

The Interpretation of Political Action:

The Case of Civil Disobedience.

A Lawton

Submitted for the degree of Ph.D

of

the University of Leicester

1988

Preface

Although the responsibility for the contents of the Thesis is mine alone a number of people have been involved in the preparation of the Thesis. Murray Forsyth has made valued comments on every chapter and I wish to thank him for his advice throughout the years. Professor Jack Spence has offered support and encouragement throughout. Terry Hopton has offered advice on the chapters on Political and Legal Obligations and I appreciate the many discussions we had on the nature of obligations. Laurence Tasker has offered encouragement and support and has continually urged me to complete.

The typing and processing of the Thesis has been done by Marlene Melber and the staff of Data Prep at Teesside Polytechnic and I wish to thank them for all the hours spent preparing the Thesis.

Finally, I wish to dedicate this Thesis to my father Ernest Lawton.

Contents

	<u>Page Nos.</u>
Introduction	1
 <u>Chapter 1 Definitions</u>	 21
Traditional Accounts	22
Henry David Thoreau	43
Mahatma Gandhi	47
Martin Luther King and Civil Rights	53
The Campaign for Nuclear Disarmament and the Peace Movement in the U.K.	58
Problems of Definition	67
 <u>Chapter 2 Political Obligation</u>	 78
Obligations and Rules	78
Consent and Contract	89
Benefits Received	103
Conceptual Analysis	115
 <u>Chapter 3 Legal Obligation</u>	 132
Natural Law	135
Legal Positivism	143
H.L.A. Hart	153
Law as Ideology	170
Rule of Law	176

<u>Chapter 4</u>	<u>The Right to Disobey</u>	
Locke		183
Hobbes		191
Natural Rights		194
Human Rights		198
The Logic of Rights		210
<u>Chapter 5</u>	<u>Democracy, Stability and Civil Disobedience</u>	235
Democracy		235
Legitimacy		248
Stability		258
Civil Disobedience and Democratic Values		277
<u>Chapter 6</u>	<u>Conclusion : A Tradition of Protest</u>	283
Civil Disobedience as Communication		283
Tradition		293
Political Language		302
The Language of Conscience		312
Bibliography		317

INTRODUCTION

The concept of civil disobedience seems to have been rediscovered in recent years and has once more entered our political vocabulary. It has become part of the debate concerning protest against nuclear weapons with the resurgence of the Campaign for Nuclear Disarmament and the peace camps set up around the air bases, particularly at Greenham Common. The implications for the Peace Campaign of civil disobedience have been discussed by supporters and opponents alike and a feature of the revived role of the church on to the political stage in recent years has been the discussion by the British Council of Churches of civil disobedience and the Peace Campaign. Civil disobedience has also arisen within other contexts and in particular the discussion within the Labour Party of a possible campaign of civil disobedience against rate-capping of selected local authorities by the 1983-87 Conservative Government under Margaret Thatcher. What then is civil disobedience?

Traditionally, the concept has been associated with the actions of Henry David Thoreau, the 19th Century American opponent of slavery and war against Mexico, who is credited with first using the term; with the actions of Mohandas (Mahatma) Gandhi in S.Africa and then in India in protesting against British rule; with the Civil Rights Movement in America and the work of Martin Luther King in protesting against racial inequalities in the 1950's and

1960's; and with the protests of the 1960's, particularly in America, that were directed against the American involvement in war in Vietnam.

My concern is not, however, to provide a history of acts of political protest that have been termed civil disobedience but rather to try and elucidate the meaning of civil disobedience for those who have, or claim to have, practised this form of political protest. It will therefore be necessary to try and locate civil disobedience within the wider context of political action generally and we shall thus be concerned with interpretation of political action and its meaning for those who practise it. At the same time we shall be concerned with those theorists who have tried to define civil disobedience and who offer us necessary and sufficient conditions for an act of civil disobedience to be said to have taken place. However, the problem arises that such theories seem incapable of covering all acts of civil disobedience and hence there arises disparities between those who claim to have practised it and those who have tried to define it. This problem leads on to a more general problem of defining political action generally and hence although the thesis was originally concerned with the concept of civil disobedience, it has developed into a wider examination of political action and its interpretation. My contention is, then, that most theories concerning civil disobedience are too limited in scope and do not account for all acts that have been termed civil disobedience. The approach that is adopted

here is one that suggests that ultimately civil disobedience as a form of political action can only be understood within a wider tradition of political protest. However, whilst many theories have been offered in defining civil disobedience, certain general characteristics do seem to emerge:

1. That civil disobedience is a political act.
2. That it is contrary to law.
3. That it is done openly and publicly.
4. That it is intended to change the law or policies of government.
5. That it may be justified by an appeal to conscience.
6. That the civil disobedient is willing to submit himself or herself to punishment.

It is also contended by most writers on the subject that, insofar as the individual performs the act openly and publicly, civil disobedience can be distinguished from the act of a criminal. Likewise it is further contended that the civil disobedient does not attempt to overthrow the government but merely to protest against particular laws or policies and thus can be distinguished from the revolutionary. In accepting punishment for breaking the law the civil disobedient further shows his/her fundamental respect for authority. Thus we may locate civil disobedience on a continuum somewhere between the criminal and the revolutionary.

However, when we come to examine, as in chapter 1, the accounts of civil disobedience concerning those who may be said to have practiced this form of protest then we find

there are differences between the theoretical models and that which they purport to define. Thus the notion of finding necessary and sufficient conditions for an act of civil disobedience to be said to have occurred is problematical. Indeed if we try and locate the actions of Gandhi or Martin Luther King within models of civil disobedience then they do not seem to fit very well. In the first case Gandhi's protest was aimed at the overthrow of British government in India albeit through peaceful, non-violent means. As such we could consider this to be revolutionary. With Martin Luther King, although state laws were broken, the legitimacy of these laws themselves was questioned insofar as they did not comply with the American constitution or federal law. Thus to what extent were Martin Luther King's actions illegal?

As a result of these problems chapter 1 suggests that it may be impossible to offer a definition of civil disobedience that will hold good for all examples of civil disobedience: in offering us definitions theorists of civil disobedience may be telling us more about their own position towards this form of protest rather than offering any objective criteria. If this is the case then to examine civil disobedience we need to locate it within a more theoretical concern with the nature of understanding definitions in social science in general. Tentative moves are made in this direction in the first chapter. Not only that but this understanding may be enhanced by an historical context. I indicated earlier that my concern is not with a chronological examination of all those acts

of protest that have been termed civil disobedience. Yet if we examine the actions of, say, a Martin Luther King there is a sense in which his actions are informed by those of Thoreau and, in particular, Gandhi. It may well be that in order to understand the actions of a King we do need the historical perspective that may suggest a tradition of political protest. This is suggested in chapter 1 and pursued further in the concluding chapter.

Not only, then, do we need to locate the discussion of civil disobedience within a wider historical and methodological context but we can specify this context more closely by an examination of civil disobedience within mainstream political philosophy and the history of ideas. Whilst it may not be possible to offer a once-and-for-all definition of civil disobedience we can examine the form that discussion concerning civil disobedience may take. This is often concerned with the relationship between the individual, or groups of individuals, and the state and how these relationships may change. Thus chapter 2 examines the notion of political obligations; how they arise, who has them and to whom are they owed. Chapter 3 examines the nature of legal obligations and the meaning of obligation to the law and of the Rule of Law. Chapter 4 looks at the sense in which we may be said to have a right to disobey or override the obligations specified in chapters 2 and 3. It is worth noting, at this stage, that an inadequate understanding of the meaning of obligations may, in part, account for the lack of clarity concerning a definition of civil

disobedience. Similarly, in chapter 5 the examination of democratic government and its relation to political stability and political protest may offer us enlightenment concerning the nature of civil disobedience as a form of political protest and its relation to a particular form of government. This form of government is not chosen arbitrarily but as a result of the contention that civil disobedience may be justified under a repressive or autocratic regime but not under a democratic one. At the same time it has been argued that civil disobedience may enhance democracy in that the act may promote participation and the furthering of democratic goals such as justice or equality. The role of civil disobedience then, under a democratic regime, is problematical.

Thus chapter 1 is concerned with the definitions of civil disobedience that have been offered, the problems associated with these definitions in the light of an examination of the actions of Thoreau, Gandhi, King and the Peace Campaign and C.N.D. and more generally with the notion of definition itself. It should be noted that in choosing the above as the focus of attention I have gone along with those political activists that the theorists of civil disobedience have themselves used to illustrate their theories. In this way any criticism of such theories will be based upon the theorists' own examples. This has the advantages of limiting discussion to manageable proportions and, more importantly, of not, at this stage of the discussion, having to offer my own definition in competition with existing definitions to

take account of other acts of political protest that show different characteristics. This is important since my whole argument is based on the notion that such definitions are inadequate insofar as any definition would be inadequate that did not concern itself with the changing context, in time and place, the changing language and the competing perspectives on any political act.

A final point concerning chapter 1 is the omission of any discussion concerning the protests against the war in Vietnam. I have tried to offer different examples from different circumstances and it seems to me that the arguments concerning protest against Vietnam are sufficiently similar to arguments concerning the Civil Rights Movement in America and the C.N.D. and more recent Peace Campaign in Britain to warrant exclusion of any detailed discussion of the Anti-Vietnam War demonstrations. In any case much of the theoretical work done on civil disobedience has come out of America in the late 1960's and early 1970's and such literature does of course reflect the concerns that were of importance to the political protest of those years.

Chapter 2 is concerned with the notion of political obligation and with the status of the claim that we do have obligations to the state. In order to come to terms with the concept of political obligation I investigate the nature of obligations in a general sense as a fruitful introduction to an understanding of political action. Thus in the first section of chapter 2 I am concerned to unpack the notions of obligations, promises and

rule-following as a prelude to the discussion of political obligation. I suggest that there are various problems concerned with the notions of obligations, promises and rule-following particularly in view of the sceptic who may ask "Why should I keep promises?" and is not satisfied with the retort that "This is what promising means." We may need to investigate the social practice within which such obligations are said to arise as a feature of social and political life.

The next section of chapter 2 examines the work of Hobbes, Hume, Locke and Rawls, in particular, concerning obligations, and more generally the notions of consent and contract as explanations of the ground of political obligations. The conclusions of this section are that the search for a general explanation of political obligation has been unsuccessful and ultimately, Rawls (1972) in particular has to admit that, obligations may only apply to a particular group of people within the political community. Not only that but explanations of obligations grounded in consent seem, ultimately, to end up as arguments concerning the notion of benefits received. That is, that our obligations to the state may depend upon the benefits that we receive from it. The difficulties of specifying what these benefits consist of are of major concern and are not often spelt out. However, the implications for civil disobedience from the above two points would appear to be; firstly, if there is no general obligation to obey the state from the perspective of theories concerning political obligation, then to what

extent can the civil disobedient be said to have a political obligation to the state? Secondly, if there are certain groups of individuals who do not receive any benefits from living within a political community then to what extent can they be deemed to owe obligations to that community?

The final section of the chapter is concerned with more recent theories of political obligation that do not in fact see it as a problem and hence would rule out of court the concerns of Sections II and III. The concerns of what are known as the conceptual analysts and their approach to political obligations are built upon the discussion of rules and rule-governed behaviour, promises and obligations that took place in Section I of the chapter. However, this does not offer us any solutions and the suggestion that political obligation is not even a problem is a view that does not seem to hold up even within liberal-democratic regimes. However such an approach does invite us to examine more closely the concept of membership of a state and what being a member of a state means. Various metaphors are used to explicate the meaning of membership and yet, whilst illuminating certain features of the relationship between the individual and the state, such metaphors only serve to obscure other features, particularly when we are concerned with the limits of membership. One of the features that does seem to be missing from explanations of political obligation is the notion of context, of locating meaning within a particular political practice. In attempting to

offer general explanations of political obligation then theorists are telling us more about their own vision of the world, whether it be by using the metaphor of consent, contract, the club or the family. It may well be that we can only understand obligation in a particular context.

Suffice it to say that attempts to provide general accounts of political obligation seem to me to have failed. Given this, then, to see civil disobedience in terms of political obligations to the state seems to beg the question. Hence, in chapter 3 I turn to an examination of legal obligations to see if this is where a discussion of civil disobedience can be properly located. Of course, it may well be that political and legal obligations cannot be separated, particularly when asking 'Why should I obey the law?' However, if we assume political obligation to be concerned with the tradition of contract and consent theory and legal obligation to be concerned with Legal Positivism and Natural Law theory then we can usefully, for analytical purposes, make this distinction.

However, the opponent of civil disobedience will argue that, irrespective of the content of the law, the law must be obeyed; if not, if our obligations to the law are open to doubt then the whole legal system is likely to collapse. Note here the identification of obligations to the law and legal obedience where having an obligation is seen as identical to being obliged to. This is the position of theorists concerned with the legal theory of Positivism, particularly Austin. This view is in direct

contrast to Natural Law theory where obligation to the law is given a moral characteristic. The different theories concerning Natural Law are many so, at the risk of oversimplification, the first section in chapter 3 attempts to draw out some common elements in Natural Law theories. However, the suggestion is that Natural Law theory as an explanation of legal obligation may rely on understandings of morals that are open to disagreement. Critics of Natural Law theory argue that it can be used to justify obedience or disobedience to the law, that it may be ideological in nature and that it is concerned to justify particular perspectives rather than to offer us an understanding of our legal obligations. However, it seems to me that if this is the case then there is nothing wrong with it. If Natural Law theory is used as a justification for obedience, or, in the case of civil disobedience, disobedience to the law then it is up to us to examine its usage as a means of convincing us that it is a relevant justification to use. Thus, for those who supported Martin Luther King then the use of the notions of 'just' and 'unjust' laws were appropriate and were found convincing.

On the other hand, Positivist accounts of legal obligation are concerned to keep separate the notion of what the law is from what the law should be. This is evident in the works of Austin and Kelsen in particular, but it does lead to the conclusion that the law is there to be obeyed and no further discussion is allowed.

Kelsen in particular is concerned to determine the validity of law rather than its content and yet this may not be as clear-cut as we may think. This is particularly the case where a dual system of law may be in operation and may lead to the kind of legal debates that accompanied much of the Civil Rights Movement in the U.S.A. where it was not clear as to who was in fact disobeying the law, the protestors or state and city governments. Apart from this problem, the position of the Legal Positivist would appear to be that if a law is valid then it should be obeyed. From this perspective, then civil disobedience will be condemned as merely an example of law-breaking to be punished as such irrespective of the reasons that the civil disobedient may put forward in support of his/her action.

A more sophisticated account of legal obligation is that put forward by H.L.A.Hart in his much applauded 'The Concept of Law' (1961). As one of the most important works in Twentieth Century legal philosophy it is worthy of serious consideration and as such I spend some time in attempting to come to terms with Hart's theory of legal obligation.

However, such an examination seems to lead to the conclusion that we do not have legal obligations! Whilst it may be conceded that Hart's account is more sophisticated than most it still fails to account for *general* obligations to the law in much the same way that we found it difficult to conceive of *general* obligations in our account of political obligations.

Part of the problem may be in the way in which law is presented as objective, impartial, applying equally to all and available to all. And yet other theories of law present a picture of law within a wider social and political context such that any picture of law may only be partial and open to differing ideological interpretations. If this is the case, then we cannot talk of general obligations to the law but rather locate such talk within its appropriate context. Hence one of the conclusions of the chapter is that the civil disobedient and his/her opponent will have differing perceptions on obligations and may have difficulty in understanding each others picture of the world within which such perceptions find their home. This point is given added weight by the discussion concerning the Rule of Law where it is considered that such a concept may be appealed to in support of the status quo and in support of change. Because of these problems then it becomes difficult to offer an explanation of civil disobedience using the notion of legal obligation and the suggestion is that it may be more fruitful to examine the notion of rights and the conception of a right to disobedience. This is the concern of chapter 4.

However, an examination of the work of Locke and Hobbes from the perspective of rights suggest that although there is a right to disobey it is a right that applies in extreme circumstances. Neither Hobbes nor Locke argue for a right to disobey in the more limiting circumstances that characterise the activities of civil

disobedients and distinguish these actions from those of the revolutionary.

A different approach is one which sees rights in terms of a specific set of relationships and within specific contexts. This approach is developed by Winfield (1982), Hart and Flathman (1976). The latter considers the notion of a 'practice of rights' where rules will provide the context for discussion of rights. If this is the case then presumably disobedience to law can be justified where there is a distinct social practice that allows such disobedience. Indeed supporters of democracy sometimes argue that such conflict is essential to keep society from stagnating. This point is developed in Chapter 5.

However, if we see rights in terms of a particular practice we can understand the arguments of those who are critical of Human Rights Declarations where such Declarations seem to conform to a picture of Western, liberal individuals. A concept of Human Rights may be context dependent and appeals to them recognised as being appropriate in some circumstances but not in others. This point is developed and I suggest that the use of Human Rights as an appeal to justify disobedience to law will depend primarily on whether such an appeal is recognised as being legitimate within a particular political community and how such Rights are specified.

Not only that, but we must consider how much weight to give to rights, a discussion of Dworkin's views being appropriate here. Dworkin (1977) is concerned to argue

against rights being overridden by some utilitarian calculation of community benefits, an argument that has been used to oppose civil disobedience.

Much of the recent discussion in academic circles has been concerned with the logic of rights and how best to express what they represent. Here discussion has often taken Hohfeld's analysis as a starting point. The problem is, though, one of transposing discussion of rights in a legal sense to discussions of rights in a moral sense and because of this difficulty debates concerning rights as benefits or choices or claims or liberties can only take us so far in developing our understanding of a right to disobey. Often such discussions are based upon a concept of relationships between individuals rather than on the relationship between the individual and the state and we may wonder whether the contexts are too different to allow useful comparison.

However, Winfield (1982) does develop the notion of different rights existing in terms of different contexts and suggests that the liberal democratic context of political rights insofar as it debases the notion of self government also debases the notion of a right to freedom.

Raz (1979) considers that in a liberal democratic state the right to participation is guaranteed and hence there can be no right to disobey in such a state. Yet whether such a state can be said to exist, or have ever existed, is another matter and such deliberations form the basis of the next chapter. As I indicated earlier the role that civil disobedience may play under a democratic

regime may be problematical. One of the problems we face is that of defining what democracy is. Indeed we may wish to concur with the notion that democracy is all things to all people and as such cannot offer a definition that is universally acceptable at all. Democracy may be a 'merely evaluative' term and this may be one of abuse or approval depending upon the context. Pluralism identifies democracy as a 'good thing', whilst Nineteenth Century laissez-faire liberalism may see it as a 'bad thing'. It may well be then that the first problem we face is one of determining whether or not we can locate civil disobedience within a particular understanding of democracy.

Also we need to understand how such a concept of democracy will be located within a discussion of legitimate government. If a feature of democratic government is that the people choose their rulers then we need to, once again, examine consent within the context of legitimate government. We can ask the question 'Is a government legitimate if it comes into power through the consent of the governed?', or is legitimacy dependent upon system performance and the notion of 'benefits received' that we discuss when examining the work of Hart and Rawls?

The concern with the notion of system performance is one that has been much in evidence in recent years in the discussions concerning 'overload' and 'ungovernability' of governments. Yet, it seems to me, governments have survived and it may well be that theorists of overload and ungovernability have overestimated the part that politics

plays in our lives and underestimated the capacity of governments to survive crises. This last point may be expanded into an argument concerning the definition of a crisis itself. What is to count as a crisis or threat to the system? If opponents of civil disobedience argue that this action is a threat to the system and hence will provoke a crisis of political stability and if this argument is found convincing then it will become difficult to justify civil disobedience. If, on the other hand, civil disobedients argue that, on the contrary, their acts are designed to uphold the values of the system then the extent to which this argument is found convincing will elicit support for civil disobedience. Appeals to empirical evidence to support either claim will not be found convincing insofar as, I argue, the notion of crisis itself may well be one that is value-laden rather than capable of description. In whose interest is it to label something a crisis? This is the problem with the, otherwise, excellent, account of political stability offered by Dowding and Kimber (1983, 1985a, 1985b).

In order to come to terms with the seemingly intractable problem of whose definition of the situation is to count the concluding chapter argues that an account of civil disobedience that locates it within a tradition of political discourse concerning political dissent is the most fruitful. Thus far, an attempt to locate civil disobedience within the context of traditional political philosophy has not, I feel, been successful. Let me summarise the problems:

1. In chapter 1 the difficulty of constructing an adequate definition of civil disobedience that will account for the various actions of individuals and groups that have claimed to be engaging in civil disobedience. This discrepancy between theory and practice is compounded by the difficulty of arriving at universal definitions within the social sciences as a whole.
2. In chapter 2 the difficulty of locating civil disobedience within an understanding of political obligation given the problems of determining the ground of obligations in general and in particular those that are said to arise from the concept of promising. These difficulties lead us to question the nature of the relationship between the state and the individual.
3. Chapter 3 examines theories of legal obligation and again highlights the difficulty of seeing obligations in general terms. There is also the further problem of choosing between competing perspectives on legal obligation characterised by those who support civil disobedience and those who are critical of it insofar as it is said to undermine the Rule of Law.
4. Chapter 4 points to the problems of specifying rights, the different kinds of rights and the weight that we may give them. Given this, the notion of a right to

disobey may be confused with the notion of it being right to disobey. Theorists seem to point to an examination of rights arising as a result of specific relationships and this does seem to be a possible avenue for investigation.

5. Chapter 5 examines the role of civil disobedience within democracy and suggests that difficulties will arise depending upon which view of democracy we adhere to. Various theorists concerning democratic performance are examined in an attempt to assess the validity of the claim that civil disobedience will undermine democracy. We are thus concerned with the justification of civil disobedience from a democratic point of view and this will depend upon how we define a democratic point of view.
6. Finally, the concluding chapter examines the concept of tradition and argues that civil disobedience may best be understood as part of a tradition of protest where the tradition is recognised, in part, by political discourse as a form of communication between individuals and in particular, between the individual and the state. Thus the sense that the communication we have will depend upon a tradition of discourse understood in terms of political language and this may best be shown by an examination of ideological language. The notion of a tradition of discourse allows the flexibility which accounts for civil

disobedience existing under different political circumstances and the flexibility that allows the civil disobedient to appeal to different justifications.

Chapter 1

DEFINITIONS

"The situation we have here is one in which the vocabulary of a given social dimension is grounded in the shape of social practice in this dimension; that is, the vocabulary wouldn't make sense, couldn't be applied sensibly, where this range of practices didn't prevail. And yet this range of practices couldn't exist without the prevalence of this or some related vocabulary. There is no simple one-way dependence here. We can speak of mutual dependence if we like, but really what this points up is the artificiality of the distinction between social reality and the language of description of that social reality. The language is constitutive of the reality, is essential to its being the kind of reality it is. To separate the two and distinguish them as we quite rightly distinguish the heavens from our theories about them is forever to miss the point". (Taylor, 1971, pp.24)

Before engaging in a discussion of the concept of civil disobedience it is necessary to preface any such discussion with preliminary remarks concerning the nature of definition itself. In particular we must pose the question of whether or not it is possible to separate out the concept under discussion into description and evaluation. This question is particularly relevant to political concepts and more generally to the social sciences where the debate over the nature of explanation and understanding has been so prevalent over the past twenty years. The form that such a question may take will be such that, for example, in describing a political system as democratic are we not in fact commending it?

In using the concept of civil disobedience then we must be aware that in offering a particular description are we, at the same time, also offering a justification for it. Consider - what would uncivil disobedience look

like? In describing an action as civil rather than uncivil are we not implicitly offering a justification for it?

Apart from these methodological considerations, which will be developed more fully later, we also need to be aware of the differences between the actions and speech of those who claim to be civil disobedients and those who are trying to locate these actions and speeches within a theory of civil disobedience. It is my contention, to be developed below, that the theorist, in trying to construct a coherent theory of civil disobedience has glossed over the multiplicity of claims, actions, explanations and justifications of those who attach the label of civil disobedients to themselves.

With these preliminary remarks in mind then let us examine typical definitions of civil disobedience.

Traditional Accounts

C.Cohen begins his discussion of civil disobedience by arguing that:

"Absolute precision in definition and the use of categories in this area is out of the question. Whatever principles emerge from this discussion borderline cases are sure to arise concerning which we are likely to remain in doubt." (Cohen, 1966, pp.2)

Despite his initial caution, however, Cohen then goes on to suggest that there are certain essential features of civil disobedience. For Cohen, an act of civil disobedience must:

1. Break the law
2. Be public
3. Be an act of protest
4. Be non-violent (although Cohen is less sure about this feature)

He then goes on to suggest that the recognition of acts of civil disobedience is distinct from the evaluation of that act although in plumping for non-violence rather than violence as an essential feature of civil disobedience this suggests that this is a feature that Cohen himself prefers.

Cohen also makes a distinction between civil disobedience and revolution such that:

"The civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws" (Cohen, 1966, pp.3)

Cohen also argues that one who deliberately breaks the law should be punished for that transgression and undergoing punishment is an important part of the protest since it shows respect for the law. The civil disobedient then, unlike the criminal, does not deliberately flaunt the law for his/her own advantage. This is a recurring theme in writings on civil disobedience and is a moot point since it could be argued that the civil disobedient does hope to gain something by "flaunting the law". It may not be a material gain, like the thief, but insofar as a policy may be changed from one that the civil disobedient disapproves of to one that the civil disobedient approves of then gain is involved.

How does Cohen's writings on civil disobedience compare with other theorists? C.Black Jnr. asserts that civil disobedience is not really disobedience but an assertion of national law in Federal States against individual state law:

"Civil disobedience is used to describe the actions of persons who actively disobey local or state law... they do so in the belief that the law itself is on their side and that the law's processes will uphold them and if not then there is an error in law. They appeal to the authority of the nation over the authority of the state" (Black Jnr., 1965, pp.496)

If this definition were applied universally then civil disobedience could not operate in a state such as Britain that does not have the dual legal system of the United States. Black is referring to the Civil Rights Movement of the late 1950's and early 1960's in the United States and suggests that civil disobedience in this instance was not, in fact, an illegal act. He asserts that:

"The fact that we are a federal union changes much that would be civil disobedience into a mere claim of legal rights asserted against only what seems to be law. And our federal character makes it possible for true civil disobedience to be mounted against a state government without any loss of national allegiance, without any surrender of the right to national guarantees and, indeed, in the interests of preserving the soul of the nation" (Black Jnr., 1965, pp.506)

Black does not specify what 'true' civil disobedience is but he seems to think that it is something similar to Gandhi's non-violence which is discussed below.

Note that Black differs from Cohen in that Black introduces the idea of laws being in conflict with each

other and that civil disobedience asserts the correct view of law i.e. the law of the nation as opposed to the law of an individual state within a federal state system.

A further definition is that offered by S.R.Schlesinger where:

".... civil disobedience is illegal activity undertaken to protest laws that are regarded as unjust. It is characterised by open i.e. non-clandestine violation of the law being protested or of other laws. In either event its purpose, according to its advocates, is to effect change in the law by calling public attention to the claimed injustice and by creating the kind of tension or crisis in the community that is conducive to the desired change." (Schlesinger, 1976, pp.947)

Schlesinger also makes the point that civil disobedience should be distinct from an act of protest that tests the constitutionality of a law. Schlesinger introduces another dimension to the concept of civil disobedience insofar as he examines its justification in terms of a democratic regime. Schlesinger contents himself with a definition of democracy in a footnote where he describes a democratic regime as one with majority rule and where there is recognition by the majority of certain basic rights of the minority. He does not specify what these basic rights are. However, a regime lacking either of the above criteria is not, according to Schlesinger, a democracy. For Schlesinger, civil disobedience cannot be justified since:

"... civil disobedience and its advocacy are a direct challenge to the basic democratic principle that the minority must accept the will of the majority once its recourse to legal procedures has been exhausted" (Schlesinger, 1976, pp.953)

According to Schlesinger, if every citizen disregarded a law he believed to be unjust then chaos and civil war would result. Schlesinger argues that in a democracy law is rational and hence we are obligated to obey it. He does not deny that unjust laws may exist but the citizen must use legal means to change the law. It is worth recalling the words of Abraham Lincoln (1838) here:

"Let every American, every lover of liberty, every well-wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others..... although bad laws, if they exist, should be repealed as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed.... There is no grievance that is a fit object of redress by mob law" (in van den Haag, 1972, pp.12)

Lincoln's position here is similar to the position of those Legal Positivists discussed below, who argue that if a law is valid then it must be obeyed irrespective of its justness or otherwise. More recently, M.Cohen is concerned to illustrate the way in which attempts to examine and understand civil disobedience may be overridden by an emotive response. In discussing the anti Vietnam War demonstrations in the United States in the 1960's Cohen considers that civil disobedience has now been debased in the "vulgar national debate on 'law and order'." He goes on to suggest that:

"Indeed for Vice President Agnew it has become a code-word describing the activities of muggers, arsonists, draft-evaders, campaign hecklers, campus militants, anti-war demonstrators, juvenile delinquents and political assassins." (Cohen, 1969, pp.211)

A further definition of civil disobedience is that offered by W.T.Blackstone. He suggests that;

1. It is not done for selfish or prudential reasons but for moral reasons or reasons of conscience.
2. It involves a public and open violation of the law.
3. The civil disobedient does not attempt to escape punishment.
4. It must be non-violent.

Blackstone goes on to comment on the above criteria.

"I intend them to be elucidations or descriptions of conditions associated with this concept [civil disobedience]. Of course once one accepts these criteria as constitutive of the normal use of the concept of civil disobedience, they do function prescriptively in the sense of providing means for identifying cases of civil disobedience. Even so this is not to define prescriptively the concept for all definitions are prescriptive in this sense."
(Blackstone, 1967, pp.683)

Problems here may be associated with conditions 1 and 4 whereby Blackstone is offering us an evaluation under the guise of description. However, he at least admits to problems associated with the nature of definition itself.

For J.Raz, civil disobedience is:

"... a politically motivated breach of law designed either to contribute directly to a change of a law or of a public policy or to express one's protest against, and dissociation from, a law or a public policy". (Raz, 1979, pp.262)

What does politically motivated mean here as opposed to, say, legally or morally motivated? Presumably Raz wishes to distinguish it from criminally motivated, although I have difficulty in discussing politically motivated

actions as distinct from actions that may have political implications or may be deemed to have political significance. Likewise with criminally motivated, for example, where certain actions may be deemed to be illegal or certain actions can be described as criminal. It is worth making the point, early in the discussion, that we need to distinguish between the intentions of actors and the intentions that may be ascribed to them by the observer.

H. Freeman sees civil disobedience as a spectrum of possibilities: it is civil, non-violent resistance or coercion, it is intended to call attention to injustice and is used by those who are barred from exercising power. For Freeman it is a form of communication within the remit of the First Amendment to the American Constitution. What is significant here is that the focus of civil disobedience i.e. injustice, is built into Freeman's definition. Can a right wing group such as the Ku Klux Klan engage in civil disobedience? For Freeman the answer is clearly no if it does not promote justice (assuming of course that there is an agreed definition which excludes the activities of groups such as the Ku Klux Klan) whereas in other definitions the Ku Klux Klan can be said to engage in civil disobedience i.e., public protest against a particular policy, desegregation, that breaks the law.

Note also the idea, that Freeman introduces, of civil disobedience as a form of communication. B. Rustin also refers to the way in which civil disobedience can dramatize an issue. I do not wish to pursue this point at

present as the idea of civil disobedience as communication forms the basis for a later chapter. However, Rustin also suggests that it is, in the case of the American Civil Rights Movement, the white southerners who were civilly disobedient insofar as their state laws were disobeying the Supreme Court and the American Constitution. Even allowing for Freeman's 'spectrum of possibilities' this may be stretching the concept of civil disobedience too far since there was, for the most part, no act of protest discernible amongst white southerners. It is worth making the point here that in terms of usage civil disobedience is often used to describe the activities of radical groups wishing to change the status quo rather than to preserve it. This may be where the idea of description as evaluation can be linked i.e. depending on one's political persuasion then a different perception of civil disobedience will be available. Those wishing to support change will describe it in commendatory terms and vice versa. However, one aspect of civil disobedience may be used to overcome opposition to it and that is the notion of "civil" and all that that entails. H.A. Bedau (1969, pp.19) refers to the idea of civil disobedience as a civic act, the disobedience of a person in his capacity as a citizen under a government.

Wasserstrom (1961) refers to the concept of civility as meaning non-violence as well as the idea of civil belonging to the civitas or the public realm. Raz (1979) makes reference to distinction between the public and the private realm, civil disobedience belonging to the public

and conscientious objection belonging to the private sphere. It is worth noting here M.Oakeshott's concept of civil association and the emphasis that he places on the concept of civility and its role as the political good, civility here being moderation, toleration, friendliness, fidelity, fairness, decency, humanity etc. (Oakeshott, 1975)

C.Cohen develops his account of the concept of civil disobedience with the basic premise of man as a member of the civitas with membership and obligations flowing from this. In other words, the notion of civil disobedience is linked to a concept of citizenship and the nature of our obligations that may follow on from the fact of citizenship. Cohen also indicates that the civil disobedient accepts the general legitimacy of the established authorities and he goes on to make a distinction between political civil disobedience which is seen by Cohen as essentially a tactic and moral civil disobedience which arises as a result of ethical considerations.

The notion of accepting the general legitimacy of established authority is developed by J.Stiehm, for whom:

"... civil disobedience may be defined as the deliberate and public infringement of a law recognised by the actor as legal (that is, as constituted and enforced in accordance with the accepted government procedures) for the purpose of producing social change. If a legal violation is unintentional it does not involve disobedience. If it is clandestine, it is criminal. If the legitimacy of the government that passed the law or is enforcing it is denied, the act is revolutionary. A person who practices civil

disobedience does not protest the origin of the authority of a law, he protests its content or its consequences" (Stiehm, 1972, pp.23)

Thus, for Stiehm, the civil disobedient is not concerned with legitimacy or authority but with the content and consequences of the laws authority passes. Therefore, civil disobedience is commenting upon and evaluating laws or policies. This is a crucial point, as it will be seen later, when discussing obligations, that most theorists who have been concerned with the concept of obligation are generally concerned with legitimacy and authority and not with the consequences or contents of policy. The discussion of 'benefits received' developed by J.Rawls (1972) is an exception to traditional accounts of obligation but, as I argue later, in the end discussions of obligations turn out to be discussions concerning 'benefits received' if they are to have any meaning.

However, not only is civil disobedience considered to be linked to discussions of obligations but it is also considered to be germane to discussions of obligations to a particular type of political authority i.e. democracy. A.Carter, for example sees civil disobedience as one form of direct action where direct action can be seen as:

"One way of practising direct democracy within a parliamentary framework." (Carter, 1973, pp.27)

Carter is concerned to locate civil disobedience within the context of a particular form of government. In a similar vein is C.Pateman's (1979 A) discussion of political obligation where political disobedience is

considered to be one possible expression of citizen activity upon which a participatory democracy is based. Within such a system of government, political obligation is considered to be a continuing issue and a permanent problem with citizens constantly questioning, sometimes through political disobedience, existing political relations.

Similarly, civil disobedience is considered to be imperative for the continuing of a democratic regime.

"There are three compelling reasons to support the incorporation into American democratic philosophy of civil disobedience. As a buffer between civil liberties and rights, and direct action and Communist ideas, having kinship with both, it provides a testing zone for challenges to either established or new rules of the game. Civil disobedience takes soundings for the operative formulas of democracy not the least of which is how to probe for a conception of justice held by dissidents and state alike. Finally the phenomenon is an educational strategy to rethink persistent questions of political obligation." (Power, 1970, pp.47)

Civil disobedience, on this account, is playing the role of a kind of Socratic gadfly constantly reminding citizens and state alike of such values as justice.

Civil disobedience has also been associated with a particular theory of democratic government, that of pluralism, where civil disobedience as group behaviour is considered to be important and where the wishes of minority groups are to be taken into account. (see Arendt, 1973 : Bickel, 1975)

However, to continue mapping the terrain of theory concerning civil disobedience, Bedau suggests that:

"Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, non-violently and conscientiously with the intent to frustrate (one of) the laws, policies or decisions of his government."
(Bedau, 1961, pp.661)

What is meant by 'frustrate' here? Does it mean change? If not, then civil disobedience may appear to be a rather weak form of political protest to some of its adherents.

R.Martin (1969-70) suggests six main principles involved in civil disobedience and these can act as justificatory reasons for engaging in it.

1. Civil disobedience is not directed against the law in general.
2. The decree in question is democratically derived.
3. There is no intention to replace democratic procedures with non-democratic ones.
4. Action is done for some conception of political justice, the common good, human rights etc.
5. There must be a condition of non-violence both with respect to life and property.
6. The civil disobedient must be willing to take the consequences.

It may be contended, however, that with respect to these six points that:

1. Presumably where the system of law itself is unjust, under a regime that, say, practises apartheid, civil disobedience against apartheid cannot be justified, whereas protest against individual laws might be.
2. This presupposes that all groups can participate equally in the democratic process. What about those groups that do not have access to the political process at all?
3. Again, this begs the question of how democratic is the process in the first instance.

4. Which conception of political justice, the common good etc, is prevalent? Different groups may have different views on these concepts.
5. How is violence to be defined? Is burning a draft card considered violence? It is also possible to argue that the violence of the state also needs to be justified.
6. Again here, commentators have pointed out that there is a certain illogicality in arguing that a particular law or policy promotes injustice and then agreeing to be punished for disobeying it.

Zinn suggests that the idea that the person who commits civil disobedience must accept punishment is a fallacy since:

"The sportsmanlike acceptance of jail as the terminus of civil disobedience is fine for a football game or for a society determined to limit reform to tokens. It does not suit a society which wants to eliminate long-festering wrongs." (Zinn, 1968, pp.31)

The civil disobedient, though, needs be aware of the response of those that he/she is trying to influence. A common response is that indicated by Senator P.A.Hart:

"Any tolerance that I must feel toward the disobeyer is dependent on his willingness to accept whatever punishment the law might impose." (Hart in Arendt, 1973, pp.43-44)

J.Rawls (1972) has argued for the logical connection between civil disobedience and punishment and S.Hook (in J.G.Murphy, 1971) argues that acceptance of punishment will stir public opinion whilst evading punishment will lead to scepticism concerning the sincerity of the action undertaken. In a recent article, however, N.Buttler (1985) has argued that the civil disobedient should be tolerated rather than punished and a special category should be

used, i.e. the category of conscientious objection to war service, where refusal to comply with the law is shown to be motivated by principled, conscientious beliefs.

Leaving aside the question of punishment for the moment, L.J. Macfarlane has suggested that:

".... political disobedience embraces the performance of any act prohibited by the law or the state or the non-performance of any act required by the law or the state, with the purpose of securing changes in the actions, policies, laws, government or constitution of the state or of the social and political system underlying it." (Macfarlane, 1971, pp.13)

Here Macfarlane is talking about a wider definition of political disobedience and note here that this wider concept is concerned with changing 'the government or constitution of the state', an intention that is not, according to most writers on civil disobedience, that of the civil disobedient. Interestingly, Macfarlane's definition may also account for political disobedience of the right as well as of the left.

A. Bickel considers that:

".... civil disobedience is the act of disobeying formally binding general law on grounds of moral or political principles without challenging the validity of the law, or the incidental disobedience of general law which is itself neither challenged as invalid nor disapproved of, in the course of agitating for change in public policies, actions or social conditions which are regarded as bad on grounds of moral or political principles - all in circumstances where the legal order makes no allowance for the disobedience" (Bickel, 1975, pp.99)

We can ask ourselves a number of questions here: in what sense is Bickel using the concept 'bad'? How do we specify moral or political principles and whose principles

are they anyway? Is the Labour Party, for example, justified in endorsing a campaign of civil disobedience because it disagrees with the political principles of a Conservative government? Interestingly enough local Labour councillors have advocated civil disobedience against the 1983-87 Conservative Government's policies on local government. However, this returns us to the suggestion put forward earlier by Cohen that we can distinguish between the idea of political civil disobedience to be used as a tactic and moral civil disobedience to be undertaken out of respect for individual conscience.

A final definition offered is that by Zashin who suggests that:

".... civil disobedience is a knowing violation of a public norm (considered binding by local authorities but which may be ultimately invalidated by the courts) as a form of protest; it is non-revolutionary, public and non-violent (i.e. there is no use of physical violence except self-defensively when participants are physically attacked) and no resistance to arrest if made properly and without undue force." (Zashin, 1972, pp.118)

This definition, it seems to me, could describe picketing or other forms of political protest. In fact M.Walzer (in P.Green and S. Levinson, 1970) does indeed extend his considerations of civil disobedience to cover industrial strikes and more generally protest against corporate bodies other than the state such as business companies or universities.

What we have, as I indicated earlier, is a multiplicity of definitions concerning civil disobedience. I have tried to indicate the flavour of these descriptions

and to give some idea of their scope. It may, therefore, at this point, be useful to summarise the points raised in the discussion thus far. The characteristics of civil disobedience are said to be:

1. It is done publicly and is not a private act.
2. It involves citizens and their obligations.
3. It is concerned with particular laws, policies or decrees and not the law in general.
4. It is concerned with the content and consequences of laws, policies and decrees and not their authority and legitimacy.
5. It is an appeal.
6. It is concerned with politics, the law and morals.
7. It is concerned with democracy.
8. It is a form of protest.
9. It is not revolutionary in nature.
10. It is not done for prudential reasons.
11. It may be morally motivated.

All the above points are ones that seem to be uncontentious and there does appear to be some measure of agreement amongst writers on civil disobedience. There are a number of points, however, where some measure of disagreement is evident.

1. It involves disobedience of laws - here there are those who consider that much of the Civil Rights Movement in the U.S.A. was not in fact breaking national law.
2. It is non-violent. Some writers would not consider this to be a necessary condition.
3. The civil disobedient willingly accepts punishment. As indicated above there is disagreement here.

4. It is concerned with change and therefore cannot be used to preserve the status quo.
5. It may undermine democratic stability.
6. It is politically motivated. Some would argue that 'genuine' civil disobedience is that which is motivated by conscience alone.
7. It is a form of group politics located within a pluralist framework of pressure group activity.
8. It may be widened to cover protest against other bodies than government, either central or local.

What the above points seem to indicate is that it is extremely difficult to isolate the necessary and sufficient conditions for an act of protest to be defined as civil disobedience. If that is the case then it will be worthwhile looking, again in a preliminary fashion, at the kind of reasons that are offered in justification of civil disobedience and those arguments that suggest that civil disobedience cannot be justified.

A central theme of the work of B.Zwiebach is that civil disobedience may be justified when it is:

"... a rightful denial of the obligation imposed by a law or other communication of authority." (Zwiebach, 1975, pp.4)

The problem here is to determine what is rightful. It is a truism to say that there is a world of difference between "having a right" and "being right."

This highlights a basic problem with justification offered in support of civil disobedience insofar as it may be political, legal or moral in character. C.Cohen

indicates a common assumption amongst writers on civil disobedience and that is that it cannot be given a legal justification:

"... deliberate disobedience to law can never receive a justification on legal grounds within that legal system." (Cohen, 1966, pp.7)

This raises the question, implicit in the Civil Rights Movement, of choosing between competing legal systems, the national versus the state law. However, it is sufficient at this stage merely to raise the problem of legal obligation, as a separate chapter is devoted to this issue.

Cohen also considers the possibility of a moral justification in breaking the law through an obligation to some higher law. This form of argument has been traced through Cicero, Aquinas, Hooker, Grotius etcetera and is an argument that was employed by M.L.King in attempting to justify the actions of the Civil Rights Movement:

"A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St.Thomas Aquinas: 'An unjust law is a human law that is not rooted in eternal and natural law'" (King, 1963, pp.85)

King raises the issue of conflict between Positive Law and Natural Law here, again this will be examined in greater detail below.

To return to Cohen, he also discusses the idea of a utilitarian justification of civil disobedience where one of the questions to be asked is 'What are the long term benefits that are likely to accrue to a society if civil disobedience is allowed'?

It is of course, extremely difficult to specify benefits and to discuss them in anything other than vague terms such as the promotion of justice or the lessening of inequality. There is also the problem of specifying who is to benefit - minority groups or the political community as a whole? One of the major arguments used against civil disobedience is that it leads to an attack upon the stability of a regime and this has to be the most important consideration in arguing against it. It is argued that civil disobedience implies contempt for the law and undermines respect for it and in so doing threatens the stability of the regime. Because of this it can never be justified in a democracy where lawful channels exist to present one's case. The view of Schlesinger is typical here:

"... civil disobedience is destructive of a regime regarded as fundamentally democratic. However, it is also one of the tactical options among other more extreme options available in a revolution to overthrow a regime regarded as fundamentally undemocratic."
(Schlesinger, 1976, pp.940)

A counter-argument to this is that a regime cannot be considered democratic if it systematically excludes minority groups from either the decision-making procedure or the benefits that are said to flow from democratic government.

However, Cohen, whilst suggesting that the issues surrounding civil disobedience are very complex, considers that:

"We may conclude that acts of civil disobedience can neither be generally justified nor generally condemned. But in any case a legal justification for the disobedient act is out of the question." (Cohen, 1966, pp.16)

Moral justification, for Cohen, may be possible but we would need to examine the specific context and reasons advanced in each case. From a different perspective H.B.Acton (1969) raises the general problems of justification and offers us Wittgenstein's railway timetable where, it is suggested, justification consists in an appeal to something independent. In this sense does the appeal to a conception of law determined by a higher consideration, as with M.L.King, consist in an appeal to an independent arbiter? For Acton:

"... is customary law or National Law a public object that both parties to a dispute can have, so to say, before them as a means of settling their differences?" (Acton, 1969, pp.224)

Acton goes on to suggest that it is a logical impossibility for A to be able to justify a course of action to B if B rejects the authority to which A appeals to.

Finally in this section it is worth returning to a problem raised at the beginning concerning the nature of justification itself. Consider the following:

"... in order to be justified acts of civil disobedience must meet each of at least 3 conditions: (1) persons may not be harmed, and property may not be destroyed; (2) there must be unconditional submission to arrest and to the legal penalties for the breaches; (3) the protests, in the course of which the breaches occur, must be directed at constitutional defects exposing either all the people or some class of the people to legally avoidable forms of harm and exploitation." (Brown, 1961, pp.676)

The conditions that Brown specifies are exactly those conditions that are said to describe an act of civil disobedience in the first place!

It may well be that with Blackstone:

"Civil disobedience is justified on occasion, but it is not possible, in advance of a given case or set of circumstances, to specify necessary and sufficient conditions for saying that civil disobedience is justified. Both the generality of moral principles, the need to decide to extend them in one way or another and the indeterminacy of the relevant empirical facts makes this so." (Blackstone, 1967, pp.703)

However, it seems to me that nothing more can be gained at this stage by continuing with the discussion of what various writers have said about civil disobedience and instead we need to focus upon how those who claim to practice civil disobedience, or have the term civil disobedience attributed to their actions, perceive their activities and to see if there are any areas of disagreement between the theorist and the practitioner.

Many accounts of the theory of civil disobedience do seem to agree upon those political activists that may be said to have practiced civil disobedience. There is, at least amongst the theorists, common agreement upon who is or was a civil disobedient even though there may not be much agreement over what civil disobedience actually is. I therefore propose to follow established practice by examining the actions of Henry David Thoreau, Mahatma Gandhi, and Martin Luther King in particular and the Campaign for Nuclear Disarmament in the U.K. along with the more recently developed Peace Movement.

Henry David Thoreau

In July 1846 Henry David Thoreau was arrested for non-payment of taxes and spent one night in the jailhouse in Concord, Massachusetts. Thoreau's refusal to pay the taxes was a result of the state of Massachusetts' support of slavery in the South. Thoreau refused to support these policies by paying taxes. His reasons for such a stand were expanded in an address before the Concord Lyceum in February 1848, published under the title 'Resistance to Civil Government' along with a collection of other essays in 1849. It is this address and its later publication that has been the focus of attention by those interested in civil disobedience. Thoreau suggests that:

"That government is best which governs least",

and

"... I ask for, not at once no government, but at once, a better government." (Thoreau, 1968, pp.11)

Commenting upon the individual's relationship with government Thoreau suggests that:

"I think that we should be men first, and subjects afterward".

and

"The only obligation which I have a right to assume, is to do at any time what I think right." (Thoreau, 1968, pp.12)

Similarly, Thoreau also comments that:

"There will never be a really free and enlightened state, until the State comes to recognise the individual as a higher and independent power, from which all its own power and authority are derived, and treats him accordingly." (Thoreau, 1968, pp.31)

It is phrases such as these that have led commentators to label Thoreau as a radical individualist. Rosenblum (1981) suggests the idea of a 'militant conscience' and argues that for Thoreau militancy was a way of life. She links this to his romanticism as indicated by Thoreau's experiment in living at Walden Pond and published as a collection of essays in 1854 as 'Walden'. Other writers have also suggested how Thoreau may be perceived as radical and even revolutionary. Interestingly enough, Abbott indicates that various writers have found Thoreau to be apolitical, or revolutionary or liberal individualist or anarchist but Abbott himself suggests that:

"Taken together, all of these works can be seen as pilgrimages in which America's social and political problems are related as secondary, even epiphenomenal concerns compared to Thoreau's egoistic obsession with self-discovery." (Abbott, 1985, pp.184)

[The works referred to are a number of writings and excursions that Thoreau embarked upon in the search for individual peace]

This is a different interpretation than the one offered by Cohen who suggests that whilst Thoreau is often presented as a classical example of a civil disobedient, witness his refusal to pay taxes and his submitting to arrest without resistance, Thoreau intended a complete repudiation of governmental authority.

Cohen considers that:

"Thoreau's act may have been noble but in seeking to place himself above the law, or outside its jurisdiction, he acted as a rebel and strictly did not engage in civil disobedience." (1966, pp.4)

Similarly W.T.Blackstone (1967) suggests that Thoreau in advocating the overthrow and repudiation of political authority is going much further than civil disobedience will allow. My own view is that Thoreau is not against government but only unjust government. As the earlier quote indicates, Thoreau is concerned with 'better' government and is particularly critical of the government of his day:

"Unjust laws exist: shall we be content to obey them, or shall we endeavour to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil. But it is the fault of the government itself that the remedy is worse than the evil. It makes it worse. Why is it not more apt to anticipate and provide for reform? Why does it not cherish its wise minority? Why does it cry and resist before it is

hurt? Why does it not encourage its citizens to be on the alert to point out its faults, and do better than it would have them?" (Thoreau, 1968, pp.18)

and commenting upon the tactic of non-payment of taxes as a political weapon Thoreau suggests that:

"If a thousand men were not to pay their tax-bills this year, that would not be a violent and bloody measure, as it would be to pay them, and enable the state to commit violence and shed innocent blood. This is, in fact, the definition of a peaceable revolution, if any such is possible." (Thoreau, 1968, pp.21)

Whatever description we may choose to give Thoreau's actions and words then it is worth recognising that at the very least, Thoreau raises pertinent questions about our relationship with the state and our response to policies and laws of the state. Also Thoreau contributes to the language of political protest, and this is where we may discern his most important contribution, and to a tradition of political discourse. In chronicling the history of radical dissent in the United States Staughton Lynd locates Thoreau firmly within a tradition of American thought from Paine to the abolitionists of the civil war. He suggests that:

"Thoreau's philosophy of civil disobedience was much less a merely personal production, and much more the manifesto of a movement, than Thoreau himself imagined. Its rationale for individual and state secession reflected the Gamsonian Strategy expanded by Phillips in an address at the Concord Lyceum in the Spring of 1845, which Thoreau attended and publicly praised. In asserting (In Civil Disobedience) that 'we should be men first, and subjects afterwards' or (as he put it in 'Slavery in Massachusetts') 'men first and Americans only at a late and convenient hour' Thoreau was in accord with Massachusetts Senator

Charles Sumner who declared in response to the Fugitive Slave Law: 'I am a man although I am a Commissioner'." (Lynd, 1969, pp.125)

We must, therefore, be aware of the context within which Thoreau was acting and speaking and see him as part of a tradition of political protest but with a gift for language that makes his writings memorable.

Mahatma Gandhi

In the same way that Thoreau was concerned with developing a particular approach to living as much as political protest then the same can be said of Gandhi. Indeed his autobiography is entitled 'My Experiments with the Experience of Truth'. Throughout his life Gandhi was continually experimenting with different ways of life in terms of diet, medical treatment, living arrangements and also politics and religion. This concern with continually seeking to develop as a human being has led one biographer to suggest that:

"Gandhi left behind an existential pattern of thought and deed rather than a system of moral and political philosophy" (Woodcock, 1972, pp.7)

Woodcock goes on to suggest that although Gandhi's political and social ideas may have been fed by Indian traditions and adapted to suit Indian circumstances, they were never exclusively Asian and Woodcock sees Gandhi as a religious and political pluralist. Gandhi himself acknowledges the influence on his thought not just of the traditional Hindu classics, in particular the Bhagavad

Ghita, but also Tolstoy's 'Kingdom of God is Within You', Ruskin's 'Unto this Last', the Sermon on the Mount and also, but to a lesser extent, Thoreau's essay on civil resistance (This was read by Gandhi in 1907 in a S.African jail after Gandhi had already been involved in political protest).

Gandhi's thought was further developed by political action taken in S.Africa to protest against the unjust treatment of Indians there and here the first experiments in Gandhian resistance took place. What were these techniques then? The major technique of Gandhian political protest was 'Satyagraha' which, in rough translation, means truth force and as such is, for Gandhi, a way of life. Civil disobedience, on the other hand, is seen by Gandhi as a mere technique.

Not only is satyagraha concerned with the pursuit of Truth but it is also concerned with the notion of self-suffering and the idea of non-violence. Gandhi uses the phrase 'ahimsa' which roughly translates as the refusal to do harm and the duty to do good. Gandhi suggests that:

"... satyagraha is essentially a weapon of the truthful. A satyagrahi is pledged to non-violence and unless people observe it in thought, word and deed, I cannot offer mass satyagraha." (Gandhi, 1982, pp.420)

Thus Gandhi is concerned with the intentions of the protestor and the purity of his/her motives. Part of the concept of satyagraha is the concept of civility:

"Experience has taught me that civility is the most difficult part of Satyagraha. Civility does not here mean the mere outward gentleness of speech cultivated for the occasion, but an inborn gentleness and desire to do the opponent good. These should show themselves in every act of a Satyagrahi." (Gandhi, 1982, pp.394)

Bondurant (1965) considers that Satyagraha transcends civil disobedience and the Satyagrahi uses civil disobedience as a technique of protest along with other traditional Indian techniques of protest such as the 'hartal' (a form of general strike) and non-co-operation. Bondurant goes on to suggest the fundamental rules of a satyagraha campaign: (Bondurant, 1965, pp.38)

1. Self-reliance at all times.
2. Initiative in the hands of the Satyagrahis.
3. Propagation of the objectives, strategy and tactics of the campaign.
4. The reduction of demands to a minimum consistent with the Truth.
5. Progressive advancement of the Movement.
6. Examination of weakness.
7. A persistent search for avenues of co-operation with the adversary on honourable terms.
8. The refusal to surrender essentials in negotiation .
9. The insistence upon full agreement on fundamental issues.

Bondurant then goes on to outline the steps that may be taken in such a campaign:

1. Negotiation and arbitration.
2. Preparation of the groups for direct action.
3. Agitation.

4. Issuing of an ultimatum.
5. Economic boycott and forms of strike.
6. Non co-operation.
7. Civil disobedience where the laws broken may be central to the grievance or symbolic.
8. The usurping of the functions of government.
9. The setting up of a parallel government.

Here we can see that civil disobedience is one step in a much wider campaign. Bondurant outlines a number of examples of satyagraha in India during Gandhi's life, and not all were directed against the government. However, it is in Gandhi's protest against the British Raj that most clearly illustrates his views on political protest.

Initially, Gandhi was an enthusiastic supporter of British government. Commenting on British rule during his early days in S.Africa Gandhi confirms that:

"Hardly ever have I known anybody to cherish such loyalty as I did to the British Constitution ... In those days I believed that British rule was on the whole beneficial to the ruled." (Gandhi, 1982, pp. 166)

This belief in the justice of British rule was well illustrated in 1914 when Gandhi's faith in British good will culminated in him raising a contingent of Indian medical officers to aid the British war effort. However, Gandhi became increasingly bitter towards the British Raj and he turned from a supporter of the British Empire into its enemy after hundreds of Indians were killed by the British Army in Amritsar in 1918. He advocated peaceful non-co-operation and it became increasingly the case that

Gandhi wished to overthrow the government. In keeping with the Satyagrahi Movement, however, Gandhi was always at pains to publicise his intentions. For example, he wrote to the Viceroy in advance of the 1930 Salt March to protest against the Salt Acts. These acts were seen as unjust and symbolic of an unpopular, unrepresentative and alien government and its Salt Tax as an injustice. In advocating a campaign against this tax Gandhi indicated to the Viceroy that:

"... nothing but organised non-violence can check the organised violence of the British government." (in Zinkin, 1965, pp.151)

After the Salt March of 1930 Gandhi increasingly became concerned with the concept of individual, as opposed to mass, resistance of government injustice and he increasingly preferred the role of a single Satyagrahi. He continued to use the notion of a fast to put pressure on the state and it is a moot point as to whether or not this is, in fact, a form of coercion rather than an appeal for co-operation and persuasion. (see Haksar, 1976 A)

Apart from the objective of independence for India, Gandhi was also concerned to end discrimination against the Untouchables and against women. He was also concerned with the creation of a 'village state', and with a general social transformation of society. From this latter perspective the notion of Gandhian socialism has been considered and likewise the stress on individualism has

been linked to Nineteenth Century English liberal thinkers such as J.S.Mill, T.H.Green and L.Hobhouse. (see Bondurant, 1965)

How then do we assess Gandhi's contribution to the politics of protest and to civil disobedience?

For Woodcock, Gandhi's achievement was in showing that the liberation from foreign power domination can be achieved without violence, that non-violent action can be a philosophic basis for a social transformation of society and that the individual, either alone or with others, can in fact exert a 'moral power' that can change society. Similarly for Tinker, who suggests that Gandhi's legacy lies in:

"... his creation and implementation of a profoundly revolutionary, highly political yet deeply idealistic political tool; non-violent resistance." (Tinker, 1971, pp.775)

For Bondurant, Gandhi's uniqueness lies in his development of a philosophy of action that uses traditional Indian ideas and those of the modern West. He assimilated different themes into working out the path to Truth and in so doing makes a major contribution to the development of social and political theory.

Gandhi was concerned not just with the short-term objective of Indian independence but with a transformation of society through Satyagraha and in this sense may be termed revolutionary. There is not the acceptance of the general authority of the state which most writers use to distinguish civil disobedience from revolution although Gandhi does accept the punishment of the state. The civil

character of Satyagraha is upheld by the voluntary submission to legal sanctions for actions contrary to law. Gandhi sees civil disobedience as one form of protest to be used within the wider non-violent campaign and indeed Gandhi's 'experiments with truth' contribute more generally to the tradition of resistance to unjust government and at the very least the example of Gandhi as a political activist was one that inspired later generations of political activists and in particular Martin Luther King and his commitment to the Civil Rights Movement in America during the 1950's and 1960's.

Martin Luther King and Civil Rights

On 1st December 1955 in Montgomery, Alabama, Rosa Parks refused to give up her seat on a bus for a white passenger and in so acting started the protest movement against segregation in the southern states of America. Perhaps 'restart' would be a more apt word insofar as black protest had been evident, if sporadic, for most of the century and the Congress of Racial Equality, a body committed to fight inequality, had been founded in 1943. However, the action of Rosa Parks sparked off the most significant protest against racial inequality since the Civil War. At the time King was a young Minister who quickly became involved in the movement to boycott the buses in support of desegregation. At school King had studied Thoreau's essay and at college had come across the

work of Gandhi and the day before the bus boycott was due to start King recalls how he began thinking, once again, about Thoreau:

"I remembered, how as a college student, I had been moved when I first read this work. I became convinced that what we were preparing to do in Montgomery was related to what Thoreau had expressed. We were simply saying to the white community, 'We can no longer lend our co-operation to an evil system'." (in Schechter, 1963, pp.153)

The influence of Thoreau and, in particular, Gandhi was evident as King articulated a philosophy of non-violent resistance not merely as a technique of political protest but, as with Gandhi, the only authentic approach to the problems of racial injustice. For King, at least, non-violence as a tactic became inseparable from non-violence as a way of life and this was reinforced by his Christian beliefs. H.Walton Jnr. comments that:

"King's non-violence sought simultaneously to: resist; defeat an unjust system; attack evil but not the evil doer; make suffering a virtue, love rather than hate; and create faith in God and the future." (Walton Jnr., 1971, pp.63)

King was confirmed in his belief in non-violent resistance after a visit to India in 1959 and his increasing awareness of the techniques of a Satyagraha campaign.

However, to return to Montgomery, the campaign there was deemed to be a success when the Supreme Court ruled that the Alabama State and local laws requiring segregation on the buses to be unconstitutional. This ruling, and others similar, have led a number of writers on civil disobedience, as indicated earlier, to assert

that the Civil Rights Movement was not one that used civil disobedience insofar as the laws being protested against were found to be unconstitutional. This seems to me to be begging the question as far as King and his supporters were concerned insofar as they believed themselves to be breaking the law, as indeed they were, even though these laws may have been unjust.

However, in the immediate aftermath of the protest in Alabama and in the following years the Civil Rights Movement began to gain momentum and took such forms as sit-ins at lunch counters, boycott of stores, and Freedom Rides throughout the South to protest against segregation. As the Movement grew, one commentator has suggested that:

"Non-co-operation and civil disobedience, together with the names of Thoreau and Gandhi, were becoming household words in thousands of Negro homes." (Schechter, 1963, pp.191)

King's own rhetoric and articulation of the role that he envisaged for the protestor was becoming more convincing as he moved further towards Gandhian non-violence:

"Non-violence is a powerful and just weapon. It is a weapon unique in history, which acts without wounding and ennobles the man who wields it." (King, 1963, pp.14)

and in the famous 'Letter from Birmingham Jail' written on April 16, 1963 and addressed to fellow clergymen, King sees non-violence as dramatising an issue:

"Just as Socrates felt that it was necessary to create a tension in the mind so that individuals could rise from the bondage of myths and half-truths to the unfettered realm of creative analysis and objective appraisal, so we must see the need for non-violent

gadflies to create the kind of tension in society that will help men rise from the dark depths of prejudice and racism to the majestic heights of understanding and brotherhood." (King, 1963, pp.81)

In the same letter King quotes St Augustine and Aquinas with approval and uses the notion of an 'unjust law being no law at all' as a justification for his actions. He suggests that:

"A law is unjust if it is inflicted on a minority, that as a result of being denied the right to vote, had no part in enacting or devising the law" (King, 1963, pp.85)

Despite this King is still concerned to show his support for the law, in general, and for democracy. Commenting on the campaign in Birmingham, Alabama in 1963, King makes clear that:

"We did not hide our intentions. In fact I announced our plan to the press, pointing out that we were not anarchists advocating lawlessness, but that it was obvious to us that the courts of Alabama had misused the judicial process in order to perpetuate injustice and segregation." (King, 1963, pp.69)

However, according to King, individuals had a responsibility to obey just laws and as much as a responsibility to disobey unjust laws and to accept punishment for the latter as a sign of fundamental respect for the law. King is also committed to the concept of democratic government and argues that those protesting against discrimination are:

"... bringing our nation back to those great wells of democracy which were dug deep by the founding fathers in their formulation of the constitution and the Declaration of Independence." (King, 1963, pp.99)

However, as with Gandhi, King was aware that for most protestors, non-violence was a technique to be used in advancing a particular cause rather than a way of life:

"To date only a relatively few practitioners of non-violent direct action have been committed to its philosophy. The great mass have used it pragmatically as a tactical weapon without being ready to live it." (King, 1963, pp.169)

King, like Gandhi, did on occasion call off a planned protest because he did not feel that the protestors were ready to engage in non-violent action.

King considered that civil disobedience had a long tradition and he mentions Socrates, the early Christians and the Boston Tea Party as civil disobedients and whilst the Civil Rights Movement can be located within a tradition of protest King was keen to develop his particular philosophy in a wider context. He became increasingly vocal in his opposition to the war in Vietnam, a stance that resulted in much criticism from previous supporters, and became increasingly concerned with a fundamental change in social and economic as well as political values. This wider concern mirrors Gandhi's involvement in wider issues than just Indian independence and like Gandhi is a reflection of perceiving non-violent resistance as a philosophy of life to be lived rather than just a political tactic.

However, in using Gandhian techniques in a different context King met with mixed results. In 1966, after ten years of concentration in the South, King became involved in political protest in Chicago, a city that proved to be

less sympathetic to King's methods and King was upstaged by the Black Power Movement. Increasingly, King was seen as an "accommodationist" by radical Blacks and Eldridge Cleaver's 'Soul on Ice' was seen as more in tune with black values than King's 'Letter from Birmingham Jail'. King's innate faith in the American political process was increasingly a belief that was not shared by young blacks.

It has been suggested (G. Hodgson, The Times, 21.8.1983) that King's "I have a dream speech" after the March on Washington in 1963 was the conclusion of one phase in the blacks' struggle for equality in the U.S.A. ushering in as it did the Civil Rights Act of 1964, which put an end to the system of segregation in the South, and the Voting Rights Act of 1965 which gave Southern Blacks the vote. Increasingly it was protest against the war in Vietnam that began to dominate the political scene in the United States.

The Campaign for Nuclear Disarmament and the Peace Movement in the U.K.

In its first phase the campaign for Nuclear Disarmament lasted from the late 1950's until the mid 1960's. It had links with the Society of Friends and an early protest involving a token sit-down outside the war-office in January 1952 was named 'Operation Gandhi'. C.Driver in his account of the C.N.D. suggests that:

"Active pacifism has a long and on the whole honourable history in Britain. Since the mid 19th Century it has been a feature of the radical branch of English religious dissent represented chiefly in the Society of Friends. Over the past 150 years it has undergone, like other originally religious inspirations, a gradual though still far from complete secularisation. Even some of the techniques used by nuclear disarmers in the 1950's can be paralleled from the 1850's. The international group which marched from San Francisco to Moscow in 1961 had their counterpart in the group of Quakers who travelled by sledge to Moscow in an attempt to stop the Crimean War." (Driver, 1964, pp.13)

From its inception, CND was split over the tactics to be used in protesting against nuclear arms and its own role was never clear. Taylor and Pritchard (1980) suggest that the leaders of CND saw it originally as a small pressure group and were not quite sure what to do when it became a mass movement. Similarly there was disagreement amongst the different factions within CND over the tactics to be used. Initially the Direct Action Committee was prominent and was not in favour of civil disobedience. This particular committee was later superseded by the Committee of 100 which advocated more radical overtures. A leading figure in the latter grouping was Bertrand Russell, a keen supporter of civil disobedience. Writing in 1936 Russell argued that:

"I know well that this (civil disobedience) is a dangerous doctrine and that the claim to set up one's own individual judgement in defiance of legally constituted authority leads logically to anarchy. At the same time almost all great advances have involved illegality.

The early Christians broke the law, Galileo broke the law; the French Revolutionaries broke the law; early Trade Unionists broke the law. The instances are so

numerous and so important that no-one can maintain as an absolute principle obedience to constituted authority." (in Clark, 1981, pp.574)

The use of civil disobedience was discussed as a major issue at C.N.D.'s first annual conference in March 1959 and the leadership of C.N.D., particularly Canon Collins, expressed their concern about the adverse public impact that they believed would follow from breaking the law. Collins argued that:

"It seemed to me that for C.N.D. as such to identify itself with illegalities would be to alienate its potential supporters, not only in the Labour Movement but outside it, to whom the bulk of campaigners wished to address themselves." (Minnion and Bolsover, 1983, pp.20)

Russell argued that a campaign of civil disobedience was crucial in bringing issues into the public arena and as propaganda to state C.N.D.'s case:

"... so long as only constitutional methods were employed, it was very difficult - and often impossible - to cause the most important facts to be known. All the great newspapers are against us. Television and radio gave us only grudging and brief opportunities for stating our case. Politicians who opposed us were reported in full while those who supported us were dubbed 'hysterical'... It was largely the difficulty of making our case known that drove some of us to the adoption of illegal methods..." (in Minnion and Bolsover, 1983, pp.20)

This dilemma over civil disobedience continued to characterise the public pronouncements of the leading members of CND. In September 1960 Canon Collins reiterated the CND's position:

"The CND is bound by conference decision to use legal and democratic methods of argument, persuasion and demonstration to achieve its aims, though of course, we have sympathy and respect for individuals who feel bound by conscience to use illegal means and undergo imprisonment." (in Driver, 1964, pp.113)

And yet the opposing view continued to be put:

"We are told that in a democracy only lawful methods of persuasion should be used. Unfortunately the opposition to sanity and mercy on the part of those who have power is such as to make persuasion by ordinary methods difficult and slow with the result that, if such methods alone are employed, we shall probably all be dead before our purpose can be achieved. Respect for law is important and only a very profound conviction can justify actions which flout the law." (Russell-Scott leaflet in Driver, 1964, pp.166)

The position of Canon Collins was very much against civil disobedience in a country such as Britain where, according to Collins, citizens had full democratic rights. The debate over civil disobedience was seen as a debate over tactics and the possible effect of those tactics: on the one hand those who felt that breaking the law would create adverse publicity and those on the other hand, who felt that it would, at least, publicise the issue. Eventually the C.N.D. dwindled as a result of a variety of factors:

1. Its internal disagreements.
2. The impact of the Cuban Missile Crisis.
3. The Partial Test Ban Treaty of 1963.
4. The dissociation from it of the Labour Party in the build up to the 1964 General Election.
5. According to its critics on the left it was not interested in the support of either the Trade Union Movement or the working classes.

However, at the very least it placed firmly on the political agenda not only nuclear arms but also the nature of political protest and in the early, heady days of the Aldermaston Marches it brought into politics many people who would not normally have participated in political action.

Nevertheless, the dilemma over the forms of political protest is still perceived to be a problem:

"The Greenham women, according to the evidence of the polls, have been a plus factor so far for the anti-nuclear campaign. That could change as their campaign increasingly turns to civil disobedience. It was this which helped to destroy CND in the early sixties and today both the pattern and the intensity of public opinion on the various nuclear issues which are current, suggest that a segment of the public presently opposed to Cruise could quite easily be alienated." (Jenkins, The Guardian, 16.2.1983)

It was also reported in the Guardian, May 1 1984, that CND was once again undergoing splits with various splinter groups, in this case Action 84, advocating alternative tactics to CND which has, according to its critics, watered down anti-nuclear protest.

However, if we recall, it was the Conservative Government's decision to deploy Cruise missiles at Greenham Common air base in Berkshire and Molesworth in Cambridge that led to a dramatic increase in support for CND. In October 1980 a CND demonstration in Trafalgar Square was attended by 50,000 people (The Guardian 15.11.1983) and heralded the return of CND back onto the stage of British politics. In September 1981 the Greenham Common peace camp was set up by women protestors walking

from Wales. The peace camps increasingly became the focus for media coverage in response to the actions of not only the protestors themselves but also to the actions of the government in response to the peace camps. In the House of Commons on November 1st 1983 the, then, Defence Secretary Mr. Michael Heseltine said that the government had a duty to defend its installations even if that meant shooting Greenham Common peace protestors. He later claimed that whilst the last thing he wanted was for peaceful demonstrators to be shot it may be that terrorists could use the peace camp women as cover to attack the installations and it could be difficult to tell them apart. In the last instance it may be that those on guard had a duty to use their guns. (The Guardian, 2.11.1983)

At the same time, however, the media has also reported on, not just the assumed personal habits, sexuality and appearances, but the tactics that have been used by the peace protestors. Increasingly, going to jail has become commonplace to the extent that the local courts have not been able to cope with the numbers being fined or being bound over to keep the peace, and choosing to go to jail instead. (Obvious parallels can be drawn here with the actions of Thoreau, Gandhi and King). Civil disobedience and direct forms of political action seem to have become increasingly acceptable. Indeed, the committing of criminal damage such as cutting air base perimeter fences with wire cutters or throwing paint on aircraft, has become more acceptable to the peace camp protestors. In

early 1986, 6th February, 4,000 protestors blockaded the gates at Molesworth base leading the chairman of C.N.D, Mr. Paul Johns, to claim that the demonstration was the biggest act of civil disobedience for many years. Given C.N.D's earlier criticisms of civil disobedience this indicates how civil disobedience in this country has become more acceptable. Part of the reason for this, I suggest is governmental response and how democratic a particular government is perceived to be. However, that particular point will be pursued below. At this stage it is worth indicating a view of civil disobedience that was endorsed by government and protestors alike (witness the splits in the CND Movement) in this country and which gave it such an adverse evaluation. In an interview with G. Bould reported in the 'Guardian 6.8.1984, John Gummer the, then, Chairman of the Conservative Party indicated that:

"In a democratic country it is part of your conscience to obey the law, because the law is the result of democratic process. Therefore I believe it to be wholly against conscience for people in a democratic country to seek to overturn the law by undemocratic means:

and when asked about civil disobedience Gummer went on to argue that:

"If you mean by civil disobedience attempting to stop what Parliament has decided by using what is, in effect, force then I'm against it. It is wholly unacceptable to lie down in front of vehicles because you happen to believe that there shouldn't be missiles in Greenham Common. Your only conscientious route is to try to persuade people to take your view. It is reprehensible to use force....

It is totally unacceptable because it is based on a private judgement.... In a democratic society what people ought to do is to campaign to have a policy changed. You can petition, shout, argue, and protest. But what you mustn't do is to try to use force, even if its non-violent force."

Gummer's argument, he admits, may be different if the regime was non-democratic. Presumably then he may have supported the campaigns of Gandhi in India.

Another feature of the peace campaign in this country is the Peace Tax Campaign (again reminiscent of Thoreau) where protestors have refused to pay the portion of annual tax demands that they believe will be spent on defence. The former leader of CND Monsignor Bruce Kent is one who has participated in this campaign, withholding 15% of his tax in protest against Britain's nuclear policy.

It is worth pausing for a moment to see how the political activities outlined above actually correspond to definitions of civil disobedience that were offered in the first section of this chapter.

Thoreau has been described as a romantic, an anarchist and a radical individualist and his language has been interpreted as an endorsement of violence and the subverting of authority. For these reasons those writing on civil disobedience have suggested that Thoreau was not a classical civil disobedient.

Likewise with Gandhi; in advocating independence Gandhi increasingly refused to respect the justice of British rule in India and tried to undermine its authority. Again Gandhi may be said to be involved in

something other than civil disobedience and he himself would locate his actions in what was for him the wider context of Satyagraha.

The whole of the Civil Rights Movement was not, it has been suggested, involved in civil disobedience but in tests of constitutionality and the beliefs of M.L.King were located within a wider context.

In Britain civil disobedience was for some considerable time considered to be a 'bad' thing in terms of its consequences by many involved in political protest and even now it is generally considered to be a tactic that is fairly extreme and one that has been severely criticised by opponents. It would appear then that it is difficult to identify acts of civil disobedience particularly amongst those activists that are generally considered in accounts of civil disobedient activity. Given this, then, we need to examine the possibility that the definitions offered so far to account for civil disobedience may be lacking in some respect or may, in fact, be inappropriate because of the difficulties, alluded to at the beginning of this chapter, with the nature of definition itself. In order to pursue this latter point it is necessary to examine current issues in the methodology of the social sciences in general and this discussion will form the rest of this chapter.

Problems of Definitions

At the beginning of this chapter is a quote from C.Taylor and I shall now develop some of the points that Taylor is making. In commenting upon the nature of interpretation of a given text, Taylor (1971, pp.6-7) suggests that in order to present our expression of the text to another, to justify our particular interpretation we must appeal to a common understanding of the language involved. We can only convince another of our interpretation if he/she shares our understanding of the language concerned. This, according to Taylor, is the "hermeneutical circle" and he indicates two attempts to break out of this circle of our own interpretation. One is the rationalist approach culminating in Hegel, and the second is the empiricist attempt to go beyond subjectivity. However, for the moment I shall pursue Taylor's discussion of the nature of interpretation. In discussing politics, Taylor suggests that the empirical approach has led to the identification of features which can stand apart from our subjective understandings of them. The search for 'brute data' is characteristic of the approach of the political behaviour school in politics and Taylor suggests that the following can be specified in such terms: killing; sending tanks into the streets; seizing people and putting them in jail and also voting by raising a hand at a meeting. However, Taylor goes on to suggest:

"But of course a science of politics confined to such acts would be much too narrow. For on another level these actions also have meaning for the agents which is not exhausted in the brute data descriptions, and which is often crucial to understanding why they were done. Thus in voting for the motion I am also saving the honor of my party, or defending the value of free speech, or indicating public morality, or saving civilisation from breakdown. It is in such terms that the agents talk about the motivation of much of their political action, and it is difficult to conceive a science of politics which doesn't come to grips with it." (Taylor, 1971, pp.19)

What is the implication of this for our definitions of civil disobedience? We need to ask to what extent can civil disobedience be characterised as 'brute data' in Taylor's sense in the way in which writers on the subject offering us necessary and sufficient conditions would have us believe or do we have to examine more clearly the motivations of the actors themselves?

According to Taylor, empirical social science will only allow 'descriptions of reality in terms of meanings' which are open to interpretation if such descriptions are placed in quotes and offered as beliefs, opinions, attitudes etc. of individuals. However, Taylor goes on to argue that there are distinctions to be made between different kinds of behaviour that can only be understood within the context of a practice. Using Searle's (1969) notion of a constitutive rule Taylor argues that in order to understand behaviour we must locate it within a particular practice which relies upon a system of rules such that the behaviour the rules inform could not exist without them. Using the example of voting, Taylor contends that:

"... an activity of marking and counting papers has to bear intentional descriptions which fall within a certain range before we can agree to call it voting, just as the intercourse of two men or teams has to bear descriptions of a certain range before we will call it negotiation. Or in other words that some practice is voting or negotiation has to do in part with the vocabulary established in a society as appropriate for engaging in it or describing it."
(Taylor, 1971, pp.26)

Taylor goes on to discuss the idea of inter-subjective meanings and suggests that although there are individual subjective meanings these must be located within the context of the 'social matrix' within which individuals find themselves and will be constituted by a common language of social and political reality within which these beliefs can be expressed. This, it seems to me, is similar to the 'patterns of thought' that John Gray (1977) locates 'essentially contestable concepts' within. If the concept of civil disobedience is one that has proved difficult to define then it may be just such an 'essentially contested concept'.

The implications of this point for civil disobedience are several:

1. The activities, beliefs, opinions of those who claim to be civil disobedients must be located within a particular context of political protest. Thus, the activities of a Gandhi, for example, may not make sense to someone from a different religious, political and social context from that which Gandhi was brought up and lived in.

2. To what extent is there a convergence of common language between those who support civil disobedience and those who argue against it? Taylor does suggest that common meanings do not necessarily imply consensus, for they can exist with cleavages in society. It may be a common meaning in that different groups may refer to it e.g. the pursuit of freedom, or the promotion of democracy; but the meaning of these phrases may be articulated differently by different groups.

3. We need to examine the meaning that political activists themselves give to their actions as an aid to interpretation of political acts and this may help us overcome problems of definition.

However, Taylor sums up his argument:

"... a social science which wishes to fulfill the requirements of the empiricist tradition naturally tries to reconstruct social reality as consisting of brute data alone. These data are the acts of people (behaviour) as identified supposedly beyond interpretation either by physical descriptions or by descriptions clearly defined by institutions and practices: and secondly, they include the subjective reality of individuals beliefs, attitudes, values as attested by their response to certain forms of words, or in some cases their overt non-verbal behaviour.

What this excludes is a consideration of social reality as characterised by intersubjective and common meanings." (Taylor, 1971, pp.32)

We can leave Taylor for the moment and examine the work of Q.Skinner who writes in a similar vein. Q.Skinner, in examining the nature of political theory has suggested that:

"... the recovery of the historical meaning of any given text is a necessary condition of understanding it, and that this process can never be achieved simply by studying the text itself" (Skinner, 1974, pp.285)

In this article, Skinner explicitly acknowledges the influence on his work of R.G.Collingwood's 'Idea of History' and his notion of the historical imagination:

"Because the historical past, unlike the natural past, is a living past, kept alive by the act of historical thinking to another is not the death of the fact, but its survival integrated in a new context involving the development and criticism of its own ideas" (Collingwood, 1946, pp.226)

However, Skinner's main concern in the article, apart from rebutting the arguments of his critics, is to examine the relationship between political principles, political actions and legitimating political behaviour. Drawing on the notions concerning speech acts as developed by, in particular, Austin and Searle, Skinner suggests that:

"It is by describing and thereby commending certain courses of action as (say) courageous or honest, while describing and condemning others as treacherous or disloyal, that we sustain our picture of the actions and states of affairs which we wish either to disavow or to legitimate. This being so, the task of the innovating ideologist is a hard but an obvious one. His concern, by definition, is to legitimate a new range of social actions, which in terms of the existing ways of applying the moral vocabulary prevailing in his society, are currently regarded as in some way untoward or illegitimate." (Skinner, 1974, pp.294)

Thus, the civil disobedient, to develop the last point in Skinner's argument, needs to present his/her actions in such a way that they do not appear to be illegitimate according to current notions of legitimacy. He/she needs to show that his/her perhaps untoward actions can be presented in a favourable light. Hence King's appeal to the Natural Law tradition with its notions of 'an unjust law'. In order to bring this about Skinner suggests that the individual may manipulate an existing vocabulary such that the individual suggests that on this particular occasion he/she is using terms in a way to express approval rather than disapproval. The individual may introduce new terms into the existing vocabulary, here one can think of the actual concept of civil disobedience, the prefix civil being used to suggest that in this particular case the notion of disobedience can in fact be approved of because of its 'civil' nature. A further tactic is to manipulate the criteria for the application of an existing set of commendable terms. Here we may consider the way in which supporters of civil disobedience argue that far from undermining democracy what they are doing is in fact crucial to the future of democracy.

More generally, Skinner wishes to conclude, amongst other ideas, that any course of action needs to be legitimated if its occurrence is not to be inhibited and secondly, that the range of concepts that the individual can appeal to in order to legitimate his/her actions will not be determined by the agent himself/herself. The individual will have to locate these concepts within the

context of what is prevalent within a particular society at a particular time. It may well be, then, that, for example, M.L.King's appeal to religious principles may become less acceptable in an increasingly secularised society.

Skinner has been criticised on the grounds that authors may go beyond existing conventions in order to be original and Skinner's account does not allow for this:

"Skinner's linguistic context is in one sense too specific and in another too general. Its specificity arises from its identification with a linguistic setting that is static and determinate. It is too general in that it directs attention away from the structure and usage of the text towards the whole range of linguistic (and stylistic) conventions prevailing at a particular time." (Lockyer, 1979, pp.207)

Lockyer goes on to deploy the notion of tradition to overcome what he perceives as Skinner's problems. However, as the notion of tradition is the subject of the concluding chapter I shall not pursue it here.

Skinner is at pains to point out that the criticisms suggested above are invalid insofar as, Skinner contends, he does allow for the development of a prevailing set of established conventions and attitudes. (1974, pp.287)

However, much of the recent debate within the field of political theory has been concerned with the views put forward by Taylor and Skinner amongst others. Indeed, according to one commentator there is a certain coherence about the more recent attempts to 'reconstruct social and

political theory'. (R.Bernstein, 1976, pp.225) Bernstein argues that this coherence is contained in a particular view such that:

"Human action cannot be properly identified, or understood unless we take account of the intentional descriptions, the meanings that such actions have for the agents involved, the ways in which they interpret their own actions and the actions of others. These intentional descriptions, meanings and interpretations are not merely subjective states of mind which can be correlated with external behaviour: they are constitutive of the activities and practices of our social and political lives." (Bernstein, 1976, pp. 229)

Indeed, this particular quotation encapsulates a major concern of this thesis and the theme throughout is that civil disobedience may best be understood as part of a political practice that has to take into account the meanings of political activity for those who are involved in the practice.

However, the approach identified by Bernstein has developed out of the work of T.Kuhn (1962) and P.Winch (1958). The ideas of Kuhn and Winch, and the critiques of them, are well known and so I shall limit myself to a few general remarks concerning the possible implications for our examination of civil disobedience.

Kuhn has suggested there are no facts independent of our describing and explaining the world that would lend itself to universal agreement. Kuhn was concerned to debunk the idea of objective science and to develop the idea of a paradigm where what is to count as science depends upon prevailing conventions within the scientific community. The notion of what is to count as science is

thus dependent upon prevailing norms and values implicit in the prevailing paradigm, or way of looking at the world. The notion of a paradigm is problematic (see Bernstein, 1976) but it does raise questions concerning the 'logic of scientific discovery' and the objectivity of science. The implications for a theory of civil disobedience are that it may well be that there is nothing 'out there', as it were, called civil disobedience which exists independently of our depiction of a particular act as civil disobedience. In describing an act as such it may tell us more about the observer than the participant insofar as the observer describes an act as 'civil disobedience' rather than 'an attack upon the very foundations of democracy', for example. Likewise if there is any mileage in using the term civil disobedience it may well be that its meaning is dependent upon a particular framework of reference existing in one particular place and time but which, like a paradigm, may be overthrown. However, without wishing to apply Kuhn's notion of a paradigm to a political context (see here Pocock's 'Politics, Language and Time and my concluding chapter) it is worth bearing in mind the idea of discussions about 'civil disobedience' as a reflection of a particular time and place.

The other theorist to consider briefly is Peter Winch and in particular his notions of 'forms of life' and rule-following. Inspired by Wittgenstein's Philosophical

Investigations, Winch develops the notion of a 'form of life' where in order to understand a word we must locate it within a particular social context:

"... in discussing language philosophically we are in fact discussing what counts as belonging to the world. Our idea of what belongs to the realm of reality is given for us in the language that we use. The concepts we have settle for us the form of the experience we have of the world." (Winch, 1958, pp.15)

and also:

"... our language and our social relations are just two different sides of the same coin. To give an account of the meaning of a word is to describe how it is used; and to describe how it is used is to describe the social intercourse into which it enters." (Winch, 1958, pp.123)

The idea of a 'form of life' is such that we must understand the language and be able to use it in its accepted manner before we can properly be said to understand the 'reality'. e.g. to understand a person who is religious we must be aware of the whole mode of religious discourse and practice to be able to grasp what that person is saying. Winch has been criticised for misinterpreting Wittgenstein's notions of forms of life (R.Bernstein, 1976) and for suggesting that 'forms of life' are discrete when Wittgenstein suggested 'family resemblances'. Winch has also been criticised for his relativism i.e. it becomes impossible to step outside the 'form of life' to describe it and make comparisons between different social and political notions. (A.R.Louch, 1963)

This is not a debate that I wish to enter into for the moment. However, we do need to bear in mind:

1. The idea of words being understood within a particular context.
2. The importance of language itself.
3. The possibility that there may be different forms of life. This is important, particularly in politics which seems to draw on the language of other 'forms of life' and nowhere is this more evident than ideological language.

These points will be retrieved in later chapters. However, to conclude; in this preliminary mapping of the territory of civil disobedience I have tried to point out the difficulties that seem to be involved in the very definition of the concept. To overcome this, it seems to me, we must widen the discussion to take account of an understanding of political activity generally.

This has been one of the major concerns of recent political and social philosophy and as such an examination of civil disobedience will be located within a wider concern with the interpretation of political activity. To begin to do this we need to develop some of the points alluded to above that are concerned with the notion of what is to count as meaningful behaviour and rule-governed behaviour. The next chapter begins to do this and goes on to locate such a discussion within the context of obligations and the role that obligations play in determining our political, social and legal behaviour.

Chapter 2 POLITICAL OBLIGATION

As we saw in the last chapter civil disobedience is considered to be concerned with the relationship between the state and the individual and the limits that may be placed upon that relationship. Within liberal democratic regimes this relationship is often characterised in terms of obligations and we can usefully examine the status of obligations in order for us to clarify civil disobedience. Insofar as we are also concerned to understand the nature of political activity more generally then we are also interested in the ways in which obligations may inform our political activity. Thus before examining the concept of political obligation it is necessary to examine, in brief, the nature of obligation itself insofar as the concept of obligation is used to characterise our relationships with others and as a prerequisite to a discussion of political relations we must examine the nature of relationships in a more general sense.

Obligations and Rules

The basic premise that I wish to examine is that of the notion of individual action such that individual actions are perceived in terms of rule following. Thus to understand the nature of, say, 'A has an obligation to do x' we can refer to the idea that A's case falls under a social rule requiring individuals in such circumstances to do x. Obligations may be said to guide A's conduct if A accepts the rule requiring 'x' because A believes that

there are good reasons for supporting the rule. Even if A's conduct appears to be that of acting under an obligation the action cannot be characterised as the discharge of an obligation if the conduct is done out of compulsion, fear or habit. Here we may make a distinction between the idea of following a rule and acting out of habit, fear or coercion. Hart makes the distinction between 'having an obligation' and 'being obliged to' and it is the latter which is characteristic of acting through fear or coercion as Hart indicates in his gunman example (H.L.A. Hart, 1961). Likewise Hart makes the distinction between following a rule and mere habitual behaviour where the latter is characterised by conformity without thinking. Following Wittgenstein, it may be that the notion of following a rule is logically inseparable from the idea of making a mistake. The test of whether our actions are the application of a rule is not whether we can formulate the rule or not but whether it makes sense to speak of a right and a wrong way of doing things. When that makes sense it must also make sense to say that we are applying criteria in what we do, that we can evaluate what is being done and that it is possible for other people to grasp that rule and judge when it is being consistently followed. On this criterion we can distinguish rule-governed conduct from habitual behaviour in that we can recognise deviations from the pattern as somehow wrong. Such criticism that may follow of such deviation is also seen as justified. (Wittgenstein, 1972, paras.185-190)

For Hart, obligations must be understood in terms of a social rule:

"To understand the general idea of obligation as a necessary preliminary to understanding it in its legal form, we must turn to a different social situation which unlike the gunman situation, includes the existence of social rules; for this situation contributes to the meaning of the statement that a person has an obligation in two ways. First, the existence of such rules, making certain types of behaviour a standard, is the normal, though unstated, background or proper context for such a statement; and secondly the distinctive function of such a statement is to apply such a rule, to a particular person by calling attention to the fact that his case falls under it." (Hart, 1961, pp.83)

How do rules function for us? According to Oakeshott rules cannot really tell us what to do but can prescribe norms of conduct such that:

"They are conditions proper to be subscribed to in choosing performances but which cannot themselves be either obeyed or performed" (Oakeshott, 1975, pp.126)

Rules give rise to obligations but are not themselves obligations. Furthermore a rule exists in being understood and in being recognised as an authoritative prescription of conditions to be subscribed to in conduct.

"A rule is an authoritative assertion, not a theorem. It may, of course, be argued about, it may be approved or disapproved of, it may be referred to in a persuasive argument designed to justify a performance or in giving a 'ruling' about what should or should not be done, and it may be theorised in terms of its postulates, but it is not itself argumentative and (recognised as a rule) it does not invoke approval or disapproval or offer itself as a reason in a plea of justification or as a subject of theoretical inquiry. It calls only for assent in any performance to which it may relate." (Oakeshott, 1975, pp.125)

Yet rule-guided conduct involves choice among alternatives and such choices are made on the basis of directives provided by rules that we accept. We apply the rule in the light of reasons that support acceptance of the rule. It is in this sense that we distinguish our conduct from instinctive, compelled or habitual behaviour, behaviour that can be explained without the use of such concepts as choice, right and wrong, reasons for and against, should and ought.

If we undertake obligations then we generally undertake to pursue a particular course of action with respect to some other person and this undertaking may be characterised by a promise. Promissary obligation is the most explicit form of obligation and there may be others cf. the obligations a parent may have towards his/her children. However, for Searle:

"... all promises are (create, are undertakings of, acceptances of) obligations" (Searle, 1969, pp.33)

The appeal is made, by Searle, to the constitutive rule that to make a promise is to undertake an obligation. Searle makes a distinction between regulative and constitutive rules where the constitutive rule is such that to say that some person has made a promise logically implies that it ought to be fulfilled:

"Regulative rules characteristically take the form or can be paraphrased as imperatives e.g. 'when cutting wood, hold the knife in the right hand'. Some constitutive rules take quite a different form e.g. 'A checkmate is made when the king is attacked in such a way that no move will leave it unattacked'. If our paradigms of rules are imperative regulative rules,

such non-imperative constitutive rules are likely to strike us as extremely curious and hardly even as rules at all. Notice that they are almost tautological in character for what the rule seems to offer is part of the definition of 'checkmate'! That, for example a checkmate in chess is achieved in such a way that it can appear now as a rule, now as an analytic truth based on the meaning of checkmate in chess" (Searle, 1969, pp.34)

Thus, if we believe, with Searle, that all promises are obligations then we must believe, according to the constitutive rule, that we ought to fulfil our obligations since it is part of the meaning of obligations that they ought to be kept. In this sense the distinction between 'ought' and 'is' disappears since to say that for example, 'promises ought to be kept' is to give a description of what a promise is. However, Cameron (1971) makes a distinction between 'ought to' in a moral sense and 'has to' in a legal or institutional sense and suggests that Searle's 'ought to' is in fact a 'has to' and as such Searle cannot reconcile the difference between 'ought' and 'is'. R.M.Hare also criticises Searle, on the grounds that we act in conformity with the rules of a game and do not merely speak about them tautologically. Hare suggests that there must be a prescriptive element in the words that state the rule, 'ought' serves an evaluative function when used in the context of a directive of human action in that a statement that an individual ought to do a particular act seems to imply that there are good reasons for doing the act. If we ask 'Why should I fulfil my promises?', to answer that 'This is what promising means' does not seem to take us very far. It would seem that the

conceptual argument can only take us so far and no farther: we break our promises! To show that an action is consistent with a semantic rule is not to show that the action is justified. Promises, in this sense, cannot by themselves create a moral obligation but can do so only in virtue of a general agreement to keep promises. However, as Gewirth points out we may not keep to the convention at all:

"To put it schematically, from 'A has an obligation to do x' there does not logically follow that 'A ought to do x'. The reason why it does not follow is that the obligation statement may be a purely descriptive one about what is required by some institution, but the person making the statement may not himself accept the institution or its purposes as right or justified. He may therefore admit that the obligation does in fact exist as part of an institution and yet deny that the obligation ought to be carried out." (Gewirth, 1970, pp.59)

To move from the fact that we have obligations to the fact that we ought to fulfil these obligations some form of bridge is required. For Hume '... interest is the first obligation to the performance of promises' such that if we do not fulfil our obligations others will lose their trust in us and as it is in our interests to be trusted then we will fulfil our obligations.

A more common bridge that is offered is one that is moral in character:

"The only way to get from the making of a promise, or from the existence of an institutional requirement that one act in a promise - keeping way, to the claim that in all cases where the institutional requirement exists one ought (prima facie) to act in that way, is via a moral principle to the effect that one ought to keep one's promises, or at least certain of one's promises. And in general the only way to get from any

institutional requirement to what a person ought (prima facie) to do is via a moral principle to the effect that one ought (prima facie) to act in that way." (Benditt, 1978, pp.125)

This leaves open the possibility of our obligations and promises being overridden by other considerations as indeed they often are, but it does not specify any moral criteria for why promises should be kept. J Rawls (1964, 1971) develops the idea of moral criteria. For Rawls promises arise where there are rules allowing promises to be made and they take the form of constitutive conventions that exist in society and are regularly acted upon. Using the game analogy, Rawls suggests that promises, like the rules of games, specify certain actions to be performed. In the case of promising the basic rule is that governing the words 'I promise to do x' in the appropriate circumstances. A bona fide promise arises in accordance with the rule of promising but in order to make this promise binding Rawls has to introduce the idea that the practice it represents is just. In turn he introduces the principle of fidelity such that bona fide promises are to be kept. For Rawls it is essential to distinguish between the rule of promising and the principle of fidelity, the rule is simply a constitutive convention whereas the principle of fidelity is a moral principle, a consequence of the principle of fairness. This principle holds that a person is required to do his part as required by an institution when that institution is just. No moral requirements follow from the existence of institutions alone and the rule of promising does not give rise to a

moral obligation by itself. To account for obligations we must take the principle of fairness as a premise to enable us to conclude from the fact that someone made a promise to the keeping of that promise.

For Rawls, what is required for a promise to be binding is that it exemplifies a certain principle of fairness which holds that a person is required to do his/her part as defined by an institution when that institution is just i.e. satisfies Rawls two principles of justice (1971), and when the individual has voluntarily accepted the benefits of an arrangement or taken advantage of the opportunities this arrangement offers to further the individual's own interest. The main argument of the principle of fairness is, then, that it is required as an extra premise to enable us to derive an obligation from the fact that a promise is made.

The use of the convention of promising can give rise to the moral requirement to perform an action not by, as it were, creating that requirement, but only insofar as the convention of promising itself invokes the terms of a prior and more general agreement by which that convention was established in the first place. The problem here, though, as Hume recognised, is that unless the general agreement is itself explained then we are on the threshold of an infinite regress.

However, in the case of constitutive rules, the rule itself constitutes a reason for acting in the manner prescribed by the rule. It may also seem that there is no room for a distinction between a statement of the rule qua

rule and reasons for the rule or for acting in conformity with it. The notion of a reason for the rule or for accepting the rule, involves, on this account a misunderstanding. Some of the rules characterised as constitutive rules are such that individuals have an obligation to follow the rules if they have entered into an activity. Thus it is considered that if I have made a promise then I have an obligation to keep it or perform it. To describe an action, or in some cases inaction, as 'breaking a promise' is sufficient to condemn that action. It is appropriate to regard 'do not break promises' as a semantic rule governing the use of that concept and a person who does not understand this use does not understand what the concept means. But the case against 'breaking promises' does not depend upon these semantic rules, it can be said that a person's conduct has been guided by such rules to the extent that the person knows what conforming to the rule means but there must be good reasons for conforming to the rule. In this sense promises do not constitute the grounds of actions but are characteristic of a certain class of actions requiring an initial premise. For Rawls this premise is the principle of fairness and for Hume it is specified in terms of interest.

By locating the concept of a rule within a particular social practice then we may become clearer about what it is to follow a rule. Following Oakeshott (1975), a practice offers us a set of conditions that qualify actions and a systematic vocabulary in which to express

our intentions. The rules of the particular practice constitute the framework within which the activity proceeds. For Rawls there is a distinction to be made between justifying a practice and justifying actions falling within that practice. Rawls indicates that the justification of any action which presupposes a practice e.g. as with promising, must be according to the rules of the institution so that consequences can only be considered only insofar as the rules allow for this. Those engaged in a practice recognise the rules as defining, and being defined by, it. We may wish to consider that any justification must be internal to the practice i.e. we cannot justify promising in terms of something outside the practice that promises ought to be kept. Yet this does not take us far enough.

"The dependence (of promises on rules) is not in the explanation of what a promise is, but in the way the requirement to keep promises is justified. I am referring to the two-level view of its justification. First one justifies the rule, then -on its basis-those instances which fall under it" (Raz, 1977, pp.223)

The problem then is how to justify the rule:

"At the very least it cannot be denied that many rules (like many principles, values and ideals) have the more humble position of depending for validity on more ultimate considerations. The problem is how to reconcile the derivative status of rules with their relatively independent role in practical reasoning: how to combine their dependence on justifying considerations with their power as reasons for action in their own right" (Raz, 1977, pp.221)

An analysis which concludes that we are under obligations if there is a social practice according to which our intention to undertake obligations is taken as justifying demands for performance and criticisms for deviation is not a negligible analysis. Yet it fails to give an account of the concept of obligation in the practical reasoning of both the person who undertakes the obligation and of those others who may come to rely on him/her and criticise any non-fulfilment. The failure of the 'first-level' explanation can be shown by asking:

"Granted that there is this social practice in which the linguistic or quasi-linguistic act of promising gives rise to such-and-such practical expectations, reactions etc. why should I go along with the practice? Why not, at any stage along the way, break the spell?" (Finnis, 1980, pp.301)

It is always possible to ask why a particular practice should be followed. Likewise it is always possible to presuppose the existence of a practice and not question following the practice and thus 'all justification becomes internal to the system'. Finnis suggests that a fuller explanation is possible which presupposes that every person has reason to value the common good in terms of social co-operation with other individuals:

".... an individual acts most appropriately for the common good, not by trying to estimate the needs of the common good 'at large', but by performing his contractual undertakings and fulfilling his other responsibilities, to other individuals ... Fulfilling one's particular obligations ... is necessary if one is to respect and favour the common good, not because 'otherwise everyone suffers' or because non-fulfilment would diminish 'overall net good' in some impossible utilitarian computation, or even because it would set a bad example and thus weaken a

useful practice, but simple because the common good is the good of individuals, living together and depending upon another in ways that favour the well-being of each" (Finnis, 1980, pp.301)

The advantage of this explanation is that it can justify the existence of social practices as well as the particular rules of that practice without necessarily assuming the 'moral ought' from the basic premise that we live in society and are not isolated individuals. Thus, the mere fact of living in society requires that we take into consideration the rules of that society when engaged in relationships with each other.

What we have discussed so far is that, for us, the rules are expressed in terms of obligations such that the fact that we have obligations to each other is worthy of serious consideration when determining what our actions shall be. And yet, as we shall now see, attempts to locate the discussion of obligations within a political dimension does lead to problems.

Consent and Contract

There are various characteristics of the practice of promising that are used to define the nature of the relationship between the individual and the state within liberal democratic theory. In making a promise an individual deliberately undertakes some act that voluntarily creates the relationship specified as obligation. It is these features that consent theorists characteristically draw upon in their use of the promise as the paradigm for the introduction of political

obligation. The features that promises, contracts and consent all exhibit is that they are all deliberate undertakings and can be performed intentionally and knowingly. By showing, for example, that a promise was made without the realisation that in so doing an obligation is undertaken is to misunderstand the meaning of what promising entails. By using deliberate undertakings as the grounds of political obligation the consent theorist stresses the individual's freedom to choose where his/her political allegiance will be located. Political obligations cannot be inherited or unwittingly acquired and a deliberate undertaking of which promising is taken to be the most obvious example, allows consent theorists to stress the voluntary nature of political obligations.

Traditionally, any discussion concerning a consent or contract theory of political obligation has started with the theories of Hobbes and Locke and, insofar as these theorists can be said to have been major contributors to the debate concerning the nature of political obligation, it is appropriate to examine their concerns. For Hobbes the voluntary nature of obligations involves the actual surrender of rights. The obligation to obey the sovereign is the result of transferring certain rights to another:

"... The way by which a man either simply renounceth or transfereth his right is a declaration or signification by some voluntary and sufficient sign or signs that he does so renounce or transfer".
(Hobbes, 1962, ch.XIV, pp.148)

For Hobbes, the promise becomes a promise to obey and the authorisation of another to act on our behalf:

"For in the act of our submission, consisteth both in our obligation and our liberty, which must therefore be inferred by arguments taken from thence; there being no obligation on any man, which ariseth not from some act of his own: for all men equally, are by nature free. And because such arguments, must either be drawn from the express words, I authorise all his actions, or from the intention of him that submitteth himself to his power, which intention is to be understood by the end for which he so submitteth; the obligation, and liberty of the subject, is to be derived, either from those words, or others equivalent; or else from the end of the institution of sovereignty, namely the peace of the subjects within themselves, and their defence against a common enemy". (Hobbes, 1962, ch.XXI, pp.209)

Initially then, the individual authorises the sovereign to act on his/her behalf and this obligation to obey continues just so long as the sovereign is able to provide the benefits to be gained by the institution of sovereignty.

For Locke, the consent of the governed is the source of the duty to obey laws. This obligation to obey is analogous to the obligation of a person who has made a promise, that is, who has agreed voluntarily to perform a certain act. Locke's central notion is explicit voluntary consent; in leaving the state of nature people agree to live together in a political community and accept the decisions of those placed in positions of authority. Locke qualifies his position by suggesting that after originally consenting to become a citizen the individual becomes bound by the decision of the majority. Locke points out that the decision to form a political community

is, and must be, unanimous, but that it would be totally unrealistic to expect that all decisions subsequently made by that community would be unanimous. Because of the impossibility of continuing unanimity the laws must be made by the majority. Locke argues that the community is constituted by the consent of the individuals within it, because it is necessary that the community as one body move in one direction or another and because it must choose between conflicting policies then:

"...it is necessary the Body should move that way whither the greater force carries it, which is the consent of the majority". (Locke, 1960, pp.375, 2nd Treatise para.96)

The doctrine of majority consent offers a way of making the legitimacy of government depend on consent, and at the same time avoiding the consequences of requiring unanimous consent. However, if for Hobbes and Locke a government is only legitimate if all citizens have consented then all citizens have obligations if the majority give their consent. The paradoxical feature of this situation is that it entails that citizens may be said to have obligations to a government to which they have not personally consented, the personal consent of those in the majority will be sufficient to bind them.

Of course one of the standard embarrassments of consent theories is that accepting them seems to lead to the conclusion that very few people have political obligations. A theory that aims to distinguish between legitimate and illegitimate government and to suggest that

obligations are incurred deliberately and voluntarily rather than being imposed, has the consequence of rendering virtually all governments illegitimate if consent is the criterion of legitimacy. Faced with this dilemma then Locke introduces the notion of tacit consent:

"... The difficulty is, what ought to be look'd upon as a tacit Consent, and how far it binds, i.e. how far anyone shall be looked on to have consented, and thereby submitted to any Government, where he has made no Expressions of it at all". (Locke, 1962, pp.392 2nd Treatise, para.119)

Tacit consent can be understood or inferred by the observer, quite independently of the subjects intention to consent or awareness that he/she is in fact consenting. This is borne out by Locke:

"And to this I say that every Man that hath any Possession or Enjoyment of any part of the Dominions of any Government doth thereby give his tacit Consent, and is as far forth obliged to Obedience to the Laws of that Government during such Enjoyment as any one under it; whither this his Possession be of Land to him and his Heirs for ever, or a Lodging only for a Week; or whether it be barely travelling freely on the Highway; and in Effect it reaches as far as the very being of any one within the Territories of that Government." (Locke, 1962, pp.392, 2nd Treatise, para.119)

Here the argument has moved away from the deliberate and voluntary commitment required for an obligation to exist to making this obligation dependent upon benefits received wherein agreement to the government is said to be shown. It may make sense to suggest that the receiving of benefits implies duties but this is quite different from explicitly and voluntarily undertaking an obligation. As

with Hobbes, an individual's intentions, as a member of the polity, to enjoy the benefits of that polity sufficiently binds the individual to the authority that makes these benefits possible. The obligation is more or less unconditional irrespective of whether the benefits are many or few. The individual's obligations continues just so long as the sovereign continues to deliver the goods and no longer. According to this argument, then, government performs a set of functions that are necessary, and desirable, to enable us to live in political society, and our obligations to it depend upon what the government does, or how well it performs. Since obedience by subjects is essential for the carrying out of these functions than we ought to obey the government. Our obligation can be seen as similar in nature to the obligation to pay the debt for goods received and the price is obedience.

Hobbes presented our obligations in more or less absolute terms: through the contract individuals bring an absolute political obedience into being. They give the sovereign the right to do everything necessary to secure their protection and having brought the sovereign into existence it becomes absurd for individuals to hinder the sovereign's will. It may be considered that Hobbes' concept of a contract is such that it does not give rise to an obligation but is an exchange; during the social contract individuals exchange one status for another where leaving the state of nature brings in unquestioning political obedience. In civil society the commands of the

sovereign are the 'publique conscience' and individuals cease to have the right to judge whether actions demanded of them are good or bad.

Thus, for Hobbes the concept of disobedience to the sovereign is problematic. For Hobbes there is no spiritual authority to challenge the authority of the sovereign and Hobbes excludes the notion of disobedience to the sovereign on religious grounds and Hobbes further suggests that subjects cannot challenge the sovereign on the grounds that the sovereign has broken the social contract or acted unlawfully. The subjects are, in effect, the authors of sovereign commands so they cannot claim to have been injured by them since "to do injury to one's self is impossible". (Hobbes, 1962, ch.XVIII, pp.180) The willing man cannot be wronged since:

"Whatsoever is done to a man, comformable to his own will signified to the doer, is no injury to him."
(Hobbes, 1962, ch.XV, pp.161)

Moreover, in civil society it is the sovereign who brings a definitive interpretation of what is 'just' or 'unjust' into existence through his commands. Hobbes excludes the very possibility of a just or unjust law.

It would appear, then, that any and all commands issued by the sovereign are authoritative and the fact of authority means that the citizen has an obligation to obey. For the citizen to consider, say, the utility of a command is a mistake, as it would be for the citizen to consider anything other than whether or not the command is

authoritative. However, Hobbes does find several types of commands that the subject can sometimes refuse to obey including:

"... to kill, wound or maim himself; or not to resist those that assault him." (Hobbes, 1962, ch.XXI, pp.209-210)

This is where Hobbes draws the limits of authority.

From a different perspective, Hume argues that our obligations are dependent upon the provision of goods and services but wishes to maintain that our political obligation is not absolute. Hume argues that political obligation and the obligation to keep promises are derived from the same kinds of social benefits received; the interest that forms the basis of our obligations to obey the government is the security and protection that it provides. Since the interest forms the "immediate sanction of government" then, for Hume, in the 'Treatise of Human Nature'.

"... obligation lasts just as far as the provision of the protection"

and

"... whenever the civil magistrate carries his oppression so far as to render his authority perfectly intolerable, we are no longer bound to submit to it. The cause ceases; the effect must cease also." (Hume, 1970, pp.111)

Yet Hume echoes Hobbes in suggesting that resistance to civil authority is a rare and serious matter and that:

"...in the ordinary course of human affairs, nothing could be more pernicious and criminal". (Hume, 1970, pp.113)

For Hobbes we are released from our obligations only in the case of the complete breakdown of sovereign authority and where we are again at liberty to submit ourselves to a new sovereign. However, for Hobbes, disobedience is rarely justified since any polity is preferable to anarchy and civil war.

Hume observes that:

"We ought always to weigh the advantages which we reap from authority against the disadvantages, and by this means we shall become more scrupulous of putting into practice the doctrine of resistance. The common rule requires submission; and it is only in cases of grievous tyranny and oppression that the exception can take place." (Hume, 1970, pp.113-114)

Note here the affinity with the arguments of more recent opponents of civil disobedience who suggest that civil disobedience is not justified in a democratic regime where the regime is just and lawful channels exist for the expression of opinions. Thus, the Attorney General in the Official Secrets Trial of February 1962 suggested that:

"If many other bodies did this (civil disobedience), if they succeeded in their efforts, it would be an end, would it not, to the rule of law. It would lead to the end of democracy, to anarchy, and possibly dictatorship ..." (in Driver, 1964, pp.168)

However, Hobbes, for example, argues that there are circumstances in which the subject can, without injustice, refuse to obey an authoritative command. But because the command is authoritative the sovereign may, without injustice, punish the refusal. The civil disobedient also argues that it is justifiable to disobey admittedly

authoritative commands and he/she may admit the sovereign's right to punish the disobedient. The civil disobedient, however, goes beyond Hobbes in insisting that the disobedient must willingly submit to the punishment that is decreed. In willingly accepting the penalty for disobedience then it does, according to M. L. King and those who shared his views, show a fundamental respect for the law. Hobbes, on the other hand, suggests that there are some penalties to which the subject is not obligated to submit. The subject resists without injustice and then does battle with the sovereign. In a Hobbesian world civil disobedience can only be seen as revolution or sedition; civil disobedients make exactly the kind of claim that Hobbes has no place for since the civil disobedient is a subject who, from the Hobbesian perspective, deliberately flaunts the authority of the sovereign. It is typically argued that civil disobedients must willingly accept punishment to distinguish themselves from the revolutionary or the criminal and in so doing affirm that they are acting in good faith out of a sincerely held conviction that a serious injustice exists. At the same time they are demonstrating that although they have broken the law they are still allegiant subjects who wish to uphold and not undermine authority. Hobbes would regard the disobedient as subversive no matter how willingly he/she embraced punishment or how 'civil' the act of disobedience was purported to be.

Locke concludes that if the magistrate believed his laws to be for the public good and his subjects persist in behaving to the contrary then God alone can be the judge between them;

"And where the Body of the People or any single Man, is deprived of their Right, or is under the Exercise of a power without right, and have no Appeal on Earth, there they have a liberty to appeal to Heaven whenever they judge the Cause of sufficient moment." (Locke, 1962, pp.426, 2nd Treatise, para.168)

Provided the government discharge its trust it cannot be disobeyed and overthrown. Locke's theory allows for two possibilities - either people go about their affairs under the protection of a properly constituted government or they are in revolt against a government that has become tyrannical and thus forfeits its right to obedience when consent can no longer be inferred and the government can no longer be termed civil.

Throughout the Second Treatise Locke argues that if governments are unjust then their subjects have a right to use force against injustice:

"... where an appeal to the Law, and constituted Judge lies open, but the remedy is denied by a manifest perverting of Justice and a barefaced wrestling of the Laws, to protect or indemnify the violence or injuries of some Men or Party of Men then it is hard to imagine anything but a State of War." (Locke, 1962, pp.322, 2nd Treatise, para.20)

For the moment, however, I propose to leave further discussion of this aspect of Locke alone as I deal with these ideas in a later chapter.

The problems associated with any discussion of the arguments of Hobbes, Hume and Locke are concerned with the possibility of giving a general justification of obligations to the state. The particular occasion of the disobedient act with which the civil disobedient is concerned can only be seen as an attack upon the state from the perspective of a Hobbes or a Locke, where they differ is in what may count as a justification for seeking to overthrow the authority of the state.

However, it was suggested earlier that because of the problems associated with an account of political obligation grounded in the explicit consent of citizens then the notion of tacit consent was introduced. Tacit consent is, for Locke, given through certain acts and he stresses the 'enjoyments' of certain benefits granted by the state as being the sorts of acts that generate consent. These enjoyments are seen by Locke as implying consent in that it would be wrong for us to accept these benefits and to refuse to obey the government. For Locke using the public highways or owning land are seen as implying consent. This may seem, at first glance, to be implausible since it would appear that the ground of political obligation now rests upon unimportant 'acts of enjoyment' such as travelling on the public highways. Of course, Locke was clearly aware that when an individual owns land or uses the public highways we do not just enjoy these simple benefits. More importantly, we enjoy the

benefits of the rule of law, police protection etc and because these benefits are unavoidable for anyone within the government's effective domain, Locke recognises that:

"The very being of anyone within the territories"

of the government will serve quite as well as any of the more specific enjoyments he mentions; we receive the benefits of government simply by being within:

"... all parts where of the force of its Law extends."
(Locke, 1962, pp.394, 2nd Treatise, para.122)

It is worth posing the question, 'How do we not tacitly consent?' and it begs the question of the 'free rider' problem. However, it would appear that the political obligation to be derived from tacit consent may not arise from such simple benefits as have may at first appeared. Nevertheless, our original consideration was that for genuine consent to have taken place it must be deliberate and voluntary and clearly no such choice exists for most people. The situation could exist, as Socrates informs us in the 'Crito', where:

"... We openly proclaim this principle: that any Athenian, on attaining to manhood and seeing for himself the political organisation of the State and us its Laws is permitted if he is not satisfied with us, to take his property and go away wherever he likes On the other hand if any one of you stands his ground when he can see how we administer justice and the rest of our public organisation, we do hold that by so doing he has in fact undertaken to do anything that we tell him; ... " (Plato, 1974, pp.92)

In this case each citizen would know that he had consented to the government's authority and would presumably heighten the awareness that the individual was indeed a member of a political community. As long as the situation makes clear that there remains a genuine alternative to residence and hence consent, then we can say that consent has been given rather than inferred. Yet we must take note of Hume's point, in 'Of the Original Contract';

"Can we seriously say that a poor peasant or partisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires? We may as well assert that a man, by remaining in a vessel, freely consents to the dominion of the master, though he was carried on board while asleep, and must leap into the ocean and perish the moment he leaves her."
(Hume, 1970, pp.263)

Hume's argument here foreshadows Hart's distinction between 'having an obligation' and 'being obliged to', referred to earlier.

In general, tacit consent seems to meet the same fate as express consent in trying to explain our political obligations. In order to present a general account of political obligation the theory has to show that all individuals within a political community have consented either explicitly or tacitly, to the authority of the government and this would not appear to be the case. In his dedication to personal consent as the ground of political obligation Locke considers the enjoyments of the benefits of government as tacit consent but it may be that

Locke confuses the notion of implied consent with signs of consent insofar as such enjoyments are not normally deliberate undertakings.

Flathman (1972) suggests that for a person to consent he/she must know what is being consented to and intend to consent to it and to communicate this intention to the person or persons to whom the consent is given. Is 'enjoyment of benefits' communicating the intention to consent? A more plausible suggestion might be to examine what can be taken as a sign of consent in a more positive sense i.e. in a democracy, for example, voting might be taken as a sign of consent to the system such that by the very fact of voting we accept the system and abide by its rules. Thus if our candidate does not get elected we do not call for another election.

Benefits Received

However, more recent accounts of the 'benefits received' argument have wished to introduce some principle of obligation because of gratitude or repayment or fair play and the most influential account here is the one developed by John Rawls. Rawls presentation of the principle of fair play is:

"The principle of fair play may be defined as follows. Suppose there is a mutually beneficial and just scheme of social co-operation and that the advantages it yields can only be obtained if every one or nearly everyone co-operates. Suppose further that co-operation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by co-operation are, up to a certain point, free: that is, the scheme of co-operation is unstable

in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefit by not co-operating." (Rawls, 1964, pp.9-10)

What is important in this account is the idea that benefits have been positively accepted and not merely received. Rawls wishes to stress the necessity that the benefits be voluntarily accepted and he does not see mere benefaction as sufficient to generate an obligation. This idea does away with problems associated with the Lockean position that tacit consent can be inferred through residence. The implication of voluntary acceptance is that the beneficiary actively participates within the scheme and these participants will have obligations towards the scheme. The benefits that may accrue to non-participants do not bind them to the principle of fair play.

Intuitively, at least, then this seems to make sense: an individual who joins a social club receives benefits such as cheap drinks enabling the individual to spend more money, say, on family and friends who thus benefit from the individual's membership. However, it would seem absurd to suggest that the friends and relatives have obligations to the club even though they may indirectly benefit from it. For Rawls, the principle of fair play accounts for the obligations of those whose active role in the scheme consists of accepting the benefits of its

workings. An individual who has merely received benefits from the scheme has exactly the same status as those who remain unaffected by the scheme.

Of course, there is a problem in distinguishing between participants and 'outsiders' particularly within the context of a political community. Here we face the immediate question of what is to count as being a member of a political community, of distinguishing participants from non-participants. We are all born into political communities with little opportunity of positively accepting, or rejecting, the benefits of political life. While it is clear that most citizens in most states receive benefits from the workings of their political communities it is difficult to imagine how these benefits might be voluntarily accepted. The benefits that may flow from government such as the provision of public highways may be termed open benefits or public goods and it is difficult to see how these may be accepted in Rawls' use of the term. It will be difficult to be certain about the acceptance of benefits in actual cases but on the notion of acceptance proposed by Rawls then this would seem to involve our having had certain attitudes and beliefs about the benefits we have received. Among other things, benefits flow from a scheme involving co-operation and are not there free for the taking. Also the benefits may be contrasted with the burdens of such a scheme. For example, we may ask to what extent are we prepared to pay a high rate of income tax if we do not value the benefits of, say, a health or education system?

Approached from a different perspective, Rawls also wants to argue that only when the scheme is just do any obligations arising from the notion of fair play come into existence. The justice condition holds that a person is obliged to do his/her fair share within the scheme if there has been a fair allocation of the benefits. The corollary of this is that a person ought not to have to share equally in supporting a scheme that treats him/her unjustly. If we understand the notion of a fair share as a share of the total burden proportionate to the share of the total benefits allocated to the individual then anyone who accepts any benefits from a co-operative scheme is bound to do his/her fair share. Each person is bound to co-operate to the extent that he/she is allowed to benefit from such a scheme; thus, those who are allocated the largest share of benefits carry the largest share of burdens and even those allocated a small share of the benefits are bound to take on a small share of the burdens. This seems to entail that the better off may support unjust schemes which will favour them and the more discriminatory the scheme the more they support it; at the same time those who receive small shares of the benefits are still bound to co-operate with the unjust scheme.

However, if we remember that benefits must be accepted in a strong sense in order for an individual to be bound under the principle, the unfairly treated have the option of refusing to accept benefits and thus have no obligation to support a scheme which treats them unfairly. The idea, then, is that only if they willingly accept the

scheme and its benefits are participants bound to bear the burdens of co-operation and only then in proportion to the benefits allocated to them. Yet we come across the problem of specifying, particularly within a political community, of what constitutes a benefit other than public goods. Nowhere are they specified by Rawls.

The account of political obligation which utilises the principle of fair play fails, partly because of the difficulties involved in envisaging political communities as co-operative schemes and partly because citizens do not generally seem to have accepted the benefits of government. Rawls took note of these problems and in his later work, *A Theory of Justice*, he modifies his account of the principle of fair play and it becomes the principle of fairness. While Rawls continues to accept that the principle may lead to obligations for those who take special advantage of the benefits of government, such as those who hold public office, he denies that the principle of fairness obligates citizens in general:

"Citizens would not be bound to even a just constitution unless they have accepted and intend to continue to accept its benefits. Moreover, this acceptance must be in some appropriate sense voluntary. But what is this sense? It is difficult to find a plausible account in the case of the political system into which we are born and begin our lives." (Rawls, 1971, pp.336-337)

And Rawls concludes that there is no political obligation for citizens in general. What is more important for Rawls is the notion of a political duty: if the basic structure of society is just then everyone has a natural duty to

support this society. The natural duty of justice binds each member of the community to support and to further the just political institutions of the community. It binds each member and provides a general account of political duty in that all members of polities whose basic structures are just are bound equally under it irrespective of individual performances, benefits etc. Individuals living under unjust political regimes are not, according to Rawls, bound at all. Whatever political obligations that citizens have then these merely support the political duty of the citizen. Rawls considers that it is only those individuals who are more able to gain political office and to take advantage of the benefits offered by the system that have obligations as distinct from duties.

However, what is this sense of justice that Rawls refers to? Rawls intends establishing certain principles of justice that are the rational choice of individuals placed in an hypothetical situation where they are ignorant of their personal attributes and their places in society. Rawls hopes to show that the principles so chosen would be in agreement with our intuitive judgements about justice and that these principles can be adopted as the public conception of justice within society. The principles that Rawls establishes are: firstly, that each person is to have an equal right to the most extensive basic liberty that is compatible with a similar right for others and, secondly, that social and economic inequalities are to be arranged so that they are both to

the greatest benefit of those with least advantages and attached to offices and positions which are open to all under conditions of the equality of opportunity. Rawls imagines individuals in the position of a social contract setting up a society, deciding on a principle that will specify the basic structure of political arrangements that will, in turn, determine the basic rights and duties of its members. These individuals are to decide behind a 'veil of ignorance' such that they know nothing about their own eventual prospects under such a scheme. Such individuals would not, according to Rawls, adopt the utilitarian principle of maximising either total or average satisfactions since this might involve any one of them ending up with less benefits than the others. On the contrary, our hypothetical individual will agree on a scheme which would benefit all and in which inequality is to the advantage of those who are worst off. In fact the principles that would be agreed upon are Rawls' principles of justice.

Despite Rawls work receiving much acclaim as one of the most important works in political theory for many years, it has been subject to critical appraisal. In brief, Lukes (1977, ch10) asks who are these individuals that Rawls envisages behind the 'veil of ignorance' and concludes that they are none other than modern, Western, liberal, individualistic men and thus any principles that they adopt will be culturally specific. Thus Rawls offers us not a theory of justice but a theory of liberal

democratic justice. Similarly in advocating a social contract then Rawls is open to the charge that is levelled against social contract theories in general:

"The liberal social contract is precisely what the words imply - a contract not a promise. It is a contract that embodies an exchange of security for obedience, but the contract is then presented as a promise, and the hypothesis of political obligation in the liberal democratic state begins its long history."
(Pateman, 1979 A, pp.170)

We are not so much concerned with Rawls' methodological assumption as with his attempt to provide an account of our obligation to the state. For Rawls we are:

"... to comply with and to do our share in just institutions when they exist and apply to us." (Rawls, 1971, pp.334)

However, we need, with Rawls, some voluntary act committing ourselves to these institutions so that they 'apply to us' in a strong sense. In the case of Rawls it looks as though it is only those individuals who have done some voluntary act to generate political obligations who will be bound under the duty of justice. This means that no more citizens will be bound to the state under Rawls' duty of justice than would be under the more traditional accounts of political obligation discussed above; accounts which Rawls himself rejects.

However, Rawls' duty of justice binds each member of the political community to support just institutions, and when laws and policies deviate from justice then an appeal

to the community's sense of justice is possible. This condition is presupposed in undertaking civil disobedience where the latter is, for Rawls:

"... public non-violent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government." (Rawls, 1971, pp.364)

For Rawls, civil disobedience is a political act in that not only is it addressed to those in political power i.e. the majority in a democracy, but also because it is an act that is 'guided' and 'justified' by political principles; these principles are, for Rawls, the principles of justice which guide and regulate the institutions of the community so that:

"In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines, though there may coincide with and support ones claims: and it goes without saying that civil disobedience cannot be grounded solely on group or self interest. Instead one invokes the commonly shared conception of justice that underlies the political order." (Rawls, 1971, pp.365)

The first consideration is that in offering justice rather than individual morality or religion as a justification for civil disobedience then is Rawls merely telling us that this is the appeal that he happens to find more persuasive than any other if it is the case that justification, as opposed to explanation, is concerned to persuade us of the rightness of that particular view? Secondly, what is this 'commonly' shared conception of justice? As indicated in the previous chapter it may well be that by appealing to some commonly shared conception of

justice then we are in the business of trying to legitimate a particular range of actions that may otherwise appear untoward. The civil disobedient may attempt to manipulate an existing vocabulary or, by describing a law as 'unjust' for example, may challenge the critic of civil disobedience to reconsider his/her expression of disapproval by the use of such emotive terminology. It seems to me that it is, here, difficult to determine exactly what a common conception of justice is.

For Rawls, civil disobedience is a 'form of address' to the sense of justice of the community and he does not allow the kind of pressure to be exerted upon the state that Gandhi, for example, advocated through non-cooperation. Rawls confines civil disobedience to instances of substantial and clear injustice and assumes a state of near justice where all share the common principles of justice and respond to appeals to the general sense of fair play. But if this is the case why should protestors break the law at all? Why not just point out to the authorities that certain clear and substantial injustices do exist? Rawls assumes that before civil disobedience is resorted to then:

"... The normal appeals to the political majority have been made in good faith and that they have failed. The legal means of redress have proved to no avail... The existing political parties have shown themselves indifferent to the claims of the minority or have proved unwilling to accommodate them. Attempts to have the laws repealed have been ignored and legal protests and demonstrations have had no success."
(Rawls, 1971, pp.373)

As Haksar (1976 A) has indicated, if the majority is so insensitive to such appeals from individuals who are suffering from clear and insubstantial injustices, how can they be said to be in a state of near justice? Civil disobedience is only possible for Rawls where the majority is capable of lapses from justice.

For Rawls civil disobedience is an attempt to formulate the grounds upon which legitimate democratic authority may be dissented from in ways that, although contrary to some law, express 'fidelity to the law' and appeal to the fundamental political principles of a democratic regime.

More generally, it would appear that there are problems in trying to provide a general account of political obligation in the theorists we have looked at so far. Because political obligation is seen in this general form then any disobedience is seen as an attack upon the state itself. Thus, for Locke and Hume the individual may be released from his/her obligations to obey the state only when the whole of government becomes intolerable. The concern is, then, with revolution rather than with the more limited concept of civil disobedience and because of this 'all or nothing' approach to political obligation, then civil disobedience, we can surmise, would be ruled out of court.

Furthermore, obligation was seen to depend upon the receipt of certain benefits. For Locke the giving of tacit consent consisted precisely in the enjoyment of the benefits provided by government. The significance of the

benefits of government to political obligation lay in the fact that their receipt by a citizen constituted consent to the authority of the government. From the perspective of the 'fair play' account, the acceptance by a citizen of the benefits of government was construed as the acceptance of benefits accruing from the sacrifices of other participants in a co-operative scheme. Considerations of fair play are supposed to bind citizens who accept these benefits to do their share in the polity. Yet in the absence of anything resembling consent to the government then the absence of benefits from the rule of government would signify that the obligations to government are nil. Murphy suggests that:

"I am inclined to think that those people who are systematically excluded from the benefits of a society do not have any moral obligation to obey that society's laws as such..." (Murphy, 1970, pp.42)

Whether moral obligation is the same as political obligation or whether there can be a prudential obligation is a moot point. However, Murphy has in mind the position of minority groups who are denied the benefits of government and the unequal position of certain groups to benefit from government was explicit in the Kerner Commission on Civil Disorders in the U.S.A. Of course, the terms within which the discourse concerning political obligation has traditionally been conducted has only included certain groups within society anyway. Thus it was, for Locke, only those individuals who had a stake in the political system i.e. property owners, who qualified

as citizens. This was reinforced by the notion that those who did not own property were, in a sense, legally non-persons as they had nothing to make contracts with. The concept of citizenship, who to include and on what grounds, changes over time. Traditional liberal theory, for example, suggested that a government based on universal suffrage could disrupt the social order by giving excessive power to those with no stake in government. Instead of regarding the vote as a natural right which an individual possessed by virtue of belonging to a particular polity, it may be seen as a privilege which has to be earned by displaying proof of competence to judge, or take part in, the activities of government.

However, all the above deliberations concerning the question of the grounds from which political obligation may be said to spring are ruled out of court by more recent theorists and it is to the theories based upon conceptual analysis and associated in particular with the work of H.Pitkin, T.McPherson and M.Macdonald that I turn to in the next section.

Conceptual Analysis

From the point of view of the conceptual analyst then to ask 'Why should I obey the state?' is a meaningless question. Traditionally this sort of question has been asked when inquiring into what our relations to the state should be, what our obligations to the state are or what is the authority of the state based upon. These sorts of inquiries are considered to be misconceived. Why?

According to those who espouse the approach of conceptual analysis then living in society involves the acceptance of rules and, contrary to the arguments of consent or contract theorists, we are born into society as non-members, as it were, and become members only by learning some of the norms, standards and conventions of society. We do not agree contractually to do so but, rather, we grow into them and the whole question of society as natural or artificial is seen as an unreal one. The point is that we do live in society however we may have supposed this to have come about and belonging to society involves the acceptance of rules. Our concepts of promises, contracts or obligations are learned, not chosen in a vacuum. Understanding what it is to be social would be impossible unless we understand what it is to have rights and obligations and vice versa. Having obligations is inseparable from living in society and the fact that we have obligations is therefore not an empirical fact which requires an explanation but is an analytic proposition. Thus Hart considers claims such as 'N has an obligation to do x' are to be considered as claims to the effect that N falls under a social rule which directs people in such circumstances to do x. Any general question of the form 'Why should we accept obligations?' is thus misconceived since having obligations is part of what living in society means. Similarly, 'Why am I obligated to obey the government?' is seen as a senseless question. Consider McPherson's view:

"To refer to something as the government is sometimes a way of saying that it has authority. That is part of what we mean by authority. Now to hold that some person or body has authority is to hold that he or it ought to be obeyed. This again is part of what we mean by authority i.e. authority as opposed to mere power. On this interpretation of government it would be pointless to ask 'ought we obey the government?', for to call something the government is precisely to imply that it ought to be obeyed" (McPherson, 1967, pp.59)

Thus, a person has no choice of whether to acknowledge that the government, in general, ought to be obeyed or not. If we understand government to mean that which has political authority in the state then it follows that if someone is a citizen of a given state then he/she should, logically, obey the government of that state. This is a very large part of what is meant by being a citizen of a state.

On the individual level, authority, by its very nature, arises in connection with social practices which assign roles to people such that in some roles the giving of orders constitutes the appropriate behaviour while in others obedience to these commands is the appropriate response. A having authority over B, then, is simply a matter of A and B occupying certain roles, vis a vis each other, defined by certain rules governing a social practice in which they are both participants. Nothing more, nor less, than this is entailed by the claim that A has authority over B: no justification is required. Note that it takes the form of Searle's constitutive rule,

discussed earlier, such that 'x counts as y'. The rule seems tautological in character since what the rule seems to offer is part of the definition itself. Thus Pitkin:

"It is part of the concept, the meaning of authority, that those subject to it are required to obey, that it has a right to command." (Pitkin, 1966, pp.48)

On this account to call something a legitimate authority is to imply that it ought to be obeyed. It is held that we cannot maintain that this government has legitimate authority over us and that we have no obligation to obey it:

"What it does not make sense for a justification of is the existence of obligations in general for that we are involved in obligations is analytically implied by membership of society or societies. We may wonder whether the government is right to require this or that thing of us, but we cannot (logically cannot) dispute that membership of political society involves obligations to government." (McPherson, 1967, pp.64-65)

The notions of contract, consent, divine right etc. have been introduced in the past to explain and justify political obligations that, on the conceptual account, do not need such justifications. This then is the general form that the conceptual argument takes where it is considered to be incoherent to detach the concepts of 'society' and 'political society' from those of 'obligations' and 'political obligations'. To ask the question of whether or not there could be a political society without political obligations is to ask a meaningless question. If, we assume for the moment, that this point can be accepted then some of the conclusions

that have been drawn from it are more problematical. The claim being advanced by McPherson is not just about the broad conceptual implications of notions such as 'political society' but it is also a claim that is being made about specific forms of government. What is being argued is that it is meaningless to ask questions about political obligation with respect to particular forms of political institutions, especially those of the liberal democratic state. This is the nature of the critique that is offered by C. Pateman (1979 B) who argues that the general terms of the conceptual approach say nothing about the actual form of political institutions and yet the argument is held to be relevant to our political situation today. The absurdity of supposing that political obligation is something that we might not have had is held to refer to the obligation to an historically specific form of political institution, namely the liberal democratic state. McPherson writes that his arguments are intended to apply to such an institution and it is assumed that there are no general questions to be raised about the legitimacy of the liberal democratic state. Thus, Pitkin's rhetorical dismissal of such questions as 'flying in the face of common sense':

"Surely one feels, if the present government of the U.S. is not a legitimate authority no government ever has been." (Pitkin, 1965, pp.994)

There seems to be confusion here between the words 'authority' and 'legitimacy' and the concepts of 'authority' and 'legitimacy'. If we wish to know the

definition of a word we may look it up in a dictionary; but to understand its meaning in a particular context, in this case that of the liberal democratic state, we must examine the tradition of usage within the context of the particular practice that it takes part in. The form that legitimacy, authority or obligation take may be arbitrary in the sense that different forms of political life have different grounds for what is to count as, say, legitimate and what is not and these will be internal to that form of life. We cannot justify choosing criteria to assess the validity of a claim outside of the practice itself but we can understand what is to count as legitimate within a given practice. From one perspective, "obey the government" may be a semantic rule, but to understand the rule we must locate it within the social and political practices of which they are an integral part.

However, according to Pateman, what it appears is being argued by McPherson and Pitkin is that any given discussion of political obligation, if it is to be meaningful, must start from the assumption that we do have political obligation. Given this starting point then a specific form of political institution does appear to be unproblematical; it ceases to be something that requires understanding and becomes a fact about the world, a fact that we have to accept in any discussion of politics:

"Any argument that moves straight from the conceptual connection between "being a member of political society" and "political obligation" to conclusions about our obligations to specific institutions is stretching purely conceptual analysis beyond its proper limits. To argue from "being a member of

political society" directly to "having a political obligation to the (liberal democratic) state" is to make the implicit assumption that "political society", "government" and "the state" all imply each other and that there is a logical, not just an empirical connection, between the notions of political society and the state." (Pateman, 1979 B, pp.223-224)

Is there any logical objections to government conceived in terms of institutional arrangements that relate to political affairs that are different in form from those of the modern liberal democratic state? Given the fact of a government it may be allowed that there is some kind of obligation to it but does it necessarily follow from the concept of society that there must logically be a government particularly in the form that we understand and know it? Presumably those of an anarchist persuasion might wish to deny this and it may well be that there is no good reason to suppose that social life is impossible in the absence of anything like the state.

In a recent discussion paper J.Horton examines the case for the philosophical anarchist response to the problem of political obligation. The position advocated by the philosophical anarchist, such as R.P.Wolff (1975), is, according to Horton, one that denies any special moral relationship between political society and its members such that the notion of membership is deprived of any moral content. Not only that but Wolff tries to argue that political obligation is incompatible with the concept of individual autonomy such that an adequate account of political obligation in terms of the self-assumed obligation of the consent theorist is not possible. The

philosophical anarchist would argue that no such choice has ever been made in terms of voluntarily assuming obligations to the state. However, according to Horton:

"... That conclusion would follow only if political obligation could plausibly be understood only as a self-assumed obligation and I shall try to suggest later that this is not the case. Rather it will be contended political obligation is best understood in the context of what it mean to be a member of a polity, and that membership of a polity is not usually, something that is chosen." (Horton, pp.7)

In developing the concept of membership Tussman (1960, pp.24-29), for example, considers that we can acquire membership by accepting the authority of the government and such membership is voluntary in character such that there is a recognition of some common or shared concern with other individuals and also a recognition that individual interests constitute only a small part of some wider interest. However, as we have suggested above with the analogy of membership of a club and benefits received, to what extent, in the absence of anything like a commitment to voluntarily join the club, can obligations be inferred? Of course by using the notion of deliberate undertakings as the grounds of political obligation then consent theory might include, according to Simmons (1979, pp.70), two very desirable features: firstly it maximises the idea of individual freedom, crucial to a liberal account of politics, for the individual to choose his/her own political allegiance and secondly, the model of the promise lends clarity and credibility to a theory of political obligation. We might also add a third where the

state may require exclusivity so that our obligations are prima facie to the state. However, as Walzer (1970) has pointed out, we may have other commitments. Walzer makes the point that as citizens qua citizens we may have as our point of reference the political community but as individuals we may have other references, other memberships of other groups which may, on occasion, come into conflict with the commitment to the state. These groups may be within the state e.g. family, community, region or outside the state to groups such as tribe, race, religion or in some cases the whole of humanity. [Note here the commitments of the Peace Movement who argue that not only do they have obligations to the whole of humanity but also to future generations]. When obligations to different groups may come into conflict then, Walzer argues, we may have a duty to disobey:

"The duty to disobey (as well as the possibility of 'selling out') arises when obligations incurred in some small groups come into conflict with obligations incurred in a large more inclusive group, generally the state." (Walzer, 1970, pp.10)

and Walzer goes on to argue that:

"The disobedience of the members of such groups will be intermittent and limited. Such disobedience does not in fact challenge the existence of the larger society only its authority in this or that case or type of case or over persons of this or that sort. It does not seek to replace one sovereign power with another, only to call into question the precise range and incidence of sovereignty. This is not revolution but civil disobedience, which can best be understood. I think, as the acting out of a partial claim against the state." (Walzer, 1970, pp.11)

One of the themes running through the work of Walzer is the idea that political obligation need not be the same for everyone, although:

"... 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...."

Although he adds the rider that:

"... so long as their disobedience of laws or legally authorised commands does not threaten the very existence of the larger society or endanger the lives of its citizens." (Walzer, 1970, pp.16-17)

However, what Walzer has achieved is, I think, to change the forms of political obligation from one that traditionally conceives of political obligation as vertical in nature to one that sees political obligation as horizontal in nature, i.e. obligation seen in terms of the relationship between citizens rather than one that examines the relationship between the individual and the state. From this perspective obligation is seen in terms of obligations to one's fellow citizens as common participants in a common enterprise (c.f. Rawls). Indeed Johnson considers, in commenting upon the activities of Thoreau, that:

"... Thoreau's act only makes sense if it can be maintained that each individual member of the state has a common interest with every other member in the quality of the common life they share and hence an obligation to try to maintain and improve it even though he does not himself benefit directly from the improvement." (Johnson, 1974, pp.532)

Johnson suggests that in determining what membership of the state is, a prior question must be "What is my involvement in the state?" Johnson suggests that the state is a normative association, like the family, which has a tradition, a culture and hence a degree of unity. She contends that:

"We are born into a particular state, we grow into membership in it, and we are as a result likely to be tied to our fellow citizens by a bond of shared experiences, attitudes and beliefs which is at least potentially the basis for a commitment to the political community and the exercise of an active citizenship." (Johnson, 1974, pp.534)

In developing a critique of traditional consent theorists' approach to political obligation, C.Pateman (1979 A) is also concerned to develop the idea of membership committed to the community and the 'self-managing' democracy that Pateman espouses. She suggests that citizens may be members of many political associations which are bound together;

"... through horizontal and multi-faceted ties of self-assumed political obligation" (Pateman, 1979 A, pp.174)

The view of political obligation advanced here is, according to Pateman, incompatible with a liberal conception of the political and is properly developed through a revised democratic conception of political association that is distinct from a liberal conception of political association. For Pateman, political disobedience is seen as one possible expression of the active citizenship upon which her vision of democracy i.e.

self-managing democracy, is based. Here political obligation is seen as a permanent problem, to be constantly questioned. Again, however, she relies on the notion of self-assumed obligation and if we return to Horton we can see why this may be problematic.

Horton wishes to preserve the idea, developed by the conceptual analysts, that membership of a polity is not usually chosen. Horton uses the analogy of the family to argue that there are obligations which may not be self-assumed and having such obligations is part of what it means to be a member of a family in that mutual obligations exist between parents and children which do not have their origins in individual choices. Horton suggests that:

"Of course the content of such obligations will vary with the shape and content of family life and between cultures and through time, but where there are families, these will be obligations between members. It is part of our understanding of what the family is that there be some such obligations." (Horton, pp.17)

To what extent though is this culturally specific? In describing the relationship in terms of obligations, is Horton referring to a particular characteristic of family life in western, liberal developed states? If we think about the relationship between parents and children in say a strict Muslim family the children may have a duty to obey, and are obliged to obey, in the same way as Hart's gunman situation. Is the relationship characterised in terms of obedience rather than obligation? Obedience may characterise the relationship between the state and

the individual in, say, a dictatorship. However, Horton wants to stress that a member of a polity is uniquely related to that polity, as with Johnson's account used earlier, and this relationship is best characterised in terms of political obligation. Horton quotes Rush Rees in elucidating this character:

"The "relation" seems to be an internal one, not my relation to the park when I am in it. When I am not in the park, this will make no difference to the park or to me. But we cannot think of the state without thinking of individual citizens or vice versa. But neither is "the relation of the individual to the state" at all like "The relation of the individual wolf to the pack" or "the relation of the individual to the crowd". These could be understood as quasi physical relations and the relation of the individual to the state is not that. It has rather to be studied, apparently, in terms of obligations." (Rees, 1969, pp.81-82)

Horton is concerned to explicate the meaning of political obligation rather than justifying it. He suggests that the actions of the polity are our actions done in our name in the same way as actions done by the family are our actions and that this 'relationship of responsibility' is part of what it means to be a member of a polity. And yet what happens if we claim to recognise different polities? Horton agrees that this is a problem but suggests that there would be something wrong with any account of political obligation that did not find Basques in Spain, or Republicans in N. Ireland a problem. However, Horton concedes that this answer is far from satisfactory.

Horton suggests that obedience to law or government is only one possible manifestation of political obligation although it will be a particularly compelling one. It

does require, however, a concern for the interests or welfare of the polity of which one is a member in the same way that within the family mature children may take account of the interests and welfare of parents. For Horton, obligations can be overridden and he does not think it possible to say anything, philosophically, about the respective weights that may be given to different obligations. However, Horton concludes by suggesting that on his account obligation is owed not to the government or the law or the constitution but to fellow members of the polity:

"Political obligations are at best part of what is involved in the recognition of the communal life of a polity" (Horton, pp.24)

However, I suspect that the analogy with the family is just that. At worst it may be used as a persuasive argument in justification of political obligations. That is, if we can characterise our relations to the state in terms of familial obligations, then within a society where it is considered that obligations to the family ought to be carried out obligations to the state or, for Horton the polity, ought also to be carried out. In using the family analogy then Horton is giving us a criteria for approval of our obligations. In recognising it as an analogy, Horton does not explore it in any great detail. Consider the different perspectives on the family in different societies and in different times and places, e.g. the difference between the nuclear family and the extended family of kinship systems. From these examples we can

legitimately ask "Do I have obligations to my immediate family or to second cousins and what is the weight of these obligations?" The answer to this question will depend upon the differing perspectives we have on family life. We must consider the context: in one form of society that sees the family as the most important social unit, then to depict our political obligations in terms of family obligations would be to receive a favourable response. Indeed, even to talk about our relationship with the state as though it were a family relationship is to seek to justify it. Furthermore, what status do we give to those who see the family not just in terms of, say, blood ties but also in terms of spiritual and religious ties where the concept of the family is a much wider one and may even embrace the whole of humanity? What are the limits of our obligations here? In wishing to move away from abstract individualism and to develop notions concerning the meaning of membership then in offering us the family model Horton has been critical of traditional accounts of political obligation. However, I am not certain that he has offered us anything more convincing. It seems to me that in order to understand the role that political obligation has played in political life and in theories concerning that political life we must understand why the concept of obligation is used in the first place and in order to understand that we must understand the language of politics and the characteristics of that language. For the moment I shall leave that aside.

The quest for an account of political obligation does generally seem beset with difficulties. If we concur with the views of the conceptual analyst then political obligation is unproblematical. Thus the civil disobedient, for example, could not question his/her obligation to the state since being a member of the state logically implies that it ought to be obeyed. And yet the concept of membership of the state, of being a citizen, is, as we have seen, problematical. Is it like being a member of a club or of being a member of a family? To whom is allegiance owed and what are the limits of this allegiance? Given these problems then, it seems to me to be premature to evaluate the civilly disobedient act in terms of obligations to the state. The individual may have other obligations which, with Walzer, are more important to him/her and which must be taken into account when considering political action involving the state. Thus we may have commitments to family, friends, groups, the community etc which may be just as important to us as our obligations to the state, particularly if we are not clear about what the state can legitimately ask of us.

At this stage then, we cannot, it appears, rely upon any account of promises and obligations to characterise our political activity. As we saw at the beginning of the chapter, the concept of promising itself is not without problems. To construct an account of political obligation based upon promising is an account that has tried to utilise the notion of voluntary activity. And yet, with Searle, promises logically ought to be kept. There is no

voluntary action here. We need to discuss the 'bridge' that requires us to keep promises and this bridge may be moral in character, as with Rawls, or it may be political in character as with the liberal democratic form of government. If this is the case then a theory of civil disobedience which depends upon an understanding of the limits of our obligation to the state will be problematical. A way forward, however, may be to examine obligations from a legal perspective. This avenue may be fruitful insofar as it is explicitly concerned with the notion of rules and how they might inform our behaviour. At the same time civil disobedience is characteristically said to involve breaking the law so it may well be that our account of civil disobedience is more appropriately located within an account of legal obligation.

Chapter 3

LEGAL OBLIGATION

One of the characteristics that was offered in defining civil disobedience was the notion that civil disobedience can be distinguished from an act of revolution insofar as the civil disobedient is concerned with particular laws or policies rather than with the law or government itself. If revolution is concerned to overthrow the government then civil disobedience, in Walzer's phrase, is a 'partial claim' against government. For those who support civil disobedience then the disobedience of particular laws is justified by appeal to some other criteria which is outside the system of law itself e.g. M.L. King quotes with approval the Thomastic concept of an unjust law being 'no law at all'. M.L. King is here appealing to a tradition which allows the moral evaluation of laws to take place and be acted upon even if this means breaking the law.

For those who oppose civil disobedience, however, any disobedience of law is seen as unjustifiable since it may, so the argument goes, undermine the legal system itself or encourage others to break the law. From this perspective whether a law is considered to be unjust or not is irrelevant in considerations of what our actions should be with respect to law - even an unjust law has to be obeyed. These concerns have been developed to take account of other considerations, particularly the notion of citizenship. For example, for Socrates in the Crito his reluctance to escape punishment was based upon an

obligation to the state as a citizen benefitting from the laws and constitution of Athens. The citizen has accepted the benefits of the laws and of obligations to them and a reciprocal obligation is owed to fellow citizens and the law. This conclusion is based, for Socrates, on the fact that this is part of what citizenship requires. We have already seen the problems that may be associated with the idea of 'benefits received' so I do not propose to dwell here.

Another familiar argument in support of obedience to the state is that concerned with democratic government:

"One's obligation to obey is a general moral duty arising out of his role as a citizen. And that duty is specially compelling in a democracy, where citizens participate, or have a right to participate in making the laws of their community" (Cohen, 1971, pp.5)

There are, thus, a range of arguments that are used when delineating the notion of obligations to the law. However, I wish to concentrate on the traditional concerns with Natural Law theory and Positive Law theory and the debate generated around these two concepts. A discussion of such theories may, at first sight, appear to be rather old and familiar but the debate mirrors the respective positions adopted by civil disobedients and their detractors. On the one hand it is suggested that individuals have duties and obligations which transcend 'mere' obedience to the law, and on the other hand civil disobedience is seen as an illegal act and the civil disobedient should be punished like any other law-breaker.

This is a crude distinction to make but it is a feature of much of the literature on civil disobedience that such distinctions are made.

However, before we begin, we need to be clear about what law is. Unfortunately there are many different explanations here ranging from the American Realist School suggesting that law is 'prophecies of what the courts will do'; Hobbes' description in *Leviathan* of the law as the public conscience 'by which we have agreed to be guided'; Cohen suggesting that

"Laws provide the skeleton upon which the flesh of social justice hangs" (Cohen, 1971, pp.214)

or, finally, a fuller description such that:

"Law is but one of the devices, institutions or processes which affect social change. Law is several things. It is a constantly changing set of norms or rules and regulations, defining appropriate and prohibitive behaviour. Law is also a set of prescribed punishments or sanctions for those who violate these norms and a presumption for the way in which these norms are to be enforced and violators punished. Law also consists of a complex network of institutional relationships and prescribed routines of behaviour. And finally law is people". (Grossman and Grossman, 1971, pp.6)

The reader is tempted to breathe a sigh of relief that the list stops there! It would appear, then, that the law may mean different things to different people and in examining the two different traditions of legal theory we must bear in mind the possibility that in trying to identify, explain or justify the law the possibility of confusion may arise through not understanding the language of other traditions. It is problems of this nature that have led

some legal theorists to dispense altogether with the idea of defining law. (see H.L.A. Hart 1961, pp.14 and H.L.A. Hart, 1953)

Natural Law

It is important to stress the differing strands that go to make up Natural Law theory and the rich diversity of its proponents. Here we shall be concerned with Natural Law as a tradition of speaking and writing about the relationship between a conception of the law of nature and man-made law and the consequent relationship between law and morals and the implications for a conception of legal obligation. We shall not be concerned with the work of any one Natural Law theorist except, to some extent, with the work of Lon Fuller whose recent writings have helped to create a revival of interest in Natural Law theories.

A useful categorisation of legal obligations has been given by J.C.Smith in 'Legal Obligation' and it will provide us with a useful starting point for examining obligation within the Natural Law tradition. Smith suggests that, for the Natural Law theorist, the ground of obligation is external to the legal system itself and it is some external norm that generates legal obligation. This external norm is moral in nature such that there is a necessary relationship between law and morality and not just a contingent one. The legal obligation to comply with a law is seen to be dependent upon the content of

that particular law. The notion of such a derivative theory of legal obligation is characteristic of Natural Law which contains the following assumptions:

- "(i) All things in the universe, including man, have a particular nature or structure which makes the thing itself and not something else.
- (ii) This nature ultimately, is to be discovered through the faculty of reason.
- (iii) Man ought to do only those acts which can be shown by the process of reasoning not to be inconsistent with his own nature and the nature of the universe in which he lives.
- (iv) The positive law of a community carries an 'intrinsic' obligation and thus is a 'law' only when it requires or permits actions which conform to the nature of things as they are and, in particular, the nature of man." (Smith, 1976, pp.5)

Natural Law theory is thus based on the argument that it is logically possible to move from premises concerning the nature of things to conclusions about what we ought to do. It is argued that there is no distinction between the law as it is and the law as it ought to be.

The law is there to be discovered, not created, by natural processes such that:

"True Law is right reason in agreement with nature"
(Cicero, on the Commonwealth Book III XXII)

Not only that but it is also concerned with right and wrong and involves a moral as well as a legal perspective. The moral quality of an act is deemed to be in accordance with Natural Law and it is impossible to distinguish between legal and moral obligation. The 'ought' of legal obligation is moral in kind such that if we are under a legal obligation to do a particular act then we ought to

do it in a moral sense. Questions of what the law is cannot be separated from questions concerning what the law ought to be.

For D'Entreves the relation between law and morals is the crux of all Natural Law theory and the most important questions to be asked concern the content of law rather than the form it takes. The content of law is perceived to be moral in nature and this enables law to be evaluated. Law is a moral proposition and, with Aquinas, the first condition of law is to do good and avoid evil. Only 'good' laws are to count as law and for a law to be considered 'good' it must be based on Natural Law such that, at least for some Natural Law theorists, if a law is considered to be at variance with Natural Law then it is in fact no law at all. A genuine human law will not violate Natural Law so that no matter how much something might have the appearance of law it is not law at all if it violates Natural Law. From this perspective, then, the civil disobedient who believes that he/she is protesting against an 'unjust' law then that law itself may be seen as illegal.

This picture of law may be considered appealing, at least in part, because it offers an explanation of why there is an obligation to obey the law. If it is held that there is something about the law which obligates us and this obligation is thought to be moral in nature then we can justify our obligations to the law. Natural Law theory explains such obligations:- everything that is law must be in accordance with morality and we therefore have

an obligation to the law. Not only that, but from this perspective then all law is in accordance with morality because being in accordance with morality is the criterion for being law at all. This argument is a common one that runs through much of Natural Law theory such that the problem of knowing what the law may have prescribed is subordinate to the problem of knowing that what they prescribe is morally right or wrong. It may well be however, that:

"They thus tend to dissolve the problem of validating of law into that of its obligatoriness. They provide us with a valuation of law which purports to be a definition" (D'Entreves, 1970, pp.178)

If the question of whether or not something really is law or not depends upon whether or not it passes certain moral tests then we may well be in doubt as to what the law is and thus about what it is that can be expected of us with respect to law. Such confusion may be alleviated by keeping quite separate the problem of validity, what the rules of the system are, and how to evaluate them. Criticisms of Natural Law theory highlight the familiar distinction between fact and value. Emmett makes the point that:

".... we have to distinguish between the questions 'By what criteria do we know whether a particular rule is a rule of law?' and 'what is the general purpose of a system of law?' The Natural Law theorists tend to conflate these distinct questions and while it may be that concepts of justice and morality are involved in the second question it is a false assumption that they must also be involved in the first. (Emmett, 1963, pp.11)

It may also be considered that Natural Law theory is inadequate in that the binding force of law is dependent upon the content of law conforming to some external factor when the content of many laws are considered to be morally neutral. Here a familiar distinction is that between 'mala prohibita' i.e. acts not morally wrong in themselves, and 'mala in se' i.e. acts considered to be morally wrong in themselves. If this distinction is valid then we may wish to consider that the effects of morals upon legal rules may vary according to the derivation of the rules such that acts considered to be 'mala in se' may have their content derived from morals. Yet it may well be that the greater number of legal rules are not moral precepts or logically derived from them but are legislative determinations of what is otherwise morally indifferent.

Most recent discussions of Natural Law theory have arisen as a result of the work of Lon Fuller for whom Natural Law is a form of morality. Fuller suggests that the law must have an 'inner morality' and he gives criteria for this: (i) there must be rules and these rules must be (ii) clear and (iii) non-contradictory. The rules must be (iv) promulgated (v) not retroactive, they must (vi) not require the impossible, nor (vii) change too frequently and there must, finally, (viii) be no contradiction between declared rule and official action. The inner morality of law must be respected if law can be said to exist. For Fuller:

"... a total failure, in any one of these eight conditions does not simply result in a bad system of law; it results in something that is not properly called a system of law at all, except perhaps in the Pickwickian sense in which a void contract can still be said to be one kind of contract. Certainly there can be no rational ground for asserting that a man can have a moral obligation to obey a legal rule that fails to meet one of the eight conditions."
(Fuller, 1964, pp.39)

Fuller's 'inner morality of law' has been criticised on the grounds that the eight conditions are maxims of legal efficacy rather than moral principles and they seem to stress the 'inner logic' of law rather than its 'inner morality.' (see P.P. Nicholson , 1973-74, pp.310)

Furthermore, Fuller's basic assumption seems to be that the law per se is morally good and without law morality could not be possible. The goodness and moral purpose of law are simply part of its meaning so that law and morality cannot be separated and any attempts to do so are not just difficult but are fundamentally misconceived. This appears to be tautological and again, here, are we being offered a definition that is in fact an evaluation? However, it may be possible to show that Fuller:

"... jousts at windmills, for at least some of his opponents would not deny that if we are to have law at all, we must have some compliance with the author's principles of legality. They do deny that these principles constitute a 'morality' or are even moral in nature." (Summers, 1971, pp.127)

It is Fuller's belief that the insistence by the Legal Positivists (see below) upon a rigid separation of law as it is and law as it ought to be precludes the possibility of our fidelity to the law or of the responsibility for making the law what it ought to be.

Critics of Natural Law theory argue that the stress placed on the necessary connection between law and morality appears to give a legal basis for disobedience to those laws which are considered to infringe those moral principles which are incorporated by definition into the concept of law. It is held that the claim of obligatory disobedience, attributed to the Natural Law theorist, as a result of an understanding of the law of nature, universal law or divine law is

"... an intolerable menace to the system of positive law..."

such that:

"No state law can tolerate a competition of this kind presented by a second legal system. The laws of the state actually obtaining must possess a monopoly of binding legal force for itself if the legal security of the state is to remain unshaken." (Brunner in Cohen, 1966, pp.11)

A classic exponent of the idea that Natural Law theory is linked to revolution and anarchy is Austin. Austin's view is that the notion that human laws which conflict with the Divine Law are not normally obligatory and therefore not laws, is an abuse of language which:

"... is not merely puerile, it is mischievous when it is said that a law ought to be disobeyed. What is meant is that we are urged to disobey it by motives more cogent and compulsory than those by which it is itself sanctioned. If the laws of God are certain, the motives which they hold out to disobey any human command at variance with them are paramount to all others. But the laws of God are not always certain ... What appears pernicious to one person may appear beneficial to another." (Austin, 1955, pp.185-186)

At the same time it may be argued that this is precisely the appeal of Natural Law theory:

"Part of the appeal of traditional Natural Law theory has undoubtedly been that it appears to give a legal basis for disobedience to particular rules which infringe those moral principles which it incorporates by definition into its concept of law." (Emmett, 1963, pp.22)

However, there is also the possibility that Natural Law theory can also be used to justify obedience as well as disobedience. According to Ross:

"... natural law in history has primarily fulfilled the conservative function of endowing the existing power relations with the halo of validity. Natural Law is first and foremost an ideology created by those in power - statesmen, jurists, the clergy - to legitimise and reinforce their position of authority." (Ross, 1958, pp.264)

The notion that Natural Law may be perceived as ideological in nature is developed by Shklar (1964) and she considers that this adds to rather than detracts from the force of Natural Law theory. She considers that it is logically rather feeble and ambiguous but insofar as it makes no false claims to neutrality, unlike Positivism, it can be used as a persuasive reason or justification for either obedience to law or disobedience.

However, it may well be that the demand of validity to an 'unjust' law is the most dramatic way of expressing the connection that holds for the Natural Law theorist between the concept of law and certain standards of morality. If we cannot suggest that higher law is logically binding upon us we may appeal to it as justification in support of

disobedience to those laws that we consider to be unjust and cannot obey them in good conscience. This is the position of the civil disobedient. However, as Ross suggests, it may well be that in saying "I am against this rule because it is unjust" we really mean "This rule is unjust because I oppose it." This is the problem that arises when we try and offer a moral evaluation of law. What criteria are we using to determine what morality is and is there agreement in moral values? These problems do not arise for the theorists of Legal Positivism who argue that the relationship between law and morals is in no sense a necessary one. The aim of legal theory is to give an account of the law as it is and the foundations for such a theory are to be found in existing legal systems. A legal theory is concerned with identifying the criteria for law and the Legal Positivist will argue that these criteria are not moral in kind. A law may be a bad law, in the moral sense, and perhaps it ought to be otherwise but as long as it satisfies certain, non-moral criteria then no matter how 'bad' the law is, it is still law.

Legal Positivism

The separation in principle of the law as it is and the law as it ought to be is a fundamental assumption of Legal Positivism. It thus represents a radical departure from the Natural Law tradition where positive law emanates from some higher law. As with Natural Law, however, there are

many varieties of Legal Positivism and it will be useful to summarise Hart's categorisation (1961, notes to ch.IX):

1. Laws are commands of human beings.
2. There is no necessary connection between law and morals.
3. The analysis of legal concepts is worthy of study in its own right and can be distinguished from other studies concerned with history, sociology etc.
4. A legal system is considered to be a closed system and logically coherent in that decisions made within the system can be logically determined from the rules of that system.
5. Moral evaluations cannot be established by anything like rational argument or proof.

While different theorists within the tradition may stress this or that aspect of the tradition, the separation of 'is' and 'ought' seems to be common. It should be noted that the separation of 'is' and 'ought' does not imply any contempt for the idea of values but it does assign law and morals to strictly different fields. The ideas concerning Legal Positivism received an early expression in the works of Bentham and Austin and we find several essential elements there: the idea of law as a command; the idea of duties created by sovereign commands; sovereignty defined in terms of obedience on the part of subjects; and the idea of some form of legal sanction for non-compliance with the commands of the sovereign thus:

"Now by a sovereign I mean any person or assemblage of persons to whose will a whole political community are (no matter in what account) supposed to be in a disposition to pay obedience; and that in preference to the will of any other person." (Bentham, 'Of Laws in General' in Finch, 1979, pp.81)

Similarly for Austin:

"... laws or rules, properly so called, are a species of commands."

and this relationship

"... is the key to the sciences of jurisprudence and morals" (Austin, 1955, pp.13)

For Austin a given society cannot be termed a political society unless most of its members are in obedience to a common authority. The command theory of law also presupposes that rules are not laws unless they undergo a law-making procedure and are adopted, and enforced, by the governing body or sovereign. The idea of force is crucial to the idea of law where the fact of command and the force to back up the command are requisites for a rule to be law. Yet, as Hart (1961, pp.47) has pointed out, there are many recognised laws which simply do not fit into the command model. These laws do not say "Do this!" but rather "Do this if you want that." The command theory identifies the legal order with compulsion and Hart is insistent that the law is not the 'gunman situation writ large'.

However, Hobbes was concerned that the sovereign, in order to perform his functions adequately, must be omnipotent and not subject to legal restraint. Given Hobbes' views on human nature as selfish, greedy, unco-operative etc, such a powerful sovereign is required

to maintain order. The form by which the sovereign imposes his will upon the subjects is the civil laws which are:

"... to every subject, those rules which the commonwealth hath commanded him by word, writing or other sufficient sign of the will, to make use of ..."(Hobbes, 1962, pp.244)

The content of morality is determined solely by the imperatives of the civil laws, there is no justice or injustice existing apart from the sovereign power such that law cannot be unjust. Hobbes suggests that in transferring their powers to the sovereign the subjects are in a sense the indirect authors of their own laws and nobody can do injustice to themselves. The law of nature becomes a part of the civil law and the binding force of these laws is derived from the sovereign will.

Bentham and Austin recognised the command of the sovereign as the sole source of all law. As we have seen, the most essential characteristic of Austin's theory of law is its imperative character; law as the command of the sovereign:

"Every positive law or every law simply and strictly so called, is set by a sovereign person, or a sovereign body of persons, to a member or members of the independent political society wherein that person or body is sovereign or supreme."(Austin, 1955, pp.9)

Yet it may be argued that laws obligate us or impose duties upon us and Austin maintains that such notions are connected with the idea of a command where to be commanded is also to be threatened with a sanction for

non-compliance and to be placed under a duty to obey. However, it may well be prudent to comply with the orders of a gunman but we do not have a duty to do so; we may be obliged but not obligated and this distinction, developed by Hart, is not apparent in Austin. There appears to be some confusion over the notion of 'being bound by' which may imply 'forced or physically constrained to' or otherwise coerced whereas it may have more to do with the idea of there being certain legal requirements that are applicable to us in certain situations. It is the latter which we ordinarily conceive of as characteristic of obligation. Two further points may serve to bring out the difference between 'being obliged to' and 'having an obligation to':

"First, one can be under an obligation even if there is no chance of being caught and penalised. And second, a statement that someone has or is under a legal obligation functions as a reason or justification for his acting in a certain way and also for the imposition of a sanction if he fails to do so, whereas a statement that someone was obliged to do something is never a justification but may be an excuse." (Benditt, 1978, pp.68)

Austin's account misses these distinctions. Likewise, Austin's account fails to deal satisfactorily, if at all, with the problem of continuity and persistence of a system of law. The reliance upon a 'habit of obedience' cannot confer any right to succeed and it may well be that a new sovereign will not be obeyed. Similarly, Austin's account in effect means that the sovereign is above the law and is not bound by law:- there are thus no legal limits to the sovereign's power.

Much of the early theory of Legal Positivism was concerned to refute Natural Law theory. Bentham, for example, linked his discussion of morals to utility and rejected much of the Natural Law theorising with the firm conviction that law could be properly understood only if it was treated as an autonomous field of study, distinct from morals or religion. For the theorist of Legal Positivism, Natural Law confused legal with moral issues. Bentham and Austin were not, however, asserting that law and morals are completely unrelated or that an unjust law was just as deserving of obedience as a just law. Legal positivism does not reject, as I indicated earlier, the 'moral ought' as completely unrelated to law but rather involves a rejection of the 'ought' in a metaphysical sense as the result of a non-metaphysical 'is'. The 'is' of Legal Positivism is contained in the existence of positive, man-made law and it is this that the Legal Positivist is concerned with. The concern is with 'ought' in a logical or legal sense as distinct from the 'moral ought'. For Austin:

"Now to say that human laws which conflict with the divine law are not binding, that is to say, are not laws, is to talk stark nonsense. The most pernicious laws, and therefore those which are most opposed to the will of God, have been and are continually enforced as laws by judicial tribunals. Suppose an act innocuous, or positively beneficial, be prohibited by the sovereign under the penalty of death; if I commit this act I shall be tried and condemned, and if I object to the sentence, that it is contrary to the law of God, who has commanded that human law givers shall not prohibit acts which have no evil consequences the Court of Justice will demonstrate the inconclusiveness of my reasoning by hanging me up in pursuance of the law to which I have impinged the validity." (Austin, 1955, pp.185)

and again

"the existence of law is one thing; its merit or demerit is another." (Austin, 1955, pp.184)

Within the same tradition of Legal Positivism it is generally considered that a more sophisticated account than either Bentham's or Austin's is that of Kelsen who, likewise, is considered with the form and structure of law rather than its moral content. Kelsen is concerned to segregate the study of law as completely as possible from the study of psychology, sociology or morals and for him a theory of law must be logically rigorous, systematic and coherent. It must be concerned with description rather than evaluation and its subject matter is quite distinct from any other science even though it lends itself to a scientific approach. In this respect it has been suggested that Kelsen treats the law as if it were contained in a 'hermetically sealed container' such that:

"It is called a 'pure' theory of law, because it only describes the law and attempts to eliminate from the object of this description everything that is not strictly law: Its aim is to free the science of law from alien elements." (Kelsen, 1970, pp.1)

Kelsen rejects Natural Law theories on the grounds that they are metaphysical and not scientific and that they thrive on moral illusion. Kelsen is keen to distinguish between an objective and a subjective 'ought' but, like other theorists of Legal Positivism, he does not deny that

a legal order can incorporate moral principles. He does deny that a legal system should conform to an absolute moral order. Kelsen suggests that:

"...the validity of positive legal norms does not depend on their conformity with the moral order; it means, that from the standpoint of a cognition directed toward positive law a legal norm may be considered valid, even if it is at variance with the moral order." (Kelsen, 1970, pp.68)

For Kelsen only a competent authority can create valid norms and such competence can only be based on a norm that authorises the issuing of norms. The authority that issues norms, is, unlike Austin's sovereign, subject to that norm in the same way as the individuals are subject to the norms issued by the authority. A legal norm is thus valid if it has been authorised by another legal norm of a higher rank. Only norms can validate a source of law and this hierarchical structure proceeds so that an administrative order is valid if authorised by a statute, this in turn is valid if authorised by the constitution, and the constitution is valid if its conception was authorised by an earlier constitution. Yet there is no positive law for the validity of the first constitution and Kelsen thus resorts to the idea of a 'basic norm' which is a norm presupposed by legal thinking and not an actual norm. This norm is considered by Kelsen to be the ultimate source for the validity of all norms that belong to the same legal system. Thus Kelsen:

"... conceives of a legal system as a pyramid of hierarchical structure of norms. The validity of all norms in a particular legal system is derived from a

basic norm which is the constitutional function of the normative order. This norm is itself a Kantian a priori which Kelsen describes as existing in the 'juristic consciousness'. His system of norms is fully closed, absolutely divorced from teleological considerations, having nothing to do with rationality, completely divorced from morality and politically neutral. This is what is meant by 'Pure' in the name of his theory." (Smith, 1976, pp.13)

While Austin's directive is the command, Kelsen's is the norm, and in a legal system this is connected with the idea of force. For Austin a law is a command backed by a threat of force but for Kelsen it is the norm that directs an official to apply force under certain conditions. Kelsen's norm is deemed valid by the fact that it has been created according to a definite rule and by virtue of that fact alone. The basic norm of the legal order is the ultimate rule according to which the norms of the legal order are established and receive their validity. Hart disagrees with this notion since, for him, questions of validity are questions of fact and not connected to some hypothetical 'ultimate rule'. Where Kelsen speaks of postulating the validity of the basic norm, the question does not arise for Hart in this way: as we shall see below there is no question of validity concerning the generally accepted 'rule of recognition', as distinct from its empirical existence.

Kelsen's treatment of obligation is dependent upon his treatment of the norm such that by the norm Kelsen means:

"... something ought to be or ought to happen, especially that a human being ought to behave in a specific way." (Kelsen, 1970, pp.4)

In order to free his theory of law of all moral content so that there is no 'moral ought', Kelsen conceives of a legal norm in terms of an;

"... hypothetical judgement expressing a specific relationship between a conditioning circumstance and a conditional consequence." (Kelsen, 1970, pp.89)

This relationship is defined in such a way that 'if A occurs then B ought logically to follow'; thus if an individual commits a crime then certain sanctions ought to follow, the legal ought being identical to the logical ought. The directive is addressed to the official and not the citizen so that the law imposes duties on officials to impose sanctions. Thus to state that we have a legal obligation means, on this account, that we fall under a legal norm which prescribes that an official ought to apply a sanction to us if we do not perform the act in question. Obligation is defined in terms of the norm:

"...the legal obligation to behave in a certain way and the legal norm that prescribes this behaviour are not two different facts; the legal obligation is this legal norm. The statement: "An individual is legally obligated to behave in a certain way" is identical with the statement: "A legal norm commands a certain behaviour of an individual". And a legal order commands behaviour by attaching a sanction to the opposite behaviour." (Kelsen, 1970, pp.115)

Kelsen's account is, then, a purely formal account of law and legal obligation depending as it does upon the form of a particular norm and its structural relation to the system of norms. However, it may be considered that the concept of obligation is more complex than this formal

treatment allows and it is not just dependent upon the logical status of deriving the binding force, or the ought, of obligation from such an institutional rule.

However, the concept of the 'norm' is similar to the notion of a rule that Hart has developed in his theory of law. In rejecting the imperative theory of law Hart develops the notion of a rule as the key to understanding jurisprudence. Thus Hart is concerned to develop an interpretation of legal activity which relies heavily on the notion of activity being governed by some system of rules. Hart calls this 'descriptive sociology'.

H.L.A.Hart

Hart develops a theory of rule-governed activity to be distinguished from the notion of habit. For Hart there are two kinds of rules that we must be aware of in any examination of legal theory: primary and secondary rules. Primary rules are standard rules of conduct which obligate the members of society to perform, or abstain from, certain acts such that:

"... human beings are required to do or abstain from certain actions whether they wish to or not."
(Hart, 1961, pp.78-79)

These rules are essential to the smooth workings of social activities and their binding force arises as a result of the majority of the members of society accepting them. Strong social pressure is exerted to secure compliance.

Such primary rules are, Hart suggests, duty imposing and are particularly characteristic of 'pre-legal' primitive societies.

Secondary rules establish an official machinery for the recognition and enforcement of such primary rules and are typically characteristic of a developed legal order. Secondary rules are important since primitive societies suffer from uncertainty and need to be replaced by rules securing recognition, allowing change, and offering adjudication. Rules of recognition are authoritative and will thus identify valid rules; the notion of rules of change will allow recognised procedures for modification of the rules and rules of adjudication will provide procedures that ensure the rules will be enforced. These secondary rules are considered to be power - conferring as distinct from duty-imposing and Hart considers that it is in the union of these primary and secondary rules that a legal system consists of.

Yet it may well be that the distinction between primary and secondary rules is not as clear as Hart would have us believe. Primary rules need not impose duties but can confer powers and conversely secondary rules, particularly rules of recognition, may impose duties. Thus:

"What then is the relevant distinction between primary and secondary rules: is it that between rules which impose duties and those which confer powers? Or is it that between the constitutional rules of recognition, change and adjudication and all other sorts of legal rules? Or perhaps that between those constitutional rules and those rules which impose duties on private individuals? Or simply that between public and

private law? Or perhaps that between the rule of recognition alone and primary rules of obligation." (Sartorius, 1971, pp.137)

Sartorius is of the opinion that it is the latter interpretation to which Hart subscribes to when he writes of the:

"... complete social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation." (Hart, 1961, pp.97)

It is this interpretation that will claim most of our attention.

Hart wishes to stress the importance or seriousness of social pressure behind the rules and it is this which determines whether or not they are thought of as giving rise to obligations. Hart also wants to distinguish between an internal and an external aspect to the rules such that those who adopt the internal point of view are prepared to comply with the rule and to bring pressure to bear on those who do not. For those who take the external point of view then the existence, but not the propriety, of the rule can be acknowledged, the difference being that;

"What the external point of view, which limits itself to the observable regularities of behaviour, cannot reproduce is the way in which the rules function as rules in the lives of those who normally are the majority of society." (Hart, 1961, pp.88)

It is this internal aspect of rules which allows us to distinguish between rules and habits, or between the regulation of behaviour in terms of commands and the

regulation of behaviour in terms of rules such as the law. Hart is critical of the American Realist's position purely because they eliminate this internal aspect of rules. In brief, the position of the school of legal theory known as American Realism and associated with the work of Frank and Llewellyn contends that law is not a system of rules but a mere technique for predicting what decision the courts will come to in particular cases. Whatever the judges decide is law. Whilst not denying the role that discretion plays in the law, particularly in 'penumbral' areas, Hart would still insist that discretion takes place within the context of a general system of rules. However, the concern of the American Realist school is with law as a method of social control to which we shall return later.

For Hart, rules exist because we take an internal point of view towards them and in so doing we undertake obligations to the rules. It is not, however, satisfactorily explained by Hart how a person who does not take the internal point of view can have any obligations. As Hacker points out:

"It is not claimed that other types of obligation, in particular legal obligation are related to the concepts of social obligation as species to genus, nor that all the features of social obligation also characterise legal obligation." (Hacker, 1977, pp.11)

but it is not clear in Hart that there is any obligation at all! Hart concedes that:

"At any given moment the life of any society which lives by rules, legal or not, is likely to consist in a tension between those who, on the one hand, accept and voluntarily co-operate in maintaining the rules, and so see their own and other person's behaviour in terms of the rules, and those who, on the other hand, reject the rules and attend to them only from the external point of view as a sign of possible punishment." (Hart, 1961, pp.88)

And yet, as Benditt points out, it is not enough that only some people take an internal point of view towards the rules whilst the rest merely obey them; it is also necessary that in order for a system of rules to exist at all it must be accepted, in a positive sense, by most of the individuals to whom it applies. The very possibility of a legal system is just the possibility that citizens will take an internal point of view towards it.

Smith (1976) has also questioned Hart's concept of the internal aspect to rules. The internal aspect cannot, according to Smith, provide the binding force of law because the internal point of view exists for Hart only where the rule is accepted as a standard of conduct. If individuals for whom the rule has no internal aspect are still under an obligation then the obligation must be derived from something other than the internal aspect of law. Smith considers that the 'oughtness' of law is conceptually prior to, and a condition that precedes, the internal aspect. The internal point of view can be used to explain how people view rules when they accept them as standards of conduct. It does not explain why they accept

certain rules as guides to conduct. As we shall see below, in answer to this problem Hart introduces the idea of a minimum content of Natural Law.

However, Hart maintains that a legal system exists when two conditions are satisfied; that the valid rules of the system are generally obeyed and that the system's rules of recognition specifying the criteria of legal validity are effectively accepted as common, public standards of officials' behaviour by the citizens generally. Officials must take the internal point of view towards the rules of official behaviour whereas, it transpires, individual citizens need only obey i.e. they need only take the external point of view towards the rules. Thus:

"In an extreme case the internal point of view with its characteristic normative use of legal language ('This is a valid rule') might be confined to the official world... only officials might accept and use the system's criteria of legal validity. The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughterhouse. But there is little reason for thinking that it could not exist or for denying it the title of a legal system."
(Hart, 1961, pp.114)

Here, Hart is involved in the same kind of qualifying remarks that Rawls has to make when considering the notion of 'benefits received' and 'acceptance' and how they may be confined to officials rather than the citizens generally.

Hart's analysis of a legal system as a system of rules can be validated through the concept of a rule of recognition. The validity of individual laws can be

referred back to some other rule that authorises an official to establish that rule and so on until some initial rule of recognition is reached. The legal system is conceived of as a network of 'chains of validity' all of which can be traced back ultimately to the rule of recognition. Rules that cannot be referred back to the rule of recognition are not part of the system. Hart's thesis is that a rule of recognition exists in every legal system and the thesis is a central feature of his theory of law. It is also a feature of Hart's Positivism in that the rule of recognition distinguishes between what is and what is not law in a morally neutral way. Using the notion of a rule of recognition we can explain the concept of valid law such that a law is valid if, and only if, it satisfies criteria provided by the rule of recognition. Hart is thus offering an account of what it is for a rule to exist. The rule of recognition is a legal rule and belongs to the legal system and yet it differs from other rules in that its existence is not determined by criteria laid down in other rules nor by the fact that it is actually applied. As Hart puts it:

"Whereas, a subordinate rule of a system may be valid and in that sense 'exist' even if it is generally disregarded, the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials and private persons in identifying the law by reference to certain criteria. Its existence is a matter of fact." (Hart, 1961, pp.107)

Thus we can answer the question of validity:

"We only need the word 'validity' and commonly only use it, to answer questions which arise within a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the very validity of the very rule of recognition which provides the criteria, it can neither be valid nor invalid but it is simply accepted as appropriate for use in this way."
(Hart, 1961, pp. 105-106)

A positive law has to pass certain tests if it is to be valid and these tests are provided by the particular legal system of which that law claims to form a part. Validity and justification is therefore determined by an internal standard unlike that of Natural Law. The legal validity is established, not by arguments concerning its merit or value but, by showing that it conforms to criteria laid down by some rule of recognition. Thus:

"The reference to the rule of requirement of a legal system means that there is indeed 'something behind' the rules of positive law. This thing is not, as the natural lawyers would claim, a set of fundamental moral principles, nor is it just power. Rather it is the recognition of the powers of a law-making authority." (Emmett, 1963, pp. 10)

Insofar as Hart's rule of recognition is seldom expressed as a rule it may appear to be an odd criterion for a legal system to have. In modern society we may in practice do away with anything other than acquiescence by the majority of subjects but an acceptance by officials is thought essential for the continuance of the legal system. For Kelsen, the idea of change centred around the nullification of the Grundnorm; for Hart it centres around the non-acceptance of the ultimate rule of recognition by the officials. If officials begin to have doubts about

acceptance of the rules of a particular legal system then the future of that legal system is in doubt but a legal system about which ordinary citizens have doubts is not necessarily in the same position. Thus:

"Two minimum conditions are necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed, and on the other hand its rule of recognition specifying the criteria of legal validity and its rule of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials." (Hart, 1961, pp.113)

So far, then, it may appear that Hart has not managed to replace obedience with obligation on the part of the general public although his account may be considered more sophisticated than those of Austin or Kelsen.

Hart's concept of legal obligation is dependent upon the existence of a social practice and in his 'Legal and Moral Obligation' he suggests that it is enough for a social practice to exist without having to question the motivation behind it in order for obligations to exist. To investigate the motivation is to engage in a different sort of inquiry. The aim of legal theory is to offer an account of law as it is and, with Positivism, there is no logical connection between law and morals. Hart does, however, retrace his steps somewhat in his 'The Concept of Law' and concedes that there may be a 'core of good sense' in the position taken by theorists of Natural Law. Hart now argues for a 'minimum content' of Natural Law and although it may not be logically necessary for law to have

such a content there are compelling reasons for it to do so. These reasons have to do with certain natural facts or truisms about men; Hart suggests that:

1. Men are human beings, vulnerable to attack.
2. Men are approximately equal in strength and intelligence so that there can be no natural domination and co-operation is seen as essential.
3. Men are neither predominantly altruistic nor selfish.
4. Men are neither completely good nor completely evil.
5. Men have limited resources at their disposal.
6. Men have limited understanding and strength of will.

(Hart, 1961, pp.189-195)

Given these 'truisms' about human nature then, certain basic minimal aims follow on: the desire for survival and the desire for mutual co-operation and social life. Given these then, according to Hart, the law must have some 'minimal content' and this is natural not logical. If the necessity of a 'minimal content' were logical then anything that could be called law would have to be compatible with the minimal content of Natural Law and hence the legal 'ought' would be identical to the logical 'ought'. Hart does not wish to maintain this position since he wishes to argue that a valid directive that is incompatible with the minimal content of Natural Law is still, nevertheless, the law.

Hart regards the distinction between the law as it is and the law as it ought to be essential for avoiding two dangers; the possibility that the authority of law may be

disregarded in searching for what the law ought to be and, secondly, the danger that existing law may supplant morality as a test of conduct. For Hart:

"In all communities there is a partial overlap in content between legal and moral obligation...."
(Hart, 1961, pp.166)

There are, for Hart, five senses in which morality is related to law;

1. Some moral rules have become part of the legal system.
2. Moral rules are often used in the interpretation and application of the law.
3. Moral rules are often used as standards of evaluation of legal systems.
4. There is a sense in which legal systems are 'bottomed in the common nature of man' (Austin).
5. Both law and morals embody the concept of treating like cases alike.

What a theory of Positive law will deny is that a law cannot be a law if it violates certain standards of morality and so long as a law complies with the rule-making procedure then it is law. It is in this sense that law is seen as independent of morality and moral standards that may be held in common do not become law, no matter how desirable or worthy they may be, until they have gone through the rule-making procedure. To insist that a law is not really a law unless it meets some given moral requirement is not only to be conceptually unclear but also to invite, according to the Positivist;

"... the most indiscriminate type of civil disobedience." (Blackstone, 1967, pp.689)

Hart claims to have distinguished four relevant features of morality that separate it from law. Firstly, moral rules are essentially thought to be important but a law whose retention was believed to be unimportant would still remain a valid law until repealed. As Hart puts it;

"It would, on the other hand, be absurd to think of a rule as part of the morality of a society even though no one thought it any longer important or worth maintaining." (Hart, 1961, pps.170-171)

Secondly, moral rules are essentially immune from changes that are made deliberately - there is no moral equivalent to the legal processes of enactment and repeal. Thirdly, offences against moral rules have a voluntary character in the sense that:

"... legal responsibility is not necessarily extended by the demonstration that an accused person could not have kept the law which he has broken; by contrast, in morals "I could not help it" is always an excuse...." (Hart, 1961, pp.174)

Fourthly, moral pressure is exerted usually, not by threats, fear or appeals to self-interest but by a reminder of the moral character of the intended action and of the demands of morality.

Yet despite these differences Hart would wish to retain the idea of a minimum content of Natural Law in law:

"The general form of the argument is simply that without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other. In the absence of this content men, as they are, would have no reason for obeying voluntarily any rules; and without a minimum of co-operation given voluntarily by those who find it in their interest to submit to and maintain the rules, coercion of others who would not voluntarily conform would be impossible." (Hart, 1961, pp.189)

Hart considers that the Natural Law position which denies legal validity to iniquitous rules to be too narrow a conception of law and it is only by separating the invalidity of law from its immorality that can we see the complexity of these separate issues so that:

"What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny. This sense, that there is something outside the official system, by reference to which in the last resort the individual must solve his problem of obedience, is surely more likely to be kept alive among those who are accustomed to think that rules of law may be iniquitous, than among those who think that nothing iniquitous can anywhere have the status of law." (Hart, 1961, pp.206)

However, in attempting to bridge the gap between the more extreme forms of Legal Positivism and Natural Law theory, it is not apparent that Hart's concepts of law and legal obligation are any more able to explain the way in which we may have obligations to the law than, for example, Austin's command model. It has been argued by Hart that he has replaced Austin's command with a rule accepted as a standard of conduct and has replaced the

sanction by 'serious social pressure' but it still appears that we are left with, essentially, a coercive model of obligation. The use of a social practice is essential to Hart's concept of obligation where a social practice gives rise to rule-governed conduct and thence to obligations but it may well be that there are serious differences between social obligations and legal obligations. According to Hacker:

"For social obligations exist through their practice, while legal obligations may exist only by means of the legal validity of the norm which imposes them, and the notion of legal validity is explained by reference to the systematic unity, conferred by the rule of recognition, of that fusion of primary and secondary rules of which a legal system consists." (Hacker, 1977, pp.21-21)

Yet, by using the notion of the internal aspect of rules Hart wants to make a distinction between merely habitual behaviour and having an obligation, a distinction that is not that convincing given that, as we saw earlier, in order for a legal system to exist it is not essential that the majority of citizens take an internal point of view towards the system. If legal obligation only exists if there is a valid law which imposes it then can we not replace obligation with rule accordance which is characteristic of the external point of view? Surely to take the internal point of view requires that there be good reasons for so doing and it is not clear what is to count as a good reason. Hart admits that the demands of authority must 'in the end be submitted to moral scrutiny' but if this the case then presumably when moral and legal

obligation come into conflict then legal obligation cannot take precedence and civil disobedience may be justified. Yet the Positivist argument is such that in matters concerning the law then legal obligation would have precedence over any considerations of morality. Either legal obligations are also moral obligations or they are not in fact obligations in the same sense. Thus we either rule out the possibility of there being distinctive legal obligations or we are left to solve the problem of what sort of an obligation legal obligation is. Benditt suspects that a legal obligation is, in fact, a matter of there being a legal directive that applies to an individual:

"Of course, people do use the expression legal obligation but what they always seem to be talking about is either the requirements that various valid rules of law impose on us or else the moral obligations that arise out of these legal requirements. For my own part, I prefer to dispense with the term altogether; I think that by referring only to valid legal requirements on the one hand and to prima facie moral obligations on the other we can express all that needs to be expressed." (Benditt, 1978, pp.121)

Given the problems that appear with Hart's account then Benditt's conclusion is certainly appealing. If we use the concept of obligation as it is ordinarily used then we must include the idea of ought and yet we do not think of this relationship merely in logical terms. The problem is succinctly put by Smith:

"If (the legal theorist) ... maintains that the relationship between law and morality is a contingent one, then he can separate questions relating to the validity and existence of a law from those relating to

its moral evaluation. In maintaining that this relationship is contingent however, he is unable to provide a meaning for the 'oughtness' of law. If, on the other hand, he maintains that the relationship between law and morality is necessary he is able to provide a meaning for the 'oughtness' of law, but is forced into the untenable position of having to deny the term 'law' to any morally objectionable enactment." (Smith, 1976, pp.21)

To some extent the problem identified by Smith may well be resolved by a closer examination of the concept of rule-following and all that that entails. It may be recalled we did this in the last chapter but further remarks will be appropriate here.

Indeed it may even be that Hart's account is in fact misconceived. Hart is trying to give a more acceptable account of Austin's theory of command yet he does not really distinguish, as suggested above, between complying with a rule and obeying a command. Commands usually entail specific orders to do a specific action by specific person or group of persons and issued by another who has authority to command. The person or group is determinate in membership. (Think of John Horton's account of political obligations in terms of the family which we examined in the last chapter - is the family determinate or indeterminate in size?) If we think of law we normally think in terms of a class of actions, in a class of circumstances by a class of people. The class is composed of an indeterminate membership and does not apply to a specific group of people. For Hart the idea of a rule is that it regulates the conduct of the citizen and this involves the notion that the rule may be complied with or

infringed. If it were the case that the consequences which a rule indicates will follow in law also is always followed in practice then it may be appropriate to talk of legal rules regimenting conduct.

Joseph Raz conceives as laws as standard reasons for acting but reasons figure in explanations of human action and not as antecedents to it. The citing of a rule as an explanation for conduct indicates the character of the conduct (in that it is in conformity with the law) and does not refer to any purpose with which it was undertaken c.f. was the purpose of the civil disobedient to break the law antecedent to action or was it just a reason given afterwards?

However, for Oakeshott:

"A rule is a presumption. It does not initiate a performance; it exists in advance of the situations of the agents and it is unable to forecast what these contingent situations will be or the wants to which they may give rise. And while it is used by agents in choosing what they shall do or say, it is never used up (as a command issued up) or exhausted in any performance; it remains 'standing' for future unknown occasions..." (Oakeshott, 1975, pp.126)

If this is the case it is difficult to conceive of the 'moral content' of laws or rules other than 'serious social pressure' on these individuals who may not subscribe to the same rules that others do. Hart considers the notion of this 'pressure' coming from voluntary acceptance of legal rules and we have already seen the problems that this notion gives rise to. Thus we

may not have an obligation but be obliged by serious social pressure. Hence, back into the command theory of law.

Law as Ideology

However, it may well be that we need to consider the social context of law rather than its logic and in particular the considerations that legal theory is concerned with ideology and with social control such that, for example, Positivism is seen in such a way that:

"It is an ideology born out of the desire to achieve complete control over the social order, and the belief that it is in our power to determine deliberately in any manner we like, every aspect of this social order." (Hayek, 1976, pp.53)

It may well be that in trying to conceive of a 'pure theory of law' we are engaged in a fruitless exercise and we have to look at its wider implications, and this may depend upon its role within a wider political and social context. Thus for Locke

"For Law in its true Notion is not so much the Limitation as the direction of a free and intelligent Agent to his proper Interest and prescribes no further than is for the general Good of those under the Law... the end of Law is not to abolish and restrain but to preserve and enlarge Freedom. For in all states of created beings capable of laws, where there is no law there is no freedom." (Locke, 1960, pp.348 2nd Treatise para 57)

This version of the law may be a particularly liberal conception of the law that is in fact built upon by later thinkers within the liberal tradition such as Hobhouse. However, even for Locke no democratic society can exist

without the power to punish offences and to protect the property of those in society, and such a society may, indeed, only exist when each of its members has given over to the community the natural powers he had in the state of nature;

"And thus all private judgement of every particular Member being excluded, the Community comes to be Umpire by settled standing Rules... and... decides all the differences that may happen between any Members of that Society, concerning any matter of right;..."
(J. Locke, 1960, pp.367, 2nd Treatise para 87)

For others the idea of a 'pyramidal concept of state power' made it possible to ground the law in the capacity to inflict sanctions and it may be that the connection between law and sanctions is the basis for law (Gottlieb, 1971). Hart's sanction is, of course, "serious social pressure."

Hart concedes that there is an enormous step from the notion of being compelled by the law and 'the opinion of fellow creatures' to the notion of punishment by the 'reproaches of conscience'. It is also an enormous step from punishment by the law to punishment by our fellow creatures. Hart considers that there is an analogy to be found, albeit limited. If such an analogy may be made it obscures more than it illuminates and while it may be used to justify a particular, liberal, view of society it has to be recognised as just such a partial view.

The notion of law as social control was put forward by the Scandinavian Realist School where it is seen as ideologically motivated where for Ross:

"... a realistic doctrine of the source of law must be a doctrine concerning the ideology which actually animates the courts, actually motivated them in their search for the norms to be taken as the basis of their decisions - an ideology which can only be discovered by studying the actual behaviour of the courts."
(Ross, 1958, pp.104)

More generally the Scandinavian Realists were concerned with psychological explanations of rights, duties etc such that:

"A person who experiences a feeling of duty feels himself driven to a certain course of action."
(Hagerstrom, 1953, pp.127)

The law is seen as a symbolic expression for the fact that we respond psychologically to certain social pressures such that fear may be a dominant motive for obedience. However, it seems to me that Hart is correct in asserting that this particular school of thought has tried to deduce too much from the discovery that certain concepts do not correspond to some perceptible physical entity and that if a statement cannot be characterised as empirical then it must be metaphysical.

Another approach is that of the American Realist tradition where the law is seen in terms of the social structure and values of society such that an examination of economic, political, social or other factors will be necessary in order to understand judicial behaviour where legal decisions are seen to be based upon an ideology. We

must attempt to discover the prevailing norms and values of society rather than treating all legal decisions as exercises in legal logic. It may well be that one consideration, here, would be the balancing of interests in society such that, and as Roscoe Pound puts it:

"A legal system attains the end of the legal order, or at any rate strives to do so by recognising certain interests, by defining the limits within which those interests shall be recognised and given effect through legal precepts developed and applied by the judicial (and today the administrative) process according to an authoritative technique, and by endeavouring to secure the interests so recognised within defined limits."
(in Benditt, 1978, pp.18)

The idea of social control has a political as well as legal role. From a Marxist perspective the idea of law and legal institutions are but ideology and superstructures on economic interests. The ideology of the ruling class is a reflection of its economic interests and law is seen as an instrument of power in the hands of the ruling class for the economic exploitation of the suppressed classes. The challenge here is to the assumption of the neutrality of law as the necessary requirement of a well-balanced and integrated society. The law is presented as an agency of conflict that serves to further dominant interests and not to preserve shared interests. Law promotes inequality and bias rather than integration. Whatever the merits or otherwise of the views presented immediately above it is important to note the way in which the law is seen in terms of a wider

context and is not to be viewed as in Kelsen's "hermetically sealed container." Thus Hart comments that:

"The principal functions of the law as a means of social control are not to be seen in private litigation or presentations which represent vital but still ancillary provisions for the failures of the system. It is to be seen in the diverse ways in which the law is used to control, to guide and to plan life out of court." (Hart, 1961, pp.39)

However, in recognising that law has a wider role to play, it is contended that Hart advocates a position which is ideological insofar as it may rationalise a belief in a conception of the individual and of social and moral codes that are part of classical liberal philosophy. A more radical interpretation is such that:

"The rhetoric of law is at its most basic the rhetoric of sovereignty and power, of rights and duties. It is the discourse of power in a dual sense. On the one hand it presupposes the semantic constant of the ethical and political discourse of liberal indiscriminationism, of freedom, equality and consensus as the inherent features of the unsystemised and unexamined social relations within which legal discipline operates. On the other hand these pre constructions of legal interdiscourse emerge in the legal text as powerful devices for excluding and obscuring alternative or oppositional readings and meanings of concrete decisions or instances of regulation." (Goodrich, 1984, pps.189-190)

Such 'alternatives' are becoming more prevalent and the implicit notion of legal discourse promoting a particular liberal individualist picture of the world is being questioned along with the notion of legal language as objective, impartial and not representing particular professional power.

If it is the case that different theories about what the law is are reflections of differing ideological positions, the theories of Legal Positivism and Natural Law will have different views about the nature of social facts insofar as it may be said that 'reality' is that which is expressed in the language we use. It may well be then that the Natural Law theorist does not in fact identify law in the same way as the Legal Positivist and in fact their dispute is centred upon the identification of law. The Positivist will argue that his/her concern is with the law as it is and that this is distinct from the Natural Law theorists concern with the law as it ought to be. This is to assume that the traditional fact/value dichotomy holds good and yet, if it is the case that Positivism is just as ideological as Natural Law, then both are concerned with evaluation and not description. They may purport to offer us a description but because of the difficulty in identifying facts their descriptions are inherently evaluative. This is the argument put forward by Beyleveld and Brownsword and they summarise their position as such:

- "1) legal facts are a category of social facts
- 2) knowledge of social facts is not given directly and exclusively through experience but only through experience working under a particular conceptual regime, or in other words social facts are not concept-neutral;
- 3) a genuine debate between positivism and natural-law theory can operate where the common assumption is that social facts are not concept-neutral but there is a dispute about whether social facts are morally neutral;
- 4) the core of natural-law theory is that social facts are concept-dependent and value dependent: and

5) the initial forms of the dispute is whether or not practical reason is general presupposes moral reason." (Beyleveld and Brownsword, 1985, pp.21)

Beyleveld and Brownsword suggest that a moral point of view is presupposed by practical reason and point to the work of Gewirth as being of significance here. However, at this juncture it is enough that Beyleveld and Brownsword raise questions concerning the possibility of a legal ideology, a concern with the notion of context and value-dependence and the possibility of perspectives on the law being dependent upon a particular conceptual framework.

It appears that part of the problem with an understanding of civil disobedience is that those who support the act may have a different conceptual framework from those who oppose or criticise it. Not only that but if it is the case that there are no 'social facts' as such but only different conceptual schemes then we raise the thorny problem of ethical relativism. An examination of the concept of the Rule of Law will bring out these problems and allow us to relate the discussion so far to civil disobedience.

Rule of Law

Consider:

"Law represents a certain form of language, which, like all other language is conceptual in its structure, and this language is adopted to convey in certain contexts the normative idea that certain rules are obligatory. This form of language is related, in an exceedingly complex way to other concepts such as social or moral standards or values prevailing in

particular societies or groups as well as to patterns of conduct actually observed by these." (Lloyd, 1977, pp.219)

It seems to me that the concept of the Rule of Law is just such a legal concept that is related to other concepts of social and moral life and just as social and moral concepts and, hence, life change over time then the meaning attributed to the concept of the Rule of Law has similarly changed over time. It is often considered that the Rule of Law is open to different interpretations but a common feature seems to be that it is to be understood as a rule of law as opposed to a rule of men and a rule of law is set above individual wills. The Rule of Law entails;

"... the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, of prerogative, or even of undue discretionary authority on the part of government." (Dicey, 1959, pp.202)

For Raz, the Rule of Law is a purely formal doctrine, which recognises that the law should be framed and administered in such a way that it is capable of guiding the behaviour of its subjects:

"It says nothing about how the law is to be made by tyrants, democratic majorities; or any other way. It says nothing about fundamental rights, about equality or justice." (Raz, 1979, pp.214)

For Raz there are two aspects to the Rule of Law such that the people should be ruled by the law and obey it and secondly that the law should be such that people will be able to be guided by it. Yet this purely formal approach ignores the way in which the Rule of Law may embody;

"... a set of publicly articulated standards of justice and fairness - which operates to protect traditional liberties." (Allan, 1985, pp.142)

In a similar vein we find that the Rule of Law:

"1 secures for men the maximum of individual liberty, freedom of speech and association, religion, and privacy, and equality before the law.

2 it secures the greatest opportunities for peaceful change not only today but in the future.

3 ultimate commitment of those devoted to the rule of law is to the belief that the growth of each individual towards responsibility and the freedom to choose the best he can discern is a purpose which must never be made subservient to other objectives."

(Cox, 1971, pp. 387)

It is hardly surprising that Cox believes that the whole concept of the Rule of Law will be destroyed if individuals are allowed to 'pick and choose' good laws from bad laws according to individual conscience. The Rule of Law is seen as a system such that any attempt to question or disobey any part of the system will result in the whole lot come tumbling down. It is inevitable that such views will be expressed when we move away from the more formal definition of the Rule of Law offered by Raz to the definitions that see the Rule of Law in terms of upholding or promoting a particular set of values. The problem is, whose values does the Rule of Law promote if:

"... law in our society is primarily a product of the experience and presuppositions of the middle-class?" (Allen, 1970, pp.368)

This position is even more pertinent when we consider how different groupings within society may view the Rule of Law. In bringing attention to perceived injustice the civil disobedient may argue that in protesting against unjust laws he/she is in fact acting to uphold the justice or fairness element in the Rule of Law. In seeking to condemn such actions the critic may argue that the action undermines the stability of a legal system and hence hinders the Rule of Law. Alternately both may wish to appeal to the Rule of Law as a justification for actions: thus if an individual, or group, can claim convincingly that their actions are done in accordance with, and promotion of, the Rule of Law then hopefully they will gain support for their particular cause. The possibility may exist then that the Rule of Law's prime function is as an ideological device to be used either in support of the status quo or for change in the status quo.

However, the idea of the Rule of Law is often presented along with notions of a general obligation to obey the law and that obligation is moral in character (see D. Lyons, 1984). An account of general obligations will run into the same difficulties that we saw in terms of political obligation and with our account of Legal Positivism where the analogy with the social act of promising may be appropriate when examining interpersonal

or horizontal relationships but may not be appropriate when examining the vertical relationships that can be said to exist between the individual and the state. [Indeed:

"The demand for freedom under the law is not the demand for an indulgent master. It is the demand that our social order be reconstructed as a voluntary group so that the law to which we are subject can, without irony, be treated as agreements to which we are all directly, or indirectly, parties" (Tussman, 1960, pp.9)

It may also be said that the pursuance of certain social objectives through legally approved channels may not make much sense to groups who feel debarred from access to these channels and thence from entering into the 'agreements' that Tussman suggests.

The idea of the Rule of Law is conceived of in terms of a systematic approach to laws which enable coherence. Within this system then change is possible where:

"Changes and developments in the rules, and their interpretation in the language of law, have to be accountable and explicable (where external, innovation is not the cause) largely in terms of the system itself - its past historical evolution and present conceptual structure. (Ingram, 1985, pp.375).

It may be a possibility then that the idea of the system itself has changed to mean a concern with stability rather than with the promotion of justice, equality or other such values. Is it the case that there is a Positivist interpretation of the Rule of Law which is different from the interpretation given by the Natural Law theorist? We would have to say yes if the arguments of Beyleveld and Brownsword are correct. A Positivist interpretation may

be concerned with the procedural requirements, as with Raz, and the Natural Law theorist may be concerned with the content of the Rule of Law.

Most of our concern is with the notion of an obligation to obey or disobey a particular law and, as with political obligation, it is difficult to support the notion that there is in general an obligation to obey the law. Thus the notion that our political activities can be explained in terms of obligations, political and/or legal, seems to meet with difficulties. Thus an understanding of civil disobedience expressed in terms of our obligations to obey or disobey meets with difficulties that are inherent in the interpretation of political activity that utilises obligations. However, we can turn to an examination of political activity that utilises the notions of rights and in particular we can legitimately ask the question; 'Is there a right to disobey the state?' We can also consider the question; 'Is it right to disobey the state?' It is to the notion of rights that the next chapter is devoted.

Chapter 4

THE RIGHT TO DISOBEY

If it is the case that an account of obligations, political or moral, is inadequate in explaining the relationship between the state and the individual in general then we can examine this relationship in terms of a discussion of rights to see if this can help us to clarify what exactly the civil disobedient and his/her opponent are disagreeing about. There are, here, a number of different forms that such a discussion will entail. First of all, an examination of the Natural Law and Natural Rights argument will be relevant and in particular the work of Locke insofar as he did have a theory of resistance to government. Secondly, an examination of more recent discussions concerning the nature of inalienable rights and human rights. Thirdly, an examination of current debates concerning the nature of rights in terms of claims, entitlements etc., debates that rely heavily upon Hohfeldian notions of rights and reflect a concern with legal notions of rights. Throughout the chapter I have assumed that it goes without saying that there is a difference between 'having a right' and 'being right' and that to have a right to something does not necessarily mean that we ought to have it. Interestingly, it is often suggested that human rights theorists confuse having a right with being morally right. More of that later. Initially then I shall concentrate on Natural Rights theory and John Locke's right to resistance.

Locke

According to Melden (1970), the idea of natural rights developed in the 17th century and was distinct from Natural Law theories in stipulating that individuals have rights from the fact that right acts may be demanded of individuals. Melden outlines some of the arguments for these rights.

"1. These rights are fundamental in the sense that without them there could not be any of the specific rights that are grounded in the specific social circumstances in which individuals live

2. That just as these rights cannot be required by anything they or others may do, so they cannot be relinquished, transferred or forfeited ... since,

3. They are rights that human beings have simply because they are human beings and, quite independently of their varying social circumstances and degrees of merit." (Melden, 1970, pp.2)

More particularly for Locke, under the law of nature individuals have a right to do anything which the law of nature does not forbid, and where the law of nature does not have anything to say then every individual has a right to act according to his own discretion and a natural right not to be interfered with by others. Locke is generally regarded as offering up a systematic account of inalienable natural rights which no citizen could be understood to have given away (Simmons (1983) argues that this is not as clear cut as may first appear). Thus the law of nature can define and maintain a system of rights:

"... no one ought to harm another in his Life, Health, Liberty or Possessions. For Men being all the Workmanship of one Omnipotent, and infinitely wise Maker, All the Servants of one Sovereign Master, sent

into the world by his order and about his business they are his Property, whose Workmanship they are, made to last during his, not one anothers pleasure. And being furnished with like faculties, sharing all in one Community of Nature, there cannot be supposed any such Subordination among us that may Authorise us to destroy one another, as if we were made for one anothers uses, as the inferior ranks of Creatures are for ours. Every one as he is bound to preserve himself, and not to quit his station wilfully; so by the like reason when his own Preservation comes not in competition, ought he, as much as he can, to preserve the rest of Mankind, and may not unless it be to do Justice on an offender, take away, or impair the life, or what tends to the Preservation of the Life, Liberty, Health, Limb or Goods of another." (Locke, 1960, pp.311, 2nd Treatise, para 6)

The individual has the right to punish transgressors of the law of nature and to exact reparation for damages done to him. The absence of a common judge to determine punishment may lead to conflict. Hence the establishment of political authority to protect property where property is seen in a wide sense as:

"Lives, Liberties and Estates, which I call by the general Name, Property" (Locke, 1960, pp.395 2nd Treatise, para 123)

Thus for Locke then:

"The Reason why Men enter into society, is the preservation of their property; and the end why they chuse and authorise a legislative is, that there may be Laws made, and Rules set as Guards and Fences to the Properties of all the Members of the Society, to limit the Power, and moderate the Dominion of every Part and Member of the Society." (Locke, 1960, pp.460, 2nd Treatise, para 222)

The way in which authorisation takes place is, as we saw in an earlier chapter, through consent. For present purposes we need only note that and examine the nature of the relationship between the individual and the state.

Locke insists that government is defined and limited by the end for which political society is established. Government is neither arbitrary nor a matter of will but is characterised by a relationship of trust between it and the citizenry. The notion of trust is crucial to an understanding of Locke's position on rights. For Locke:

"The Legislative acts against the Trust reposed in them, when they endeavour to invade the Property of the subject, and to make themselves, or any, part of the Community, Master or Arbitrary Disposers of the lives liberties, or fortunes of the people."
(Locke, 1960, pp.460, 2nd Treatise, para 221)

when this happens then:

"By this breach of Trust they forfeit the Power, the People had put into their hands, for quite contrary ends, and it devolves to the People, who have a Right to resume their original Liberty, and, by the Establishment of a new legislative (such as they shall think fit) provide for their own Safety and Security, which is the end for which they are in society."
(Locke, 1960, pp.461, 2nd Treatise, para 222)

When trust is betrayed then the remedy for this is revolution. Thus Locke argues against political absolutism. However, according to Simmons (1983, pp.189) the right that an individual exercises in rebelling against such a government that breaches its trust is not 'an inalienable right of revolution' but a natural right to be free of interference by others, this natural right returning to him by the government's failure. Yet it seems to me to be more complex than this insofar as Locke offers a number of reasons for the dissolution of government and justification for disobedience. In paragraph 212 of the 2nd Treatise there is no obligation

to obey laws that are made without authority i.e. consent. Presumably here trust does not arise in the first place. In paragraph 215 Locke suggests that if the Legislative is hindered from acting freely then the Legislative is altered and thus puts an end to Government. Likewise in paragraph 216 when the 'Electors, or ways of Election are altered' without consent then the Legislative is once again altered. In other words, it appears to me that the breach of trust consists not just in what the government may or may not do in terms of 'interference' but also in terms of how that government is chosen. This will determine its legitimacy. In paragraph 220 Locke suggests that in these cases Government is dissolved and the people are at liberty to choose a new Legislative. It really depends on how widely we interpret the notion of self-preservation. In paragraph 222 Locke goes on to discuss acting contrary to trust when the 'supreme executor' corrupts the Representatives or threatens the electors in order that they should vote in a certain way. However, the occasion of revolt is not very often:

"...such **Revolutions** happen not upon every little mismanagement in publick affairs. Great mistakes in the ruling part, many wrong and inconvenient Laws and all the slips of human frailty will be borne by the People, without mutiny or murmur. But if a long train of Abuses, Prevarications, and Aritifices, all tending the same way make the design visible to the People, and they cannot but feel, what they lie under, and see, whither, they are going, 'tis not to be wonder'd, that they should then rouze themselves, and endeavour to put the rule into such hands, which may secure to them the ends for which Government was at first erected ..." (Locke, 1960, pps.463-464, 2nd Treatise, para 225)

This position is very similar to that adopted by Rawls and others who argue that injustice must have existed for a long time and legal remedies have been exhausted before disobedience may even be considered. However, Locke goes on to suggest, in paragraph 226, that the power of the people to set up a new Legislature is in fact the best means of hindering rebellion. Here Locke sees rebellion as acting against the laws and then the state of war is entered into which is force without authority. Note how important the law is for Locke where it not only preserves but also enlarges freedom.

However, not all resisting is rebellious and as we saw earlier when the trust is breached between the ruler and the citizens there are grounds for resistance. The question then is; who judges when that trust is broken?

"If a controversie arise betwixt a Prince and some of the People, in a matter where the Law is silent, or doubtful, and the thing be of great consequence I should think the proper Umpire, in such a case, should be the Body of the People. For in cases where the Prince hath a trust reposed in him, and is dispensed from the common ordinary Rules of Law; there, if any Men find themselves aggrieved, and think the Prince acts contrary to, or beyond that Trust, who so proper to Judge as the Body of the People (who, at first, lodg'd that Trust in him) how far they meant it should extend?" (Locke, 1960, pps. 476-477, 2nd Treatise, para 242)

Note here the similarities with a Rawlsian account of civil disobedience where if there is an injustice existing then it can be remedied by an appeal to the majority. This is exactly the kind of claim that Locke seems to be

making. However, ultimately for Locke if there is no possibility of resolution then the appeal must be to a higher authority:

"But if the Prince, or whoever they be in the Administration, decline that way of Determination, the Appeal then lies no where but to Heaven. Force between either Persons, who have no Known Superior on Earth, or which permits no Appeal to a Judge on Earth, being properly a state of War, wherein the Appeal lies only to Heaven, and in that state the injured Party must judge for himself, when he will think fit to make use of that Appeal, and put himself upon it." (Locke, 1960 pp.477 2nd Treatise para 242)

Is this not exactly what the civil disobedient claims to be doing by appealing to conscience?

This ultimate appeal to God is further reiterated in Locke's 'Letter on Toleration' where it is suggested that the magistrate can have no authority over the care of men's souls and if there is disagreement between the authority and the subjects then ultimately God must be the judge.

The idea that individuals have natural rights prior to entering into society and particularly political society, presumably means that there is some kind of criteria by which we can judge whether political society measures up or not. What kinds of rights are these? Using the language of rights that is more familiar to us today, Simmons (1983) indicates that there are three different kinds of rights at work in Locke's 'Two Treaties'. First, he suggests that there is a 'liberty' right in the sense that there is a 'right to do' something. Locke's account of the acquisition of property is a right of this kind

where individuals have a right to appropriate property through their labour. Secondly, there are rights which have correlative duties and Simmons (1983, pp 195) points to Locke's discussion of charity, the case of children and natural equality as examples of rights correlating with duties.

Within the rights - duty relationship there are two distinct types of rights - 'optional claims rights' whose rights are protected by duties of non-interference on the part of others, and also rights which are held as a direct consequence of duties which the holder of rights has. Thus the notion of parental rights may just as well be called duties. More significantly, however, Simmons argues that natural rights, for Locke, are rights to do what we are bound to, or have a duty to do. Thus the natural right to self-preservation is in fact a duty. If this is the case then, the idea of the right to resist in terms of self-preservation also becomes a duty to resist and the duty to preserve civil society thus:

"Revolution for Locke is not an act of revenge, it is an act of restoration, of the re-creation of a violated political order." (Dunn, 1984, pp.55-56)

Under certain circumstances then could there be a duty of civil disobedience? We would have to say no, for Locke, since he would not consider, I suggest, the normal forms of civil disobedient protest i.e. particular laws or policies, to be an attack upon self-preservation. Thus it may be that for Locke there is a duty to revolt but not to the much more limited action of civil disobedience.

From a different perspective, the idea that rights overlap duties brings in a sense of moral rightness. In making a distinction between obligations and rights Ake (1969) argues that to have an obligation is to be morally bound, whereas to have a right is to have an option which can be claimed, waived, exercised or not exercised but if we dress up rights as duties then we are insisting that they ought to be exercised. Presumably, then, for Locke the duty to resist implies that it ought to be carried out. Resistance to the state is morally justified on this account. Ake considers that:

"If the individual has a duty to uphold certain higher values even against the collectivity, then he must also reserve the right to evaluate the moral status of the acts of the collectivity, and to decide whether the higher values are being upheld or violated. If the collectivity decides what the higher values are and when they are violated ipso facto the duty of the individual to uphold higher values against the collectivity disappears." (Ake, 1969, pp.253)

Yet, for Locke, when there has been a 'miscarriage' of authority by those in power then authority returns to the society and not the individual (para 243). However, we can locate Locke's understanding of rights, duties and, generally, the relation between the individual and the state within the wider context of contributing to a Liberal tradition in politics. This is certainly the case with Ake and also with Putnam (1976 B) who perceives that this tradition expressed the aspirations of the 'rising bourgeoisie', justified their activities and generally affirmed those rights which were defined by developing legal systems from the 17th century onwards. Putnam

contends that this tradition held three rights to be central to its doctrine: the right to property, the right to equality and the right to equal participation in the political process. However, we must be aware that the context of discussions concerning rights will change over time such that Locke's notions concerning rights may not be applicable and in fact may not refer to the same concept as it did for later theorists. However, we can see this difference in context if we briefly look at Hobbes account of natural law.

Hobbes

For Hobbes the right of nature is the liberty that each man has to preserve his own life. A law of nature is;

"... a precept or general rule, found out by reason, by which a man is forbidden to do that, which is destructive of his life, or taketh away the means of preserving the same." (Hobbes, 1962, pp.146 ch. 14)

Insofar as the state of nature is a condition of war then every man has a right to everything. In order for peace to exist then this right can be laid aside by either renouncing it or transferring it to another such that the individual is obliged not to hinder those to whom the right has been transferred. This of course is the basis of Hobbes' contract theory of obligation that characterises the relationship between the individual and the state. Raphael (1967) sees natural rights for Hobbes as a right to act rather than a right to have something or

a right against other persons. However, individuals give up this right and authorise the Sovereign to act on their behalf. For Hobbes it is impossible to appeal to some higher authority to question the Sovereign's authority:

"And whereas some men have pretended for their disobedience to their Sovereign, a new covenant, made, not with men, but with God, this is also unjust: for there is no covenant with God, but by mediation of somebody that representeth God's power; which none doth but God's lieutenant who hath the sovereignty under God." (Hobbes, 1962, pp.178, ch. 17)

In other words, Leviathan. As indicated earlier, this does not allow the notion of civil disobedience under a Hobbesian regime. Hobbes goes on to specify the rights of sovereigns which appear to be artificial rather than natural and include the right to make war and conclude peace, to choose counsellors, to reward others and also includes duties by subjects to the Sovereign such as the duty to consent with the majority, not to breach the covenant and to obey the sovereign. (see ch.XVII pps.178-183) Yet;

"The obligation of subjects to the sovereign is understood to last as long, and no longer, than the power lasteth, by which he is able to protect them. For the right men have by nature to protect themselves, where non else can protect them can by no covenant be relinquished." (Hobbes, 1962, pp.212, ch. 21)

However, for Hobbes:

"The law of nature, and the civil law, contain each other, and are of equal extent. For the laws of nature which consist in equity, justice, gratitude, and other moral virtues on these depending, in the

condition of mere nature are not properly laws but qualities that dispose men to peace and obedience." (Hobbes, 1962, pp.246, ch. 26)

Hobbes does not allow private conscience:

"...That every private man is judge of good and evil actions. This is true in the condition of mere nature, where there are no civil laws; and also under civil government, in such cases as are not determined by the law. But otherwise, it is manifest, that the measure of good and evil action, is the civil law, and the judge the legislator, who is always representative of the commonwealth. From this false doctrine, men are disposed to debate with themselves, and dispute the commands of the commonwealth; and afterwards to obey, or disobey them, as in their private judgements they shall think fit; whereby the commonwealth is distracted and weakened." (Hobbes, 1962, pp.287, ch 29)

Thus Hobbes does not allow appeals to God or to conscience to justify disobedience and where such appeals are made, where private judgement is allowed to dictate whether people should obey or not, then the commonwealth is weakened. This argument is one that is typically present in criticisms of civil disobedience i.e. it weakens the stability of government itself. For Hobbes:

"...the law is the public conscience, by which he hath already undertaken to be guided." (Hobbes, 1962, pp.287, ch 29)

Thus, for Hobbes then, the right of resistance is only allowed when the Sovereign seeks to kill or wound the subject.

Natural Rights

Yet how convincing is this account of natural rights? Margaret Macdonald (1956) clearly believes that the concept of natural rights is one that belongs to propositions concerning values to be clearly distinguished from analytical or empirical propositions. She suggests that a theory of natural rights confuses reason with right. The fact that man can reason may be said to be fact about man and this does not entail values. What reason may know will be confined to either analytical or empirical facts. Bentham, of course, referred to natural rights as 'nonsense upon stilts' but the concept has still laid claim to our deliberations. However, according to one commentator:

"The problem besetting natural right theory is that the very content of rights prohibits them from being either natural givens or products of any natural condition, or from being attributes of the self, given prior to and independently of individuals relations to one another." (Winfield, 1982, pp.84)

Winfield argues that the attempt to give rights foundations by grounding them in Natural Law is to commit a fallacy insofar as rights have their legitimacy recognised in terms of 'self-determined structures of interaction'; they exist for their own sake and not for any other. Winfield suggests that:

"Consequently rights exist not as a function of the self, but only in virtue of specific voluntary relations among a plurality of individuals."
(Winfield, 1982, pp.85)

Thus we can talk of different kinds of rights such as property rights, moral rights, civil rights etc. whose content will derive from the different context of the specific relationships we may have. Winfield suggests that the rights and duties that characterise, say, the relationship between parents and children arise not in virtue of the 'natural' relationship between parents and children but in virtue of the willed 'enactment of the family'. Accordingly the 'rightful' parents of children may not be the natural mother and father. Thus, in the context of the political, the rights of citizens can be recognised only within a body politic;

"...rights are constituted through specific enacted structures of reciprocal recognition in which the members of a plurality of individuals can choose a certain mode of action towards one another and have its legitimacy mutually respected." (Winfield, 1982, pp.90)

Given this perspective then Winfield has to condemn the notion of human rights which are said to arise by virtue of our being human rather than as a result of relations that we may have with others. "Our species being does not automatically make us a bearer of rights" for Winfield independently of our having minds and wills that are capable of recognising and being recognised by others.

We will return to the notion of rights dependent upon a specific structure of relationships later and in particular to Flathman's concern with a practice of rights but as yet we have not finished with the notion of natural rights. Hart believes that there is at least one natural

right and that this is the equal right of all men to be free. He goes on to distinguish between special rights (those arising from promising as the most obvious example) and general rights. Specific rights entail a 'mutuality of restrictions':

"...when a number of persons conduct any joint enterprise according to rules and thus restrict their Liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission." (Hart, 1955, pp.185)

Is the golf club, as an example of a joint enterprise with rules, more appropriate than the political community here? Think of the arguments concerning tacit consent and the 'benefits received' argument advanced by Hart in his 'Concept of Law' and Rawls in his 'A Theory of Justice' that were explored in the previous two chapters.

Other rights, for example those that parents and their children may have with respect to each other, arise out of what Hart terms a 'natural relationship' instead of a direct voluntary transaction. However, special rights are seen to be conditional in two ways: firstly the existence of any such rights depends upon people having entered into some special relationship and secondly, when some transaction has given rise to such rights these are not held against everybody but only against those who have corresponding duties in virtue of the same transaction. For Hart the moral obligation to obey the rules created in such circumstances is due to the co-operating members of society. Thus, according to Hart, the social contract

theorists were correct in asserting that obligation to laws arises not through benevolence but arises between members of a political community through their mutual relationships. Hart contends, however, that the mistake of the social contract theorists was to identify the right-creating situation arising out of mutual restrictions with the paradigm case of promising. They are similar insofar as they arise out of special relationships and not out of the character of the action itself.

Hart's other concept of rights is that of general rights and they are different from special rights in a number of ways:

1. They do not arise out of any special relationship between individuals.
2. They are rights which all individuals have who are capable of choice and are not dependent upon particular conditions, such as those which give rise to special rights.
3. General rights have correlative duties not to interfere to which everyone is subject and not merely those who are party to some special transaction.

There are though, certain similarities between general and special rights:

1. To have a general right is to imply that others shall not interfere with that right.

2. The right is moral in character and is a manifestation of the equal right to be free. It does not arise from the character of the action itself.

It does raise a problem though in that there is, in Hart, a logical gap between showing that if there are any moral rights there exists a moral right to be free and establishing that such a natural right is possessed by everyone. It requires the promise that if there are any natural rights then everybody possesses them. Likewise we may ask to what extent Hart's notion of general rights will fall foul of the same kinds of arguments that seemed to mitigate against a general account of political obligations. Should rights, like obligations, be considered as arising out of horizontal relationships between individuals rather than the vertical relationship that characterises the state and the individual? We can leave this aside for the moment as I wish to use Hart's notion of general and special rights as a prelude to the discussion of, more generally, traditional accounts of the notion of human rights and the more recent position that sees rights as arising in virtue of being created by some relationship rather than being natural.

Human Rights

The first problem here is how to specify what exactly human rights are. Milne has specified them in terms of the right to life, the right to respect for individual dignity, the right to be dealt with honestly, the right to justice in terms of having individual interests

considered fairly, the right to aid and the right to freedom not only from unprovoked violence but also from all forms of arbitrary coercion or interference. (Milne, 1979, pp.30)

Generally, these are said to accrue to human beings in virtue of their humanity. Thus all individuals are to be treated as equals, not because they are equal in any respect other than being human, and that they are equal in terms of their worth and not their merit. Every individual has the right to be treated as a person of intrinsic worth and as an end in himself or herself. Benn (1978) is one who indicates that the nature of human beings are such that human beings are 'objects of value', that they ought to be respected as moral persons and that certain propositions concerning human beings are in fact desirable. Similarly, Golsing (1968) specifies essentials of human beings where they have:

1. A capacity to engage in voluntary activity.
2. Desires and interests.
3. A capacity to engage in purposive activity.
4. A capacity to communicate demands.
5. A capacity for conscious response to demands.
6. There exists the possibility of clash between demands and.
7. The existence of community as already indicated in 4, 5, 6.

For Golsing, although points 1-3 indicate the nature of human beings, these cannot be separated from the notion of rights existing within the community.

These 'lists' of human rights have been enshrined in the various documents that have been issued in the name of human rights. The International Covenant on Civil and Political Rights under the auspices of the United Nations which came into force in 1976 states in the preamble that the rights it enshrines derive from the inherent dignity of the human person. It recognises the equal and inalienable rights of all members. Likewise the Universal Declaration of Human Rights recognises the inherent dignity and the equal and inalienable rights of all individuals. Article 1 of the declaration states that:

"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."

If we go even further back to the Virginia Declaration of Rights of 1776 then we find:

"That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot by any compact deprive or divest their posterity, namely the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety."
(Melden, 1970)

Well, what is the status of these statements? Milne suggests that insofar as Articles 1-21 of the United Nations declaration are concerned with juridical and political rights then it presupposes the values and institutions of liberal democracy. Examples here could be Article 17 where:

- "1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property."

or Article 19 where:

"Everyone has the right to freedom of opinion and expression. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

Milne also comments that insofar as Articles 22-30 of the Declaration are concerned with economic and social rights then they are specifically the economic and social rights of modern industrial society. Examples here may include Article 24 where:

"Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay."

or Article 23 point 1 where:

"Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment."

According to Milne, whilst full employment is desirable that does not make it into a right. From a different perspective Neilsen (1968) comments on the difficulty of measuring the 'intrinsic worth' of individuals.

More critically, Cranston (1967) contends that the traditional concept of human rights as political and civil rights to life, liberty etc. are now being replaced by other rights. Cranston suggests that social and economic

rights are now being presented as universal human rights and this involves a logical mistake in that they belong to a different category. He suggests that political and civil rights are for the most part rights against government interference and any discussion of human rights should be confined to this area of discourse.

Pollis and Schwab (1979) are concerned to express their doubts about the universal nature of human rights and suggest that they represent the cultural heritage of individualism and the Universal Declaration of Human Rights may have limited applicability to those countries, particularly in the Third World, which do not have the same democratic tradition. Given these considerations then is it the case that appeals to justify disobedience in terms of a theory of human rights will be an appeal that is appropriate within liberal democracy but not within some other regime? Critics argue that civil disobedience, on the contrary, may be justified only in non-democratic regimes.

However, for the moment we shall concentrate not so much on what a concept of human rights will consist of but what kind of status they may have and we need to examine the concept of human rights as inalienable and, in particular, to consider whether or not a right to disobey can be considered to be inalienable. The sense of inalienable right is that right which cannot legitimately be taken away. According to Brown it is possible to hold inalienable rights and these rights have four distinct

features: firstly, they are moral, secondly, they are politically based; thirdly they are natural, and fourthly they are self-evident. Brown suggests further that;

"...inalienable rights are rights to institutions of a specific sort, and where the required institutions are lacking and the rights infringed, they are rights against governments to provide the specific legal procedures which constitutes the protection." (Brown, 1961, pp.247)

We may thus wish to consider that for Hobbes, for example, there is, then, an inalienable right to self-preservation. Brown suggests that we cannot morally consent to a government that infringes an individual's rights and yet what does it mean to 'morally consent' to a government? Is this different from ordinary consent? There are two objections that Brown can conceive of to the notion of inalienable rights: firstly, from the point of view of cultural diversity, it maybe the case, as Pollis and Schwab argue, that rights may be conceived of as belonging to a particular political, social and cultural context; in this case western democracy. Brown does not believe this to be a problem since he contends that individuals will have rights whether they know it or not. If there are human rights then they are intrinsic to the individual irrespective of his/her social context. The second objection that Brown considers is the possibility of rights being overruled. Brown contends that it is possible to have an hierarchy of 'moral goods' and an inalienable right to institutions to cater for these

goods, and to provide 'general protection' of our moral interests. And yet what criteria do we choose to weigh 'moral goods'?

The idea of rights being overruled can be tied in with the notion of prima facie rights. The vocabulary of prima facie rights was adopted from the distinction made between prima facie duties and duties 'sans phrase' as developed by Ross. When this distinction is applied to rights, a right 'sans phrase' is one which has always dictated the result that ought to be followed in cases to which it applies whereas a prima facie right is merely one that should so dictate unless stronger considerations intervene. As Melden has indicated, a prima facie right is not just an apparent right, rather it is a right that;

"...qualified as it is , is real enough and not merely apparent and presumptive, in short, a [right] that further investigation cannot dispel as unreal or unfounded." (Melden, 1970, pp.483)

There is no difficulty in squaring the notion of a prima facie right with the fact that a right does not just vanish in cases where it is applicable but where its dictates are justifiably overridden. To do this we need to distinguish between conditions of possession, which specify who has or can have the right (and whether it can be waived, forfeited, nullified, given up or transferred), the scope of a right, which specifies what the right is to and in what situations, and the weight of a right, which involves a partial or full specification of what should be done in cases of conflict between the right and other

considerations. To describe a right as *prima facie* is to say something about its weight but not about its scope or conditions of possession.

When a right, say, the right to freedom of speech or assembly, is overridden in a particular case (in order to, say, avoid a riot) this does not imply that the right holder ceases to possess the right. Moreover, rather than view this case as being covered by an exception built into the scope of the right - which would require us to say that a person had the right to freedom of speech or assembly but that it did not cover cases where it was likely to trigger a riot - we can view it as being covered by a specification of the right's weight. Here we would say that a person had the right to freedom of speech and that it applied even where it was likely to trigger a riot but that it was subordinate to some stronger considerations, such as public safety as with the case of the riot.

Thus, it may be that we need to balance different rights. 'Freedom' rights- to speak, publish or participate in political activities- can balance 'welfare' rights- to receive education or health care- with cases of apparent conflict worked out individually by weighing the strengths of the different moral obligations and rights. Because the right to freedom and the right to well-being can conflict as when a doctor's right to take a vacation conflicts with a patient's right to medical care, if they were absolute rather than *prima facie* then they could not exist. *Prima facie* rights do not pose the problem that if

they conflict we must conclude that one of them does not exist. It is understood that with prima facie rights respecting them is conditional upon there being no more severe moral considerations which may require violating them. In the case of prima facie as opposed to absolute rights, this would not involve a violation at all, but merely an implementation of the result of having weighed the rights and found one or some as having greater significance and thereby priority in some situation. Of course the major problem with any discussions of the 'weighting' of rights must involve some criteria that we can appeal to in determining the respective merits of competing rights. Utilitarianism may be one answer with the felicific calculus and the greatest good principle but the problems with this are well-known. This is, however, part of the problem that the civil disobedient may come across. Is there such a thing as the right to protest or the right to disobey? If so, can this be overridden by other rights such as the rights of the majority, versus the minority, to some conception of public good, stability or even democracy? Whose rights, not just what rights, have to be examined. In this we can be helped by Dworkin's discussion in 'Taking Rights Seriously'.

Dworkin suggests that an essential feature of rights is that they are powerful enough to prevail in competition with collective goals such as welfare, security and prosperity even though we may be unable, for the most

part, to give full and precise specifications of the scope and weight of particular legal or moral rights. However, for Dworkin:

"...a right is a claim that it would be wrong for the government to deny an individual even though it would be in the general interest to do so." (Dworkin, 1977, pp.269)

For Dworkin a possible Utilitarian gain for the benefit of all cannot stop a person doing from what he/she has a right to do. A right differs from a community goal in several important respects:

Firstly, its specification calls for an opportunity or resource or liberty to be accorded to particular individuals.

Secondly, a right must have a certain threshold weight against collective goals in general. Dworkin contends that we would not be consistent if we agreed that people have a right to free speech, but also took the view that any balance of community welfare would justify abrogating free speech.

Thirdly, Dworkin argues that rights should be distributed evenly whereas a community goal may be achieved by unequal distribution of burdens or benefits.

Dworkin's thesis applies to the principles governing the relationship between individuals and their government. In 'Taking Rights Seriously' he discusses the implications of his theory and his general antipositivist stance with the intention of understanding the judicial process, of conceptualising the functions of the judge in

the legal process and of criticising other legal theorists. In general he is concerned to identify the limits of governmental authority by reference to a view of human rights. In line with his stress on rights as a principle of due process, Dworkin denies that individuals have a general right to liberty:

"I have in mind the traditional definition of liberty as the absence of constraints placed by a government upon what a man might do if he wants to... This conception of liberty as license is neutral amongst the various activities a man might pursue, the various roads he might wish to walk. It diminishes a man's liberty when we prevent him from talking or making love as he wishes but it also diminishes his liberty when we prevent him from murdering or defaming others." (Dworkin, 1977, pp.267)

Commenting further on this sense of liberty and right Dworkin concludes that:

"I do not think that the right to liberty would come to very much, or have much power in political argument if it relied on any sense of the right weaker than that. If we settle on this concept of a right, however then it seems plain that there exists no general right to liberty as such. I have no political right to drive up Lexington Ave. (A one-way street)... The vast bulk of the laws which diminish my liberty are justified on utilitarian grounds as being in the general interest or the general welfare; if as Bentham supposes, each of these laws diminishes my liberty, they nevertheless do not take away from me anything that I have a right to have." (Dworkin, 1977, pp.267)

What does Dworkin believe we have a right to as such? It is 'the right to treatment as an equal' which means 'the right to equal concern and respect in the political decision about how.... goods and opportunities are to be distributed.' (Dworkin, 1977, pp.273)

Dworkin holds that the important thing about rights is that they give the right holder an especially strong justification for acting in a certain way or for demanding a certain benefit, a justification which is independent of, and which will generally triumph in, competition with collective goals. For Dworkin, rights function as 'trumps' over collective goals and this is what is distinctive about them. For a principle to provide a guarantee of a benefit that is independent of, and stronger than, appeals to collective goals it must have two characteristics:

1. It must be individuated. This means that the principle must define a class such that every member of the class is assigned the benefit. In contrast policies that are designed to attain collective goals are more concerned with aggregate benefit.
2. The principle must be a strong or high-priority moral or legal consideration. It must have sufficient weight that its dictates yield to those of collective goals only in clear emergencies, or at least are not such as to be outweighed by them in normal circumstances. The kind of justification peculiar to rights does not depend on whether a particular assignment of a good maximises attainment of some collective goal; the principle invoked, rather, provides an independent guarantee of the benefit.

Dworkin believes that for a moral principle to have these two characteristics it cannot itself be based upon some collective goal but must rather be based upon considerations of individual dignity or equality of respect. It is not surprising to find Dworkin sympathetic to civil disobedience and argues that society should be tolerant of some disobedience (see Ch.8 in Taking Rights Seriously).

The Logic of Rights

In contrast to Dworkin's discussion of rights and principles, Flathman (1976) locates his discussion of rights within the context of rules and social practices. For Flathman, rights exist in a practice where they are recognised as such. More specifically, in order to qualify as a right then:

- "(1) an x must be identifiable in the language of the practice of rights in question.
 - (2) there must be an A who is able to exercise the right and a B able to discharge the obligations
 - (3) it must be possible for B to avoid discharging the obligations
 - (4) the exercise of x must be judged advantageous to A and disadvantageous to B and
 - (5) the right to x must be established in the rules or conventions governing the practice."
- (Flathman, 1976, pp.82)

The implications for civil disobedients are:

- 1) If a right to disobey can be established within the rules or conventions governing the practice then presumably civil disobedience can be justified.

- 2) Is 'rights talk' confined to individuals? Does it make sense within the context of Flathman's treatment of rights to talk about group rights? Flathman is concerned with the nature of authority also and raises the possibility of conflict between them. Flathman sees both as practices that do co-exist but nevertheless will be often in a state of continuing tension. This is to be expected given the individualistic nature of rights as outlined by Flathman. He suggests that:

"... rights, whether legal or otherwise, leave the initiation of conduct largely to the unregulated action of the individual members of society. So long as these decisions remain within the framework of rules that define the practice, social coordination is achieved by uncentralised social and political process. Participants in this process have no formalised or institutionalised responsibility to concern themselves with the broad social consequences of the use they make of their rights, the assumption apparently being either that the question of the social good is not raised by the exercise of rights or more plausibly, that it will in fact be best served by uncentralised interaction so long as that interaction remains within the limits defined by the rules of the practice. (The individual freedom of action allowed by the practice should itself be regarded as a social good.)" (Flathman, 1976, pp.142)

This individualist conception of what it is to have rights and how it may contribute to the 'common good' does look a bit like the economic liberalism of Adam Smith's 'hidden hand'. However, for Flathman then, to have a right is to have a warrant that authorises A to act in such a way that A judges to be advantageous to himself/herself even though it may be disadvantageous to B. Thus for A to claim a

right is to suggest that he/she can perform a particular course of action irrespective of its consequences for some other person or group of persons. Furthermore if this is the case then the individual civil disobedient can claim that he/she has a right to engage in a particular form of action that may disadvantage others. From the perspective of the civil disobedient is this right legal or moral in nature? Presumably it cannot be legal as it does not make sense to suggest that there is a legal right to disobey the law. Unless there is, as we saw with the Civil Rights Movement, a dual system of law in operation where it may be legally valid to disobey a law if that law is not in accordance with the higher law, higher law here being taken to mean national as opposed to state law. It may be that it is state law that is itself ultra vires. If the right to disobey is moral in nature then presumably we are back in the realm of human rights as opposed to legal rights and hence back into the debate between the theory of Legal Positivism and the Natural Law theorist of the last chapter.

If it is the case that individuals have rights then do either individuals, or the community, or the state have a duty not to interfere with these rights? This of course is the well-known discussion concerning the correlativity of rights and duties. Here the attribution of rights to a person is taken to imply that one other (or others) will have a duty to him/her. From this perspective it may be that a right is but a duty seen from a different angle then every right will entail a duty and every duty a

right. However, Feinberg (1966) among others, has provided examples of duties that do not seem to correlate with rights. Consider the example of charity which may require us to contribute to one or another of a large number of eligible and worthy recipients, no one of which can claim our contribution as their due. Thus the person who recognises a duty has considerable discretion as to when he/she will discharge it, and the person(s) who may benefit from the discharge of such a duty is not assignable or determinate. When we support Band Aid we are not giving to a particular individual and in this sense it is considered that the duty has not been individuated and hence does not generate a corresponding right. Thus, it is argued, not all duties entail rights of other people, even though such a correlation may exist for other duties. Feinberg suggests that a right 'in personam' is a right against a specific person and a right 'in rem' holds against the world at large e.g. natural rights. He suggests different types of rights and duties:

1. Indebtedness
2. Duties of commitment
3. Duties of reparation
4. Duties of need-fulfillment
5. Duties of reciprocation
6. Duties of respect
7. Rights of community membership
8. Duties of status
9. Duties of obedience

He goes on to declare that:

"Duties of indebtedness, commitment, reparation, need-fulfillment and reciprocation are necessarily correlated with other people's 'in personam rights'.

Duties of respect and community membership are necessarily correlated with other people's 'in rem' rights, negative in the case of duties of respect, positive in the case of duties of community membership.

Duties of status and obedience are not necessarily correlated with other people's rights." (Feinberg, 1966, pp.142)

It may well be that we have general rights (and duties) in Hart's sense arising out of 'community membership'. Similarly, Lyons (1970) argues that whilst there are rights that do correspond to duties there are other types of rights (the right to do) that do not. He focuses on the constitutional right of Americans to free speech. This right does not create an 'area of free choice' by imposing duties on others but instead it imposes a disability or lack of authority on Congress. The First Amendment, it is argued, deprives Congress;

"...of the authority...to enact laws requiring or prohibiting speech of certain kinds." (Lyons, 1970, pp.50)

An attempt by Congress to legislate in this area could presumably be challenged successfully in court and declared null and void. Thus although the right to freedom of speech may have a conceptual correlative;

"...it is not an obligation, it is a legislative disability." (Lyons, 1970, pp.51)

Baybrooke argues that Lyons is too rigid in his concept of a right and misses the 'open texture of the concept, and he conceives of an obligation not to interfere' in the case of free speech. Baybrooke asks us to imagine someone

asserting the existence of a right while allowing that no one is under any duty regarding the acts covered by the right. In such a case;

"...the alleged right has turned out to be a right that has no meaning...The alleged right does not protect him, it does not give him a ground for complaint. There is nothing for him to gain in invoking it before during or after any attempts at interference." (Baybrooke, 1972, pp.361)

But we can imagine such a right being useful if we imagine it to be correlated with a disability on the part of another person or persons. If someone purports to do what he/she lacks the legal authority to do such as legislate away the freedom of speech then there is ground for complaint, assuming that this harms someone's interests. There may be something to gain in invoking such a right in that the invalidity of the action will be officially declared and deprived of practical effect. More generally, the most important means of institutionalising some rights may be to create disabilities or liabilities rather than duties and this will often be the solution where a legal duty cannot be expected to be particularly effective.

Thus we can continue to say that Congress has a duty not to make laws that may abridge the freedom of speech but this particular duty cannot even be properly stated without bringing in the notion of a disability, nor is it enforceable along the lines of most duties but requires instead the sanction of nullity. There is considerable weight to be given to the contention that a disability or

lack of authority rather than a duty may sometimes be the correlative of a right. Other duties may well be lurking in the background but these may be peripheral and not specifically correlated with the right.

Lyons is arguing from the perspective of rights concepts advanced by Hohfeld. In crude terms Hohfeld distinguishes between:

1. A legal claim.
2. A legal liberty (or privilege).
3. A legal power.
4. A legal immunity.

The most important distinction here is between the idea of claims and liberties. The idea of a claim is that it has a duty as its correlative. A liberty is freedom from duty and has as its correlative the absence of a claim that some other party would have. A claim right is a right to be given something by someone else or a right not to be interfered with or treated in a certain way by somebody else. However, Hart has argued that first, it is analytically important to distinguish liberty (mere absence of duty) from claim right and secondly, that it is important to see that a liberty unprotected by any claim-rights against interference cannot usefully be classified as a right. This suggests that rights are treated as distinctly **beneficial** and not merely as legally recognised **choice**. Finnis (1980, pps. 203-204) suggests that the notion of rights as beneficial or as choices represent two general ways of examining rights. On the one hand rights are said to be benefits secured for

persons by regulating the relationships between individuals such as being legally free to act. On the other hand it is argued that such a theory of rights misses the point insofar as rights are about choices either negatively by not impeding it (as with liberty rights) or positively by giving legal effect to it (as with claim rights).

However, consider the following example: A liberty right to do A, say to hang flowers on the front door, consists in the mere absence of any duty to refrain from doing that particular thing. Such rights are apt to be rather numerous but more importantly there may be in most of the cases no duties which specifically protect the particular liberty right in question. Yet there may be other duties that prohibit such actions as trespass or violence against a person's property, and this effectively restrains the neighbour who does not like flowers from destroying or removing them. These duties may constitute a sort of 'perimeter', to use Hart's phrase, on which any number of liberty rights could rest. Where such general duties can be called into play, as supplements to a given liberty right, it becomes impossible to use the supplemented right (effectively any liberty right) as an example of a right without some corresponding duties. However, Johnson uses the Hohfeldian analysis when examining the nature of political authority. She suggests the following:

"If the state is acting within its sphere of authority.

The state has: a right (to obedience)
 The subject has: a duty (to obey)

If the state is acting outside its sphere of authority:

The state has: a no-right (to obedience)
 The subject has: a privilege (to disobey)"
 (Johnson, 1974, pp.526)

Problems arise firstly in deciding when the state has acted outside its authority - how do we decide? Secondly, so far the nature of rights has been held to be appropriate to discussions concerning relationships between individuals and not relations between the state and the individual. However, Johnson continues:

"Note that when the state has a no-right the subject has only a **privilege** not a **duty** of disobedience. That is, he is entitled to disobey if he wants to. It is a matter of discretion. Disobedience becomes politically obligatory only if there is a higher authority than the state whose right against the subject imposes a duty of disobedience upon him."
 (Johnson, 1974, pp.526)

Johnson suggests that Natural Law might be held to impose just such a duty but she adds that the notion of a duty to disobey is rare in liberal political theory presumably because the appeal to higher authority is one that is not recognised within the liberal tradition. It also begs the question to what extent is the individual conscience deemed to be a higher authority than the state. Does it make sense to suggest that the state has rights against the subjects when the state is the subjects? The discussion of benefits versus choice and claims versus

liberties is one that has dominated recent discussions of rights and I want to examine in a little more detail these notions.

Feinberg (1966) has developed the idea of rights as claims suggesting that to have a right is to have a claim to something and against someone which will be recognised in law. For such a characterisation to be illuminating an account needs to be given of what a claim is and what makes a claim valid. Feinberg thinks that much can be learned about the nature and value of claims by examining the activity of claiming. But Feinberg does not accept the view that what makes a claim valid is some feature of the activity of claiming. Rather he invokes legal and moral principles to explicate the notion of a valid claim. When there is a set of reasons based on legal rules or moral principles which support a person being able to do or have something, then that person has a valid claim. To have a claim is to be in a position to make a claim. Yet an individual can have a claim without that claim amounting to a right. Such a claim might not be conclusively established by legal rules or moral principles since to have the status of a right a claim must be validated and pass certain tests. For Feinberg when a person has a legal claim to *x* it must be the case that, firstly, he/she is at liberty in respect of *x* and hence has no duty to refrain from or relinquish *x* and, secondly, that this liberty is the ground of other people's duties to grant *x* or not to interfere with respect to *x*. Thus it is true by definition that in the

sense of a claim, rights logically entail other people's duties. Feinberg suggests that the paradigm of such rights are the creditors right to be paid a debt by the debtor and the landowner's right not to be interfered with in the exclusive use of his/her own land (Feinberg, 1980). Here Feinberg has strengthened his earlier conception (Feinberg, 1973, pp.65-68) of having a claim where this amounts to making a claim to, having a point or having a case. It consists in having relevant reasons of some weight that may lend credibility and put the individual in a position to make a claim. In his later work Feinberg distinguishes between 'making claim to', 'claiming that' and 'having a claim'. Feinberg also distinguishes between 'claims to' and 'claims against' and this corresponds to different aspects of the validity of a claim. A valid 'claim to' calls for, but does not entail, an obligation on some party to act in such a way as would satisfy it. If it is practicable for a 'claim to' to be satisfied, then it can serve as a justifiable basis for calling on the duties of other persons. But a valid 'claim to' is only part of the justification for a 'claim-against' for the latter claim, by definition, requires that there would be duties of some assignable individual(s).

For Feinberg, a right has two principal elements: a valid claim to something and a valid claim against someone. Although one or other of these elements may be more visible in particular contexts, both elements must, Feinberg considers, be evident in a 'fully-fledged' right. He does, however, allow for a weaker sense of right, which

he calls the *manifesto* sense, that does not entail duties of other people, since the 'claim to' has not yet become of sufficient weight to generate a valid 'claim against'. Feinberg's notion of rights as valid claims allows him to treat a moral and a legal right as parallel in character. What distinguishes them is the kind of norm from which they derive their validity. For Feinberg, moral principles figure in the case of moral rights and it is by reference to such principles that 'claims to' are adjudged to be morally valid, and it is moral duties which are involved in 'claims against'. Correspondingly for legal rights we consider legal rules and principles to determine the validity of 'claims to' and it is legally created duties that are invoked in 'claims against'.

Feinberg suggests that human rights enter into the picture as a special class of moral rights. Some human rights may be fully-fledged moral rights, others, such as the '*manifesto*' rights, are, at best, emerging rights.

Martin (1980) supports the idea that in order for a claim to be valid these must be "appropriate practices of recognition and maintenance" and sees human rights as claims against governments where presumably government practices of recognition would be included within the appropriate range of practices. What happens if government refuses to recognise the particular claim that is being made? Mayo (1967) considers that a human right is a claim on behalf of all men and is a claim to action by government;

"...a human right is a claim on behalf of all men, to corporate action (or perhaps inaction) on the part of whatever institution is in a position to satisfy the claim (normally the institution(s) of which all men are necessarily members i.e. states)." (Mayo, 1967, pp.75)

Mayo also considers that a Declaration of Rights or Bill of Rights is a recognition by governments that such rights exist but presumably there is a world of difference between even recognising rights and then acting to enforce or guarantee these rights. The American Civil Rights Movement was not attempting to establish new rights or even to seek recognition of rights but rather to argue that rights already in existence should apply to them and indeed according to the American Constitution did apply to them.

We can here return to the notion of inalienable right, discussed earlier, where the sense of inalienable right as expressed in the American Declaration of Independence is that which cannot legitimately be taken away. However, if we use the concept of a claim it may be possible to waive or transfer a claim so that there are no inalienable rights. We may prefer to use the term entitlement, meaning desert, to establish the fact of inalienable rights.

Let us examine the notion of 'entitlement' more closely. McCloskey takes entitlement rather than claim or duty to be fundamental, at least as far as moral rights are concerned, and this is where McCloskey's main interest seems to lie. Rights are:

"... best explained positively as entitlements to do have, enjoy, or have done, and not negatively as something against others, or as something one ought to have." (McCloskey, 1976, pp.102)

Unlike Feinberg, McCloskey holds that a fully-fledged right need not specify who is obligated to provide what the right is to. The connection between rights and the duties of others becomes very loose. Rights as entitlements are 'intrinsic to their possessors' and are held independently of other people and, according to McCloskey, an entitlement need not depend upon the will of any other person(s). It rests, rather, on 'objective moral considerations', on a moral authority to act in a certain way. McCloskey wants to deny, in particular, that a right can be equated with a particular set of duties or claims against. He argues that we do not speak of rights in situations where it is far from clear who is to bear the burden of realising them, and that since circumstances determine which claims arise from a right one who tried to define or delimit a right by the particular claims which the right had generated would have to allow that it was in a continual state of flux as circumstances change.

McCloskey also wishes to deny that rights entail duties and he wishes to stress the logical priority of entitlements over claims against. Although McCloskey's theory is an alternative to accounts employing a notion of claim itself definable in terms of duties, his notion of an entitlement does not appear to be dissimilar to Feinberg's notion of a 'claim to'. Both are to be separated from the notion of the duties of other parties

and both provide a major part of the grounds for the creation of such duties. McCloskey emphasises in a way that Feinberg does not, that an entitlement or claim to is an independent element that is deeply rooted in the nature of human beings. For Feinberg a mere 'claim to' can only generate a manifesto right.

However, if entitlements or 'claims to' are deeply rooted in human nature we are back to looking for the grounds of rights in the fact of our humanity i.e. human rights. Secondly, in order to specify what we are entitled to them presumably we need to specify what kind of society it is that we live in and what kind of values that this society promotes. One of the claims of the Civil Rights Movement in American was the fact that they were appealing not to some alien concept of rights but to rights that were already enshrined in the American Constitution and thus recognised by all Americans. Problems arise of course when rights conflict and this would get us back into the debate of absolute rights or prima facie rights. So far, then, despite all the concerns with the logic of rights we have not advanced very far with our concerns to understand the notion of a right to disobey. We can rephrase the question in terms of 'claims to', 'claims against' (the state) or entitlements but the problem still remains. Is there something in virtue of our human being that entitles us to disobey? If there are certain rights possessed by all

individuals independently of individual merits then it must be that despite many inequalities we must be equal in some respect that is of supreme moral importance:

"The real point of the maxim that all men are equal may be simply that all men equally have a point of view of their own, a unique angle from which they view the world. They are all equally centres of experience, force of subjectivity. this implies that they are all capable of being viewed by others imaginatively from their own point of view ... In attributing human worth to everyone we may be ascribing no property or set of qualities, but rather expressing an attitude - the attitude of respect - towards the humanity in each man's person. That attitude follows naturally from regarding everyone from the 'human point of view', but it is not grounded on anything more ultimate than itself, and is not demonstrably justifiable." (Feinberg, 1973, pp.93)

Unfortunately from the 'political point of view' such worthy sentiments concerning the nature of individual autonomy are often overridden by appeals to the 'common good' or 'public interest'.

One of the problems that we have faced is deciding upon some kind of moral 'checklist' in order to judge whether an action can be justified or not. In a number of writings Gewirth has argued that we do have such a checklist and it can aid us in our understanding of rights. He argues that:

"...the basis of rights must be sought in the conviction held by every human agent that he has rights to the necessary conditions of action by virtue of his having purposes and pursuing goods." (Gewirth, 1978, pp.103)

Gewirth has two basic rights that are derived from the two necessary conditions for purposive action - choice and intentionality. He has argued from a set of empirical

statements about any agent and his intentional or purposive acts that there are certain human moral rights. All that is required for this inference, Gewirth claims, is a clear view of what it is to be a purposive, intentionally acting person and what the presuppositions and consequences of such action are. He calls this a 'dialectically necessary argument' and argues that when an agent A performs an act x for purpose E then this entails not only that E is good and 'my freedom and well-being are necessary goods' but also that individuals have rights to freedom and well-being. These rights can be seen to be human moral rights because they are 'generic' in the sense that all humans have these features and because every human being is an actual or potential agent. Gewirth has thus tried to bridge the 'is/ought' gap by deriving from the;

"...beliefs that each human agent necessarily has about his own rights of action"

the fact that each agent has 'inherent rights' (Gewirth, 1978, pp.103). In this way Gewirth establishes the Principle of Generic Consistency (PGC) which is the supreme principle of morality:

"Every agent by the fact of engaging in action, is logically committed to the acceptance of certain evaluative and deontonic judgements and ultimately of a moral principle which require that he respect in his recipients the same generic features of action, freedom and well-being that as rational he necessarily claims as rights for himself. By virtue of this logical necessity, the PGC is rationally justified as a categorically, obligatory moral principle." (Gewirth, 1978, pp.198)

and further on Gewirth suggests that:

"The PGC combines the axiological substantive content of moral duties with a formal consideration of consistency or mutuality. It is not only that the agent must act in accord with his recipients rights to freedom and well-being, what gives this its justificatory basis is that the agent also, and necessarily acts in accord with his own rights to freedom and well-being." (Gewirth, 1978, pp.203)

Gewirth suggests that initially generic rights may be prudential but become moral when the agent accepts that all prospective agents have the right to freedom and well-being. The PGC, insofar as it indicates that we should act in accordance with the generic rights of our recipients as well as ourselves, seems to be little different from the Kantian maxim of the Kingdom of Ends. Gewirth has identified the characteristics of human beings in terms of their capacity for action and that action involves some good to the agent but even if we grant this it does not follow that 'A has a right to x' from 'x is a necessary good for A'. We are still left floundering in our attempts to give an objective basis for the grounds of moral rights. What does follow on from the statement that we are equal in terms of our common humanity? To go on to discuss the equal right to be free or to pursue happiness does not tell us a great deal unless we investigate what is to count as being free or pursuing happiness and here would have to investigate a whole host of different social, religious, political etc practices.

In his account of rights Winfield (1982) argues that

rights are not natural but neither are they just products of convention, relative to any order to which a community conforms. He argues that:

"The conjunction of right and duty comprising rights consists in these interrelations which must always have the form of mutual recognition and respect since one only has obligations when one's own exercise of freedom is acknowledged. Therefore, to refer to rights is to refer to those modes of interaction which have normative validity." (Winfield, 1982, pp.85)

For Winfield these relations are normative insofar as they ought to hold since rights exist for their own sake and no other. They are not grounded in anything independent and they do not have foundations. Winfield believes that the problem with Natural Rights theory is that it attempts to give rights foundations whether in Natural Law or in the self. Thus if convention is argued to be the grounds of rights then this is the same logical fallacy as bedevils the Natural Law argument. With rights, individuals have the reality of their freedom unconditionally respected. Thus when it comes to determining who has rights it is just those with minds and wills with which to recognise and be recognised by others. Thus rights will arise in virtue of relationships and just as we have different kinds of relationships through the family, politics, religion etc. then we may expect to have rights that are appropriate to that relationship. Thus, for Winfield, when rights are violated, to condemn such violations is to condemn specific institutional distortions in the relationships. From this point of view if the Civil

Rights Movement argue that their rights are being violated then they are criticising the social and political structures which allow such violations to occur.

Winfield is critical of the principle of human rights insofar as human rights theory defines the exercise of freedom independently of any social or political relations. Government then exists to secure rights given prior to and separately from it. Thus, Winfield argues, the pursuit of human rights entails a system of government where the citizen is free not to participate actively in self-government but to exercise a pre-political liberty. This, Winfield argues, entails the debasement of political freedom insofar as political freedom is self-government. Self-government is conceived in terms of relations of self-determination comprising a 'structure of interaction' in which individuals can practice mutually respected self-rule, undertaken for its own sake. This is what comprises political rights. What Winfield is arguing against is also a specific form of political system that debases the notion of political freedom, as he conceives it. This is the liberal democratic model and we have already seen the problems that Hart and Rawls have had in attempting to legitimate obligations in such a model and the difficulty of determining who benefits, who consents and who positively accepts such a political system. More of this, however, in the next chapter.

Finally, we consider the arguments of Raz (1979) in his deliberations concerning the notion of a right to disobey. Raz describes civil disobedience as a

'politically motivated breach of law' designed to lead to a change of law or policy or express protest against a law or policy. This, he suggests, is most easily applied to individuals but it can also apply to the analysis of group action but he suggests that the character of the reasons, and therefore of the actions of individual participants, may differ. However, Raz offers us a crude definition because he is not concerned to single out a class of legitimate political action. He wishes to offer us a value neutral definition in order to separate the classification of different types of political action from their justification.

However, in examining civil disobedience and the nature of rights, Raz informs us of his understanding of rights:

"One needs no right to be entitled to do the right thing. That it is right gives all the title one needs. But one needs a right to be entitled to do that which one should not. It is an essential element of rights to action that they entitle one to do that which one should not. To say this is not, of course, to say that the purpose or justification of rights of action is to increase wrongdoing. Their purpose is to develop and protect the autonomy of the agent. They entitle him to choose for himself rightly or wrongly. But they cannot do that unless they entitle him to choose wrongly." (Raz, 1979, pp.267)

Thus there is a difference between asserting that civil disobedience is right and claiming that under certain circumstances the individual has a right to civil disobedience. To say that there is a right to civil disobedience is to allow the legitimacy of resorting to this form of political action to one's political

opponents, for example, the Ku Klux Klan in America. It is to allow that the legitimacy of civil disobedience does not depend on the rightness of one's cause.

As a way forward, Raz assumes that every individual has a right to political participation in his/her society. This right is limited because of the need to respect the same right in others and because it may conflict with other values. He goes on to suggest that it is the law which will determine what these limits are and where this occurs, Raz suggests, we are dealing with a 'liberal state' and where it does not we are dealing with an illiberal state. Raz goes on to conclude that in the liberal state there is no moral right to civil disobedience but there is such a right in illiberal states. It is the latter which violates the citizens rights to political participation. In the liberal state one's right to political participation is, by hypothesis, adequately protected by law:

"Every claim that one's right to political participation entitles one to take a certain action in support of one's political aims (be they what they may), even though it is against the law, is ipso facto a criticism of the law for outlawing this action. For if one has a right to perform it its performance should not be civil disobedience but a lawful political act. Since by hypothesis no such criticism can be directed against the liberal state there can be no right to civil disobedience in it." (Raz, 1979, pp.273)

Raz grants that his picture of a liberal state is a narrow one and that it may contain any number of iniquitous laws and he concedes that it will sometimes be right to protest against them. Raz considers that to show that the act is

right is to get the approval of other persons whilst to show that the individual has a right to perform a certain action is to show that even if it is wrong he/she is still entitled to perform it. This argument does not figure in a discussion of civil disobedience in a liberal state. Whether or not having a right to act is a precondition of the rightness of the act depends on the underlying reasoning supporting the claim of a right and its limitation.

For Raz, civil disobedience is beyond the general right to political action since there must be limits on the right to political participation in order to set a boundary to one's toleration of unjustified political action.

Raz, however, does not consider the possibility of the liberal state being a hypothetical abstract state in that no state in practice allows that every person has a right to political participation. Traditionally even those states that have been termed liberal-democratic such as the U.K. or the U.S.A have set limits to the condition of citizenship such that members of the state have been excluded from the political process. This is, of course, one of the arguments used by the Civil Rights Movement that they have been denied the rights of full citizenship. There is a sense in which every state may be termed 'illiberal' in Raz's sense of the word and if this is so then there is a right to civil disobedience in every state. However, the idea of the state is one that will be pursued at length in the next chapter and in particular

the notion of what is the liberal democratic state, what is its authority grounded in, what makes it legitimate, how has it changed and how does civil disobedience fit in with it.

Thus far, it seems to me that the notion of a right to disobey is problematical. Most theorists will wish to suggest that there is a difference between being right and having a right but, it seems to me, discussions often lead to a suggestion that having a right, in a political sense, will depend as much upon moral claims as it will on legal claims. Thus it is difficult to see clearly a distinction between having a political right that does not depend upon some understanding of what is to count as being morally right within that particular society. Not only that but most discussions of right do seem to assume that the society is a liberal individualistic one.

Given this then, the notion of a right to disobedience may be different in different societies. Where there is a general right to political participation within a community, then we may consider it wrong to exclude minority groups. Where no such right is recognised then we may wish to focus upon other, more appropriate, concepts of rights.

It would therefore be incorrect to assume that there is a general right to disobedience of, and obedience to, the state, without an examination of the scope of government, the limits of governmental authority and the

understanding of citizenship within a particular political community. It is to such a political community viz liberal democracy that we now turn our attention.

Chapter 5 DEMOCRACY, STABILITY AND CIVIL DISOBEDIENCE

A number of issues will concern us in this chapter:

1. With which theory, or theories, of democracy is a theory of civil disobedience compatible.
2. The importance of a concept of stability for theories of democracy.
3. The extent to which civil disobedience may be said to undermine, or contribute to, the stability of a democratic regime.

Democracy

In order to proceed with an examination of the concept of democracy then we need to remind ourselves, briefly, of the points that were made in the first chapter concerning the nature of description itself. It was suggested, by C Taylor, that the explanatory framework adopted by a social scientist will have a 'value slope' indicating that such a framework will embody a particular viewpoint of 'human needs and human potentialities'. Thus we cannot separate out fact and value. The implication of this for democracy is that in describing a system of government as democratic then we are in fact ascribing a value to it. Facts will always be classified and presented on a particular explanatory framework which will tilt the arguments one way or another. Thus political science can never be

neutral but will be presented in such a way as to support one set of values or another. This perspective, then, argues against the approach which makes a distinction between an empirical fact and a linguistic fact. Here a linguistic fact is such that to call a political system a democracy is, in modern times, to commend it. Orwell suggests that:

"In the case of a word like democracy, not only is there no agreed definition but the attempt to make one is resisted from all sides. It is almost universally felt that when we call a country democratic we are praising it: consequently the defenders of every kind of regime claim that it is democratic, and fear that they might have to stop using the word if it were tied down to any one meaning". (Orwell, 1946, pp.149)

The approach that separates out fact and value and makes a distinction between a linguistic fact and an empirical fact is one that has been supported by those theorists of democracy who argue that democracy is both a set of procedures and a set of values, procedures that can be identified and described. Thus democracy may be seen as a particular set of arrangements for choosing a government which is distinct from specifying what the ends of government are supposed to be. This position is adhered to by Barry who indicates that:

"First, I follow here those who insist that 'democracy' is to be understood in procedural terms." (Barry, 1979, pp.156)

Barry then goes on to argue that democracy represents the interests of all and that it is concerned with formal equality. Similarly Bobbio argues that:

"The only way of understanding democracy, in counterposition to all other forms of autocratic government is to consider it characterised by rules which establish who is authorised to make collective decisions and under what procedures." (Bobbio, 1984, pp.3)

Here, then, democracy is seen as a form of government, distinguished from other forms of government in that the persons authorised to make decisions and the procedures for specifying how these decisions are made will be different from, say, monarchy or oligarchy. However, Bobbio then goes on to link democracy with the ideology of liberalism:

"The liberal and the democratic state are interdependent in two respects; in the direction that goes from liberalism to democracy, where certain freedoms are necessary for the correct exercise of democratic power; and in the opposite direction from democracy to liberalism, where democratic power is necessary to guarantee the existence and persistence of fundamental liberties." (Bobbio, 1984, pp.4-5)

Leaving aside, for the moment, the relationship between democracy and liberalism we can see the tendency to link the descriptive with the evaluative, to link the notion of formal procedures for government to a political ideology. We can see the tendency to conflate the two if we examine, in brief, one of the most influential theories of democracy, that of pluralism. Schumpeter's classical definition was concerned to see democracy as:

"The institutional arrangements for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." (Schumpeter, 1976, pp.269)

Similarly for Lipset who considers that:

"Democracy in a complex society may be defined as a political system which supplies regular constitutional opportunities for government officials and a social mechanism which permits the largest possible part of the population to influence major decisions by choosing amongst contenders for political office." (Lipset, 1960, pp.45)

Writing on the Pluralist model, Macpherson suggests that:

"The main stipulations of this model are first, that democracy is simply a mechanism for choosing and authorising governments, not a kind of society nor a set of moral ends; second, that the mechanism consists of a competition between two or more self chosen sets of politicians (elites) arrayed in political parties for the votes which will entitle them to rule until the next general election." (Macpherson, 1977, pp.78)

However, rather than just offering us a description of a particular form of government, writers within the Pluralist tradition are apt to further promote the Pluralist model as the 'good life'. For Lipset:

"A basic premise of this book is that democracy is not only or even primarily means through which different groups can attain their ends or seek the good society, it is the good society itself in operation." (Lipset, 1960, pp.43)

Tussman in 'The Body Politic' suggests that it is a myth to believe that self-interested competition between individual interests and factions will promote the common good but the most convincing critique of Pluralism is, I feel, that offered by Rogin:

"Pluralist thinking has not produced scientific propositions so much as useful insight and for this it deserves credit. At the same time because of its underlying preoccupations, the pluralist vision is a

distorted one. The fear of radicalism and the concern for stability, however, legitimate as values, have interfered with accurate perceptions. Thanks to its allegiance to modern America, pluralism analyses efforts by masses to improve their conditions as threats to stability into threats to constitutional democracy. This is a profoundly conservative endeavour. Torn between its half-expressed fears and its desires to face reality, pluralist theory is a peculiar mixture of analysis and presumption, insight and illusion, special pleading and dispassionate inquiry. Perhaps Pluralism may best be judged not as the product of science but as a liberal American venture into conservative political theory." (Rogin, 1967, pp.282)

Leaving aside the problem of what is to constitute an accurate perception of political reality, Pluralism, as Rogin suggests, may best be viewed not as a scientific explanation of political reality but as an ideological picture of how political reality can be conceived of by those holding Pluralist views. Of course we can view any explanation of political 'reality' in these terms where the strength of the picture lies not in its conformity with some scientific or academic explanation but in its ability to convince us that this is the appropriate conception. However, if there is no distinction to be made between fact and value, is it any wonder that in offering us a description of contemporary American political life then the Pluralist is also commending that life to us? Skinner makes some very similar points when he suggests that:

"The underlying impression of political conservatism, in an account such as Dahl's, is not primarily generated because the political system of the U.S. is commended explicitly on the grounds of its stability and efficiency. It is generated by the fact that the existing, operative political system is commended implicitly, through the equation between its salient

feature and the allegedly sufficient conditions for saying of political system that it is genuinely a democracy." (Skinner, 1973, pp.301)

Skinner considers two connected facts about the term democracy itself. He suggests, firstly, that the term has become the subject of ideological debate and as such there would appear to be no limits to the range and circumstances to which democracy as a description of a given political system may apply. Secondly, Skinner suggests, such political systems are said to constitute a set of characteristics taken in some sense to be 'rule by the people' and that this state of affairs deserves to be commended. Skinner goes on to suggest that:

"It is a fact about the prevailing meaning and usage of the term democracy that it has become a member of the class of so-called evaluative - descriptive terms which philosophers of language have recently been much concerned to analyse. Such terms are applicable if and only if a certain state of affairs obtains, but whenever the relevant state of affairs does obtain, then to apply the corresponding term is not only to describe the state of affairs, but also (and eo ipso) to perform the speech-act of commending it ..."
(Skinner, 1973, pp.298)

If democracy is concerned with values then what, exactly, are these values? Here we find a number of different accounts that attempt to distinguish between different types of democracy such as liberal, socialist, participatory etc. If we concentrate on an account of democracy concerned with the notion of liberal democracy we saw earlier how Bobbio considered liberalism and democracy to be interdependent and indicated that liberalism had informed thinking on democracy. How then

is liberalism to be characterised? If we follow the account of Manning we see that the concepts of a 'balanced society' and of liberty are deemed to be important for liberal thinkers:

"Liberalism, as a teaching deeply attached to stability and freedom, emphasises the importance of rules and obligations in all voluntary associations." (Manning, 1976, pp.14)

and

"A liberal society is a pluralistic society precisely because the concept of counterbalance is essential to its understanding of liberty and liberty is the first concern of the liberal." (Manning, 1976, pp.16)

The concern with freedom, rather than equality, and the concern with balance ties in with the pluralistic perspective on the nature of the political community. Note here that the Federalist papers were concerned with balancing sectional interests and with public respect for the law. Similarly for Montesquieu:

"What is called unity in a body politic is a very delicate thing: true unity is unity or harmony which results in all the parties no matter how opposed they may seem to be, working, for the general good of the society just as discords in music work for the whole harmony ... it is like the parts of the universe which are eternally linked by the action of some and the reaction of others." (quoted in Manning, 1976, pp.22)

Apart from the concept of balance we are exhorted, by Liberals, to defend liberty and for the Liberal it is freedom secured by the law. It is freedom from interference and with Locke, for example, this freedom was closely associated with a conception of private property. Neither Locke nor other classical thinkers that have been

characterised as Liberal were much concerned with the idea of equality and this was, according to Miller, (1978) for a number of different reasons:

1. Liberals, according to Miller, believed that a government based on universal suffrage would disrupt the kind of social order that they were in favour of by giving excessive power to those who had no stake in government.
2. Instead of regarding the vote as a natural right which a person had simply by being a member of a particular community, Liberals saw it as a privilege to be earned by displaying proof of competence to actually take part in government.
3. Some Liberals made an explicit comparison between the state and a private company arguing that only those individuals who made a financial contribution to the state's revenue should take part in making political decisions (c.f. 'no taxation without representation').

Contrast the above with the point made by Barry that:

"... winning an election is a basis for rule that does not conflict with natural equality. Indeed it might be said to flow from it." (Barry, 1979, pp.193)

Locke considers that just civil government can take the form of monarchy or oligarchy since, although its legitimate authority rests upon the consent of the governed embodied in the social contract, this does not entail citizens participation in self-government but only their right to select who will rule on their behalf. Indeed there has been associated with democracy a real fear of mass participation in government and insofar as this is associated with democracy then democracy has, until quite recently, been deemed a 'bad thing'. De Tocqueville warned of the possible effects of democracy on the functioning of the polity. Although the principle of majority rule may be welcomed, unless the power of the majority is restricted by constitutional and legal checks and balances, the expression of this power could lead to the tyranny of the majority. This, of course, was the theme developed by J.S.Mill when warning us of the danger of the tyranny of mass opinion. More recently Ortega Y Gasset has feared the "tyranny of the masses" and led Lipset to suggest that:

"The belief that a very high level of participation is always good for democracy is not valid... An increase in the level of participation may reflect the decline of social cohesion and the breakdown of the democratic process." (Lipset, 1960, pp.14)

It is this tension between participation and stability that informs, in part, the civil culture thesis of Almond and Verba. Here, in order for the political system to be stable it must satisfy three pairs of contradictory principles or tensions. The first tension is that between

the delegation of power to the governmental elite by the non-elite and the control of that elite by the non-elite. The second tension is that between political participation motivated by self-interest and participation in the political process as an end in itself. The notion of political participation in virtue of self-interest may depend on the effectiveness of the system in giving people what they want and if the system does not provide the goods then it could lead to political instability. This tension is concerned with the notion, also, of an active or passive citizenship and to theories concerning expectations of government. The third tension is that between consensus and cleavage. The civil culture thesis then has three dimensions to ensure stability: moderate participation, moderate utilitarianism and moderate polarisation.

However, such theorists as Almond and Verba have found it difficult to reject elite theories of pluralism where it is the claims put forward by competing elites that comprehend the needs and interests of society. Democracy can function smoothly through the bargaining of elites and does not seem to require the high degree of participation which traditional theory may have held to be essential to an account of 'true' democracy.

There are other traditions of thought that have been associated with democracy. For Corcoran (1983) the values associated with democracy such as equality, justice, rights etc are not coincident with or derived from democratic theory but, rather, are gathered together from

a number of different sources such as Idealism, Roman Law, Christianity, which may, according to Corcoran, often be at serious odds with democracy.

Suffice to say that although we have been primarily concerned with the relationship between Liberalism and democracy the two are contingently related rather than logically related, compatible rather than entailed. Thus a different form of democracy other than Liberal democracy may stress participation and equality rather than representation and freedom. However, as Corcoran suggests, there is the possibility that Liberalism and democracy are, or maybe, in conflict. If Liberalism is concerned with permitting individuals the right to maximise their own self-defined interests then this will conflict with the concept of democracy as a means, traditionally majoritarianism, to combine individual wants in such a way as to produce common goals. This method may throw up common goals which conflict with the priorities established by particular individuals. This is the paradox that Wollheim refers to in his article (R. Wollheim, 1972).

In order to avoid conflict there must be some form of constraint not only on individuals but also on the regime itself. However, consider the following:

"Lack of agreement over the term democracy has been largely brought about by an over-concentration on the precise institutional manifestations of democracy and the assumption that democracy means some specific set of arrangements. Democracy, however, is a regime type as is monarchy or totalitarianism. These regime types do not imply that the systems falling under them have

exactly the same institutional pattern, rather they entail that the same principles underlie the political process.

Thus we are concerned only with regimes that embody certain principles. We take a regime to be that set of rules, conventions and norms that govern the operation of the political process. It is the set of constraints upon the actions of individuals, groups and institutions in a political community." (Dowding and Kimber, 1985 A, pp.23)

Easton suggests that this set of constraints may be broken down into three components. Firstly, an authority structure which specifies the ways in which political power is organised and distributed throughout the community. Secondly, a set of values which provide the boundaries within which day-to-day policy can be formulated without violating the beliefs of the community. Thirdly, the norms which specify the kinds of procedures and behaviour that are expected and accepted by the community. Note here that there appears to be no distinction between the notions of procedures and values - the two are brought together under Easton's analysis. It is also worth noting that Easton's analysis can apply to any political community irrespective of the form that the regime may take. As long as the prevailing norms, values, procedures etc are recognised by those living within the community then it may not matter what kind of political regime is in operation. As we shall see below it is this concept of recognition that is crucial to understanding the concept of legitimacy.

However, within democracy one of the criteria for saying that it is a democracy is that of upward control where ultimately sovereignty lies not with the Monarch or elite but with the people. However this may be instituted in practice it may be considered a distinguishing feature of a democratic polity. R. Dahl (1982) lists five ideal criteria for democracy:

1. Equality in voting, This is, of course, a development of a recent criterion. From a liberal point of view the move towards equality would not necessarily be approved if it threatened liberty.
2. Effective participation. Again this would not meet the approval of those elite theorists who argue that participation on a mass scale is not essential to democracy.
3. Enlightened understanding which would involve a recognition of equality.
4. Final control over the agenda. This would link up with the notion of upward control and specify where sovereignty could be located.
5. Inclusion. Here the stress would be on a development of universality, again a move away from the 19th century belief of limited franchise.

However, these criteria are 'ideal' and whilst they may not give the concept of democracy any greater clarity they may inform us of Dahl's own preferences. Thus we do seem to have a problem in deciding what democracy is, what are its most salient features and how much weight should we give to different features. Not only that but it is likely that what is to count as important in such discussions will change over time. From the perspective of civil disobedience, its approval or disapproval may depend on, for example, whether we are committed to the notion of participation or not or whether we are concerned with the idea of balancing sectional interests such that stability becomes of paramount importance as with the pluralist account. One of our concerns is not so much with whether or not a particular regime can be said to be democratic or not but rather we are concerned with the effect that civil disobedience may have upon a regime and in order to discuss this we need some understanding of the legitimacy of a regime insofar as we need some understanding of the commitment or otherwise of individuals to the regime as a whole.

Legitimacy

Bound up with the idea of democracy, and with any notion of government, is the concept of legitimacy and if we adhere to conventional understandings of the concept we find two approaches: Firstly, the approach that sees legitimacy concerned with the notion of democracy as a procedure. Secondly, that which is concerned with

democracy as a set of values. On the first view, if democracy is concerned with a set of rules that establish who is authorised to make collective decisions and under which procedures then it refers to the legitimacy of the rules and the recognition of those rules that stipulate who is to make decisions. In monarchy it may be hereditary succession that is the ground for legitimacy, in democracy it is generally recognised to be the consent of the governed. We rule ourselves through upward control and in the Anglo-American tradition of democratic government this is through the notion of Representative Democracy as distinct from other forms of democracy. There is a sense in which legitimacy, from this perspective, is internal to the system itself. We recognise legitimate governments elsewhere even though the criteria for choosing the ruler(s) may be different from our own. Legitimacy would seem to be concerned, then, with a right to rule and recognition of that rule. Its equivalent in legal theory is Hart's 'Rule of Recognition' and Kelsen's 'Grundnorm'. Oakeshott, for example, considers this recognition to be appropriate when commenting upon the civil association:

"Since the civil condition is not enterprise association and since cives as such are neither enterprisers nor joint enterprisers it follows that they are related solely in terms of their common recognition of the rules which constitute a practice of civility." (Oakeshott, 1975, pp.128)

It is not so much the rules as the common recognition of them that is important. Similarly with legitimacy, it would make no sense to argue that a government was the legitimate government if it was not recognised by those over whom it purports to have authority. Oakeshott goes on to suggest that:

"The recognition of **respublica** which constitutes civil association is neither approval of the conditions it prescribes nor expectations about the enforcement of these conditions; it is recognising it as a system of law. What relates cives to one another and constitutes civil association is the acknowledgement of the authority of **respublica** and the recognition of subscription to its conditions as an obligation. Civil authority and civil obligations are the twin pillars of the civil condition." (Oakeshott, 1975, pp.149)

Oakeshott wishes to suggest that recognising the authority of **respublica** is not dependent upon finding the conditions it prescribes to be desirable, congenial, meritorious, etc. but consists just in recognising that its authority applies to us. The legitimacy of such authority does not depend upon it promoting the general happiness or the common good but comes about through such authority being constituted in accordance with accepted rules. e.g. irrespective of what a government did in office in the U.K. we would call it a legitimate government if it won an election by having a greater number of candidates returned than the other parties. Oakeshott gives the example of the M.C.C whose authority consists in the recognition that it is the custodian of the rules of cricket in the U.K. Its authority has nothing to do with the recognition of

the desirability of the rules and the authority will only lapse when its authority ceases to be recognised. (Oakeshott, 1975, pp.154 Footnote)

Barry is critical of this and suggests that the analogy with the M.C.C tells us more about Oakeshott's view of the world than the world itself (Barry, 1979, pp.192). Barry goes on to suggest that if the M.C.C were to claim jurisdiction 'over any matter that has anything in common with the normal stuff of politics' then its authority would be questioned. Barry argues that if the M.C.C were to raise money through a levy on every game of cricket then as soon as it came to spend the money then its non-representative character would be questioned. In putting forward this position then Barry is also putting forward a consideration of legitimacy in the democratic state. Barry argues that:

"The most important point about a system of election for representatives is that it provides an intelligible and determinate answer to the question why these particular people, rather than others perhaps equally well or better qualified should run the country. If people can be induced to believe in the divine right of kings or the natural superiority of a hereditary ruling caste it may be possible to gain general acceptance on the appropriate ascribed characteristics but once the idea of the natural equality of all men has got about, claims to rule cannot be based on natural superiority." (Barry, 1979, pp.193)

It is worth noting that the M.C.C is not 'claiming to rule' but has merely become the custodian of the rules of the game. As long as there is recognition by all involved in cricket then the M.C.C is the legitimate body. If the idea of 'natural equality' has got about then presumably

as long as the rules are applied equally to all so that, for example, an Ian Botham is not discriminated against when he considers the game's authorities to be 'gin swigging old dodderers', then the M.C.C's authority will not be questioned. Presumably when the M.C.C tries to raise funds and distribute money throughout the game it may be said to be acting outside its commonly recognised authority and hence will be questioned on the grounds of acting outside its authority as the custodian of the rules of the game rather than because its makeup may be unrepresentative.

If it is the case that in the views presented so far legitimacy is concerned with the notion of valid rules and recognition of those rules then does it make sense to talk about a 'decline in legitimacy'? It does not make sense to talk about a decline in the right to rule - there is either a right or there isn't. We can talk of legitimacy breaking down altogether if people no longer accept the rules of the game itself. Consider the following: the Catholics in N.Ireland do not accord less legitimacy to rule from Westminster than do, say, people living in the South East of England; rather they accord it no legitimacy whatsoever, insofar as they do not recognise the right of the British Parliament to make rules under which Catholics are bound. From this perspective we can link legitimacy to the notion of stability insofar as the system is recognised by the members of the polity and the continued legitimacy of the regime will depend upon the general acceptance of the rules of the game. This, rather

legalistic definition, depends upon the notions of validity, right (in the sense of having a right rather than being right), entitlement to rule etc. This is the language with which such a concept is discussed.

However, there is also the possibility that the concept of, say a rule of recognition, does not exist in a vacuum but also there must be some reason for the recognition of this rule rather than another. This may depend upon giving legitimacy itself some value. The legitimacy of a political regime will require the clarity, consistency and the effective functioning, in terms of general acceptance, of the legally established procedures. It may also require a consensus between the governing and the governed and a belief by the governed that the existing regime will promote common values. On this view legitimacy is concerned with values and the promotion of those values. This will lead to a distinction between the right of government to rule and what that government does and how it performs. Legitimacy, then, is concerned not just with the quality of being lawful but also with what a government does, not with how it achieves power but what it does once in power. Thus Charles Taylor (1971, pp.36) suggests that legitimacy can only be used as a description of 'subjective meaning'. What we need to consider is the opinions or feelings of its members concerning the legitimacy of a polity. However, this, it seems to me, is no different from Oakeshott's distinction between the existence of rules and the recognition of those rules as binding upon us. Their existence is one reason why we

would consider rules as binding upon us but we would also, I suggest, need to consider why we should accept these rules rather than others. Such a consideration may be dependent upon an ideological understanding of, and a commitment to, the political regime. For example, if we believe in a particular form of democracy as promoting a set of values then if the regime did not promote those values then we may begin to question its right to demand our support. It is a moot point whether or not we need to distinguish between authority and legitimacy:

"Legitimacy like authority therefore implies recognition of a right to hold office and implies general consent to the rules of the political system, but whereas authority in its pure form is characterised by entirely voluntary compliance, legitimacy involves a right to enforce obedience, within certain agreed limits." (Carter, 1979, pp.51)

Carter considers that the authority of an individual or group or institution may wane whilst legitimacy is retained since, so Carter suggests, to deny legitimacy it is necessary to alter the generally accepted rules. However, whether authority is on the wane or not is not the point. To suggest that authority is on the wane presumably means that individuals do not deny that it applies to them, but rather whether it is entitled to do so and, secondly, whether or not individuals who are constrained by an authority relationship believe that the sanctions imposed by authority will in fact be carried out. Consider the army private who may react differently to commands from different superiors. He does not deny the existence of authority but he knows that one superior

may be 'softer' than another and hence may take liberties with the authority holder. This is not to say that authority is on the wane.

Schaar (1984) makes the point that traditionally the notion of legitimacy has been concerned with the legalistic 'right to rule' enforced by something outside the political community such as Divine Right. This traditional approach to legitimacy has, Schaar considers, been replaced by belief or opinion. Whether Divine Right itself is anything other than belief or opinion is a moot point. However, our concern is with the notion that legitimacy has some effect upon the stability or otherwise of a political regime: in crude terms if legitimacy is considered to be low then a regime may be said to be unstable. An immediate problem, as indicated earlier, is to what extent does it make sense to discuss levels of legitimacy? Bealey (1985) suggests that any analysis must examine the relationship between a system of authority that is attempting to 'legitimate' itself and the citizens who may be evaluating the actions of such an authority in terms of what they deem to be 'right and proper'. Bealey considers that citizens generally accord legitimacy to some aspects of governing and not others. I find this point difficult to follow: we do of course evaluate government actions in terms of whether they are reasonable, unreasonable, expensive, unworkable, will lead to unemployment, loss of freedom etc. but this is an entirely different exercise than asking does the government have the right to do this?. Bealey goes on to

consider the notion that elite group support may be essential in that it will have a more highly developed sense of what is legitimate or not than ordinary citizens. He also considers it important that legitimacy may relate to different components of a political entity. Bealey uses Gamson's four objects of 'political trust' to support this point. Yet the notion of political trust is not the same as legitimacy. If the populace as a whole no longer believes what the present government does or says, then it may well be that, in a democracy, at the next election that government will lose. Again this is different from arguing that the government is no longer legitimate. I shall return to the notion of political trust below.

Bealey also refers to the link between effectiveness and legitimacy such that the outputs of government can be used as a criteria of whether or not, it is said, legitimacy deserves to be given.

However, legitimacy is defined in terms of its subjective meaning, it is said to be related to some notion of stability. For Lipset:

"Legitimacy involves the capacity of the system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society." (Lipset, 1960, pp.64)

What we must be aware of is the possible confusion arising from an understanding of a threat to a particular government as a threat to the system itself. An example

of such category confusion led the judge in the recent trial of Clive Ponting to the view that the government of the day was synonymous with the state.

However, we are left with a number of questions from the discussion of legitimacy so far:

1. If legitimacy is concerned with more than a minimal, legalistic, definition as outlined in the first view above, if it is concerned with a set of values and an evaluation of performance, then does a decline in performance lead to a decline in legitimacy? This is the view taken by the theorists of overload and ungovernability which will be discussed shortly.
2. If legitimacy is dependent upon consent within a democratic polity, then does declining consent mean declining legitimacy? Not only that but how do we measure declining consent?
3. Does civil disobedience constitute a threat to legitimacy and thence to the stability of the democratic regime? This may well depend upon whether or not civil disobedience is seen as an attack upon the 'right to rule' formulation of legitimacy or as an attack on the values of legitimacy. The civil disobedient will argue that he/she is not undermining the legitimacy of the regime itself but is only trying to change a particular law or policy. From the other perspective the civil disobedient may argue that

he/she is trying to reassert the values of a particular regime rather than trying to undermine them insofar as the civil disobedience will try and justify his/her actions in terms of justice, rights, conscience etc.

- 4 How is legitimacy involved with the concept of the stability of democracy which may be presupposed by question 3?

Stability

The theories of overload and ungovernability are concerned with system performance. Birch (1984) indicates that the concept of overload was introduced in 1975 by M. Crozier and A. King. Writing separately both authors suggested that:

"...There had been a rapid growth in public expectations about what benefits could be provided by government in Western Democracies, that many of these expectations had inevitably been disappointed and that the result was a serious decline in public confidence in government." (Birch, 1984, pp.135)

In an oft quoted phrase King suggests that:

"Once upon a time, then, man looked to God to order the World. Then he looked to the market. Now he looks to government. The differences are important. God was irremovable, immutable. The market could be removed or mutated but only, it was thought, at a very high price. Government, by contrast, is removable, mutable and corporeal. One blames not "Him" or "it" but "them"." (King, 1975, pp.288)

and he continues that:

"...just as the range of responsibilities of Governments has increased, so, to a large extent independently, their capacity to exercise their responsibilities has declined." (King, 1975 pp.288)

Birch identifies three groups of theorists that have been involved in the debate. Firstly, the neo-conservatives such as Bell, Huntington, Lipset and Kristol. Secondly, the liberal economists, particularly S. Brittan and thirdly, the neo-marxists, identified as Offe and Habermas, who see the decline in legitimacy as a consequence of overload. If we examine the first group of thinkers Birch suggests that they perceived that the liberal policies of the 1960's created more problems than they solved. The policies are said to have encouraged people to have excessive expectations concerning rights and equality. The enlarged role of the state and the expectations that this has generated placed too much strain on political institutions and this led to declining confidence in these institutions and this has weakened the whole democratic system. Lipset comments that effectiveness of government is seen in purely instrumental terms whilst legitimacy is evaluative.

With respect to Birch's second group of theorists then the only way to overcome the crisis of confidence in the state is to revolt against materialism and to change the nature of values such that the demands upon the system are not so extensive. The third perspective of Offe and Habermas is such that the process of legitimation can be defined as one by which:

"...The capitalist state manages through a variety of institutional mechanisms, to convey the image of an organisation of power that pursues common and general interests of society as a whole, allows equal access to power, and is responsive to justified demands" (Offe in Birch, 1984, pp.143)

Habermas was more concerned with the realm of values and motivations. He argues that there must be general agreement on wider values within society. If not, there would be a 'motivational crisis', which Habermas sees as a discrepancy in the values and motivations required by the political system and those values and motivations that are produced by the social system. McCarthy provides us with a summary of Habermas' main arguments:

- "1. "As long as we have to do with a form of socialisation that binds inner nature in a communicative organisation of behaviour, it is inconceivable that there should be a legitimation of any action norm that guarantees even approximately, an acceptance of decisions without reasons." (Legitimation Crisis, pp.36)
2. Since liberal capitalism, the need for legitimation of norms can be set only through appeal to universalistic value systems.
3. Today, the only form of universal morality capable of withstanding the destruction of tradition is a communicative ethics in which all politically significant decisions are tied to the formation of rational consensus in unrestricted discourse.
4. The basic elements of a communicative ethics are today already influencing typical socialisation processes in several social strata, that is, they have achieved 'motive forming power'.
5. As a result, the privatistic motivational patterns essential to formal democracy are threatened with disintegration, a threat that can be documented in the spread of withdrawal and protest syndromes." (McCarthy, 1978, pp.376)

For Habermas, as Zimmermann (1984) notes, the decline of legitimacy arises from the value discrepancies of capitalism with its emphasis on individual efficiency and the growing size and power of a state capitalist society within which this individual motivation no longer works. Birch makes the point that there is no historical evidence to support this view! Habermas' arguments parallel those of Inglehart (1977) for whom rapid changes in economic circumstances lead to changes in life-style which in turn produce changes in value-systems. Yet these changes may be exaggerated in terms of their rapidity and consequence for the political system. In Britain, for example, it is often said that the success of Margaret Thatcher's Conservative Governments since 1979 has been in the ability to change the 'terms of the debate' so that mass unemployment is something that the government may be seen to bear little responsibility for and cannot do anything about. Mrs Thatcher's success in getting this message accepted is evidenced, it is said, by her return to office in 1983 and 1987. Another problem is that the notion of a crisis of confidence may be one that applies to the activities of a particular government rather than the system as a whole.

However, Habermas sees;

"...the long term erosion of the cultural tradition which had regulated conduct and which until now could be presupposed as a tacit boundary condition of the political system. Because of this a chronic need for legitimation is developing today." (Habermas, 1976, pp.5)

The effects of this crisis are reflected in loss of identity, a weakening of social integration, in other words alienation. I shall look at the concept in more detail below and content myself with the observation that both Habermas and Offe are concerned with a critique of capitalism as much as that of the democratic state and a decline in economic growth may not have the severe consequences for democratic government that some theorists might imagine. Ultimately, within a democracy, we can always "throw the rascals out"!

A further theory is that associated with the work of J. O'Connor in his 'The Fiscal Crisis of the State'. O'Connor focuses upon what he sees as the incompatible dual commitment of governments - the commitment to social welfare and the commitment to business, profit etc. to pay for the social welfare commitment. The first commitment will undermine the second. The failure to provide welfare and the drain on business profits will, O'Connor suggests, lead to a crisis of legitimacy. However, Zimmerman (1984) lists a number of objections to O'Connor's theories and suggests that empirical evidence does not support O'Connor.

The findings of J. Alt also seem to contradict such theories when he suggests that people have come to expect less of government:

"In large measures then, the story of the mid-1970's is the story of a politics of declining expectations. People attached a great deal of importance to economic problems, people saw clearly the developments that were taking place, and people expected developments in advance and thus were able to discount the impact of

the worst of them. However, in unprecedented numbers, people also ceased to expect the election of their party to make them better off, largely because they also ceased to expect it to be able to do very much about what they identified as the principal economic problems of the time. The result of this ... was not a politics of protest, but a politics of quiet disillusion, a politics in which lack of involvement or indifference to organised party politics was the most important feature." (Alt, 1979, pp.270)

If economic performance, or lack of it, does not lead to a crisis in legitimacy, then what does? Dahrendorf (1980) argues that effectiveness and legitimacy go together, but that legitimacy is a moral concept. Here a government is legitimate if it is in accord with prevailing cultural values. This begs the question of the extent to which government itself may determine exactly what these cultural values may consist of.

However, to what extent is Alt's 'politics of quiet disillusion' significant in terms of political stability? The political apathy of the mass electorate has been well-documented (see Lipset and Adorno) and as noted earlier, the increase in political participation has been seen as a reflection of the decline of social cohesion and the breakdown of the democratic process. However, apart from concern with economic performance, much attention has been focused upon the idea of a declining trust between the government and the governed. V. Hart is one theorist offering an analysis of declining trust where:

"That which I call political distrust is, in a democracy, an unfavourable evaluation of the process of their polity based upon the perceptions by citizens of a discrepancy between the actual operation of the

political system and the democratic system and the democratic norms publicly accepted as its standards." (Hart, 1978, pp.2)

Hart uses questionnaires to elicit the level of trust and she contends that the tradition of protest against the government is stronger in the U.S.A. than in Britain since in Britain we lack any powerful 'mythology' concerning the independent rights and sovereignty of the people. Hart sees 'the distrustful' as true to the mainstream of American political tradition. Without wishing to question the methodology used, Hart's point seems to be a reasonable, if unoriginal, one in noting that there is a tradition of political protest in the U.S.A. which may be different in kind from that in Britain, if for no other reason than America has a written constitution and a Bill of Rights to be used as a 'checklist' to measure existing injustices against. This was typically the case with Martin Luther King and the Civil Rights Movement. Hart suggests that the increase in political protest during the 1960's in the U.S.A. was, in fact, a return to 'normal' politics rather than a dramatic collapse of social cohesion.

In a similar vein is the work of A.Miller (1974) who suggests that discontent can be functional for a political system if it acts as a catalyst for orderly change, but when normal channels are seen to be ineffective then there is the increased possibility that any protest will take the form of extra-legal protest. This is a position that is adopted by the supporters of civil disobedience.

However, if it is the case that normal channels are ineffective then 'throwing the rascals out' may have little effect if a change in the system itself is required. Miller argues that:

"A period of sustained discontent may result from deep-seated social conflict which, for some segment of the population, has been translated into a negative orientation towards the political system because their sense of insufficient political influence implies a futility in bringing about desired social change or control through political efforts: hence they feel government is generally not to be trusted because it does not function for them. Such feelings of powerlessness and normlessness are very likely to be accompanied by hostility towards political and social leaders, the institutions of government and the regime as a whole." (Miller, 1974, pp.951)

Yet is it the case that a 'negative orientation' is created? Blacks in America were suffering from long-seated discontent but, at least in the Civil Rights Movement, this discontent manifested itself in a demand for equal participation in the system; for equal spoils of what the system could offer, rather than an attempt to overthrow the system itself. Miller's response to this point is to suggest that there was a marked difference in the attitudes of blacks towards government between 1964 and 1970, so that by 1970 blacks were increasingly cynical about their government. Miller concludes that increasing levels of distrust may indicate that legitimate, in terms of established, procedures for seeking redress of injustices or promoting political change are no longer seen to be effective by certain sections of the population.

For Gamson, in 'Power and Discontent', trust is the 'output dimension' of the same body of political attitude of which efficacy is the 'input dimension'. Efficacy is described as essentially the feeling that someone in authority can be made to respond if the citizen exercises his/her rights of expression. Efficacy and trust are but two faces of the same coin which has been variously described as:

1. Political alienation
2. Diffuse support (by Easton)
3. Allegiance (by Dahl)
4. Cynicism (by Miller)
5. Output alienation (by Almond and Verba)

Thus it may well be that:

"...much protest arises not because a disadvantaged group has rejected conventional politics, but because conventional politics have rejected or excluded them."
(Marsh, 1977, pp.56)

Thus, if conventional politics means representative democracy and certain groups, despite their efforts to achieve representation through the conventional channels, feel that the system is ignoring their interests then they may go outside conventional politics to get their views known. Thus the Greenham Peace Camp campaigners may feel that no political party or conventional pressure group is sufficiently representing their views, hence their 'unconventional' politics. However, the existence of a feeling of alienation, distrust, cynicism etc. may not undermine the stability of a political regime. We would need to clarify who is alienated from what or whom, to

whom is mistrust directed. For example, Gamson identifies four objects of political trust: the incumbents, the institutional framework, the public philosophy and the political community. Gamson's developmental model suggests that the authorities are the first objects to be identified when trust is in decline:

"If such experiences extend over more than one set of authorities, potential partisans may conclude that the institutions themselves may be the source of bias, and "throwing the rascals out" will have little effect if indeed it is possible... Attacks on political institutions may in turn lead to distrust in the ideology or public philosophy used to justify them. Finally ... the disaffection may be generalised to the political community itself and a desire for political separation may develop." (Gamson, 1968, pp.178)

In a similar fashion R.E.Lane (1979) suggests that, to qualify as a crisis of legitimacy, critical views would have to be directed, firstly, at the system itself and not at the present incumbents or their policies. Secondly, such views would have to be directed at the values that underpin the system and not merely serve to identify villains or even criticise system performance. Thirdly, such criticisms would need to persist over a long time and, fourthly, be rooted in some structural property of the system such that a group or set of groups is not systematically deprived of what are considered to be crucial values. Finally, Lane considers that a sense of personal malaise related to system performance would persist. If we apply this analysis to examples of civil disobedience then certainly Gandhi's actions could be said to lead to a crisis in legitimacy insofar as he was

particularly concerned with the first four of Lane's points. The Peace Campaign, on the other hand, could not be identified with a crisis of legitimacy as it is difficult to apply any of Lane's considerations to this campaign except, possibly, the third point.

However, Wright's (1979) findings would contradict the last point of Lane's. Wright indicates that:

1. There is no persuasive evidence to suggest that political alienation and discontent among the mass of the public pose a serious threat to democratic stability.
2. Since the major observable consequence of disaffection with the government seems to be a decline in political interest and withdrawal from political activity then, Wright suggests, mass alienation is more of a threat to the notion of democratic representation than it is to democratic stability.
3. Thus the main problem of modern democracy is, therefore, not one of 'deactivating' the masses but of creating the mechanism that which mass participation can be allowed. (Wright, 1979, pp.59)

Wright goes on to argue that the alienated are drawn from those social groups whose members characteristically participate little in politics anyway. They are inactive in political or voluntary organisations and have little of the money, time or expertise that effective participation in politics requires. In this sense their alienation

matters little to the persistence, stability or viability of the regime. This would tie in with those theorists who argue that democratic pluralism is, in effect, competition between elites. Thus:

"With the manual workers and lower middle classes ordinarily passive and inactive playing no initiative role, the key to stability is an accepting and approving middle class. When they give their consent and support, the entire mechanism will more or less function adequately." (Hamilton and Wright, 1975, pp.202)

It may be that much of the concern with alienation, mistrust etc. is based upon the idea that consent is essential for the legitimation of the liberal democratic regime and where that consent seems to be lacking then the legitimacy of the regime is said to be in question. This of course depends upon the idea of consent existing in the first place. We may need to distinguish between consent, assent and acquiescence where all that is required for the vast majority of the citizenry is that they acquiesce in decisions taken on their behalf. Hart and Rawls recognise this problem in their accounts of obligation where the notion of an 'insider's' point of view was used by Hart to give obligation a strong sense. Sniderman (1981) is one who makes a distinction between the committed and the supportive citizen and it is not surprising that citizens generally give a different weight to the importance that a political regime plays in their lives compared to other commitments to friends, family, clubs, societies, neighbourhood etc.

Thus it may be that a perceived decline in political trust may not lead to the crisis that it is supposed to: it may just lead to apathy, alienation, withdrawal etc. Indeed it may well be that a crisis is not something that can be identified objectively but only exists in the minds of those who feel threatened or for whom the concept of a crisis may be of value to them. I am thinking here of the way in which governments may exaggerate the perceived threat of some group or country in order to gain support for their own actions in dealing with such a threat. There is nothing like a crisis to unify citizens behind their governments. Thus an important feature of any depiction of a crisis, a threat to stability or legitimacy will depend upon the actions of government itself. For example if the government of the day can convince its citizens that criticism of their actions implies criticism of the system as a whole then such criticism may become muted if the critics do not wish their actions to be perceived as threatening the system as a whole. As I have indicated elsewhere, civil disobedience, in breaking a law, may be depicted as an attack upon the legal system itself and thence cannot be justified. The extent to which this line of argument is convincing will determine public response to such actions of civil disobedience.

However, at this stage we need to explore the concept of stability itself in a little more detail to see if it is possible to describe which actions will undermine the stability of a democratic regime. The concept of stability has been the subject of much theoretical

discussion in recent years and the concept has been considered ambiguous insofar as there does not appear to be any generally accepted definition. Hurwitz described the situation as:

"The concept of political stability is an excellent illustration of the fuzziness and confusion existing in political science research regarding concept formation, operationalisation, and measurement. The concept of stability means all things as various individuals attempt to measure the degree or amount of 'political stability' present in their particular universe ... Although there are strands of common agreement in most of the literature as to the basic broad meaning of the term, confusion abounds due to lack of agreement concerning the meaning of the terms employed to define 'stability'; and there is also a lack of consensus regarding the operationalisation of these latter terms." (Hurwitz, 1973, pp.449)

Hurwitz identifies five different approaches to stability: firstly, the absence of violence; secondly, the longevity or duration of government; thirdly, the existence of a legitimate constitutional regime. Presumably constitutional in terms of western democratic regimes. It could be argued that in certain political systems that are different from that of the western democratic that a legitimate regime does not have to be constitutional, but merely comes to power by recognised means. However, fourthly, the absence of structural change and fifthly, multifaceted societal attitudes. The latter presumably to ensure continuity.

Flanagan defines a 'system crisis' as;

"...a challenge to the authority of the constituted decision-making expressed through extralegal means of protest on a scale sufficient to threaten the

incumbents ability to maintain order and continued occupancy of authority roles." (Flanagan, 1973, pp.48)

Civil disobedience is just such a challenge that may constitute a threat to the authority of the regime. The problem, it seems to me, is to identify a challenge. If we take into account the intentions of those who are said to constitute a challenge to authority then it may well be that this is the last thing they intend and is only one interpretation that may be put on their actions. This was certainly the case with M. L. King where his avowed intention was not to challenge the authority of the regime but to secure for black Americans the rights that should have been theirs by the principles of the American Constitution. A further problem is that alluded to earlier; can we define a crisis or do we depict a crisis? If we label something a crisis then by this very labelling we may come to perpetuate such a crisis through self-fulfilling prophecy in the same way that perceived reservations concerning the Stock Exchange or Wall St. may quickly generate loss of confidence and a crisis in those financial institutions.

However, a further theory of instability is that developed by C. Ake (1974/75) where every violation of law, such as civil disobedience, is deemed to be ipso facto a defiance of constituted authority. According to Ake such violations threaten the maintenance of existing patterns of the distribution of the power to make decisions for society. Here the network of 'political

role expectations', or the political structure constitutes a system of channels or obstacles that control the flow of political exchanges (that is the transactions and communications) between political actors. Political stability is the regularity of the flow of such political exchanges. To determine the extent of political stability of a political system we must be able to systematically identify both the regularities and irregularities in the flow of political exchange. Presumably, for Ake, this flow is vertical rather than horizontal in direction and thus he presupposes a political relationship to be that between ruler and subject. However, Ake suggests that we can measure this flow by using a time-series model where measurement is taken in as many different points in time as possible. Thus the degree of political stability at a given point in time is such that

$$\frac{p_i}{p_{ii}}$$

where p_i is the number of political actors violating the system of political exchanges, and p_{ii} is total political population. The drawback so far is, as we saw above, some actors may be more significant than others.

However, the degree of political stability over a time period

$$= \frac{1}{n} \sum_{i=1}^N x_i$$

where N is the number of readings and x is the score of readings. Yet it is not clear what is to count as a violation. The general trend of writings on the concept of political stability is to designate some form of political behaviour, such as frequent changes of government, as instances of political instability. Ake's point is that frequent changes of government may in fact be the norm.

Yet, the 'politicalness' of an act is not a quality inherent in that act but rather a characterisation that we give it according to the context within which we study it and the context within which it occurs. Thus we may characterise civil disobedience as a political act that violates the system of authority and hence threatens the political system as a whole. Or we may characterise it as a moral act, or a religious act, that does not have the meaning for the practitioner that we may ascribe to it.

There is one other theory of stability that lays claim to our attention and this is put forward by K. Dowding and R. Kimber (1983). Dowding and Kimber argue that a political object, for example a democratic regime, may be in either a state of stable or unstable persistence, but the former state can only be identified in a situation where some kind of challenges are threatening the continued existence of the identifying characteristics of the object. They argued that stability cannot be quantified and that there can be no degrees of stability. However, in order for a system to be said to survive, they argue that the continuity of some elements is needed

between moments in time, and although continuity of some elements is maintained, over a long period of time there is no reason why all the elements could not be replaced. This would ensure that stability is not seen as identical to lack of change and, hence, conservatism. They also see stability in terms of the relationship between a political object and those forces that are said to threaten it:

"... political stability is the state in which a political object exists when it possesses the capacity to prevent contingencies from forcing its non-survival." (Dowding and Kimber, 1983, pp.238-239)

They suggest that systems may react to threats in different ways so their discussion of political stability does have the advantage of seeing how a government responds to a threat as being important. They also suggest that political entities may have a natural lifespan and non-survival at the end of this lifespan should not be seen as proof of instability. Forced non-survival entails instability. Yet what are 'the identifying characteristics' of the object under threat. It is crucial to Dowding and Kimber's analysis that these be clearly specified. In a later paper (1985a) they identify the characteristics of a democratic regime. It is a regime type in that it embodies a set of rules, conventions and norms that govern the operation of the political process. They identify upward control, political equality and norms that 'lead members to behave democratically'. This condition of democratic behaviour is usually institutionalised through the legal system

although Dowding and Kimber do concede that laws may have anti-democratic entailments and they suggest that under certain conditions individuals may be under a;

"... democratically inspired moral imperative to break that law. Those actions, though law-breaking, may be held to be democratic and not anti-democratic."
(Dowding and Kimber, 1985 A, pp.60)

This of course is the position that some theorists on civil disobedience take in arguing that civil disobedience can be justified in that it may promote democracy even though it is illegal. In this vein Dowding and Kimber go on to argue that the demand for greater democracy cannot threaten democracy itself, but may threaten the particular institutionalisation of democracy that is in some way deficient.

Whilst there are many good points that come out of Dowding and Kimber's analysis it seems to me that they have assumed that the essential features of democracy can be clearly identified so that an attack upon them can also be clearly identified. Much of the discussion of the early part of this chapter was concerned with the difficulties in defining democracy and in keeping evaluation out of such definitions. We saw how, for example, in describing pluralism there was a tendency to equate such a form of democracy with America of the 1950's and early 1960's and thence with the good life. So this is the first problem, can we identify clearly the features of democracy? The second problem with the model offered to us by Dowding and Kimber is the same problem that has

already been mentioned in this chapter viz can we describe a threat to the system or is a threat a value that we can ascribe to any political action? Is to call something a threat automatically to consider it to be, in some sense, a 'bad thing'? We would have to say "yes", but it will depend upon the perspective that the individual adopts. For example, the offer of support and help by a well-meaning liberal male to the women peace campers at Greenham Common may be seen by the latter as a threat to their feminine solidarity and the purity of their cause, insofar as for them male means aggression by definition. Dowding and Kimber's definition needs to clarify what they believe to be a threat even though this may tell us more about their own political values than offer us an objective description.

Civil Disobedience and Democratic Values

If we assume that at least for some exponents of civil disobedience the act finds its logical place within a system of democratic government, then how does civil disobedience fit in with the discussion thus far. The concern of the early part of the chapter was with the problems of defining democracy in the light of the debate over the (im)possibility of separating description and evaluation. With respect to theories of democracy then the dilemma may be presented in terms of the approach to democracy with its emphasis on procedure contrasted with the approach to democracy based on values. From the point of view of the former, then, can we be critical of the

civil disobedient for not taking part in democratic procedures if these procedures do not allow equal access? (Allowing, of course, for the democratic understanding that minorities will not subvert the will of the majority and assuming that the minority is not coerced). Irrespective of any discussion of participatory or representative government then, if a group are excluded from the procedures that are theoretically open to all, to what extent are they under an obligation to comply with the recognised channels for communicating political opinions? Remember that for Rawls, civil disobedience would only be justifiable if all the channels for expressing opinion had been exhausted. Thus our concern would be with a definition of democracy that emphasised formal procedures and a concern that these procedures obtained in practice.

From the point of view of values then, to what extent is civil disobedience an act which promotes democratic values or undermines them? Firstly, we would have to specify what these values are; the Civil Rights Movement was concerned to see in practice those rights that, they argued, were already enshrined in the American Constitution. The Civil Rights Movement were seeking to promote those values that, in principle, were in accordance with the values promoted by all Americans. However, the possibility exists of a conflict in values. We have already suggested the possibility that democracy and liberalism as ideologies may stress different values and there is also the possibility of the weight given to

different values changing over time and different groups also giving weight to different values. There is also the possibility that the concept of stability itself has become a value which has been given greater weight than notions of equality or liberty in recent years, particularly by those who are in a position to have their views given a priority on the political agenda, e.g., those that the elite theory debate identifies. If that is the case, then any views concerning the possible undermining of stability may be given great weight. In this case the civil disobedient has to change the language of the agenda so that in political debate views concerning the promotion of equality or rights are given greater prominence than the language of stability and perceived threats to such stability.

If we examine the characteristics of democracy and in particular the notions of inclusiveness and contestation, then the civil disobedient may also be significant. If the notion of inclusiveness is concerned with the concepts of citizenship, participation and equality, then the civil disobedient may argue that he/she is rescuing politics from mass apathy and elite domination by the mass involvement in politics and thus is promoting the notion of an active, rather than a passive, citizenship and it was certainly considered to be a success by the CND Movement in this country that at the very least it raised the level of political awareness and public participation in politics. It is, of course, another matter to transform this into effective participation in the

decision-making process. It is thus a moot point whether or not the civil disobedient is promoting or undermining democracy. As suggested above one consideration is that civil disobedience may be critical of a particular institutionalisation of democracy that fails to match up to some democratic ideal. We must thus be aware of the object of protest - is it the system itself, a particular government, individuals, the public or some other group? Finally, civil disobedience may be said to form a part of group politics as defined by theories of pluralism except that civil disobedients may argue that their access to conventional channels of communication is limited or non-existent and hence forces the civil disobedient to turn to unconventional or illegal methods of protest. Barry makes a telling point here when he suggests that:

"... the more closely a society approximates to the model of a monolithic majority bloc facing a minority which is always on the losing side, the more a reasonably prudent person would refuse to accept that, if he or she found himself in such a society and in the minority group, he or she would be bound to respect the laws that had been passed by the majority over minority opposition." (Barry, 1979, pp.179)

Similarly, what is the position of the group that gives its allegiance not to the state but to some culture within a state that is alien to common customs or values, or the group that gives its allegiance to some religion or ideology which is at odds with the dominant value system? There is the possibility that a group may refuse to acknowledge the legitimacy of the state because its primary loyalty is to, say, the nation, rather than the

state. If the primary allegiance of a minority is not to the state, then there is a danger that the conditions necessary for a functioning liberal democracy will not arise. There is a sense in which members of the polity will have to internalise a sense of personal citizenship. Otherwise there may be competition for legitimacy within the state itself. There must be identification of the citizens with the polity and prevailing values, otherwise, as Grew et al indicate, a problem may arise if certain groups of individuals have low identities with the polity and higher identities with particular groups and 'deviant' values. For Lord Scarman in the Scarman Report on inner city disorders:

"Some young blacks are driven by their despair into feeling that they are rejected by the society of which they rightly believe they are members and in which they would wish to enjoy the same opportunities and to accept the same risks as everyone else. But their experience lends them to believe that their opportunities are less and their risks greater." (Lord Scarman, 1982, paras.2.35)

Disappointed expectations may lead to frustration or despair, and so in response to the rejection they feel young blacks themselves may reject the identity of the polity. This, it is argued, was one reason for the increasing violence in America in the 1960's as many blacks felt that the expectations raised by the Civil Rights Act of 1963 were not being met quickly enough. Once again regime responsiveness is a crucial factor here.

Thus institutional participation may be important not just as a sign of legitimation of the regime but also to enhance identification with it. Thus

"In any institutionalised society the participation of new groups reduces tensions; through participation, new groups are assimilated into the political order."
(Huntingdon, 1968, pp.88)

Thus was the position of the Civil Rights Movement in the U.S.A. insofar as they professed to want to be assimilated into the mainstream of American culture rather than left out.

The notion, then, that civil disobedience may be allowed in a non-democratic regime but not in one that is democratic begs the question of what a democratic regime looks like and what is the relationship between individuals or groups to that regime. How this relationship is characterised will depend upon how individuals and groups themselves see it. Thus we need to show how the language of the civil disobedient is significant in determining the meaning that the act has for its adherents and the response it receives from those who would oppose it. In order to do this we need, I suggest, to locate it within a context, a tradition, of political protest, a context of language that binds together the actions of Thoreau, Gandhi or Martin Luther King in a much more coherent fashion than any attempt at defining the necessary and sufficient conditions of civil disobedience. It is to this task that I now turn my attention to.

Chapter 6 CONCLUSION : A TRADITION OF PROTEST

Having examined definitions of civil disobedience and found them wanting insofar as they do not appear to offer an account of civil disobedience that could cover all instances of it; having examined in more general terms the relationship between the individual and the state in terms of obligations and rights in particular and found explanations of political action involving these concepts to be problematical; having examined the concept of political protest located within a particular type of political system i.e. democracy and found the characteristics of such a system to be in dispute; we can finally turn to an examination of civil disobedience that is located within a particular context of political understanding based upon language and the notion of a tradition.

Civil Disobedience as Communication

Not all the accounts of civil disobedience are concerned with offering a description of the necessary and/or sufficient conditions for an act to be termed civil disobedience. B. Smart in his 'Defining Civil Disobedience' is concerned with the way in which civil disobedience can be understood as a mode of address. This approach is one that opens up fruitful possibilities and is worth considering in some detail. Smart is concerned, initially, with the meaning of acts, understood by using H. P. Grice's triad of intentions;

"...let U stand for the Utterer..., A the Audience and x the Utterance, then:

- (1) U intends to produce an effect on A (that A should believe p or do O) by the utterance of x.
- (2) U intends that A should recognise the first intention;
- (3) U intends that the effect on A should be produced because of A's recognition of the first intention." (Smart, 1978, pp.249)

Smart is concerned with the notion of 'address' as explicated in Rawl's account of civil disobedience and Smart develops this using the idea of non-natural meaning which includes non-linguistic actions. The suggestion is that we can decode certain actions by reference to meanings that can be inferred from the context. The example that Smart gives is that of the bus conductor ringing the bell three times to indicate that the bus is full. This act is non-linguistic but it has meaning. Smart asks us to see civil disobedience as non-linguistic non-natural actions. Though non-linguistic they may be protests, vehicles of information and persuasion and, possibly, threats. How does Smart's approach fit in with other accounts? He quotes Bayles' definition:

" For purposes of this discussion civil disobedience may be defined as selective and public performance of actions (commissions or omissions) truly believed to be illegal for reasons which the agent takes to be morally compelling." (Bayles, 1970, pp.4)

Smart argues that in defining civil disobedience as deliberate and conscientious violation of the law Bayles does not require intention (1) of Grice's triad since (1) introduces both an audience and a response that U intends to elicit from that audience. In a democracy, for

example, the audience may be the government or the public or both. Civil disobedience is then an act of communication: it is essentially a form of protest that binds together the civil disobedient and the government or the public in the relationship of Utterer/addressee. Two other essential features are also generated by the fact that acts of civil disobedience are essentially forms of protest. Civil disobedience is a protest against something, there must be an object of protest. The second essential feature is:

"...the principle or principles invoked, appealed to or cited by the civil disobedient. Both acts of civil disobedience and other conscientious acts are governed by principles (moral or otherwise). This means that certain principles form part of the explanation of how the acts came to be formed. Furthermore, both acts of civil disobedience and other conscientious acts may be justified by the principles that govern them. That is the governing principles may be good principles, or the best applicable or the least evil applicable in the circumstances. But in the case of civil disobedience it is essential that not only does a principle govern the action and therefore in principle be able to justify it, but also that the principle may be appealed to, invoked, or cited. For this to be possible the act must convey non-natural meaning and civil disobedience as protest meets this requirement." (Smart, 1978, pp.256)

Smart is also concerned with the question of whether or not communicative civil disobedience is the only kind there is. He suggests that civil disobedience may fall under the 'cluster concept' of conscientious illegality. To develop this he returns once more to Rawls' definition of civil disobedience. He identifies seven features in Rawls' definition of civil disobedience:

1. It is in violation of a law and intended to be so.

2. It is public and with fair notice given.
3. It is nonviolent.
4. It is accompanied by a willingness to accept the legal consequences.
5. It is usually performed to bring about a change in the law or in the policies of the government.
6. It is addressed to the majority's sense of justice.
7. It is addressed to a sense of justice that is mainly incorporated in the law and social institutions.

However, Smart contends that none of these conditions are definitionally necessary and he goes on to examine each in turn:

1. Rawls intends the condition of law violation to distinguish civil disobedience from conscientious refusal. In practice, Smart claims, this distinction has not been made. Rawls is also concerned with whether civil disobedience should include the presentation of test cases. Rawls thinks that the civil disobedient should not be simply presenting test cases for a constitutional decision; the acts of the Civil Rights Movement were often presented in this fashion. However, Smart believes that what is important is that the act has to be regarded as

illegal by the appropriate organs even though it may not in fact be so. The civil disobedient likewise, does not have to believe that his/her act is illegal.

2. Smart suggests that the act must be addressed to the public but there is no reason to suppose that this is incompatible with the performance of the act itself being just.
3. Here Smart argues that violence and force can be a part of civil disobedience without it constituting a threat in the speech act sense or in the sense of imminent danger. Smart constructs a range of possibilities and indicates that civil disobedience can be threatening insofar as it is a mode of address and if government or the object of protest has to change its policy then, Smart argues, it may have been subject to 'coercion of persuasion'. This is a point that we considered earlier with Gandhi - to what extent could, in particular, his acts of fasting be said to coerce the government?
4. Rawls suggests that willingness to accept the punishment is a sign of sincerity and the civil disobedient will distinguish himself/herself from the criminal. Why, asks Smart, should the refusal to willingly submit to punishment for the breaking of a repressive or unjust law automatically impugn a person's honesty?

5. Smart here suggests that the civil disobedient may be addressing the public concerning these matters that lie outside the scope of law and governmental institutions such as discrimination in social relations. Here we might think of Gandhi undertaking an act of civil disobedience to protest to his fellow Indians of the iniquities of the caste system. Although presumably the act would have some implication for government or the legal system assuming that a law is broken.
6. Smart offers two criticisms made by P. Singer (1973, pp.86-92) firstly, a minority may have a conception of justice which they believe that the majority should adopt rather than them appealing to the majority's sense of justice. Secondly, Singer sees no reason why civil disobedience should be restricted to appeals to justice; Rawls explicitly excludes appeals to individual conscience or to religious doctrines or indeed to any reference to group or self-interest.
7. Barry and Haksar (quoted in chapter 1) have both criticised Rawls for defining civil disobedience in such a way that it is never needed!

In his conclusion Smart wishes to contrast civil disobedience with revolution by 'excluding the conjunction of revolutionary aims with coercion by violence'. I am

none too sure what Smart means by this since is it always the case that revolution is 'coercion by violence'? However, Smart offers us a final definition:

"Civil disobedience must be a vehicle of non-natural meaning: it is a protest and may also be a threat and information addressed to governments and the public; it is either a deliberate violation of the law or of an injunction or a deliberate challenge of the official interpretation of the law; it involves an appeal to principles of public concern that are held to have been breached; it may involve violence either as the coercion of force or as the coercion of persuasion or as a merely dramatic device but it cannot combine the coercion of force by violence with the overthrow of the government and the constitution." (Smart, 1978, pp.267)

Whilst we may welcome Smart's attempt to offer an account of civil disobedience that is different from the traditional accounts given in chapter 1 it still suffers from problems:

Firstly, if it is a vehicle of non-natural meaning then presumably we must understand the context within which civil disobedience makes sense. In the way that we may understand ringing the bell three times as a sign that the bus is full we would not understand this unless we understand the conventions that govern the activities of the conductor. We may, for example, consider a society where the bus is the only form of transport available, it runs infrequently and when it does it is never 'full' in the sense that every available space is utilised, including the roof. There is no understanding of 'full' in terms of six standing passengers on the lower deck and no more. The point is that if we are to understand civil disobedience then we must locate it within a particular

framework of understanding and this involves an understanding of the conventions that govern political protest in those societies that civil disobedience has been located. Secondly, Smart suggests that civil disobedience may be a threat but what is to count as a threat is not something that belongs to an act but is a characteristic that can be given to an act depending upon how that act is seen. As we saw with the concept of a crisis in the last chapter, it may be incumbent upon government to depict an act as a threat, or leading to crisis, if it wishes to gain support for its criticism of the act. Smart's definition does not, I think, allow for these differing interpretations. Thirdly, and similar to the last point, is the sense in which any non-linguistic act is open to interpretation perhaps more readily than linguistic acts. Imagine the child in the classroom raising an arm : this could be because the child knows the answer to a question and indicating by raising an arm is the appropriate way of doing this; perhaps the child wishes to go to the toilet and again this is the appropriate way of indicating this desire; or perhaps the class as a whole is choosing its prefects or monitors and the child who raises his/her arm is voting in a simple election. Thus the act of raising an arm is open to a number of different interpretations any of which may be valid, given the context. In order for us to determine what the action is we must rely upon the child telling us what he/she is doing and therefore we must take into account the intentions that are given to us by the actor,

even though this may be interpreted differently by the audience. Thus the communication between U and A may be less clear than Smart allows. Fourthly, although Smart is critical of Rawls insofar as Rawls believes that the civil disobedient should address the sense of justice of the majority, Smart himself does not offer us an account of what the content of such an appeal should be. To do this we must examine the appeal that civil disobedients themselves make whether it be to some concept of justice, conscience, natural law etc. The appropriate appeal will depend upon, it seems to me, that which is recognised as being a good reason within a particular practice or tradition of political protest. Thus we must locate the appeal of the civil disobedient within a tradition of political protest, a tradition which sanctions certain justifications but not others. Thus for a Gandhi, for example, the conception of civil disobedience as violence would not be appropriate. Likewise, within the same tradition, is Martin Luther King. However, I intend to explore the concept of a tradition below and the notion of language as an ideological tool used by the committed in understanding of politics that is distinct from other understandings of politics.

One final problem associated with Smart's approach to civil disobedience as a form of communication is that Smart assumes that the audience not only thinks that the communication is to be given weight, but also that the audience understands the communication in the first place. It may be that the Utterer is speaking in a language that

the audience does not understand. I do not mean this in a trivial sense, but in the sense that if language is constitutive of a particular conception of reality that is real for the Utterer, there is no guarantee that the audience shares this conception, and hence understands the language. It may be analogous to religion. Imagine a Jehovah's Witness comes knocking on the door and as part of his/her attempt to convince us of the truth of his/her message asks 'Who built this house?'. For somebody who is not religious the question may appear to be an odd sort of question and will probably immediately think of the name of the builder, if it is a new house, such as Wimpey or Baratts. This is not the appropriate response. The Jehovah's Witness will go on to inform the audience that God, insofar as he creates everything, is the builder of the house. The same confusion can apply in politics where, for example, the civil disobedient may appeal to, say, Natural Law or conscience to justify his/her actions. The audience, if it does not recognise Natural Law or conscience as being important or appropriate when considering the act of civil disobedience, may find the civil disobedients language rather perplexing. We saw this as a problem when examining the differing conceptions of law offered by Natural Law theorists compared to Positive Law theorists.

Tradition

However, to understand the language that is appropriate to civil disobedience then we need to look at civil disobedience in terms of a tradition of protest.

Writing on tradition, Shils suggests that :

"As a temporal claim, a tradition is a sequence of variations on received and transmitted themes. The correctedness of the variations may consist in common themes, in the contiguity of presentation and departure, and in descent from common origin." (Shils, 1981, pp.13)

Whilst Shils was writing on the concept of tradition in general, Pocock was concerned to develop the notion of a political tradition using the concept of a paradigm. He offers us the following:

"Men think by communicating language systems; these systems help constitute both their conceptual worlds and the authority - structures, or social worlds, related to these; the conceptual and social worlds may each be seen as a context to the other, so that the picture gains in concreteness. The individual's thinking may now be viewed as a social event, an act of communication and of response within a paradigm - system, and as a historical event, a moment in a process of transformation of that system and of the interacting worlds which both system and act help to constitute and are constituted by..." (Pocock, 1972A, pp.15)

Pocock considers that the notion of a paradigm in a political sense operates in different contexts, performing different functions in ways in which the paradigm can never be discrete but will;

"... migrate from contexts in which they have been specialised to discharge certain functions to others in which they are expected to perform differently." (Pocock, 1972A, pp.21)

For Pocock:

"At any given moment the 'meanings' of a given utterance must be found by locating it in a paradigmatic texture, a multiplicity of contexts which

the verbal force of the utterance itself cannot completely determine; and if we wish to trace some aspect of its history by making statements of our own, we must, by our own deployments of language, isolate the context or universe in which we say this piece of history took place." (Pocock, 1972A, pp.29)

Is there a confusion here between meanings and the consequences of utterances? Different interpretations can be put upon statements irrespective of what the Utterer meant and which are beyond his/her control. It is not enough to suggest that by examining the context with which a statement is made then it can be understood; there must be some investigation of how this utterance was received and the different interpretations that can be put upon it and the consequences that will follow. Thus the civil disobedient informs us that the act he/she is proposing to engage in is a just act. Now this can be understood within the context of a particular tradition of understanding politics where such acts are described as just acts. However, the critic of civil disobedience may respond from a different tradition that such acts are unjust. The observer can see both positions and understand them and see how both interpretations can be given to a particular act.

However, Pocock goes on to develop the notion of a tradition where:

"A tradition in the pure sense consists of a set of present usages and the presumption of their indefinite continuity; the only modes of social action which it conceives or recognises are use and transmission, and the radical critic is therefore driven to invent, or import some other mode of action laying outside the tradition." (Pocock, 1972A, pp.253)

However, J.G.Gunnell is critical of the idea of a tradition, particularly as it applies to political theory, commenting that:

"The idea of the tradition is not so much a research conclusion as it is an a priori concept." (Gunnell, 1979, pp.66)

and again:

"What is presented as an historical tradition is in fact basically a retrospective analytical construction which constitutes a rationalised version of the past." (Gunnell, 1979, pp.70)

Indeed, it seems to me that Gunnell's point is particularly appropriate to those writers who contrast traditional society, as opposed to a tradition, with modern society. Eisenstadt is typical here:

"Tradition can perhaps best be envisaged as the routinised symbolisation of the models of social order and of the constellation of the codes, the guidelines, which delineate the limits of the binding cultural order, of membership in it, and of its boundaries, which prescribe the "proper" choices of goals and patterns of behaviour, it can also be seen as the modes of evaluation as well as of the sanctioning and legitimation of the "totality" of the cultural and social order, or any of its parts" (Eisenstadt, 1973 pp.139)

However, Lockyer has argued that:

"... 'intellectual traditions' provide conceptually the most adequate context within which to examine the activity of past political theorists and to elucidate their historical relationships." (Lockyer, 1979, pp.203)

Lockyer argues that 'continuity, community and prescriptive authority' are the chief characteristics of the idea of a tradition and he wishes to point out that its acceptance need be instructional or habitual. Lockyer distinguishes between an ideological tradition which embodies a shared set of beliefs and values and a

tradition of discourse which is concerned with a set of related questions. The latter is the concern of the political philosopher where there exists some shared conception of an authoritative literature defining problems and what is to count as the appropriate method of approaching these problems. With respect to the latter, Lockyer concentrates primarily on the work of Q. Skinner (discussed in the first chapter). Lockyer notes Skinner's concern to decode the intentions of particular writers by examining the linguistic context within which such intentions are uttered. Lockyer comments, however, that Skinner neglects the continuity of concepts and language through time and suggests that by using the notion of an intellectual tradition we may widen the context and so improve upon the specific and, for Lockyer, limited view of context used by Skinner. He quotes with approval the use by Pocock of the notion of linguistic paradigms where there are accepted and authoritative concepts in which to discuss political beliefs and values even though there may be disagreement over these. Thus, for example, the Liberal can communicate with the Conservative even though both may disagree over the political values that are, or should be, prevalent in modern Britain. Lockyer suggests that the characteristics of the intended audience are an important part of the context of any piece of argument. He does recognise that there may be problems in defining the audience and suggests that it is those with whom the author intended to communicate. In the context of a work

of political theorising it may, though, be impossible to limit the audience and indeed it may be intended for both present and future generations.

However, Lockyer suggests that in paying too much attention to the relationship between the author and the audience we may fail to give due weight to the extent to which the language of communication is itself inherited. This is part of my own critique of Smart where the content of the communication is not commented upon with respect to civil disobedience. Within the context of political theory, though, Lockyer writes that:

"The appropriate context for understanding an act of communication will not be, therefore, the historically local linguistic community but a problem - situation which crucially includes the inherited authoritative language that constitutes a society's intellectual traditions." (Lockyer, 1979, pp.209)

Lockyer goes on to argue that the range of problems that political theorists have tried to answer constitute a tradition of discourse and have a history because they have different meanings in different contexts. For Lockyer they serve as reflections on changing political and social arrangements. If this is the case, then is the concept of 'civil disobedience' the same for Thoreau, King, Gandhi or the Peace Campaigners given the differing political and social contexts within which they operated? Presumably not. Lockyer makes the point that:

"A so-called perennial question like 'what is the nature of the just state?' does not merely receive a different answer from say Plato, Augustine, Hobbes and Marx, it constitutes a different question, since the terms 'just', 'nature' and 'state' mean something different to each of them." (Lockyer, 1979, pp.217)

Hence, if we follow this line of argument, then to define once and for all the concept of civil disobedience using the words and actions of Socrates, Thoreau, King et al is mistaken because they gave different meanings to the notions of obligations, justice, the state etc. And yet, according to B.A.Haddock we can overcome this problem:

"The world of politics is a world of constant flux, and we cannot hope to understand it unless we make its transience a central feature of our explanations. Political discourse, therefore, can only be understood in a concrete historical context, as part of a history of ideas." (Haddock, 1974, pp.426)

We can see the concept of civil disobedience, not as something static, but as something that changes over time, drawing upon particular interpretations by particular political actors. This sense of change and flux is indicated in a typically telling passage from M.Oakeshott's essay on 'Political Education' and it is well worth quoting at length:

"Now a tradition of behaviour is a tricky thing to get to know indeed, it may even appear to be essentially unintelligible. It is neither fixed nor finished, it has no changeless centre to which understanding can anchor itself; there is no sovereign purpose to be perceived or invariable direction to be detected, there is no model to be copied, idea to be realised, or rule to be followed. Some parts of it may change more slowly than others, but none is immune from change. Everything is temporary. Nevertheless though a tradition of behaviour is flimsy and elusive, it is not without identity, and what makes it a possible object of knowledge is the fact that all its parts do not change at the same time and that the changes it undergoes are potential within it. Its principle is a principle of continuity: authority is diffused between past, present and future; between the old, the new and what is to come. It is steady because, though it moves, it is never wholly in motion; and though it is tranquil it is never wholly at rest." (Oakeshott, 1962, pp128)

However, if we return to the notion of a paradigm and the notion of a linguistic paradigm can we say exactly which meanings will be the appropriate ones to be attributed to a particular concept at any particular time? Why, in a linguistic paradigm, will one set of meanings dominate at one particular time? Is it the case that the Liberal and the Conservative, in communicating with each other, share the same paradigm? If so then presumably it is the Conservative's values and beliefs that presently hold sway insofar as the Conservative Party has been in power in Britain since 1979.

Sheldon Wolin considers the application of Kuhn's paradigm in political theory in his attack upon the behavioural science approach to politics. He contends that:

"Social scientists who are impressed by the seeming fertility of the scientific imagination in producing new theories may be sobered by Kuhn's emphatic assertion that one of the 'most striking features' of normal science is 'how little' it aims to produce major novelties, conceptual or phenomenal (pp.35)' (Wolin, 1968, pp.133)

Wolin sees the 'greats' in traditional political theory as paradigm innovators insofar as Hobbes, Machiavelli et al 'inspired a new way of looking at the political world'. In contrast, behavioural science, insofar as it examines, for example, voting behaviour, is concerned with the actual arrangements of political society and is thereby said to constitute a 'normal paradigm'. However, it may be that Kuhn's notion of a paradigm appears as a godsend to these political theorists, like Wolin, who are anxious

to criticise the advance of political science at the expense of political theory. If science itself can be discredited so much the better for those who are concerned with traditional political theory as a normative activity. In this sense the concept of the paradigm may become a tool for those who are concerned to understand politics in one way rather than another. Yet, in adopting the concept of a paradigm from its essentially scientific home, is it possible that political theorists such as Wolin are guilty of exactly the same mistake that they accuse behavioural political scientists of? In using the paradigm Wolin is still using the language of science to argue for a particular conception of politics and the only difference with the objects of Wolin's critique is a difference in a conception of science not politics. Moreover:

"Any attempt by political scientists to achieve a uniparadigmatic condition for their discipline would be morally indefensible and ultimately self-defeating. For such a uniformity of perspective could be achieved only by arbitrarily choosing one viewpoint and excluding all others." (Beardsley, 1974, pp.59)

Beardsley does go on to suggest that political science can, and indeed should, achieve a 'multiparadigmatic condition' which seems to mean little more than the researcher being aware of the limitations of his/her interpretation and be willing to concede other alternatives which stem from competing perspectives.

However, Wolin does make an interesting claim which is relevant for our purposes:

"... the most embarrassing aspect of the Negro protest movement was its reminder that some of the basic elements of the paradigm such as the constitution and the Declaration of Independence, were more consistent

with the demands of the protestants than with the actions of the guardians of the paradigm." (Wolin, 1968, pp.150)

Other 'basic elements' of the paradigm were presumably a defence of the Rule of Law and as argued above the claim to oppose civil disobedience because it may undermine the Rule of Law is a perfectly understandable one from the point of view of those who have everything to lose if such a situation were to arise. Thus both the actions of the protestors and their opponents can be depicted as consistent with the 'basic elements' of the paradigm. Thus it seems to me that the use of the concept of paradigm in politics may be little more than a metaphor but can we get something more out of the concept of a tradition?

K.Minogue argues that:

"A tradition can be designated, but it cannot be defined, because any definition would be a formulation of the tradition, and there are any number of possible formulations, none of which can limit or explain its future career." (Minogue, 1968, pp.302)

and in particular:

"... within a political tradition individuals change and many, like Coleridge, put away their squeaking trumpets of sedition in the attic of youth; but those who fought in the International Brigade find successors in those who march in protest against atomic weapons, looking back, within the tradition, to Lollards, levellers and chartists." (Minogue, 1968, pp.285)

Is it the case then that civil disobedience is just such a tradition, or part of a tradition, of political protest and if so despite the impossibility of definition

can we attribute characteristics to it and in particular can we locate a particular language that is constitutive of just such a tradition of political protest?

Political Language

Not only do we need to resolve the above problems but we also need to examine the possibility that political language may be distinct from other language. Its concern may be with persuasion, rhetoric, conviction rather than with the logic of a philosophical understanding. We may wish to contrast political language with other forms of language such as religious language which may be concerned to affirm a relationship with God, or moral language which may be concerned with commending and with expressing disapproval in terms of the concepts of good and bad. Political language may use the form of religious language or moral language in order to convince the sceptical or the unenthusiastic but it is not itself religious or moral language. The use that political language will make of these other forms of language will depend upon prevailing conventions. For example, in an age when science is seen to offer the solutions to universal problems and the scientific approach is one that is deemed to be the appropriate methodology then theorists may claim the status of science for their political theorising in order to give that theorising greater credibility. Or Mrs. Thatcher can quote the words of St. Francis of Assisi when taking office in order to outline the role of her government. From a different perspective, and one that

will be explored below, the civil disobedient in appealing to his/her conscience may be doing nothing more than invoking that which has been considered appropriate by other protestors who wish to deny the authority of the state over them. It is the form of the appeal rather than the content that may be important here. When we wish to say something significant within the realm of political conduct we may be concerned to convince, to exhort or to admonish and often this significance comes from the sense in which our exhortations can be seen to reflect a distinctive manner of speaking about politics whether it be a liberal, conservative or anarchist conception of politics. More cynically, Orwell considered that:

"Political language - and with variations this is true of all political parties, from Conservatives to Anarchists - is designed to make lies sound truthful and murder respectable, and to give an appearance of solidity to pure wind." (Orwell, 1946, pp.157)

However, insofar as the world is conceived in just such an ideological manner it is the particular world in which the ideologist lives and is not susceptible to the logic of a philosophical understanding. This is the argument developed by D.Manning (1976, 1980) where ideological language exists as an ongoing evaluation of events and the language used in an ideological understanding is an attempt to draw everyday occurrences into a picture in which every event is seen in the light of the whole. The Conservative can thus depict an event as an attack upon the Rule of Law and the stability of the regime, concepts which are important to the Conservative.

Yet to substantiate such a claim then we must refer to the doctrine to which it belongs rather than to some independent definition which says that such an act has such and such characteristics and therefore must be an act of such and such a kind. We must examine the context within which such conceptions can be located. Thus, Liberal conceptions of 'liberty', 'rights' etc are ones which reflect past and present usage and will rely on previous formulations within that tradition for their full sense to be appreciated. Likewise, with civil disobedience. If the protestor is concerned with the notions of 'appeal to conscience', or 'an unjust law' then we need to be aware of the tradition of usage which makes such concepts intelligible. Thus, in ideological language we are concerned with depicting events rather than describing or explaining them and the successful ideologist is one who makes his/her depictions seem valid or appropriate.

In order to communicate political convictions the ideologist may appeal to, say, science to convince the sceptical of the validity of their claims and convictions. And yet a tradition of ideological writing does not, according to Manning, possess the kind of logical coherence that we look for in, say, mathematics; the accounts of a Marx or a Spencer are forceful accounts because of their appeal as ideological rhetoric and in spite of their rather erroneous logic. In fact such accounts may easily encompass logically incoherent principles since such accounts are not attempts to arrive

at an understanding of the world based on unalterable logic or evidence but, rather, offer us continuing evaluations of changing circumstances. Indeed ideology may comprehend situations in a way that science cannot, for ideology, unlike science, is able to portray facts in terms of their relevance for individual desires, aspirations, and political commitment. Competence in the use of ideological language allows us access to a vocabulary with which to express our practical concerns about politics by referring to such desires and aspirations. The ideologist is concerned with the world that we live and act in and this is neither a finished artefact nor does it ever remain stable, it is continually changing. Political activity is not ground in some body of theoretical knowledge even though the ideologist may deem it necessary to acquire the appearance of some historical, philosophical or scientific substantiation to lay claim to the kind of certainty that he/she believes that individuals need to act with confidence in the world.

Thus, with Manning then, the arguments of the ideologist constitute the language of a tradition in the way that they rely upon previous utterances for their full sense to be appreciated, and to substantiate an ideological claim we must refer to the doctrine to which it belongs. Thus, to depict an event as a 'revolution' rather than as a 'rebellion', 'coup' or 'palace revolt' and then to characterise it as an 'inevitable stage of development' is to locate it within a wider picture. Such

a tradition of discourse does not possess the kind of coherence that allows us to define the correct use of a concept, once and for all, unless we can show that ideological concepts express demonstrable truths. In Oakeshott's phrase, "everything is temporary". The disputes within a tradition are all part of that tradition and are essential to its development over time. In much the same way Gandhi chose those ideas that were useful for his purposes from a variety of different sources and insofar as M. L. King adopted the ideas of Gandhi then they were in the light of changing circumstances. It is inevitable that concepts are developed or abandoned, new phrases are coined and old ones given new meaning. We should not assume that vague or ambiguous concepts should detract from the sense of an ideology in the way that such lack of clarity may be detrimental to a philosophic account. Such an ideological tradition of discourse is characteristically 'open-textured' and this need not surprise us given the way in which such language is concerned to catch us in its spell rather than offer an objective explanation.

We may consider that the difference between one ideology and another will, then, reveal themselves, not in a simple opposition of principles, but rather in the language, the concepts that each employs and consequently in the different ways that each views the world. Often such distinctions are not clearly defined and the possibility exists that differing ideologies may overlap. Thus N.Harris makes the point that;

"The state in Burke's writings meant, at its most important, society in its moral guise, since both government and society were rightly headed by the landed aristocracy and no serious conflict between the two could be envisaged. But with the development of the Liberal notion of the 'individual', contrasted with the state as an external and alien force, and the absorption of both Liberal ideas and formerly Liberal businessmen, conservatism abandoned the mystical connotations of the term 'state'; it became merely administration." (Harris, 1968, pp.102)

There is a sense in which ideologies are doctrines to be adhered to; we may believe in them but we are not informed by them. And ideologies offer us a conceptual framework for the evaluation of an act: it is in the sense that ideologies offer an evaluation of an experience rather than the experience itself that Oakeshott (1962) considers ideology to be a 'crib for the inexperienced' and as an 'abridgement of a tradition of behaviour.'

For Oakeshott, language is seen not just as a way of describing or influencing a practice but as a part of practice itself. A study of the language of a practice is most significant because "a practice may properly be recognised as a language of self-disclosure which can be spoken only by agents." (Oakeshott, 1975, pp.58) Thus:

"It is composed of conventions and rules of speech, a vocabulary and a syntax and it is continuously invented by those who speak it and using it is adding to its resources. It is an instrument to be played upon, not a tune to be played. Learning to speak it is learning to enjoy and to explore a certain relationship with other agents." (Oakeshott, 1975, pp.58)

Moreover, the task of the ideologist is not that of investigation because there is no subject matter to investigate and the ideologist cannot legitimately claim that his/her work derives authority from the methodology

of an academic discipline but a political significance can be attributed to the work of an ideologist that cannot be derived from academe. If ideological sense is not, then, the same as philosophic sense then we cannot justify criticising ideology on philosophical grounds. (Manning & Robinson, 1985) It is inappropriate to impose on ideology criteria of sense that rightly belong to other kinds of activity: there is no objective criteria by which we can judge the validity of statements made within ideological discourse and we can only put them in the appropriate context and then assess their sense. We can establish what kind of assessment is appropriate by listening to what ideologists themselves say about their beliefs and the way in which they react to them. Thus, for Minogue writing in a different context:

"It is the business of the ideologist of nationalism to persuade us that history culminates in nationalism. In a similar way, Marxists force history on to the procrustean bed of the class struggle and Christians are some times disposed to see the hand of providence everywhere. Ideologists like egoists, see little else but their own reflection and it is part of their strength that they should do so." (Minogue, 1967, pp.78)

For any tradition of discourse to continue over time it must necessarily embody, or account for, the differing perspectives thrown up by, and expressed in, a period of change. Thus we can see, in part at least, the continuing success of Conservatism (as a 'limited style of politics') in that it is able to take account of, and encompass, new ideas and concepts and thus we should not look upon a tradition of discourse as an unambiguous, static system of

ideas. Furthermore the concepts that we use are interwoven with our understanding of society and interact with the way we view society.

Political discourse refers to the vocabulary employed in political thought and action; to the ways in which the meanings traditionally established in that vocabulary set the context for political reference by establishing criteria to be met before an act can be said to fall within the ambit of a given concept and to the judgements or commitments that are sanctioned when these criteria are met: these criteria being dependent upon the practice in which that political discourse is used. And yet:

"The objective of those who talk politics is to persuade those to whom they address their remarks that certain persons, practices and policies are worthy of support, and others not, rather than in the manner of academics that certain propositions are true or false or certain theories are coherent or confused. Their ambition is to maintain or change the existing terms of human relationships and whether or not they succeed depends more on how much commitment they can attract for their proposals than on how well conceived they might appear to the merely curious. It is their being supported rather than their being incontestable that makes them practical in politics." (Manning & Robinson, 1985, pp.100)

The use of ideological terms will not be arbitrary but will depend, to some extent, upon an existing tradition. But it is the strength of an ideology that it can imagine new interpretations of existing events. Interpretations themselves are forever changing in response to the ideological imagination; hence to look for exemplary meanings of words like revolution, civil disobedience, the state, when these words appear in the context of an ideological argument, is mistaken. They do not lend

themselves to analysis in such a manner. To 'fight for freedom', 'purify the race', 'combat injustice' and so on are not descriptions of actions, but are rather ways in which actions can be characterised and making these characterisations stick is the task of ideological language.

We note that the language of a King or a Thoreau is essentially emotive, it is concerned to persuade, often with very powerful language, that their view of the world is the one that is right and just. Smart's examination of civil disobedience misses out on this aspect of language that is peculiarly political;

"We declare an ideological conviction by elaborating its assertions and participating in activities deemed to express adherence to its principles. We do not demonstrate its claims by conducting an investigation. The medium of ideological communication is imagination, not analysis and proof. What the ideologically committed affirm is an aspiration in life." (Manning, 1980, pp.130)

Thus was Gandhi concerned to see his political protest as a way of life that must be consistent with his other beliefs concerning religion, non-violence, family relationships and so on.

However, Edelman, is more particularly concerned with the language of resistance and he suggests that:

"Whether, particular political actions are forms of participation or forms of conflict is ordinarily no more self-evident than whether basic interests are in conflict, the perception depends heavily on linguistic and gestural categorisation." (Edelman, 1977, pp.119)

For Pocock, language may constitute acts of power since verbalisations can either inform people and so modify their perceptions or by defining them and so

modifying the ways in which they are seen by others (1973, pp.30). And yet, Pocock argues, although language gives an individual power, it is a power which the individual cannot fully control or prevent others from sharing. In performing a verbalised act of power, individuals enter into a 'polity of shared power' insofar as we share a language. However, Pocock argues:

"The two-way character of communication will be entirely lost when there are those who have the meaning of their words decided entirely for them, and reply to the speech acts of those in command of the language only, if at all, in terms which the latter have determined and to which they import nothing of their own." (Pocock, 1973, pp.36)

Consider the way in which it is often said that those in power control the agenda of debate. Pocock characterises the above as a master-slave relationship. Pocock goes on to suggest that:

"All speech, we have premised, is performative in the sense that it does things to people. It redefines them in their own perceptions, in those of others and by restructuring the conceptual universes in which they are perceived." (Pocock, 1973, pp.36)

As was suggested above, the success of the ideologist is the extent to which such 'redefinitions' or 'restructurings' may be accepted by the hitherto ideologically uncommitted. Of course it often may not have the desired effect. In the presidential speech preceding the release of the White House tapes at the time of Watergate the 'New Yorker' commented that:

"He (Nixon) unveils a swamp and instructs us to see a garden of flowers." (Schlesinger Jnr., 1974, pp.558)

The Language of Conscience

We have already seen the way in which an appeal to natural rights and Natural Law can be seen as an appropriate appeal for a civil disobedient to make. There is also the possibility of an appeal to conscience and I will try and illustrate some of the above points concerning the use of language with a brief discussion of the way in which conscience has been used in determining what to do in politics. At the S.D.P. conference in Harrogate on Wednesday 17th September 1986 the S.D.P. leader Dr. David Owen included in his speech a reference to the fact that we are still a nation 'with a good conscience' as though it is something that we as a nation can possess. Is this what conscience is? Henry Ferne's 'The Resolving of Conscience', 1642, was in the words of J. Sanderson:

"... probably one of the most effective of the pamphlets sustaining Charles 1 against the armed resistance of his subjects in the fifth decade of the seventeenth century." (H.Ferne, 1984, pp.1)

For Ferne, organised armed resistance to the 'supreme magistrate' is wrong under all circumstances and should be renounced by anyone who claims to be a Christian. For Ferne, certain biblical texts were held to be of supreme importance in opposing resistance. Ferne suggests that:

"...the clear light of Divine Scripture and rectified reason, the only rules of Conscience and by these you shall be brought to see the crookedness of the New Doctrine of these times and the uneven dangerous windings of this way of resistance..." (H.Ferne, 1984, introduction)

Here Ferne is using the appeal to conscience to sustain arguments against resistance, whereas the civil disobedient may use arguments in favour of, and justifying, resistance to authority. Conscience is not something that can decide in favour of one particular act as against another but can be appealed to by individuals to elicit support for their own actions.

A century later Clarendon suggests that conscience can go further than the law in condemning individuals. He too argues that conscience determines our obligations to authority:

"The Apostle ... takes all possible care to establish the Power and Jurisdiction of Kings and Magistrates, and obedience to Laws under the obligation of conscience, and required subjection to all those, not only for wrath (for Fear of punishment) but for conscience sake..." (E.Hyde, 1751, pp.163)

For Clarendon rebellion is linked with treason and murder and as such is condemned.

Irrespective of its use as an appeal to justify action can we say anything more about it? L.May (1983) argues that at the core of individual conscience is an 'egoistical motivation' and that can be specified in terms of; firstly, the realisation that a certain act is wrong; secondly, that the act will produce disharmony within oneself when conduct is examined later and thirdly, the individual is motivated not to do that which he/she sees as wrong because of the internal conflict that will result. And yet there is no explanation of how we determine whether an act is wrong or not; conscience comes into play after the realisation that an act is wrong.

Conscience does not make the act wrong: it is conventions, moral and social, that determine which acts are to be considered right or wrong. The utilitarian will have one set of criteria for determining the rightness or wrongness of an act; if we hold a different conception of morality then other criteria will be important for us. We would not have a conscience about taking something belonging to somebody else if this was not considered, in our society, to be stealing and deemed to be wrong. To talk of conscience critically scrutinising our every action seems to me to be misconceived - we need to know how these actions fit into a wider scheme of things. For example, for some of the protestors against the war in Vietnam the concept of war itself was not necessarily seen as a bad thing. This particular war was insofar as, for the protestors, it was unjustified, immoral and involved killing innocent citizens and ravaging a foreign land that posed no threat to the United States. It was these considerations that decided individuals against it rather than the judgement that all war is unjust, immoral etc. And Pocock suggests that:

"A man may wish to justify a particular action, to persuade others to adopt or approve it, and this will doubtless do much to determine the content of his argument. But it is an error ... to suppose that men are at entire liberty to find and put forward exactly the rationalisations they need. How a man justifies his actions is determined by factors not at his command and what they are must be ascertained by studying both the situation in which he is placed and the tradition within which he acts". (Pocock, 1972B, pp.194)

However, A. Campbell-Garnett suggests that:

"... conscience involves both a cognitive and an emotive or motivational element. The cognitive element consists in a set of moral judgements concerning the right or wrong of certain kinds of action or rules of conduct, however, these have been formed. The emotive or motivational element consists of a tendency to experience emotions of a unique sort of approval of the doing of what is believed to be right and a similarly unique sort of disapproval of the doing of what is believed to be wrong."
(Campbell-Garnett, 1969, pp.81)

I am not convinced of the difference between them insofar as both rely upon approval of what is to count as right or wrong.

However, civil disobedience can be seen as a form of political protest that is concerned with the relationship between law, rulers and subjects and the limits that can be set to such relationships and such relationships may be characterised, justified and criticised in terms of conscience, rights, Natural Law, justice and so on. It is doctrinaire insofar as there is a common language that is used to characterise such limits, conscience and human rights often being seen as appropriate for such characterisations. From this conception, then, acts are seen as significant in communicating a set of beliefs. To see them as symbolic is to miss the point. In offering them as symbolic then the civil disobedient is not taking these acts seriously and will have difficulty in convincing others. A symbolic act does not communicate to others the force of one's beliefs and thus is an empty gesture. Smart here is correct to see civil disobedience in terms of a language of communication but in order to get the full force of such a communication we must

understand the weight of a tradition of political protest that manifests itself in the work of a Gandhi or a King. This is what civil disobedience is about. It is a politics of protest that wishes to express beliefs concerning the relationship of law, authority, ruler and subject in terms of concepts that have been used over time and whose meaning for adherents is drawn out of that context.

BIBLIOGRAPHY

- Abbot, P. (1985) 'Henry David Thoreau, the State of Nature and the Redemption of Liberalism' *The Journal of Politics* vol. 47, no. 1, pp. 182-208
- Acton, H.B. (1952) 'Tradition and Some Other Forms of Order' *Proceedings of the Aristotelian Society* vol. 53
- Acton, H.B. (1969) 'Political Justification' in Bedau, H.A. (ed) *Civil Disobedience Theory and Practice* (New York, Pegasus)
- Ake, C. (1969) 'Political Obligation and Political Dissent', *Canadian Journal of Political Science* vol. 2, pp. 245-255
- Ake, C. (1974-75) 'A Definition of Political Stability', *Comparative Politics* vol. 7, pp. 271-283
- Allan, T.R.S. (1985) 'Legislative Supremacy and the Rule of Law : Democracy and Constitutionalism', *Cambridge Law Journal* vol. 44, no. 1, pp. 111-143
- Allen F.A. (1970) 'Civil Disobedience and the Legal Order.' in Kent, E. (ed) *Law and Philosophy* (Meredith Corporation)
- Almond, G.A., Flanagan S.C., Mundt, R.J. (1973) *Crisis Choice and Change* (Boston, Little Brown and Co.)
- Alt, J. (1979) *The Politics of Economic Decline* (Cambridge, Cambridge University Press)
- Arendt, H. (1973) *Crises of the Republic* (Harmondsworth, Penguin)
- Austin, J. (1955) *The Province of Jurisprudence Determined* (1832) (London, Weidenfeld and Nicolson)
- Austin, J.L. (1975) *How to do things with Words* (Oxford, Clarendon Press)
- Baldwin, T. 'Locke and the Right to Freedom' *Morrell Studies in Toleration* No. 5 (University of York, Politics Department)
- Barker, E. (1951) *Principles of Social and Political Theory* (Oxford, Oxford University Press)
- Barrow, R. (1982) *Injustice, Inequality and Ethics* (Brighton, Wheatsheaf)
- Barry, B. (1973) *The Liberal Theory of Justice* (Oxford, Clarendon Press)

- Barry, B. (1979) 'Is Democracy Special?' in Laslett P. & Fishkin J. (eds) *Philosophy, Politics and Society* 5th Series (Oxford, Blackwell)
- Bates, S. (1973) 'Laws, Habits of Obedience and Obligation', *Philosophical Quarterly* vol. 23, pp. 41-51
- Baybrooke, D. (1968) *Three Tests for Democracy* (New York, Random House)
- Baybrooke, D. (1972) 'The Firm but Untidy Correlativity of Rights and Duties' *Canadian Journal of Philosophy* vol. 1, no. 3, pp. 351-363
- Bayles, M. (1970) 'The Justifiability of Civil Disobedience' *Review of Metaphysics*, vol. 24, pp. 3-20
- Bealey, F. (1985) 'How, When and Why Does Democracy Collapse? Thoughts on Threats to its Stability'.
- Unpublished paper presented at the *European Consortium for Political Research Joint Sessions*, Barcelona.
- Beardsley, P.L. (1974) 'Political Science : The Case of The Missing Paradigm', *Political Theory* vol. 2, no. 1, pp. 46-61
- Bedau, H.A. (1961) 'On Civil Disobedience' *Journal of Philosophy* vol. 58, pp. 653-665
- Bedau, H.A. (ed) (1969) *Civil Disobedience : Theory and Practice* (New York, Pegasus)
- Bell, D.V.J. (1973) *Resistance and Revolution* (Boston, Houghton Mifflin Company)
- Benditt, T.M. (1978) *Law as Rule and Principle* (Sussex, Harvester Press)
- Benn, S. (1978) 'Human Rights - for whom and for what?' in Kamenka, E. & Erh-Soon Tay, A. (eds) *Human Rights* (London, Edward Arnold)
- Beran, H. (1976-77) 'In Defense of the Consent Theory of Political Obligation and Authority', *Ethics*, vol. 87, pp. 260-271
- Berger, F.E. (1970) 'Law and Order' and Civil Disobedience', *Inquiry* vol. 13 pp. 254-273
- Berki, R.N. (1981) 'Oakeshott's Concept of Civil Association : Notes for a Critical Analysis' *Political Studies* vol. 29, pp. 570-585

- Bernstein, R.J. (1976) *The Restructing of Social and Political Theory* (Oxford, Blackwell)
- Beyleveld, D. & Brownsword, R. (1985) 'The Practical Difference between Natural Law Theory and Legal Positivism', *Oxford Journal of Legal Studies* vol. 5, no. 1, pp. 1-32
- Bickel, A.M. (1975) *The Morality of Consent* (Yale University Press)
- Bienen, H. (1968) *Violence and Social Change* (Chicago & London, University of Chicago Press)
- Birch, A. (1984) 'Overload, Ungovernability and Delegitimation' *British Journal of Political Science*, vol. 14, pp. 135-160
- Birnbaum, P., Lively, J. & Parry, G. (eds) (1978) *Democracy, Consensus and Social Contract* (London & Beverley Hills, Sage Publications)
- Black, C.L. Jnr. (1965) 'The Problems of the Compatability of Civil Disobedience with American Institutions of Government' *Texas Law Review* vol. 43, pp. 492-506
- Black, M. (1962) *Models and Metaphors* (Ithaca : New York, Cornell University Press)
- Blackstone, W.T. (ed) (1967) 'Civil Disobedience : Is it Justified?', *Georgia Law Review*, vol 3, pp. 679-703
- Bobbio, N. (1984) 'The Future of Democracy', *Telos* no. 61, Fall, pp. 3-16
- Bondurant, J.V. (1965) *Conquest of Violence : The Gandhian Philosophy of Conflict* (Berkeley, University of California Press)
- Bowie, N.E. and Simon, R.L. (1977) *The Individual and the Political Order* (New Jersey, Prentice Hall)
- Brown, S.M. Jnr. (1955) 'Inalienable Rights' *Philosophical Review* vol. 64, pp. 192-211
- Brown, S.M. Jnr. (1961) 'Civil Disobedience', *Journal of Philosophy* vol. 58, pp. 669-681
- Buckman, P. (1970) *The Limits of Protest* (London, Victor Gollancz)
- Buttle, N. (1985) 'Civil Disobedience and Punishment' *Political Studies* vol. XXXIII, pp. 649-656
- Cameron, J.R. (1971) 'Ought' and Institutional Obligation' *Philosophy* XLVI pp. 309-323

- Campbell-Garnett, A. (1969) 'Conscience and Conscientiousness' in Feinberg, J. (ed) *Moral Concepts* (Oxford, Oxford University Press)
- Carnes, J.R. (1960-61) 'Why Should I Obey the Law' *Ethics* vol. 71, pp. 14-26
- Carter, A. (1973) *Direct Action and Liberal Democracy* (London, Routledge and Kegan Paul)
- Carter, A. (1979) *Authority and Democracy* (London, Routledge and Kegan Paul)
- Cassirer, E. (1946) *The Myth of the State* (New Haven and London, Yale University Press)
- Childress, J.F. (1971) *Civil Disobedience and Political Obligation : A study in Christian Social Ethics* (New Haven and London, Yale University Press)
- Clark, R. (1981) *Bertrand Russell and His World* (London, Thames and Hudson)
- Cohen, C. (1966) 'Civil Disobedience and the Law' *Rutgers Law Review* vol. 21, no. 1, pp. 1-17
- Cohen, C. (1970) 'Defending Civil Disobedience' *The Monist* vol. 54, pp. 469-487
- Cohen, C. (1971) *Civil Disobedience* (Columbia University Press)
- Cohen, J. (1986) 'Structure, Choice and Legitimacy : Locke's Theory of the State' *Philosophy and Public Affairs* vol. 15, no. 4, pp. 301-324
- Cohen, M. (1969) 'Civil Disobedience in a Constitutional Democracy' *The Massachusetts Review* vol. 10, Spring, pp. 211-226
- Coleman, S. (1968) 'Is There Reason in Tradition' in King, P. & Parekh, B.C. (eds) *Politics and Experience: Essays Presented to Michael Oakeshott* (Cambridge and London, Cambridge University Press)
- Collingwood, R.G. (1946) *The Idea of History* (Oxford, Oxford University Press).
- Corcoran, P. (1983) 'The Limits of Democratic Theory' in Duncan, G. (ed) *Democratic Theory and Practice* (Cambridge and London, Cambridge University Press)
- Connolly, W.E. (1981) *Appearance and Reality in Politics* (Cambridge and London, Cambridge University Press)
- Connolly, W.E. (ed) (1984) *Legitimacy and the State* (Oxford, Blackwell)

- Cox, A. (1971) 'Direct Action, Civil Disobedience and the Constitution' in Grossman, J.B. and Grossman, M.H. (eds) *Law and Change in Modern America* (California, Goodyear Publishing)
- Cranston, M. (1967) 'Human Rights, Real and Supposed' in Raphael, D.D. (ed) *Political Theory and the Rights of Man* (Basingstoke and London, Macmillan and Co.)
- Crozier, B. (1974) *A Theory of Conflict* (London, Hamish Hamilton)
- Dagger, R.K. (1977) 'What is Political Obligation?' *American Political Science Review* vol. 71, pp. 86-94
- Dahl, R. (1982) *Dilemmas of Pluralist Democracy : Autonomy v's Control* (New Haven and London, Yale University Press)
- Dahrendorf, R. (1980) 'Effectiveness and Legitimacy' *Political Quarterly*, vol. 51, pp. 393-410
- Danford, J.W. (1978) *Wittgenstein and Political Philosophy* (Chicago, University of Chicago Press)
- Daniels, N. (ed) (1975) *Reading Rawls* (Oxford, Blackwell)
- Denitch, B. (ed) (1979) *Legitimation of Regimes: International Framework for Analysis* (London, Sage)
- D'Entreves, A.P. (1970) *Natural Law* (London, Hutchinson)
- Dicey, A.V. (1959)
Introduction to the Study of the Law of the Constitution (1885) 10th Edition (Basingstoke and London, Macmillan Education Ltd.)
- Donnelly, J. (1985) *The Concepts of Human Rights* (London and Sydney, Croom Helm)
- Doody, J.A. (1984) 'Recent Reconstructions of Political Philosophy' *Philosophy Today* vol. 28, no. 3, pp. 215-228.
- Dowding, K. and Kimber, R. (1983) 'The Meaning and Use of Political Stability' *European Journal of Political Research* vol. 11, pp. 229-243
- Dowding, K. and Kimber, R. (1985 A) 'Conceptual Problems in Research on Democratic Stability'
- Unpublished paper presented at the *European Consortium for Political Research* Joint Sessions, Barcelona
- Dowding, K. and Kimber, R. (1985 B) 'Pluralism, Economic Growth and Democratic Stability'

Unpublished paper presented at the *European Consortium for Political Research* Joint Sessions, Barcelona

Dowrick, F.E. (ed) (1979) *Human Rights: Problems Perspectives and Texts* (Farnborough, Saxon House, Teakefield)

Driver, C. (1964) *The Disarmers : A Study in Protest* (Hodder and Stoughton)

Duncan, G. (ed) (1983) *Democratic Theory and Practice* (Cambridge, Cambridge University Press)

Duncan, G. (1985) 'A Crisis of Social Democracy' *Parliamentary Affairs* vol. 38, no. 3, pp. 267-281

Dunn, J. (1980) *Political Obligation in its Historical Context* (Cambridge, Cambridge University Press)

Dunn, J. (1984) *Locke* (Oxford and New York, Oxford University Press)

Dworkin, R. (1968) 'Is Law a System of Rules?' in Summers, R.S. (ed) *Essays in Legal Philosophy* (Oxford, Blackwell)

Dworkin, R. (1977) *Taking Rights Seriously* (London, Duckworth)

Dworkin, R. (1985) *A Matter of Principle* (Cambridge : Massachusetts and London, Harvard University Press)

Easton, D. (1965) *A Systems Analysis of Political Life* (New York, London and Sydney, J. Wiley & Sons)

Edelman, M. (1964) *The Symbolic Uses of Politics* (Urbana, Chicago and London, University of Illinois Press)

Edelman, M. (1977) *Political Language : Words that Succeed and Policies that Fail* (New York, San Fransisco and London, Academic Press)

Edgeworth, B. (1986) 'Legal Positivism and the Philosophy of Language : A critique of H.L.A. Hart's 'Descriptive Sociology'' *Legal Studies* vol. 6, no. 2, pp. 115-139

Eisenstadt, S.N. (1973) *Tradition, Change and Modernity* (New York, London, Sydney and Toronto, J. Wiley & Sons)

Emmett, D. (1963) *Justice and the Law* (Lindsey Press)

Fann, K.T. (1969) *Wittgensteins Conception of Philosophy* (Oxford, Blackwell)

- Fay, B. (1975) *Social Theory and Political Practice* (London, Allen and Unwin)
- Feinberg, J. (1966) 'Duties, Rights and Claims' *American Philosophical Quarterly* vol. 3 pp. 137-144
- Feinberg, J. (ed) (1969) *Moral Concepts* (Oxford, Oxford University Press)
- Feinberg, J. (1973) *Social Philosophy* (New York, Prentice Hall)
- Feinberg, J. (1980) *Rights, Justice and the Bounds of Liberty* (Princeton : New Jersey, Princeton University Press)
- Feinberg, J. & Gross, H. (eds) (1977) *Law in Philosophical Perspective* (California, Dickson Publishing Company)
- Ferne, H. (1984) 'The Resolving of Conscience' (1642) introduced by J. Sanderson (*Strathclyde Papers on Government and Politics* vol. 38)
- Finch, J. (1979) *Introduction to Legal Theory* (London, Sweet and Maxwell)
- Finnis, J. (1980) *Natural Law and Natural Rights* (Oxford, Clarendon Press)
- Flanagan, S.C. (1973) 'Models and Methods of Analysis' in Almond, G.A., Flanagan, S.C., Mundt, R.J. *Crisis, Choice and Change* (Boston, Little Brown and Co)
- Flathman, R.E. (1972) *Political Obligation* (New York, Atheneum)
- Flathman, R.E. (1973) *Concepts in Social and Political Philosophy* (Macmillan)
- Flathman, R.E. (1976) *The Practice of Rights* (Cambridge, Cambridge University Press)
- Flathman, R.E. (1980) *The Practice of Political Authority* (Chicago, University Chicago Press)
- Flathman, R.E. (1982) 'Rights, Utility and Civil Disobedience' in Pennock, J.R. & Chapman, J.W. (eds) *Ethics, Economics and the Law* (Nomos XXIV) (New York and London, New York University Press)
- Flew, A. (ed) (1968) *Logic and Language First Series* (Oxford, Blackwell)
- Frankena, W.K. (1955) 'Natural and Inalienable Rights' *Philosophical Review* vol. 64 pp. 212-232

- Frazier, C. (1972) 'Between Obedience and Revolution' *Philosophy and Public Affairs* vol. 1, no. 3, pps. 315 - 334
- Freund, P.A. (1966) 'Civil Rights and the Limits of Law' *Buffalo Law Review* vol. 14, pp. 199-207
- Friedman, W. (1967) *Legal Theory* (London, Stevens and Sons)
- Friedrich, C.J. (1963) 'Rights, Liberties, Freedoms : A Reappraisal' *American Political Science Review* vol. 4, pp. 841-854
- Friedrich, C.J. (1972) *Tradition and Authority* (London, Pall Mall)
- Fuller, L. (1964) *The Morality of Law* (New Haven, Yale University Press)
- Gamson, W.A. (1968) *Power and Discontent* (Illinois, Homewood)
- Gandhi, M.K. (1982) *An Autobiography or the Story of My Experiments with Truth* (1927) Translation by M. Desai (Harmondsworth : London, Penguin)
- Germino, D. (1967) *Beyond Ideology : The Revival of Political Theory.* (New York, Harper and Row)
- Gewirth, A. (1970 A) 'Obligation : Political Legal and Moral' in Pennock, J.R. & Chapman, J.W. (eds) *Political and Legal Obligation* (Nomos XII) (New York, Atherton Press)
- Gewirth, A. (1970 B) 'Civil Disobedience, Law and Morality : an examination of Fortas' Doctrine' *The Monist* vol. 54 pp. 536-555
- Gewirth, A. (1978) *Reason and Morality* (Chicago and London, University of Chicago Press)
- Gewirth, A. (1984) 'The Epistemology of Human Rights' *Social Philosophy and Policy* vol. 1, Spring, pp. 1-24
- Goldwin, R. (ed) (1968) *On Civil Disobedience : Essays Old and New* (Chicago, Rand McNally)
- Golsing, M. (1968) 'Towards a Theory of Human Rights' *Monist* vol. 52, pp. 521-549
- Goodrich, P. (1984) 'Law and Language' *Journal of Law and Society* vol. 11, no. 2, pp. 173-206

- Gottlieb, G. (1971) Comment on R.Dworkin 'Taking Rights Seriously' in Rostow, E.V. (ed) *Is Law Dead?* (New York, Simon and Schuster)
- Gough, J.W. (1973) *John Locke's Political Philosophy* 2nd edition (Oxford, Oxford University Press)
- Graham, K. (1985) 'Regulative Political Theory' *Political Studies* vol. XXXIII pp. 19-37
- Gray, J. (1977) 'On the Contestability of Social and Political Concepts' *Political Theory* vol. 5, pp. 331-348
- Green, P. and Levinson, S. (eds) (1970) *Power and Community* (New York, Vintage Books)
- Grice, H.P. (1969) 'Utterer's Meanings and Intentions' *Philosophical Review* vol. 78 pp. 147-177
- Grossman, J.B. and Grossman, M.H. (eds) (1971) *Law and Change in Modern America* (California, Goodyear Publishing)
- Gunnell, J.G. (1968) *Political Philosophy and Time* (Middletown: Connecticut, Wesleyan University Press)
- Gunnell, J.G. (1978) 'The Myth of the Tradition' *American Political Science Review* vol. 72, pp.122-134
- Gunnell, J.G. (1979) *Political Theory: Tradition and Interpretation* (Cambridge : Massachusetts, Winthrop Publishers)
- Gurr, T.R. (1970) *Why Men Rebel* (Princeton : New Jersey, Princeton University Press)
- Habermas, J. (1976) *Legitimation Crisis* (London, Heinemann)
- Habermas, J. (1985) 'Civil Disobedience : Litmus Test for the Constitutional State' *Berkeley Journal of Sociology* vol. XXX, pp. 95-116
- Hacker, P.M.S. (1977) 'Hart's Philosophy of Law' in Hacker, P.M.S. & Raz, J. (eds) *Law Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford, Clarendon Press)
- Hacker, P.M.S. and Raz, J. (eds) (1977) *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford, Clarendon Press)
- Haddock, B.A. (1974) 'The History of Ideas and the Study of Politics' *Political Theory* vol. 2 pp. 420-431

- Hagerstrom, A. (1953) *Inquiries into the Nature of Law and Morals* (Stockholm : Almqvist and Wiksell)
- Haksar, V. (1976 A) 'Coercive Proposals (Rawls and Gandhi)' *Political Theory* vol. 4, pp. 65-79
- Haksar, V. (1976 B) 'Rawls and Gandhi on Civil Disobedience' *Inquiry* vol. 19, pp. 151-192
- Hall, R.T. (1970-71) 'Legal Toleration of Civil Disobedience' *Ethics*, vol. 81, pp. 128-142
- Hall, R.T. (1971) *The Morality of Civil Disobedience* (New York, Harper and Row)
- Hancock, R. (1975) 'Kant and Civil Disobedience' *Idealistic Studies* vol. 5, pp. 164-176
- Harris, J.W. (1980) *Legal Philosophies* (London, Butterworth)
- Harris, N. (1968) *Beliefs in Society* (London, C.A. Watts and Co.)
- Hart, H.L.A. (1953) *Definition and Theory in Jurisprudence* An Inaugural Lecture delivered before the University of Oxford 30th May 1953 (Oxford, Clarendon Press)
- Hart, H.L.A. (1955) 'Are There any Natural Rights' *Philosophical Review* vol. 64 pp. 175-191
- Hart, H.L.A. (1961) *The Concept of Law* (Oxford, Clarendon Press)
- Hart, H.L.A. (1963) *Law, Liberty and Morality* (Oxford, Oxford University Press)
- Hart, H.L.A. (1973) 'Legal and Moral Obligation' in Flathman, R.E. (ed) *Concepts in Social and Political Philosophy* (Basingstoke : Hampshire and London, Macmillan)
- Hart, H.L.A. (1983) *Essays in Jurisprudence and Philosophy* (Oxford, Clarendon Press)
- Hart, V. (1978) *Distrust and Democracy* (Cambridge, Cambridge University Press)
- Hayek, F. (1971, 1976) *Law, Legislation and Liberty* vol. I and II (London, Routledge and Kegan Paul)
- Held, V. (ed) (1972) *Philosophy and Political Action* (Oxford, Oxford University Press)
- Hirschman, A.O. (1970) *Exit, Voice and Loyalty : Responses to Decline in Firms, Organisations and States.* (Cambridge, Harvard University Press)

- Hobbes, T. (1962) *Leviathan* (1651) edited and abridged by J. Plamenatz (W. Collins and Sons)
- Holden, B. (1974) *The Nature of Democracy* (London, T. Nelson and Sons)
- Honderich, T. (1976 A) *Political Violence* (Ithaca : New York, Cornell University Press)
- Honderich, T. (ed) (1976 B) *Social Ends and Political Means* (London, Routledge and Kegan Paul)
- Hook, S. (1971) 'Social Protest and Civil Disobedience' in Murphy, J.G. (ed) *Civil Disobedience and Violence* (California, Wadsworth)
- Hopton, T. (1982) 'Kant's Two Theories of Law' *History of Political Thought* vol. III, no. 1, pp. 51-76
- Horton, J. 'Political Obligation' *Morrell Studies in Toleration* Discussion Paper 11, University of York.
- Hughes, G. (1968) 'Civil Disobedience and the Political Question Doctrine' *New York University Law Review* vol. 43, March, pp. 1-19
- Hume, D. (1970) *Moral and Political Philosophy* (edited and introduced by H.D.Aitken) (Darien, Conn U.S.A., Hafner Publishing Co.)
- Huntingdon, S. (1968) *Political Order in Changing Societies* (New Haven and London, Yale University Press)
- Hurwitz, L. (1973) 'Contemporary Approaches to Political Stability' *Comparative Politics* vol, 5, no. 3, pp. 449-463
- Hyde, E. (1751) *The Miscellaneous Works of Edward, Earl of Clarendon* (London)
- Inglehart, R. (1977) *The Silent Revolution: Changing Values and Political Styles amongst Western Publics* (Princeton : New Jersey, Princeton University Press)
- Ingram, P. (1985) 'Maintaining the Rule of Law' *The Philosophical Quarterly* vol. 35, no. 141, pp. 359-381
- Jenkins, I. (1980) *Social Order and the Limits of Law A Theoretical Essay* (Princeton : New Jersey, Princeton University Press)
- Johnson, K. (1974) 'Perspectives on Political Obligation' *Western Political Quarterly* vol. 27, pp. 520-535

- Johnson, K. (1975) 'Political Obligation and the Voluntary Association Model' *Ethics* vol. 86, pp. 17-29
- Kamenka, E. and Erh-Soon Tay, A. (eds) (1978) *Human Rights* (London, Edward Arnold)
- Kelsen, H. (1970) *The Pure Theory of Law* (Berkeley, Los Angeles and London, University California Press)
- Kent, E.A. (ed) (1970) *Law and Philosophy* (New York, Meridith Corporation)
- Kent, E.A. (1971) *Revolution and the Rule of Law* (Englewood Cliffs : New Jersey, Prentice Hall)
- Kerner, O. et al (1968) Report of the National Advisory Commission on Civil Disorders (Washington, U.S. Government)
- Kiefer, H.E. and Munitz, M.K. (eds) (1970) *Ethics and Social Justice* (Albany : New York, Albany State University of New York Press)
- King, A. (1975) 'Overload Problems of Governing' *Political Studies* vol. 23, pp. 284-296
- King, P. and Parekh, B.C. (eds) (1968) *Politics and Experience: Essays presented to Michael Oakeshott* (London and New York, Cambridge University Press)
- King, M.L. (1963) *Why We Can't Wait* (New York, Harper and Row)
- Konvitz, M.R. (1964) 'Civil disobedience and the Duty of Fair Play' in Hook, S. (ed) *Law and Philosophy* (New York, New York University Press)
- Kuhn, T.S. (1962) *The Structure of Scientific Revolutions* (Chicago, University of Chicago Press)
- Ladd, J. (1970) 'Legal and Moral Obligation' in Pennock, J.R. and Chapman, J.W. (eds) *Political and Legal Obligation* (Nomos XII) (New York, Atherton Press)
- Lane, R.E. (1979) 'The Legitimacy Bias:- Conservative Man in Market and State' in Denitch, B. (ed) *Legimation of Regimes: International Framework for Analysis* (London, Sage)
- Lewis, D.L. (1970) *King : A Critical Biography* (New York, Praeger)
- Lewis, J.U. (1968) 'Moral Obligation and the Concept of Law' *Rutgers Law Review* vol. 23, pp. 68-81
- Lipset, S.M. (1960) *Political Man* (London, Heinemann)

- Lively, J. (1975) *Democracy* (Oxford, Blackwell)
- Lloyd, D. (1977) *The Idea of Law* (Harmondsworth, Penguin)
- Locke, J. (1960) *Two Treatises of Government* (1690) introduction by P. Laslett (New York, Cambridge University Press)
- Lockyer, A. (1979) 'Traditions' as Context in the History of Political Theory' *Political Studies* vol. XXVII, no. 2, pp. 201-217
- Louch, A.R. (1963) 'The Very Idea of a Social Science' *Inquiry* vol. 6, pp. 273-286
- Lukes, S. (1973) *Individualism* (Oxford, Basil Blackwell)
- Lukes, S. (1977) *Essays in Social Theory* (London and Basingstoke, Macmillan)
- Lynd, S. (1969) *Intellectual Origins of American Radicalism* (London, Faber and Faber)
- Lyons, D. (1969) 'Rights, Claimants and Beneficiaries' *American Philosophical Quarterly* vol. 6, no. 3, pp. 173-185
- Lyons, D. (1970) 'The Correlativity of Rights and Duties' *Nous*, vol. 4, pp. 45-55
- Lyons, D. (1984) *Ethics and the Rule of Law* (Cambridge, Cambridge University Press)
- Macdonald, M. (1956) 'Are There Any Natural Rights?' in Laslett, P. (ed) *Philosophy Politics and Society* 1st Series (Oxford, Blackwell)
- Macdonald, M. (1968) 'The Language of Political Theory' in Flew, A. (ed) *Logic and Language* First Series (Oxford, Blackwell)
- Macfarlane, L.J. (1971) *Political Disobedience* (Basingstoke : Hampshire and London, Macmillan)
- Macintyre, A. (1971) *Against the Self-Images of the Age: Essays in Ideology and Philosophy*. (London, Duckworth)
- Macintyre, A. (1981) *After Virtue - a Study in Moral Theory* (London, Duckworth)
- Macpherson, C.B. (1962) *The Political Theory of Possessive Individualism* Hobbes to Locke (Oxford and New York, Oxford University Press)
- Macpherson, C.B. (1973) *Democratic Theory. Essays in Retrieval* (Oxford, Oxford University Press)

- Macpherson, C.B. (1977) *The Life and Times of Liberal Democracy* (Oxford, Oxford University Press)
- Manning, D.J. (1976) *Liberalism* (London, J.M. Dent & Sons)
- Manning, D.J. (ed) (1980) *The Form of Ideology* (London, Allen and Unwin)
- Manning, D.J. and Robinson, T.J. (1985) *The Place of Ideology in Political Life* (London, Sydney and New Hampshire, Croom Helm)
- Marsh, A. (1977) *Protest and Political Consciousness* (London and Beverley Hills, Sage)
- Martin, R. (1969-1970) 'Civil Disobedience' *Ethics*, vol. 80, pp. 123-139
- Martin, R. (1980) 'Human Rights and Civil Rights' *Philosophical Studies* vol. 37 pp. 391-403
- May, L. (1983) 'On Conscience' *American Philosophical Quarterly* vol. 20, no. 1, pp. 57-67
- Mayo, B. (1967) 'Rights' in Raphael, D.D. (ed) *Political Theory and the Rights of Man* (Macmillan & Co.)
- McBride, W.L. (1970) *Fundamental Change in Law and Society* (Paris, Martin)
- McCarthy, T. (1978) *The Critical Theory of Jurgen Habermas* (London, Hutchinson)
- McCloskey, H.J. (1965) 'Rights' *Philosophical Quarterly* vol. 15, pp. 115-127
- McCloskey, H.J. (1976) 'Rights - Some Conceptual Issues' *Australasian Journal of Philosophy* vol. 54 pp. 99-115
- McPherson, T. (1967) *Political Obligation* (London, Routledge and Kegan Paul)
- Melden, A.I. (ed) (1970) *Human Rights* (Belmont : California, Wadsworth Publishing Co.)
- Miller, A. (1974) 'Political Issues and Trust in Government' *American Political Science Review* vol. 68, pp. 951-972
- Miller, D. (1978) 'Democracy and Social Justice' in Birnbaum P., Lively J., Parry G., (eds) *Democracy, Consensus and Social Contract* (London and Beverley Hills, Sage Publications)

- Miller, D. and Siedentop, L. (eds) (1983) *The Nature of Political Theory* (Oxford, Clarendon Press)
- Miller, W.R. (1964) *Non-Violence - A Christian Interpretation* (London, Allen and Unwin)
- Milne, A.J.M. (1968) *Freedom and Rights* (London, Allen and Unwin)
- Milne, A.J.M. (1979) 'The Idea of Human Rights : A Critical Enquiry' in Dowrick F.E. (ed) *Human Rights : Problems Perspectives and Texts* (Farnborough, Saxon House, Teakefield)
- Milne, A.J.M. (1983) *The Right to Dissent : Issues in Political Philosophy* (Basingstoke : Hampshire and London. Macmillan Press)
- Milne, A.J.M. (1986) *Human Rights and Human Diversity : An Essay in the Philosophy of Human Rights* (Basingstoke : Hampshire and London, Macmillan Press)
- Minnion, J. and Bolsover, P. (1983) *The C.N.D. Story* (London, Allison and Busby)
- Minogue, K. (1967) *Nationalism* (Batsford)
- Minogue, K. (1968) 'Revolution, Tradition and Political Continuity' in King, P. and Parekh, B.C. (eds) *Politics and Experience: Essays Presented to Michael Oakeshott* (Cambridge and London, Cambridge University Press)
- Minogue, K. (1985) 'Participation Versus Consent : Conflicting Tendencies Within the Idea of Democracy'
- Unpublished Paper presented at the *European Consortium for Political Research Joint Sessions*, Barcelona.
- Mullins, W.A. (1972) 'On the Concept of Ideology in Political Science' *American Political Science Review* vol. 66 pp. 498-510
- Murphy, J.G. (1970) 'In Defence of Obligation' in Pennock, J.R. and Chapman, J.W. (eds) *Political and Legal Obligation* (Nomos XII) (New York, Atherton Press)
- Murphy, J.G. (ed) (1971) *Civil Disobedience and Violence* (California, Wadsworth)
- Neilson, K. (1968) 'Scepticism and Human Rights' *Monist* vol 52 pp. 573-594
- Nelson, W.N. (1973-74) 'Special Rights, General Rights and Social Justice' *Philosophy and Public Affairs* vol. 3, pp. 410-430

- Nelson, W.N. (1980) *On Justifying Democracy* (London, Routledge and Kegan Paul)
- Nicholson, P.P. (1973-74) 'The Internal Morality of Law : Fuller and His Critics' *Ethics* vol. 84, pp. 307-326
- Norman, R. (1986) 'Civil Disobedience and Nuclear Protest : A Reply to Dworkin' *Radical Philosophy* vol. 44, Autumn, pp. 24-27
- Nowell-Smith, P.H. (1954) *Ethics* (Harmondsworth : England, Penguin)
- Oakeshott, M. (1962) *Rationalism in Politics and other essays* (London, Methuen and Co.)
- Oakeshott, M. (1975) *On Human Conduct* (Oxford, Clarendon Press)
- O'Connor, J. (1973) *The Fiscal Crisis of the State* (New York, St. Martins)
- Orwell, G. (1946) 'Politics and the English Language' in *Inside the Whale and other Essays* (Harmondsworth : England, Penguin)
- Parekh, B. (1979) 'The Political Philosophy of Michael Oakeshott' *British Journal of Political Science* vol. 9, pp. 481-506
- Pateman, C. (1974) 'Criticising Empirical Theorists : A Comment on Skinner' *Political Theory* vol. 2, no. 2, pp. 215-218
- Pateman, C. (1979 A) *The Problem of Political Obligation* (Chichester, Wiley)
- Pateman, C. (1979 B) 'Political Obligation and Conceptual Analysis' in Laslett, P. and Fishkin, J. (eds) *Philosophy, Politics and Society* 5th Series (Oxford, Blackwell)
- Pech, B. (1969) 'Radical Disobedience and its Justification' in Bedau, H.A. (ed) *Civil Disobedience : Theory and Practice* (New York, Pegasus)
- Pennock J.R. and Chapman, J.W. (eds) (1970) *Political and Legal Obligation Nomos* (XII) (New York, Atherton Press)
- Pennock J.R. and Chapman, J.W. (eds) (1981) *Human Rights* (Nomos XXIII) (New York and London, New York University Press)
- Pennock J.R. and Chapman, J.W. (eds) (1982) *Ethics, Economics and the Law* (Nomos XXIV) (New York and London, New York University Press)

- Pitcher, G. (ed) (1968) *Wittgenstein* (London and Melbourne, Macmillan)
- Pitkin, H. (1965) 'Obligation and Consent I' *American Political Science Review* vol. 59, pp. 990-999
- Pitkin, H. (1966) 'Obligation and Consent II' *American Political Science Review* vol. 60, pp. 39-52
- Plato (1974 edition) *The Last Days of Socrates* (Harmondsworth : England, Penguin)
- Pocklington, T.C. (1970) 'Protest, Resistance and Political Obligation' *Canadian Journal of Political Science* vol. 3, pp. 1-17
- Pocklington, T.C. (1975) 'Political Philosophy and Political Obligation' *Canadian Journal of Political Science* vol. 8, pp. 495-509
- Pocock, J.G.A. (1968) 'Time, Institutions and Action : An Essay on Traditions and Their Understanding' in King, P. and Parekh, B.C. (eds) *Politics and Experience: Essays presented to Michael Oakeshott* (Cambridge and London, Cambridge University Press)
- Pocock, J.G.A. (1972 A) *Politics, Language and Time* (London, Methuen and Co.)
- Pocock, J.G.A. (1972 B) 'The History of Political Thought: A Methodological Enquiry' in Laslett, P. and Runciman, W.G. (eds) *Philosophy Politics and Society* 2nd Series (Oxford, Blackwell)
- Pocock, J.G.A. (1973) 'Verbalising a Political Act : Towards a Politics of Speech' *Political Theory*, vol. 1, pp. 27-45
- Pollis, A. and Schwab, P. (eds) (1979) *Human Rights : Cultural and Ideological Perspectives* (New York, Praeger Publishers)
- Power, P. (1970) 'On Civil Disobedience in Recent American Democratic Thought' *American Political Science Review* vol. 64, pp. 35-47
- Power, P. (1972) 'Civil Disobedience as Functional Opposition' *Journal of Politics* vol. 34, no. 1, pp. 37-55
- Prosch, H. (1964-65) 'Limits to the Moral Claim in Civil Disobedience' *Ethics* vol. 75, pp. 103-111
- Puner, N.W. (1968) 'Civil Disobedience : An Analysis and Rationale' *New York University Law Review* vol. 43, pp. 651-720

- Putnam, R. (1976 B) 'Rights of Persons and the Liberal Tradition' in Honderich, T. (ed) *Social Ends and Political Means* (London, Routledge and Kegan Paul)
- Raphael, D.D. (ed) (1967) *Political Theory and the Rights of Man* (Methuen and Co.)
- Raphael, D.D. (1970) *Problems of Political Philosophy* (London, Pall Mall)
- Rawls, J. (1955) 'Two Concepts of Rules' *The Philosophical Review* vol. 64, no. 1, pp. 3-32
- Rawls, J. (1964) 'Legal Obligation and the Duty of Fair Play' in Hook, S. (ed) *Law and Philosophy* (New York, New York University Press)
- Rawls, J. (1969) 'Justice as Fairness' in Laslett, P. and Runciman, W.G. (eds) *Philosophy, Politics and Society* 2nd Series (Oxford, Blackwell)
- Rawls, J. (1972) *A Theory of Justice* (Oxford, London, New York, Oxford University Press)
- Raz, J. (1969-70) 'On Lawful Governments' *Ethics* vol. 80, pp. 296-305
- Raz, J. (1975) *Practical Reason and Norms* (London, Hutchinson)
- Raz, J. (1977) 'Promises and Obligations' in Hacker, P.M.S. and Raz, J. (eds) *Law, Morality and Society: Essays in Honour of H.L.A. Hart* (Oxford, Clarendon Press)
- Raz, J. (1979) *The Authority of Law* (Oxford, Clarendon Press)
- Raz, J. (1984) 'Legal Rights' *Oxford Journal of Legal Studies* vol. 4, no. 1, pp 1-21
- Rees, R. (1969) *Without Answers* (London, Routledge and Kegan Paul)
- Reiman, J.M. (1972) *In Defence of Political Philosophy* (New York, Harper and Row)
- Reshwold, M. (1958-59) 'The Concept of Human Rights' *Philosophy and Phenomenological Research* vol. XIX, pp. 354-379
- Richter, M. (ed). (1980) *Political Theory and Political Education* (Princeton : New Jersey, Princeton University Press)

- Robins, M.H. (1975-76) 'Promissory Obligations and Rawls' Contractarianism' *Analysis* vol. 36, pp. 190-198
- Rogin, M.P. (1967) *The Intellectuals and McCarthy. The Radical Specter* (Cambridge, Massachusetts, M.I.T. Press)
- Rose, R. (ed) (1980) *Challenge to Governance Studies in Overloaded Politics* (London and Beverley Hills, Sage Publications)
- Rosenblum, N.L. (1981) 'Thoreau's Militant Conscience' *Political Theory* vol. 9, no. 1, pp. 81-110
- Ross, A. (1958) *On Law and Justice* (London, Stevens and Sons)
- Rostow, E.V. (1968) 'The Consent of the Governed' *The Virginia Quarterly Review* vol. 44, no. 4, pp. 513-530
- Rostow, E.V. (ed) (1971) *Is Law Dead?* (New York, Simon and Schuster)
- Ryan, A. (1970) *The Philosophy of the Social Sciences* (Basingstoke : Hampshire and London, Macmillan)
- Ryan, A. (1972) 'Normal Science or Political Ideology' in Laslett, P. Runciman, W.G., and Skinner, Q. (eds) *Philosophy, Politics and Society* 4th Series (Oxford, Blackwell)
- Salkever, S.G. (1974) 'Virtue, Obligation and Politics' *American Political Science Review* vol. 68, pp. 78-92
- Sartorius, R. (1971) 'Hart's Concept of Law' in Summers, R.S. (ed) *More Essays in Legal Philosophy* (Oxford, Blackwell)
- Scarman, Lord (1982) *The Scarman Report: The Brixton Disorders 10-12 April 1981* (Harmondsworth : England, Penguin)
- Schaar, J.H. (1984) 'Legitimacy in the Modern State' in Connolly, W.E. (ed) *Legitimacy and the State* (Oxford, Blackwell)
- Schechter, B. (1963) *The Peacable Revolution* (Boston, Houghton Mifflin Company)
- Scheingold, S.A. (1974) *The Politics of Rights* (New Haven and London, Yale University Press)
- Schlesinger, A. Jnr. (1974) 'Politics and the American Language' *The American Scholar* vol. 43, pp. 553-62

- Schlesinger, S.R. (1976) 'Civil Disobedience : The Problem of Selective Obedience to Law' *Hastings Constitutional Quarterly* vol. pp. 947-959
- Schochet, G.T. (1974) 'Quentin Skinner's Method' *Political Theory* vol. 2, no.3, pp. 261-276
- Schumpeter, J. (1976) *Capitalism, Socialism and Democracy* 5th edition (London, Allen and Unwin)
- Shapiro, M.J. (1981) *Language and Political Understanding: The Politics of Discursive Practices* (New Haven and London, Yale University Press)
- Shepherd, A. (1986) 'The Politics of Nuclear Protest in the Fifties : C.N.D. and the Early New Left' *Teaching Politics* vol. 15, no. 3, pp. 476-490
- Shils, E. (1981) *Tradition* (Boston, Faber and Faber)
- Shklar, J.N. (1964) *Legalism* (Cambridge : Massachusetts, Harvard University Press)
- Simmons, A.J. (1979) *Moral Principles and Political Obligations* (New Jersey, Princeton University Press)
- Simmons, A.J. (1983) 'Inalienable Rights and Locke's Treatises' *Philosophy and Public Affairs* vol. 12, pp. 175-204
- Singer, M. (1972) 'The Basis of Rights and Duties' *Philosophical Studies*, vol. 23, pp.48-57
- Singer, P. (1973) *Democracy and Disobedience* (Oxford, Clarendon Press)
- Skinner, Q. (1972) 'Social Meaning and the Explanation of Social Action' in Laslett, P., Runciman, W.G. and Skinner, Q. (eds) *Philosophy, Politics and Society* 4th Series (Oxford, Blackwell)
- Skinner, Q. (1973) 'The Empirical Theorists of Democracy and their Critics : A Plague on Both Their Houses' *Political Theory* vol. 1, pp. 287-306
- Skinner, Q. (1974) 'Some Problems in the Analysis of Political Thought and Action' *Political Theory*, vol. 2, 1974, pp. 277-301
- Skinner, Q. (ed) (1985) *The Return of Grand Theory in the Human Sciences* (Cambridge, Cambridge University Press)
- Skolnick, J.H. (1972) *The Politics of Protest: Task Force Report Submitted to National Commission on the Causes and Prevention of Violence* (New York, Simon and Schuster)

- Smart, B. (1978) 'Defining Civil Disobedience' *Inquiry* vol. 21, pp. 249-269
- Smith, J.C. (1976) *Legal Obligation* (London, Athlone Press)
- Sniderman, P.M. (1981) *A Question of Loyalty* (Berkeley, University of California Press)
- Stake, R.P. (1975) 'A Phenomenology of Justice and the Case for Civil Disobedience' *De Paul Law Review* vol. 24, no. 3, pp. 705-730
- Steinberg, J. (1978) *Locke, Rousseau and the Idea of Consent: An Inquiry into the Liberal Democratic Theory of Political Obligation.* (Westport : Connecticut, Greenwood Press)
- Stiehm, J. (1972) *Non-Violent Power: Active and Passive Resistance in America* (Lexington : Massachusetts, London and Toronto, D.C. Heath and Co)
- Summers, R.S. (ed) (1968) *Essays in Legal Philosophy* (Oxford, Blackwell)
- Summers, R.S. (ed) (1971) *More Essays in Legal Philosophy* (Oxford, Blackwell)
- Summers, R.S. (1971) 'Professor Fuller on Morality and Law' in Summers, R.S. (ed) *More essays in Legal Philosophy* (Oxford, Blackwell)
- Summy, R. (1985) 'Typology of Non Violent Politics' *Australian Journal of Politics and History* vol. 31, no. 2, pp. 230-242
- Tatalovich, R. (1973) 'Thoreau on Civil Disobedience : In Defense of Morality or Anarchy?' *Southern Quarterly* vol. 11, pp. 107-113
- Taylor, C. (1969) 'Neutrality in Political Science' in Laslett, P. and Runciman, W.G. (eds) *Philosophy, Politics and Society* 3rd Series (Oxford, Blackwell)
- Taylor, C. (1971) 'Interpretation and the Sciences of Man' *Review of Metaphysics* vol. 25, pps. 3-51
- Taylor, R. and Pritchard, C. (1980) *The Protest Makers* (Oxford, Pergamon Press)
- Thoreau, H.D. (1968) 'Resistance to Civil Government' (1848) in R. Goldwin (ed) *On Civil Disobedience : Essays Old and New* (Chicago, Rand McNally)

- Tinker, J.M. (1971) 'The Political Power of Non-Violent Resistance : The Gandhian Technique' *Western Political Quarterly* vol. 24, pp. 775-778
- Tolstoy, L. (1967) *Writings on Civil Disobedience and Non-Violence* (New York, Bergmann Publishers)
- Trigg, R. (1973) *Reason and Commitment* (Cambridge, Cambridge University Press)
- Turbayne, C. (1962) *The Myth of Metaphor* (New Haven and London, Yale University Press)
- Tussman, J. (1960) *Obligation and the Body Politic* (New York, Oxford University Press)
- Useem, M. (1975) *Protest Movement in America* (Indiannapolis, Bobbs-Merrill Company)
- Van den Haag, E. (1972) *Political Violence and Civil Disobedience* (New York, Harper and Row)
- Wainwright, W.J. (1967) 'Natural Rights' *American Philosophical Quarterly* vol. 4, no. 1, pp. 79-84
- Walton, H. Jnr. (1971) *The Political Philosophy of M.L. King Jnr* (Westport : Connecticut, Greenwood Publishing Co.)
- Walzer, M. (1970 A) *Obligations : Essays on Disobedience, War and Citizenship* (Cambridge : Massachusetts, Harvard University Press)
- Walzer, M. (1970 B)
'Civil Disobedience and Corporate Authority' in Green, P. and Levinson, S. (eds) *Power and Community* (New York, Vintage Books)
- Waskow, A.I. (1971) 'The Meaning of Creative Disorder' in Grossman, J.B. and Grossman, M.H. (eds) *Law and Change in Modern America* (California, Goodyear Publishing)
- Waskow, A.I. (1975) *From Race Riot to Sit-In: 1919 and the 1960's* (Gloucester : Massachusetts, Peter Smith)
- Wasserstrom, R. (1961) 'Disobeying the Law' *Journal of Philosophy*, vol. 58, pp. 641-653
- Watkin, T.G. (1980) *The Nature of Law* (Amsterdam, New York and Oxford, North-Holland Publishing Company)
- Weber, P.J. (1967) 'Toward a Theory of Civil Disobedience' *Catholic Lawyer* vol. 13, Summer, pp. 198-210

- Winch, P. (1958) *The Idea of a Social Science and its Relation to Philosophy* (London and Henley, Routledge and Kegan Paul)
- Winch, P. (1972) *Ethics and Action* (London, Routledge and Kegan Paul)
- Winfield, R. den (1982) 'The Injustice of Human Rights' *Philosophy and Social Criticism* vol. 1, pp. 83-96
- Winfield, R. den (1984) 'The Reason for Democracy' *History of Political Thought* vol. 5, pp. 543-573
- Wittgenstein, L. (1972) *Philosophical Investigations* (Oxford, Blackwell)
- Wolff, R.P. (ed) (1971) *The Rule of Law* (New York, Simon and Schuster)
- Wolff, R.P. (1975) *In Defence of Anarchism* (New York, Harper and Row)
- Wollheim, R. (1972) 'A Paradox in the Theory of Democracy' in Laslett, P. and Runciman, W.G. (eds) *Philosophy, Politics and Society* 2nd Series, (Oxford, Blackwell)
- Wolin, S. (1968) 'Paradigms and Political Theories' in King, P. and Parekh, B.C. (eds) *Politics and Experience: Essays presented to Michael Oakeshott* (Cambridge and London, Cambridge University Press)
- Woodcock, G. (1972) *Gandhi* (London, Fontana Collins)
- Zashin, E.M. (1972) *Civil Disobedience and Democracy* (New York, Free Press)
- Zimmermann, E. (1984) 'The Study of Crises in Liberal Democracies : Pitfalls and Promises' *International Political Science Review* vol. 5, pp. 319-343
- Zinkin, T. (1965) *Gandhi* (London, Methuen and Co.)
- Zinn, H. (1968) *Disobedience and Democracy : Nine Fallacies on Law and Order* (New York, Random House)
- Zwiebach, B. (1975) *Civility and Disobedience* (Cambridge and London, Cambridge University Press)