawls, *Theory of Justice*, p. 50.

Rawls, but mainly because a given reader who does not share Rawls's premises is unlikely to be persuaded by his arguments.

If we accept this account of Rawls's intentions, we can see that he would benefit from finding out what ordinary people believe. If he wants his arguments to have purchase beyond the philosophical community, it would help him to know what nonphilosophers think. Because philosophers are a distinctive and unrepresentative group, it cannot be taken for granted that arguments that appeal to them will also appeal to the wider public.

In addition to concerns along these lines, evidence of ordinary beliefs is relevant to the persuasiveness of moral arguments. To take a familiar example that bears on political obligation, in his essay, 'Of the Original Contract,' Hume presents a still devastating critique of consent theory, based on the fact that people are not aware of having consented. Since consent is an intentional act which must be performed knowingly, people cannot have consented unless they are aware they have done so.[369] In this case, evidence of what people think is relevant to a specific factual circumstance, whether or not people have performed acts of consent. This might appear to be a special case, because political obligations based on consent require intentional actions, but something similar is true of gratitude theories of political obligation, which depend on feelings that people are supposed to have and wish to express.[370] Information as to whether the relevant feelings are in fact widespread is crucial for this theory.

Along similar lines Simmons criticizes the principle of fairness on grounds of generality. He claims that, in order for citizens to 'accept' public goods, they must have specific attitudes. Most important, they must believe that the goods are worth their costs and that they are provided through the cooperative efforts of their fellows.[371] Simmons argues that the requisite beliefs and attitudes are not widespread. Many citizens do not think much about the benefits they receive. Some do not believe they are worth their costs, while others regard the benefits 'as purchased (with taxes) from a central authority, rather than as accepted from the cooperative efforts of our fellow citizens.'[372] These are straightforward claims about the beliefs of democratic citizens.

[369] D. Hume, 'Of the Original Contract,' in E. Miller (ed.), *Essays: Moral, Political, and Literary*, rev. edn. (Indianapolis: Liberty Press, 1985).

[370] A. D. M. Walker, 'Political Obligation and the Argument from Gratitude,' *Philosophy and Public Affairs*, 17 (1988).

[371] A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principles*], p. 132.

[372] *Ibid.*, pp. 138–9.

Evidence as to whether Simmons's claims are true would obviously affect our assessment of his argument.[373]

I believe that evidence of ordinary opinions can play a wider role. In particular, such evidence can can serve as a check on the views of political philosophers. I am not making the strong claim that such evidence should be determinative. Rather, it should be *a consideration* in assessing the force of particular arguments. Once again, the amount of weight we should accord it depends on circumstances.

My defense of common opinion follows J. L. Austin's familiar justification of arguing from ordinary language in 'A Plea for Excuses.' Austin claims that ordinary language is not the 'last word' on the questions he examines, as 'it can everywhere be supplemented and improved upon.' But it should be regarded as the *first word*:[374]

> [O]ur common stock of words embodies all the distinctions men have found worth drawing, and the connexions they have found worth marking, in the lifetimes of many generations: these surely are likely to be more numerous, more sound, since they have stood up to the long test of the survival of the fittest, and more subtle, at least in all ordinary and reasonably practical matters, than any that you or I are likely to think up in our arm-chairs of an afternoon—the most favored alternative method.[375]

My claims for ordinary opinion are along similar lines—though not as strong. Basically, I believe that lived experience provides a test for moral theories. If people generally arrive at similar conclusions about some range of moral phenomena, we should regard their conclusions as common sense on that issue. Their views are especially worth considering, if the reasons with which they support them are plausible, even more if they resemble developed philosophical opinions. Once again, how much weight we should accord ordinary opinions depends on a number of factors, including the degree of consensus they exhibit, whether agreement is among different kinds of people, with different demographic and socioeconomic backgrounds, and the state of opinions in the philosophical community. If philosophers generally agree on a particular position, this strongly suggests that the weight of arguments supports it. Thus ordinary opinions are of greater interest

[373] For some empirical evidence that tells against Simmons's view, see Klosko, 'The Principle of Fairness and Political Obligation,' *Ethics*, 97 (1987).

[374] J. L. Austin, 'A Plea for Excuses,' in G. Warnock and J. Urmson (eds), *Philosophical Papers*, 2nd edn. (Oxford: Oxford University Press, 1970), p. 185 (emphasis in original). I am indebted to Colin Bird for suggesting the relevance of Austin's claims.

[375] *Ibid.*, p. 182.

when philosophers disagree, especially if there are developed lines of argument on different sides of the issues in question, with some theorists believing that arguments for one side are more persuasive, while others prefer those for the other side. Under such circumstances, what ordinary people believe can be a consideration—perhaps a strong consideration—in favor of one line of argument over others.

One can doubt if ordinary opinions should receive this amount of moral weight. We can presume that ordinary people have not thought about moral questions as carefully as philosophers have. So why should we pay attention to their views? Along similar lines, one could argue that we are interested only in views that are supported by the strongest available arguments. The views of nonphilosophers are worthy of attention only if they are so supported, and if they are, it is the supporting arguments that concern us rather than the fact that people hold them.[376] In response, I do not claim that nonphilosophers have fully developed, self-conscious moral opinions. But opinions of this kind are not necessary. In the cases that interest us, we are concerned with people's general approaches to their experience, the nature of their overall moral responses. Such matters require relatively little abstract reasoning. They are far removed from assessing some proof in Plato's *Parmenides* or Rawls's arguments for the difference principle. Proofs like these are analogous to abstruse factual matters. In such cases, appealing to the opinions of people who do not know the facts is a waste of time. However, the general reflections that concern us require relatively little abstract reasoning. I believe the evidence of the focus groups we will examine indicates that people are generally thoughtful about issues that concern them, that their reasoning is well above whatever threshold is required to take it seriously. In the final analysis, these claims must be verified. We will not be able to decide how much weight ordinary opinions should receive until we can assess them and their supporting arguments and see how widely they are shared. I believe that ordinary opinions on the relatively specific matters discussed in Chapter 10 should receive more weight than on the general concerns discussed in this chapter—for reasons we will see. But as we will see, the consistency of views on general questions and the similarities between what people say and familiar philosophical views creates a strong prima facie case for their importance on these general matters as well.

[376] For discussion of this point, I am indebted to Steve Wall.

3. Ordinary Opinions on Political Obligations

The evidence I discuss is drawn from a series of focus groups. In all, ten focus groups were conducted between 2001 and 2004. Six were conducted in a university town in a southern state; two of these featured nonfaculty university employees, two undergraduate students, and two graduate students. The final four were conducted in a mid-Atlantic state in March 2004. Two featured workers at a high-tech company in the suburbs of a large city. These two groups had five and four participants respectively, generally highly educated. It bears mention that among the first five were an Englishman and an Australian, and in the second group, a Russian. The remaining two groups featured, respectively, three and four part-time restaurant workers in a small town in the same state. These participants were younger—late teens or early twenties—and less educated, though each of these group contained one college student (see Table 9.1).

Table 9.1 Basic information on focus groups[377]

Date	Participants	Facilitator
March 26, 2001	9 University staff members,	Wood[378]
	nonfaculty, non-PhD	
April 23, 2001	6 University staff members,	Wood
	nonfaculty, non-PhD	
April 30, 2001	5 undergraduate students	Klein and Klosko[379]
January 21, 2002	5 students, mixed graduate	Klein and Klosko
	and undergraduate	
March 4, 2002	3 undergraduate students	Klosko
August 27, 2003	7 graduate students	Klosko
March 25, 2004	5 high-tech workers	Klosko
March 25, 2004	4 high-tech workers	Klosko
March 26, 2004	3 restaurant employees	Klosko
March 26, 2004	4 restaurant employees	Klosko

[377] A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), p. 193.

[378] *Ibid*., pp. 198–99.

[379] For discussion of the reasoning in such cases, see G. Klosko, 'The Moral Force of Political Obligations,' *American Political Science Review*; 84 (1990).

All ten groups began with some warm-up questions about whether people obey the law, and if so, why. Discussion then moved from factual issues concerning how people do behave to whether and why they should obey. The facilitator asked the group members to imagine a hypothetical other person who did not obey the law and felt that he was not doing anything wrong. Respondents were asked if this person was in fact not doing anything wrong and the relevant moral considerations. As reasons emerged, the facilitator probed in order to sharpen responses. Discussion moved on to vignettes, to which subjects were asked to respond. Different vignettes were employed in different groups. Chapter 10 will feature detailed examination of three vignettes that were discussed systematically by the final four groups. In each group, discussion ranged from approximately forty-five minutes (in the later groups) to about an hour and fifteen minutes (in the earlier ones).

Throughout all ten focus groups, facilitators were careful not to mention or indicate their preference for any particular position in the debates over political obligation. They tried to allow the discussions to proceed with as little guidance as possible.[380] Although there was a good deal of irrelevant discussion and movement back and forth between different questions, clear views emerged, and there was striking similarity between the course each discussion took and between the views that were generally assented to.

I will examine the evidence systematically. With seven focus groups, this might become repetitive. However, as I have noted, repetitiveness,

[380] Transcripts are available from the author, upon request.

that is, similarities between groups, is an important consideration in assessing the evidence. Discussion in this chapter is based only on groups 4–10. The first two groups were highly preliminary, to provide experience with focus groups and techniques for leading them. Discussion was much less focused than in the later groups, and so it is more convenient to concentrate on the later groups. However, I should make it clear that what was said in groups 1 and 2 was generally consistent with the later groups. There were no obvious or significant differences, and I am not excluding them in order to influence my conclusions. Group 3 was also consistent with later groups. It too will not be discussed, but this time because of technical problems, which made it impossible to transcribe the proceedings properly. Large parts of the discussion are unintelligible.

I am most interested in how discussion in the focus groups bore on two main questions: whether people believed they had political obligations, and how they thought about this subject. I will examine the topics in succession, group by group. Discussion of the first topic was briefer than the second. Discussion of whether people believed they had political obligations led immediately to the reasons for their views, which are discussed at greater length, in Section 3.1. I should note that reporting abbreviated accounts of what was said in each focus group leaves room for a good deal of subjective judgment. In the following accounts, I have attempted to report the clearest and most explicit statements on the questions under discussion, thereby representing what was most clearly expressed in each group.

3.1 The Existence of Political Obligations

Group 4. As was the case with all focus groups, this one, comprised of five students, mixed graduate[381] and undergraduate students, began with a discussion of whether people *do* obey the law. Participants remarked immediately that not all laws are obeyed. People regularly disregard minor laws:

> 4.1. [382] Female: I would say most people obey the law most of the time but most people don't obey the law in the sense that either speeding or either minor infractions, most people would be perfectly willing to do. Jaywalking, other stuff.

[381] Kate Wood was a staff member at the University of Virginia Center for Survey Research. She was commissioned to organize and conduct the initial focus groups and to instruct Klosko and Klein on how to do this for subsequent groups.

[382] David Klein is a member of the Department of Politics, University of Virginia. Due to problems with the recording for this group, this discussion could not be fully transcribed.

Minor laws are obeyed because of fear of the consequences of being caught violating them. The consequences of violating these laws are relatively slight, and group participants believed they are violated regularly. Nonminor laws concern matters such as 'Murder, stealing, grand theft, of course' (4.4, Male 3). These involve 'some sort of moral ramification' (4.2, Male 2). By this, Male 2 apparently meant that violating these laws has severe consequences.

The distinction between laws that people do and do not obey is important because it sensitized focus group participants to a similar distinction in regard to the moral question whether people *should* obey. This called forth a similar distinction between laws that are acceptable to violate and others that are not. Participants saw few if any problems in violating laws intended to regulate private conduct on moral grounds. In regard to such a law:

> 4.2–3 Female:…and people are aware of it, but they totally disregard it because (a) they don't think that there's anything morally wrong with it, and also they really don't think that they're going to be busted for it. And I think underage drinking, same type of things. Like, people see it going on so much, fake IDs that they think that the consequences aren't that bad, it's not that stigmatized, and that they can get away with it.

In assessing the distinction between laws that people should and need not obey, we should recognize that, in giving examples of the latter, as in discussing other laws that do not have to be obeyed because of extenuating circumstances, participants tacitly assume that, in the absence of such circumstances, laws should be obeyed. Accordingly, in spite of their attention to exceptional cases, participants were almost unanimous in claiming that it is wrong to violate significant laws. More evidence for this claim, including information on how group members think, will be presented in Section 4, which will concern reasons for people's views. For now, I should note that one member of the group strongly disagreed, claiming that the fact that some action is or is not against the law should have no bearing on how one thinks about it:

> 4.7. Facilitator:…Do you think it would be okay for you to break the law in most cases?
> Female: I do.
> Fac.: I'm sorry?
> Female: I said I do.
> Fac.: You do think it's okay.

> Female: Yeah, I wouldn't consider it my judgment whether or not I would do it. I would not consider the legality of the action in factoring my decision. If I knew I could get away with the consequences under the law, then when I was making my decision, I would make it like any other decision not weighing that in.
> Fac.: I see, okay, so the fact that it's against the law isn't going to bother you?
> Female: Yeah.

But other group participants disagreed. The exchange continued:

> Fac.: Okay. Other people think the same?
> Female 2: No, no. Because I think that if it's a law, I would take that into account to begin with.

More on this group's reasoning will be seen in Section 4. For now, we should note, first, that this group was unusual in having a committed anarchist. This particular person held the most antiobligation view of all participants in all ten focus groups. In addition, the distinction between laws that it is and is not acceptable to break is important and indicates the oversimplified inadequacy of standard political obligation questions, such as, 'Do you have a moral requirement to obey the law?' Clearly, focus group participants qualified this on the basis of their experience—and required little reflection to do so. One reason frequently cited was people's experience while driving. Virtually everyone speeds, with most people not thinking they are doing anything wrong—within limits. Thus people could not have requirements to obey the law *simpliciter*. Implications will be discussed in Chapter 11. But once again, recognition of such cases, or those discussed in this group, concerning moralistic laws restricting private behavior, does not tell against people's general belief that they should obey laws that do serve useful public functions.

Group 5. Participants in this small group of three undergraduates made a similar distinction between laws that people do and do not regularly obey:

> 5.1. Male 2: Hmm. People obey the big laws and disobey the small ones. I mean, everyone speeds, but very few people go out and rob a bank. I think it's more of a question of magnitude than anything else.

Once again, people obey minor laws only for fear of getting caught and feel no compunction about disobeying them.

> 5.1. Male 1:…Little laws, I mean, like the laws that you're less likely to get caught for will be broken unless you get caught.

As with Group 4, participants held that the little laws are characterized by lack of significant consequences if they are violated. Participants also argued that one should not obey immoral laws; more than this, one has a moral duty to disobey them:

> 5.5. Male 1:…Like, if the law is immoral, then like I think you have like a moral duty to not follow it.
> Fac.: What are examples of immoral laws?
> Male 1: Like Martin Luther King would talk about how the segregation laws were laws that weren't just, so if you're following an unjust law, you're not, or it's better to not follow an unjust law than to break a just one because, he's even said, he even spoke of like a moral obligation to do so.

Noting these exceptions, participants claimed that it is wrong to disobey significant laws—although in this particular case, this view emerged as an assumption that was taken for granted rather than as a claim explicitly stated.

Group 6. The pattern seen in the two groups we have reviewed held here as well. This group was made up of seven graduate students. Participants quickly pointed out laws one is not required to obey. For instance:

> 6.2. Male: No, I don't think you should have blind loyalty to the State. You can always be a conscientious objector. I mean, if no one else is hurt, then, as far as you are aware, I think it is morally fine to object and to not obey.

Feelings were similar in regard to laws such as speeding and underage drinking. Participants did not believe it was wrong to disobey such laws (6.4–5). But the case was clearly different with other, more significant laws. Even though participants believed it was acceptable to speed, this held only up to a certain point:

> 6.6. Female: A huge factor you have to take into consideration—especially between antisodomy laws and violating the speed limit—I think, is the degree to which it infringes upon other people's…Antisodomy laws aren't really affecting everybody else, except the two consenting adults, or whatever, but exceeding speed limits can have disastrous effects if you violate the rules. I think that that is going to be a factor.

The group consensus was that significant laws are to be obeyed. For instance, in regard to tax laws:

> 6.9. Fac.: What about something like tax laws?
> Male: You should pay your taxes.
> Fac.: Why?

> Male: Because it provides benefits to you and everyone else. They are fairly simple laws. The effect of…if you don't want to live in a certain society with taxes, then you have the option to leave. If you don't use services…You can either use these services or not. If you don't, then you choose not to, but you should pay taxes.

Detailed discussion of attitudes towards other laws and reasons for their views will be presented in Section 4.

Group 7. In this group, comprised of five high-tech workers, there was no dissent in regard to the requirement to obey the law. As in the other groups, participants said that certain laws are not covered, most clearly traffic laws (7.1). Aside from this, the question inspired little comment. The overall sentiment was strongly in favor of requirements to obey the law. Thus as one person said in response to a question about moral reasons to obey:

> 7.1. Female: Just a law-abiding citizen. One of the things you do as an American.

The following exchange took place with another participant:

> 7.4. Fac.: Are there reasons that they should [obey the law]? If you see somebody who is not, do you think that this person . . . that it is okay that this person is not obeying the law, or do you think that he is really doing something wrong in not obeying the law?
> Male 1: I get angry, although I am not saying that is rational. If I see someone turning without signaling or swerving excessively on the road, in traffic—because that is where it is obvious, in traffic. If I see someone throwing stuff out of their car, littering, I think if everyone were doing that, would you like that done in your own place? I guess in some respects, when it is thrown, I choose to think about it, but I guess it is not something that I think abut a lot, except when it is obvious and affects you directly.

Once again, more evidence concerning how members of this group think will be seen in Section 4 in regard to reasons for their views.

Group 8. In this group too, also comprised of high-tech workers, the four respondents immediately distinguished between laws people do and do not regularly obey. Participants in this sophisticated and articulate group focused on the need for the distinction. For instance:

> 8.2. Male 4: I think you have to define what you mean by law because I think you have traffic laws. You have laws connected with social intercourse. You have anti-gayness laws. You have all of these different ideas what law could

be. And actually people, too. Who are these people that are breaking or are not breaking the law? So, I just, it's kind of vague, I think. It's not.

Asked to distinguish between laws one should obey and those it is acceptable to disobey, participants articulated clear reasons for moral requirements to obey:

8.3. Male 2: I think we all agree that laws are made to regulate our behavior so that we live a more stable and just, you know, they support the idea of justice.

Another participant's objection to this statement, because of the injustice of laws against homosexual behavior in certain states (8.4), led to clearer formulation:

8.4. Male 3:…there are laws that are imposed so people get along better and to prevent the strong from taking control of the weak and so on.

These laws should be distinguished from others 'that exist to protect what are referred to commonly as special interests' (8.4).

While this group presented reasons why a number of different kinds of laws need not be obeyed, there was no dissent concerning the need to obey the central core. Further examination of their reasoning too will be pursued in Section 4.

Group 9. The pattern we have seen also held in this group, which featured three relatively young and uneducated part-time restaurant workers, though, again, one was in college. Although they were not as articulate as members of the groups we have examined, they expressed similar views. Once again, participants qualified general claims about 'obeying the law.' They distinguished immediately between laws that people do and do not obey:

9.1. Female 2: Mmhm. Speeding is breaking the law and I bet every single person speeds. So…everyone, guaranteed. No matter how much of a saint, or anything, everyone breaks the law.

Grounds for the distinction centered on consequences. The laws that people obey are 'the ones that really matter, the ones that are putting people's lives clearly in danger.' (Male 1, 3.9). Laws with real consequences that should be obeyed include tax laws. After some discussion about what taxes are for, respondents declared that not paying one's taxes is not acceptable:

9.8–9. Female 1: Well it's not fair to everyone else who has to pay their taxes.
Fac.: Um, what do you mean?
Female 1: It's not fair to people 'cause everyone else is paying taxes, but he is not, and he can get away with it, and then…

Male 1: I see it more that, like if he's not paying taxes, then that's money that's not getting funded back into the government, and therefore that affects me, because all those programs aren't going to have the financial backing to support everyone. I see it more as an infringement upon like, you know, society's rights.

Group 10. Discussion in this group, also comprised of restaurant workers—four, one in college—followed the same pattern. In response to whether people obey the law, participants qualified the question: 'Well, uh…it depends on what law like, you're really talking about I mean…like speed limits, people speed all the time, but I mean…' (10.1, Male 3/4) Other laws are of course obeyed, for example, laws against killing other people (10.3). Tax law was raised as an example of a law that people generally obey. With one exception, participants clearly stated that not paying is wrong:

10.7–8. Fac.:…Is he doing something wrong? What do you think?
Female 2: I mean, I guess it's whose opinion.
Male 3/4: I think it's wrong.
Female 1: Yeah, I think it's wrong.
Male 3/4: Very wrong.
Fac.: Yeah just, go around. And again, I'm just interested in what you think. So [Name A], what do you think? Is he doing something wrong?
Female 1: Yeah, I would say he's doing something wrong. Not paying your taxes, I think that's doing something wrong.

To some extent, Female 2's ambivalence on this question was a result of her lack of experience with the tax system:

10.8. Female 2: I really don't understand, because I don't pay taxes. Like when I do my taxes I get money back.

As with other groups, further information on the attitudes of participants in this group will be reviewed in Section 4, in connection with the reasons for their views.

3.1.1. Conclusions

Almost without exception, participants in the seven focus groups we have looked at believed it is wrong to disobey the law. Although this position was not always stated explicitly, it was implicit in attempts to identify laws that one is *not* required to obey. This is consistent with the survey evidence on questions of political obligation. Perhaps the most detailed and best-known study is Tom Tyler's *Why People Obey the Law*.[383] For our purposes, this work is less

[383] Since I conducted six of the seven groups discussed in this chapter and codirected the other (and conducted all four discussed in Chapter 10), there is an obvious possibility that I infected the discussions with my own views and preferences. I believe this was not the case. Not only was I aware of this possibility and so made an effort to avoid it, but I believe the transcripts support a general claim of noninfluence. For instance, I spent a good deal of time presenting considerations against fairness explanations, when they were presented—in order to learn more about the reasoning behind them—and never, to my knowledge, directly argued in favor of fairness explanations. But transcripts do not show everything. For instance, groups could have been influenced by my facial expressions, tone of voice, body language, etc. However, in the final analysis, strong evidence of noninfluence is the degree of consensus within and between groups. Even if we assume that some individual participants were influenced by my reactions, it is highly unlikely that *all* were.A more important problem is the possibility, inherent in focus group research, that the responses of some participants were influenced by those of other, vocal participants. This possibility cannot be ruled out; on this subject, see L. Sanders, 'Against Deliberation,' *Political Theory*, 25 (1997). Once again, however, the degree of consensus across groups suggest that it was not an important factor.

useful than it might have been. Tyler is a psychologist and interested in factors influencing people's adherence or nonadherence to the law, rather than the moral principles to which they subscribe.[384] Still, evidence he presents provides strong indirect support for the claim that people believe they have political obligations. Respondents for Tyler's survey were 1,575 residents of Chicago, interviewed in 1984. Asked about the statement, 'People should obey the law even if it goes against what they think is right,' 82 per cent agreed. With 'I always try to follow the law even if I think that it is wrong,' 82 per cent agreed. With 'If a person is doing something and a police officer tells them to stop, they should stop even if they feel that what they are doing is legal,' 84 per cent agreed. With 'Disobeying the law is seldom justified,' 79 per cent agreed.[385] Similar results were obtained in other surveys. For instance, G. R. Boynton and his colleagues interviewed 1,001 adults in Iowa in1966. Less than 3 per cent of their respondents agreed that 'if you don't particularly agree with a state law, it is all right to break it if you are careful not to get caught'; more than 94 per cent disagreed. Less than 3 per cent disagreed that 'Even though one might strongly disagree with a state law, after it has been passed by the state legislature one ought to obey it.' More than 93 per cent agreed.[386]

Their results are further confirmed by a simple preliminary survey my colleague, David Klein, and I conducted in 1999. Subjects were 157 undergraduates, in introductory Comparative Politics, American Politics, and Political Theory courses.[387] The questions addressed similarities and differences in attitudes toward moral requirements to obey the law and what we regarded as familiar moral requirements.

[384] Groups 4 and 6 featured graduate students in political theory, some of whom may have been aware of my views and influenced by them. Thus what was said in these groups should bear less weight than what was said in other groups.

[385] References are to focus group number and page number of transcript. Thus 4.1 is group 4, p. 1. Participants are identified when transcribers could distinguish them by voice, although all proper names used are eliminated, for reasons of confidentiality. 'Male 3/4' in Group 10 reflects a case in which two participants had similar voices.

[386] T. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990) [Tyler, *Why People Obey*].

[387] A previous empirical study of the moral bases of political obligations was conducted by W. Reid and J. Henderson, 'Political Obligation: An Empirical Approach,' *Polity*, 9 (1976). Although this piece is innovative in addressing the problem, its approach is notably crude.

Students were randomly assigned to one of five groups. Those in the largest group were presented with the following series of statements:

- I should obey the law.
- I should obey the law, even if doing so inconveniences me.
- I should obey the law, even if doing so inconveniences me greatly.
- I should obey the law, even if doing so causes me great harm.

For each statement, respondents were asked to indicate whether they agreed strongly, agreed somewhat, neither agreed nor disagreed, disagreed somewhat, or disagreed strongly. The responses are summarized in the first column of Table 9.2.

The results strongly support the claim that people believe that they have political obligations, which they view as significant moral requirements, to be complied with even when doing so is costly. These responses are consistent with the traditional view that requirements to obey the law are prima facie requirements, rather than unconditional. Although they are of significant force, they are subject to being overridden by countervailing factors. Nearly 95 per cent of respondents either agreed strongly or agreed somewhat with the statement 'I should obey the law.' Large majorities continued to agree that they should obey the law when doing so inconvenienced them, even greatly. However, perceived obligations fell off dramatically when obeying the law might cause the respondent 'great harm.'

For purposes of comparison, we included questions about familiar moral requirements, in the other surveys in this set. These respondents, who were not asked about obeying the law, saw the same series of statements as those in the 'obey the law' group, except that the first phrase in each question was replaced with one of the following:Table 9.2 Political obligations and familiar moral requirements (Figures indicate percentages who either agreed strongly or agreed.)

	Obey law	Keep promises	Help in need	Tell truth	Avoid harm
Unqualified	94.8	94.7	95.0	96.9	100
If inconveniences me	94.8	94.7	85.0	96.9	96.4
If inconveniences greatly	86.2	84.2	70.0	81.3	89.3
If causes me great harm	19.0	15.8	35.0	40.7	35.7
N	58	19	20	32	28

- I should tell the truth.
- If I make a promise, I should keep it.
- I should attempt to come to the aid of someone who is in dire need.
- I should avoid causing harm to others.

We hypothesized that these duties too would exhibit prima facie structures and so that the patterns of responses to these statements would resemble the pattern of responses to the statements about obeying the law. As seen in Table 9.2, they clearly do. The number of respondents in this survey was small, and they were all college students. But if other subjects would respond similarly, the results would provide further support not only for the claim that people believe they have political obligations but also that they view them as similar to familiar moral requirements.

On their face, the surveys I have summarized provide good evidence that people believe they should obey the law. However, as we have seen, there are reasons to be skeptical about these responses.[388] As our focus group evidence indicates, people generally do not obey *the law* or believe they do wrong in not doing so. They identify various laws as useless—because they serve no important function, disobedience of which has no adverse consequences—and others as not justified or even pernicious, on moral grounds. Only when these exceptions are taken into account do participants say that laws should be obeyed and claim that they obey them. On the basis of focus group evidence, I think it is likely that further probing of the views of survey respondents who agreed that 'I should obey the law' would bring forth distinctions between different kinds of laws.

I believe that regular appeals to distinctions between laws one need and need not obey tell us something important about political obligations. Participants' belief that laws without consequences need not be obeyed implies a connection between consequences and reasons for obedience. If this connection is generally supported, it could tell against theories of political obligation that do *not* rest on consequences. These include theories based on consent and natural duties of justice. Theories based on membership and fairness provide more complex cases, as we will see in Sections 4 and 5.

[388] Tyler, *Why People Obey*, p. 45. Responses on similar questions in a second wave of interviews (N = 804) were similar; see *ibid.*, p. 46. Two additional questions, with response rates of 74 per cent and 69 per cent are included by Tyler, *ibid.*, p. 45. In the latter of these, 69 per cent of respondents agreed with: 'It is difficult to break the law and keep one's self respect.' (p. 45). I view this question as unclear, because it raises the troublesome issue of self-respect.

4. Reasons

Reasons the participants expressed as to why people should obey the law were generally consistent across focus groups. Participants focused on three ideas, which they interlinked: benefits laws provide; the unfairness of disobeying while expecting other people to obey; and membership in the political community. When participants in a given group raised concerns of membership, they were asked what they meant by this. In regard to membership and moral arguments generally, participants had difficulties formulating clear lines of reasoning. Although the arguments they advanced fell into recognizable patterns that were similar from group to group, participants frequently had trouble distinguishing between different moral grounds, even when pressed to do so. Once again, I review group discussions systematically.

Group 4. Once again, this group consisted of five students, mixed graduate and undergraduate. As I have noted, with one exception, participants professed belief in general political obligations, subject to the exceptions discussed in Section 3.1. When discussion turned to the reasons for these requirements, the first response offered was a version of tacit consent:

4.8. Female 2: It's something you're assenting to by living in the society you're living in.

4.8. Female 2: '…You have assented to it in some way.'

This idea did not resonate with the group. When discussion returned to it, the person who had articulated it moved away from it, invoking other concerns.[389] What the group fastened on instead was a

[389] G. R. Boynton, S. Patterson, and R. Hedlund, 'The Nature of Support for Legislative Institutions,' *Midwest Journal of Political Science*, 12 (1968): 166. For brief discussion of additional studies, see Tyler, *Why People Obey*, p. 31.

generalization argument. In some sense, you should not disobey, because of what would happen if everyone behaved similarly:

> 4.9. Male 1: Well, the problem becomes if, if we start choosing which laws you follow, which ones you don't follow, then that just seems to get you…because if everybody starts to do that, where would we be then? I mean, there are standards that have to be enforced. If you pick and choose, it just seems to make a nonsense of the whole idea.

Concerns along these lines were returned to by several participants:

> 4.13. Male 3: There were…reasons for it, I think, and one is the idea that one of the benefits of law is to have a stable, predictable society, where everyone drives around 55 or doesn't murder on a daily basis for a cow next door. If I make an infraction on one of these laws, it may be of little significance for me to make this one infraction, but thinking about that as a norm for everyone to do an infraction, then I think you would, being the risk reversed, I would take that into account and say, would I expect this of others? And then my answer would be 'no,' so it would be reciprocal to me and I would say 'no' to myself.
>
> Fac.: Could you just do that last part again? I'm not sure.
>
> Female: Yeah.
>
> Male: Sure. So, in deciding whether or not to break a law, I would ask that question, what if everyone else broke this law or broke other laws at their own discretion? I think the cost would be too high. So I think that would definitely factor into my decision.

The main consideration underlying a generalization argument is appeal to the consequences of disobedience, if this becomes general. One person should not disobey, because this might lead others to disobey, the results of which would be damaging to society. As we saw in Chapter 7, arguments along these lines are frequently called 'snowball arguments.' It is important to recognize that such arguments are vulnerable on empirical grounds. In a large society, it is unlikely that one person's disobedience will lead to widespread disobedience. That it would is not impossible and cannot be ruled out. But special circumstances would have to apply, for example, disobedience by especially prominent people, or if for some reason the disobedience in question

attracted significant public attention. Although such cases are not impossible, they should be regarded as exceptions. It is central to the logic of collective action that, in a large society, specific acts of obedience or disobedience do not affect the burdens or benefits of other members of society.[390] Yet in this group, as in others (as we will see), this fact was largely lost on people. Participants repeatedly appealed to fear that one person's disobedience would spread to others. For instance, this concern was expressed as follows:

> 4.14. Male: Because when I make the infraction, I know we said that we'd offer zero repercussions, but that's not the case really. The case is that [Name C] might see me or will see me and so forth and someone else, my parents, might find out, my neighbors and whatnot. Someone will know if I continuously make infractions and being that I find that acceptable, and they see that acceptable to me, I think it could spread. For others to say, 'well I guess he got away with it' or 'he's doing it.'

In this group, as in others, members resisted arguments that snowball effects are improbable, on empirical grounds. For instance:

> 4.14–15. Female: But if you knew that no one else would see, like, in the middle of the night's thing, then you would be okay with it?
>
> Male: I guess one question that's raised is whether we act as autonomous agents or whether we act as agents within a sort of a context and your position seems to be that our actions, whether we like it or not, affect other people around us.
>
> Male: Yeah, I know we're operating on a hypothetical where we would have zero repercussions, where nobody would know, but to me that's not realistic.
>
> Female: But it is realistic. I mean there's obviously some cases where you could break the law, like he was saying, in the middle of the night with no traffic. You come upon a red light. No one's going to know. There are some cases which you could know.
>
> Male: Well that's hypothetical again. I mean, there could be a camera there. You could file your taxes and not file them.

In response to repeated attempts to consider cases in which there would be no detectable consequences from one person's disobedience, this participant responded that such conduct would still be wrong. If there were no consequences, the act in question should be viewed as unfair:

> 4.17. Male:…Even though it wouldn't be much, I mean if we have an 8-million-piece pie and the guy's only taking a crumb, like you said, so

[390] This survey is included in D. Klein and G. Klosko, 'Political Obligation: The Empirical Dimension,' paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.

what? But I'd take it the other way. I'd look at the neighbor and I'd say, 'Damn you, you're not doing your part,' and then I'd think reciprocally. What if I was watering my lawn and everybody's lawn is dry as heck and mine's green?

Even here, one will note, noncompliance has visible consequences. Consider the following exchange:

4.29. Fac.: Yeah, but that's so counterfactual. It's really so counterfactual that you would have any effect that we can really dismiss that kind of case as an outlier. A real case is one in which you literally, I hate to say this about all of us, that in a society of 260 million people, what we do in many cases has no effect whatsoever on the welfare of the country as a whole. And again, you can't detect it. If you've got a catalytic converter, we've got bad air. You've got a catalytic converter whether you, [Name C], use it or not. The best scientist in the world won't be able to tell.

Male: But there's always.

Male: So does it hinge on the detection of whether there's an effect of the thing that you're then supposed to fulfill?

Fac.: Well, that's what we're asking you.

Male: But there's always, like the quantum butterfly. For want of a nail, the shoe was lost, for want of a shoe, the horse was lost, for want of a horse, the…was lost.

Fac.: Yeah, but for want of your using your catalytic converter, nothing will be lost. It's conceivable that something would be lost and we can deal with the kind of things [Name C] is talking about.

Male 1: Using a catalytic converter means that my kids won't use it and someone else in my family and…

Female: And even when you don't go into that, a dollar does make a difference. It goes toward something.

As we will see, in other groups, different sorts of snowball arguments were frequently invoked.

Group 5. In this group, too, comprised of three undergraduates, one participant responded positively to the idea that people should obey the law because they have consented to government (5.9). But group members had a difficult time fleshing this idea out:

5.9–10. Male 3: Well the question to me would be, do you consent to the government just by the fact of being born into the country or taking benefits from the government?

Fac.: So, have you consented to government?

Male 3: Yes, because I have received benefits from the government and also I've voted in elections so I have, in essence, consented to our political system that we have, in general terms.

As one can see, this respondent does not have a clear idea of what constitutes consent to government. He runs together ideas of consent and acceptance of benefits,[391] and additional ideas. According to another respondent, one joins society by absorbing its main ideas:

> 5.10–11. Male 1: I think, hmm, I think by the time you're old enough to have values and to know the difference between right and wrong, by the time you're influenced by the society around you, I think by then you've joined. I don't think necessarily, and that's only, you've joined because you're a part of it in the sense that like, what's around you is a part of you now, and you can't really, you can't really stop that.
>
> Fac.: So, but it's not when you're born. It's somehow during the process of becoming an adult that this happens to you?
>
> Male 1: Yeah, or the point where like a society has inflicted its values or has impressed a certain way of thinking on you is when you've joined that society.

Additional possible sources of obligations were discussed. While the idea that political obligations stem from gratitude had little resonance (5.11–12), participants were more interested in the idea that obligations stem from membership. But once again, they had difficulty saying exactly what it is to be a member of society. Participants argued that to be a member is to receive benefits from society, or more simply, to live there.[392] In spite of their inability to become clear on this idea, even with repeated probing from the facilitator, the idea continued to be attractive to them:

> 5.18. Fac.: Does any of this have any implications or ramifications in regard to obeying the law? Because you're a member, you should obey the law? Because of the attachments you're talking about? See, you obviously see membership as tied in with these attachments that you have to a certain place or a certain culture, right?
>
> Male 3: Yes. That would be the main reason, I would say, for obeying the law.

Another participant attempted to turn this around, suggesting a reverse relationship:

> 5.18. Male 2: What if you're aversant and you say that I'm a member of society because I obey the law?

[391] L. Green is also skeptical, for other reasons ('Who Believes in Political Obligation?' in J. T. Sanders and J. Narveson [eds] *For and Against the State* [Lanham, MD: Rowman and Littlefield, 1996], 309–15); see Ch. 1, pp. 13–16.

[392] 4.12–13. Fac.:…But, I'll just actually use the example you brought up, I'm sorry, [Name D].Female 2: [Name D].Fac.: [Name D]. That you brought up. You said at [University U], there's an honor code, right? And you said you chose to come here. Well, what if somebody says, my country, there's one thing, when I went to school at [University U], I followed the honor code faithfully because I had chosen to go there. But, this country I live in, or maybe let's make it someone who came from another country and now they've gone back so we don't use the US. We would want you to have just kind of an abstract picture. They're in this other country and they say, 'I was born here. I didn't choose to be born here. My friends and family are all here. I don't speak other languages very well and I can't very well leave, so I can choose it. It wasn't like [University U] that I chose or my friend who goes to [University U] chose and so he had an obligation. So I don't really have an obligation. I don't feel that morally I need to obey the law because I didn't choose to be here.' Do you still feel that there is one, in that case?Female 2: I think that, even in that case, there is an obligation. Yes, you don't choose to be born in a particular place or something but it also depends on the polity. I mean, if it's some place like, I don't know, [Place], since I come from [Place], if it's some place like [Place] where you can influence the laws, where there is a democratic setup, blah, blah-blah, blah-blah, you can choose to influence the law and therefore until you try to do that, you do have an obligation to obey what is already in place. So yeah, I would say, even then, there is an obligation.

Pressed on what is wrong with breaking the law, this respondent raised an additional concern, that not to obey the law could hurt other members of society:

> 5.19. Fac.: … We've looked at different reasons that could be given to Jack [the hypothetical person under discussion]—that's he's consented to government, he should be grateful for the benefits that government has conferred. So what about if our man on the train says that you should obey the law because you're a member of society.
>
> Male 2: Is he hurting other members of his society? If he's not paying his taxes, then, I mean, it's a nice argument to make, but I don't know how convincing it is.
>
> Fac.: So what you're saying is that a more convincing argument would be you should obey the law because you're hurting other members of society?
>
> Male 2: I think that's, yes.

According to another respondent, being a member of society must be supplemented with receiving benefits from society:

> 5.20. Male 3: Yeah, I think you're strongly obligated to obey laws that don't conflict with your personal conscience.
>
> Fac.: But why, because you're a member of society?
>
> Male 3: Yes, and to follow that idea, because I'm a member of society and I receive benefits from the society, so it's in my interest to contribute to the order of the society, not to its breakdown.

When these ideas were followed up, the participant presented close links between being a member of society and receiving benefits from it. Although these are separate notions, according to the participant: '…I would question belonging to a political group or any other group where you receive neither benefits nor have responsibilities' (5.20, Male 3).

This group too responded favorably to a strong connection between obeying the law and benefits supplied by government. Thus, one should pay one's taxes because of government benefits. According to one participant, 'I think that's a reasonable claim to me' (5.22, Male 2). Another participant agreed (5.22, Male 3). With this group too, there was a strong inclination to connect up reasons to obey with consequences of one's actions. Not to obey is to harm society by impeding production of benefits. The facilitator repeatedly pointed out that, in a large society, the consequences of nonobedience are often undetectable, especially if other people do not find out about the nonobedience in question. At one point, a participant argued that if in fact

there are no adverse consequences of nonobedience, then it is not wrong:

> 5.26. Male 1: No. Because if he's not hurting anybody, he's not hurting himself, and what he's doing is so insignificant that it's not hurting anybody, I don't think he's doing anything wrong.

Another participant argued against this reasoning,[393] and Male 1 changed his opinion:

> 5.26. Male 1: Okay, I see what you mean. So you're saying that because he's benefiting from the fact that everyone else is doing it, he should or it's wrong for him to not do it?
>
> Male 2: It's wrong for him to do it.
>
> Male 1: Yeah.

As we saw in Group 4, participants had a strong tendency to generalize one person's own behavior. Even if there are not detectable consequences if one person breaks the law, if everybody does so, consequences will be severe. This line of reasoning of course raises questions about connections between one person's behavior and that of everyone else. When the facilitator argued against detectable consequences, participants still employed generalization arguments:

> 5.24–5. Fac.: … But do these causal connections actually exist in regard to my cheating on the water shortage? It's something I can do, you know, I take a bath instead of a shower. How's anybody going to know if I've taken a bath instead of a shower?
>
> Male 2: Well, if your lawn looks…green, they'll all know.
>
> Fac.: Well yeah, no, not…
>
> Male 2: But you're right, the bath, you know…
>
> Fac.: Well again, is it wrong to do this under these circumstances?
>
> Male 2: I don't really think it's a question of people knowing or not. I think that's kind of the wrong way to look at it. I mean, once again, like, if it's just person who's violating the water rationing, then okay, that's not going to make a big difference. An extra five gallons a day out of the reservoir is not. But if everybody is taking five gallons a day or if half, then that's going to make a difference after a couple of days.

As the discussion continued, participants argued that, even in the absence of consequences, nonobedience is wrong because it is unfair:

> 5.26–7. Male 2: … Like, other people are obeying the law and he is benefiting from that by not. Do you see? I don't know, maybe, I don't know.

[393] M. Olson, *The Logic of Collective Action* (Cambridge, MA: Harvard University Press, 1971), Ch. 1.

Male 1: Okay, I see what you mean. So you're saying that because he's benefiting from the fact that everyone else is doing it, he should or it's wrong for him to not do it?

Male 2: It's wrong for him to do it.

Male 1: Yeah.

Fac.: It's wrong for him to use the extra water?

Male 2: Yeah, to use the excess water.

Fac.: What do you think, [Name A]

Male 3: Well, to rephrase that, you could look at it as he's taking more than his share. Or, I could be tongue-in-cheek here and say that he's violating a manual of Kant, law of universal consequences or whatever.

Fac.: Categorical imperative?

Male 3: Categorical imperative, yes.

Fac.: Yeah, is he taking more than his share?

Male 1: Yeah.

Male 3: Yes.

Male 1 responds that in a case like this, the person violating the rule has 'broken a social contract' (5.27), although, when asked what this means, he was unable to say (5.27).

Once again, we see that participants were not entirely clear in their moral reasoning. The two main ideas invoked for why people should obey the law were a loose conception of membership and a connection between benefits supplied by government and consequences of disobedience, supported by a generalization argument, that is, what would happen if one's own pattern of behavior were followed by everyone else? As we saw, participants had trouble saying what they meant by membership and tied this in with receiving benefits. Participants were similarly unclear on the relationship between receipt of benefits and consequences of disobeying the law. At one point, when the tenuousness of connections between one's own behavior and that of others was pointed out, participants responded in terms of fairness, that it is wrong to take advantage of others' efforts, even if there are no detectable consequences. We should recognize that wrongs of unfairness are distinguishable from wrongs based on the fact that others are harmed by one's conduct, even if the latter is harmful only because he or she leads other people to behave similarly. But although these ideas are distinguishable in theory, participants in this focus group, like those in Group 4, had a hard time consistently recognizing the distinction.

Group 6. In this group, comprised of seven graduate students, discussion of laws that should and need not be obeyed was complicated by participants' ability to name exceptional cases and extenuating

circumstances. When the participants stated that one should comply with tax laws, the facilitator asked why. The first response was in regard to benefits that taxes provide:

> 6.9. Male: You should pay your taxes.
>
> Fac.: Why?
>
> Male: Because it provides benefits to you and everyone else. They are fairly simple laws. The effect of…if you don't want to live in a certain society with taxes, then you have the option to leave. If you don't use services…You can either use these services or not. If you don't, then you choose not to, but you should pay taxes.

As in the groups we have seen, this line of argument was supported by appeal to generalization:

> 6.9–10. Male:…ultimately, I think the question is that you have to understand your role as a citizen and understand that there are certain things you are obligated to do, because if you don't fulfill that role, if everyone doesn't fulfill that particular role, then there are very big problems for society as a whole. Morality isn't possible unless you have certain conditions fulfilled.

There was some acceptance of the idea that obligations are based on consent. These graduate students were familiar with Locke's distinction between express and tacit consent. Accordingly, although one participant said that she had not consented to obey government—'Because at no point in time has the United States sent me a form and asked for my consent to the laws and Constitution of this'—she claimed that she had consented tacitly, 'by deriving the benefits and protections that the United States Government has to offer' (6.12, Female 2). This idea was supported by another participant who claimed 'I think tacit consent is given as soon as you accept benefits' (6.12. Female). Consent was returned to in response to a question concerning what it means to be a 'member' of society:

> 6.15. Female: I see that tacitly, one way or another, all of us in this room have chosen to put ourselves under the jurisdiction of the United States, so, yes, that's the reason we are obligated.

One idea participants articulated clearly was a conception of fairness. Unlike in the other groups we have looked at, participants here appealed to fairness in response to claims about the lack of detectable consequences of their own obedience or nonobedience:

> 6.18. Female: But that didn't answer my point, which was that you're obligated to pay because if you don't, other people have to pay. It is because you're not accepting your fair share.
>
> Fac.: How do you respond to this?

Male: I think that that is along the right lines. As part of a group, you need to play your fair part.

Female: Not freeload.

The facilitator asked if it is wrong for someone not to pay his taxes, even if his nonpayment has no detectable effect on the US Treasury:

6.19. Female 2: But if everybody didn't pay their taxes, why should Jones get to not? Basically, it comes down to whether you believe in the Golden Rule or you don't. If you believe that you can learn to do unto others, if you believe that you expect reciprocal treatment…

In spite of the apparent clarity of this respondent's reasoning, in response to an additional question, she explicated what she meant by the Golden Rule, by invoking an idea of consent and a snowball argument as well as fairness:

6. 19. Female 2: Because, on some level he has consented, as part of a democratic society, he's consented to majority rule. If everyone, like she said—the slippery slope argument—if everyone sees exception for themselves in a democratic society, then the society falls apart. You are under some obligation to obey laws that you disagree with.

When the facilitator made the point that the fact that any given individual's nonpayment has no consequences, another participant argued from fairness:

6.21. Female: But you contribute to the problem. Unless you want other people…the thing is that when you don't pay your taxes, you don't pay your taxes because you're assuming that everybody else will. In other words, you're not treating other people…you're not behaving as you expect everybody else to behave. You expect to be able to behave differently, and so…benefits. You know that if everybody else takes your same approach, you know that it is only by virtue of the fact that everybody else pays that you can get away with not paying.

But as in other groups, arguments from fairness and the consequences of general noncompliance were not clearly distinguished by all participants:

6.22. Male: It always escalates. You would be one person this year, and then more people in the future will learn that 'I can get away with it,' and…

In this group, too, then, appeals to fairness were supported by a snowball argument, although considerations of consent fed into this mix. Still, the clarity with which members of this group articulated norms of fairness bears mention—although, once again, it is possible

that some of these graduate students were influenced by knowledge of my views on political obligation.

Group 7. As the discussions were organized in the remaining four groups, relatively little attention was paid to general political obligations and their underlying reasons, as conversations focused on analysis of the vignettes discussed in Chapter 10. Group 7, once again, was comprised of five high-tech workers, including an Englishman and an Australian. In this group, the idea that one should obey because of consent had no resonance (7.3). When the question was pursued, one group member presented a generalization argument:

> 7.4. Male 1: I get angry, although I am not saying that is rational. If I see someone turning without signaling or swerving excessively on the road, in traffic—because that is where it is obvious, in traffic. If I see someone throwing stuff out of their car, littering, I think if everyone were doing that, would you like that done in your own place? I guess in some respects, when it is thrown, I choose to think about it, but I guess it is not something that I think about a lot, except when it is obvious and affects you directly.

As ideas along these lines were elaborated upon, the group advanced ideas closely related to the principle of fairness. Asked how they would respond to someone who does not pay his taxes:

> 7.5–6. Male 2: I think that he is doing something wrong in that he is not contributing a component of what he has made and what he is—or she.
>
> Female: Because we all do and they are getting away with it. It makes you angry.
>
> Male 1: That is right, because you are sharing the same services. You are gaining benefit from the road system, the lights, electricity, whatever it is that is provided and that you feel that you are paying the taxes for. You feel that somebody who is doing that is not conforming to what your idea is about how people should behave in society.

When the facilitator asked if it is wrong not to comply with the law—tax law—if no one will know whether or not you have paid, the responses were similar to what we have seen in other groups. One participant responded immediately with an argument based on generalization:

> 7.8 Female: What is wrong is that if everybody has that attitude, you are talking tens of thousands…you know, a lot of money there. So, yes, if you have that attitude and everybody else has that attitude, it is significant.

Another participant followed this remark with an argument from fairness rather than the consequences of disobedience.

7.8–9. Male 1: Yes, we have to have a society that functions on the same rules for everybody. Just because one person does it and gets away with it, that does not mean that that is a fair system, because a system has to apply to everybody. So if you are saying that it is fair for one person to do it, you really have to assume that it is fair for everyone. And it is not fair for everyone, because the whole system would break down.

I think in your own mind, fairness comes into it, because you are judging what is fair for you to have to do against what other people in your position should do. You feel that, okay, so you are getting some benefit from these services that you are paying taxes for. In your own mind, you weigh that and you say, 'Well, I think it is justified because I get benefits.' Then you compare yourself to the next person along the way doing the same, and why not, what is their excuse? So in your own mind, there is a comparison going on. There is a fairness of how you exist against how somebody else chooses to exist. You do that when you assess or judge these things.

As I have noted, we should view a fairness argument as more sophisticated than one based on generalized consequences. Fairness does not require empirical connections between the behavior of one person and large numbers of others. Although such connections do exist in particular cases, as a general rule, they require exceptional circumstances.

Group 8. This group too was comprised of high-tech workers, in this case, four, including a Russian. Because participants clearly identified laws that need not be obeyed, discussion of reasons to obey the law was in terms of specific kinds of laws that are in the appropriate category. Thus in response to the question whether it is wrong to disobey traffic laws, one participant replied:

8.4. Male 2: I think we all agree that laws are made to regulate our behavior so that we live a more stable and just, you know, they support the idea of justice.

In response to how people would assess someone who does not pay his taxes, one participant replied in accordance with fairness:

8.5–6. Male 4: Well, I think that there's a certain infrastructure that we live in and we take advantage of, and it's not clear what the particular tax law that he's not…

Fac.: Well, IRS, we're heading into income tax season, and the federal…

Male 4: But he wants to send his kids to school and he wants to take advantage of the roads, I'd say that's not right.[394]

[394] As Locke does, in the *Second Treatise of Government*, Sects. 119–22, in P. Laslett (ed.), *Two Treatises of Government* (Cambridge: Cambridge University Press, 1988); see Simmons, *Moral Principles*, pp. 90–5.

Having agreed that tax laws are justifiable,[395] participants expressed reasons one should obey them as follows:

8.8. Fac.: Okay, let's just push. And again, I'm interested in the underlying reasons. So, why is it wrong not to obey a justifiable law?

Male 2: Well, what's justifiable? We'd disagree that taking out of the common good is, not, um, yeah.

Fac.: Why is it wrong? Why is it wrong?

Male 2: So I mean is this justified?

Male 4: Because it violates a sense of justice.

Male 1: It also violates a sense of the rule of law, which we heard a lot of a few years ago, but to some degree, I guess we all want to believe that we're all equal under the law, whether in fact we are or not, and that there is some sort of order that we can enjoy.

When the facilitator raised the point concerning lack of detectable consequences of nonobedience, in regard to tax law, participants in this group responded very clearly in terms of the unfairness of not obeying:

8.10. Male 1: But collectively there is a victim. That is to say, the group of people who are trying to get away with keeping monies from the treasury are electively creating victims.

Male 2: Even if one person doesn't pay their taxes, there's still a victim in that the victim is everybody else who is paying their taxes. Even though the amount by which they are victimized may be really, really tiny, there still is a victim.

Male 4: It also victimizes the sense of equality. Again, you're in the situation, if everybody's treated equally and you all live up to your responsibilities, people get along reasonably well but as soon as there is the idea based in reality or not that somebody's getting away with something that I have to live up to and they don't, I think you start subtly breaking down the sense of society.

In this last response, considerations of fairness, based on undetectable consequences are subtly conflated with an argument based on consequences. But on the whole, in this group, reasons to obey were clearly grounded on concerns of fairness.

Group 9. Once again, this group was comprised of three part-time restaurant workers. After some discussion of laws that people do and

[395] 5.16. Male 1: I think there is a difference being a Virginian and being an Arizonian because I think you get varying benefits or varying consequences between which, between each, and it also depends, I think like, if you live in Fairfax or if you live in Richmond.

should obey and others they need not, the facilitator asked about the acceptability of not paying taxes. This required some clarification of functions the tax system serves (9.6–8). The immediate response was in terms of fairness:

> 9.8–9. Female 1: Well it's not fair to everyone else who has to pay their taxes.
>
> Fac.: Um, what do you mean?
>
> Female 1: It's not fair to people 'cause everyone else is paying taxes, but he is not, and he can get away with it, and then…
>
> Male 1: I see it more that, like if he's not paying taxes, then that's money that's not getting funded back into the government, and therefore that affects me, because all those programs aren't going to have the financial backing to support everyone. I see it more as an infringement upon like, you know, society's rights.

As one can see, concerns of fairness here were run together with adverse consequences of nonobedience.

Because participants in this group were relatively poorly educated, the facilitator had to do a certain amount of explaining concerning the workings of the US tax system, for example, what withholding is and some rough idea of state and federal income tax rates. He raised the possibility that the reason that people are required to pay is that they have consented to government. The response clearly ran together a number of distinct ideas:

> 9.15. Male 1: I guess he has consented…he's agreed in a way to live here. He can't not obey the law. Because if he can't obey the law, then why couldn't everybody? And if everybody does that, then we have anarchy. So…I don't know exactly what…

Aside from obvious lack of clarity about different grounds for political obligation, one thing to note is the appeal of an argument from generalization. The remainder of the discussion of general reasons to obey the law was unsatisfying, as participants wandered between empirical and normative claims and had trouble distinguishing moral reasons to obey the law and the consequences of being caught not doing so. But as we will see in Chapter 10, their responses became clearer when they were asked to assess particular vignettes.

Group 10. This group was also composed of part-time restaurant workers, in this case, four. As in the groups discussed, participants distinguished between laws that people do and do not obey. The facilitator asked whether it is wrong to disobey laws of the former type, choosing tax laws as an example. Once participants were clear that the question concerned whether it was wrong not to comply, not

whether one could be punished for not complying, the reasons advanced centered on benefits that taxes provide:

10.8. Female 1: Because you use that every day. You know what I'm saying. Like, your taxes goes [sic] to every day life. You know what I'm saying? So if you're not paying it you're not paying…I mean I just think it's wrong. I don't know how to explain it, but…

As in Group 9, participants expressed lack of knowledge about basic features of the tax system. Once these had been explained (10.8–9), participants moved immediately to considerations of fairness. The following exchange concerns a hypothetical case of someone who earns $50,000 or $60,000 a year and does not pay his taxes.

10.9–10 Female 2: Well he could go to jail.

Fac.: OK, so I mean, one reason is…

Female 1: Plus it's not fair if everybody else is doing it, and they're not, then…

Male 3/4: That's what I was going to say, it's not fair.

Female 2: [unintelligible]…all that money here, and why the hell should he get fifty grand a year?

Female 1: Yeah, I mean it's not fair,' cause you know, mostly everybody pays their taxes. So if he's not, that's just one person…it's not fair.

Fac.: What do you guys think?

Male 3/4: Yeah, I was going to say that. I mean, everyone else is going out of their way to pay their taxes. I mean we work, we get money withheld, but we still have to pay taxes. And I mean like, everyone hears about like, school systems going downhill and everything, so I mean…I…that's just…no issue, I think it's wrong.

The facilitator presented a counterargument. Unlike a private club, which you have to join, we did not choose to join our society. Therefore why should we have to pay? The response was in terms of benefits that society provides, and an implicit conception of reciprocity:

10.11. Male 3/4: Well, where's the money going to come from? Choice or not, you live there, and you take advantage of what that money pays for every day, whether you're driving on a road, walking on a sidewalk. If you don't have any money, you know, social programs are there to pay for you, to keep you afloat, so…no matter what, you're taking advantage of tax dollars. No matter what's going on in your life. It's always happening.

The following exchange ensued:

10.11–12. Fac.: So what do you guys think? And again, I'm just interested if you agree, if you don't agree. You know, just to find out what different people think.

Female 1: I don't know, I pretty much said what I had to say about taxes, I mean…

Female 2: Right.

Fac.: Well but [Name C]'s just given us, you know, an argument. He says well, whether or not you've joined, you still take advantages of services that you get from the taxes.

Male 3/4: It's an everyday [unintelligible] thing. Anything you do, I mean… like you said, you're taking advantage of something, so…You should have to give back too.

As in other groups, the facilitator presented another counterargument, based on the fact that the contribution or noncontribution of one person would not be noticed, and participants responded with a snowball argument, based on the adverse consequences of noncompliance:

10.13. Male 3/4: Everybody…one person does it, everybody's going to do it. One person sees you can get away with something…

Female 1: [unintelligible]

Female 2: That's like, um, stealing cable.

Male 3/4: It's like what they used to do on July Fourth on the Mall, they'd smoke up. Where everybody would go down on the mall and they'd all smoke weed. The thought being, there was like eight thousand of us doing it, there's not enough cops to arrest all of us. So if one person starts cheating on their taxes and not paying and then tells everybody about it…

Female 1: Everyone's gonna do it.

Male 3/4: Nobody's gonna pay it, and you won't have two trillion dollars anymore.

When the facilitator argued that no one would know whether the person in question had paid, one participant responded, then, that it made no difference whether or not he paid:

10.13 Female 2: Well, who cares? I mean, if we're not going to be able to know…[396]

Other respondents argued that it would still be wrong:

10.14. Male 3/4: But morally it's wrong.

Female 1: But it does make a difference, you need to pay your taxes.

Fac.: Why?

Female 1: You know, especially if you work. Because you use it every day. You know, I mean, I don't…

Fac.: You mean you use the services.

Female 1: Yeah. That's what I mean.

[396] 5.26. Male 2: I think he is though because I'm sure other people are upholding or are living up to the rationing and they might be hurt by it in terms of, like say, their lawn's dying, or whatever, and they feel bad about that. I don't know.

Once again, the underlying idea seems to be one of reciprocity.

There was additional, somewhat meandering discussion around the fact that one person's noncompliance would not have consequences. One participant responded:

10.19. Male 3/4: That's true, but I guess that it's just going back to what everyone's been saying already, I mean…

To this, Female 2, who had claimed that it made no difference whether or not the person paid, responded: 'Right, exactly' (10.19). This probably indicates lack of clear thought on her part, more than anything else.

5. Conclusions

My first conclusion in this chapter is that people generally believe they have political obligations. However, as we have seen, they distinguish between laws that people do not generally obey, which they believe it is not wrong to disobey, and others that people do obey and it would be wrong not to. As I have noted, granted this distinction, we cannot properly speak about obligations to obey *the law*. In all focus groups without exception, respondents claim that certain classes of laws have little or no moral force and, apparently, do not serve real social purposes. It therefore requires interpretation to determine what subjects think about political obligations as traditionally understood: moral requirements to obey the law because it is the law, as opposed to other reasons to obey, including the consequences of obedience or disobedience. In the focus groups, there appeared to be little appreciation of law in this precise sense. What this tells us about people's views of political obligations is a subject to which I return in Chapter 11.

As we have seen, people's reasoning on why they should obey was basically consistent across focus groups, although emphases differed from group to group. The three main kinds of reasons offered centered on benefits laws provide, unfairness of disobeying while expecting other people to obey, and membership in the political community. Although arguments fell into recognizable patterns, participants frequently had difficulty formulating them clearly, or distinguishing between different grounds. To defend requirements to obey, participants readily offered generalization arguments, that it is wrong for one person to disobey, because of connections with the behavior of everyone else. In many cases, participants had difficulties appreciating the fact that the effects of the compliance or disobedience of one individual

would be undetectable, in spite of facilitators' efforts to get them to see this. In general, participants tended to overstate the consequences of individual acts of disobedience, believing that one person's disobedience would cause large numbers of other people to behave similarly.

It is not surprising that participants had trouble with the moral reasoning. There is something deeply paradoxical about cases in which if I disobey, there are no consequences, but if everyone else does, there are. Since it is wrong to disobey in the latter circumstances, it must be wrong in the former as well. And so, connecting wrongness with consequences in the latter, participants also do this in the former. While reasoning from fairness explains the wrongness of individual acts, subjects have a hard time moving away from consequentialist reasoning. The regularity with which such arguments were presented is striking. I believe that the fact that people generally argue in this way is a significant conclusion of this chapter. It bears mention that empirical studies of other areas of collective action—for example, protest activities—have uncovered similar 'magical thinking,' as participants tend to overestimate the importance of their own contributions there also.[397]

Other moral grounds to which participants appealed were somewhat jumbled. Clearly, however, these centered on benefits government provides, for receipt of which people felt they should reciprocate. Participants made frequent appeals to ideas of fairness: it would be wrong for one person to disobey while counting on the obedience of everyone else. Although some participants presented pure fairness arguments, for others, connections were causal, depending on snowball arguments. If Smith did not comply, she would not be doing her part, because this would lead to widespread noncompliance, and so to nonprovision of benefits that she counted on receiving. An argument like this may be viewed as directly consequential. Smith should pay her taxes or else (through the intercession of the snowball argument) society would lack tax revenue and services would collapse, just as Smith should not point a loaded gun at Jones and pull the trigger, because of the consequences of that act. However, rather than appealing directly to consequences, participants generally framed their reasoning in terms of Smith's not doing her part. Everyone else was contributing, so why should she not? But again, rather than

[397] This participant expressed similar ideas a bit later in the session: 'Male 4: You're taking from the common pot for your personal good without contributing anything back to the common good' (8.7).

moving on to describing this wrong as one of unequal treatment, participants tended to conceptualize it in terms of adverse consequences.

Additional arguments from membership were thrown into this mix. As we have seen, participants had trouble pinning this notion down, although several explicated it in terms of receiving benefits. Something similar could be said of consent. Several participants believed they had consented to government, although they expressed this view only vaguely. Since consent arguments arose only a few times, it is difficult to say anything conclusive about them. But it bears mention that, when asked to be more specific, participants frequently explicated consent in terms of receiving benefits from society, for receipt of which it would be wrong not to reciprocate.

My overall conclusion is that people generally conceptualize their political obligations in terms of benefits the state provides and consequences of noncompliance. There is a clear reciprocal relationship here. The close relationship between such views and the 'reciprocal obligations' repeatedly appealed to by the US Supreme Court are apparent. Because the state provides benefits, one should obey the law, but more than this, people clearly perceive strong relationships between *general* obedience and provision of benefits. Virtually the entire discussions in all focus groups were in such terms. One reason for this should be noted. Because participants in all focus groups pointed out problems in talking about the law in an abstract sense, discussion was in terms of specific government services or programs. This naturally focused participants' thoughts on what these programs did, and so on consequences. It seems likely that these connections reveal an additional factor in people's thinking about obeying the law. Rather than confronting the law in the abstract, people address questions about whether they should obey in relationship to the particular laws that affect them directly and with which they deal. For some people, such direct encounters provide a basis for abstract reflection. But perhaps not surprisingly, I generally found that people had difficulty rising to a highly abstract level, removed from concern with particular kinds of laws.

In spite of their concern with specific kinds of laws, subjects undoubtedly reasoned beyond direct consequences of obedience or disobedience. The distinction between laws one should and need not obey had a strong consequentialist basis. It is all right to speed, to jaywalk, and so forth, because there generally are no adverse consequences of doing so. But participants treated other cases without direct consequences differently. Even though it makes no difference whether or not

I pay my taxes, participants strongly stated that I should do so. As we have seen, they turned to snowball and related arguments to resist the claim that one person's conduct makes no difference. Although participants did not make this point clearly, they appear to have employed generalization arguments to account for differences between the two kinds of cases. As things stand, speeding, jaywalking, and other laws are regularly violated, without undue consequences. This is not the case with tax and other significant laws, since general violation of these would have dire consequences. In other words, the consequences that participants appear to have had in mind are *generalized* consequences.[398] Laws are significant and should be obeyed if the consequences of general disobedience would be severe. If the consequences of general disobedience would be insignificant, then the laws in question have no point, and people believe they are free to disobey them.

Connections people draw between obedience and government services have additional implications. Along with what people said in focus groups, we should pay attention to what they did not say. Because respondents repeatedly presented arguments based on consequences, this provides a measure of support for theories of political obligation that depend on benefits and consequences, rather than others such as a natural duty of justice or consent—though as I have just noted, there was some talk of consent. In addition, the fact that political obligation depends on government services explains why people generally conceive of this in particularized terms. I have an obligation to obey the government of the United States rather than Norway, because of services I receive from the US government rather than that of Norway. Norway's should probably be viewed as a just government, perhaps more just than that of the United States, but the essential services it provides are given to its citizens rather than those of the United States, and so those citizens presumably feel particular allegiance to it.

The subject of particularity was not discussed in any of the focus groups. But I view these reflections as obvious common sense and would be surprised if focus group participants did not express things similarly. If I am correct, then, to the extent that we take people's reasoning to be similar, this will make it more difficult to accept nonparticularized views of obligation, notably a natural duty theory. Along similar lines, the fact that no participant in any focus group so much as mentioned a natural duty to obey the law also tells against

[398] Later in the discussion, the point was returned to:8.12. Fac.: So why are tax laws justifiable?Male 4: The consequences of not having taxes would be not having government and, the result of not having government would be wide-scale victimization.Male 1: Chaos, anarchy. Most people don't want to live under anarchy. We need government and therefore we need the ability to raise revenue so that the government can operate. We quibble over how much revenue, where the money should be spent, but most people, even the most conservative fiscal conservatives, agree that we need government to some degree and therefore we need taxes.

such a view. On the whole, I view relative silence on nonbenefit/nonconsequence theories as further evidence that political obligations are generally viewed as obligations of reciprocity for benefits received.

In closing, I should call attention to the preliminary nature of the evidence examined in this chapter. The seven focus groups I have discussed involved few participants, thirty-two in all. Though they included students and nonstudents, of different ages and levels of education, they are not representative of the population of the United States, to say nothing of other countries. Obviously, the results discussed must be viewed as provisional until a larger number of participants can be studied, including participants with more widely differing backgrounds and demographic characteristics.

10
Examples and Cooperation

In this chapter, we move from people's opinions on general questions of political obligation to their thoughts about cooperative schemes. As I argued in Chapter 9, under some circumstances, ordinary opinions can contribute to normative arguments. In this chapter, I support this position by examining the role of examples in contemporary moral and political arguments. My central contention is that how ordinary people assess particular examples that can bear on the persuasiveness of arguments that employ them. I believe ordinary opinions can play an especially significant role in this area.

1. The Role of Examples

We can begin by considering Judith Thomson's well-known defense of abortion rights. She presents the example of an unconscious violinist whose kidneys are failing. You wake up in bed one morning to find that the Society of Music Lovers has plugged his circulatory system into yours, so that your body in effect provides him with dialysis. He will recover in nine months and then can be unplugged safely; to unplug him is to kill him.[399] The example has attracted much attention, and scholars argue about its applicability to circumstances of abortion. For instance, Baruch Brody claims that it elides the distinction between duties to save another person's life and not to take it.[400] There is room for argument about this criticism, and others, but these cannot be explored

[399] This participant made a similar point soon after: 'Female 2: I think he doesn't have to. I dunno, I'm getting like…to the bottom. I don't know what I should do (10.15).'

[400] S. Finkel and K. Opp, 'Personal Influence, Collective Rationality, and Mass Political Action,' *American Political Science Review*; 83 (1989); Finkel and E. N. Muller, 'Rational Choice and the Dynamics of Collective Political Action: Evaluating Alternative Models with Panel Data,' *American Political Science Review*; 92, (1998).

here. What concerns me is the example's probative force. If we assume that, in spite of criticisms, there are important similarities between the example and abortion, how we respond to the example tells us something about the rights or wrongs of abortion.

It is interesting to note that, in presenting the example (and others in the paper), Thomson uses second-person language: 'You wake up in the morning…';[401] 'the fact that for continued life the violinist needs the continued use of your kidneys does not establish that he has a right to be given the continued use of your kidneys. He certainly has no right against *you* that you should give him continued use of your kidneys.'[402] I take it that such language indicates Thomson's intent to present *ad hominem* arguments along the lines of what is discussed in Chapter 9. Her aim is to persuade the reader of the merits of her view.

However, more is involved here. The example is presented in support of a normative claim: that it is wrong to be required to provide the violinist with use of your kidneys. What interests me is that it also puts forth an implicit empirical claim: *people will generally agree* that, as depicted in the example, being required to provide use of one's kidneys is wrong. If the example is to serve its purpose in Thomson's argument, people must generally respond in this way. And so I believe that how they in fact respond affects the persuasiveness of her argument. If, confronted with the example, people generally saw nothing wrong with the demands of the Music Lovers, this would weaken her argument; if they viewed the demands as objectionable, this would strengthen it. How people generally respond to the example is a factor that should be considered in assessing the persuasiveness of the argument that contains it. Once again, as argued in Chapter 9, I do not claim that evidence of ordinary opinions should be viewed as determinative. But in the kinds of cases I have indicated, it is a factor, possibly a significant factor, that should be dealt with.

Let us move to a more abstract level and also from abortion to political obligation. The points made about Thomson's example can be generalized. Assume a particular theory of political obligation, T^1, which is comprised of a series of linked moral propositions. Let us assume that one of these, P^1, is supported by a particular interpretation, I^1, of a specific example, E^1, while I^1 is in turn supported by its consistency with P^1 and T^1. Things are relatively nonproblematic if political philosophers generally respond similarly to E^1, that is, if their intuitions are basically similar. But what if the philosophical

[401] See Klosko, 'The Moral Force of Political Obligations,' *American Political Science Review*, 84 (1990).

[402] J. Thomson, 'A Defense of Abortion,' *Philosophy and Public Affairs*, 1 (1971) [cited as Thomson, 'Defense of Abortion']: 48–9.

community is split? One group of philosophers puts forth I^1 and says that the example supports P^1. But another group presents a different interpretation, I^2, which supports a different proposition, P^2, which, in turn, is part of an alternative theory of obligation, T^2.

In a case such as this, theoretical concerns are obviously important. If a given interpretation of E^1 is not supported by philosophical considerations (and by a group of theorists), it might not have to be taken seriously. But if there are competing interpretations that have appropriate theoretical support, then appeal to philosophical considerations alone might not settle the issue.[403] Oftentimes when there are competing, plausible theories and the philosophical community is split, appeal to examples takes on considerable weight. In such a case, specific interpretations of the example are of course linked to theoretical concerns, but the example provides an independent piece of evidence. And so once again, what if the example evokes different intuitive responses from different groups of philosophers? In such cases, it is not uncommon for one party to the dispute to declare that his or her opponent's 'intuitions are wrong.' The obvious counter is: 'No. Your intuitions are wrong.' However facetious this exchange, what interests me is the possibility of subjecting such disputes to empirical tests. If we assume that there are plausible arguments for both sides, the fact that most philosophers support one interpretation rather than the other could obviously be relevant. If philosophers are split and ordinary people disproportionately favor one view, that could be important. In any event, to the extent that appeal to examples contains implicit empirical claims, under the right circumstances, these can be tested in this way.

2. Cooperation and the Principle of Fairness

The examples on which I focus concern an issue central to recent debates about the principle of fairness, the nature of cooperative activity necessary for it to generate obligations. We will look at two specific examples and what different scholars say about them. We begin with

[403] B. Brody, 'Thomson on Abortion,' *Philosophy and Public Affairs*, 1 (1972).

Nozick's example of the public address system.[404] Although Grey benefits from broadcasts his neighbors arrange, when it is his turn to run the system, he prefers not to. The question is whether his refusal violates an obligation he has incurred under the principle of fairness. Nozick believes that Grey is not wrong, and I believe this intuition is generally supported.[405] The interesting question is exactly why Grey does not have the obligation. According to Nozick, one cannot incur obligations under the principle of fairness unless one accepts the relevant benefits. Nozick contends that the broader principle the example illustrates is that the principle of fairness does not 'serve to obviate the need for other persons' *consenting* to cooperate and limit their activities.'[406]

Simmons agrees that Grey does not have an obligation, but provides a different reason. According to Simmons, the public address scheme has simply grown up around Grey. Although he has benefited by listening to the broadcasts, because he is an 'innocent bystander' and not a 'participant' in the scheme, he does not have to contribute.[407] Simmons argues that, even though one cannot 'accept' public goods in the usual sense, one can become a member of a cooperative scheme that provides them by having particular attitudes—as indicated in Chapter 9 (pp. 187–8). According to Simmons, the larger point the example illustrates is the nature of the cooperation necessary in an obligation-generating cooperative scheme. Simmons believes this requires a strong, conscious sense of cooperation among participants.

Ever since my first work on political obligation, I have taken issue with Simmons's interpretation. What strikes me as central to Nozick's example is the small value of the benefits involved. I believe it is wrong for a cooperative scheme to impose obligations on people, even if they benefit from it, if the benefits are of little value. Accordingly, if we alter the example to increase the magnitude of the benefits so that they are indispensable to people's lives, obligations can be seen to be generated. I reproduce the substance of an example I have used:

> A lives in a small territory, X, that is surrounded by hostile territories, the rulers of which declare their intention of massacring the X-ites. Accordingly,

[404] Thomson, 'Defense of Abortion,' 48.

[405] *Ibid*., 55; emphasis in original.

[406] If the reasons supporting T^1 are clearly stronger than those supporting T^2, then the matter should be settled relatively easily and the views of ordinary people need not be consulted—even if a group of diehard supporters of T^2 persist in their views. In the case at issue, we should assume that there are persuasive grounds for both T^1 and T^2, that their proponents have different views about which reasons are stronger, and that both groups have reasonable basis for their claims.

[407] R. Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974) [Nozick, *Anarchy, State, and Utopia*], pp. 93–5.

> the X-ites band together for their joint protection, instituting demanding measures: compulsory military service for men and women; mandatory service in the reserves, including a substantial period of yearly active duty until a relatively advanced age; and provisions for rapid mobilization of reservists. Because these requirements are obviously burdensome, A, who would prefer to go about his business as usual, decides not to comply. Under these circumstances, assuming that a number of X-ites sufficient to ensure the safety of X and its inhabitants do comply, he would obviously be a free rider. Though the mutual protection scheme has simply sprung up around him, there can be little doubt that he has a strong obligation to do his part.[408]

According to this interpretation, A's beliefs concerning the nature of the scheme's cooperative activity and the origin of the benefits in question are largely irrelevant. The fact that he receives benefits that he can be presumed to be unable to do without is sufficient to establish obligations.[409]

While Simmons and I agree that Nozick's public address system is not able to establish obligations, we disagree about the principle at issue and so about what constitutes an obligation-generating cooperative scheme. This difference carries over into the defense example. Simmons contends that this scheme cannot ground obligations, because the benefits it provides are not 'cooperatively' produced in the relevant sense, while I believe that the benefits are of sufficient value to generate obligations. It is important to recognize that Simmons's and my interpretations of the two examples are supported by more than intuitions. Simmons appeals to theoretical concerns about the nature of cooperative schemes, while I appeal to quite different concerns about the magnitude of received benefits. Who is right? Which of our intuitions are not wrong?

Although such disagreements over examples are not always intractable, an impasse can easily develop. In accordance with a reflective equilibrium method, one way to address disagreement is to appeal to additional examples. Both Simmons and I provide additional examples.[410] But the problem is that, because we have different theoretical interpretations of what is at issue, we are both able to provide examples that support our own positions. Disagreement over each other's examples settles nothing, while invocation of still additional examples would be likely to have similar results.

[408] The lack of controversy in the philosophical literature suggests that there would also be little support for the opposing view in the wider community. Results of focus groups, as discussed later in this chapter, support this contention.

[409] R. Nozick, *Anarchy, State, and Utopia*, p. 95 (emphasis in original).

[410] A. J. Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979) [Simmons, *Moral Principles*], pp. 120–1.

Commenting on this dispute, William Edmundson says that mine is the more plausible interpretation of the defense example:

> On Klosko's view, this A has a fair play duty to do his share, even to serve in the vanguard if ordered; while on Simmons's view A has no fair play duty to serve—the benefits of resistance are merely 'thrust upon' him. Here, I think, intuition is likely to side with Klosko rather than Simmons.[411]

Clearly Edmundson believes that 'intuition' adds at least some weight to one construal of the example. However, what does the phrase 'intuition is likely to side with Klosko' mean? Is this a statement about Edmundson's own intuitions, or is he appealing to how most people would respond to the example? If it is the former, then Edmundson's own intuitions would provide some support, although this is likely to be slight. Edmundson is only one person. His intuitions could be important in sense (1) mentioned in Chapter 9, in that he is making an *ad hominem* appeal to the reader (see pp. 186–7), who he presumably believes will agree with him. If Edmundson's appeal is to the intuitions of the general public, the support afforded by these intuitions would be considerably greater—provided, of course, that Edmundson is right about them.[412] Such an appeal to general intuitions is also consistent with *ad hominem* argument directed at the reader, but it is something more. If the public generally agrees about how the example should be construed, this will significantly increase the burden of justification for a theorist who disagrees. He would be bound to explain why the public is wrong as well as why his construal is preferable. Of course, if it is the views of the wider public that Edmundson refers to, then he is committed to devising some means to find out what their views actually are.

In his most recent discussion of the principle of fairness, Simmons clearly explains his view of the underlying intuitions. Once again, he believes in the need for a strong sense of cooperation among the members of a given cooperative scheme, if it is to generate fairness

[411] G. Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992; new edn., 2004) [Klosko, *Principle of Fairness*], p. 52 (slightly modified).

[412] For ease of discussion, I omit other conditions that are necessary.

obligations. He quotes Donald Regan, according to whom 'genuine cooperation involves a real (and successful) attempt to achieve a jointly valued outcome by coordinated behavior.'[413] Simmons notes that other scholars advance a weaker conception of cooperation, as entailing only joint production and consumption of common benefits, without additional attitudinal requirements.[414] But he rejects this, as intuitively unsound. I quote his reasoning at some length, in regard to extending fairness obligations from small-scale schemes to large political bodies:

> This is important, I think, because our intuitions about fair play are drawn from our experiences with small-scale schemes that *are* cooperative in the strong sense. These intuitions are extended only by analogy to large-scale, impersonal, indifferently motivated schemes. And in the case of the *political analogy*, the analogy is plainly strained beyond the breaking point, appearing plausible only in the most memorable moments of voluntary and wide-ranging public sacrifice (e.g., when the boys march off to [defensive] war).
>
> It is such conscious sacrifice for the common good (among other things), not the mere (habitual or coerced) 'rendering of services,' that gives rise to our sense of the demands of fair play. It is the former phenomenon that is familiar to us from small-scale, strongly cooperative schemes. In typical small-scale cooperative ventures (e.g., those involving cooperative games, or the joint projects of neighborhoods or small voluntary associations), others make deliberate sacrifices in support of mutually beneficial goals, while *relying* on us to do the same—and while having reasonable grounds for such reliance, since we are participants as well, sharing the same goals and understandings. Indeed, others act in such contexts only *because* they think they have reasonable grounds for believing that (at least) most of us will freely make the same sacrifices.[415]

Although I think Simmons is largely correct about small-scale schemes, I believe they are also characterized by cooperation in the weaker sense. In addition to their strong sense of cooperation, they also involve joint production and enjoyment of benefits. Although cooperation in the former sense is lost in large political schemes, these are able to ground obligations, if the benefits they provide are of sufficient magnitude. The sense of cooperation that Simmons notes is necessary to ground obligations to the small schemes, because they provide benefits that are of relatively little value.

And so we return to our question, who is correct in all this? Are schemes with cooperation in only the weak sense able to establish

[413] Simmons, *Moral Principles*, Ch. 5; Klosko, *Principle of Fairness*, Ch. 2.

[414] W. Edmundson, 'The Duty to Obey the Law,' *APA Newsletters*, 99 (1999), p. 3. In his response to Klosko's article ('Presumptive Benefit, Fairness, and Political Obligation,' *Philosophy and Public Affairs*, 16 [1987]), in which the defense example originally appeared, Simmons appears to concede that political obligations are generated under the circumstances described, although he contends that moral principles in addition to fairness are involved; see 'The Anarchist Position: A Reply to Klosko and Senor,' *Philosophy and Public Affairs*, 16 (1987), 271–2.

[415] In private correspondence, Edmundson kindly answered this question, saying that it is intended as an empirical claim about what people believe, which he would confirm through empirical research.

obligations? Simmons of course appeals explicitly to 'our intuitions about fair play,' to 'our sense of the demands of fair play.' My assumption is that the 'our' in question is intended as the reader, to whose intuitions Simmons appeals, in the *ad hominem* sense I have noted. But it seems that there is also an appeal to the views of the wider population, although who is included is not specified. Simmons presumably believes that how people generally view the schemes in question is a consideration in favor of his view, although he provides no evidence about what 'we' think. In a case such as this, when the philosophical community is split and there are good reasons on both sides, evidence about what members of the general population think could play some role in settling the matter.

3. Ordinary Opinions

The evidence I discuss is drawn from the last four of the ten focus groups. As noted in Chapter 9, two of these featured workers at a high-tech company in the suburbs of a large city. These two groups had five and four participants respectively, generally highly educated, and included in the first group an Englishman and an Australian, and in the second, a Russian. The second two groups featured respectively three and four part-time restaurant workers in a small town in the same state. Once again, these participants were younger—late teens or early twenties—and less educated, though each of these group contained one college student.[416]

I concentrate on these four groups because of my concern with interpreting examples. Three particular examples in the form of vignettes were discussed systematically in these groups, and only in them. I should make clear, however, that discussion in these groups was generally consistent with what transpired in the six earlier groups. Different vignettes were employed in the earlier groups and discussed in substantially similar terms. However, because the three examples were not examined in the earlier groups, I discuss only the final four.

As noted in Chapter 9, after the discussion of general questions of political obligation that we have seen, the facilitator introduced a series of vignettes, to which subjects were asked to respond. Different vignettes were employed in different groups. In the four groups examined

[416] A. J. Simmons, *Justification and Legitimacy* (Cambridge: Cambridge University Press, 2001), p. 39.

here, the vignettes were based on Nozick's public address system, the defense example, and a third vignette featuring a well-cleaning cooperative scheme. (The order in which the vignettes were presented was well-cleaning, defense, public address.) In these groups, discussion ranged from approximately forty-five minutes to about an hour.

In analyzing vignettes, participants expressed clear views. Consensus opinions were assented to by all participants in all four groups and maintained, even though the facilitator presented moral arguments against them. In examining these opinions, we are concerned not only with how participants responded but also with the reasons they advanced. Their agreement on responses is more meaningful to the extent this was supported by similar reasons, especially if their reasons are theoretically cogent. Attempting to sort out different reasons that were advanced was a significant concern in all focus groups.

As we have seen, in discussing political obligations generally, participants appealed regularly to considerations based on benefits the state supplies and concomitant moral requirements to do one's share in providing them, and to requirements stemming from membership in the political body, generally described as the community, and to a certain extent in terms of consent, though this last notion was presented particularly unclearly. In discussing the three vignettes, participants generally viewed noncooperation as wrong and adjusted their views according to the circumstances described in the different vignettes. Throughout, participants focused almost exclusively on benefits supplied, the unfairness of not doing one's part, and membership. While considerations bearing on the nature of the cooperative activity that different cooperative schemes required were mentioned, no participant in any group argued that a strong sense of cooperation is necessary to ground obligations to participate. In spite of repeated probing by the facilitator, participants resisted such ideas.

I will discuss the three vignettes in turn, recounting what emerged as each of them was discussed by each of the four groups. In presenting responses to the vignettes, I alternate restaurant workers (Groups 9 and 10) and high-tech workers (Groups 7 and 8).

Well vignette

> Green and about thirty other members of his village share a well that provides clean drinking water. Each of the other villagers takes a turn cleaning the well and checking it for problems. When it comes to his turn, Green refuses to take his turn. Do you think he's wrong to refuse?[417]

[417] *Ibid.*, pp. 38–9; Simmons cites Arneson, Klosko, and Dagger.

This is a straightforward example, involving an excludable benefit that the recipient must take steps to procure. Thus I expected participants to view refusing to cooperate as wrong, an expectation that was strongly confirmed by responses of all participants in all four groups.

Group 9. In Group 9, participants drew clear connections between receipt of benefits and requirements to participate. Participants agreed that someone is entitled to water only if he cooperates in cleaning the well; if he does not clean, then he is not entitled. For example:

> 9:20. Female 2:[418] I think if he doesn't want to put his part in doing that, he shouldn't get any of the water.
>
> 9:20. Female 1: So it's like, he shouldn't be able to use the water if he's not helping.

When asked for reasons why it would be wrong for Green not to take his turn, participants referred back to discussion of reasons to pay one's taxes from earlier in the session:

> 9:22. Male 1: He's a member of our society, he needs…you need to participate, you need to do those…he needs to pay…his little, you know, bit. We all need to pool our fair share.

Apparently, to participants, ideas of membership and doing one's fair share for the community were closely related. This connection was repeated when the facilitator asked this last respondent what he meant by 'membership.' The latter responded:

> 9:24. Male 1: You know, they want to live in a fairly decent place. And without everybody pulling their share, it doesn't work. It doesn't matter whether you use stuff or not, everybody has to pull their share. If society is going to function.

As we will see, in subsequent discussion, conflation of membership and cooperating in providing and receiving benefits was a common theme.

Group 7. In this group too, there was clear consensus that not to participate is wrong and unfair. As it was described, the moral basis of the requirement to participate appears to resemble the principle of fairness. For instance:

[418] *Ibid*., pp. 40–1; emphases in original.

7:11. Female: Everyone else is pitching in and doing their share. He needs to pull his part of the weight and clean it as well. Why should everybody else do all the work, and he is reaping the benefits from it? That is not fair.

Male 3: That is a pretty easy one.

[Laughter]

Fac.: Is this consensus?

Male: Yes.

Group 10. Discussion was similar in Group 10.

10:20. Female 1: 'Cause all the other twenty-nine people are doing it, why can't he, so, I mean…

Male 3/4: He's just trying to take advantage of what's given to him…

Along similar lines, if he does not take water, he is not required to help clean the well:

10:22. Fac.: OK, what if he says 'Look, I don't want the water from the well.'

Male 3/4: Well if he doesn't want the water from the well, then…

Female 2: Then don't clean it, who cares?

If he starts taking water:

10:22. Female 2: Well then he has to clean it.

Group 8. A similar conclusion emerged in Group 8, although it was formulated more explicitly:

8:13. Male 4: There is a common resource and a common good and a common obligation, and once you partake of the common resource, I think you automatically buy into the common obligation to maintain that resource.

Defense vignette

Grey lives in a small territory, and we'll call it 'X.' So, territory X, that is surrounded by hostile territories, the rulers of which declare their intention of massacring the people of X. Accordingly, the people of X band together for their joint protection, instituting demanding measures, compulsory military service for men and women. You know, they institute a draft. Mandatory service in the reserves, including a substantial period of yearly active duty, and provisions for rapid mobilization of reservists. Because these requirements are obviously burdensome, Grey, who would prefer to go about his business as usual, decides not to comply. Under these circumstances, assuming that a number of people of X sufficient to ensure the safety of the country and inhabitants do comply, is he justified in doing so?[419]

[419] As noted in Chapter 9, all four groups were conducted by Klosko alone. On possible problems of influence, see p. 191, n. 32. Once again, proper names used have been removed, for purposes of confidentiality. Transcripts are available from the author, on request.

Although this is a more difficult case, I expected participants to believe it would be wrong of Grey not to serve. This expectation too was confirmed by all participants in all groups, in spite of the absence of the strong sense of cooperation that Simmons requires. As we will see, when the absence of strong cooperation was explicitly pointed out to participants, this had little effect on their responses.

Group 9. All participants in this group agreed that it would be wrong not to serve, though the moral reasons they invoked were somewhat jumbled. Their reasoning rested in large part on the importance of the benefits in question. Although appeal to some notion of fairness was also apparent, participants had difficulty clearly distinguishing this from other moral considerations, especially the consequences of nonparticipation. People were generally unable to make this distinction, even with repeated probing by the facilitator, especially in reference to the fact that in a large society nonparticipation by any given individual would be unlikely to have detectable consequences. For example:

> 9:27–8. Male 1: With that situation, I think it's pretty clear-cut. Where the group's, or the society's rights far outweigh like, the individual's rights. So if you have one person…Just imagine if that actually happened, if some guy says 'Oh…but I don't want to go.' It's like, oh OK. If the government says, 'OK. You don't have to.' Then everybody could do…everybody could say, 'OK, I don't want to go.' So then, you have a whole…You're surrounded by countries who are gonna massacre you. And then what happens? Everybody dies, because…the individuals are worried about their individual—

Even if, unlike the well case, the subject does not have to seek out the benefits of defense in order to receive them, he should still cooperate. Grounds invoked for this requirement included membership and weight of benefits involved. Once again, participants found it difficult clearly to separate these notions:

> 9:31. Male 1: It doesn't make any—I'm sure there's a lot of benefits that he uses that he didn't seek out. Like education. I'm sure…You know, he didn't ask for a school to be built, blah blah blah, or, you know, but that's…You know, he's a member, like I said, he's a member of the society, and there's a lot of things that he may not necessarily ask for but that doesn't—The government's role is to, you know, provide all these services for us, for the general public. It has no bearing necessarily on the individual. You're not gonna find your own, you know, personal government, you know? It's not gonna suit your specific needs. It's about, uh, the needs of the group.

The facilitator raised the point that the defense scheme differs from the well-cleaning one, in lacking face-to-face cooperation.[420] Participants claimed that this made little difference:

> 9:33. Female 1: You're a member…you're a member of society, and you're supposed to…everyone's supposed to help out.
>
> Female 2: You have to put your share into it. No matter if you want to or not.

In explaining the basis of the subject's obligation to serve, in spite of the lack of a strong sense of cooperation, participants focused once again on the adverse consequences of his refusal to do so. They believed this could cause other people not to serve, and so eventually damage society.

> 9:36. Male 1: Well if you don't let Jones serve then what's going to make… Why wouldn't anybody else serve? Like, if we're forced with that situation, if we're forced into a dire need. Right now we may not be in that kind of a situation but if we ever are, we need that—we need a standard to go by so when we do need, you know these things, we can enforce them.
>
> Fac.: What do you guys think?
>
> Female 2: I agree with him. If someone doesn't do it then it's just going to be a big excuse for more people not to do it. And then it's just going to snowball up, and no one will do anything.

The participants' reasoning here is consistent with what we saw in Chapter 9. Participants strongly tended to believe that, even in a large society, their noncooperation would have negative consequences. According to this line of reasoning, you should do your part for fear of damaging society, as opposed to not being unfair to your fellow citizens without regard to the consequences of your action.

Group 7. At first sight, it could appear that discussion in this group supports Simmons's contention in regard to strong cooperation. In discussing the well example, one participant remarked on how the small size of the group made participation especially important. Nonparticipation would be noticeable and undermine the scheme's sense of cooperation. He contrasted these circumstance to what is encountered

[420] As read to all four groups.

in a country of 280 million people, in which noncooperation would be less noticeable.[421] It bears mention that this participant made this observation before the large-scale defense example was presented—and so provided the facilitator with a smooth transition to the defense example. However, participants—including the participant who had commented on sense of cooperation—strongly argued that it would be wrong for the given subject not to serve in the defense scheme. In regard to this:

> 7:13. Male 1: He will benefit from this system to which he is making no contribution. To me it doesn't seem fair.
>
> Male 3: If he is not a conscientious objector, I do not see that he could justify it at all.

The facilitator explored the implications of the point that had been made about sense of cooperation. But this was viewed as having no effect:

> 7:13. Fac.: [Name A] said something interesting. He said that if we are talking about the well example—it is a small group of people where each one's contribution is noticeable. So I varied it, that we have a different kind of group which is large and each one's contribution is not noticeable.
>
> Male: It does not make any difference.
>
> Fac.: Why?
>
> Male: Well, the size of the group really does not distinguish what is right from what is wrong. If you were a group of two, or 200 million, it is not that your contribution would change the outcome if they were attacked; it is a question of making a decision about what is right to do.

As for reasons why it would be wrong not to comply, participants once again appealed also to membership in the group:

> 7:16. Female: Well, I mean he is part of the group. As a society, you are part of a group, whether it is your family group, or whatever category. There are lots of groups in life. He is moving himself apart from the group that he should be part of and standing up with. He does not want to be part of society; he wants to live in his own little world and not participate and defend the people.

[421] Once again, references are to focus group number and page number of transcript. Participants are identified when transcribers could distinguish them by voice. 'Male 3/4' in Group 10 reflects a case in which two participants had similar voices.

In this group too, participants had a hard time identifying the precise grounds for the requirement to comply, appearing not to be able to distinguish membership, fairness, and adverse consequences.

Group 10. Participants here too claimed that it would be wrong not to comply. Even though defense is a public good and so does not have to be sought, its importance outweighs this:

> 10:25. Male 3/4: That's kind of one of those…like, at the very core of everything issues. Like, our defense is the most important thing that we can pay for, and *the* most important thing that we can worry about, because the second we let our guard down we're done. So there will be no more well with any clean water for anybody, because if we don't protect it there's nothing to argue about.
>
> Female 1: Right.
>
> Male 3/4: And that's just…that's like a…it seems to me like a totally separate issue.
>
> Because it's just…it affects everybody, whether they like it or not.
>
> Male 3/4: Yeah, just 'cause you don't ask for defense, you still expect it. I mean…
>
> Male 3/4: Your life depends on it.
>
> 10:26. Male 3/4: Yeah. I mean, so what are we going to do? Be like, OK, just leave him there, and try to let him defend everyone? I mean, he's not asking for it. He expects it, but he might not be asking for it. Like, we don't ask people to defend us, but we expect it.

Here too, the contrast between face-to-face cooperation in the well vignette and its absence in defense did not resonate with participants. Far more important in their eyes was the importance of defense, although they were not completely clear on the underlying reasons. They too did not distinguish concerns of fairness from membership:

> 10:29–30. Male 3/4: Life is not a game. This is very serious. It's not about …you know, I don't feel like playing Monopoly today, it's about, um, there's people that want to kill us. [unintelligible] September 11th. Somebody's got to do it, you know. And if we've got to get everybody from the ages of eighteen to twenty on a random list to do it, that's what we've got to do.
>
> Male 3/4: I mean…I don't want to die for anyone, but I mean, somebody has to.
>
> Male 3/4: If that's what I have to do…
>
> Female 1: So you're saying if he gets punished, then other people will see, so they won't do it. Is that why?
>
> Male 3/4: Absolutely.
>
> Female 1: OK. Yeah, see I agree with that.

Group 8. Participants of this group too believed that, without extenuating circumstances, not to participate is wrong:

8:15. Male 2:Yeah, he figures he's going to live whether he participates or not so he might as well let other people get hurt.

Male 1: He wants something for nothing, in effect, so yeah.

Male 4: Yeah, I would say he's wrong.

Male 1: Yeah.

Once again, the contrast between the kinds of cooperation in the well and defense examples was raised.[422] Participants responded that this did not alter requirements to serve:

8:22. Male 4: Again, to me it goes back to receiving benefit from the common good and the need to contribute as an individual to preserve the common good. Just as you would pay taxes or do your day of cleaning the well, the requirements to be a citizen of country X is to give X amount of your time to participate in the defense of your country. The defense is a common good and, if you receive that common good, you should do something to support it and, in this case, the requirement is that you participate in the Reserves for X number of years.

Fac.: What do you guys think? Again, a range of opinion.

Male 2: I would agree with him because if you live in a country where you don't have face-to-face interchange of ideas with a governing body, you're accustomed to that. This is something that you've accepted.

Male 4: Well again, the obligation is basically an obligation to your fellow people, your companions and the people around you. You have a certain degree of obligation to look after, the common good, to look after their safety too. But in terms of the moral obligation or even if you're out of the loop in the decision-making process, nonetheless, if they're going to suffer if you don't do your duty, then you have an obligation to do your duty.

8:24. Male 1: If, because, well, to a large degree it's what Male 4 said, he's, he is, as a member of that society, getting a benefit and…

Male 4: Not paying for it.

Male 1: Paying for it, in effect.

[422] As read to group 9; there were slight variations in the wording of this vignette for different groups.

Three of the four participants in this group explicitly denied that this contrast in forms of cooperation made a difference, while the other participant did not disagree.

Public address vignette

> What we have here is a bunch of neighbors get together and institute a public address system to provide the neighborhood with music and information that is of benefit to people in the neighborhood. And, again, White, when his turn to run the broadcasting system comes, he says he does not want to have to give up a day to run the broadcasting system. Even though he has listened to it, and he has benefited from these broadcasts, he says he just does not want to take his turn.[423]

Group 9. In this groups there was a general sense that if White benefited from listening to the public address system, then he should contribute. But this requirement was viewed as less strong than others that had been discussed. Participants could contemplate what would happen if he did not cooperate, even if this meant that the system would break down:

> 9:38. Male 3: I don't know, if he doesn't want to do it, maybe he should bring it up, even having the loudspeaker at all. If…It's all about the majority, in my opinion. They—I'm sure they voted to have that loudspeaker in it because it would serve the community better. So now they passed it, so now each member of society does their fair share. I don't know.

The facilitator asked why this is different from defense. What if they decide they don't want an army:

> 9:39 Fac.: So what if, um…What if the majority says, 'Well, we don't want an army.' Why is that any different from the loudspeaker example?
>
> Male 3: You say if the individual says…?
>
> Fac.: Yeah I mean, you know, we…you know, if we go back to the one we talked about, defense. What if the majority says, 'We don't want an army.'
>
> Female 1: Well then they're all gonna die, and that sucks an egg.

Group 7. Responses here were similar. One participant claimed that if White benefited from listening to the public address system, then he should contribute:

> 7:18–9. Female: But again he is not participating, he is not pulling his share of the weight.

[423] 9.31–2. Fac.: … Now we're talking about a much bigger situation. I mean, we've got a country with, I think it's got two hundred seventy million people. You know, so it's an enormous country. So you don't have, you know, this sort of face-to-face cooperation that you might have, um, in the well example. So again, you know, our friend Jones says, 'Look, I don't want to have to participate in the military because, you know, we're—you don't have—the benefits of defense aren't coming from cooperation. You know, people aren't cooperating, a small group of people aren't cooperating to produce those benefits. So I don't see why I have to cooperate.'

However, another responded to this by appealing to the trivial nature of the benefits involved. Even though the vignette has White benefiting from the public address system, the benefit is insignificant:

> Male 3: But it is something dumb. It is just something some idiot has decided, 'Let's have a speaker system in our neighborhood.'

Probing, the facilitator asked how circumstances in regard to this cooperative scheme differed from those in the defense scheme:

> 7:19. Fac.: Why is this any different than the neighbors getting…not the neighbors, the community getting together to defend themselves from marauding terrorists outside?
>
> Male: It is life and death in one case. The other is just some…
>
> Male: annoyance.
>
> [Laughter]

Group 10. Once again, there was a general sense that if the subject benefited by listening to the broadcasts, he should contribute, because everyone else was doing so. But once again, this requirement was recognized as weaker than others that had been discussed, in that nonparticipation should not be punished.

> 10:35. Male 3/4: If you listen to it you should give money. So since he's listening he should go do it. But I don't think he should be drastically punished or reprimanded for not doing it, because it's really…it doesn't seem to be that huge of a deal.
>
> Male 3/4: It'll be punishment enough just by not doing it, because people are going to get mad at you.

The facilitator asked why circumstances here differed from those in the defense example. In response, participants noted the small value of the benefits, in comparison to those of defense:

> 10:35 Fac.: Well, why is this different from the military one?
>
> Male 3/4: Because the military affects our everyday safety of our lives.
>
> Female 1: Yeah, that affects everybody.
>
> Male 3/4: Music is just music.
>
> Male 3/4: It's just entertainment.
>
> Male 3/4: It's not nearly as severe as our personal safety.
>
> Female 2: Yeah, no, it's not even anywhere near as severe.

Facilitator then asked if everyone agreed, and there was no dissent.

Group 8. Participants in this group claimed that the subject should not be required to participate if he had not agreed to. The facilitator then compared this conclusion with those about the defense scheme, in

which general sentiment was that subjects should be required to cooperate, even if they had not agreed to do so (8:24). There was strong agreement that the decisive factor was the importance of the benefits involved—or lack thereof.

8:25–6. Male 1: Well, I think that self-preservation of a society is far more dire than a public…

Male 2: 'Musac.'

Male 1: 'Musac,' or whatever it is that they're playing. So, it's because of the…

Male 2: The value to it.

Male 1: Of the gravity of what's at stake that makes the difference.

Fac.: So you think this is, again, different opinions?

Male 2: Yeah, I would agree that the trivialness or gravity of the situation is essential. And, it's not that, he may have some moral justification. Say, he lacks a sense of fellowship and he believes he is apart from everybody. He doesn't think people should cooperate together, even though he believes the threat is real. Well, he may be justified in not participating, but it doesn't mean society would not be justified in forcing him to participate. I don't have a problem with that concept, both of people being justified in their opposition to each other.

One participant speculated on what would happen if the benefits of the public address system were in fact more important. But again, this supposition was counteracted by the obviously greater weight of defense:

8:26–7. Male 4: Well, it does raise an interesting point though is that if these people are avid 'musac' lovers and they feel this is very important to their community, this guy is wrong, but, you know.

Male 2: If the community would perish without it, then…

Male 4: So how do you draw the line? How do you draw the line?

Male 2: I would draw the line based on the survival of the community. If the community would perish without this action being taken, then the community is justified in forcing people to participate. But if the community wouldn't perish, then they're not, and we sort of have this continuum of direness where at one end things are trivial and society really has no business imposing on you and, on the other end, survival is at stake and society must whether it's its business or not.

4. Conclusions

As one can see, the better educated high-tech workers in groups 7 and 8 were far more articulate than the part-time restaurant workers in 9 and

10. But in spite of this and other differences,[424] responses in all four focus groups were strikingly similar. Consensus views were expressed on all three vignettes in all four groups, and as one can see, there was consistent, strong agreement across groups.

A few conclusions are clear. First, analysis of vignettes was generally similar to the lines of argument we saw in regard to the questions examined in Chapter 9. In analyzing the vignettes, participants connected up requirements to cooperate and receipt of benefits and varied the nature or strength of requirements that were generated according to the importance of the benefits involved. This was consistently the basis for distinguishing requirements generated by the defense and public address systems. Along similar lines, participants consistently maintained that receipt of defense generated requirements to participate, even though this benefit was unlike water from the well in not having to be sought, because of the great importance of defense.

On the question of moral grounds for the relevant requirements, participants in all four groups discussed reciprocating for benefits received and considerations of community membership. General agreement in assessment of vignettes is supported by similar agreement on moral grounds. Reasons advanced in regard to the vignettes were similar to what was seen in the portions of group discussions devoted to general questions of political obligation and were also consistent across all ten focus groups. In analyzing the vignettes, participants generally had difficulty sorting out the different moral grounds, and though they strongly emphasized that people should be required to do their parts, they tended to view this in terms of both considerations of fairness and the consequences of noncompliance, rather than of fairness alone. This is similar to what we saw in Chapter 9 and seems to be a pervasive feature of ordinary people's moral reasoning.

The point of greatest relevance in this chapter is the contrast between the large-scale defense scheme and the other, smaller schemes. As we have seen, the defense scheme was consistently viewed as generating obligations, in spite of the absence of a strong sense of cooperation. Repeated probing by the facilitator in all four groups did not change this sentiment. Although the contrast was viewed as important in Group 7, this was because of more immediate consequences of nonparticipation in a small group. There was consensus in this group too on requirements to cooperate in providing defense. On the dispute between Simmons and me over the nature of cooperative activity

[424] 7:11. Male 1: Another interesting thing is you have a group of 30 people, rather than a group of 280 million people. I think people's sense of value is increased when you are operating in a small group—that sense of community you get from participation towards a joint end that everyone can see, that people can see…You can actually tell. His lack of contribution would be noticeable. When you are asking questions about whole countries, of 280 million people, I am not sure if it applies quite as directly. It does to someone's personal realm, but it seems to get a bit diluted.

required to generate obligations, the evidence is unequivocal. To the extent that responses in the four focus groups are representative of what ordinary people think, there is strong evidence that they do not believe that a strong sense of cooperation is necessary to generate fairness obligations.

Let us return to the larger question of the relevance of ordinary opinions. As it seems to me, the main conclusion can be formulated as follows. In a case like those we have examined, it is difficult for a given scholar to maintain that a particular example supports a given conclusion, C^1, when people generally view it instead as supporting C^2. The relevant disclaimers are discussed earlier in this and in the previous chapters. In the cases that interest us, if there are strong theoretical reasons for holding C^2, the fact that people generally view the example as supporting it is a significant consideration in its favor and increases the burden of justification for supporters of C^1.

Once again, I should close by calling attention to the small number of participants in the focus groups discussed in this chapter. The four groups had a total of sixteen participants. In spite of some differences in their backgrounds, all resided in the same state, in only suburban or rural environments, and all were Caucasian. Once again, the results must be viewed as provisional until the views of many more, and more varied, participants can be examined.

11
Conclusions

The conclusions of this work are both normative and empirical. I am also interested in drawing normative conclusions from empirical results. The central normative argument is of course defense of political obligations on the basis of the principle of fairness, and an MP theory with fairness at its core. Because we need public goods supplied by the state in order to lead acceptable lives, we all have obligations to support their production. Combining empirical facts concerning our needs and how they must be satisfied, and moral claims concerning equality and fair distribution, yields political obligations based on the principle of fairness. With joint production and consumption of essential public goods creating a community, further obligations arise from moral requirements to assist needy members and to advance the interests of the community as a whole.

I have attempted to counter the most important arguments against fairness obligations. In Chapter 2, a 'public goods argument' in defense of the state is presented. I criticize libertarian and philosophical anarchists, who claim either that we do not need the state, or, alternatively, even if the state is 'legitimate,' we do not have obligations to it. As we have seen, the central flaw in all these arguments is inability to account for the production of essential public goods. A variety of alternatives to the state are examined and found wanting. In Chapter 3, these conclusions are applied directly to fairness theory, in order to defuse arguments from alternative supply. According to this line of argument, Smith does not have obligations to the state, if she prefers to procure the necessary public goods through other means. This contention is defeated by the public goods argument of Chapter 2. Unless Smith can make a plausible case for her preferred means of supply, she

will continue to have obligations under the principle of fairness, while on factual grounds, it is unlikely that she will be able to meet this burden.

Chapter 4 criticizes a general political theory based on the natural duties of justice. Through examination of different versions of this position advanced by John Rawls and Christopher Wellman, we see that natural duty requirements to aid other people are not sufficiently strong to ground political obligations. But even with this deficiency, natural duties can contribute to a multiple principle view. As a principle of reciprocation, the principle of fairness is able to generate obligations only in regard to provisions that benefit the subject himself. The natural duty to help others is able to extend this reach. Combining these two principles with the CG principle yields a theory of political obligation that is able to ground compliance with all reasonable laws. In Chapter 6, an alternative to this theory is criticized, one based on 'reformist consent.' The main problems with this view also concern supply of public goods.

Chapters 7–10 subject fairness theory to an empirical test. In examining Supreme Court cases in the US, Germany, and Israel, and ordinary opinions as revealed in focus groups, we encounter significant convergence of opinions. To identify political obligations as based on fairness rather than other principles, we should look for a set of elements. These include:

(e.1) benefits supplied by the state;
(e.2) requirements of reciprocation in regard to these;
(e.3) a claim that requirements to reciprocate should be general among benefit recipients; and
(e.4) a claim that these requirements should be held equally, that each recipient should do his or her share.

As I have noted, connections between obligations and benefits distinguish certain principles of political obligation from others, for example, from a natural duty of justice and a principle of association. Virtually all court decisions and focus groups responses explain requirements to obey the law on grounds that include (e.1) and (e.2). These are perhaps most apparent in the 'reciprocal obligations' invoked by the US Supreme Court. But, fairness is only one principle of reciprocation. Gratitude and a principle of exchange are others. Hence the importance of (e.3) and (e.4), requiring general and equal treatment. These elements identify particular requirements of reciprocity as grounded on fairness rather than other principles. Moral views that are characterized by all four of these elements can be identified as variants of the principle of fairness.

Obligations in all the empirical sources studied are consistent with these points, though correspondences are not exact, and other moral principles were also invoked. The central ideas in the US Supreme Court cases are reciprocal obligations, based on fairness, although as we have seen, fairness takes a back seat to the idea of reciprocal obligations, which is repeatedly expressed. The German cases are similar, in propounding the need to reciprocate for benefits received and a principle of equality, which receives strong emphasis. The Israeli cases are somewhat different. Consequentialist concerns in connection with the essential benefit of defense are more prominent, for reasons we have seen. But these too should be interpreted as reciprocal obligations. A norm of equality is also explicitly appealed to, although in only one case.

Discussion in the focus groups is basically similar. Central to the reasons to obey expressed by participants are benefits the state provides. Participants readily presented generalization arguments in regard to these, moving all but instinctively from individual cases to arguing that one person should obey the law, because of the consequences if everyone else behaved similarly. Although such reasoning is closely linked to fairness, it is distinct, in that connections between one person's conduct and everyone else's are through snowball arguments. In a fairness argument, Grey should comply because, with other people complying, it would be unfair for him not to. There is no immediate appeal to the consequences of his actions. A snowball argument, too, contains an implicit requirement that Grey be treated no differently than anyone else, but it also contains an appeal to consequences. Grey should obey, because if he did not, then no one else would. Fairness and snowball arguments are alike, in appealing to generalization and norms of equal treatment. But snowball arguments are flawed on empirical grounds. Only under unusual circumstances, will Grey's behavior actually have these consequences. Hence, fairness arguments are more sophisticated, in not requiring appeal to improbable factual circumstances.

Other moral notions were invoked in focus groups. These included, prominently, appeals to membership and, less frequently, consent, although people who expressed these ideas did not seem entirely clear about them. Probing indicated that membership was frequently bound up with receiving benefits from the state. Something similar was frequently true of consent. Still, to the extent that people appealed to these ideas, their views depart from fairness. Not surprisingly, focus

group participants frequently ran together different lines of argument and moral principles. However, the overall thrust of their reasoning was basically consistent from group to group.

Discussion of the vignettes reported in Chapter 10 strongly supports connections between obligations, significant benefits, and fairness. While Simmons argues that a strong sense of cooperation is central to obligations generated by the principle of fairness, focus group participants rejected this idea. Participants in all four groups emphasized connections between obligations and benefits and that each person should do his or her part. In addition, in all cases, the existence or nonexistence of obligations was correlated with the value of benefits received. There was strong support of obligations in regard to defense, as opposed to weaker or no obligations in regard to a Nozick-style public address system. Once again, as in regard to other subjects, snowball arguments figured significantly in participants reasoning in regard to the vignettes.

Because the evidence of the different sources is not unequivocal, I do not conclude that it directly supports a fairness view. But I believe that it does so indirectly. In keeping with the 'Grotian' argument invoked in Chapter 7, I am interested in how different pieces of evidence stand in relation to each other. Once again, according to Rawls, 'justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.'[425] Although far from perfect or complete, in both court decisions and focus groups, there is overall convergence on (e.1)–(e.4). The overlap of views is undoubtedly closer to a principle of fairness than to any other basis for political obligations. If, following Grotius, we believe that agreement between different sources should be 'referred to a universal cause,'[426] then the most likely universal cause is the principle of fairness, although this assessment is based on comparison between fairness and other principles, as opposed to direct convergence.

To bring this work to a close, I will discuss how my conclusions bear on traditional questions of political obligation. The MP theory developed in Chapter 5 is able to satisfy the four criteria noted in Chapter 1. It is general and particular, establishes obligations that are limited in force, and is able to cover the entire range of state services. As noted in Chapter 1, although I view it as important, I do not believe explaining obligations that people feel to existing governments is an additional

[425] 8:21–22. Fac.: Let me change one factor with the, or highlight one factor in regard to this scenario. Again, we're back with the X-ites who are surrounded by hostile enemies, and if you notice, when we talked about the well example, in the well example, we've got a relatively small group. There is face-to-face cooperation. There is a real sense of cooperation. People are aware of the other people who are cooperating. Whereas here, we are talking about a much larger situation. We're talking conceivably about a country where you don't have this face-to-face element. You don't have this sense of cooperation. Does the absence of the sense of cooperation affect whether it's right or wrong for the guy on the corner to refuse to serve?

[426] This is as read to group 7; there was more variation in exactly how this scenario was expressed than with the others.

criterion of success, although fairness theory appears to be better able to accomplish this than are other theories. There is, however, a significant difference between this theory and more traditional theories of obligation. As noted briefly in Chapter 1, as traditionally understood, political obligations are content-independent. Smith has a moral requirement to obey the law because it is the law, without reference to what a given law is about. MP theory departs from this model, in that different laws are to be obeyed for different reasons, based on the particular concerns of given laws. Such a view might appear to verge on philosophical anarchism, as advanced by Simmons. And so does this book, largely devoted to criticizing philosophical anarchism, end up with a variant of what it criticizes?

In *Moral Principles and Political Obligations*, Simmons of course rejects general political obligations but argues that their absence does not imply that people should not obey the law. There are good reasons to obey many laws. Simmons focuses on consequences: 'Where disobedience to law is concerned, we must remember that disobedience almost always affects someone else negatively and we have moral duties to those persons qua persons (as opposed to 'citizens'), which must be taken into account.'[427] According to Simmons, there is no presumption that Grey should obey the law. Only if the balance of considerations tells in favor of obedience, should he obey; if it tells against, then he should not. Simmons argues that individuals should 'support' legitimate governments.[428] But aside from his claim that this is a 'non-particularized' requirement, owed to all legitimate governments, as opposed to that government to which the subject would ordinarily feel closely bound, this injunction provides little guidance as to what constitutes 'support.' Simmons's logic clearly leaves this to the individual to determine. However, as we saw in Chapter 2, as an empirical matter, in order for public goods to be provided, the government must be able to say what constitutes support and to make sure that people comply with its dictates.

On this account, the views of philosophical anarchists depart sharply from the presumption of obedience that is normally said to follow from a successful theory of obligation. In this respect, MP theory is similar to traditional theories. It requires that Grey consider the particulars of a given law before he can understand his reasons for being required to obey, and as we saw in Chapter 5, the reasons will

[427] These include age differences, suburban v rural, and the fact that of the nine participants in 7 and 8, three were foreign nationals.

[428] J. Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), p. 21.

differ from law to law. But in regard to each law, MP theory is able to establish a presumption of obligation. Confronted with its arguments, if Grey wishes to claim that he need not obey, the burden of justification will fall on him. In other words, while MP theory resembles philosophical anarchism in requiring attention to the particulars of given laws, it departs from the same in providing strong reasons to obey in each case. As we saw in Chapter 5, MP theory can establish comprehensive moral requirements to obey. These reasons are only prima facie rather than conclusive and are subject to being overridden by other moral considerations. But in this respect, MP theory does not differ from other successful theories of obligation (assuming we had them), including one based on consent.

Still, in an important respect, the reasoning of focus group subjects appears to be closer to philosophical anarchism than to traditional theories of obligation. In the conclusion to Chapter 9, I argued that traditional questions of the form, 'should you obey the law?' are flawed. With great regularity, focus group participants distinguish between laws they should obey and others that it is acceptable not to. In general, subjects strongly believe they should obey the law. The class of exceptions was comprised of laws that were viewed as trivial or useless, most notably certain traffic laws, and others that were viewed as morally dubious: underage drinking, antisodomy laws, etc. And so we should ask if, in deciding against obedience to certain laws, participants had discarded the presumption of obedience in regard to them. On the face of it, they had little or no regard for these laws, and so were they assessing them on particular circumstances alone? I do not believe this is the case. Although it would take in-depth probing in additional focus groups to find out how people actually think on this subject, a plausible hypothesis is that one result of connecting requirements to obey with government services is to sever that connection when services are useless or immoral. Because MP theory bases requirements to obey on different kinds of governmental services, it can explain why certain laws are set aside, especially if they are generally viewed as not serving valid purposes. Because the presumption of obedience that MP theory generates is only a prima facie requirement, it is subject to being set aside because of the dubious quality of given laws. As noted above, because of people's propensity to generalize when confronting questions of obedience or nonobedience, the consequences on the basis of which they calculate appear to be generalized consequences. Laws against speeding are useless, not because of the consequences when I speed, as these are insignificant, but because things work acceptably when *everyone* goes a few miles over the limit. In regard to such a case,

the presumption that a given law promotes the public good *has been overturned* by experience, which shows that it does not.[429] While if I do not pay my taxes, society might actually benefit (according to consequentialist calculations); if everyone refused to pay, the consequences would be severe. It is because generalization in cases such as speeding yields consequences that are generally viewed as acceptable that people feel no compunction about speeding.

Once again, there is as of yet no direct evidence that people reason along these lines, although the fact that they generalize and that they view the laws in question as useless is some indication that they do so. To the extent that people's reasoning on such matters is consistent, this hypothesis provides a better explanation of their thinking than others, for example, that in some matters, they take into account the fact that a given law is the law, but do not for useless laws. It is more likely that, in regard to what are viewed as useless laws, the verdict is in. Subjects do not have to assess them against general requirements to obey the law, because society has long concluded that they do not serve valid public purposes. As I have argued throughout this work, political obligations are rooted in receipt of essential public goods (and other significant benefits) from the state. The fact that laws or other public provisions do not serve legitimate purposes dissolves moral requirements to comply with them.

[429] H. Grotius, *Prolegomena to the Law of War and Peace*, F. Kelsey (trans.) (Indianapolis: Bobbs-Merrill, 1957), para. 40.

Cases Cited

Germany

BVerGE 12 (1960).
BVerGE 38 (1974).
BVerGE 48 (1978).
BVerGE 69 (1985).
BVerGE 78 (1988).

Israel

*Baranowsk*i v. *Minister of Defense*, H.C. 2700/96, not published.
Elagazi v. *Minister of Defense and Others*, H.C. 470/80, not pusblished.
Epstein v. *Minister of Defense and Others*, H.C. 4062/95, not published.
Poraz v. *Tel-Aviv-Jaffa Municipality*, H.C. 953/87.
Ressler and Others v. *Minister of Defense*, H.C. 910/86.
Rubenstein and Others v. Minister of Defense, H.C. 3267/97.
Shain and the Israeli Association for Civil Rights v. *Minister of Defense and Chief of Staff*, H.C. 734/83.
Steinberg v. *Attorney General of the State of Israel*, C.A. 5/51.

United States

Arver v. *U.S*. 1918. 245 U.S. 366.
Bowles v. *Willingham*. 1944. 321 U.S. 503.
Cherokee Nation v. *State of Georgia*. 1831. 30 U.S. 1.
Chisholm v. *Georgia*. 1793. 2 U.S. 419.
Cox v. *Woods*. 1918. 247 U.S. 3.
Gillette v. *U.S*. 1971. 401 U.S. 437.
Goldman v. *Weinberger*. 1986. 475 U.S. 503.
Holmes v. *United States*. 1968. 391 U.S. 936.
Jacobson v. *Massachusetts*. 1905. 197 U.S. 11.
Lichter v. *U.S*. 1948. 334 U.S. 742.
Luria v. *U.S*. 1913. 231 U.S. 9.
Minor v. *Happersett*. 1875. 88 U.S. 162.
McCulloch v. *Maryland*. 1819. 17 U.S. 316.
McKinley et al. v. *U.S*. 1919. 249 U.S. 398.
Northern Pacific Railroad Company v. *North Dakota*. 1918. 250 U.S. 135.
Parker v. *Levy*. 1974. 417 U.S. 733.
Republica v. *Chapman*. 1781. 1 U.S. 53.

Rutland Marble Co. v. *Ripley*. 1870. 77 U.S. 339.
Talbot v. *Jansen*. 1795. 3 U.S. 133
U.S. v. *Bethlehem Steel Corp*. 1942. 315 U.S. 289.
U.S. v. *Macintosh*. 1931. 283 U.S. 605.
U.S. v. *O'Brien*. 1968. 391 U.S. 367.
U.S. v. *Rice*. 1819. 4 Wheat. 246.
U.S. v. *Schwimmer*. 1929. 279 U.S. 644.
U.S. v. *Seeger*. 1965. 280 U.S. 163.
U.S. v. *Wong Kim Ark*. 1898. 169 U.S. 649.
U.S. Term Limits Inc. v. *Ray Thorton*. 1995. 63 U.S.L.W. 4413.
Wayte v. *U.S.* 1985. 470 U.S. 598.
Welsh v. *U.S.* 1970. 398 U.S. 333.
Yakus v. *United States*. 1944. 321 U.S. 414.

References

Abraham, H. J. (1993). *Justices and Presidents*, 3rd edn. New York: Oxford University Press.

Adema, W. (1997). 'What Do Countries Really Spend on Social Policies? A Comparative Note,' *OECD Economic Studies*, 28.

Andreoni, J., Erard, B., and Feinstein, J. (1998). 'Tax Compliance,' *Journal of Economic Literature*, 36.

Arneson, R. (1992). 'The Principle of Fairness and Free-Rider Problems.' *Ethics*, 92.

Austin, J. L. (1970). "A Plea for Excuses," in G. Warnock and J. Urmson (eds.), *Philosophical Papers*, 2nd edn. Oxford: Oxford University Press.

Barak, A. (1992). 'The Israeli Legal System: Heritage and Culture,' *Hapraklit* 40.

Barnett, R. (2000). *The Structure of Liberty: Justice and the Rule of Law.* Oxford: Oxford University Press.

Becker, L. (1986). *Reciprocity.* London: Routledge and Kegan Paul.

Benson, B. (1990). *The Enterprise of Law.* San Francisco: Pacific Research Institute for Public Policy.

Beran, H. (1987). *The Consent Theory of Political Obligation*. London: Croom Helm.

Berger, F. R. (1975). 'Gratitude,' *Ethics*, 85.

Berlin, I. (1969). 'Two Concepts of Liberty,' in *Four Essays on Liberty.* Oxford: Oxford University Press.

Blake, M. (2002). 'Distributive Justice, State Coercion, and Autonomy,' *Philosophy and Public Affairs*, 30.

Boldt, H. (1990). *Deutsche Verfassungsgeschichte*, 2. Bde. Muenchen: Deutscher Taschenbuch Verlag.

Boynton, G., Patterson, S., and Hedlund, R. (1968). 'The Nature of Support for Legislative Institutions,' *Midwest Journal of Political Science*, 12.

Brandt, R. (1964). 'The Concepts of Obligation and Duty,' *Mind*, 73.

Brody, B. (1972). 'Thomson on Abortion,' *Philosophy and Public Affairs*, 1.

Buchanan, A. (2002). 'Political Legitimacy and Democracy,' *Ethics*, 112.

—— (1991). *Secession: The Morality of Political Divorce.* Boulder: Westview Press.

Cadoppi, A. (1993). 'Failure to Rescue and the Continental Criminal Law,' in M. Menlowe and A. Smith, (eds), *The Duty to Rescue: The Jurisprudence of Aid.* Dartmouth: Aldershot.

Camenisch, P. (1981). 'Gift and Gratitude in Ethics,' *Journal of Religious Ethics*, 9.

Caplan, B. and Stringham, E. 'Network, Anarcho-Capitalism, and the Paradox of Cooperation,' *Review of Austrian Economics.* (Forthcoming).

Card, C. (1988). 'Gratitude and Obligation,' *American Philosophical Quarterly*, 25.
Carr, C. (2002). 'Fairness and Political Obligation,' *Social Theory and Practice*, 28.
Carroll, J. (1992). 'How Taxpayers Think about Their Taxes: Fairness and Values,' in J. Slemrod (ed.), *Why People Pay Taxes: Tax Compliance and Enforcement*. Ann Arbor: University of Michigan Press.
Carter, A. (2001). 'Presumptive Benefits and Political Obligation,' *Journal of Applied Philosophy*, 18.
Christiano, T. (1999). 'Justice and Disagreement at the Foundations of Political Authority,' *Ethics*, 110.
Coons, C. (2001). Wellman's 'Reductive' Justifications for Redistributive Policies that Favor Compatriots,' *Ethics*, 111.
Copp, D. (1999). 'The Idea of a Legitimate State,' *Philosophy and Public Affairs*, 28.
Cowen, T. (1994). 'Rejoinder to David Friedman on the Economics of Anarchy,' *Economics and Philosophy*, 10.
—— (1992). 'Law as a Public Good: The Economics of Anarchy,' *Economics and Philosophy*, 8.
Dagger, R. (2000). 'Membership and Fair Play,' *Political Studies*, 48.
—— (1997). *Civic Virtues*. Oxford: Oxford University Press.
Daniels, N. (1979). 'Wide Reflective Equilibrium and Theory Acceptance in Ethics,' *Journal of Philosophy*, 76.
de Jasay, A. (1997). *Against Politics*. London: Routledge.
Dworkin, R. (1986). *Law's Empire*. Cambridge, MA: Harvard University Press.
—— (1977). *Taking Rights Seriously*. Cambridge, MA: Harvard University Press.
Edmundson, W. (1999). 'The Duty to Obey the Law,' *APA Newsletters*, 99.
—— (1998). *Three Anarchical Fallacies*. Cambridge: Cambridge University Press.
Ellickson, R. (1991). *Order Without Law*. Cambridge, MA: Harvard University Press.
Erickson, J. (1983). *The Road to Berlin*. London: Weidenfeld & Nicholson.
Feinberg, J. (1984). *Harm to Others*. Oxford: Oxford University Press.
Feldbrugge, F. (1965–6). 'Good and Bad Samaritans: A Comparative Survey of Criminal Law Provisions Concerning Failure to Rescue,' *American Journal of Comparative Law*, 14.
Finkel, S. and Muller, E. N. (1998). 'Rational Choice and the Dynamics of Collective Political Action: Evaluating Alternative Models with Panel Data,' *American Political Science Review*, 92.
—— and Opp, K. (1989). 'Personal Influence, Collective Rationality, and Mass Political Action,' *American Political Science Review*, 83.
Frazer, J. 'Citizenship and Rules of Consent.' (Unpublished).

Friedman, D. (1994). Law as a Private Good: A Response to Tyler Cowen on the Economics of Anarchy,' *Economics and Philosophy*, 10.
—— (1979). 'Private Creation and Enforcement of Law: A Historical Case,' *Journal of Legal Studies*, 8.
—— (1973). *The Machinery of Freedom*. New York: Harper and Row.
Gans, C. (1992). *Philosophical Anarchism and Political Disobedience*. Cambridge: Cambridge University Press.
Gaus, G. (2000). 'Review of Barnett, *Structure of Liberty*,' *Criminal Justice Ethics*, 19.
Gilbert, M. (1993). 'Group Membership and Political Obligation,' *Monist*, 76.
Goodin, R. (1988). 'What is So Special about Our Fellow Countrymen?' *Ethics*, 98.
Green, L. (1996). 'Who Believes in Political Obligation?' in J. T. Sanders and J. Narveson (eds.), *For and Against the State*. Lanham, MD: Rowman and Littlefield.
—— (1988). *The Authority of the State*. Oxford: Oxford University Press.
Grotius, H. (1957). *Prolegomena to the Law of War and Peace*. (trans. F. Kelsey). Indianapolis: Bobbs-Merrill.
Hall, M. and Klosko, G. (1998). 'Political Obligation and the United States Supreme Court,' *Journal of Politics* 60.
Hardin, G. (1968). 'The Tragedy of the Commons,' Science, 162.
Harriott, H. (1996). 'Games, Anarchy, and the Nonnecessity of the State,' In J. Sanders and J. Narveson (eds), *For and Against the State*. Lanham, MD: Rowman and Littlefield.
Hart, H. L. A. (1958). 'Legal and Moral Obligation,' in A. I. Melden (ed.), *Essays in Moral Philosophy*. Seattle: University of Washington Press.
—— (1955). 'Are There Any Natural Rights?' *Philosophical Review*, 64.
Head, J. G. (1974). *Public Goods and Public Welfare*. Durham, NC: Duke University Press.
Hobbes, T. (1991). *Leviathan*. R. Tuck (ed.). Cambridge: Cambridge University Press.
Hobhouse, L. T. (1994). 'Liberalism,' in J. Meadowcraft (ed.), *Liberalism and Other Writings*. Cambridge: Cambridge University Press.
Hohfeld, W. (1919). *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. New Haven: Yale University Press.
Horton, J. (2001). 'Political Obligation, Identity, and Political Community.' Paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.
—— (1992). *Political Obligation*. London: Macmillan.
Hume, D. (1969). *A Treatise of Human Nature*, E. Mossner (ed.). Harmondsworth: Penguin.
—— (1985). 'Of the Original Contract,' in E. Miller (ed.), *Essays: Moral, Political and Literary*, rev. edn. Indianapolis: Liberty Classics.
Jones, A. H. M. (1957). *Athenian Democracy*. Oxford: Blackwell.
Kagan, S. (1989). *The Limits of Morality*. Oxford: Oxford University Press.

Kalt, J. (1981). 'Public Goods and the Theory of Government,' *Cato Journal*, 1.
Kant, I. (1991). 'Idea for a Universal History with a Cosmopolitan Purpose,' in H. Reiss (ed.), *Kant's Political Writings*, 2nd enlarged edn. Cambridge: Cambridge University Press.
Karp, J. (1990). 'Finding an Equilibrium,' *Israeli Democracy*.
Keren, M. (2002). *Zichroni v. State of Israel: The Biography of a Civil Rights Lawyer*. Lanham, MD: Lexington Books.
—— (1998). 'Justifications of Conscientious Objection: An Israeli Case Study,' *International Journal of the Sociology of Law*, 26.
Klein, D. and Klosko, G. (2001). 'Political Obligation: The Empirical Dimension.' Paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.
Klosko, G. (2004). 'Multiple Principles of Political Obligation,' *Political Theory*, 32.
—— (2004). 'Duties to Assist *Others* and Political Obligations,' *Politics, Philosophy, and Economics*, 3.
—— (2003). 'Samaritanism and Political Obligation: A Response to Christopher Wellman's "Liberal Theory of Political Obligation," ' *Ethics*, 113.
—— (2001). 'The Natural Basis of Political Obligation,' *Social Philosophy and Policy*, 18.
—— (2000). *Democratic Procedures and Liberal Consensus*. Oxford: Oxford University Press.
—— (1998). 'Fixed Content of Political Obligation,' *Political Studies*, 46.
—— (1994). 'Political Obligation and the Natural Duties of Justice,' *Philosophy and Public Affairs*, 23.
—— (1993, 1995). *History of Political Theory: An Introduction*, 2 vols. Fort Worth, TX: Harcourt Brace Jovanovich.
—— (1992). *The Principle of Fairness and Political Obligation*. Savage, MD: Rowman and Littlefield. (new edn., 2004).
—— (1992). 'Review of Schmidtz, *Limits of Government*,' *Political Theory*, 20.
—— (1991). 'Reformist Consent and Political Obligation,' *Political Studies*, 39.
—— (1991). 'Four Arguments against Political Obligations from Gratitude,' *Public Affairs Quarterly*, 5.
—— (1990). 'The Moral Force of Political Obligations,' *American Political Science Review*, 84.
—— (1990). 'Parfit's Moral Arithmetic and the Obligation to Obey the Law,' *Canadian Journal of Philosophy*, 20.
—— (1990). 'The Obligation to Contribute to Discretionary Public Goods,' *Political Studies*, 38.
—— (1989). 'Political Obligation and Gratitude,' *Philosophy and Public Affairs*, 18.
—— (1987). 'Presumptive Benefit, Fairness and Political Obligation,' *Philosophy and Public Affairs*, 16.

—— (1987). 'The Principle of Fairness and Political Obligation,' *Ethics* 97.
—— , Keren, M., and Nyikos, S. (2003). 'Political Obligation and Military Service in Three Countries,' *Politics, Philosophy, and Economics*, 2.
Kommers, D. (1989). *The Consitutional Jurisprudence of the Federal Republic of Germany*. Durham: Duke University Press.
Kraut, R. (1984). *Socrates and the State*. Princeton: Princeton University Press.
Landes, W. M. and Posner, R. A. (1979). 'Adjudication as a Private Good,' *Journal of Legal Studies*, 8.
Lenin, V. I. (1975). The State and Revolution,' in R. Tucker (ed.), *The Lenin Anthology*. New York: Norton.
Locke, J. (1998). *Second Treatise of Government*, in P. Laslett (ed.), *Two Treatises of Government*. Cambridge: Cambridge University Press.
Luce, R. D. and Raiffa, H. (1957). *Games and Decisions*. New York: Wiley.
Lyons, D. (1965). *Forms and Limits of Utilitarianism*. Oxford: Oxford University Press.
MacCallum, G. (1967). 'Negative and Positive Freedom,' *Philosophical Review*, 76.
MacCormick, N. (1972) 'Voluntary Obligations and Normative Powers,' *Proceedings of the Aristotelian Society* (Suppl.), 46.
McDermott, D. (2001). 'Natural Duties and State Legitimacy.' Paper presented at the 2001 meeting of the American Political Science Association, San Francisco, CA.
Malbin, M. (1972). 'Conscription, the Constitution, and the Framers: An Historical Analysis,' *Fordham University Law Review*, 40.
Maunz, T. and Zippelius, R. (1988). *Deutsches Staatsrecht*, 27th edn. München: C.H. Beck'sche Verlagsbuchhandlung.
Menlowe, M. (1993). 'The Philosophical Foundations of a Duty to Rescue,' in M. Menlowe and A. Smith (eds), *The Duty to Rescue: The Jurisprudence of Aid*. Dartmouth: Aldershot.
Miller, D. (1995). *Principles of Social Justice*, Cambridge, MA: Harvard University Press.
—— (1995). *On Nationality*. Oxford: Oxford University Press.
—— (1993). 'Public Goods Without the State,' *Critical Review*, 7.
Miller, R. (1998). 'Cosmopolitan Respect and Patriotic Concern,' *Philosophy and Public Affairs*, 27.
Mish'Alanai, J. (1969). ' "Duty," "Obligation," and "Ought"',' *Analysis*, 30.
Montesquieu (1989). *The Spirit of the Laws*. (eds and trans. A. Cohler, B. Miller, and H. Stone) Cambridge: Cambridge University Press.
Morris, C. (1998) *An Essay on the Modern State*. Cambridge: Cambridge University Press.
Moskos, C. and Chambers, J. (eds) (1993). *The New Conscientious Objection*. Oxford: Oxford University Press.
Murphy, M. 'Philosophical Anarchism: False and Arrogant.' (Unpublished).
Narveson, J. (1988). *The Libertarian Idea*. Philadelphia: Temple University Press.

Nozick, R. (1974). *Anarchy, State, and Utopia*. New York: Basic Books.
—— (1969). 'Coercion,' in S. Morgenbesser, P. Suppes, M. White (eds), *Philosophy, Science and Method: Essays in Honor of Ernest Nagel*. New York: St Martin's.
Nussbaum, M. (2001). 'The Enduring Significance of John Rawls,' *Chronicle of Higher Education*, July 20.
—— (1996). 'Patriotism and Cosmopolitanism,' in J. Cohen (ed.), *For Love of Country*. Boston: Beacon Press.
Olson, M. (1965). *The Logic of Collective Action*. Cambridge, MA: Harvard University Press.
Ostrom, E. (1990). *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.
Peri, Y. (1993). 'Israel: Conscientious Objection in a Democracy under Siege,' in C. Moskos and J. C. Whiteclay (eds), *The New Conscientious Objection: From Sacred to Secular Resistance*, New York: Oxford University Press.
Pitkin, H. (1965). 'Obligation and Consent, I,' *American Political Science Review*, 59.
Pohlman, H., (ed.) (1993). *Political Thought and the American Judiciary*. Amherst, MA: University of Massachusetts Press.
Prichard, H. A. (1968). 'The Obligation to Keep a Promise,' in *Moral Obligation*. Oxford: Oxford University Press.
Rawls, J. (1993). *Political Liberalism*. New York: Columbia University Press.
—— (1989). 'The Domain of the Political and Overlapping Consensus,' *New York University Law Review*, 64.
—— (1987). 'The Idea of an Overlapping Consensus,' *Oxford Journal of Legal Studies*, 7.
—— (1985). 'Justice as Fairness: Political Not Metaphysical,' *Philosophy and Public Affairs*, 14.
—— (1971). *A Theory of Justice*. Cambridge, MA: Harvard University Press.
—— (1964). 'Legal Obligation and the Duty of Fair Play,' in S. Hook (ed.), *Law and Philosophy*. New York: NYU Press.
—— (1958). 'Justice as Fairness,' *Philosophical Review*, 67.
—— (1951). 'Outline of a Decision Procedure for Ethics,' *Philosophical Review*, 60.
Raz, J. (1985). 'Authority and Justification,' *Philosophy and Public Affairs*, 14.
—— (1979). *The Authority of Law*. Oxford: Oxford University Press.
—— (1972). 'Voluntary Obligations and Normative Powers,' *Proceedings of the Aristotelian Society* (Suppl.), 46.
Reid, W. and Henderson, J. (1976). 'Political Obligation: An Empirical Approach,' *Polity*, 9.
Rothbard, M. (1982). *The Ethics of Liberty*, Atlantic Highlands, NJ: Humanities Press.
—— (1978). *For a New Liberty*. New York: Macmillan.

Sanders, J. T. and Narveson, J. (eds), (1996) *For and Against the State*. Lanham, MD: Rowman and Littlefield.
Sanders, L. (1997). 'Against Deliberation,' *Political Theory*, 25.
Scanlon, T. (1990). 'Promises and Practices,' *Philosophy and Public Affairs*, 19.
Shachar, Y. (1982). 'The Elgazi Trials—Selective Conscientious Objection in Israel,' *Israel Yearbook on Human Rights* 12.
Schmidtz, D. (1992). *The Limits of Government*. Boulder, Co.: Westview.
—— and Goodin, R. (1998). *Social Welfare and Individual Responsibility*. Cambridge: Cambridge University Press.
Schumpeter, J. (1976). *Capitalism, Socialism, and Democracy*. New York: Harper and Row.
Shapira, A. (1983). 'Judicial Review without a Constitution: The Israeli Paradox,' *Temple Law Quarterly* 56.
Shapiro, I. (2003). *The State of Democratic Theory*. Princeton: Princeton University Press.
Simmons, A. J. *Justification and Legitimacy*. Cambridge: Cambridge University Press, 2001.
—— (1996). 'Philosophical Anarchism,' in J. T. Sanders and J. Narveson (eds.), *For and Against the State*. Lanham, MD: Rowman and Littlefield.
—— (1996). 'Associative Political Obligations,' *Ethics*, 106.
—— (1993). *On the Edge of Anarchy*. Princeton: Princeton University Press.
—— (1992). *The Lockean Theory of Rights*. Princeton: Princeton University Press.
—— (1987). 'The Anarchist Position: A Reply to Klosko and Senor,' *Philosophy and Public Affairs*, 16.
—— (1979). *Moral Principles and Political Obligations*. Princeton: Princeton University Press.
Skinner, Q. (1988). 'The State,' in T. Ball, R. Hanson, and J. Farr (eds), *Political Innovation and Conceptual Change*. Cambridge: Cambridge University Press.
Slemrod, J. (ed.), (1992). *Why People Pay Taxes: Tax Compliance and Enforcement*. Ann Arbor: University of Michigan Press.
Smith, M. B. E. (1973). 'Is There a Prima Facie Obligation to Obey the Law?' *Yale Law Journal*, 82.
Sneed, J. (1977). 'Order without Law: Where Will Anarchists Keep the Madmen?' *Journal of Libertarian Studies*, 1.
Song, Y. and Yarbrough, T. (1978). 'Tax Ethics and Taxpayer Attitudes: A Survey,' *Public Administration Review*, 5.
Spicer, M. W. and Becker, L. (1980). 'Fiscal Inequity and Tax Evasion: An Experimental Approach,' *National Tax Journal*, 33.
—— and Lundstedt, S. B. (1976). 'Understanding Tax Evasion,' *Public Finance*, 32.
Strang, C. (1960). 'What if Everyone Did That?' *Durham University Journal*, 53.

Taylor, M. (1987). *The Possibility of Cooperation*. Cambridge: Cambridge University Press.
Thomson, J. (1971). 'A Defense of Abortion,' *Philosophy and Public Affairs*, 1.
Tyler, T. (1990). *Why People Obey the Law*. New Haven: Yale University Press.
US Department of the Treasury (n.d). *Tax Reform for Fairness, Simplicity, and Economic Growth, the Treasury Department Report to the President, Summary of Proposals*. Washington, DC.
Waldron, J. (1993). 'Special Ties and Natural Duties,' *Philosophy and Public Affairs*, 22.
—— (1987). 'Theoretical Foundations of Liberalism,' *Philosophical Quarterly*, 37.
Walker, A. D. M. (1988). 'Political Obligation and the Argument from Gratitude,' *Philosophy and Public Affairs*, 17.
—— (1980–1). 'Gratefulness and Gratitude,' *Proceedings of the Aristotelian Society*, 81.
Walzer, M. (1970). 'Political Alienation and Military Service,' in *Obligations*. Cambridge, MA: Harvard University Press.
Weber, M. (1946). 'Politics as a Vocation,' in H. Gerth and C. W. Mills (eds. and trans.), *From Max Weber: Essays in Sociology*. Oxford: Oxford University Press.
Webley, P., H. Robben, Elffers, H., and Hessing, D. (1991). *Tax Evasion: An Experimental Approach*. Cambridge: Cambridge University Press.
Wellman, C. (2001). 'Toward a Liberal Theory of Political Obligation,' *Ethics*, 111.
—— (2000). 'Relational Facts in Liberal Political Theory: Is There Magic in the Pronoun "My"?' *Ethics*, 110.
Wertheimer, A. (1987). *Coercion*. Princeton: Princeton University Press.
Wolff, J. (1970). 'Political Obligation: A Pluralistic Approach,' in M. Baghramian and A. Ingram (eds.), *Pluralism: The Philosophy and Politics of Diversity*. London: Routledge.
Wolff, R. P. (1970). *In Defense of Anarchism*. New York: Harper and Row.
Wollstein, G. (1981). 'Die preußische Reformzeit—Das Landwehrkonzept,' in K. Kodalle (ed.), *Tradition als Last? Legitimitätsprobleme der Bundeswehr*. Köln: Wissenschaft und Politik.
Woozley, A. (1979). *Law and Obedience: The Argument of Plato's Crito*. Chapel Hill: University of North Carolina Press.
Zippelius, R. (1991). *Allgemeine Staatslehre*, 11th edn. München: C.H. Beck'sche Verlagbuchhandlung.
Zweigert, K. and Kotz, H. (1992). *Introduction to Comparative Law*, 2nd rev. edn. (trans. T. Weir). Oxford: Oxford University Press.

INDEX