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The Obligation to Obey: Revision and Tradition

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THE OBLIGATION TO OBEY: REVISION AND TRADITION

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The turbulent sixties, years of the civil rights movement and of the Vietnam War, brought, as a by-product of civil strife and widespread discontent, renewed interest in the question of the duties an individual owes his society. It was soon to give way to a preoccupation with what society owes to its members, that is to the swelling of interest in theories of justice and individual rights. But before it did so a good deal of common ground seemed to have been established among many of the political and moral theorists who did and still do attend to the issue. It is summed up by the view that every citizen has a prima facie moral obligation to obey the law of a reasonably just state. Its core intuition is the belief that denying an obligation to obey its laws is a denial of the justice of the state. This is believed to be so either on instrumentalist grounds or on grounds of fairness. The instrumentalist contends that the state will not be able to function if its citizens are not obligated to obey its laws and respect that obligation for the most part. The fairness argument has it that anyone who denies an obligation to obey in a just state take unfair advantage of others who submit to such an obligation.

I have joined several theorists who challenge this consensus.[1] There have, of course, always been those who deny the existence of an obligation to obey the law on the ground that no state can be just. Their most powerful philosophical spokesman in recent years has been Robert Paul Wolff.[2] The challenge posed by the arguments referred to is that they claim that even in a just state, if there can be such, there is no general obligation to obey the law. Not even all those who deny the existence of a general obligation to obey the law have realized its full implications. If there is no general obli-

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1. *See* Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L. J. 950 (1973); A. WOOZLEY, LAW AND OBEDIENCE (1979); A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATION (1979); J.RAZ, THE AUTHORITY OF LAW (1979); Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3 (1981).

2. R. WOLFF, IN DEFENSE OF ANARCHISM (1970).

gation to obey, then the law does not have general authority, for to have authority is to have a right to rule those who are subject to it. And a right to rule entails a duty to obey. I shall contend below that in a very real sense this conclusion returns to the main line of thought of the founders of modern political theory. However, it appears to be a novel position and not surprisingly has led to a number of misunderstandings as typified in Dr. Finnis's article in this issue. This article aims to help dispel some of the misunderstandings.

I. Government Without Authority

Let us start by considering the (apparent) paradox of the just government. Most political theorists acknowledge that there is no general obligation to obey the law of an unjust state. But, it is contended, there is an obligation to obey the law of a reasonably just state, and the greater its justice the stricter, or at any rate the clearer, the obligation. But is this so? Isn't the reverse the case? The morality of a government's laws measures, in part, its justice. Its laws are moral only if there is a moral obligation to perform the actions which they impose a legal obligation to perform. That moral obligation cannot be due to the existence of an obligation to obey the law. To establish an obligation to obey the law one has to establish that it is relatively just. It is relatively just only if there is a moral obligation to do that which it imposes legal obligations to do. So the moral obligations on which the claim that the law is just is founded are prior to and independent of the moral obligation to obey the law. The alleged moral obligation to obey arises from these independent obligations to act as the law requires.

Since the obligation to obey the law derives from these other moral obligations, its weight or strictness reflects their weight. The stricter they are the stricter is the obligation to obey. But if so, then the obligation to obey the law is at best redundant. It may make a moral difference if it exists in an unjust state, for there it imposes a moral obligation where none exists. But in a just state, it is at best a mere shadow of other moral duties. It adds nothing to them. Since the obligation to obey exists only in a just state, it is at best redundant.

Consider the question whether there is a legal obligation to obey the law. The obligation exists, but it is hardly ever mentioned, for it is the shadow of all the specific legal obligations. The law requires one to pay tax, refrain from murder, assault, theft, libel, breach of contract, etc. Hence, tautologi-

cally, one has a legal obligation to pay tax, refrain from murder, assault, theft, libel, breach of contract, etc. A short, though empty and uninformative, way of describing one's legal duties is to say that one has a legal duty to obey the law. One has a legal duty to obey the law because one has a legal duty to obey this law and that, and so on, until one exhausts their list. It is likewise, the paradox can be interpreted as alleging, with the moral duty to obey the law. It exists only to the extent that there are other, independent moral duties to obey each of the laws of the system. It is merely their shadow.

In fact the paradox is even worse. The obligation to obey the law is no mere shadow. It would be, were it to exist, a moral perversion. Consider legal duties such as the duty not to commit murder and not to rape. Clearly there are moral duties to refrain from murder and from rape. Equally clearly we approve, if we do, of the laws prohibiting such acts, because the acts they forbid are morally forbidden.[3] Moreover, we expect morally conscientious people to comply with these laws because the acts they forbid are immoral. I would feel insulted if it were suggested that I refrain from murder and rape because I recognize a moral obligation to obey the law. We expect people to avoid such actions whether or not they are legally forbidden, and for reasons which have nothing to do with the law. If it turns out that those reasons fail, that it is only respect for the law which restrains them from such acts, then those people lose much of our respect.

But if the obligation to obey the law is not a morally correct reason by which the morally conscientious person should guide his action, at least not in such elementary and fundamental areas of the law as those mentioned, then can there be such an obligation? Can there be a moral obligation to perform an action if to take the existence of the obligation as one's reason for the action it enjoins would be wrong, or ill-fitting?

So much for the apparent paradox of the just law. The more just and valuable the law is, it says, the more reason one has *to conform to it*, and the less *to obey it*. Since it is just, those considerations which establish its justice should be one's reasons for conforming with it, i.e., for acting as it requires. But in acting for these reasons one would not be obeying the law,

3. Here as elsewhere in this article I am assuming that the immorality of an action, even if a necessary condition for the justice of a law prohibiting it, is never a sufficient condition.

one would not be conforming because that is what the law requires. Rather one would be acting on the doctrine of justice to which the law itself conforms.

I called the paradox merely 'apparent' because it is overstated. For reasons we will examine in the next section, sometimes the law makes a moral difference. In particular sometimes the law is just, although no independent obligation attaches to what it requires. In these cases it is morally obligatory to act as the law requires because it so requires. But even though overstated the alleged paradox is instructive. It challenges the existence of a general obligation to obey the law. To succeed it need only establish that in some fairly central cases there is no such obligation. From this point of view it matters not that some laws are not like the laws against murder and rape. If a legal prohibition of murder neither imposes an independent moral obligation nor makes the duty not to murder stricter or weightier than it was without the law, then the case is made. The prohibitions of murder, rape, enslavement, imprisonment and similar legal prohibitions are central to the laws of all just legal systems. Their existence cannot be dismissed as marginal or controversial. If these laws do not make a difference to our moral obligations, then there is no *general* obligation to obey the law. There may be a moral obligation to obey some laws, but this was never in contention.

The argument so far depends on two assumptions both of which are open to challenge. First, the argument assumes that to refrain from murder or any other moral perversion solely because the law proscribes it is morally distorted and undesirable. It may be objected that while this is not the best motive for refraining from murder it is not the worst either. It is better for example than sparing a person's life because he will then suffer a more painful death. Second, it assumes that the reasons for obeying the law, when such can be found, must derive from the reasons for having laws with that particular content. It may be objected that the reasons for obedience normally thought of as constituting the obligation to obey have nothing to do with the desirability of any particular law but with the desirability of the existence of a legal system and a structure of government by law as a whole.

The argument of the following pages will help rebut these objections and will bolster the assumptions, especially the second one.[4] My present purpose is more modest. Even if

4. The first objection is indecisive. The fact that some motives for

the alleged paradox fails to disprove the existence of an obligation to obey, it succeeds in making us reexamine some of our assumptions about the functions of law in society. It reveals that much of the good that the law can do does not presuppose any obligation to obey.

Once more a simplified picture will help bring out the point more clearly. Let us assume that in its sole proper function, the law prohibits murder, neglect of children by their parents, and other similar immoralities. On this assumption it is plausible to claim that the law's direct function is to motivate those who fail to be sufficiently moved by sound moral considerations. The conscientious, knowledgeable person will do what the law requires of him regardless of whether the law exists or not. The law is not for him. It is for those who deny their moral duties. It forces them to act as they should by threatening sanctions if they fail to do so. By addressing the self-interest of those who fail to be properly moved by moral considerations, the law reassures the morally conscientious. It assures him that he will not be taken advantage of, will not be exploited by the unscrupulous.

This oversimplified picture demonstrates the good a government without authority can do.[5] One can threaten and penalize people without having authority over them. One can also have an organization to issue and carry out threats without authority over them either. We can imagine the law enforcement functions we have in mind being carried out by people who are paid salaries, or given other incentives to enforce and to administer the laws. The personnel in charge of the implementation of the law need not necessarily be subject to the authority of the government or its law; they may be doing a job under a contract. Their actions are morally permissible for reasons independent of the law. Even when they encroach on the personal liberty of the offender, they need not invoke the law in justification. They treat offenders in

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action according to law are worse than the desire to obey may be nothing more than the ranking of evils. It may show merely that we normally regard intellectual confusion (the belief in an obligation to obey and action for it) as a lesser evil than cruelty, hatred, etc.

5. My analysis here is loose and informal. It runs parallel to the ingenious discussion of the pre-state existence of voluntary protection associations in R. NOZICK'S ANARCHY, STATE AND UTOPIA (1974). I do not share his picture of the working of the invisible hand, nor his understanding of people's moral rights and duties. But my argument parallels his in the emphasis on the extent to which governments do or can carry out functions which do not presuppose possession of authority.

ways morally appropriate for those who renege on their moral duties.

The picture is oversimplified. But it is so in what it leaves out, not in what it says. Governments fulfill the functions we described, but they do much else besides. Some of their other functions do not presuppose the recognition of authority either. It is an important fact about the modern state that to an ever greater extent it affects our fortunes by means other than exercising, or claiming to exercise, authority over us. In many states the government, or public authorities generally, are the largest employer in the country, control much of the infrastructure through a state monopoly on the provision of mail, telephone, airport and seaport services and the like. The armed forces are the largest clients for many high technology industries, and so on. The details vary from state to state, but the overall picture is rather similar.

The effects of this concentration of economic power are evident in the state's growing use of its economic muscle to achieve aims which in previous times would have required legislation or administrative actions. Governments attempt to affect the direction of industrial development, the level of economic activity, the rate of inflation, the level of unemployment, the regional distribution of wealth in the country, and other objectives through their economic power alone. Even non-economic objectives such as racial equality in employment are sometimes pursued by the use of economic power, rather than by the exercise of authority. It is often argued that the awarding of governmental contracts only to equal opportunity employers is the best way of pursuing such objectives.

Many of these developments are relatively recent and raise difficult questions about the adequacy of the existing machinery for controlling governmental powers. The machinery evolved primarily as a check on the government's exercise of legislative and administrative power. It is ill suited today to supervise the economic activities of public authorities. Nevertheless, it is clear that only the degree to which governments affect their populations by non-governmental means is new, for governments have always affected individuals by changing their physical or economic environment by means which do not invoke its authority. Governments have built roads, dug canals, constructed state buildings and monuments, employed people and the like for as long as political society has existed.

II. On the Foundation of Political Authority

Governments affect us through their intervention in the market by changing the physical environment, and by providing the morally unscrupulous or misguided with self-interested reasons to do that which they ought to do, but which moral reasons fail to make them do. Focusing on these aspects of governmental activity helps dispel the myth that denying the existence of an obligation to obey the law amounts to denying the possibility of a just government. This myth is based on a misperception of the aims and means of governmental action. If in principle governments can discharge all the mentioned functions without authority, then they can do so justly as well as unjustly. From our perspective it does not matter if the same ends can be achieved by other means, ones which do not involve the existence of governments. I am not challenging the justice of alternative modes of social organization, nor comparing their precise merits. I only seek to establish that those who favor the continued exercise of many of the existing functions of governments cannot argue from that to the existence of a general obligation to obey the law. For those functions can be discharged by governments independently of such an obligation.

One objection may be that the argument overlooks that at least government officials must accept governmental authority for government to function as described. If the officials do not obey the law, then the morally unscrupulous, for example, will have no fear that legal sanctions may be applied to them. The contract model answered this objection, because officials would serve the government by consent, rather than because they recognize its authority. This may not be a very practical arrangement in some cases. A more important objection may be that, where governments do not exercise any authority, not even over their officials, one may well doubt whether they are governments at all rather than corporations who voluntarily undertake some good social services. Be that as it may, the functions described which are normally carried out by governments can in principle be carried out without authority. Furthermore, let us remind ourselves that the argument does not require that nobody is under the authority of government. It only claims there is no general obligation to obey the law, i.e. that not everyone is under an obligation to obey all the laws, not even in a relatively just society.

My basic position is not that no one has any moral reason

ever to take account of the existence of the law. I argue that the extent of the obligation to obey varies from person to person. In no case is the moral obligation as extensive as the legal obligation. Consider three typical situations in which ordinary citizens do find themselves under an obligation to obey.

First, imagine that I use in the course of my employment tools which may create a safety hazard to passers by. The government has issued safety regulations detailing the equipment which may be used and the safety measures that I must take to make their use safe. The government experts who laid down these safety regulations are experts in their field. Their judgment is much more reliable than mine. I am therefore duty bound to obey the regulations which they have adopted.

Second, we all have reason to preserve the countryside. In areas visited by many people, this goal would be enhanced if no one had barbecues. In fact everyone has barbecues in those areas. The damage is done and my refraining from a barbecue will not help. The situation is so bad that my having a barbecue will not make even a small difference. At long last the government steps in and forbids having barbecues except in a few designated locations. Because the regulation might reverse the trend, I have an obligation to obey this law.

Third, I disagree with the government's policy of allowing the construction of nuclear power plants. I can try to block the roads leading to the construction sites to stop building material and machinery from reaching the workers. Doing so will be against the law. It will also, if successful to any degree, encourage other people to take the law into their own hands when they think they can force the government to change its policies. This will undermine the ability of the government to discharge its functions. Despite this lapse on the government's part, I still regard it as a relatively just and moral government. I have an obligation to obey the law and avoid breaking it in the way described.

In one respect the last case differs from the first two. Though I am obligated to obey the law, the obligation does not show that the law or government has authority over me regarding the issue in question. In the first two cases my obligation to obey results from the law's authority. It knows best, or it can best arrange matters. Hence, I had better accept its instructions and obey. In the last case there are no such assumptions. It is merely that I will undermine the government's ability to do good. That reason can, and often does,

apply to people not subject to the authority of the government. A foreign state may restrain its action in order not to undermine the ability of my government to fulfill its useful functions. But a foreign state is not subject to the authority of the government.[6]

More important are the features the three cases have in common. 1) They are typical cases. Much of planning law, laws concerning safety at work, regulations regarding standards of manufactured goods such as cars, pharmaceuticals and the like, rules concerning the safe maintenance of cars, or concerning standards of safe driving, qualifications required for engaging in certain occupations, and many more, all belong to the first category. Standards for the preservation of the environment, for the protection of scarce resources, for the raising of revenue through taxation to finance public projects, welfare services or other valuable projects, and many more belong in most cases to the second category. Any act aimed at forcing public authorities to change their policies or actions by unlawful means belongs to the third category. Some laws are more likely to be broken for these reasons than others, but the violation of any law can, on occasion, be used for such a purpose.

2) In all the examples, the law makes a difference to one's moral obligations. The moral obligation is a prima facie one; it may be overridden by contrary considerations. But for the law, I might well have adopted different safety precautions. I accept the superior reliability of the law on such issues, and defer to its judgment. I would not have had any reason to avoid having barbecues in the beauty spots of the second example, but for the introduction of the law which gives rise to the expectation that the widespread but damaging practice will come to an end, or at least that it will be sufficiently reduced so that my self-restraint will make a difference, however little. Finally, had the blockade of the nuclear power plant site not been against the law, it would not have been an act tending to undermine the ability of the government to carry out its proper functions. That is why it is proper to talk in all these cases of my obligation to obey some laws.

3) None of the cases separately, nor all of them together

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6. In other words, I agree with R.P. Wolff's contention that sometimes one has reason to obey someone who claims authority for reasons which do not amount to submission to his authority. *See*, R. WOLFF *supra* note 2, at 15-16.

offer an argument capable of being generalized to point to a general obligation to obey. The contrary is the case. They highlight the degree to which the obligation is limited and varies in accordance with circumstances. The first case depends on the law's superior knowledge. But if I am the greatest living expert on pharmaceuticals, then the law has no authority over me regarding the safety of pharmaceuticals. Sometimes I have the option of investing time, money and mental effort in a problem to solve it myself, or to go to a knowledgeable friend and follow his advice. The law, in cases of the first type, is like a knowledgeable friend and the same range of options are available. So that in such matters the range of the law's authority over individuals varies from one person to another.

The second example concerns not the law's superior knowledge, but its ability to achieve goals which individuals have reason to pursue, but cannot do so effectively on their own, because their realization requires coordinating the actions of large numbers of people. Although central to the normal functioning of the law, such cases cannot be generalized to generate an obligation to obey the law of a relatively just state. First, not all laws purport to fulfill such a function. Laws of the kind involved in the first class of cases, as well as laws like the prohibition of rape and murder differ from laws which coordinate the efforts of large groups. In the former cases, the reasons for acting in accord with the law apply with the same stringency in each case regardless of the degree of general conformity with the law. Every time someone murders or recklessly engages in a risky activity he acts wrongly, harming or risking others. Not so in our second example. Here the existence of reasons for the action, and their weight, depend on general conformity, or the likelihood of it. Some laws are of this character, others are not. The reasons which lead one to acknowledge the law's authority in cases of coordination do not apply elsewhere. Second, laws striving to achieve coordination address masses of people, and are designed to be enforced and regulated through the activities of judicial and administrative institutions. They are drafted not merely to state most accurately the actions required if coordination is to be achieved, but also to be easily comprehended, and to avoid giving rise to administrative corruption, the harassment of individuals, and other undesirable by-products of the operation of the legal machine. A person who understands the situation will often have reason to go beyond the law, and to do more than the law requires in pursuit of

the same coordinating goal. Alternatively, he may find that on occasion he has no reason to follow certain aspects of the law. They may be the inevitable simplifications the law has to embrace to be reasonably understood and efficiently enforced. There is no reason for an individual not faced with the same considerations to conform to the law on such occasions.

The third type of example is often invoked to supplement the previous two and plug the remaining holes. It is argued that if the law is reasonably just, then cases like those of the first two types exist in large numbers. In other cases one ought to obey the law, for otherwise one would undermine its ability to function effectively. The argument is based on a false premise. Law breaking is liable to undermine the effectiveness of the government in many cases. In others, violations of law have no such effect. Offenses never known to anyone or violating the interests of one private individual only, as with many torts and breaches of contract, generally do not diminish the government's effectiveness. There may be other reasons for conforming with the law in some of these cases, but the threat to the effectiveness of government and the law is not among them.

These three types of arguments illustrated by our examples are not the only ones which lead to obligations to obey some laws or others. I have discussed them, because, other than consent and voluntary commitments, they most commonly give rise to an obligation to obey. They usefully illustrate the main points which need emphasizing. First, that the extent of the duty to obey the law in a relatively just country varies from person to person and from one range of cases to another. There is probably a common core of cases regarding which the obligation exists and applies equally to all. Some duties based on the coordinative argument (e.g. duty to pay tax) and on the bad example argument (e.g. avoiding political terrorism) are likely to apply equally to all citizens. Beyond this core, the extent of the obligation to obey will vary greatly. Second, the extent of the obligation depends on factors other than whether the law is just and sensible. It may depend on the expertise of the individual citizen, as in cases of the first kind, or on the circumstances of the occasion for the violation, as often in cases of the third kind.

III. REVISIONISM IS TRADITIONALISM

Dr. Finnis's article in this issue[7] exemplifies some of the confusions which pervade our reflections on the obligation to obey. His central claim is that the law presents itself as a seamless web: its subjects are not allowed to pick and choose.[8] This is certainly the case. But Finnis does not even pause to indicate that he draws from this the conclusion that we are not allowed to pick and choose, let alone present any reason in support of it. For him, if this is how the law presents itself, then this is how we ought to take it. To be sure, if we have an obligation to obey the law, then the conclusion does indeed follow. But one cannot presuppose that we have such an obligation in order to provide the reason ("the law is a seamless web") for claiming that we have an obligation to obey. This would be a most vicious circle indeed. Does he perchance imply that we cannot pick and choose, for if we do the whole system of law and order will be undermined and will eventually collapse? He certainly does not argue to that effect, nor does he consider the case to the contrary which I have presented above and previously.[9] Under these circumstances one hesitates to foist any particular interpretation on Finnis's statement.

Dr. Finnis's intriguing article contains similar throwaway points which leave the reader wondering how they are meant to be taken. Does he really believe that "apart from the law" a person "could reasonably be relatively indifferent to the concerns and interests of persons whose activities . . . do not affect him or at least do not benefit him"?[10] There are no doubt people who do hold that we have no moral obligations to people who do not benefit us. But such a broad statement has no hope of carrying conviction without any word in its defense. Moreover, most of those people will take the point as militating against there being an obligation to obey the law, at least to the extent that it requires us to benefit strangers. Finnis regards it as a further reason to believe in an obligation to obey.

Finnis tells us that, even if farmers have a duty not to pollute the river they may misguidedly dispute this, and therefore the way to get them to do their moral duty is to

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7. Finnis, *The Authority of Law in the Predicament of Contemporary Social Theory*, 1 NOTRE DAME J. L. ETHICS & PUB. POL'Y 115 (1984).
8. *Id.* at 120.
9. J. RAZ, THE AUTHORITY OF LAW ch. 12 (1979).
10. *Id.*

have a moral obligation to obey the law. They will then refrain from pollution, because the law requires them to do so. But that will be the case only if they will not make a mistake about their obligation to obey the law, and only if the law makers will not make a mistake about the obligation not to pollute the rivers. Even if these conditions are met, they constitute an argument for the existence of an obligation to obey the law only if the lawmakers are not likely to make fewer mistakes than the farmers on other issues as well. For the obligation to obey is general and what is won in the absence of pollution can easily be lost in the maltreatment of old age pensioners or of the mentally ill.

Those who emphasize the danger of every person deciding for himself, whether the case for the law's authority over any range of questions is good or not, often overlook this last point. Human judgment errs. It falls prey to temptations and bias distorts it. This fact must affect one's considerations. But which way should it incline one? The only general answer which I find persuasive is that it depends on the circumstances. In some areas and regarding some people, caution requires submission to authority. In others it leads to denial of authority. There are risks, moral and other, in uncritical acceptance of authority. Too often in the past, the fallibility of human judgment has led to submission to authority from a misguided sense of duty where this was a morally reprehensible attitude.

Finnis's elegant discussion of the river pollution case illustrates one way in which the law can do good, and when it does it should certainly be obeyed.[11] It is a good illustration of an occasion on which the existence of the law makes a difference. While some laws make a difference, I doubt that all do. Some of the examples used above show how greatly many legal rules, all equally central to the law, differ from the river pollution example. One should not be so captivated by one paradigm that others go unnoticed. Consider the river pollution case itself. Finnis quite reasonably directs our attention to a time when coordination, though desirable, does not obtain and the law steps in to secure it. But travel ten years on. By now, let us simplify, either the scheme introduced by the law has taken root and is the general practice, or it has long since been forgotten and is honored only in the breach. In the second case, my conforming with the law will serve no useful purpose unless it happens to protect me from penal-

11. *Id.* at 134-37.

ties, or to stop my behavior being misunderstood by others. There is then no point in obeying the law. There is reason to conform with it if the scheme is in general effective. But, as is evident by comparing this case with the previous one where the law is the same but the practice of conformity is missing, that reason is not the law but the actual practice.

All the questions I raise can be answered. I have stated my answers in previous publications and supplemented them above. Finnis seems to disagree, but he fails to tell us why. He properly explains why the law is a way of achieving coordination,[12] but he never even attempts to show that coordination requires general obedience to law.[13]

I should make clear my agreement with Finnis in his doubts about the value of social choice and game theory as guides to moral decisions. This is not the occasion to go into such issues. But we should remember that all the arguments concerning an obligation to obey which were canvassed so far were essentially instrumental arguments. They assumed that we have reason to promote or protect certain states of affairs, and examined whether recognition of an obligation to obey the law, or obedience to law, is a way of doing so. But are there not non-instrumental reasons for obeying the law?

Non-instrumental reasoning is central to a distinguished tradition in political philosophy. Today one of the most common arguments, often repeated in different forms, is based on alleged considerations of fairness. It is unfair, it claims, to enjoy benefits derived from the law without contributing one's share to the production of those benefits. As has been pointed out many times before, this argument is of dubious validity when one has no choice but to accept the benefits, or even more generally, when the benefits are given to one who doesn't request them, and in circumstances which do not imply an understanding concerning the conditions attached to their donation and receipt. Besides, even where it is unfair not to reciprocate for services received, or not to contribute one's share to the production of a good of general public value, it cannot be unfair to perform innocuous acts which neither harm any one, nor impede the provision of any public good. Many violations of law are such innocuous acts. Therefore, appeals to fairness can raise no general obligation

12. *Id.* at 134-35.

13. Throughout I am using "coordination" in its ordinary signification, rather than in the narrow and artificial sense it has been given in some recent writings in game theory.

to obey the law.

The more traditional non-instrumental justification of the obligation to obey the law relies on contract and consent. Not all consent theorists base either the validity of the consent or the reasons for giving it on non-instrumental reasons. Hobbes wished to derive it all from enlightened self interest. Locke allowed moral reasons to enter the argument, but they are instrumental reasons. Consent to obey is designed to bring greater conformity with the natural law and greater respect for the natural rights of men than is likely to be achieved in a state of nature. Rousseau was the most important eighteenth century thinker to highlight the intrinsic value of the social contract as the act which constitutes civil society, as well as the personality of those who belong to it.

Consent to obey the law of a relatively just government indeed establishes an obligation to obey the law.[14] The well-known difficulty with consent as the foundation of political authority is that too few have given their consent. This argument in its customary form can be right and wrong at the same time. Consent or agreement requires a deliberate, performative action, and to be binding it has to be voluntarily undertaken. Many people, however, have never performed anything remotely like such an action. The only time I did was during my national military service, in circumstances where failure to take the oath would have led to being court-martialled. I would not have made the oath but for these circumstances, and I do not think I was ever bound to observe this coerced undertaking.

Nevertheless, this objection is also misguided. There are other ways of incurring voluntary or semi-voluntary obligations. Consider a family or a friendship. There are obligations which friends owe each other, and which are in a sense voluntary obligations, as it is obligatory neither to form friendships nor to continue with them once formed. Yet we do not undertake these obligations by an act of promise or consent. As does friendship, these obligations arise from the developing relations between people. Loyalty is an essential duty arising from any personal relationship. The content of this duty helps us to identify the character of the relationship. If the duty precludes your having sex with another person, then your relations are of one character; and if it precludes publicizing disagreements between you, then you have

14. I discuss the issue at some length in my *Authority and Consent*, 67 VA. L. REV. 103 (1981).

relations of another kind, and so on. In other words, duties of loyalty are semi-voluntary, because the relationship itself is not obligatory. Moreover, they are non-instrumentally justified because they are part of what makes the relationship into the kind of relationship it is. (I am assuming that having the particular relationship, friendship, is itself of intrinsic value.)

What has this excursion into the normative aspect of personal relations to do with the obligation to obey the law? It demonstrates the possibility of one kind of obligation to obey which arises out of a sense of identifying with or belonging to the community. Such an attitude, if directed to a community which deserves it, is intrinsically valuable. It is not however obligatory. One does not have a moral duty to feel a sense of belonging in a community; certainly there is no obligation to feel that one belongs to a country (rather than one's village, or some other community). I talk of a feeling that one belongs, but this feeling is nothing other than a complex attitude comprising emotional, cognitive and normative elements. Feeling a sense of loyalty and a duty of loyalty constitutes, here too, an element of such an attitude.

The government and the law are official or formal organs of the community. It they represent the community or express its will justly and accurately, then an entirely natural indication of a member's sense of belonging is one's attitude toward the community's organization and laws. I call such an attitude respect for law. It is a belief that one is under an obligation to obey because the law is one's law, and the law of one's country. Obeying it is a way of expressing confidence and trust in its justice. As such, it expresses one's identification with the community. Respect for law does not derive from consent. It grows, as friendships do; it develops as does one's sense of membership in a community. Nevertheless, respect for law grounds a quasi-voluntary obligation. An obligation to obey the law is in such cases part and parcel of one's attitude toward the community. One feels that one betrays the community if one breaks the law to gain advantage, or out of convenience, or thoughtlessness, and this regardless of whether the violation actually harms anyone, just as one can be disloyal to a friend without harming him or any of his interests, without even offending him.

An obligation to obey which is part of a duty of loyalty to the community is a semi-voluntary obligation, because one has no moral duty to identify with this community. It is founded on non-instrumental considerations, for it constitutes an attitude of belonging which has intrinsic value, if ad-

dressed to an appropriate object. Vindicating its existence does not therefore establish the existence of a general obligation to obey the law. For good or ill there are many who do not feel this way about their country, and many more who do not feel like this about its formal legal organization. It is sometimes said that the denial of a general obligation to obey is of recent vintage. It is in may ways the opposite. At the birth of modern political theory in the seventeenth and eighteenth centuries, there was one clear orthodoxy: if there is a general obligation to obey the law, it exists because it was voluntarily undertaken. That is the view defended in this article. The fathers of modern political theory also believed that such obligations were indeed voluntarily undertaken. If this view is no longer true today it is because the societies we live in are less homogeneous, more troubled about their own identity, and about the role of government and the law in the social fabric. Society has changed, not political theory.