
Political Obligation and Civil Disobedience

Author(s): Edward A. Stettner

Source: *Polity*, Vol. 4, No. 1 (Autumn, 1971), pp. 105-115

Published by: The University of Chicago Press on behalf of the Northeastern Political Science Association

Stable URL: <https://www.jstor.org/stable/3234067>

Accessed: 10-05-2020 01:42 UTC

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Northeastern Political Science Association, The University of Chicago Press are collaborating with JSTOR to digitize, preserve and extend access to *Polity*

Review-Articles

Political Obligation and Civil Disobedience*

EDWARD A. STETTNER, *Wellesley College*

In a time of disagreement over the legitimacy of American governmental institutions and policies, it is perhaps not coincidental that the twelfth and latest *Nomos* volume¹ and several other recent works deal with the topic of political obligation. In such periods of crisis, many men want to know why they are obliged to obey government, when and how they may justifiably disobey, and how the claims of the government can be reconciled with other claims on our allegiance. The various works considered here often display a fruitful interaction of political concern and philosophic investigation. They may help us better to understand our own political situations and the obligations incumbent upon us, as well as to clarify an old and important issue in political theory.

The topic of political obligation includes a number of subsidiary questions—too many for us to investigate here. I must therefore confine my attention to three (still rather broad) topics. They are, first, the meaning(s) of the term obligation, and the various types of obligation—political, legal, and moral—which theorists discuss. Secondly, we shall look at the various alleged grounds or bases of political obligation. And thirdly, we must consider the limits of obligation and arguments for a right or duty of disobedience.

I

The term “obligation” is susceptible to a narrow and a broad reading. Read narrowly, obligation implies a deliberate personal commitment to behave in a particular way. Thus H.L.A. Hart argues that obligations are (1) incurred or created voluntarily, (2) given to particular persons, and (3) characterized by the “relationship of the parties” not the “character of the actions.”² We often say that the person to whom we

* Works considered in this essay are cited in the footnotes.

¹ J. Roland Pennock and John W. Chapman, eds., *Political and Legal Obligation, Nomos XII* (New York: Atherton Press, 1970). Hereafter cited as *Nomos*.

² H. L. A. Hart, “Are There Any Natural Rights?” in *Political Philosophy*, ed., Quinton (Oxford: Oxford University Press, 1967), pp. 55, 56n. See also Hart, “Legal and Moral Obligation,” in *Essays in Moral Philosophy*, ed. Melden (Seattle: University of Washington Press, 1958), pp. 82–107. The

owe an obligation has a "right" against us. Advocates of this view usually argue that the paradigm case of obligation is the act of promising, which we do voluntarily, in which the other person has a right to expect us to keep our promise, and where it is the act of promising not what is promised which is important. Or we may compare this sense of obligation to a game, in which we follow the rules voluntarily, have obligations to the other players, and are bound by the rules *qua* rules of the situation.

John Ladd develops this narrow meaning of obligation and the analogies to promising and games most ably. But whereas Hart and others go on to argue for some sense of political obligation, Ladd feels that the narrow sense of obligation can in no way be stretched to include politics, in that, among other considerations, in a game you don't sensibly challenge certain rules but the whole game, while in politics we challenge particular laws but not the legal order. Thus there can be no meaningful "political obligation."³ But surely this is incorrect—for we do attempt to step outside a political system and evaluate it as a whole.⁴ Which brings us to a consideration of the broad sense of obligation.

Kurt Baier takes specific issue with those who define obligation narrowly. Hart had asserted that "obligation" must not be used "as an obscuring general label to cover every action that morally we ought to do or forbear from doing."⁵ But for Baier, "*obligation* is the noun logically correlative to morally ought."⁶ Baier admits the force of the narrow sense of obligation, but argues (in my view, correctly) that we must then ask whether we have an obligation in the broad (morally ought) sense to do what we are obligated to do (in the narrow sense).

narrow-broad distinction is made by Hart and several of the other writers considered here, as well as by T. C. Pocklington, "Protest, Resistance, and Political Obligation," unpublished paper delivered at a meeting of the American Political Science Association, September 2-6, 1969.

³ John Ladd, "Legal and Moral Obligation," in *Nomos*, pp. 3-35.

⁴ Considerations of space prevent a detailed analysis of Ladd's argument or of some of the other arguments mentioned below. In my view Jeffrie G. Murphy's "In Defense of Obligation," in *Nomos*, pp. 36-45, meets Ladd on his own ground, arguing, as I would, that the parallels between promising and a narrow political obligation are greater than Ladd allows. Mark R. MacGuigan's "Obligation and Obedience," in *Nomos*, pp. 46-54, is a good argument for the insufficiency of the narrow sense of obligation which Ladd employs.

⁵ Hart, "Are There Any Natural Rights?," in Quinton, p. 55.

⁶ Kurt Baier, "Obligation: Political and Moral," in *Nomos*, pp. 116-141, at p. 132, his emphasis.

For example, it seems reasonable to inquire whether we ought to keep a valid promise, as the whole context of the promise may be immoral.⁷ Alan Gewirth makes a similar point, arguing that any institution, such as a game or a society's legal system, still demands further moral justification.⁸

We may further support a broad usage of "obligation" by agreeing with Richard Flathman that the word is used in different ways, and that there is no argument through which we can show that only one of these is appropriate. Some of the ways in which the term is used are surely not analogous to a promise or a game, but rather cases where we expect men to feel bound because of more general moral considerations.⁹ It seems most appropriate, then, to recognize the special force of the narrow use of the word, but to insist that obligations in the broad sense be taken into account. We may even go further, and argue that a theory of obligation based on the narrow sense alone remains incomplete.

Turning to the various types of obligations, we see that a theorist's interpretation of moral obligation depends in part on the sense of the word he emphasizes. But in all senses it is implied that we feel a duty, that we would that something be so. MacGuigan argues that the orthodox view of "legal obligation" is now the doctrine of legal positivism, holding that legal obligations are whatever the law says they are, but that this does not imply that we feel any moral obligation to obey the legal system.¹⁰ Some disagree: Gewirth argues that there are ways in which one can speak of the morality of every legal system.¹¹ This issue, however, is somewhat beyond our interests here, for it is the concept of political obligation which is of immediate importance. If we follow MacGuigan's interpretation of legal obligation, then a theory of political obligation attempts precisely to make the connection between legal and moral obligation—to argue that we ought to feel a

⁷ *Ibid.*, pp. 132–4. See J. P. Flamenatz, *Consent, Freedom and Political Obligation* (Second Edition; Oxford: Oxford University Press, 1968), p. 14 for a discussion of whether one can consent to do something wrong in the first place. See also Ladd, *Nomos*, p. 15; and Murphy, *Nomos*, p. 40.

⁸ Alan Gewirth, "Obligation: Political, Legal, Moral," in *Nomos*, pp. 55–88.

⁹ Richard E. Flathman, "Obligation, Ideals, and Ability," in *Nomos*, pp. 89–115, particularly pp. 98–100. John W. Chapman, "The Moral Foundations of Political Obligation," in *Nomos*, pp. 142–176; and Nannerl O. Henry, "Political Obligation and Collective Goods," in *Nomos*, pp. 263–89, also employ the word in the broad sense.

¹⁰ MacGuigan, *Nomos*, p. 50.

¹¹ Gewirth, *Nomos*, pp. 76–80.

moral obligation to obey the legal system (note: not one particular law only). But if we interpret legal obligation as already implying moral obligation, then legal and political obligation are nearly identical, with political obligation being a slightly broader concept, referring not only to obedience to law but to the policies of government.¹²

It should be emphasized that political obligation, as it is interpreted in the works under consideration here, usually refers not to an absolute but to a *prima facie* duty. If we support the theory, we will agree that, everything else being equal, men ought to obey every government. But we may still feel there are many other kinds of duties and considerations which should also affect our actions, so that political obligation, while it may be an important force, will not always determine what we do.

II

Looking at the alleged grounds or bases of political obligation, our narrow sense of the concept, which emphasizes the analogy of promising, usually results in a consent or contract theory. Locke's claim that no man may be "subjected to the Political Power of another, without his own Consent,"¹³ is the classic statement of this view. J. P. Plamenatz provides an impressive contemporary treatment of consent theory. Plamenatz declines to argue on the grounds of tacit consent, instead interpreting explicit consent very broadly. He claims that "where there is an established process of election to an office, then, *provided the election is free*, anyone who takes part in the process consents to the authority of whoever is elected to the office." Plamenatz does qualify his argument, though, allowing that consent obligates voters "only to some extent," and that the obligation to obey "arises from other things besides consent."¹⁴ Kent Greenawalt questions Plamenatz's limited conclusions from consent, agreeing that in a small group we might consider someone who took part in the voting process obligated. But Greenawalt feels that in a complex society we have less choice of candidates and less chance to influence the legislature, so that while we may in some sense be bound to our own representative it is hard to conceive of an obligation to the whole government.¹⁵ Despite these

¹² See also *Ibid.*, pp. 80–1, for a slightly different analysis of the two terms.

¹³ John Locke, *The Second Treatise of Government*, ed., Laslett, par. 95.

¹⁴ Plamenatz, pp. 170, 172, his emphasis. See chapters 2 and 7 and the postscript for a full discussion of obligation.

¹⁵ Kent Greenawalt, "A Contextual Approach to Disobedience," in *Nomos*, pp. 332–369, especially pp. 344–5.

objections, it seems to me that Plamenatz's argument that participation in an electoral process implies a presumption of obedience to the government is a convincing one, though the presumption is certainly weaker than in the case of an explicit promise to a friend.

It is the great virtue of Michael Walzer's work to show that Plamenatz's arguments need to be supplemented—and that consent theory can cut two ways, that it can create a presumption in favor of disobedience as well as obedience to government. Walzer's book¹⁶ is, as he says, a series of "essays in consent theory." Walzer admits that consent theory yields a "procedural rather than a substantive ethics"; that it doesn't perhaps provide sufficient information as to what men "should" do (except to honor commitments).¹⁷ And our critics of the "broad" persuasion would, of course, claim that the theory cannot support its own basic argument that men should honor their commitments. Yet Walzer's analysis of the various commitments to which all men are subject is an original and important demonstration of the contemporary relevance of an old theory.

Walzer agrees with Plamenatz that participation in the political process of a democratic state is an explicit case of consent, and that an obligation is thereby incurred. He also feels that something meaningful can be made out of the notion of tacit consent, and that simple residence in a state is enough to incur obligations, though these are weaker than those taken on through participation.¹⁸

More meaningful often than either of these classes of consent to society or the state are commitments to various social groups. Parties, sects, movements, unions—all of these demand and often get a man's meaningful participation. Walzer draws the conclusion "that groups in which willfulness is heightened and maximized can rightfully impose greater obligations upon their members than can those catholic religious and political associations where membership is, for all practical purposes, inherited." Walzer goes on to argue that these groups will often deserve allegiance which overrides allegiance to the state, in which case one has an "obligation to disobey."¹⁹

Given these conflicting obligations, Walzer considers the situations of different groups of men. He argues, for example, that aliens in a

¹⁶ Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge: Harvard University Press, 1970).

¹⁷ *Ibid.*, ix-x.

¹⁸ *Ibid.*, pp. 28, 105, 111, chapter 5, passim. Walzer argues there must be "meaningful participation," where the voter is not "deceived" as to the significance of his role. He also feels this commitment is amplified over time (pp. 97-8).

¹⁹ *Ibid.*, chapter 1, especially p. 10.

land tacitly consent. They should, therefore, feel obligated to defend the society but never the state. And Walzer extends the concept of alien to someone born in a society but who chooses not to participate explicitly.²⁰ Oppressed minorities should be regarded, likewise, as having little or no obligation to the state, but individuals here may have many obligations to one another. Much the same holds true for prisoners of war.²¹

I am inclined to agree with most of Walzer's arguments. Yet I wonder if a broader theory of morality is not necessary, for the reason mentioned above, and for others. Walzer argues at one point that a group of thieves would not have an obligation against the state, and one of the reasons he gives is that "the activities of thieves endanger the security of us all."²² He also suggests that thieves are not "morally serious." This discussion perhaps looks in the direction of some standard besides consent. Then too, Walzer must explain how men withdraw from groups and so end some obligations. One case, I would think, where we do so is when we feel our group is acting unjustly; yet consent doesn't allow for this reaction or perhaps explain adequately why we join in the first place.²³ Finally, Walzer's discussion of prisoners of war (and refugees) presents a vivid picture of the limbo and consequent fright of stateless persons. Walzer here mentions the "value of the state as an inclusive community," interpreting this largely in terms of social solidarity and fellowship.²⁴ But the example may also imply that the state guarantees security, the good life, etc., which would again seem to get us outside of a strict sense of consent.

H.L.A. Hart has developed another interpretation of obligation which, while still based on a narrow sense of the concept, throws some doubt on the appropriateness of any theory derived from the analogy to consent. Hart suggests that instead of viewing a society in terms of consent, we should view it as a "joint enterprise" of men, who establish rules which restrict their own liberty. If the rules provide for some political authority, then there is a moral obligation to obey its edicts, which obligation is "due to the cooperating members of the society as such. . . ."²⁵ This theory needs to be spelled out further than Hart has done. Walzer's obligation to groups might prove assimilable in that there are presumably all sorts of organizations which could qualify as joint enterprises. Yet this version of a narrow obligation

²⁰ *Ibid.*, chapter 5.

²¹ *Ibid.*, chapters 3, 7.

²² *Ibid.*, p. 20

²³ *Ibid.*, see chapter 9 in this connection.

²⁴ *Ibid.*, pp 146-7.

²⁵ Hart, "Are There Any Natural Rights?" in Quinton, pp. 61-2.

does perhaps put a greater emphasis on a society-wide group, leaving less room for an obligation to disobey.

Those who interpret political obligation in the broad sense suggest that we need to look, not at what men have done as contract theorists do, but at the nature of government and the legal system. A broad theory of obligation must then argue that there is something about government (not any specific government) which should lead men to feel an obligation to obey.

The number of theories which develop this argument is great, and I can do no more than sketch a few main points here. Thus Gewirth argues that constitutional democracies can (at least in theory) claim an obligation because they foster the values of freedom, welfare and justice.²⁶ Chapman likewise feels that Western political thought and institutions have developed a pluralism of values, including justice, liberty, equality, and self-development. Drawing on the work of Berlin, Rawls, and others, he attempts to show that these values can be logically supported and that they accord with man's psychology. Chapman concludes by calling for a "recognition of obligations to support such a form of society."²⁷

Nannerl O. Henry gives us a very interesting argument for obligation in general, and then for an increased sense of obligation to governments which maximize popular participation. Following Hobbes and Hume, she develops a utilitarian theory which holds that government brings men certain benefits or collective goods—such as security, welfare, justice, and liberty. Following Aristotle, Henry then argues that popular participation in the governing process tends to work toward a maximization of these goods which affect all men, and thus that the general needs of the society are most likely to be satisfied with such participation.²⁸ Baier also favors a utilitarian approach, claiming that "no individual can hope for as good a life for himself outside the framework of a society as within it . . .," deducing that "(almost) any society is preferable to none."²⁹ Still other writers have argued that justice, not utility, is to be valued, and that a theory of obligation can be developed from the claim that governments tend to embody justice.³⁰

²⁶ Gewirth, *Nomos*, especially pp. 65–72, 81–3.

²⁷ Chapman, *Nomos*, *passim*, the quotation is from p. 176.

²⁸ Henry, *Nomos*, especially pp. 268–281.

²⁹ Baier, *Nomos*, pp. 136, 139.

³⁰ See Ernest Barker, *Principles of Social and Political Theory* (Oxford: Oxford University Press, 1951), Book V; and John Rawls, "The Justification of Civil Disobedience," in *Civil Disobedience: Theory and Practice*, ed., Bedau (New York: Pegasus, 1969), pp. 240–55. Barker sees a stronger obligation than Rawls, but both argue for some sense of obligation while allowing or justifying civil disobedience.

The broad perspective on political obligation is likewise held by Morton Kaplan in a recent (admittedly polemical) work which takes issue with many contemporary criticisms of American politics. Kaplan claims to state "the principles that govern obligation," but doesn't really deliver. He argues a seemingly utilitarian theory at one point: that men need the state to subordinate individual selfishness to the common good. But elsewhere Kaplan follows Burke: radical changes in institutions and policies seem more likely to go wrong than right. The conclusion seems to be a prudential (again somewhat utilitarian, though Kaplan rejects the term in favor of the catch-all "moral") obligation to existing procedures and governments. Kaplan uses these arguments to defend many aspects of current American foreign policy, and to attack radical critics, Black Studies departments, student evaluation of faculty, and many other things.³¹ (Whatever our conclusions may be on the merits of Kaplan's particular arguments, the book clearly suffers from poor organization, and Kaplan could learn much about careful arguments in regard to obligation from some of the other studies we have considered here.)

III

When we consider the limits of obligation, we must look first at the concept of civil disobedience.

James Luther Adams has given what I think most theorists would accept as a complete definition of civil disobedience:

Civil disobedience is (1) a nonviolent, (2) public violation (3) of a specific law or set of laws, or of a policy of government having the effect of law, (4) which expresses a sense of justice in a civil society of cooperation among equals and (5) which is generally undertaken in the name of a presumed higher authority than the law in question (6) as a last resort (7) for the purpose of changing the law and (8) with the intention of accepting the penalty which the prevailing law imposes.³²

Many writers agree that someone acting within the bounds of this definition is justified. That does not, of course, mean that civil dis-

³¹ Morton A. Kaplan, *Dissent and the State in Peace and War: An Essay on the Grounds of Public Morality* (New York: Dunellen, 1970) pp. 97, 16-7, 56, 32, 38, 39, and passim.

³² James Luther Adams, "Civil Disobedience: Its Occasions and Limits," in *Nomos*, p. 294. See also the interesting comparison to the theory of a just war on pp. 302-311.

obedience is always right, only that men have a right to use it when they feel the above conditions prevail. In relation to political obligation, then, points (4) and (5) particularly are countervailing obligations which can at times override the obligation to obey.

We might oppose this conclusion in several ways. For example, one might feel that the disobedient individual may begin ethically, but that he will soon lose respect for all laws, and so will those he influences.³³ Yet, accepting your punishment may well show respect for law in general.³⁴ Another argument against the right to civil disobedience holds that in a democracy men can never go beyond dissent—that we can seek to change law but may never disobey it. Greenawalt considers this position and concludes (correctly, I think) that it is a meaningful argument which should restrain us greatly. But he goes on to illustrate that democratic processes often do not work correctly and that certain groups may be partially or completely excluded. In such cases the objection does not hold.³⁵ We may also add that majorities often move very slowly, and that at times they can deliberately discriminate against a minority, not by excluding it from the political process but simply by not listening.

Assuming that the right to civil disobedience can be sustained in the face of these objections, there are still qualifications to be made. One necessary distinction is that between direct and indirect civil disobedience. Thus Abe Fortas argues that civil disobedience is “never justified . . . where the law being violated is not itself the focus or target of the protest.”³⁶ Lawrence Velvel shoots several large holes in this argument, pointing out that some laws or government actions can’t be violated by single individuals (he mentions the Tonkin Gulf Resolution). Or we may be protesting the *absence* of a law. Or a set of bad conditions. Individuals may not be properly situated to break a law either (for example, women and the draft).³⁷

A more important question is what degree of coercion “civil disobedience” allows. Historically, the concept has been associated with absolute nonviolence. Yet nonviolence can be coercive, as in a sit-in. The works under consideration divide on this point. For example, MacGuigan allows limited coercion only, unless those hindered are “heav-

³³ Judge Charles E. Wyzanski argues this position. See *ibid.*, p. 299.

³⁴ *Ibid.*, p. 300. See also Walzer, p. 17.

³⁵ Greenawalt, *Nomos*, pp. 363–8. See also Walzer, p. 37.

³⁶ Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: Signet Books, 1968), p. 63.

³⁷ Lawrence R. Velvel, *Undeclared War and Civil Disobedience: The American System in Crisis* (New York: Dunellen, 1970), pp. 196–8.

ily involved in the injustice," in which case he justifies more coercion but not violence. This would rule out most sit-ins, as they coerce innocent people.³⁸ Velvel is more permissive: he argues that major property damage and physical harm to people are usually not justifiable, but at times they are, since "history shows" that "necessary change" will not otherwise be accomplished.³⁹ But this last seems a misconception for each particular case, since civil disobedients have no right to win, only to attempt to do so.

Yet another question concerns the legal status of civil disobedience, which, on the face of it, appears obviously illegal. MacGuigan argues that when all of the necessary conditions (particularly taking the punishment) are met, it should be considered a "paralegal" action, directed against the letter of the law not law itself.⁴⁰ Once again, Velvel is more liberal, developing a very interesting argument for "jury nullification." He argues that civil disobedience is close enough to being legal for every jury to be charged that a verdict of innocent would be appropriate if the jurors felt the action was just. He does not feel this would happen often enough to unsettle the legal system. But this point seems debatable (see the first objection to civil disobedience above). Velvel's point that it takes only one juror to hang a jury seems also to weaken rather than strengthen his argument. Then, too, one can always imagine one juror in a Southern jury refusing to convict a black's murderer.⁴¹

A final qualification to our concept of civil disobedience is Velvel's claim that disobedients need not always take their punishment. Arguing against the Vietnam war, he feels that taking one's punishment is tactically stupid, that society is the loser (again because some civil disobedience is "vital" to progress), and that the fact of being punished is not what makes the cause successful.⁴²

Velvel in this last point raises a fundamental issue. It may be that an action where one does not stay around to accept his punishment can be justified in some cases. But is this still, as Velvel argues, civil disobedience? Resistance, insurrection, rebellion, revolution—these and other terms denote more extreme actions. All can probably be justified

³⁸ MacGuigan, *Nomos*, pp. 53–4. See also Gerald C. MacCallum, Jr., "Some Truths and Untruths about Civil Disobedience," in *Nomos*, pp. 376, 392.

³⁹ Velvel, p. 207. See Walzer, chapter 2, especially pp. 24–5, 30–1, 40–1, for a consideration of this question in a different context, that of a corporate body. Walzer considers civil disobedience as (descriptively and prescriptively) primarily a group oriented rather than an individual action.

⁴⁰ MacGuigan, *Nomos*, pp. 50–1.

⁴¹ Velvel, chapter 14, *passim*. Some of my objections are considered.

⁴² *Ibid.*, pp. 242–4.

in certain conditions, such as Hitler's Germany. But I think we must then develop arguments for each step, not attempt to stretch "civil disobedience" to cover all forms of refusal to obey. And these further arguments are surely harder to make than those which justify civil disobedience.

IV

What conclusions can we draw from this discussion of political obligation and civil disobedience? In practice this seems to depend on individual commitments and values. It should be clear that I regard the concept of political obligation as a meaningful one—when interpreted in terms of a *prima facie* obligation. I think both our narrow and broad senses of obligation can impose commitments on us, and that, in a reasonably democratic state, where we have explicitly taken part in political actions, we have a reasonably strong political obligation. Nevertheless, our perceptions of justice (or some other value or commitment) may indicate at some point that civil disobedience is a justifiable act. And I am convinced by Walzer's argument to the point of agreeing that our "private" associations may also impose an obligation to disobey. All of this points out that the question is (or should be?) a terribly difficult one for each of us—but what did we expect?