

ON OBLIGATION AND CIVIL DISOBEDIENCE

The Views of Some "One-Eyed Men"

James F. Childress

In the recent burst of enthusiasm for endorsing violence and revolution, there has been too little reflection on why men ought to obey the law. Indeed, it seems that the charge of irrelevance can be levelled against anyone who insists on thinking seriously about traditionally important issues of political ethics such as political obligation, which, according to Isaiah Berlin, is "the most fundamental of all political questions." Fortunately, as these books show, not all philosophers and theologians have succumbed to the attraction of easy slogans.

Obligations: Essays on Disobedience, War, and Citizenship, by Michael Walzer. Harvard. 244 pp. \$7.95.

Political and Legal Obligation. Nomos XII, edited by J. Roland Pennock and John W. Chapman. Atherton Press. 455 pp. \$7.95.

Civil Disobedience: Conscience, Tactics, and the Law, by Carl Cohen. Columbia. 222 pp. \$7.50.

John Stuart Mill once said that all political philosophers are "one-eyed men." Such a judgment is not entirely negative. Sometimes, limited and partial perspectives pressed to their conclusions can illuminate aspects of our political life. By consistently interpreting the citizen's obligations in a pluralistic democracy in terms of consent, and by denying "the myths of common citizenship and common obligations," Michael Walzer has provided such illumination. He enables us to discern better what it means to speak of the obligation to die for the state, of conscientious objection and of civil disobedience. But his is a partial perspective that cannot make individual consent carry the weight placed upon it.

Walzer does not argue that our obligations have no other source than consent, but he does try to see what light the nature of consent casts on such questions as dying for the state or obeying its laws. For example, where consent is not present, there is no obligation: "Consents . . . are commitments to other

James Childress is a member of the department of religious studies at the University of Virginia.

people, or they are commitments to principles or parties or political institutions that arouse expectations in other people."

Obligations are unevenly present in any political order because, he says, consents are not uniform. Individuals have different obligations because of their different moral biographies. These biographies, largely constituted by "trains of consent" over a period of time, preclude "perpetual" obligation; voluntary, willful commitment usually comes by degrees rather than by a single, once-and-for-all act. Walzer can deny, therefore, that all men in a particular order are obligated to refrain from the same deeds or to engage in the same actions. Furthermore, he adds, one should not talk about consents in relation to the state only, for people consent to a variety of persons, groups, associations, institutions and ideals. Nor can one assume that an obligation to obey the state necessarily takes precedence over the obligations one has incurred to friends or fellow members of a church. Much depends on the kind of obligation, but even more on the *quality* of the commitment or consent—including both its intensity and its public character. A group (with partial claims to primacy) that provides the conditions of maximizing willfulness may make a stronger claim on a morally serious person than a group (such as the state) that has received only tacit consent. In a conflict between the two, there may be an obligation to disobey the state.

Walzer's discussion of civil disobedience is instructive but inadequate. He provides a badly needed sociology of disobedience, demonstrating that the issue of disobedience is usually raised not in the conflict between the sovereign individual and the sovereign state, but between different groups and the state. The individual is, after all, a member of several groups as well as a citizen of the commonwealth. Walzer explains well *why* men disobey the state, but his argument is less adequate when he uses this sociology to weigh the *rightness* of disobedience, particularly when he tries to identify who has the burden of proof. He relies on the notion of *prima facie* obligation: When there is such an obligation, the failure to fulfill it must be justified.

Walzer's claim is that "men have a *prima facie* obligation to honor the engagements they have explicitly made, to defend the groups and uphold the ideals to which they have committed themselves, even against the state, so long as their disobedience of laws or legally authorized commands does not threaten the very existence of the larger society or endanger the lives of its citizens. Sometimes it is obedience to the state, when one has a duty to disobey, that must be justified. First explanations are owed to one's brethren, colleagues, or comrades."

This passage discloses some of the tensions in Walzer's position, especially when it is set beside his claim that "residence in a democratic state does, I think, generate a *prima facie* obligation to obey the laws of that state—in part because of the benefits that are necessarily accepted along with residence, in part because of the expectations aroused among one's fellow residents, and finally because of the universality of obligation in a democracy, from which no resident can easily exclude himself." In effect, Walzer has failed to establish where the burden of proof lies, for he asserts both a *prima facie* obligation to obey the laws of a democratic state by virtue of residence and a *prima facie* obligation to follow a lesser group because of one's explicit commitment. He then asserts that departures from either set of obligations must be justified, although primary weight must be given to the explicit, voluntary commitments to smaller groups—except under severe conditions, e.g., when society is threatened or the lives of others are at stake. The addition of these last considerations suggests that Walzer himself cannot remain satisfied with a view of obligations that deals only with consent. Thus, whether the language of obligation or the language of duty or some other vocabulary is used, it is clear that Walzer has incorporated standards which cannot adequately be explained simply in terms of consent.

One of the most suggestive aspects of Walzer's argument is that in contemporary democracies there are alienated citizens whose plight can be interpreted by analogy with the resident alien in international law. The alienated citizen may well have a *limited negative obligation* to obey the state's laws, but not an *ultimate positive obligation* to fight and risk losing his life. Even such a limited obligation may be owed not to the *political society* but to *society*. It may have less to do with one's role as citizen than with one's private and interpersonal relations. Mere residence does not create the ultimate obligation to die for the political society, and the alienated citizen should perhaps be treated in the way conscientious objectors are currently handled.

Of course, this creates a presumption against conscription. But again, Walzer seems to recognize that there may be other moral reasons (e.g. the preservation of a society by means of maintaining a particular political order) which have some significance and weight independent of obligations based on consent. Perhaps this too is a recognition of the inadequacy of consent theory by itself—at least in this form.

Walzer's difficulties in asserting a minimal obligation based on residence as tacit consent furnish an interesting counterpoint to John Ladd's essay, "Legal and Moral Obligation," in *Nomos XII*. Ladd denies that there is a generalized obligation to obey the law at all. He criticizes efforts to develop theories of political obligation in terms of the *system* as a whole, particularly John Rawls's version of social contract, influenced by game theory, which views political obligation in a democratic order as based largely on the duty of fair play. While he rejects the concept of political obligation (which he interprets too narrowly) on *logical* grounds, much of his argument rests on *moral* grounds. Political obligation is morally objectionable because (1) it diverts our attention from the moral aspects of *particular* laws and policies by its focus on the political and legal order as a whole and (2) it depends on a mythology about procedural democracy which obscures the ways in which certain groups are condemned to remain in the limbo of minorities. Ladd insists that law and morality should be joined "at the level of the concrete actions and choices of individual people" who should inquire into the morality of particular laws and not simply into the morality of the system as a whole. Theories of political obligation which focus on the system as a whole are guilty of the "fallacy of misplaced morality." Like Walzer—but for quite different reasons—Ladd wants to avoid putting the burden of proof on the disobedient.

Some essays in *Nomos XII* are critical of Ladd's position. And some of these (e.g. Murphy, MacGuigan, Gewirth, and Baier) concentrate on the ways in which a *prima facie* obligation to obey the laws is connected to a social decision procedure—the system as a whole. Murphy contends that if we are committed to a social decision procedure, "we are also *prima facie* committed to obey the laws of that system even when, in our own judgment, they are not for the best. For if one is going to decide each case solely upon its own merits as one sees them, then there is no sense to the notion of social rules or of the rule of law as a social

decision procedure." Baier has a view of man which justifies regulating human behavior by sanctioned social rules, and he thinks that "being in the territory of a given state may be sufficient ground for saying that one (*prima facie*) morally ought to obey that state, or putting it differently, that it would be (*prima facie*) morally wrong for one not to obey it."

These debates over whether to deal with obedience in relation to particular laws or to the system as a whole are clarified by Nannerl Henry's distinction between two perspectives from which to view the issues: (1) The student of politics as wholes asks "Why ought men to obey their governments?" (2) The individual moral decision-maker asks "Why ought I to obey this law?" It seems necessary to move beyond the framework of her essay, however, and determine how these two perspectives are, or can be, related. For example, what does an answer to the first imply for the second?

James Luther Adams also takes the standpoint of the individual decision-maker in an essay entitled "Civil Disobedience: Its Occasions and Limits." His essay is stimulating, partly for its treatment of civil disobedience in relation to voluntary associations—an analysis that has some affinities with Walzer's sociology of civil disobedience—but especially for its analogy between the norms of just war and the norms of civil disobedience. Although this use of just war criteria is a real contribution, Adams offers no satisfactory justification for the analogy. One might contend that these norms are generally applicable to both war and civil disobedience because both are uses of force, but such a claim would not hold as well for *persuasive* as for *coercive* disobedience (and the author concentrates on its persuasive forms). One explanation might be that both sets of norms are simply specifications of the questions of common moral sense in relation to exceptional problems of the political order. That is, common moral sense will always inquire into the ends, motives, means and consequences of actions, including war and disobedience. Perhaps it is more accurate to suggest that civil disobedience is subject to the same general demands of morality as any other action than to say that it is illuminated by just war norms.

The use of just war criteria provokes another question, for they purport to give the conditions under which departure from a moral rule—"do not harm or kill other persons"—can be justified. Presumably the criteria for civil disobedience suggest the conditions under which violation of the law can be justified, but to assess those conditions we need to know more about the logically prior question, "Why ought men to obey the law?" Adams provides no

answer. Even so, his outline of the factors that are indispensable in the moral appraisal of civil disobedience demonstrates that any contextual, act-utilitarian approach, such as the one offered by Kent Greenawalt in the same volume, is terribly inadequate. Greenawalt's norm for assessing disobedience is that "an act with social consequences is morally justified if it will probably contribute to the social good." Fortunately, his analysis of disobedience in relation to the social good is broader and subtler than his basic thesis might imply.

A fuller treatment of civil disobedience in relation to a utilitarian framework appears in Carl Cohen's *Civil Disobedience: Conscience, Tactics, and the Law*. Cohen asserts the existence of a *prima facie* obligation to obey the law as one of the requirements of civilized life: Existence involves decision-making procedures, and, as a member of the *civitas*, the civilized person has a duty to obey the laws—a duty which becomes even more compelling in a democratic order. Although this view of political obligation is not fully developed, it does shape the way Cohen explores the possible justifications of civil disobedience. His study would have been improved by a more systematic address to this question.

Cohen's analysis and justification employ ideal types, set up in a logic of dichotomies but properly qualified to take account of actions which do not fit the paradigms. He employs three different elements (the act, the actor's motivation, and his justification) which then seem to fall into two main patterns.

	I.	II.
Relation of civil disobedience and the law or policy protested	direct	indirect
Motivation of the actor	moral	political
Justification	higher law	utilitarian

Civil disobedience motivated primarily by *moral* (that is, personal moral values or principles) rather than political considerations will tend to be *direct* and will usually be justified in terms of a *higher law* to which the protestor appeals. Politically motivated civil disobedience addressed to the whole community with the intention of effecting a change in a law or policy by pressure, confrontation or resistance, may take either direct or indirect forms, but it will usually be indirect, and its justification will usually depend on some utilitarian framework, "some intelligent weighing of the consequences of the disobedient act." Thus, in Cohen's terms, recent civil

disobedience of the Mayday Tribe in Washington was an attempt to force political change through pressure, combined with a heightening of consciousness, by indirect actions which were justified in a variety of ways, but especially by utilitarian appeals.

There are some unresolved ambiguities in Cohen's movement from conceptual analysis to justification. For example, two elements which are often included in the concept of civil disobedience—submission to arrest and punishment, and nonviolence—are omitted (although in extenuation one acknowledges that Cohen does concentrate primarily on submissive and nonviolent disobedience). And he can legitimately assert that whatever the concept of civil disobedience *might* include, he is going to concentrate on certain of its concrete forms. There are difficulties with this, however, because of his insistence that civil disobedience is non-revolutionary. The extent to which civil disobedience is non-revo-

lutionary, because of features of submission and non-violence that in different ways affirm the legitimacy of the state, thus receives no consideration. Non-submissive and violent disobedience may well move more in the direction of revolution, and perhaps it must be justified within a different framework. Cohen argues for submissive disobedience, not in order to keep the action non-revolutionary but, rather, to make it tactically effective, especially in the case of indirect disobedience: The civil disobedient "must be careful not to underestimate the moral force of the self-sacrificial element in disobedient protest and not to underestimate, in consequence, the deleterious effect upon any civil disobedient protest that would result from the attempt to evade the punishment normally meted out to those who knowingly break the law." There are also chapters on the legal justification of civil disobedience and issues such as free speech and the Nuremberg judgments.

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