SOCIETAL OBLIGATION

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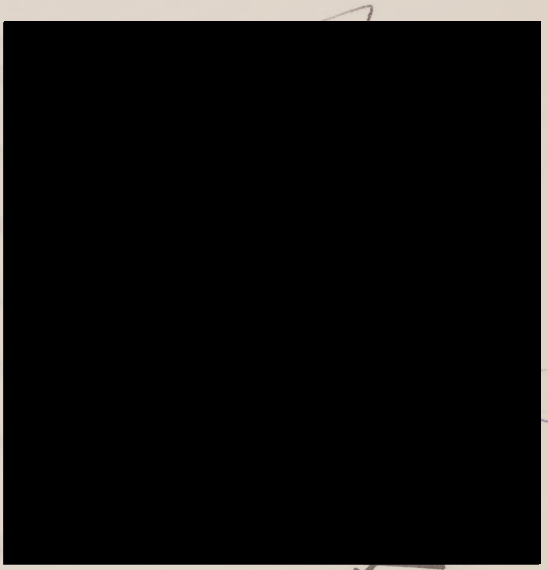

SOCIETAL OBLIGATION

by

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DISSERTATION

Presented to the Faculty of the Graduate School of

The University of Texas at Austin

in Partial Fulfillment

of the Requirements

for the Degree of

DOCTOR OF PHILOSOPHY

THE UNIVERSITY OF TEXAS AT AUSTIN

December 1970

To Irene Szalay

". . . Boys, a gentleman always rises when a lady enters a room. He must. A gentleman keeps his obligations, even in Hell."

ACKNOWLEDGEMENTS

Members of my committee have taken a great deal of time with this dissertation. I have thanked them in the past for their efforts. I would like to thank them again.

Marion Lawrence, Christy Ott and Jan Morgan have taken a great deal of time in the styling and typing of this manuscript. My thanks to them.

September, 1970

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Publication No._____

William John Bennett, Ph.D.
The University of Texas at Austin, 1970

Supervising Professor: Edmund Pincoffs

This dissertation is about legal and moral obligation. In response to the skeptic who questions a) whether there are any obligations at all and/or b) whether particular claims about obligations in particular situations are true, an argument will be advanced affirming the existence of certain societal obligations. These societal obligations are moral obligations and recognition of them is required for demonstrating the legitimacy of the exercise of power by legal institutions.

The theories of obligation of H.A. Prichard and W.D. Ross will be criticized. These theories neglect certain dimensions of obligation and do not provide an adequate response to certain forms of skepticism about obligation. Cases in Anglo-American contract law will be presented to

reveal the way courts justify imposing obligations on parties in lawsuits. An argument justifying the procedure of the courts will bring to light the societal obligations which are basic to other types of obligation. The theory of obligation will then be tested by applying it to situations in which questions about obligation arise. The example of Socrates in the Crito will be offered as an example of the theory in practice. Finally, there will be discussion of the importance of these societal obligations and discussion about the limits of the inquiry concluded.

CONTENTS

Introduction

The Subject Matter of the Inquiry

This is an inquiry into the nature of legal and moral obligation. An argument will be advanced for considering legal obligation as a model for moral obligation. Beginning with an account of obligation in the law, particularly the law of contracts, it will be argued that such an account of obligation can be extended to reasoning about moral obligation with fruitful result. But, the beginning with obligation in the law does not reveal a commitment to the priority, either logical or ontological, of legal obligation. This beginning is merely a heuristic device aimed at laying out the facts which are the roots of both legal and moral obligation. There are certain facts about the way men in societies live which, when recognized, provide the information from which a rationale for obligation can emerge. Simply, there are certain societal obligations which are at the root of both legal and moral obligations.

The argument will begin by considering certain

modern theories of obligation. We will examine the theories of H.A. Prichard and W.D. Ross. These obligation theorists belong to what is known as the intuitionist school. Their approach to the problem of obligation is still followed by many contemporary philosophers. At the end of chapter one we will suggest that another perspective on the problem of understanding obligations will provide more fruitful result than that offered by Prichard and Ross and their contemporary intellectual descendants. The presentation of this perspective will begin in chapter two, and will be concluded in chapters three and four. In chapter five we shall consider whether the alternative theory presented has provided more enlightenment about obligation.

This paper will not discuss all types of obligation. It will argue, primarily, that societal obligations are basic to other types of obligation. That is, unless societal obligations are acknowledged by men, conditions for the positing and fulfillment of other types of obligation, such as, for example, obligations to oneself, can never be realized. Societal obligations are moral obligations, but there are moral obligations which are not societal obligations but depend for their existence upon a state of affairs in which societal obligations are met. But there may be other sorts of obligations,

such as obligations to God and obligations to oneself, and if there are such obligations as these, this paper will say nothing about them.

Preliminary Jurisprudential Remark

In the process of developing and pointing out instances and principles of legal obligation, a theory about the character and function of law will be revealed. This theory of the nature and purpose of law will not be defended from many attacks which would surely come from contemporary schools of jurisprudence. The reader should be forewarned that what is said about 'the law' is based upon a commitment to law as a normative and purposive enterprise. This question, the problem of 'the law as teacher', is itself a question for another inquiry, and cannot here, in this context, be entertained at any length.

Some Initial Suspicions and Response to Them

Suspicions, occasioned by the doubt that legal obligation can be instructive for inquiry about moral obligation, might initially take three forms. It is important that something be said about these suspicions immediately.

The 'Hobbist' Suspicion

Despite some indebtedness to Hobbes, the arguments of this paper do not reveal a commitment to a Hobbist conflation of the moral into the legal by reference to both as 'enacted rule' by an authoritative source which enactment both promulgates and justifies the rule.[1] This mistaken identification of a) source and b) justification, seriously misrepresents the process of legitimization of rules be they legal or moral. To merely point to the fact of the power of the state in response to a question about the legitimacy of legal institutions, is to confuse a condition for successful operation of the law with a question which is essentially about the rationality of the law. Might is not identifiable with right in Socrates' Greece or twentieth century international relations since power is not self-justifying. To suggest that obligation is simply explained by saying that it is what the state exacts from its citizens by virtue of its power is to fail to see that an obligation can be operative in the absence of such power, and thus, that it draws its power, gains its status, from elsewhere. Precisely, a world without enacted positive law need not be characterized as a world without law, and further, it ought to be noted, this need not draw us into espousing any

form of traditional natural law theory. We shall see the middle ground of law, the justification by commitment and consent, as our argument develops. The Code Books and the lex Dei are not the only alternatives.

The Socio-Cultural Relativist Suspicion

It might be objected that the consideration of the concepts of obligation contained in Anglo-American contract law and their relevance to concepts of moral obligation is such a narrow task, an inquiry so limited, that it isn't worth the effort. Such an objection might insist that any concepts of obligation developed thereby are only a summation of the beliefs and opinions of certain individuals whose relative perspectives limit their truths to particular places and times; law, or morals, or both, assert truths only relative to the cultures which adopt them and assert them in culturally restrictive ways, and thus (it is concluded) these truths have little import for the more broadly conceived human community, except, of course, as sociological information. But such an objection in principle cannot stand.

Differences of practice and belief, the favorite evidence of this position, only attest to the fact that there

are different practices and beliefs; it is not evidence that a certain practice or belief need be, must be, or should be, so limited. To show that legal or moral principles and rules, general or specific, differ from society to society or culture to culture, is not, ipso facto, support for the contention that such principles or rules possess only relative validity. There is such a thing as progress and enlightenment, and a society can improve itself by following the deliverances of rational judgment. Such judgment and its deliverance can achieve a statement as humane as the Bill of Rights and when it does, should not be placed on the same footing with the 1969 Constitution of Rhodesia designed to perpetuate white minority rule, merely by force of the relativist's insistence.[2]

The Procedural-Relativist Suspicion

The third suspicion focuses upon the judicial decision itself. It argues that to rely, as we will, upon the officially expressed opinions of judges for the purpose of revealing the courts' focus in determining the obligations of one party to another is unjustified. Denied in this reliance are the 'hard facts' of the decision itself and the realities of all decision-making processes. The discrepancy between expressed opinion

and the decision-making process is pointed to in order to reveal the error of conceiving of the legal process as a rule-bound activity. Through his writing, Jerome Frank revealed why he is thought of as one of the leading advocates of this suspicion.

The 'formalist', according to Frank, is deluded as to the exclusive value of conventional legal rules and principles. He must recognize that "the judge's opinion makes it appear as if the decision were a result solely of playing the game of law-in-discourse."[3] What he does not see is that "the opinions are often ex post facto; they are censored expositions."[4] Specific decisions must be considered not as the revelation of an unalterable course of logic proceeding from unquestioned premises to undeniable conclusion but rather, as Frank says, "as a result of the judge's hunches."[5]

To this suspicion there are many replies. First, as a description of the legal decision itself, which is not the focus of our inquiry, this alternative offered by Frank is not completely convincing. Resting on the 'hunch' to explain an obviously present uniformity in and predictability about, decisions, is obviously troublesome. Secondly, as Frank himself admits, the legal rules and principles are some of what Frank calls the "hunch producers."[6] It is simply the

case that a judge's intuition is likely to be informed by the rules and principles about which he has been taught, whether he recognizes that fact or not.

Looked at somewhat differently, this suspicion, in demanding attention to the subjective facts of decision-making, must recognize that if it is true that all reasons are rationalizations, then a distinction must nevertheless be made between 'good' or 'acceptable' rationalizations and 'bad' and 'unacceptable' ones. Practical affairs demand a distinction between reasons or rationalizations which are acceptable and those which are not. Despite the fact that all opinions may have their origins in the 'hunches' of men, not all 'hunches' are equally acceptable for the purposes of knowing and 'doing'.

Further, the rules and principles are taken seriously, as are the opinions, by those who recognize them as, in Llewellyn's words, "rules of authoritative ought."[7] If it is an accepted convention to act and talk as if one meant what he said in the promulgation of rules in an opinion, then it is appropriate to evaluate what one has said as if he meant it. When an opinion is offered as justification it is appropriate to talk about it as justification whether or not investigation reveals it to be mere 'window-dressing'

for the judge involved. Were our inquiry about the processes involved in decision-making rather than about the value of the reasons profferred in opinions of judges as justification for the assignment of obligation, then the 'suspicion' would form a large portion of our inquiry.

But for our purposes, for which we must evaluate the justification given for decision by the courts, we have no choice but to deal with that justification which is given. If what Frank is aiming at is a question about the value of all 'justificatory talk' we must refer him and the reader who is suspicious to other philosophical works for a full treatment of the subject.[8] We are dealing with given explanations, with a perspective on obligations which is offerred by the opinions in the cases. We must take the judge at his word; the burden rests upon him who says that the judge does not mean what he says to prove it.

Final Introductory Remark

Apart from the major and corollary arguments and the value which they possess, it is hoped that the reader will gain some other value from this presentation. Hopefully, the reader will gain some appreciation of the law as intellectual

business of the first order, whatever his opinion is at this beginning point. Further, he should enjoy the wit and humor of some of the more clever advocates of the law. Thirdly, I hope that he is stimulated by the recognition of the variety of agreements, bargains, and arrangements that men make with each other to consider the degree to which he too is subject to a wide variety of contracts. Finally, here is the evidence of the varying fickleness, infidelity, pride, vanity, selfishness, generosity, benevolence, dignity, and wisdom of men, as such traits are revealed in the process of human dealings. It is fortunate to able to write a paper about the obligations of men to other men: the continuing subject matter --human interaction and arrangement--thus provides an initial asset of avoiding dullness.

Chapter One

The Concept of Obligation in Recent Moral Philosophy

Introduction

We now begin this inquiry into the problem of obligation. The problem of obligation is posed by the following question: What satisfactory reply can be given to the skeptic who questions whether there are obligations? The skeptic may object a) to the general claim that there are obligations or b) to particular claims that there is an obligation in certain circumstances. In response to this skepticism we shall argue that there are obligations and shall advance and support particular claims about obligations.

The purpose of this chapter is to illustrate how prominent moral philosophers in this century have responded to the problem of obligation. We shall look at the philosophies of H.A. Prichard and W.D. Ross. Following this, we shall take a brief look at a contemporary debate about

obligation engaged in by intellectual descendants of Prichard and Ross. At this point, we shall pause and reflect about the perspective from which Prichard and Ross and their intellectual descendants view the problem of obligation. With the help of another contemporary philosopher we shall then note our dissatisfactions with the choice of this perspective. Finally, we shall suggest that another perspective be taken on the problem, and shall put forward criteria for evaluating our alternative theory.

H.A. Prichard's Theory of Obligation

H.A. Prichard in his famous essay, Moral Obligation, immediately sets important limits to his contribution.[1] He recognizes, he says, what he believes his audience believes, that he as a philosopher is speaking and writing as if (it would be assumed) there were something to be said about moral obligation. But to this stereotype Prichard admits embarrassment. He wonders aloud about his task. This wonder is suggestive of the tone and import of the entire essay. He writes:

> To many it will come as a surprise that there are questions to be raised about moral obligation. For although a normal person, once he has reached a certain age, plainly has the idea of moral obligation, since he thinks of himself as morally bound not to do certain actions, and although he will have asked himself on various occasions

> whether he ought or ought not to do certain actions, he is not therefore necessarily led to ask any general question about moral obligation, such as: What character must an act have for us to be morally bound to do it? Yet, the existence of such questions is shown by the existence of what are called books on moral philosophy, in whose subject duty undeniably occupies an important if not the central place.[2]

Skepticism about traditional moral philosophies is in part a function of Prichard's conclusion about the nature of moral obligation itself, for (seemingly) when one knows what it is about which one speaks then to speak of it as something else is a mistake.

Thus, Prichard wants to know what kind of thing is referred to by the phrase 'moral obligation'. He answers that the thing referred to is something which is "sui generis i.e., unique and therefore incapable of having its nature expressed in terms of the nature of anything else."[3] Prichard does not speak of moral obligation but about what he calls a 'sense' of rightness or obligatoriness for this is how the attribute referred is understood. He says about this sense of obligation to do some act that it is "absolutely underivative or immediate."[4]

If the obligation is to be investigated through the 'sense of obligation' and if this sense possesses the character Prichard attributes to it, then certain conclusions follow

about the utility of certain kinds of discourse concerning investigation into obligation. These conclusions are contained in what Prichard calls the negative side of his theory. He writes:

> The negative side of all this is, of course that we do not come to appreciate an obligation by an argument, i.e., by a process of non-moral thinking, and that in particular we do not do so by an argument of which a premise is the ethical but not moral activity of appreciating the goodness either of the act or of a consequence of the act; i.e., that our sense of the rightness of an act is not a conclusion from our appreciation of the goodness either of it or of anything else.[5]

To argue, as Prichard does, that appreciation of an obligation is not achieved by argument is to set limits to the usefulness of argument in the task of trying to appreciate the presence of an obligation in a particular situation. This point requires emphasis, for Prichard does not argue that argument has no use but that its use is limited, i.e., it is to be cut off, stopped at some point, and intuition is to provide final access to that which one seeks. Certain reasonings might play preliminary roles in gaining appreciation. Prichard writes:

> To appreciate its [action's] rightness two preliminaries may be necessary. We may have to follow out the consequences of the proposed action more fully than we have hitherto done, in order to realize that in the action we should originate A [one whole set of consequences] . . . Again we may have to take into account the relation B involved in the situation, which we had hitherto

failed to notice.[6]

But once these relations are perceived, once, as Prichard puts it, "we come to recognize that the proposed act is one by which we shall originate A in a relation B," then our preliminary reasoning is completed and our mode of appreciation changes, as Prichard states, "we then appreciate the obligation immediately or directly."[7] Argument is preliminary to appreciation and it may be necessary, but, it is never a sufficient condition of discovery. Argument seems to have the role of removing certain impediments from one's vision, which once removed enables one to see directly, clearly, immediately. Prichard announces that there is a point at which argument leaves off for intuition to enter. We must note that Prichard does not tell us where this point is; he only tells us that there is such a point.

Prichard admits to the subjectivist notion of obligation, that is, that the existence of an obligation depends upon some subjective apprehension of obligation, upon some feeling or sense of obligation. He writes:

> Yet since, in fact, it [obligation] is a character of ourselves, there is nothing to prevent its existence depending on our having certain thoughts about the situation, about the nature of the activity in respect of its effects. Indeed for this reason, its existence must depend on some fact about ourselves . . . We

> cannot allow therefore but that the subjective view is true.[8]

If one believes that some sort of subjective awareness is the ratio essendi of obligation then it must be clear that argument and discussion with others comes to serve a peculiar purpose when it is appreciation of obligation that is sought through such activity. Argument and discussion must lead to subjective appreciation; they must function through such appreciation to be relevant to the task of discovering obligation. They cannot, by themselves, apart from such apprehension, determine that an obligation is present.

Prichard believes that his theory of obligation requires him to attack critically the traditional exponents of the notion that there is much of importance to be done by the moral philosopher in the task of helping others to come to an appreciation of (their) obligation(s). Prichard in one place insists that the entire subject of moral philosophy has been an "attempt to answer an improper question."[9] But once this mistaken attempt is pointed out, it is possible, according to Prichard, to have a new kind of moral philosophy considerably more humble in its aspiration. It must be a kind of moral philosophy grounded in the recognition of how obligations come to be. The demand for knowledge

about things like obligations must be answered with reference to such recognition. Prichard writes:

> Nevertheless, the demand, though illegitimate, is inevitable until we have carried the process of reflection far enough to realize the self-evidence of our obligations, i.e., the immediacy of our apprehension of them. This realization of their self-evidence is positive knowledge, and so far, and so far only, as the term moral philosophy is confined to this knowledge and to the knowledge of the parallel immediacy of the apprehension of the goodness of the various virtues and of good dispositions generally is there such a thing as moral philosophy.[10]

We shall take issue with the limitation thus imposed in the body of this paper.

Before a brief summary of Prichard's view is provided a short look at his conclusions in an article entitled The Obligation to Keep a Promise will be worthwhile. There, Prichard talks about promises and how the use of the word 'promise' or some equivalent word usually implies in common usage that the promisor is under obligation to the promisee. There is, Prichard says, a practice of associating the use of the word 'promise' with the presence of an obligation for him who uses it, and there is a kind of unwritten agreement that one will not use these words unless he means to accept and recognize the obligation. But Prichard is troubled about the status of this unwritten agreement. He writes:

> The general conclusion which I wish to suggest, but only

> with the greatest hesitation, is that promising to do this or that action, in the ordinary sense of promising, can only exist among individuals between whom there has already been something which looks at first like an agreement to keep agreements, but is really an agreement not to use certain noises except in a certain way, the agreement nevertheless being one which, unlike ordinary agreements, does not require the use of language. But, of course, it would be more accurate to say that what I am suggesting is not a conclusion but rather a problem for consideration; viz. what is that something implied in the existence of agreements which looks very much like an agreement and yet, strictly speaking, cannot be an agreement.[11]

Prichard here touches on a very important phenomenon of human association. The agreement which is not, strictly speaking, an agreement, will reappear and will function critically in the theory of obligation put forward by this author. Prichard's penchant for the 'ordinary' and 'normal' way of viewing things limits his capacity to transcend the perspective offered by that vision of things and inform it, enlarge it, by the view offered from other perspectives.

Beginning our summing up of Prichard's view with this last issue, it appears that Prichard made inquiry about obligation turn, in large part, on the delineation and explanation of the experience, reported by 'normal' men, of feeling obligated. Thus, part of the problem is stripped away by Prichard's announcement of what it is that he will talk about and what it is he will avoid. Prichard makes

inquiry about obligation inquiry about the sense of obligation. An obligation depends for its existence, in Prichard's view, on one feeling that he is obligated. This is to say that the problem of obligation, the problem to be investigated, is to be responded to in a particular way. For Prichard, the skeptic should be pointed to the fact that individuals apprehend, recognize, appreciate, obligations.

Prichard argues that the sense or feeling of being obligated is absolutely underivative and immediate. His form of intuitionism can be characterized as intuition at the level of the particular act. It is in this context that intuition is required and obligation revealed. Argument and discussion are not ruled out, are not kept out, of this context. They serve the useful purpose of bringing one to the point in a context at which intuition takes over. Discussion and argument take one to the point at which he is able to see what it is that he wants to see, but the seeing, the appreciation, is credited to something other than these. For they are not by themselves sufficient, for as Prichard says, "we do not come to appreciate an obligation by an argument."[12]

We mentioned earlier that it is difficult to locate the point at which, according to Prichard's theory, discussion and argument are closed off for intuition. Prichard does

not mark the point; he does not provide road signs announcing to argument and discussion 'This far and no further'. It is only clear that discussion and argument cannot go the whole distance. Gradually, it seems, impediments and obstacles to vision--recognition of one's obligation--are removed until one is able to see what he should see. The 'obligation' is to be revealed at some point; at what point is never made clear.

W.D. Ross: A Variation of the Theme

In The Right and the Good, Ross is concerned to discover whether "there is any general character which makes right acts right, and if so, what it is."[13] Though Ross does not intend to deal directly with obligation, his answer to this question has important implications for the understanding of obligation.

In his essay The Meaning of Right, Ross concludes that the attempt to formulate criteria for rightness has always been unsatisfactory. This ought to lead the ethicist, in Ross's opinion, to a basic assumption about fundamental terms in the vocabulary of morals:

> Anyone who is satisfied that neither the subjective theories of the meaning of "right" nor what is far the most attractive of the attempts to reduce it to simpler

> objective elements . . . is correct, will probably be prepared to agree that "right" is an irreducible notion.[14]

Ross's support for his argument rests in an appeal to common usage which shows that 'right' is not equivalent in meaning either to what the subjectivists or objectivists put forward for it. Thus, in response to the question about the general character of right acts asked above, Ross responds that there is no such general character; 'right' is an irreducible notion.

But for Ross the irreducibility of 'right' does not lead one to skeptical conclusions regarding the business of moral philosophers. Ross argues that there is much to be done by the philosopher. He himself goes on to discuss the recognition by men of the existence of certain duties. Some of these duties are what Ross calls "prima facie duties."[15] It is the business, the legitimate business, of the philosopher to investigate the nature of these duties.

Prima facie duties are accepted by men as things they are obliged to do. These include duties which rest a) on one's own previous acts, b) on acts of others to or for one, c) on "the fact or possibility of a distribution of pleasure or happiness," and on other bases.[16] But these obligations possess a character which Ross is concerned to stress emphatically. He writes:

> That an act, qua fulfilling a promise, or qua effecting a just distribution of good . . . is prima facie right, is self-evident, not in the sense that it is evident from the beginning of our lives, or as soon as we attend to the proposition for the first time, but in the sense that when we have reached sufficient mental maturity and have given sufficient attention to the proposition it is evident without any need of proof, or of evidence beyond itself. It is self-evident just as a mathematical axiom, or the validity of a form of inference, is evident.[17]

Prichard characterized an obligation as something which is known through intuition; here, Ross characterizes the grasping of certain kinds of duties as being self-evident; he is an intuitionist at the level of the type or kind of act. One 'knows' these duties and in affirming them has a tool whereby the determination of the presence or absence of obligation in a particular situation may be facilitated.

But, the duties revealed to the mentally mature and attentive do not help, in Ross's opinion, as much as one might hope in the task of determining what one's obligation is in a particular situation. Situations are complex. Judgments about duty in such specific situations do not possess "the certainty that attaches to our recognition of the general principles of duty."[18] These duties, self-evident to the mentally mature and attentive, disclose in general what one is to do, but in particular, in the context of a particular situation, their application is troublesome. Situations

reveal conflicts between duties. One seeks a way out of the conflict; one seeks resolution. Ross attempts to offer a procedure for resolution of conflict when it occurs, and in so doing, he offers additional criteria for determining 'what makes acts right'. He says:

> It is worthwhile to try to state more definitely the nature of the acts that are right. We may try to state first what (if anything) is the universal nature of all acts that are right . . . Every act viewed in some aspects will be prima facie right, and viewed in others prima facie wrong, and right acts can be distinguished from wrong acts only as being those which, of all those possible for the agent in the circumstances, have the greatest balance of prima facie rightness, in those respects in which they are prima facie right, over their prima facie wrongness, in those respects in which they are prima facie wrong.[19]

But, a problem arises. Something is needed to measure amounts of prima facie rightness and prima facie wrongness. Given a conflict between two prima facie duties, how is one to determine which, if followed, gives rise to the greatest amount of prima facie rightness 'over' prima facie wrongness? Something is needed which provides for priorities of duty, which sets forth some criteria enabling the calculation to take place. Ross admits the problem but indicates that he is pessimistic about a solution:

> For the estimation of the comparative stringency of these prima facie obligations no general rules can, so far as I can see, be laid down. We can only say that

> a great deal of stringency belongs to the duties of 'perfect obligation'--the duties of keeping our promises, of repairing wrongs we have done, and of returning the equivalent of services we have received.[20]

This is the limit of rules. Practical judgment can, it appears, go no further in formulating principles or rules relevant to duties and obligations. It is now left to the care of the mentally mature and attentive.

For Ross, the problem of obligation is a two part problem. First, one needs to discover and announce to the skeptic the general principles of obligation, the general rules of duty, what Ross calls the 'prima facie duties'. Secondly, one must recognize that these principles are self-evident and that it is with them that recognition of obligation begins. Once grasped, these duties can be brought to particular situations to aid in the determination of one's obligation in that situation. Intuition provides access to principles which will help, with the limits Ross recognizes, in the particular situation where ignorance or conflict and confusion prevail.

Some differences between Prichard and Ross, crucial to evaluation of their theories, must be marked out. First, Ross is less concerned than Prichard to mark out the borders of moral inquiry by fiat; and thus will not join Prichard in

the latter's attack upon the fruitfulness of the inquiry into right, duty, and obligation. Ross, though limiting himself and perhaps other moral philosophers by his conception of what things discussion may fruitfully inform, is nevertheless basically enthusiastic about trying to provide rules and principles for the determination of duty and obligation. He does not question his motives nor insist nor suggest that the profession of some expertise in these matters must finally prove embarrasing to the philosopher.

This general characterization of Ross's penchant for doing moral philosophy is reflected in his theory. Here, there is simply a great deal more to be said about the character of moral obligation than Prichard was willing to say. Ross does not subscribe to the notion that cases of obligation, i.e., situations in which obligations are to be recognized, offer or reveal their 'obligation content', following preliminary discussion, by intuition. This disagreement with Prichard is explained by noting the different place and purpose of intuition in the Rossian account. As was mentioned earlier, if Prichard can be characterized as intuitionist at the level of the particular act, Ross is intuitionist at the level of the type or kind of act. Thus, Ross's prima facie duties are self-evident and apply to all contexts in

which the question of one's duty or obligation arises. One brings the results of one's 'grasping' or 'appreciating' to particular situations. Thus, when the self-evidence of one's obligation in the particular situation is not revealed within the situation itself, conflict can arise, and conflict can lead to uncertainty, to ignorance about what it is one ought to do. This possibility, not treated by Prichard, Ross admits and emphatically demonstrates.

Thirdly, Ross leaves the inquiry open in a way that Prichard does not. Admitting the limitations of his recommended procedure for estimating the relative stringency of duties, Ross does not rule out the possibility of finding other more suitable criteria. The inquiry is left open for suggestions about the hierarchy of prima facie duties; perhaps more definitive rules relevant to the application of these duties to situations can be supplied. These are problems about duty and obligation which Ross urges the philosopher to consider.

Fourthly, Ross, because of his persuasive discussion about prima facie duties, better represents the kind of justification usually offered in commonplace discourse about moral obligation. It is familiar to hear justification for assertion or denial of obligation resting upon invocation of the duties Ross enumerates. Men talk about obligation in the

way Ross does; they talk about these duties Ross enumerates, and like Ross they find difficulty in the thought of going beyond them. That is, men take these duties to be self-evident; reference to them is the court of last appeal.

The final contrast, again with reference to the prima facie duties, is Ross's clear delineation of the point at which discussion ends and intuition enters. Discussion ends at the point where one recognizes one's prima facie duties. Ross better marks the road. We may have room to argue about, for example, the relative stringency of these duties, but the duties themselves are not to be denied as such. We do not deny them when we have grasped them, and for the task of grasping them, understanding them, Ross announces clearly where the road turns.

Frankena and a New Recommendation for the Bound of Inquiry

William Frankena's article, Obligation and Motivation in Recent Moral Philosophy, considers the arguments of some intellectual descendants of Prichard and Ross, philosophers reared and nurtured in the tradition we have been considering. This contemporary debate over the nature of obligation Frankena characterizes as the debate between

'externalists' and 'internalists'. Their dispute as recorded by Frankena is as follows:

> Many moral philosophers have said or implied that it is in some sense logically possible for an agent to have or see that he has an obligation even if he has no motivation, actual or dispositional, for doing the action in question; many others have said or implied that this is paradoxical and not logically possible.[21]

It may be that Prichard would have to be considered an internalist and Ross an externalist by this standard, but this is not the issue which concerns us. What is more interesting and important is Frankena's conclusion about the merits of each of the positions. It reveals his concern to view each argument in light of some of the basic and fundamental issues of morals and moral philosophy. Frankena writes:

> It seems to me, therefore, that in the end the internalist must argue (as Falk does), not only that externalism involves a gap between obligation and motivation but that such a gap cannot be tolerated, given morality's task of guiding human conduct autonomously. Then, however, the externalist will counter by pointing out that internalism also entails a danger to morality. Externalism, he will say, in seeking to keep the obligation to act in certain ways independent of the vagaries of individual motivation, runs the risk that motivation may not always be present, let alone adequate, but internalism in insisting on building in motivation, runs the corresponding risk of having to trim obligation to the size of individual motives.[22]

Thus, Frankena argues that the merits of the disputants' claims must be evaluated in light of the more broadly conceived problem of morality's subject matter, aims, and ends.

To consider the evaluation of such theories to turn on larger questions, Frankena is committed to a criticism of the disputants' procedure. He makes this criticism willingly:

> The main result yielded by our discussion, then, is that the opposition we are studying cannot be resolved, as so many seem to think, by such relatively small scale logical or semi-logical arguments as we have been dealing with.[23]

It can be resolved, according to Frankena, by other broader scoped inquiries, inquiries into the "relation of morality to society, and of society to the individual."[24] In the conclusion to his essay Frankena gives a final exhortation to a broadening of the inquiry into obligation; he provides a recommendation of the subject matter with which an inquiry into obligation must deal if it is to satisfactorily answer the important problem posed by 'externalism' and 'internalism'. He writes:

> The battle, if war there be, cannot be contained; its field is the whole human world, and a grand strategy with a total commitment of forces is demanded of each of its participants. What else could a philosopher expect?[25]

Conversant with the language of Moore, Prichard, Ross, and their descendants in the tradition, Frankena demands that he and other philosophers be not limited by the perspective offered by that tradition. This demand for a new perspective on the problem of obligation brings us to the stage of critical

reflection about what it is that we have been dealing with, and such reflection will be followed by specific criticism of the theories of Prichard and Ross and finally, the setting forth of a new theory from a broader perspective.

Intuitionism and the Problem of Obligation

We have seen that for Prichard the problem of obligation is best met by speaking of obligations as things felt or sensed by individuals. Obligations are facts about oneself, as Prichard says. To Ross, the problem of obligation is answered by reference to recognition of prima facie duties and to the need for applying the fruits of such recognition to particular situations. For both philosophers, intuition plays some important role in revealing obligations. It may be the case that at some point in any theory of obligation some sort of appeal to intuition is necessary. It may be the case that to 'grasp the simple', to see what must be seen, is finally the task of all inquiry. That is, all discussion and argument may lead, and it is their purpose to lead, to some point at which one can argue and discuss no more but must simply see, grasp, appreciate. If this is so, what may differentiate theories of obligation is where and how

well one marks the point where discussion ceases and intuition takes over.

With Prichard and Ross the problem of obligation is understood and answered too narrowly. As Frankena recommends, the perspective must be broadened. It is my opinion that the narrowness of perspective of the views of Prichard and Ross is related to their premature introduction of intuition. Intuition may be required at some point in order to understand, appreciate, one's obligation, but I believe it ought to be brought in at a point other than that indicated or marked by Prichard and Ross. Because of the narrowness of perspective of the views of Prichard and Ross I believe they are subject to the following criticisms.

First, <u>there is a failure to establish satisfactory criteria for resolving situations of conflict and ignorance</u>. That is, where the individual believes he is caught between conflicting obligations or where he is ignorant of whether or not he has an obligation, Prichard and Ross do not provide adequate criteria for resolution of the problem. This problem of conflict is obvious in regard to Prichard's theory as we have shown earlier. With Ross, the possibility of conflict is recognized and admitted but Ross himself admits the limitations of his own theory in helping to resolve the

conflict due to the absence of any rules relevant to defining the 'comparative stringency of duties'.

The situation in which there is ignorance of whether or not one has an obligation is similar to the situation of conflict for pointing out shortcomings in the theories. Again, by the way Prichard understands the problem of obligation the fact of being ignorant of one's obligation amounts to the absence of feeling obligated, and unless the failure rests in neglect of what Prichard calls preliminary argument and discussion, there is no way out of one's ignorance. There are no road signs to follow. With Ross, the inapplicability of any of the prima facie duties to a particular situation leaves the situation, and the individual within it, in a similar state. In short, we want to know, given a particular situation in which either conflict or ignorance prevails, whether more can be provided by way of investigation for the purpose of determining obligation, than is provided by Prichard and Ross. Are there other road signs?

Second, there is a failure to establish sufficient criteria for the point or place at which discussion and argument are to be cut off, and the 'grasp' or intuition to take place. Both Prichard and Ross are trying to point out that the individual must, at some point, see, intuit, or grasp, some

'simple' or some unanalyzable or underivative character in the general task of discovering one's obligation(s). For Prichard it is not argued where one does close off discussion for this intuition. For Ross, the point is marked off clearly, but is marked off prematurely. Too soon do both philosophers invoke the need for intuition. It is possible to be both precise about where this cut-off point lies and yet to extend it, and thus extend the fruitfulness of discussion and argument beyond a point marked by Ross.

Third, by concentrating on the subjective apprehension of obligation, a dimension of obligation equally relevant to understanding what it is men call their obligations, is lost. One need not meet what we have called the problem of obligation by reference to the individual apprehension of obligation in the way Prichard and Ross talk about it, either in the feeling of obligation (Prichard) or the apprehension of prima facie duties (Ross). It is possible to talk about obligations, to thus deal with the problem of obligation from another perspective, namely, from that of the individual member of society as member of society. We can talk about obligation as something which arises because men would live together.

Such a perspective as that just suggested will be offered in the four chapters. It will broaden the boundaries

of the inquiry in a way recommended by Frankena. When we are finished we shall have to decide whether this theory too necessitates some recourse to what we have called intuition. If it does, we shall then have to decide how and where this intuition functions differently in our theory than it does in the theories of Prichard and Ross. Finally, we shall have to decide whether this other perspective, provides any more fruitful results for answering the skeptic than the theories we have been considering. We shall argue that it does provide such results.

Criteria for an Adequate Theory of Obligation

Taking the perspective we have chosen we shall attempt to answer the following questions. These questions arise from the skepticism which, as we stated at the beginning of the chapter, creates the problem of obligation.

1. What do we mean when we say that an individual, A, is obligated to another individual, B?
2. Is it true to say that in particular situations, A is obligated to B?
3. In those situations how do we decide whether A is obligated to B?

In addition to answering these questions we shall answer a fourth question:

4. When we have described the situation as one about which it is true to say that A has an obligation to B, does this fact exhaust description of the meaningful relationships which exist between A and B?

We shall now begin to answer these questions by turning our attention to examples of legal obligation.

Chapter Two

Obligation and the Law of Contracts*

Introduction

Courts reveal a predilection for considering certain kinds of factors and elements within situations as most relevant in answering the question of whether an obligation is present in such situations. The kinds of things which the law looks at are the kinds of things, we shall argue, that the moralist or moral man ought to look at in defending obligation claims and in pursuit of an understanding of obligation.

We will consider some rather commonplace issues in the law of contracts revealed in the context of actual cases in Anglo-American law. The fact that these cases are commonplace in no way takes away from, but rather supports, the judgment that they reveal an insight into basic issues of obligation.

Section One

Implied Agreements: The Relevance of Conferred Benefits to The Imposition of Obligation

In Re Crisan[1]

Mrs. Sona Crisan was an eighty-seven year old widow. While shopping at her grocer's on Saint Patrick's Day, 1955, she suddenly collapsed. Police were summoned and she was taken to the emergency ward of a Detroit hospital where she remained, unconscious, for fourteen days. Later, she was transferred to another city hospital where she remained until she died, eleven months later. During all this time, Mrs. Crisan never regained consciousness. She, therefore, was never aware of the services that were being given to her; she obviously had never explicitly agreed to acceptance of them; nor had she ever signed any agreement nor acknowledged any dealings with the hospital. When she died she left a fairly large estate. To this estate the city of Detroit attached a claim for three thousand dollars, the amount expended in her care. The executor of her estate refused to make payment. The city of Detroit then brought suit

against the estate for the above amount. The case finally found its way to the Supreme Court of Michigan where Justice Edwards spoke, in decision, for the majority.

Edwards agreed with the contention of the appellant executor that Mrs. Crisan had obviously never agreed explicitly to any obligations to the city. That was an unchallenged issue of fact. But Edwards and a majority of the court felt that an implied agreement existed, that the dealings between Sosa Crisan and the city of Detroit constituted an enforceable contract. To find for the city seemed to Edwards so obvious a conclusion that it barely required comment:

> And the reasons upon which this decision rests are too broad, as well as too sensible and too humane to be overborne by any deductions which a refined logic may make from the circumstances that in such cases there can be no contract or promise in fact.[2]

To Edwards the violation of the usual pattern of contractual dealing--the explicit agreement, the drawing up upon a sheet of paper the mutual obligations accepted, the carrying out of performance of these obligations by the parties--was not sufficient reason to vitiate the contractual status of what had taken place, the result of which was a judgment for the city.

But Edwards had more to appeal to than 'humaneness' and 'sensibility'; he had, for one, the Restatement of the

Law of Contracts, a document prepared by the American Law Institute.[3] In this document was a provision which Edwards relied on, and in this provision we find an argument of interest:

> A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if,
>
> a) he acted unofficiously and with intent to charge therefor, and
> b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and
> c) the person supplying them had no reason to know that the other would not consent to receiving them if mentally competent; and
> d) it was impossible for the other to give consent or because of extreme youth or mental impairment, the other's consent would have been immaterial.[4]

Edwards and the majority accept the ALI opinion that what is of the greatest relevance here in determining whether Crisan has an obligation to the city is discovered by finding out about a) the nature and effect of the benefits and b) the 'minds' and intentions of the parties. What can be inferred from the situation of the parties about their states of mind, and whether or not the benefits were of effect, i.e., were real benefits, seem to be the decisive issues. Our next two cases will further refine what the import of these considerations is.

Day v. Caton[5]

Caton and Day lived on adjoining lots. There appeared to be some need for a party wall between these lots. Caton, without consulting Day, began construction upon the land bordering their lots of such a party wall. There had been no agreement between Caton and Day about the possibility of such construction nor had there been any agreement to share expenses were such construction ever undertaken. When Caton finished building the wall, he presented to Day a bill for one half the cost of the work. Day refused to pay, insisting that he had never agreed to such payment, nor had he ever in conversation intimated to Caton that he might, at some point in time so agree. In court, Day insisted that his standing by and watching in silence could not "raise [any] implied promise to pay anything for the wall."[6] Caton, of course, insisted that such conduct constituted an implied promise. The lower court accepted Caton's argument, but the issue was phrased somewhat differently in the judge's instruction to the jury:

> A promise would not be implied from the fact that the plaintiff [Caton], with the defendant's knowledge, built the wall and the defendant used it, but it might be implied from the conduct of the parties. If the jury find that the plaintiff undertook and completed the building of the wall with the expectation that the defendant would pay him for it, and the defendant had reason to know that the plaintiff was so acting with that expectation, and allowed him to so act

> without objection, then the jury might infer a promise on the part of the defendant to pay the plaintiff.[7]

On appeal, the questioned instruction was held to be proper and a correct statement of the law. Judge Devens, speaking for a majority of the Supreme Court of Massachusetts, wrote that in some situations, "silence may be interpreted as assent," especially if one is silent "in the face of facts which fairly call upon him to speak."[8] Devens pointed to the facts of a) the reception of a benefit by Day, b) Day's option to refuse which was not exercised, and c) Day's silence, as the decisive facts. Again, as in Crisan, it appears that the states of mind of parties and the presence of conferred benefits form the focus of the judicial inquiry.

Austin v. Burge[9]

Burge published a paper in Butler, Missouri. The father-in-law of Austin subscribed to the paper and requested Burge to send it to Austin for a period of two years. For that period the father-in-law paid but when the subscription ran out Burge continued to send the paper to Austin and billed him. This went on for several years. During that time Austin sent payment of the subscription price twice but on each occasion requested Burge to cancel his subscription

for the future. Burge didn't stop sending the paper and Austin continued to read it but refused to pay for it. Burge brought suit against Austin for the subscription price of the paper for the years unpaid.

At the trial on the lower level Austin won the case, convincing the judge and jury that to enforce payment would be, in effect, to force him into contractual relations he never wished to have, and such a forcing could not be grounds for a valid agreement. It was the evidence of his demand that the paper be no longer delivered which apparently distinguished his case, in the eyes of the lower court, from Caton v. Day. Burge, however, appealed to the Kansas City Court of Appeals and the judgment of the lower court was reversed. The majority, speaking through Judge Ellison, reasoned its finding for Burge.[10]

Ellison agreed with Austin that "one cannot be forced into contractual relations with another and that therefore he cannot against his will be made debtor of the newspaper publisher."[11] But, Ellison insisted, "it is equally certain that he [Austin] may cause contractual relations to arise by necessary implications from his conduct."[12] Such necessary implications were present here according to Ellison. The conduct referred to, of

course, was Austin's continuing acceptance of the paper and the receiving of benefits thereby. In Ellison's view this case had many of the same elements as Caton v. Day despite Austin's protest to the contrary. Ellison writes:

> One who accepts the paper by continuously taking it from the post office, receives a benefit and pleasure arising from such labor and expenditure as fully as if he had appropriated any other product of another's labor.[13]

Further, Ellison continues, "there being no pretense that a gratuity was intended, an obligation arose to pay for it."[14]

Ellison, like the judges in the other two cases, focuses on the questions of benefit and the 'intentions' of the parties as manifested by their acts for the purpose of coming to a decision about whether Austin has an obligation to Burge. It is now appropriate to consider what significance these cases, and what brief remarks we have made about them, have for our inquiry. This statement of significance must be understood as only an initial statement. The significance of these cases is really cumulative and only after we have presented all the cases will we be able to give a full explanation of what it is that these cases provide for our argument.

Conclusion to Section One

In general, these cases on 'benefits conferred' indicate the importance of a) the reception of benefits by one party because of the action of another party, and b) the intentions of the parties as manifested in their conduct, as criteria for the imposition of obligation by a court of law. What is considered a benefit by the law is fairly obvious; it is not different from any common sense notion of what constitutes a benefit. The only test, it appears, of whether a service or an action performed for another is a benefit is whether the party so receiving considers the service beneficial, or would consider it beneficial judged by some reference to commonly accepted notions of what individuals value. We ask whether the party considered such service a benefit or whether it can be presumed that he would consider it a benefit as we consider whether the standard practice would be to consider such service a benefit. The notion of what constitutes the intentions of the parties, both the provider and the receiver, is, in the law, a more complex notion and something must be said about it.

To preserve the dictum that one cannot be forced into contractual relations with another it is necessary to alter the commonly accepted notion of 'intent' in order to account for the 'willingness' of the parties in the cases

where willingness is not evident to initial inspection. It is obvious, first of all, that the determination of whether the parties finally burdened with obligation in these cases should be so burdened is not disclosed by reference to their privately held wishes. Crisan had no such wishes or intentions; Day had no intentions of entering into contractual dealings and Austin indicated a definite intention to end or cease contractual relations. Some concept of 'intention' or 'willingness' must be located beyond such privately held wishes to justify the argument that these parties were not forced into contractual relations.

In all three cases the determination of the 'willingness' of the parties is supplied by an inference from their conduct or status. In the cases of Crisan and Day there was silence; in the case of Austin there were words to an effect contrary to 'willingness'; but in all three cases there was the reception and enjoyment of non-gratuitously given benefits. It is to such reception and enjoyment that the court refers in its justification of imposing obligations upon the parties. Thus, the presence of non-gratuitously given benefits enjoyed by the receiving party is the key to understanding the assignment of an implied promise in these cases by the court. We can refer again

to Ellison's argument. First indicating the presence of an enjoyed benefit for Day, Ellison concludes, "there being no pretence that a gratuity was intended, an obligation arose to pay for it."[15]

It is important to note that these cases reveal an avowed determination of the part of the law to get to the consideration of the ultimate benefits which are effected by means of the interaction of the parties beyond any simple reference to signed and sealed agreements, documents, letters and the like. Any notion that such formal requirements determine the absence or presence of obligation for parties under the law of contracts must be dismissed. In Crisan and Day there were no such documents, and in Austin the only document was a letter by Austin indicating his strong wish that the subscription be stopped. It is obvious that the significance of such written instruments pales beside the result of the inquiry into the results of interaction of the parties, how the parties were changed, how the parties were benefited, how their specific concrete situations were altered.

Section Two

Reliance as Consideration: The Relevance of Dependency

Relations of Parties to the Imposition of Obligation

Introductory Note on Consideration in the Law of Contracts

In determining that each of the situations in section one were contract situations with legally enforceable obligations, it was settled that each party was receiving, or was to receive, because of the 'agreement', a certain benefit. The benefits received by Crisan, Day, and Austin, were benefits of different sorts, while the benefit sought by Detroit, Caton, and Burge was in each case money. These benefits altogether form the 'consideration' of the contracts, the 'that for which' an agreement is entered. In the law of contracts agreements to be legally enforceable must possess 'consideration' on both sides; each side must profit or gain because of the agreement. A party cannot make an agreement with another that this other work for him for the remainder of his life for the wage of one peppercorn and then seek enforcement in a court of law. The reciprocal activities are so incommensurate that the law would have to judge there was insufficient consideration, no consideration at all on one side, and hence no valid agreement. But there are some complexities to this problem of consideration. Our discussion below will prove that what

can count for, or as, consideration can be in the eyes of the law, some very unusual things.[16]

Hamer v. Sidway[17]

At the occasion of the golden wedding anniversary of Mr. and Mrs. Samuel Story their son, William Sr., promised his nephew William Jr., that if young William would "refrain from drinking, using tobacco, swearing, and playing cards or billiards for money until he became twenty-one years of age . . . " he, William Sr., would give him five thousand dollars.[18] Young William accepted the conditions of the agreement and performed in accordance with it. At age twenty-one William wrote to Uncle William for the money but Uncle insisted that he wait a while, that he would hold it in safekeeping for his nephew, but told his nephew not to worry for the money was surely his. Twelve years later Uncle William died, having paid none of the money over to his nephew. His nephew in the meantime had assigned the debt to a third party (a gambling debt?), who then brought suit against Uncle William's estate and the hard-hearted executor.

At the trial defendant-executor contended that "the contract was without consideration to support it, and

[was] therefore invalid."[19] But the case was decided in favor of the plaintiff. Judge Parker speaking for a majority of the Court of Appeals of New York felt that the defendant required a broader view of what can constitute reasonable consideration. He wrote:

> A valuable consideration in the sense of the law may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other.[20]

Thus, benefits on both sides is not a necessary condition for an enforceable contract. It is sufficient that one party be made to 'suffer' in a broad sense, upon justified reliance on the words or conduct of another party:

> Consideration may mean not so much that one party is profiting as that the other abandons some legal right in the present, or limits his legal freedom of action in the future, as an inducement for the promise of the first.[21]

It was determined that young William had so abandoned or limited his legal rights and legal freedom under this definition so as to enable him to recover.

It must be emphasized that the decisive fact in this case was not the promise of the uncle but the conduct of the nephew in reliance upon that promise. The mere fact of promise only indicated an intention to benefit but without performance on the other side this intention or promise to

benefit would have been without consideration and could not be a promise enforceable in the law. Promises by themselves do not generally give rise to obligation in the law unless, such promises are acted upon or relied upon. Where no condition is set in the promise, there is no obligation, for there we have a mere gratuity. In this case the obligation arose vis-a-vis the conduct of the party promised. It was the response, through subsequent behavior, to the promise which made the promise enforceable.

Devecmon v. Shaw[22]

This case, merely an expansion of the rule of Hamer concerned another uncle-nephew relationship. A nephew lived with his uncle and for a number of years was in his employ as a clerk. The uncle requested the nephew to take a pleasure journey to Europe for which the nephew was to pay but the uncle promised him that he would be reimbursed at a later time. The nephew took the trip and spent his own money as requested. The uncle died before reimbursing him, and the executor of the estate being unwilling to pay found himself in court on the complaint of the nephew.

There was no question in this case, as there was

none in Hamer, of there being reliance by one party on the promise of another. But there was some question in the mind of the executor and a minority of the court, the Court of Appeals of the state of Maryland, as to whether the nephew had 'given up anything', had been made to 'suffer' in reliance upon the promise. Judge Bryan, speaking for the majority, found that there was sufficient detriment in that the plaintiff spent his money "in this way, instead of some other mode."[23] Thus, the nephew won the case and collected.

As was mentioned above, this case merely illustrates how the rule of Hamer is extended. It points up again that the enforcement of promises by the law is not to be understood as a judicial device for signalling the sacredness, or prima facie rightness, or 'self-evident' rightness of promises themselves, but rather, is to be understood as signalling the importance of conduct undertaken in reliance upon such promise. It is not the saying of words that somehow immediately binds; it is the action of another in reliance upon those words which must be the decisive fact. This principle is profoundly set forth in the next case, a case before one of the great spokesmen for the law, Benjamin Cardozo.

DeCicco v. Schweizer[24]

Miss Blanche Schweizer was engaged to be married to Count Oberto Giacomo Giovanni Francesco Maria Gulinelli. On January 16, 1902, Blanche's father executed a written agreement by which he promised and agreed to pay to Blanche "during his own life and to send her during her lifetime the sum of two thousand five hundred dollars, the first payment of said amount to be made on the twentieth of January, 1902."[25] There was language in the agreement to the effect that this promise was being made in consideration of the fact that Blanche and the Count were about to be married. Blanche's father made the first payment and continued payments up until January of 1912. At that point although a significant amount of the balance remained, Mr. Schweizer refused to make any more payments. Mr. Schweizer was brought to court for the balance by an assignee of Blanche.

Defendant Schweizer insisted that the promise was without consideration, that it was a mere gratuity, that no reliance nor detriment was 'suffered' by plaintiff's assignors on the promise because "Count Gulinelli was already affianced to Miss Schweizer and the marriage was merely the fulfillment of an existing legal duty."[26] There was, in fact, no condition mentioned in the agreement that the parties were receiving this <u>for</u> getting married or <u>if they would</u> get married.

Defendant took this line of argument in response to plaintiff's contention that proof of the reliance of Blanche was attested to by the fact that she married the Count. The question thus put to the court was whether there was sufficient evidence to find reliance on the part of Blanche by the act of marriage to constitute sufficient consideration and an enforceable agreement. The case went to the Court of Appeals of New York where the majority spoke through Judge Cardozo.

For Cardozo there were two major questions to be answered: a) was it reasonably inferrable that reliance upon the promise became an inducement to get married?; and b) if such hypothesis is reasonably inferrable, should Blanche's father be forced to pay? In dealing with the first question, Cardozo reexamined the document signed by the father and the context surrounding the signing.

The document, according to Cardozo, argues that "the promise was intended to affect the conduct not of one only, but of both [parties]."[27] Cardozo so believes because " . . . the very formality of the document suggests a purpose to affect the legal relations of the parties."[28] "One does not commonly pledge oneself to generosity in the language of a covenant."[29] Thus, Cardozo would counter the 'gratuity' assertion of the defendant and argue that the promise was

intended by the promisor to be a promise which could be relied upon. But, as to whether such reliance did take place Cardozo gives no certain opinion. Nevertheless, although it is not absolutely clear that they did rely, neither is it clear that they did not. To this raising of the question of the burden of proof on this issue Cardozo issues an admonition to the defendants:

> The springs of conduct are subtle and varied. One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others.[30]

A conclusion of reliance is reasonably inferrable. Given the reasonableness of the opposite inference, however, Cardozo needs further grounds to justify a finding for the plaintiff. This second question is answered by further consideration of the fact of the defendant's meddling. An important legal attitude and judgment is revealed by Cardozo's words:

> It [the law] strains, if need be, to the uttermost the interpretation of equivocal words and conduct in the effort to hold men to the honourable fulfillment of engagements designed to influence in their deepest relations the lives of others.[31]

Given that the fact of reliance was not established but inference about it was possible either way, the fact that the subject matter of the situation was so important, that the action of the parties may well have been motivated by the

promise, and this action was of great significance, becomes the decisive fact. He who speaks in promise, and by his speaking opens up the possibility that others, in reliance upon his words, will act, speaks at the peril of being taken seriously.

In the cases of Hamer and Devecmon there was no question but that the promisees had relied upon the words of the promisors, but in this case, no such obvious conclusion follows. Reliance usually must be proved. Here it was not; it was only reasonably inferrable. The extension of Hamer and Devecmon occasioned by DeCicco can be understood in the following way. Not only does the situation wherein a promisee obviously relies on the words of the promisor give rise to an obligation for the promisor, such obligation can be and is imposed when it is reasonably inferrable that a party's words may have been the spring of another party's action. All these cases insist that parties should get the benefits they expect when their expectation, given the words of another, is reasonable.

Conclusion to Section Two

Once again in these cases, as in the cases in

section one, the subjective intention to be obligated, or the subjective recognition of obligation, is not dispositive of the question of whether such party is obligated. Usually, of course, as we have seen, it works the other way. Parties, here the two executors and Mr. Schweizer, apparently do not recognize their obligations to the injured parties but this is not proof that there are no such obligations in the situation. The court finds it quite reasonable and meaningful to tell Mr. Schweizer that he has an obligation which he does not 'feel' or 'sense'. Whether there is such an obligation turns on the resolution of other issues.

In these cases we see the law pointing to the importance of a) words spoken by one party to another which words express, by reasonable inference, an intention to benefit the parties spoken to and b) the action or conduct entered into because of such words, to the determination of whether or not obligation is present in the situation. Once again, attention is directed to the character of the interaction between parties and to the effects of that interaction. In the cases in section one we looked to the interaction and asked, 'Who was benefited by it?'. Here, we look to the interaction and ask, 'Who was burdened by it?'.

What is now beginning to become evident is that the

law recognizes that it is to the character and consequences of forms of human interaction undertaken by parties for the purpose of self-improvement or benefit, that attention must be directed if we want to know how obligations arise. It is to this interaction, the intentions and actions of the parties toward each other; and to its consequences, the benefiting or burdening of parties, that the gaze of the court must be drawn, given the court's purpose of assigning and locating obligation and responsibility. The passage taken from Cardozo's opinion contains the basic insight supporting such attention. It is because men deal with each other, and by such dealings are influenced deeply in their lives, that such objective circumstances of the situation--the intentions of parties, their conduct, and the benefits or burdens consequent to interaction--must be taken into account; for it is these dealings and interactions which in the judgement of the community must be preserved, and in order to be preserved must function according to acceptable standards. This preliminary speculation about the 'why' of judicial focus will be expanded only much later in the argument; it is only mentioned now out of deference to the suggestiveness of Cardozo's remark.

As a conclusion to this section, we only remark, as

we did in the conclusion to the first section, that the focus of the judicial eye is clearer by means of the presentation of the cases, although the reason or justification for that focus is not yet apparent. We need more evidence before that case is made.

Section Three

The Relevance of the Relative Bargaining Position of Parties, A Kind of Difference of Status, to the Imposition of Obligation

Weininger v. Metropolitan Fire Insurance Company[32]

Weininger was a fur dealer. To protect himself against loss he took out a fire insurance policy with the Metropolitan Fire Insurance Company. In the policy given to Weininger there was an express provision which rendered the insurance coverage void if "the insured should keep gasoline or benzine on the premises."[33] Weininger accepted and signed the policy with full knowledge of its contents. Weininger's establishment was later destroyed by fire. On inspecting the premises, a member of the fire patrol found a gallon of gasoline which Weininger's employees had been using to clean the

merchandise. The gasoline was found, however, in a portion of the store not on fire. Weininger sought to collect from the insurance company but using the provision mentioned above defensively, they refused. Weininger brought suit against the company, and an Illinois Court, hearing the case on appeal found for him.

The justification of the court's finding seemed to rest on the determination of two issues: a) a finding of the fact, and b) a decision of policy. First, in regard to the fact situation the court felt that it did not necessarily reveal a violation of the provision:

> The keeping and using of such volatiles [a single gallon of gasoline] on the premises for necessary use in the complainant's business was such a slight departure from the provisions of the policy that there was no breach therefor.[34]

But this determination of 'fact' only follows if policies are to be read and understood in a certain way. There would be many ways to so read and understand such policies but the procedure of this court is to admit its initial ambiguity vis-a-vis this problem and to resolve the ambiguity in a consistent way. Thus, the court admits that it is not clear whether the provision was violated but given such unclarity the decision follows readily:

It is the rule that the policy or contract of insurance

> is to be construed liberally in favor of the insured and strictly against the company.[35]

Thus, what is relevant is who it is that is doing the bargaining; that is what is the decisive issue in this case. Attention to the relative size and power of the parties appears to carry significant weight.

Campbell Soup Company v. Wentz[36]

The brothers Wentz, farmers in Pennsylvania, made an agreement with the Campbell Soup Company "for delivery by the Wentzes to Campbell of all the Chantenay red cored carrots to be grown on fifteen acres of the Wentz farm during the 1947 season."[37] The contract provided that the Wentzes a) would deliver the carrots with stalks cut off and in clean sanitary bags approved by Campbell, b) would have to abide refusal by Campbell of carrots in excess of twelve tons to the acres, and c) would have to abide by Campbell's refusal, in any situation, to accept the carrots and in that event, "while he [Wentz] cannot say Campbell is liable for failure to take the carrots, he is not permitted to sell them elsewhere."[38] Campbell simply agreed to buy what it approved of, grown by the Wentzes. After some brief period of performance by both parties, the Wentzes stopped delivery. Campbell

brought suit for specific performance of the contract. The lower (district) court found for the Wentzes and refused to rule specific performance. Campbell took its appeal to the United States Court of Appeals, Third Circuit.

Judge Goodrich of the Third Circuit spoke for the majority, upholding the lower court's decision. In Goodrich's opinion he referred to the three provisions of the contract mentioned above. Referring specifically to provision c), he commented:

> This is the kind of provision which the late [Judge] Bohlen would call "carrying a good joke too far." What the grower may do with his products under the circumstances is not clear. He has covenanted not to store it anywhere except on his own farm and also not to sell to anyone else.[39]

To say that it is a seemingly unfair and unreasonable provision is, however, not to say that it must be unenforceable. There is a third way of looking at the problem according to Goodrich:

> We are not suggesting that the contract is illegal. Nor are we suggesting any excuse for the grower in this case who has deliberately broken an agreement entered into with Campbell. We do think, however, that a party who has offered and succeeded in getting an agreement as tough as this one is, should not come to a chancellor and ask court help in the enforcement of its terms. That equity does not enforce unconscionable bargains is too well established to require elaborate citation. . . . All we say is that the sum total of its provisions drives too hard a bargain for a court of conscience to assist.[40]

Goodrich later refers to the fact that in the contracts made for the purpose of setting up agreements between Campbell and individual growers, there is a standard form made by Campbell which "has quite obviously been drawn by skillful draftsmen with the buyer's interests in mind."[41]

The conclusion about the unenforceability of the agreement vis-a-vis its being 'unconscionable', seems to consist of a warning by the court to Campbell that since it is able to come to the bargaining table with the power and intent to coerce, it will be treated harshly at the hands of the law when a dispute concerning the agreement arises. It is possible to consider the court's ruling of unconscionability to have to do solely with the terms of the agreement and not with the 'status' of the party who drew it up. But, it is, of course, unlikely that any but a more than equal party would be able to get away with such an agreement, so that issue with 'unconscionable terms' usually means judgment in respect to the superior bargaining power of one party. This case shows a judicial inclination to focus on the unequal power of one party, which power is exercised coercively, as an important factor in considering obligation, here resulting in a judgment releasing a party from obligation.

Henningsen v. Bloomfield Motors[42]

This landmark case concerns the purchase and sale of an automobile. Henningsen bought his wife a new Plymouth. Two weeks after the sale Mrs. Henningsen was injured when the car suddenly veered and smashed into a brick wall. Mr. Henningsen brought suit both against the dealer, Bloomfield Motors, and the manufacturer, Chrysler Corporation, for the damages incurred. He insisted that there was an implied warranty of merchantability attached to the sale of the car, and that such a warranty was violated by the obvious defects of the car. The defendants insisted that no such warranty existed. On the lower court level, the Henningsens won, but final determination of the case--all important for future cases of this type, and of great importance to our inquiry--will be given in some detail.

Bloomfield and Chrysler defended on the expected basis that the degree and nature of warranty for the automobile appeared on the back of the purchase order signed by both parties. The language of the warranty agreement was as follows:

> 7. It is expressly agreed that there are no warranties, express or implied, made by either the dealer or the manufacturer on the motor vehicle, chassis or parts furnished here-under except as follows.
> The manufacturer warrants each new motor vehicle . . . to be free from defects in material or workmanship

> under normal use and service. Its obligation under this warranty being limited to making good at its factory any part or parts thereof which shall be returned to it with transportation charges prepaid . . . this warranty being expressly in lieu of all other warranties express or implied, and all other obligations or liabilities on its part.[43]

In short, the company will make good failures of function in the automobile if the car is operated under normal use and service and if the buyer gets the parts of the car to the factory at his own cost. Major faults could, under this contract, require the buyer to ship the engine to the factory at his cost, and pay for its return. The company asserted and proved that the Henningsens knew of this provision when they signed the contract. But to Judge Francis of the New Jersey Court other considerations were to be taken into account.

Francis's opinion contains much reference to the problems of bargaining in the modern economic world. Traditionally, as Francis says, a contract was the result of the free bargaining of parties who stood on approximately equal footing. But this tradition and this situation no longer apply. Francis writes:

> But in present day commercial life the standardized mass contract has appeared. It is used primarily by enterprises with strong bargaining power and position. The weaker party in need of the goods or services, is frequently not in a position to shop around for better

> terms, either because the author of the standard contract has a monopoly (natural or artificial) or because all competitors use the same clauses. His contractual intention is but a subjection more or less voluntary to terms dictated by the stronger party.[44]

Such a subjection, in Francis's mind exists between automobile manufacturer and individual consumer:

> The status of the automobile industry is unique. Manufacturers are few in number and strong in bargaining position. . . . From the standpoint of the purchaser there can be no arms length negotiation on the subject. Because his capacity for bargaining is so grossly unequal, the inexorable condition which follows is that he is not permitted to bargain at all. He must take or leave the automobile on the warranty terms dictated by the maker.[45]

The realization of such inequities requires, for the interests of the common good, that courts step into the situation and attempt to heal the damage done by the inequity:

> Courts keep in mind the principle that the best interests of society demand that persons should not be unnecessarily restricted in their freedom to contract. But they do not hesitate to declare void as against public policy contractual provisions which clearly tend to the injury of the public in some way.[46]

Francis and a majority found for Henningsen, asserted that an implied warranty did exist, and helped to change the shape of such policies throughout the automobile industry.

We can single out for emphasis the important elements of the opinion. First, we have witnessed the rise of enormous corporation which issues to the public standardized

contracts obviously written with the corporation's advantage in mind. Second, such a situation reveals a threat to the freedom of contractual dealing. Third, the real point of decision for Francis is: such contracts will be declared void when they violate or endanger free contractual dealing to a serious extent. From a judgment about the power of the corporation or company which power is manifested in its contract the court imposes a stringent obligation upon the company requiring of it a fairer provision. The focus is on the practice of large corporations, coercive practice manifesting unequal bargaining power.

The court looks to the interaction of parties, again, to the character of that interaction, and to its effects. The character of the interaction is here obvious. The intentions of the parties are manifest in their conduct. A large company intends to get all it can from the relatively helpless individual. The effects of interaction are obvious. In the language of benefits and burdens, one party gets great benefits and few burdens, the other limited benefits and enormous burdens. Most important, by the evidence of these effects, coercion is revealed, and a threat to free contractual dealing emerges. Coercion, a consequence of power manifested, is the decisive fact of the case.

Conclusion to Section Three

In the cases of Weininger and Wentz attention to the power and practice of large corporations brought, finally, a release from obligation for the parties who appeared to have a prima facie obligation to the other party. In Henningsen, an obligation was imposed upon a party who, by clear inference from the agreement, appeared to have none. Once again the finality of written agreements is undercut in favor of more fundamental issues. Again, the focus is not on what was said or written down or explicitly promised; but rather, on the nature and effects of interaction. Such focus is present with a view, as we mentioned in the conclusion to section two, to the preservation of beneficial forms of interaction and the standards required therefor. One standard apparently important to the law is that such interaction be free, and the focus on the size and power of the stronger parties in these cases is appropriate for maintenance of the standard.

In summary we witness the courts considering a) the size and power of the parties, a feature of the interaction, and b) the effect of the size and power of the parties, coercion, an effect traceable to a feature of the interaction, as the decisive elements of the case. Consideration of these

factors forms the basis for the imposition of, or release from, obligation. In conclusion, we know that the law judges that a) the fact of unequal bargaining power and b) the fact that such unequal bargaining power produces an unequal distribution of benefits and burdens, suggest the presence of coercion and reveals a threat to free bargaining. Such suggestion and revelation are decisive, in these cases, of the obligation issue.

Section Four

Summary: The Focus of the Law in the Determination of Obligation

The cases we have considered have revealed the law's concern to focus on certain issues in the determination of obligation for parties, who, by their words or conduct, form agreements with each other for benefit. The elements of situations listed below form the dispositive subject matter for these cases. It was the answering of these questions which led to the imposition of, or release from, obligation:

1. Did a party receive benefits because of the non-gratuitous action of another party?
2. What were the intentions of the parties as manifested

in their words or conduct?

3. Did a party, acting upon reasonable inference from the words or conduct of another, act to his detriment?

4. Was unequal bargaining power exercised coercively?

Now it is not claimed that the answering of such questions will always, in cases in the law, be determinative of the 'obligation issue'. We have only considered certain recurrent problems in the law and have focused on considerations which frequently determine the respective rights and duties of parties. But the cases and the questions do suggest (what we have been arguing all along) a definite perspective on the problem of obligation. Inquiry into whether obligations are present takes place by means of asking and answering questions like the above. We must now see whether it is possible to more precisely define this focus of the law, whether all these questions point to a single characteristic judgment.

It is the benefiting and burdening of parties through, because of, or by means of, the words, conduct and action of other parties, which defines the important fact to which the law is drawn in its assignment of obligation. It is a fact of the interconnectedness of men in human society that they both benefit and burden each other by words and actions, and

to find a means whereby such benefiting and burdening can take place most fruitfully for society has appeared to be the task of the law. But these underlying reasons, this pervasive rationale, will be disclosed more fully in the next chapter. For the time being we were only concerned to witness the law in its activity of assigning obligation. By means of this presentation it is already possible to make some preliminary comparisons between the view of the law and the view of the theories we presented in chapter one, on the issue of obligation.

Section Five

Preliminary Reply to Prichard and Ross

We can use the instruction from the law to challenge and comment on some of the conclusions of Ross and Prichard noted in chapter one.

First, to Prichard's insistence that we must take the meaning of the presence of obligation in a situation to be equivalent to the fact that an individual has a feeling that he is obligated, the cases we have presented offer contrary evidence. Crisan perhaps provides the best example. Mrs. Crisan nor her estate nor its executor felt or sensed such

obligation. The court felt that it was meaningful to speak of the presence of obligation without reference to anyone's feelings except perhaps, its own. It is obvious that the courts do not subscribe to a form of the subjective view which argues that an individual must feel obligated to be obligated. Obligation of the Crisan estate did not depend upon such a 'subjective fact' about Mrs. Crisan as Prichard urged. It depended upon the fact that Mrs. Crisan received non-gratuitously given benefits and that an implied promise to pay arose given the likelihood of her consent. The 'implied promise' is not a statement about anyone's feelings. The justification for positing such a promise is, again, made by reference to the objective, 'public', facts of the situation.

Secondly, Prichard holds that argument and discussion are preliminary to the appreciation of obligation, that "individuals do not come to appreciate an obligation by argument."[47] This contention is not challenged by the evidence presented here. What is sought in the law, of course, is not primarily the realization of a party's obligation by the party but the determination of obligation despite, regardless of, the individual's appreciation of it. It may be the case that an individual cannot appreciate an obligation by argument; but it is obvious that from the point of view of the courts it is

possible and practical to speak of obligation without reference to the feelings of him who is said to be 'under' the obligation. How obligation is spoken of by the courts is, of course, quite different from how it is spoken of by Prichard. In the way the courts speak of it, discussion and argument do stop at some point. Before the full role and function of argument and discussion are revealed by the argument in the next chapter, it cannot be shown how far they can go. Nevertheless, when one takes a different perspective on the problem of obligation such as the perspective taken by the law, argument and discussion are seen, must be seen, to serve a different purpose than that assigned to them from the Prichardian point of view.

Thirdly, the courts, like Ross, seem to believe that promises ought to be kept. Ross insists that the keeping of promises is a prima facie duty revealed as self-evident to the mentally mature and attentive. The perspective and procedure of the law cannot, at this point, offer any improvement upon the Rossian limitation, for we have not seen any argument in general about why promises made should be kept. We have arrived, through the discussion of obligation in the law, at the Rossian point. Only if we can get behind the court's insistence that promises be kept can our claim, made in chapter one, that Ross prematurely invokes 'self-evidence'

and 'intuition', be justified. We have not moved beyond the point yet at which Ross invoked self-evidence.

Fourthly, to Ross's claim that there are no general rules for choosing between prima facie duties something can be said at this point. Ross does not know where, in a hierarchy of prima facie duties, to place, for example, the duty of keeping promises. The law flatly states in the cases in section three, Weininger, Wentz, and Henningsen, that when a promise if kept would foster the encouragement of coerced agreements, then the promise-keeping duty must give way. A priority in favor of encouragement of free, uncoerced, agreements is announced. Why it is announced, the rationale for the priority, is not clear, but the court announces it confidently. If a rationale for this judgment can be provided then the appeal to self-evidence can be put off.

But the resolution of this problem, like the resolution of the problems raised by the other three comments, must await further delineation of the perspective offered in contrast to those of Prichard and Ross. It has not been demonstrated at this point in our argument that the criticisms made of Prichard and Ross in chapter one are justified. Precisely, to the question of the point at which discussion and argument must cease and the inquirer is to appeal to intuition,

this point has not yet been clearly marked out. When the argument is able to present the evidence relevant to the making of that case, the same evidence will be significantly probative for the more particular questions we have just raised.

Section Six

Conclusion to Chapter Two

The purpose of this chapter was to illustrate the approach of the law to the problem of obligation by giving examples of the law assigning obligations to parties in individual cases. This has been done. We have seen the kinds of issues which the law considers important. We have seen the relative position of parties in regard to benefits and burdens following preliminary explicit or implicit agreements is where the law focuses in its task of assigning obligation. We have suggested that such a focus possesses a rationale, and that this rationale has to do with the setting of standards for certain kinds of human interaction.

In addition to the presentation of the outlook of the law, we have made preliminary criticism of the postulates of certain of the theories considered in chapter one, by

virtue of the postition the judgments and opinions in the cases has afforded us. The everyday activity of the law provides evidence of men attempting to reason about obligation. The task now is to formulate reasons for the direction and character of this judicial reasoning. We have seen that the law has a definite perspective on the problem of determing and assigning obligation; we must now discover why it has the focus it does, and how it justifies having such focus. Such discovery will take us beyond judicial reasoning, beyond the usual reasoning of judges of law.[48]

Chapter Three

The Meaning and Justification of Societal Obligation

Introduction

This chapter has two purposes. First, we seek to understand why the courts focus on the issues they do, the focus evidenced in chapter two. This investigation is beyond the scope of reasoning of courts of law whose function it is to decide individual cases, not to indulge in the justification for the rules and principles it employs. Second, we want to know what relevance such an investigation has for understanding moral obligation. The answers needed will lead us to posit and explain certain societal obligations.

Some Problems in, and Requirements of, Social Interaction

We recognize that it is by the making of bargains, agreements, and formal and informal contracts that men and

societies grow, benefit, and prosper. We are concerned to keep alive such growth, benefit, and prosperity, and so ought to be concerned to keep operative the means by which such ends are achieved. The reason that such bargains, agreements, and contracts are considered to be worthwhile is emphasized by Locke, quoting Hooker:

> "But for as much as we are not sufficient to furnish ourselves with competent store of things needed for such a life as our natures doth desire, a life fit for the dignity of man, therefore to supply these defects and imperfections which are in us, as living singly and solely by ourselves, we are naturally induced to seek communion and fellowship with others; this was the cause of men uniting themselves at first in politic societies."[1]

To Locke the formation of politic society is to provide a life for man commensurate with his dignity. But, one can view the situation somewhat differently as, for example, Hobbes did in Leviathan. The formation of that state or society is less for the purpose of a life of dignity than for a more fundamental aim. He writes:

> The final, cause, end, or design of men, who naturally love liberty and dominion over others, in the introduction of that restraint upon themselves in which we see them live in commonwealths is the foresight of their own preservation, and of a more contented life thereby--that is to say, of getting themselves out from that miserable condition of war which is necessarily consequent . . . to the natural passions of men when there is no visible power to keep them in awe and tie them by fear of punishment to the performance of their covenants.[2]

The mutual benefiting of men which comes first, in the formation of politic society or commonwealth, can be understood as either sort of benefit; that is, the agreement to live together and to cooperate is seen as a benefit no matter how one characterizes such benefit. Philosophers, with few exceptions, have subscribed to this truth.[3]

Once together, living in the bonds of the social contract or commonwealth, further agreement, bargain, and contract fosters well-being. This obvious truth, were it not for its central importance to the purpose of the inquiry, would scarcely require mention. This fact about our life with each other is at the basis of our theory of obligation. A justification of obligation is made intelligible by virtue of the fact that the community is concerned to encourage the making of such agreements and bargains which are the means to the increase of benefits.

We now take a Hobbist turn, or a turn, if not limited in its direction to the thought of Hobbes, is a turn that nevertheless sees in the absence of certain requirements by the community an invitation to catastrophe. For we said earlier, in chapter two, that the preservation of certain sorts of social interaction requires conformity to certain standards. Unless the community imposes certain standards

by means of which human interaction, by agreement, bargain, and contract, can be regulated, the interaction will change its character, the means whereby benefits accrue to individuals and society will falter, or cease altogether. Precisely, the powerful will subject the weaker to their will; the benefits will fall on one side, and the weaker will cease to have any substantial advantage in entering politic society. Unless there by rules of interaction in the affairs of men, the purpose of politic society is frustrated, and men are returned to the state of nature, the state of war in Hobbes, an incomplete state, an insufficient state, for Locke. The naturalness of self-interest, the pervasiveness of men seeking benefits for themselves, makes the entrance into politic society intelligible. But this same self-interest, this seeking of benefits, if left unchecked, will be pursued individually at the cost of drastic loss of benefit to many. Men naturally seek benefits for themselves. For this reason they enter politic society, and once in politic society if left to get what they can with no restraint offered by the community the purpose or aim of politic society will be frustrated.

The community which is aware of the truth of these assertions must, therefore, offer and impose a variety of means, certain standards of interaction. Given its aim of

preserving itself and providing a means of benefit accrual for individuals, it must posit aims more particular than the achievement of benefits which will serve that aim. It must do at least two things. First, it must encourage the making and keeping of agreements, bargains and the like. Second, it must discourage the making of coercive agreements. These requirements will be considered separately, in some detail.

Why the Community Must Encourage the Making and Keeping of Agreements

The community ought to encourage the making of agreements, first because such agreements work to the benefiting of individuals. These benefits are understood as the effects of those received objects of choice and desire of individuals. Collectively or individually the community which encourages and fosters agreement-making encourages the means whereby individuals gain those benefits. The community must be concerned with the keeping of agreements because it is only by such keeping that the benefits sought can be realized and the continuation of bargaining for benefit be encouraged. If an agreement is not kept by one party but is kept by another the law of self-interest may encourage the defaulting party

to default again, and the party who did keep the agreement may be wary about making future agreements. Such results threaten the continued existence of politic society in accordance with its purposes. The party who kept the agreement gains no benefit thereby, and becoming wary of agreement again, limits his future opportunities for benefit. The party defaulting is encouraged to default again and contributes to the return to a state of nature. In short, the very end that was eschewed reappears. Of course, this outcome is possible only if the community fails to enforce the agreements made. If it does impose and enforce standards, one being that agreements be kept, then the ride of self-interest is short. The reasons for the community to encourage the making and keeping of agreements are obvious. Less obvious but more interesting is how a community with these ends should go about working toward their realization.

How the Community Encourages the Making and Keeping of Agreements

First, the community encourages future <u>making</u> of agreements which are beneficial, as defined by the individuals, by enforcing the agreements which have already been made

but are left unkept. Thus, the wary party denied or fearful of being denied benefit is encouraged to make agreements in the future when he understands that agreements past and future will be enforced. When the self-interest of the opposite party is counterbalanced with the imposition upon him of enforcement, the wary party is made secure.

Second, the community encourages the keeping of particular agreements by enforcing the agreement if it is not kept. Censure, or disapproval or fine or punishment can redefine the character of the defaulting party's self-interest.

The purpose of enforcement is, of course, the bringing of benefits to all parties. But if the end is to bring such benefits to all parties then the community ought to do more. If a party has provided a benefit for another party but would not provide this benefit if he did not get a benefit in return, then the community ought to find some way for providing this first party with a compensatory benefit. The community does this because it wants to encourage parties providing other parties with benefits. Thus, the community ought to be 'agreement-sensitive'; it ought to try to find agreements between parties when one has benefited the other and the other recognizes or should recognize a benefit. If the community is not 'agreement-sensitive' and only takes as agreements what

are obviously agreements, i.e., explicit, written, signed and sealed agreements, then it discourages the fostering of benefits for parties, for the party providing benefits will probably stop providing them if he does not receive a benefit in return.

In conclusion the community finds it consistent with its ends to encourage the making and keeping of agreements. Such encouragement takes place by a) enforcing agreements which are made and b) by being 'agreement-sensitive', by trying to find an agreement wherever it can, especially in those cases where one party benefits another and would stop such benefiting were he not to receive a benefit in return.

Why the Community Must Discourage the Making of Coercive Agreements

The community must discourage the making of coercive agreements because such agreements reflect a state of affairs inconsistent with the aims of politic society. The reasons are really the same as those in the last two sections. If coercive agreements are made and are allowed to stand, the rule of the stronger again dominates. The coercing party will continue to coerce, benefits will fall more and more

on one side, and the aims of society are frustrated. Further, given the fact that men seek to benefit themselves and pursue such benefits by means of agreement, the fact of coercion, the fact that the individual did not freely enter into the agreement, suggests that the agreement does not inure to his benefit. But, a coerced agreement may contain limited benefits for the party coerced. If so the community's reasons for discouraging the making of coercive agreements are nevertheless undiminished. To allow coercive agreements even where the coerced party has limited benefits as a result, is nevertheless an invitation to further coercion, and given the postulate about the pervasiveness of self-interest and proclivity to seek first for self, an invitation to that state of affairs where the strong rule and rule through strength.

How the Community Discourages the Making of Coercive Agreements

The community discourages the making of coercive agreements by not allowing them to stand, by refusing to enforce their conditions.

We can now see that it makes sense for the community which wishes to preserve itself as a framework for interaction

within which individuals can benefit themselves must a) enforce agreements that are made between individuals, b) be 'agreement-sensitive', i.e., look to find an agreement when a party benefits through the non-gratuitously given efforts of another, and c) disallow coerced agreements. We must now see what all this has to do with obligation.

Obligation and the Community

Requirements of individuals in the community, as members of the community, to act in such a way that the community may be preserved may be called societal obligations. These obligations are the minimal obligations of men living together in society. The relationship between such requirements and the preservation of the community has been brought out in the preceding section. The preservation of the community means the preservation of a frame of interaction wherein individuals may benefit by association and agreement. The requirements are therefore understood as a means of preserving a frame of interaction for individuals so they may benefit. But a community which does not provide the conditions for individuals to benefit within it in the present is not a community which deserves to be preserved.[4] Requirements are

seen therefore as necessary to the fulfillment of the aims of the community in the present and to the continued existence of such a community in the future. It is absurd to speak of the preservation of a community which will provide a frame of interaction for individuals to benefit in the future when what exists in the present is a frame of interaction which does not encourage such benefits. The community which is to be preserved must be one which deserves to be preserved. The community so deserves which, in the present, provides for the benefiting of individuals. That the community be preserved means therefore the imposition of obligations upon individuals in the present.

The community's creation of obligation thus has an eye on present conformity to the aims of the community, and on the possibility of future realization of those aims. An individual is obligated in the present, for by such means is the aim of the community realized, i.e., the benefiting of all members, and is obligated because were he not, the possibility of a future 'benefiting community' is made less likely. To have operative a means whereby benefits and burdens can be shared--usually by mere enforcement of an agreement, but occasionally by implying an agreement, or nullifying a coercive agreement--is to have the present aim of the

community realized, and the possibility of a future benefiting community made more likely. It is the natural self-seeking of men in a community, their choice of benefits over burdens, and the aim of the community to insure a frame of interaction wherein benefits can be shared, and hence where burdens must be shared, that creates obligations. Or, the general demand that the community realize its aims and be preserved so realizing these aims has the effect of imposing a particular demand upon an individual when his self-seeking resists that demand, or merely operates in disregard of it. Because the community cannot trust such self-seeking to be the sole regulator of interaction within the community, it requires of men that they act in such a way that the realization of benefits for others, present and future, is not impaired. These requirements are obligations.

This is an argument disclosing what obligations are, and how and why they arise. But what is the community making this argument? And to whom is the argument made? We must say something about these issues before going further.

How Can It Be Said That the Community Makes This Argument?

It can be said that the community propounds this

argument because although strictly speaking a community is not a person or a philosopher, it can be understood as the collective voice of rational men who live within that community. To speak of a community arguing is merely a way of speaking about the arguments which are advanced by individuals within that, or some other, community, which arguments support the aims and purposes of living in a community, and reveal what is required if such aims and purposes are to be realized. Thus, any individual who can see that it is good to live in a community, and that therefore there must be requirements set down for the continuation of such community, can be the author of the argument. Simply, it is rational to both see the need for such requirements and to argue for their imposition. By virtue of certain truths agreed upon by rational men the argument for the imposition of such requirements, the argument for obligation, follows.

To Whom Is This Argument Offered?

The community offers this argument to anyone who wants to know about obligation. This can be a) someone like the Crisan executor in Crisan or the father in DeCicco, who having heard the argument of the court seeks to know why, in

general, individuals must be brought before the court and made to follow through on their agreements. The argument goes beyond that which was heard in court; it explains why the law has the focus it does, always concentrating on benefits and burdens vis-a-vis interaction between parties.

But the argument may also serve to enlighten b) one who does not stand before the judgment of the community. It may answer the problem of the philosopher who seeks to know what obligations are and where they come from. This argument, following some reflection on what we know to be true, can answer those questions. It is, theoretically, available to the judge as well as to the philosopher responding to a question about the nature of obligation. It tries to say what can be said; it goes as far as it can to find a rationale for obligation. But we must now see how far that is.

Obligation and Rationality

To indicate the extent to which discussion and argument can be employed to determine the presence or the absence of obligation in a situation, let us construct a hypothetical situation which contains many of the relevant issues at stake in the inquiry. Let us imagine Mr. Schweizer

standing before Judge Cardozo. Schweizer insists that he does not feel such an obligation. Cardozo answers that Schweizer does have an obligation to the plaintiff despite, regardless of, how he feels. Cardozo makes his remarks about the 'springs of action' and 'equivocal words and conduct'. Schweizer is not moved. "Why should it be," he asks, "that because others may have relied on my words and conduct, relied to their detriment, that I should be forced to pay, found obligated to them?" The argument we have put forward, we presume, is made available to Cardozo. "Because," Cardozo answers, "these individuals like others in the community may be reluctant to act again in the future, to act again for future benefits by making agreements if they cannot believe that their agreements are of effect. To deny them the effects of their agreements is to deny them the benefits of living in a community. The aims of the community are thereby frustrated. Further, to allow you to be free to leave this agreement is to encourage you and others, who we know are interested more in benefits for themselves than for others, to abandon agreements again and thus not suffer burdens under them. When agreements like this have no effect but to benefit one side, or to unfairly burden one side, then the making of agreements becomes a risky business. When agreements become risky to make, people

hesitate to make them, and when they hesitate to make them they hesitate to bring about benefits for themselves. Thus, their aim and our aim in living in a community is frustrated." But Schweizer is still not convinced. "But why," he asks, "do we care about the community? Why should I care about the community either realizing the aim of providing a means whereby individuals may benefit themselves now, or about the continuation of such a community?" This is a very difficult question. It is important to consider how Cardozo might answer it.

This question seeks a justificication for the justification. That is, we have attempted to justify the perspective of the law in assigning obligations by an appeal to certain fundamental facts about human society and certain truths about human behavior in such societies. Such an appeal has resulted in an argument for the focus and perspective of the law which we observed in operation in chapter two. But now it is asked, through the hypothetical, what is the argument for the argument. Once the situation is reached where the individual, here, Mr. Schweizer, admits that unless his agreement in enforced, the community is frustrated to some extent in realizing its aims, and the preservation of that community is endangered, but asks why such an argument should convince him, him who (let us postulate) is near death, who is thus

not to be appeased by arguments for his own future benefits, what is left to be said? There are, it seems two possible ways to answer this question.

First, we may have to appeal to intuition, we may be forced to insist of Mr. Schweizer that he admit that a community which provides for the achievement of benefits for its members is better than the destruction of that community, and that because it is better he must see that it is right that it be preserved. Any man of normal intelligence will see that it is right for men to have a community within which they may all benefit rather than to have a state where only the strong survive by preying on the weak. By virtue of agreeing to this, to the rightness of this state of affairs, Mr. Schweizer's final objection to the imposition of obligation upon him can be met.

A second response to Mr. Schweizer's question would suggest that Mr. Schweizer has <u>contracted</u> to care for the continuation of the community. Mr. Schweizer has received benefits from the community--it has protected him and nurtured him, it has given him language and speech, education and the power to reason and make agreements for his benefit. Like <u>Crisan</u> the agreement is here implied for although Mr. Schweizer never explicitly agreed to pay back the community for its

trouble it is reasonable to assume that he would have so agreed, like Crisan, had the choice been given to him. In short, he must abide by the agreement with his daughter and son-in-law because he agreed to abide by such agreements in his, by his, agreement with the community. This agreement was, in one sense, reminiscent of Prichard, an agreement not to use noises except in a certain way. Whether we demand of Schweizer that he grant the 'prima facie' rightness of holding men to their agreements with other men when not to hold frustrates the aim of the community, or whether we insist that he abide by his agreements to other men by virtue of his implied agreement to keep agreements, this is the end of the road and the end of the argument. This is the limit for discussion and argument in response to the skeptic.

We conclude this section by some summary remarks about the source and justification of obligation. The source of an obligation is the community itself. Obligations arise from the community, by living in the community, by virtue of the requirements the community must impose upon its members if the community is to achieve its end of providing a means for the benefiting of individuals. The justification of an obligation is, finally, the individual's assent to the rightness of preserving such a community either by reference to

some intuition of his, or to his implied agreement to so preserve the community. No obligation arises for an individual who does not live and never has lived, among other men. No obligation can be justified to him except by reference to some prior affirmation or agreement on his part. To him who refuses to admit such affirmation or agreement, it can only be said that such affirmation or agreement is implied. But there is no more to be said, to him.

Before it is possible to evaluate our theory of obligation and to compare it with the theories put forward in chapter one, we must show that it is moral obligation as well as legal obligation which we have been arguing about. We now proceed to this task and await a summary of our position at the end of the chapter.

Societal Obligations as Moral Obligations

These societal obligations are moral obligations. They apply to all individuals benefiting from social interaction; for those who benefit by living, or by having lived, in a society, there is no way to avoid the imposition of such requirements. The individual who benefits is not free to act as if the conditions which enable him to benefit are conditions

which he is free to neglect. Recognition of the necessity of these obligations places them in a position of priority. These obligations when adhered to provide the conditions necessary to further and fuller social interaction. They provide for the growth of society and for the variety of human interactions without which life would not be worth living. They are general. They are ineluctable. They are of fundamental importance. Such characteristics justify considering them as 'moral' obligations.

But whatever they are called they must be recognized. The skeptic may balk at the use of the term 'moral', but he cannot resist what must be seen. Here is a category of obligations which demands the attention of anyone who reflects about the necessities of life, when men live with each other.

The failure to live up to one's obligations is always damaging to the social order. The society is diminished, by virtue of its aims, whenever any individual fails to live up to his obligations when that failure is known. And to the argument that the society is not diminished when one fails to act on one's obligation and that failure is never recognized, is never known, there are two responses. First, there is always the possibility that the failure will be discovered. One can rarely be certain that his violations of promise to

others will go unnoticed. Secondly, the individual who opts to secretly violate his contract with society by such option violates the perspective on his actions which he (impliedly) promised to take. The asking of the egoistic question in a context in which the issue is one of obligations to others is inappropriate. He must be reminded of his implied promise to take a perspective other than one which specifies only where his interest lies.

Although societal obligations are moral obligations, it is not true that all moral obligations are societal obligations. A fuller idea of what constitutes life with others requires a filling in of features of social interaction not discussed here. Other obligations emerge from other activities engaged in by men once the activities aimed at meeting societal obligations are consummated.

Societal Obligations and Legal Obligations

These societal obligations are the minimal obligations upon which the more particular legal obligations rest. Without the argument presented in explanation of the societal obligations, the rationale of the courts in assigning obligation, as illustrated in chapter two, is absent. That legal

obligations 'rest' on societal obligations is disclosed by referring to the necessity for justifying the power given to the courts, official organs of power in the society. The justification for the operation of institutional power is based on a recognition of the necessity for a means of enforcing societal obligations. Necessity of adherence justifies a means of enforcement. The legitimacy of legal institutions depends on the implied consent of those subject to the legal order, consent to the exercise of power for the end of preserving a framework of interaction for those consenting. There is a moral justification for the operations of legal institutions.

In regard to the problem of distinguishing moral from legal obligations it must be noted that there is no self-evident distinction between those acts, in violation of one's obligation to others, which should or should not be subject to legal sanction. That is, it is not obvious for which breaches of obligation legal institutions should provide remedy. An examination of the definition of 'contract' offered by The Restatement of Contracts reveals the wide area of choice:

> A contract is a promise or set of promises for breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.[5]

Considerations labeled under the catch-all phrase 'reasons of public policy' may dictate where and when the legal institution should refrain from providing institutional settlement of conflict arising out of breach of obligations. Such considerations include most notably (in my opinion), situations in which judicial probing would effect an intrusion into the areas of privacy of individual lives with which the law should not be concerned.[6] In those situations, however, a procedure like that of adjudication can, with good reason, be recommended to the parties involved.

Response to Skepticism

To the skepticism which questions whether there are any obligations at all, the preceding argument responds by pointing out certain obvious facts of social life. Recognition of these 'facts' requires the recognition of obligations. To the skepticism which questions whether there are obligations in particular situations the argument responds by pointing out that the 'particular situation' of living in society demands recognition of the presence of obligation in, at least, that situation. Further, the argument demands that in those situations wherein the factors, already enumerated at length

earlier in this chapter, are present, obligations arise. If the skeptic would persist in his skepticism he must take on the burden of proof and demonstrate where and how the argument presented earlier in this chapter fails.

Response to Prichard and Ross

It is now appropriate to review our criticisms of Prichard and Ross, summarized at the end of chapter one, in order to discover whether we have improved upon their theories. The first criticism made there of Prichard and Ross was that they failed to establish satisfactory criteria for resolving situations of conflict and ignorance in regard to obligation(s).

The response to Prichard and Ross is similar to the response made to the second form of skepticism noted above. To him who lives in society and who questions, or is ignorant of, whether he has obligations or not, the argument as a whole is offered to rid him of his ignorance. Second, to Ross's doubt about the relative stringency of duties some suggestion of a hierarchy of duties is present by means of the arguments in the third section of chapter two supported by the argument in the beginning of this chapter. That is, for example, it is the case that the duty to keep a promise is, generally, of

less stringency than the duty to keep a coerced promise from being carried into effect. To maximize free uncoerced dealing it may be necessary to violate a promise. If so, the duty to keep a promise gives way.

But finally, to Prichard and Ross--a general response--the argument of the second and third chapters provides clues to what factors should be considered as relevant when one is in a sitaution and is ignorant or confused or both, in regard to whether he is obligated to another or another to him. Although the need for creative judgment in such situations is not eliminated, for the application of rules to situations is always 'open-textured', the argument has provided information as to what rules should be consulted by creative intelligence in such situations.[7]

In our second criticism in chapter one we noted that Prichard and Ross do not establish satisfactory criteria for the marking off of the point or place at which discussion and argument cease to be useful in answering the skeptic and intuition must take over. The argument, especially our hypothetical dialogue between Schweizer and Cardozo, marks this place beyond that suggested by either Prichard or Ross, and marks it clearly as the end of the road.

Further, in regard to the second criticism, we

suggested a problem in chapter two in discussion of Prichard's rebuttal to the legal examples. We suggested there that Prichard might respond to the supposedly 'objective' theory of obligation supported by the cases, that we had merely substituted the judge's intuition or apprehension for that of the parties. But at this point we can see that the opinion is not so much a matter of the judge's intuition as of the reasoned voice of the community speaking through one of its official spokesmen. We view the judge's opinion not as a spontaneous report of his feelings or intuitions but as an attempt to apply the reasoned requirements of interaction laid down by the community to a particular situation. Such reasonings are available to the judge. We view the judge's opinion as intelligent understanding of the conditions of individual and communal existence. To see that such a position is tenable, the reader is referred back to Cardozo's opinion in DeCicco. The great judge is acutely sensitive to these conditions of individual and communal existence and is acutely aware of his responsibility to judge in accordance with his recognition.

Finally, we said in chapter one that Prichard and Ross, by concentrating on the subjective apprehension of intuition ignored a dimension of obligation equally relevant to understanding what it is men call their obligations. This

dimension has been revealed by the argument in these last two chapters. Only the reader can judge whether such argument is relevant to understanding what it is men call their obligations. I think he must judge it so. We need not be limited to the dimensions revealed by Prichard and Ross.

Conclusion

We must refer back to chapter one to Frankena's remarks about the required scope of an inquiry which is aimed at resolving the issues between 'externalism' and 'internalism'. Frankena said that "the battle could not be contained," that a broader scope was needed which would include within it questions about the relation of morality to society and of society to the individual.[8] He argued that small-scale semi-logical arguments could be of only limited value in answering the skeptic's doubts about obligation. We have taken Frankena's advice and have broadened the inquiry. The results are valuable enough, I submit, to support the criticism offered about the theories of Prichard and Ross. Their theories though valuable are too narrowly and too restrictively conceived.

We must now take our theory, preceding final evaluation of it, and put it to work for us. We need new examples

and applications. And, we need to say something more about those moral obligations, which though dependent upon a condition in society wherein societal obligations are met, are not themselves societal obligations.

Chapter Four

The Theory of Obligation Applied

Introduction

The purpose of this chapter is to test our theory of obligation to see whether and with what degree of helpfulness it can be employed. We want to look at particular situations and kinds of situations to discover whether the rationale we have provided can be of help in determining the 'obligation content' of situations. Our first example, the problem of Socrates in the Crito, is a classic situation in which to consider the problem. The answers Socrates himself gives to the questions of Crito and the Laws are support for our theory and in this way the example serves two purposes. Given the situation in the Crito, is our rationale reasonable? Can it be applied? The argument of Socrates supports our argument. It can be applied.

Following this discussion we will suggest where and how our theory can be applied by considering some issues and

situations within which the obligation question arises; these issues and situations were chosen because of their relevance to contemporary issues about obligation.

After this we will suggest how the application of our theory reveals its boundaries. It will be argued that the theory is indeed applicable, and applicable with good and valuable result, but, nevertheless, its application is limited. There are questions about morals which reference to our theory will not help answer. We must point out the limitations of a theory of societal obligation in disclosing the full spectrum of issues within the subject matter of morals and moral obligation.

Obligation in the Crito

Crito comes to Socrates in prison and offers a plan of escape. In considering his options, Socrates attempts to discover what his obligation is in the situation. It will be useful to point out how Socrates proceeds with this inquiry. Those aspects of the situation upon which Socrates focuses are, by now, quite familiar.

Socrates imagines the Laws coming to speak to him. The Laws understand that Socrates contemplates escape. They

ask him why he plans such a thing:

> Come now Socrates, what charges do you bring against us and the state that you are trying to destroy us? Did we not give you life in the first place? Was it not through us that your father married your mother and begot you? Tell us, have you any complaint against those of us laws that deal with marriage?[1]

The Laws insist that Socrates' escape would be both an act aimed at destruction of the state and the laws and an act of betrayal, given how much the laws and the state have done for him. The Laws argue that Socrates has an obligation not to do this. But what is the evidence for this obligation? The Laws would have Socrates recall the benefits they and the state have provided for him:

> Well have you any complaints against the laws which deal with children's upbringing and education such as you yourself had? Are you not grateful to those of us laws which were instituted for this end, for requiring your father to give you a cultural and physical education . . . ? Then since you have been born and brought up and educated, can you deny, in the first place, that you were our child and servant, both you and your ancestors?[2]

The Laws recall to Socrates' mind the enormous benefits he has received from them. Recognition of such benefits reveals the great importance of the community--the state and its laws--and point to its priority as a provider of benefits even before those benefits given by father and mother. The Laws ask:

> Are you so wise as to have forgotten that compared with your mother and father and all the rest of your ancestors your country is something far more precious, more venerable, more sacred, and held in greater honor both among gods and among all reasonable men?[3]

The community being the condition by means of which a parent is able to provide opportunities for benefit to the child, it holds the prominent place, and ought to hold the prominent place in the eyes of one of its progeny. Any man who is reasonable, the Laws argue, can recognize this.

But given that Socrates ought to revere the law for the benefits it has bestowed upon him, does it follow that he must not violate its edict? How does evidence of benefits reveal grounds for implying a promise? Socrates surely never explicitly promised the Laws or the state that he would always obey them, but the Laws do not limit themselves to that requirement for their argument. They speak again to Socrates:

> We have substantial evidence that you are satisfied with us and with the state. You would not have been so exceptionally reluctant to cross the borders of your country if you had not been exceptionally attached to it. . . . Are we or are we not speaking the truth when we say that you have undertaken in deed if not in word, to live your life as a citizen in obedience to us?[4]

A promise implied by 'deed' or conduct is sufficient in the eyes of the Laws. This point is emphasized again:

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

here to do whatever we tell him.[5]

The Laws reveal to Socrates their focus upon the benefits he has received and the promise they imply from him by virtue of his acceptance of those benefits. They then argue that they are committed to take such a view as they urge Socrates to consider what would be the result of his failure to abide by this implied promise. They ask:

> Now Socrates what are you proposing to do? Can you deny that by this act which you are contemplating you intend, so far as you have the power to destroy us, the laws, and the whole state as well? Do you imagine that a city can continue to exist and not be turned upside down, if the legal judgments which are pronounced in it have no force but are nullified and destroyed by private persons?[6]

How can a city continue to be the source of provision of benefits for its members if its members do not observe certain rules of interaction? The Laws, providing Socrates with an account of the benefits he has received from them, now question him about the possibility of continuation of such benefits for present and future citizens presuming Socrates' failure to perform on his promise.

Finally, the Laws announce to Socrates that a wrong is being done to him, not by the Laws themselves but by those who apply them, but this does not constitute a justification for destroying the fabric of lawfulness without which no society, city, state, community, can survive. They say:

> As it is, you will leave this place, when you do as the victim of a wrong done not by us, the laws, but by your fellow men.[7]

That same self-interest and disregard of others in view of which the community imposes standards, and which, left to its own law will turn upside down the state and its purposes, is not incapable of creeping into the regulation and application of the requirements of the community and in so doing can contaminate the processes from which justice proceeds. The determination of obligation requires human judgment, and the intimacy of reason and self-interest, as pointed out by James Madison, always constitutes a threat to the community.[8] In the case of Socrates it finally produced a verdict of death.

Socrates speaking through the laws directs his attention to the effect of interaction with the state in terms of benefits and burdens. Discovering benefits and an implied agreement he judges himself to be subject to obligation to the state and to perform according to its expectation, its reasonable reliance upon his conduct. It is interesting to note that the three elements focused upon in the cases in chapter two and brought out again in chapter three in discussion of the rationale of obligation reappear here. Socrates' understanding of obligation, spoken by the Laws, necessitates a commitment to these operative concepts. The Laws insist

a) that agreements be kept--because Socrates has promised he ought to perform on that promise, b) that he, Socrates, be 'agreement-sensitive', that he look, given the presence of benefits, to his words and conduct to see if an agreement can be implied, and c) that no element of coercion is operating to cancel the agreement. This last is suggested by the Laws' remarks that Socrates was quite willing and eager to stay in Athens, that he was not coerced into staying but freely chose to remain. The significance of the reappearance of these rules is to illustrate how they may be quite fundamental to the analysis of obligation, that they perhaps more than other rules recognized by the law, are useful, prima facie at least, for detecting the presence of obligation. We shall see their applicability in other contexts.

Other Applications of a Theory of Obligation

A transition from the example of Socrates to other situations in which questions about obligation can arise is easily afforded when we consider the contemporary problem and dispute about the individual's responsibility to his country. Today this problem arises in this country due to the waging of an undeclared, and as believed by many, immoral war. The

problem of the draft concerns most of our young people today; it forces many of them to reexamine fundamental questions about the nature and degree of one's obligation to his country. Let us presume the question is 'Does one have an obligation to his country and is there at least a prima facie responsibility to obey its edicts?'. If one does not feel or sense such an obligation, is there anything left to be said? Can our theory speak to this problem?

An answer to both problems can be given by applying our theory to the problem. Let us look to benefits and burdens as a consequence of initial interaction between the state and the citizen. Has the individual received benefits from the state? Indeed the answer to this question is as obvious as it was in the hypothetical case we constructed in which Cardozo spoke to Schweizer, and in the example of the Crito. Life, language, security, protection, the power of thought, unimpeded movement, privacy, association, education are some of the things afforded the individual by the community in which he lives. These must be considered benefits.

But let us imagine an objection. The individual insists that the effect of interaction between him and the state has led to a burdening of the individual. He complains that as a result of living in this community, of interacting

with this state, he has become unhappy, alienated, exploitative, selfish, insensitive, dirty, and generally incapable of 'relating' to other people. Thus, he argues, as a result of such bargaining, such initial interaction with the state, he has become severely burdened and it is now the state's responsibility to benefit him. He does not seek great benefit he insists; he does not seek a payment of a large sum of money; he seeks only, let us presume, to be left alone. What are the merits of the case? Has our analysis left us with nothing to say on an all-important and fundamental question of obligation?

Questions of obligation, whether they be before courts or simply the '<u>conceptus communis</u>' sitting in no official public capacity, are not resolved simply by application of principles. One cannot leave his common sense and intelligence behind when he enters the inquiry. Such common sense and intelligence reveals the flaw in the citizen's argument. It is not at all clear that what he asserts are burdens are such, given the potentialities of life outside the state or community. It is not clear that the net effect of interaction with the state has been a burdening, in fact, the converse is true. Where is the support for the belief that a life outside of the community, is better than, more ennobling, more benefiting, happier, than life within one? Can the expenditure

of all energies in the battle merely to survive be considered a life with fewer burdens? We must compare the state of the individual in the community with the state of the individual in some sort of state of nature. However seriously one takes the individual's argument that he has been burdened (and this argument, this outrage must be taken seriously by those who value the future of society), one cannot agree that the net effect of interaction is burden rather than benefit. The conclusion is that the net effect of interaction is benefit for the individual. But, were the benefits given non-gratuitously; were they given with an expectation of compensation?

If the community did not give its benefits non-gratuitously it would not give them at all. It would make no sense to give them. If the purpose of the community in providing its benefits is not, in part, the attempt to preserve the community, then it would not demand that the conditions for preserving the community be maintained. But by its demand it aims to preserve and perpetuate its existence and by this demand indicates its non-gratuitous intent. We have the presence of benefits and the presence of non-gratuitous intent.

According to our theory, we must now be 'agreement-sensitive'. Is it possible to find an implied agreement by reference to the words or conduct of the citizen? Let us

employ the Crisan test. It is Crisan which must be considered the most relevant given the situation of the party here at or during the initial stage of interaction. He was an infant, a child, and not like Austin or Day capable of understanding that benefits were being given to him and given to him non-gratuitously. He was more like Mrs. Crisan who was unconscious of what was being provided her. In Crisan the court made extensive reference to the Restatement of Contracts. We shall cite again the all important provisions of that document, all important to the disposition of this case as well as to Crisan:

> A person who has supplied things or services to another, although acting without the other's knowledge or consent, is entitled to restitution therefor from the other if,
>
> a) he acted unofficiously and with intent to charge therefor, and
> b) the things or services were necessary to prevent the other from suffering serious bodily harm or pain, and
> c) the person supplying them had no reason to know that the other would not consent to receiving them if mentally competent; and
> d) it was impossible for the other to give consent or because of extreme youth or mental impairment, the other's consent would have been immaterial.[9]

We must examine whether our cases can be considered to fall under the intent of this provision.

The state certainly fits the requirements laid down in the provision. It acts without the infant's consent, it acts with 'intent to charge'. The child on the other hand,

the infant citizen, receives services necessary to prevent harm and pain, or at least without the protection and help of society, harm and pain become much more likely prospects for the individual. The state certainly 'has no reason to know that the other would not consent if he could'. Given the enormous benefits it provides, cannot the state reasonably assume that the individual would consent if he was capable of understanding his options? Would anyone choose to reject the benefits we have listed, only in part, above? Such a conclusion leads to the judgment that the state, in this case, is entitled to the restitution it demands. The judgment must be that the individual has an obligation to the state to obey its edicts.

It must be pointed out, however, that this response only serves to answer one question: is there an obligation on the part of the individual to obey the state? The answer is yes, but this answer may not, and in most cases, will not, dispose of the issue of what course of action an individual should take. We are absenting other factors to come to a determination of one of the important factors in a case. But let us presume that the final issue in the case is whether an individual should be obligated, should conceive of himself as having an obligation, to fight in an undeclared war. One of the questions to be determined in the disposition of this

case is the question we have been considering. But, there are other questions. Our theory tells us what to look at, what to look for, what are the kinds of factors which are relevant, but, it cannot at first glance, determine for complex situations, what the recommended parameters of action are.[10]

Staying with this example for a moment longer, the individual can argue that the state's promise to abide by lawful procedures in dealing with its own citizens in the context of waging war has been violated by its action. Does a state which violates its own laws thereby contribute to its own destruction? Does the individual have an obligation to contribute to that self-destruction by submitting to military service in that war? This kind of question must also be taken into account. All of the questions must, as we have argued, look at the actions of the parties vis-a-vis each other--What was agreed upon? What were the benefits and burdens consequent to such agreement? But, let us apply the general rule which we argued for earlier. The community, the rational members of the community, must decide what requirements are necessary in this context to preserve a community which provides a means of benefiting its members and to maintain such a community now. We must reflect about the conflicting obligations in this case and decide that we

are obligated to do that which will contribute to this end more significantly. We only know where to look, we don't as yet know what the final result should be. In some ways this example is the best we can give. It shows both the strengths and limitations of the theory. It brings us back to the complexities of real situations which, since chapter two, have been lacking in representation.

We must consider the important implications of recommending that individuals, in deliberating about obligation, consider the effects of interaction in terms of benefits and burdens and the reasonable inference from conduct in interaction, as possessing significance over and beyond explicit agreements and words. There is much left unsaid between individuals who are lovers and friends which can give rise to the imposition of obligation. Relationships between nations can also give rise to such effects as reasonable reliance upon the reasonable implications from conduct. The fact that individuals will become suspicious of making future agreements when the ones they make earlier are not performed nor enforced is clearly evidenced by reference to the political scene. The cynicism which accompanies the occasion of political speeches is an indication of the unwillingness of individuals to agree again (to trust and believe is how one agrees in

this context), to the offer of the speech-maker. How cheapened political talk by men who would be taken seriously has become because the failure to carry through on their earlier agreements has not been 'enforced' by loud outcry from the offerees, their constituents. Such evidence discloses a failure to apply a concept of obligation to situations which, by virtue of their importance, should always be viewed with an 'obligation-sensitive' eye. To apply this theory of obligation consistently would be to become sensitive to effects and consequences of interaction which in large part are left ignored.

But is such a moral squint to be seriously recommended? Would not commitment to this principle and consistent application of it lead to a kind of moral hysteria? Would not the moral issue, the obligation issue, be raised too often? Moral maturity it is said is indicated by knowing when to raise the moral issue and when not, and presumably this means that it is not raised all the time. But would not the acceptance of our view require such an obsession?

Despite the attractiveness of the notion that we may offer a rule for applying the rule of this theory, it cannot be done. Whether an issue is to be brought under such consideration as we have recommended cannot be resolved by a general theoretical direction. To answer the question 'When

should the theory be applied?' by saying that it should be applied when a question of obligation arises is not much help, but is about all that can be said. A theory like this is likely to suffer from the same sort of misconception that is frequently discovered in discussion of Kant's theory of the categorical imperative. Kant does not insist that every act one undertakes be scrutinized beforehand for its conformity to the law of reason. Nor does this theory suggest that every act be scrutinized beforehand for its possible effects on the continued well-being of a community. Attention to the fact that one is a member of a community, that by one's actions one affects the state or condition of other individuals with whom one more immediately interacts, need not mean myopia to the other values of life, nor sole obsession with the community. We must recognize the place of societal obligation in the context of other values. We will now speak to this problem because it says something about the boundaries of our inquiry.

The Boundaries of Societal Obligation

To speak merely about the community and to speak merely about societal obligation is not to speak of all the relevant factors or features of what we might call the moral

dimensions of experience. A theory of societal obligation is not a theory of the moral life. There are moral obligations which are not societal obligations. A theory about societal obligations is not a theory about all moral obligations. There are more things to be thought of than one's requirements which arise because one lives in a community.

A community within which men can interact and by such interaction benefit themselves deserves the attention and care of the men who live within it, but there comes a time when given a relatively stable record of performance of their societal obligations, other obligations arise. We insist on having more than a community by means of which individuals can accrue benefits. We may decide that we should have benefits of a certain sort, and only then perhaps is the community worth dying for. We may be concerned, in addition to preserving the community, to preserve a community of a certain type, with a certain character, with a certain quality.

In regard to individuals our concern to evaluate their action is not limited to whether or not they perform on their agreements. All of the questions which men are inclined to ask about each other are not resolved by determining whether one keeps his agreements. Let us consider the father and daughter in DeCicco. We have judged that the father is

under an obligation to his daughter. How much does this tell us about the father and his character? Can we presume to judge him as an evil or bad person, on the basis of what we know, the knowledge merely that he is not willing to fulfill an obligation to his daughter? We cannot so presume. We need to know more. Nor do we know whether he is interesting, sensitive, thoughtful, a good drinking companion, or any of a host of other things which we may regard as important.

A theory of obligation like ours says nothing about certain questions with which philosophers have frequently been concerned. We do not have a theory of virtue. We do not assume that people who keep their agreements are, ipso facto, virtuous although we may want to say that men who do not keep their agreements are not virtuous. Would mere performance on the part of the father in DeCicco for as long as he did perform, evidence virtue on his part? It would not, nor would it tell us whether the father for as long as he did perform was worthy of respect. Was he a creature deserving of dignity? Was he autonomous? Was he loving and loyal? All these questions are not answered and cannot be answered by reference to the criteria we have put forward for determining whether one is under obligation.

Conclusion

We began this chapter with the example and argument of Socrates in the Crito. This example provides support for our theory. The Socratic theory appropriately places the focus of the Laws on the same elements revealed and discussed in chapters two and three. The times have changed significantly since the days of Socrates' Athens but the character of human desire and the requirements of politic society remain the same. This was brought out by the second example, the question about a contemporary individual's obligation to his society. The same issues are relevant, the same factors are to be taken into account.

In proceeding with our discussion of the application of the theory we maintained that a theory of societal obligation is not a theory of the moral life nor the good life. The importance of societal obligations is not diminished when they are juxtaposed with other values and other obligations. It is simply that life with other men is more complex and more profound than living up to one's societal obligations.

To determine finally the place of societal obligations in the context of other values we must, as Frankena would recommend, open up the boundaries of inquiry. Our inquiry is

too narrow to deal successfully with that question. Again we could say with Frankena, that the battle here is indeed the whole world and nothing short of a commitment of all our resources can be expected to bring a satisfactory result.

Chapter Five

Summary and Conclusion

A Unified Theory of Obligation--Summary and Reflections

Societal obligations are requirements that individuals act so that the realization of present and future benefits for others is not impaired. Such requirements arise because men live, and would live, in a community and can be taken to agree, as rational beings, to the preservation and continuation of that community. Situations disclose the presence of obligation by reference to the effects of interaction of parties, who live in society, in terms of benefits and burdens. The claim that one has an obligation is justified when one shows that unless a course of action is pursued or abandoned, the community, in its task of providing a means of benefit for individuals, is hindered, either from doing its task presently or in the future. These effects are concomitant because the failure in the present to provide for the achievement of benefits for individuals threatens, given the

way men act, the continuation of the means whereby individuals benefit, which means is the very rationale for the existence of the community itself. Simply, men interact. Unless there be rules of interaction, such interaction will fail to bring about what is sought by men. Rules of interaction in the judgment of the community, produce requirements. These requirements are obligations.

We set as antagonists in this inquiry, first, a state of affairs wherein the law of self-interest describes the motivation of individuals and reveals the character of interaction. Self-interest is left unchecked. There is no agreement; there is no community, and hence there are no obligations. On the other side is a community; there is an agreement by men that they will abide by certain rules for the purpose of their own and others' benefit. Here there is agreement and there are obligations. We began our argument by placing ourselves right in the middle of this community and square in the operation of the imposition of obligation by this community in the context of the courtroom. As we tried to find a rationale for such imposition we considered the state of nature described above. It is the choice of community and submission to rules of interaction within it which brought us back, away from this state of nature,

back to the courtroom, to its pronouncements, and beyond.

It appears from what Socrates says in the Crito that the choice between community and state of nature for one who lives and grows in a community, is not a real choice. To make a choice possible a state of affairs must be present in which the choice is not taken away by reference to an implied promise. The present members of communities can destroy those communities to give future individuals the choice between community or no community and obligation and no obligation. The only question is, for what reason should we exchange the reality of an implied promise for the possibility of an explicit one? We may judge it more considerate of the needs and wants of future generations to impose upon them obligations by reference to implied promises than to allow them the possibility of choosing explicitly whether they would live together or not. For although that explicit choice, is possible only in a state of nature, we must consider whether the benefits of the possibility of that choice outweigh the burdens concomitant with that possibility.[1]

Obligations and Lawfulness

To move from consideration of obligation in the

court of law is not to move to a context where there are no obligations. We have said that there are moral obligations which are not legal obligations. The difference between what we might want to call legal and moral obligation, is at least that for moral obligation there is no official judge and jury, no publicly authorized authority, no courtroom and many of the procedures that go with judgment in a courtroom. But there is a judge and there ought to be rational judgment. There ought to be appeal to precedent and appeal to the community's well-being. To see lawfulness as a disposition to view situations in the way we have described, whether it be within or without a courtroom, is to see that the presence of a judge and jury is no guarantee of lawfulness as surely as the absence of a publicly appointed and authorized judge and jury need not imply the absence of lawfulness. The life of law rests finally in the systematic procedures of determining case by case the responsibility of individuals to each other individually and collectively with a view to the preservation of a frame of interaction whereby they may benefit.

To view the law as the simple operation of force or power, to view it as the 'gunman situation writ large' is to fail to see that the law, as opposed to the gunman in the gunman situation has a justification for its exercise of power.[2]

To take the law simply as there, as a given datum, as an exercise of power is a consequence of the same kind of thinking that takes obligations as simply there, as given data of experience. The fatal effect of such a view is that no distinction is made between legitimate and illegitimate exercise of power on the one hand, and feelings of obligation and obligations on the other. To lose this distinction is, for the former, to predicate right on power, and for the latter, to predicate 'right' on idiosyncrasy. To the former conclusion we can only insist that failure or powerlessness is not evidence of failure to be right; and to the latter that intensity of feeling is no evidence of correctness of feeling. But we do not merely insist that these assertions are correct. We insist that these assertions can be supported. The task of our inquiry has been to support this latter insistence. The reader must now evaluate the evidence, and come to his own conclusion.

An Adequate Theory of Obligation

At the end of chapter one we advanced criteria for an adequate theory of obligation. Those criteria have been met. We have explained what is meant by saying one has an

obligation to another, have demonstrated that it is true to say that individuals have obligations to others, and have shown how this claim is supported. We suggested how the presence of obligation, societal obligation does not exclude the presence of other obligations in situations. We have shown that there are relations between individuals other than that of societal obligation.

Beyond this we have tried to show that inquiries need not be limited in the way of Prichard and Ross. It is not that limited inquiries are wrong; our inquiry itself is limited but it is not wrong. The problem with Prichard and Ross and the skeptic whose doubts occasioned this inquiry is, that if we judge from what they say, they fail to recognize a dimension of obligation which is important. Perhaps the major problem revealed in the poverty of recent ethical philosophy is like the major problem of another sort of poverty. The worst thing about poverty according to Ralph Ellison is not that one merely lacks goods; it is rather that one defines oneself and one's goals in such a terribly narrow and limited way.[3] Such narrowness and limitation in definition of oneself and one's goals results in a neglect of things important.

NOTES

Introduction

[1]See Thomas Hobbes, Leviathan, ed. Oskar Piest, (New York: Liberal Arts, 1958), chap. XXVI

[2]"Rhodesia," New York Times Encyclopedia Almanac 1970, (New York: New York Times Book and Educational Division, 1969), p. 857.

[3]Jerome Frank, What Courts Do In Fact, 26 Ill. L. Rev. 645 (1932). Reprinted in Morris R. Cohen and Felix S. Cohen, Readings in Jurisprudence and Legal Philosophy, (Boston: Little, Brown, and Co., 1951), pp. 474-475.

[4]Ibid., p. 475.

[5]Ibid., p. 477.

[6]Ibid.

[7]Karl Llewellyn, A Realistic Jurisprudence--The Next Step, 30 Col. L. Rev. 431 (1930). Reprinted in Cohen and Cohen, p. 472.

[8]For example, the skeptic should consult the following arguments:

a) Plato, Gorgias, especially 482-487.
b) Plato, The Republic.
c) A helpful distinction for questions of this type is made by Kant in Chapter II of the "Transcendental Analytic" of the Critique of Pure Reason. This distinction is between questions of right (quid juris) and questions of fact (quid facti). Kant, interestingly, refers to the language of jurists in discussing

this distinction.

d) A contemporary article of interest on the subject is William Kneale, "Objectivity in Morals," Philosophy, XXV, (1950).

Chapter One

[1]H.A. Prichard, Moral Obligation, (London: Oxford University Press, 1949), see chapter entitled "Moral Obligation."

[2]Ibid., p. 87.

[3]Ibid., p. 94.

[4]Ibid., see chapter entitled "Does Moral Philosophy Rest on a Mistake?," p. 7.

[5]Ibid., p. 9.

[6]Ibid., pp. 7-8.

[7]Ibid., p. 8.

[8]Moral Obligation, see chapter entitled "Duty and Ignorance of Fact," pp. 37-38.

[9]Moral Obligation, see chapter entitled "Does Moral Philosophy Rest on a Mistake?," p. 1.

[10]Ibid., p. 16.

[11]Moral Obligation, see chapter entitled "The Obligation to Keep a Promise," p. 179.

[12]Moral Obligation, see chapter entitled "Does Moral Philosophy Rest on a Mistake?," p. 9.

[13]W.D. Ross, The Right and the Good, (London: Oxford University Press, 1930), see chapter entitled "What Makes Right Act Right?," p. 16.

[14]Ibid., see chapter entitled "The Meaning of Right," p. 12.

[15]The Right and the Good, see chapter entitled "What Makes Right Acts Right?," p. 19.

[16]Ibid., p. 21.

[17]Ibid., p. 29.

[18]Ibid., p. 30.

[19]Ibid., p. 41.

[20]Ibid., pp. 41-42.

[21]William K. Frankena, "Obligation and Motivation in Recent Moral Philosophy," Essays in Moral Philosophy, ed. A.I. Melden, (Seattle: University of Washington Press, 1958), p. 40.

[22]Ibid., pp. 79-80.

[23]Ibid., p. 73.

[24]Ibid., p. 80.

[25]Ibid., p. 81.

Chapter Two

*Understanding the concept of obligation in the law of contracts is, in my opinion, revelatory of the concept of obligation throughout the Anglo-American Law. Law itself has a contractual basis as we shall argue later on. It is interesting to note that philosophies of law which tend to emphasize the authoritative aspects of law tend to use the model of the criminal law. I think this is what Hart constantly has in mind throughout his writings. Although Hart and his works must be taken seriously, for he is most informative, I think that his failure to see the contractual basis of

Anglo-American Law accounts for his neglect of such features as reciprocity between law maker and those subject to the law. Law is more interactive between law maker and subject than the 'rules of recognition' paradigm suggests.

The criminal law can be understood as part of the contract between the individual and the state wherein the individual agrees to let the state punish him by virtue of the burdens he places upon the community. The necessity of consent or agreement generally for the existence of law will be brought out in chapters three through five.

It seems that the usual theoretical contrast is the understanding of the law as authority or the understanding of law as agreement. Authority views, like those of Austin and Hobbes, emphasize the law as a power. Law in this understanding takes on a paternalistic character. On the other hand, philosophies of law which emphasize the agreement aspect, theories like that of Socrates in the Crito which we will discuss in chapter four, and in contemporary jurisprudence, a view like Lon Fuller's (see The Morality of Law and The Law In Quest of Itself) see the law as a contract between citizens and the community.

I think it can make a great deal of practical difference which view one takes. A paternalistic philosophy of law is found in the Soviet Union (cf. Harold Berman, Justice in the USSR) while in the United States we still suscribe to a contractual notion by and large (cf. Holmes, The Common Law). Given paternalism the task of law is to bring the individual back into the 'spirit' of things, to rehabilitate him (cf. Berman, especially chapter on "Psychoanalysis and the Law in the Soviet Union") while the contract notion merely demands 'payment' of what was 'promised'.

[1]In Re Crisan, 362 Mich., 569, 107 N. W. 2D 907. This case and all the cases considered in this chapter can be found in Lon Fuller and Robert Braucher, Basic Contract Law, (St. Paul: West, 1964), p. 49.

[2]Fuller and Braucher, p. 50.

[3]The American Law Institute publishes model proposals for legislation, and as in this case a summary or restatement of law.

[4]Fuller and Braucher, Restitution #116, Restatement of Laws of Contracts, p. 50.

[5]Day v. Caton, 119 Mass. 513, Fuller and Braucher, p. 365.

[6]Ibid.

[7]Ibid.

[8]Ibid., p. 366.

[9]Austin v. Burge, 156 Mo. App. 286, 137 SW 618, Fuller and Braucher, p. 366.

[10]The finding is based on the reasoning that no gratuity was intended by the publisher, and defendant did not argue that he thought the sending of the paper was gratuitous. The court relies on Fogg v. Atheneum, 44 N. H. 115, and Ward v. Powell, 3 Har. (Del.) 379. In these cases the important facts are substantially the same. In all the cases, Austin, Fogg, and Ward, defendants were apparently receiving the paper at a post office and taking it home. The defendants would have a better case had they left the paper at the post office. In the opinion in Austin, Ellison says that there was no pretense that a gratuity was intended. That there was no pretense suggests that defendant's counsel may not have been doing his job. Apparently the point that defendant could not have thought the paper was a gratuity was conceded by counsel. If he did concede that point, he shouldn't have; he may not have won but he certainly would have had a better case.

[11]Fuller and Braucher, p. 367.

[12]Ibid.

[13]Ibid., p. 368.

[14]Ibid., p. 367.

[15]Ibid.

[16]Of course, the 'that for which' can be a promise as well as a service. One party makes a promise because of the other party's action. Holmes has an interesting definition in The Common Law " . . . it is the essence of consideration, that, by the terms of the agreement, it is given and accepted as the motive or inducement of the promise. Conversely, the promise

must be made and accepted as the conventional motive or inducement for furnishing the consideration. The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise." (Holmes, The Common Law, Boston: Little, Brown, and Co., 1963, p. 230.)

[17]Hamer v. Sidway, 124 New York 538, 27 NE 256, Fuller and Braucher, p. 188.

[18]Fuller and Braucher, p. 188.

[19]Ibid., p. 189.

[20]Ibid.

[21]Ibid.

[22]Devecmon v. Shaw, 69 Md. 199, 14 A 464, Fuller and Braucher, p. 201.

[23]Fuller and Braucher, p. 202.

[24]DeCicco v. Schweizer, 221 NY 431, 117 NE 807, Fuller and Braucher, p. 430.

[25]Ibid.

[26]Ibid.

[27]Ibid., p. 431.

[28]Ibid.

[29]Ibid., p. 433.

[30]Ibid.

[31]Ibid.

[32]Weininger v. Metropolitan Fire Insurance Company, 359 I11. 584, 195 NE 420, 98 ALR 169, Fuller and Braucher, p. 662.

[33]Fuller and Braucher, p. 662.

[34]Ibid.

[35]Ibid.

[36]Campbell Soup Company v. Wentz, 172 F 2D 80, Fuller and Braucher, p. 751.

[37]Ibid.

[38]Ibid., p. 753.

[39]Ibid.

[40]Ibid.

[41]Ibid.

[42]Henningsen v. Bloomfield Motors, 32 NJ 358, 161 A 2D 69, 75 A. L. R. 2D 1, Fuller and Braucher, p. 133.

[43]Fuller and Braucher, p. 133.

[44]Ibid.

[45]Ibid., p. 136.

[46]Ibid.

[47]Day v. Caton, 119 Mass. 513, Fuller and Braucher, p. 365.

[48]Attempts by lawyers to formulate a theory of contracts, a philosophical underpinning of the practice, seem to me to be unsatisfactory. See Cohen, "The Basis of Contract," Harvard Law Review 46, (1933); Kohler, Philosophy of Law,(1914), p. 134 and following; and other articles cited in Fuller, Basic Contract Law, pp. 150-151. Cohen's influential article ought to be quoted in part for its interesting and familiar conclusion. He writes: "Contract Law is commonly supposed to enforce promises. Why should promises be enforced? The simplest answer is that of the intuitionists, namely, that promises are sacred per se. . . . . But while this intuitionist theory contains an element of truth, it is clearly inadequate. No legal system does or can attempt to enforce all promises . . ." Cohen offers no more viable account however.

Chapter Three

[1]John Locke, "The Second Treatise of Civil Government," Two Treatises of Government, ed. Thomas Cook, (New York: Hafner, 1947), p. 128.

[2]Thomas Hobbes, Leviathan, ed. Oskar Piest, (New York: Liberal Arts, 1958), p. 139.

[3]One notable exception which has not received much attention in contemporary thinking is Rousseau's theory. See his Discourse on the Origin of Inequality and Social Contract. I find it surprising that a generation of radical thinkers who subscribe to a view of human perfectability and who view the role of institutions in society as ultimately negative, have not made more use of Rousseau. There is at least there, an argument and a point of view.

[4]The community goes to war. But this does not necessarily mean that benefits cease to flow to individuals by virtue of their membership in it.

[5]Fuller and Braucher, Basic Contract Law, (St. Paul: West, 1964), p. 88.

[6]See for example Miller v. Miller, 78 Iowa 177, where the court refused to act on a breach related to a contract between husband and wife. The court said, in part, " . . . that judicial inquiry into matters of that character, between husband and wife, would be fraught with irreparable mischief."

[7]'Open-textured' comes from H.L.A. Hart, The Concept of Law, (Oxford: Clarendon Press, 1961), pp. 124-132. Hart is referring to a character of legal rules.

[8]William K. Frankena, "Obligation and Motivation in Recent Moral Philosophy," Essays in Moral Philosophy, ed. A.I. Melden, (Seattle: University of Washington Press, 1958), p. 80.

Chapter Four

[1]Plato, "The Crito," The Collected Dialogues of Plato, ed. Edith Hamilton and Huntington Cairns, (New York: Random House, 1961), p. 35.

[2]Ibid., pp. 35-36.

[3]Ibid., p. 36.

[4]Ibid., p. 37.

[5]Ibid.

[6]Ibid., p. 35.

[7]Ibid., p. 39.

[8]James Madison, The Federalist Papers, (Chicago: Great Books Foundation, 1947), Vol. X, p. 55.

[9]Fuller and Braucher, Basic Contract Law, (St. Paul: West, 1964), p. 50.

[10]In terms of the criticism of Prichard and Ross that they fail to set forth criteria for resolving situations of conflict and ignorance, it must be recognized that our criteria do not provide a catechism for resolving conflict in all situations. No rule can be offered which will eliminate conflict and ignorance in complex situations.

Chapter Five

[1]I believe therefore that the case for revolution takes upon itself the burden of proof.

[2]I am referring to Hart's discussion of Austin's "Province of Jurisprudence" in Hart, Concept of Law, (Oxford: Clarendon Press, 1961), pp. 18-25.

[3]I have paraphrased Ralph Ellison's remarks in "Harlem is Nowhere," in Shadow and Act, (New York: Signet--New American Library, 1953), pp. 282-289.

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