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Justice and Civil Disobedience:
A Study of Rawls, Kant and the Utilitarians

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ABSTRACT

This study examines the relationship of three theories of political obligation and justice to the justification of civil disobedience, defined as a public, nonviolent and deliberate violation of a law with the intent of effecting or influencing a change in that law. Civil disobedience occurs within the context of a legal order and legal processes of reform however limited. The civil disobedient asks when is it morally justified to violate an unjust law and in what way? The essential problem faced by the civil disobedient is one of conflicting moral directives: one directing individuals to obey laws; the other directing individuals to promote justice.

The utilitarian finds civil disobedience to be the preferred course of action under certain conditions but the broad discretion allowed to the individual raises problems concerning the limitations of human knowledge and considerations of the stability of legal order.

Kant in contrast allows little discretion and ensures stability by concluding that one may never disobey laws, even when they lead to great harm, or even when they are gravely unjust.

John Rawls attempts to provide a systematic treatment of the role of civil disobedience which would balance considerations of stability against those of the promotion of justice as well as providing limitations on individual discretion. Ultimately he confronts again the problems first encountered with utilitarianism regarding human knowledge. The ultimate choice of theories, it is argued, depends on the possibility of balancing stability and justice in a way which permits a combination of moral flexibility and precision that takes account of the limitations of the individual.

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Chapter I: Civil Disobedience and Justice

A. Opening Remarks

Civil Disobedience is a term which has in recent times been used to encompass a wide range of activities in opposition to established governments. In so far as it touches on actions as disparate as legal protest and demonstration, covert evasion and thwarting of laws, violent demonstrations, and deliberate public violations of law, civil disobedience raises an array of problems concerning the role of violence, the role of protest, the status of laws, and the rights of individuals against the power of the state. I intend here to focus on one particular form of opposition to the dictates of the state. In doing so I shall give the term civil disobedience a specific definition so that it selects out a particular class of actions which involve opposition to and rejection of the state's claim to ultimate authority--i.e., the right to command and judge what is right in all matters. Civil disobedience once given this narrower sense will provide a target whereby the relationship of certain theories of obligation and justice to the justification of disobedience may be examined.

In this chapter we shall also describe the background conditions of civil disobedience and raise the problem of conflicting directives to which it is expected each of the theories will provide some responses. Finally we shall examine the preliminary criteria by which we shall assess

the soundness of each theory. Chapters II, III, and IV will examine Utilitarianism, Kant and Rawls respectively and in each highlight specific difficulties with the theories. Chapter V will return to the problem of conflicting directives and the justification of civil disobedience in the light of the critical points derived from Chapters II, III, and IV.

B. Defining Civil Disobedience

In defining civil disobedience we will be excluding certain types of actions which are often called civil disobedience. The purpose of this narrow definition is to call attention to one particular type of action requiring justification. Rawls also adopts such a procedure in order to facilitate clarity and definiteness so that on one issue alone the way in which a solution is given can be seen, although his definition is slightly different from ours. In following his procedure we facilitate the comparison and criticism of the three theories.

Civil disobedience is defined as a public, nonviolent and deliberate violation of a law with the intent of demonstrating the injustice of that particular law and with the intent of effecting or influencing a change in that law.

The relationship of the two intentions of civil disobedience immediately points to the importance of justice in the very nature of the act as we have defined it. In one sense the definition implies that the injustice of a law is

a reason for changing that law. In other words the intention of changing a law is predicated on its injustice and the civil disobedient person must intend both. The definition in this sense might read "...to demonstrate the injustice of a law and thereby effect or influence a change in that law."

There is a variation of the definition which allows that one may have both intentions but does not anticipate that showing the injustice of the law will have an effect or influence on the changing of the law in any direct way. The civil disobedient still believes that injustice is a reason for changing the law, and hopes to change the law, but does not anticipate that the change will be immediately effected by the act of civil disobedience.

The important question in both cases is under what conditions is the injustice of a law sufficient reason to break that law with the intention of showing its injustice and influencing its change. The injustice of a law as a "sufficient reason" implies that in some way justice is appealed to in order to justify disobedience. Each of the theories we shall consider will respond by saying what kinds of injustice in fact provide sufficient reason for change and which if any justify breaking a law.

We shall now consider how this definition is narrower than others. Firstly, it might be asked why only laws are included and not also policies of governments. The reason

for excluding policies and including only laws requires some comment for it might be thought that policies do have the same status as laws and raise the same problems as laws. The answer is somewhat complex. If laws are construed narrowly as legal statutes promulgated by a law-making procedure, they appear to be distinct from policies, these latter being construed as statements of intention combined with behaviour in accord with that stated intention. A policy on housing issued by a cabinet in a parliamentary system, and matched by actions deriving from the statement of intention appears different in many respects from a legal statute requiring certain standards to be met in housing construction, or a law providing grants for housing construction. Policies may change with different circumstances or a new government. Policies of themselves do not, as laws do, imply a compulsion to act in a certain manner. A policy is not binding on the members of the government--i.e., they are not legally compelled to act on the statement of intent. Building regulations, though, are binding on individuals; they are backed by coercion--courts, penalties and inspectors. However, with respect to civil disobedience, it might be thought that a policy and a law have a significant common element--both have the backing of a government and can be enforced as a law in the narrow sense. For instance, the policy can be given effect in legal statutes such as a law providing for housing grants. And a housing

policy might violate precepts of justice just as well as any legal statute--i.e., the policy might express an intention to do something which would be unjust. Further, what is of concern to civil disobedience is the injustice of governmental actions, and these actions can at least take the forms of a policy or a legal statute.

Although there is this common element, civil disobedience is first and foremost problematic because it is a violation of a law. It is not obvious, though, how an individual could violate a policy if it were the target of civil disobedience. If we were to include policies along with laws in our definition of the target of civil disobedience, then, since violating a policy is not a clear possibility, it would seem that the civil disobedience could involve violating a law other than the one which is the target of civil disobedience. Civil disobedience in the latter case could be directed at either or both and would in effect divide civil disobedience into two types: one which violates a law considered unjust; the other which violates a law which is just for the purpose of demonstrating or effecting the change in some other law or in a policy. In the latter instance the law violated is not the target of civil disobedience. This raises acutely a special problem of justification. The question becomes "can one be justified in disobeying a just law to oppose an unjust one?". This question is significantly different from the question "can

one disobey an unjust law?". The former has a bearing on the latter in so far as it asks if one can act unjustly or wrongly in opposing injustice. This issue, most directly arising with policies, we should like to leave aside, in order to focus only on the violation of unjust laws. Thus we concern ourselves strictly with violations of laws which are themselves the target of civil disobedience.[1]

A second important difference of our definition from others is that our definition allows only injustice as a reason for opposing a law by violating it. Many other reasons might be offered; other values might be employed. For example, one might oppose a law because of environmental considerations, because a law is unconstitutional, misframed, misapplied, or unnecessary, or because the law requires or allows immoral actions. Any of these might be offered as reasons to violate a law to demonstrate opposition to it. Our definition rules these out.

This definition then marks civil disobedience off from actions which constitute legal protests or demonstrations (e.g., a march on Parliament Hill that was accompanied by the appropriate permits), and from actions in which the violation of a law is accidental or inconsequential. For instance, a march on Parliament Hill which was to protest conditions on reservations, especially those which were directly due to laws, and which had been refused the appropriate permits, would not be construed as civil

disobedience because the law violated is secondary to the attack on social conditions and the refusal of permits is not itself being attacked.

The definition does however include actions directed at social conditions such as poverty and racialism if those actions deliberately violate laws involved in sustaining those social conditions (e.g., poll taxes and discriminatory literacy tests for voting). It includes also those actions which are directed at laws which are sincerely believed to be unconstitutional or illegal, as long as the justifying reason proffered is based on the injustice of those laws. On the other hand it is not concerned with those actions of this kind which are done solely with the intention of raising test cases in courts. One might believe a law to be unconstitutional. The obvious procedure would be to have the courts assess that law's constitutionality.[2] But to do this requires, in most cases, that one be charged under the provisions of the law. Thus one might deliberately violate the law in order to produce a test case. One is saying in effect, that if the law is unconstitutional the actions it prohibits ought not to be prohibited. If they ought not to be prohibited, then one does not act wrongly, in a legal sense, if one does those actions. The decision is left to the courts, and the penalties are accepted, at least provisionally, if the law is determined to be in fact constitutional. On the other hand the act of civil disobe-

dience, as we define it, is specifically concerned with demonstrating and effecting change, rather than with legal procedures to test a law's validity.[3] We shall turn to a detailed consideration of "legal validity" shortly.

The provision that civil disobedience be a nonviolent act marks it off from actions similar to civil disobedience in other respects. With this provision, one might find it possible to construe, for example, political kidnapping as an act of civil disobedience--i.e., as in some sense a non-criminal act. The act is a public and deliberate violation of a law prohibiting kidnapping with the intention of bringing attention to and changing an injustice; assuming that these were its sole objectives, it might be justifiable in the same way as nonviolent acts. Nevertheless it is a violent act against one person who may in fact be quite innocent of any injustices himself. The use of violence to achieve the ends of reform is a problematic matter in whatever circumstances it is raised. In the case of civil disobedience, the use of violence raises the question whether injustice might be opposed by violating just laws, as did the problem of the target of civil disobedience. So, for the same reason, we intend to leave it aside. There are two ways of dealing with the question of violence in this context. The first would be to make actions like civil disobedience but involving violence a sub-set of acts of civil disobedience and to make a specific argument regarding

the use of violence--i.e., when it is or is not justified. The second, which we have adopted, would be to define acts involving the use of violence as a separate class of actions distinct from those described as civil disobedience. As the former raises a range of problems and considerations substantially different from those treated in a discussion of the latter, it seems fair to relegate actions which are similar to civil disobedience as defined except that they include the uses of violence to a separate category requiring an independent justification. This procedure, of course, does not necessarily exclude the possibility that acts of violence might on some occasions be justified as political means.

Civil disobedience is one of many possible forms of resistance to the state. It may occur as one step in a sequence of actions or on its own. For instance, a group might consider a strategy to change a particular law or conditions one of which is that law, beginning with representations and test cases, leading on to public demonstrations against the law or conditions, and next to civil disobedience and perhaps to stronger means. On the other hand, civil disobedience may be considered not as a tactic for executing a strategy for achieving change, but as the most appropriate means for achieving a particular change.

We shall contrast civil disobedience with two other

important forms of resistance to the state, revolution and conscientious refusal. Conscientious refusal may be viewed as an individual violation of a law with the intent of avoiding committing an act (required by the law in question) which the individual in his own reflective judgement considers wrong. Civil disobedience aims to demonstrate and change injustice in laws, while conscientious refusal aims at avoiding having to do wrong acts required by law. In other words, conscientious refusal aims at avoiding being an agent of wrong, while civil disobedience is an action on the part of or on behalf of victims of injustice. An individual who resists induction into the armed services under draft laws because he believes war to be wrong and who does so to avoid being engaged in the activities of war commits an act of conscientious refusal. Those who in public--e.g., in front of a government office or induction centre--burn draft cards with the intention of drawing attention to the injustice of the system of draft laws and to show their opposition to those draft laws, are engaged in civil disobedience. They are specifically concerned with the injustice of certain governmental commands, whereas those who engage in conscientious refusal are concerned with not being compelled to do something which they believe to be morally wrong.

In both civil disobedience and conscientious refusal individuals express their judgement regarding a governmental

act--a law. For our purposes these judgements are presumed not to be first opinions. The judgements are thought out and reasoned. The individuals can give reasons why they believe the law is unjust. The reasons they give are by them considered to be justifying reasons for their action in violating the law. Latent in this situation is a possible conflict of normative criteria. As several writers, Acton and Held in particular, have suggested, between the citizens and the government there must be some common evaluative standard which both recognize as having some validity if actions like civil disobedience and conscientious refusal are to have a basis for justification which the two sides can appeal to.[4] Clearly, where such a common standard does not exist, those engaged in civil disobedience will face a major problem of convincing a government that their action is in fact justified. However, this does not necessarily mean that such a common standard must exist for civil disobedience or conscientious refusal to be given a valid moral justification.

In contrast, revolution is a major organized attempt, almost always involving violence although not necessarily so, to overturn an established social and/or political order: in other words to overthrow a system of social and political practices. On this view revolution aims to destroy and replace the existing form of the state and/or the society in which the state is embedded. In this sense revolution is not

concerned with particular laws or policies or practices as such but with their operation as a system. In so far as it does not involve simply the violation of law but rather a suspension of respect for an entire system of practices one of which is the system of law, it is the most extreme form of opposition. Nevertheless revolution, unless it is anarchist, does not suspend respect for law itself, but rather a particular system of law. The anarchist apart, a revolutionary intends to replace one system with another: he still expects and anticipates the rule of laws. He is concerned, in part, as Hart puts it, with the birth of a new legal system. The revolutionary has reasons which he considers are justifications for his actions and these may be either those of the regime in question or independent evaluative criteria. There is no presumption of some common evaluative standard between a revolutionary and a government.

Civil disobedience in contrast to revolution does not require a justification of an outright rejection of a regime's claim to command while it does claim to be a justifiable violation of at least one of its commands. Civil disobedience, straddling as it does this border, contains a problem of conflicting claims. It most acutely raises a problem for the disobedient person of conflicting obligations to which we shall give more detailed consideration once we have considered the kinds of situations in which civil disobedience occurs.

C. The Context of Civil Disobedience

We will be particularly concerned with laws rather than other aspects of society. What then are laws? Our definition of civil disobedience specifies that civil disobedience is a violation of an unjust law. Since we are concerned with the normative criteria which might justify civil disobedience, we must presume that something can be a law and also unjust. If this cannot be the case because of the definition given 'law', the question of justifying civil disobedience as disobedience of a law would never arise: all laws would be just by definition and one would never be in a position to commit justifiable disobedience on the grounds of injustice. There would, even in such a case, remain a problem of determining when something is a 'true law'--e.g., when it meets certain tests one of which is its justice. To take such a route in some sense is a circuitous way of formulating this particular situation of injustice and law.

If a person engaged in civil disobedience wishes to argue that X is not a law because X does not meet a test of justice, several things will be confused. For, what the person must do is override the government's claim that X is a law because X has been "duly enacted". The civil disobedient, arguing in his way, says that he is obliged to obey only just laws; the government says he is obliged to obey all laws. The disagreement lies in what is to count as a law. The civil disobedient by arguing that only if X is just can X be

a law attempts to deny that the government when it says 'X is a law' means 'X was enacted' in the correct manner. But this hides the issue that they may in fact disagree over the grounds, justification, or reasons for an obligation to obey the law. More importantly the civil disobedient person especially wants to say that there is generally speaking an obligation to obey the government's enactments but that in the case of X either the grounds for that obligation are absent, or, although the grounds are there, in this particular case the obligation is outweighed by other considerations.

In general, in modern states the problem of what to do about injustice allows that the state, as long as it has followed certain procedures, has created a law. By defining civil disobedience as a violation of an unjust law, we are able to take the direct approach of specifying law as something which meets a non-normative test and leave the question of justifying disobedience entirely and clearly one of normative principles. In other words one does not obey a law simply because it is issued by the state. One must introduce normative criteria which are the basis of a moral obligation to obey laws. The question of justifying civil disobedience, a violation of law, then hinges on whether or not this obligation to obey laws can be overridden by other normative considerations. What we term the context of civil disobedience involves the definition of law, the type of society, and the form of political rule under which civil disobedience

occurs. By using a positivist view of law, such as H.L.A. Hart's, one can separate the normative issue. It allows for the case that X is claimed to be law, but may be found not to be law, and separates this analytically from the case where X is law but in which other factors regarding the moral obligation to obey what is in fact law are in the case of X either overridden or not applicable.

Hart's account meets our needs for a definition of law. In his view a law is an element of a legal system. A law is a rule which specifies what must or must not be done. "Where there is law,...human conduct is in some sense non-optional or obligatory."[5] A legal system in Hart's view is not simply a collection of laws. Most laws, especially from the standpoint of the citizen, and those which we are directly concerned with as objects of civil disobedience, are primary rules--rules forbidding or enjoining certain types of behaviour and imposing legal duties and obligations. But a legal system is more than those primary rules: it includes also secondary rules--rules about the primary rules. These secondary rules specify how primary rules are to be created or changed or determined to be applicable to a particular case.

Secondary rules constitute the tests that a particular rule must meet if it is to be said that the rule is a legally valid law. Hart identifies three fundamental classes of secondary rules:

1. Rules of recognition provide for conclusive identification of what is a primary rule. For example a list of laws may constitute an authoritative test of what is law for those under it. The rule of recognition might, however, be more complex, identifying characteristics such as being enacted by a certain body, being custom, or being judicial decisions. Amongst rules of recognition, if in any system there are several, there is a presumption that they will be ordered.[6]

2. Rules of change empower persons to introduce new primary rules and eliminate old ones. These indicate who is to legislate and how they are to legislate for a specific group.[7]

3. Rules of adjudication empower individuals, e.g., judges, to make authoritative determinations of whether a primary rule has been violated in a particular case.[8]

In Hart's view this constitutes a non-normative conception of what law is. It allows the identification of law within a particular system either by the members of the groups to whom it applies as well as the appropriate officials or, in an extreme case, solely by the appropriate officials (statements from an internal point of view), and it allows the identification of what is law in a particular system by those not members of the groups to whom it applies (statements from an external point of view).

Hart identifies two necessary and sufficient conditions for the existence of a legal system:

> 1. The "rules of behaviour which are valid according to the system's ultimate criteria of validity must be generally obeyed...."[9].
>
> 2. "Its [the system's] rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials."[10].

The latter condition does not require that officials have a justified moral obligation to accept the standards (the standards could be bad ones) but only that, in fact, they do accept and use them for whatever reason, moral or otherwise. The first condition is empirical in the sense that one does not usually say that a legal system exists unless most of its requirements are in fact followed by most persons to whom they apply. It is not necessary that private individuals believe they are morally obligated to obey laws. It is only necessary that they in fact obey, for whatever motive, be it fear of punishment, self-interest, habit, or simply that something is law. These are motives for obedience, but they are not necessarily justification of obedience. This condition that laws for the most part actually are obeyed if a legal system may be said to exist will play an important role in the sequel in our considerations of the relation of

civil disobedience to stability.

We can now state with more precision what the person contemplating civil disobedience is about to do. He is in the position where a legal system exists--the two minimum conditions are present. He does not believe that the fundamental primary and secondary rules are to be rejected. Rather, he believes that one of the primary rules which has the status of being legally valid according to rules of recognition, change and adjudication, is nevertheless unjust. His question is "when can such a law be violated, and if so, in what way?". To answer this question he must invoke certain principles of justification. These principles of justification will in part show that what is law ought not to be law and in part show what course of action with respect to that law is justified. The argument he makes will have reference to a moral obligation to obey laws. This obligation is distinct from a legal system: it is not a part of a legal system, but external to it. Such an obligation may in fact show that with certain legal or political systems no moral obligation to obey laws is present.

But, as was hinted by the reference to political systems, there is more to the context of civil disobedience than is included in the legal system. What Hart refers to as the rules of change for a legal system overlap with the political system. Rules of change might include, for instance, the provision for a parliament and its mode of

operation--i.e., the procedures that must be followed for that body to create law. But the legal system does not include the politics of selecting members (e.g., in elections) or the substance of a debate in a parliament. The politics of creating law--i.e., getting some proposal through a procedure which, according to rules of identification and change, make that proposal a law--are distinct from the legal system. The format within which law is created is capable, with Hart's definition of law, of considerable variation. A dictatorship can create law just as well as a democracy or constitutional monarchy as long as the two conditions for the existence of a legal system are met and the three features of a legal system are identifiable and applied. Thus it is possible to have different political systems which themselves are susceptible to normative evaluation, all of which have legal systems. Civil disobedience, then, can be contemplated against varying background conditions of political systems.

A similar consideration applies to the social system--its class structure, the distribution of wealth, the conditions of work and personal relationships. Although the legal system entails general conformance to its dictates if it can be said to exist and although it has a structuring effect on the character of a social system, the latter nevertheless has components which are distinct from law. These two are subject to normative evaluation. For instance, laws may have nothing to say about the distribution of wealth or may have

some effect upon it but the distribution is not necessarily part of a legal system and may be assessed by normative standards independently of the laws' impact upon it. Thus widely differing social structures may also form part of the background conditions for civil disobedience.

We have now indicated a basic conception of the situation in which civil disobedience is placed. The problem of civil disobedience arises in the context of some form of established society and political rule. Both involve identifiable institutions and practices, one of which is a legal system. The legal system functions as a form of social control which regulates human conduct and relations. Such regulation is mainly stipulated in rules--i.e., laws. Individuals live their lives for the most part in the context of laws. Their activities are partly but in important ways conditioned and ordered by the expectation that certain rules, among them the laws of the state, hold in general for everyone. The laws of the state along with customs and social rules act as a limitation on the range of actions available to a person. Government for its effectiveness depends in part on large-scale compliance and in part on the ability to apply coercion. Our definition of civil disobedience, however, by emphasizing injustice as a potential reason for disobedience, suggests that order as provided by laws is not of itself the only function of law in society: laws are also to embody, among other things, justice. It is from considerations of

justice and order that the problem of justifying civil disobedience emerges.

D. The Problem of Civil Disobedience: Conflicting Directives

1. Standards for the Assessment of Laws

The problem of civil disobedience arises when questions are raised as to the justice and injustice of laws. Such questions indicate a doubt on the part of some individuals about some aspect of the law. We are presuming that this doubt is not as to whether a primary rule is valid law. This type of question is settled internally by the legal system. We are concerned with those cases in which a doubt is raised as to whether what is law ought to be law and with those cases in which it can be determined that what is law ought not to be law. The individual is concerned with the consequences for the obligation to obey the law of a negative answer for any given law. If something ought not to be law and yet is law, is one obligated to obey that law in the same way as one is obligated to obey laws which ought to be law and are law? What are the grounds of obligation and how are they related to justice?

Underlying these questions is a presumption that there are standards which tell us what ought to be law. Such standards are distinct from standards of what the legal system ought to look like, for example, formal features such as freedom from political influence, court procedures, and

the notion of due process of law. These latter standards provide a basis for the rule of law in general. From the standpoint of normative theory there must be a justification for the rule of law which would back laws for societies in some circumstances. We say "in some circumstances" since it can be argued that some forms of the rule of law do not create an obligation to obey in the same way as others. For instance, P. Singer has argued that different systems have different grounds for obligations to obey.[11] But in general there is still some justification which says why we should ever have the rule of law in any form as opposed to not having any law whatsoever.[12]

Doubts about laws can be assessed in part by reference to this more general ground for the rule of law. Once a normative theory has considered this more general ground it may move on to consider the various forms the rule of law may take. Even so, once it has been shown that the rule of law in general is justified, at least a partial, if weak, ground for an obligation to uphold law has been given and this obligation must be taken into account in a justification of civil disobedience. Civil disobedience seems to leave the general ground to uphold law in general intact: it does not claim that any law or all laws ought to or may be disobeyed. In addition as Singer points out, specific forms of the rule of law create different and more or less strong obligations to obey.[13] It is on the level of these specific obligations

that the problem of civil disobedience directly arises. The civil disobedient person has some argument based on considerations of justice about a specific law which says that it ought not to be a law. This argument depends on the assessment of laws.

The rightness or wrongness of laws may be judged by different standards. We shall contrast the standard employed by civil disobedience--justice--with two other important standards--moral rightness or wrongness and efficiency. A law though legally enacted may enjoin morally wrong acts. In other words, if one were to comply with the law, one would be compelled to commit an act which was morally wrong considered simply on its own. For instance, if a state were to enact a law on treason which stipulated that the penalty for violation was to be a particularly extended and excruciating series of tortures followed by execution, most persons would agree that such a punishment was morally wrong. (Cf. Kafka's The Penal Colony) Such torture would under any circumstances be morally wrong. It is the act of torture which the law enjoins which by itself is judged morally wrong.

However there could be cases where the acts which the law enjoins are not morally wrong considered separately but are unjust when considered as a set. Consider the notion of a regressive income tax. The act of taxing an individual--i.e., taking some money from him for state projects of value to him and to others--is not necessarily morally wrong nor

unjust; but a system of taxation which took more money the less one earned would be unjust according to the ability-to-pay principle without requiring any morally wrong acts. At least in some cases then, laws may be just or unjust as assessed by some standard of justice distinct from other moral standards.

The third important standard by which laws may be assessed is efficiency. A law may prescribe neither morally wrong acts nor unjust acts but may not be as efficient as some other way of arranging affairs. It might be argued that marketing boards are neither unjust nor morally wrong in their action but nevertheless are not as efficient as another mechanism for achieving the same result--e.g., a free market system. Here the criticism is that the law does not achieve its purpose in the most effective manner: the law is a poor law. We may compare this to a situation in banks. The bank requires a system for handling the daily business of its customers. Most banks currently operate with a number of teller's wickets at which persons queue. Consider a group of persons waiting in line at different tellers in a bank, one of whom has been waiting twenty minutes. At that point someone else enters the bank, stands in another line, and is served in five minutes while the first continues to wait in his line. By queuing people show that they believe that the persons who enter first should be served first, thus minimizing the time spent by each person.

But because of the system of individual teller's wickets, this is not achieved. The system is inefficient from the standpoint of time spent by the customers in doing business. Charges of inefficiency very often are met with the reply that there is no more efficient practice which is feasible--i.e., the existing system is the best possible and no further improvements can be made. Ultimately the charge of inefficiency is made most severe if there is a practical and more efficient system readily available.

2. Justice and Morality

The specific concept of justice that civil disobedience relies upon will not be given a complete definition independent of the three theories to be considered. In general, though, it may be said that as part of normative theory the concept of justice deals with that area of morality which is concerned with the fundamental conditions for social orders. The concept and the principles which specify it may be used to assess social orders as a whole or specific components of a social order such as laws. In presuming the rule of law in the manner of Hart, we have committed ourselves to no particular form of government. Equally so, the characterization of law does not presuppose the modern nation-state. For our purposes, however, we shall confine ourselves to modern states. A state as a political organization may be described by its constitutive principles or rules. The particular power-holders within the state at

any given time are referred to as the regime. A state then may be assessed as just or unjust by comparing its constitutive principles to principles of justice. A regime's behaviour, including the laws it enacts and how it reaches decisions, may be assessed in two ways: in relation to the constitutive principles of the state, which may be thought of as commands or "oughts" for the power-holders, or in terms of principles of justice. In this way we can speak of unjust and just states, and just and unjust regimes.

The problem of the conception of justice will be taken up with each of the three theories. However, at this point, in order to develop the problem of conflicting directives, we shall consider some general points regarding the place of justice in normative theory.

Normative theory is particularly concerned with obligations and the problem of civil disobedience with political obligation. The type of obligations considered are moral obligations which in a general way may be distinguished from prudential obligations. Prudence constitutes what is best for any particular person to do, given his objectives. To act prudently is to do that which will advance one's own interests most effectively not taking into account other persons' interests. In this sense we might speak of obligations of prudence. This type of consideration may also be viewed as encompassing matters concerned with the achievement of practical purposes such

as learning to do something or choosing the appropriate means to do something.

Morality and moral obligations characteristically take into account other persons, i.e., what is right for an individual to do with regard to others and himself taking into account the interests and values of other persons. Some characteristic moral concepts are honesty, benevolence, not harming others and justice or fairness, this latter meaning allowing others what is rightfully theirs. An obligation of justice or fairness entails the consideration of what is right in relation to others.

Moral obligations are generally thought to take precedence over prudential obligations. An individual might find, for example, that a certain means, X, achieves one of his goals, G, most effectively for himself but morality asks "is X the right thing to do?". Thus if X involves lying, a question of moral rightness is raised which is different from the question of whether X is an appropriate means to G, and a question the answer to which will determine if X ought to be done.

Political obligation is the moral obligation to obey the commands of the state. For a discussion of civil disobedience political obligation takes the form of a moral obligation to obey laws. However, it is one thing to ask if a law is morally right and another to ask if one ought to obey the law. The content of a law may be morally

indifferent but not so the breaking of that law. For instance, parking laws may be said to have no moral content. They do not involve the enforcement of any moral principle as does a law regarding theft or murder. But whether one is to obey a law or not is a moral question.

Justice, as a species of moral consideration, also gives rise to moral obligations as do other moral concepts --e.g., an obligation to be honest, an obligation to be fair, and an obligation to support justice or to act justly. The question then for the civil disobedient person is how does justice relate to political obligation. What creates a moral obligation to obey a state and what role does justice play in that obligation?

3. Conflicting Directives

Civil disobedience claims justice as a singularly important consideration for political obligation. The obligation to obey a law is based on the justice of that law. This implies that political obligation is not entirely dependent on the form of the political processes which create law--i.e., on whether they are, for example, democratic, representative, or dictatorial. Civil disobedience as formulated appears then to be concerned with the justice of the <u>outcomes</u> of law-making procedures and not particularly with the moral character of the procedures that create law.[14]

Although such a view is not an adequate account of the origin of political obligation, it will be worthwhile to

examine the view of obligation implied above in order to contrast it with an alternative view. The most direct way in which to examine the way justice might function as a basis for political obligation is to imagine a society in which all laws, considered singly and in concert, enjoined only those actions which were also morally right. It would follow from those laws being morally right, that one had an obligation to obey those laws. This would follow because one has an obligation to do what is morally right. When laws enjoin morally right actions, an obligation to obey laws is coincident with an obligation to do what is morally right. The obligation to obey all such laws would hold regardless of the nature of the social and political systems. For example, the obligation would hold whether the political system was democratic or a dictatorship.

One might still say that the laws could be improved by ensuring that other virtues (e.g., efficiency) are met but that one was still morally obligated to obey them. From the standpoint of civil disobedience such a situation would constitute the ideal circumstance, for the condition for obedience--justice--is complete. Since problems of disobedience do not arise under ideal circumstances, we must consider the relation of law and justice under non-ideal circumstances as that relation bears upon an obligation to uphold law in general. Existing legal orders may be distinguished according to the criteria of basic principles

of justice on a continuum extending from fundamentally just to fundamentally unjust. To say that an existing order is fundamentally just implies that in principle the institutions and practices of the society are for the most part concordant with principles of justice but that nevertheless some deviations from the ideal occur. Just institutions may give rise to unjust laws as well as just ones. To say that an existing order is fundamentally unjust implies that its institutions and practices are for the most part discordant with principles of justice. Nevertheless it is important to note that unjust institutions may give rise to just laws. This of course implies that it be possible to ascertain independently of an existing legal order if it is just or unjust and if laws are just or unjust.

The basic principles of justice which Rawls, Kant and the Utilitarians expound are criteria for assessing existing orders. The question of disobedience to laws concerns the relationship of an individual to an existing order. Thus to consider what each theory would say about disobedience requires derivative principles applying to individuals. The two derivative principles applying to individuals which are important to civil disobedience are the obligation to obey laws and the obligation to support and promote justice.

If we proceed directly from an obligation to uphold and obey law in general to a particular law, it would seem that one has an obligation to obey that law regardless of its

justness or unjustness. However, given the existence of unjust laws, and an additional obligation to further and promote justice, it seems that an individual would have a duty to oppose unjust laws. If we presume that all legally permitted means of opposition have been exhausted without success and if disobedience is the only means available to oppose the laws, we are then faced with the problem that it appears that the duty to oppose unjust laws counsels disobedience of laws. This means that proceeding firstly from a duty to uphold laws and secondly from a duty to promote justice, we get two conflicting directives: an individual must uphold all laws and an individual may violate some laws--i.e., unjust laws.

Such a problem of conflicting directives would most directly be resolved by some sort of balancing or ranking of the obligations from which the conflict derives. The problem may, however, be approached from the standpoint of conflicting justifications for a particular action. In this approach we may observe the opposition of the civil disobedient person and the so-called law and order argument against civil disobedience.

The civil disobedient argues that if the obligation to obey laws is to be binding, those laws lust be just. When a particular law is not just, no obligation to obey exists. Disobedience is thus permissible, even if it may not necessarily be exercised. The law and order argument counters

that the obligation to obey depends on conditions other than justice--in particular, the value of order and stability. Justice, although a valuable and important goal, does not pre-empt the value of a stable order in society. Order is a necessary condition for the preservation of society. When an individual disobeys a law he undermines the stability of the society and legal order. Without that order, justice could not be ensured. The argument maintains that a stable order is a pre-condition for justice and that civil disobedience in its ostensible pursuit of justice undermines that essential pre-condition. The two arguments conflict over the basis for the obligation to obey and for this reason imply conflicting prescriptions as to morally acceptable course of action.

The three theories we shall be considering are normative theories. A fully comprehensive normative theory, of which principles of justice form a part, would provide the basis for ascertaining under what circumstances compliance with laws is obligatory and under what circumstances non-compliance is permissible or obligatory. It must further provide the basis for determining what forms of opposition are permissible under those circumstances where non-compliance is counselled--e.g., in our case, civil disobedience.

Essentially we are asking "under what conditions would each theory justify civil disobedience?". This question is a specific case of a more general and important political

question "when if ever is one justified in disobeying a law?". Clearly this second question must be answered in a way which allows that at least on some occasions disobedience of a law is permissible. This second more general question is in one sense roughly the obverse of a fundamental question posed by the Seventeenth and Eighteenth Century contractarians "Why if at all should one obey any state?". In this question one is concerned with stipulating the conditions the state must meet in order to be entitled to obedience. On the other hand in the formulation which we have given of the justification of civil disobedience, one is concerned with conditions under which one might disobey the law, presupposing that the state has some grounds for commanding obedience.

The three theories which we will examine will have to contend with a resolution of both conflicting directives and the basis for an obligation to obey. We now turn to an examination of the characteristics of normative theory in general and the standards of evaluation which will be applied to each theory in the sequel.

E. Evaluation of Theories

The most important criterion of assessment for us is the adequacy of the theory's account of the problem of civil disobedience. Although the assessment of adequacy is of necessity predicated on certain formal requirements for a normative theory (to which we shall shortly turn), adequacy

most importantly depends on the degree to which the theory does not leave us in doubt about what is to be done in specific cases. This is not to say that there can be no cases where, for whatever reasons, we ultimately cannot ascertain what ought to be done.

This last consideration suggests two approaches to the conception of the task of normative theory. The first approach suggests that the task of normative theory is to develop a body of principles and methods for their application which would for every case determine what ought to be done. If all the appropriate information were obtained, the application of the principles would result in a clear statement of what was morally required. Cases still might arise where, because of the practical difficulties of obtaining the requisite information, the principles could not be fully applied and therefore would not give a complete answer. We may make an analogy with one view of the science of weather prediction. In this view the science provides all the necessary descriptive factors and all the rules needed to specify the necessary factual information that would be needed to predict weather for any specified locality. However, because of the limitations of information gathering such prediction in some cases is neither practicable nor accurate. Nevertheless the theory itself is not at fault.

The second approach suggests that the task of normative theory is to develop a body of principles and a guide to

interpreting then which will give moral guidance but which of themselves cannot determine in advance just what the right course of action will be. Exceptions and special cases will always arise which the theory could not foresee but which its principles provide the necessary guidance to make judgements. Following the analogy with weather prediction, we would say that the theory provides a basis for predicting the general large-scale phenomena but not the details of every specific location. The nature of the phenomena involved does not permit any greater precision. The unusual and exceptional will always arise.

Both of these approaches allow that there will be cases where the theory will not be able to give a definite answer in advance. A third type of conception of normative theory maintains that normative theory is to develop a set of principles which an individual need only follow at all times in order to do the morally right actions. In some sense this conception might be viewed as an ideal: no doubt as to what was morally right or wrong could arise. Ultimately such an ideal normative theory is unattainable, although some theories may be viewed as having attempted to approximate it. Rather than view this interpretation as a standard of adequacy we view it as a description of "codes of behaviour" which might be based upon a normative theory.

The test of adequacy implies that the more a theory can clearly identify and limit the cases where doubt arises, the

more adequate it will be. A theory which does not account for certain cases in any way when those cases are of principal importance as practical moral problems simply is not adequate. To take an extreme example, a normative theory is surely not adequate if it not only does not consider questions of killing other persons but also rules those out as moral questions. Such questions are confronted primarily as moral questions.

The more formal requirements for normative theory are encompassed by the soundness of the theory. Different theories may provide the same prescriptive judgement for the same conditions. Although several theories might come to the same conclusion, it would not follow that any one of them is correct. Any one could contain logical inconsistencies, conceptual ambiguities, or, more seriously, faulty axioms. Alternatively, even if the theories disagree in their prescriptive judgements, one or more of them might contain the same flaws.

A final important consideration in the assessment of normative theory has to do with the success of the principles in contains. A theory containing principles expected to resolve certain cases may encounter insuperable difficulties in doing so, even though those principles may be satisfactory for other cases. For example, it has been suggested that a serious and critical problem for any form of utilitarianism is the difficulty of ascertaining the relevant kinds of

consequences of an action and of knowing all the relevant consequences of an action.[15]

All of the foregoing factors will come into play in varying degrees for each theory as we go along. In the closing chapter we shall have opportunity to identify the critical factors for all three.

F. Preliminary Remarks on the Three Theories

The problems of conflicting obligations and conflicting justifications appear to have a ready solution in utilitarian doctrine. In general one disobeys a law when it does more good than harm to do so, all things considered. The obligation to obey laws is overridden when compliance leads to greater harm than some other course of action. Civil disobedience constitutes a course of action for which utilitarianism can delimit the conditions under which it would be the preferred course of action. However, as we shall see, utilitarianism allows a broad discretion for the individual, and this broad discretion must be balanced against considerations of stability.

Kant in contrast allows little discretion when it comes to obedience to laws. In one interpretation he ensures stability in what appears to be a radical way: one may never disobey laws, even when they lead to great harm or are gravely unjust. One may always judge a law unjust and declare that it is so but may not rightfully act in contravention of the state's claim to obedience. In a more recent

and as yet unconsolidated interpretation of Kant's theory, it is allowed that one may sometimes break a law, but, as we shall see, not in the manner required by civil disobedience as we have defined it.[16]

John Rawls' A Theory of Justice brings together into a comprehensive theory more than two decades of research into the nature of justice. The book reflects nearly all the major topics of continuing concern to political philosophy, among them his discussion of the question whether one has an obligation to comply with unjust laws. His principles of justice derive on the one hand from an extension of Kant's "rational legislation in a kingdom of ends" and on the other hand from a rejection of utilitarian principles.[17] Much has been said against Rawls' claim to have developed a successful alternative to utilitarianism as a basis for principles of justice. It has even been questioned that his theory is an alternative to utilitarianism. With respect to civil disobedience, Rawls attempts to provide a systematic treatment of its role which in effect would balance considerations of stability against those of the promotion of justice and to provide limitations on individual discretion. As we shall see, problems arise with his account which lead us back to utilitarian considerations.

We now turn to the utilitarian account.

Footnotes

1. Rawls does allow that the law violated need not be the target of civil disobedience. See John Rawls, A Theory of Justice (hereafter, Theory) (Cambridge, Mass.: The Belknap Press of Harvard University, 1971), pp. 364-365.

2. We assume here that there is a likelihood that the courts will fairly consider test cases, and that if such were unlikely--i.e., the courts consider appeals to constitutionality irrelevant--one would not contemplate test cases.

3. Cf. Peter Singer, Democracy and Disobedience (Oxford: Oxford University Press, 1973), p. 10. See also Virginia Held, "Civil Disobedience and Public Policy", in Edward Kent (Editor), Revolution and the Rule of Law (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1971).

4. Cf. Virginia Held, ibid., p. 98; Rawls, Theory, p. 365; and H.B. Acton, "Political Justification", in H.A. Bedau, Civil Disobedience: Theory and Practice (New York, N.Y.: Pegasus, 1969), p. 221 and pp. 223-224.

5. H.L.A. Hart, The Concept of Law (London: Oxford University Press, 1961), p. 80.

6. Ibid., p. 92.

7. Ibid., p. 93.

8. Ibid., p. 94.

9. Ibid., p. 113.

10. Ibid..

11. Peter Singer, Democracy and Disobedience, pp. 2-3.

12. Carol Pateman, "Political Obligation and Conceptual Analysis", in Political Studies, Volume XXI, Number 2 (June 1973), pp. 206-207.

13. Singer, op. cit., pp. 57-59.

14. Ibid., p. 69.

15. Cf. David Lyons, Forms and Limits of Utilitarianism (Oxford: Oxford University Press, 1965), pp. 55-60.

16. Cf. T.C. Williams, The Concept of the Categorical Imperative (London: Oxford University Press, 1968), and Julius Ebbinghaus, "Interpretation and Misinterpretation of the Categorical Imperative", in R.P. Wolff (Editor), Kant (Garden City, N.Y.: Anchor Books, 1967), pp. 211-213.

17. Rawls, Theory, p. viii.

Chapter II: Utilitarianism

A. Utilitarian Doctrine, Justice and Law

The basic concept of utilitarianism as a moral theory is that what is morally right is determined by what is good, good meaning happiness or welfare. The fundamental principle expressing this concept is:

> A particular course of action is right under certain circumstances if on the whole it produces the greatest amount of happiness taking into account all those affected by that course of action.

Happiness, or welfare, in this formulation is a value which is to be the criterion or moral rightness. Bentham and Mill both took happiness to be in some sense a quantity of which one could have more or less. They were then able to say that more happiness was more valuable than less. Happiness is this sense is a psychological property of individuals. Some of the major thorns in the side of utilitarian doctrine have consisted in the difficulties of giving adequate definition of what psychological states count as happiness and how one could go about measuring and comparing those states between individuals. Although Sidgwick maintained the concept of happiness as such, more recent writers, in part to avoid the problems of defining happiness as a psychological state, have utilized the terms benefit and welfare. These terms perform the same function as happiness in the utilitarian conception. They are complex notions. As such they include the concepts of advantage, material goods, health, and satisfaction. These in turn

are much more susceptible to objective assessments than is the simple notion of happiness as a psychological state even though the complexness of the notion of welfare makes their assessment more difficult practically speaking. Nevertheless we shall use interchangeably the terms happiness, benefit and in some contexts good, under the assumption that they all designate the important concept of the utilitarian principle.

From the utilitarian principle it follows that although several courses of action may lead to happiness, of those which are possible, the one which leads to the larger amount or degree is morally right. Where there are alternatives, actions which lead to more unhappiness in the final analysis are morally wrong. There is a sense in which all actions may be said to lead to some unhappiness. The utilitarian is interested in the net balance of happiness or unhappiness resulting from a particular action. Assuming for the moment that several courses of action are distinguished by greater and lesser amounts of happiness that they have as their consequence, one can select the morally right course of action as the one which results in the greatest happiness. One can also say that there are classes of actions which all lead to some happiness and hence are not directly morally wrong but which are nevertheless superseded by that course of action which results in the greatest amount of happiness. In assessing the rightness or wrongness of a course of action,

it is for the utilitarian always a matter of comparing the alternatives. The principle of utilitarianism requires that one select from amongst various possible courses of action. One cannot say that any course of action is right based on an analysis of that action in isolation from other possible actions. For this reason the utilitarian principle does not directly generate any moral absolutes. The act-utilitarian version, for instance, leaves open in principle that any action--e.g., stealing--may in particular circumstances turn out to be the morally right course of action.

It should be noted that in our interpretation utilitarianism and its central principle are of interest only in so far as they constitute a moral theory and not in that respect in which they may function as a theory of prudence. It has sometimes been suggested that utilitarianism creates obligations where we do not normally expect them--e.g., in matters of choosing between going to a show or listening to the radio. In our view matters such as these are concerned with the way in which an individual maximizes his own happiness. These matters do not as such concern the maximization of happiness for all concerned individuals in a characteristically moral situation. We should not apply the utilitarian principle as a moral criterion in those situations where moral questions do not arise.

The principle that the greatest happiness determines what is morally right in a given situation defines utilitar-

ıanism as a doctrine which maximizes the good. To maximize this good requires a calculation like that of costs versus gains. One must assess the net result of an actıon in comparison wıth the alternatives--i.e., an action has more than one type of consequence--some good and some bad. It is the comparison of the overall balance in favour of good or bad which will determine which of the alternatives is right or wrong. This process may also be likened to the process of selecting the most efficient course of action--i.e., that course of action which obtains the greatest result for the least cost. Efficiency, though, must be applied over-all and must not be construed as or conflated with a narrower concept of efficiency. For it could be argued that in some circumstances economic efficiency in the operation of certain economic institutıons leads to an amount of happiness which is not out-weighed by other benefits resulting from it. Efficiency with respect to the utilitarian principle means the determination of the course of action which has the lowest costs in terms of unhappiness and the highest benefits over-all since that course of action would produce the greatest net balance. Thus one could say that certain welfare schemes, although they have a high economic cost where this economic cost is viewed as a bad consequence, nevertheless have such a high gain in terms of happiness that they are justified in spite of economic cost.

As a moral theory utilitarianism is expected to be

applied to say what is right and wrong and what our obligations are. We have suggested in our introduction that the first task of a normative theory is to proceed with a justification for the rule of law before proceeding to specific cases and considerations which might overrule an obligation to obey. The problem with utilitarianism as a doctrine has been compounded by the development of two schools of utilitarian thought--act and rule utilitarianism. It is important also to recognize a third view which maintains that the distinction between the two is false and unnecessary.[1] We intend to take the main principle of utility and derive some secondary principles of obligation. In particular we shall have to make sense of 'law' as we have defined it for utilitarian thinking.

We shall begin to develop the utilitarian doctrine by a consideration of act utilitarianism. On our interpretation, act utiltarianism maintains that any particular act that one is to do is assessed directly on each occasion by the utilitarian principle. So-called moral rules such as "thou shalt not steal" are reduced to the status of moral guides--i.e., they sum up previous conclusions about particular types of acts. Nevertheless the rules do not themselves establish any moral obligations. Any action including obedience or disobedience to laws is to be assessed solely on its own merits and not by reference to a moral rule such as one ought to obey the law. One must always ask about each action what

the good and bad consequences will be and decide according to the utilitarian principle what the right course of action is.

Consider a man trying to decide what to do when confronted with a law which he firmly believes is bad on utilitarian grounds--i.e., leads to more harm than good. Let us say it is a law prohibiting certain religious practices, including public worship. He believes that religious persons do no harm to society and that their religious precepts contribute to their individual happiness as well as aiding them to act in a way conducive to the general happiness of others--e.g., through acts of benevolence. The law prohibiting their practices means that society must forgo the benefits that accrue in this way and in addition directly causes religious individuals to be unhappy: it prevents their acting in a way which is satisfying for them. He is further assured that the particular religions in question do not involve any activities which would be injurious to the welfare of all. On the other hand he knows that public worship will be severely punished. The law asserts that should some members persist in public worship all members of the religion in question will be punished regardless of whether they participated in public worship or not. Let us say that he concludes that if he participates in public worship grave harm will result to large numbers of persons, while if he refrains an increment of happiness less than the

harm will not be added to the whole. In other words, not to participate leads to the greatest net balance of happiness given the existing circumstances. On this analysis he would conform with the requirements of the law; but he does not do so because the law is good. In fact he is sure the implementation of the law reduces happiness from what it might have been. He obeys because now that the law is law, disobeying the law leads to greater harm than obeying it.

We note that he does not accord any special status to the law either generally or in particular--i.e., he does not believe he has an obligation to obey laws prior to each case or instance when he must decide what to do. He believes that the law is deleterious in its effect but even so he does not act against it. Still he has made a judgement of the law as law--i.e., on utilitarian grounds the law ought not to be a law. But it is law and his conformity or non-conformity is not based on that evaluation of the law per se; rather it is based upon particulars of the case at hand and not on a prior obligation to obey laws.

If we were to imagine a society of act utilitarians, each acting according to the notion that the utilitarian principle applies directly to each action they might contemplate and according to the notion that rules (including laws) are simply guides and have no special status with regard to moral obligation, it is difficult to see why they would ever contemplate having laws in the sense in which we have defined

them. Law as we have defined it is first and foremost a form of social control. Any given law makes some behaviour under some circumstance non-optional. It limits the behaviour an individual is expected to select from. The point of having laws then is to mark off certain actions: to ensure that they do not occur. The feature of a legal system that persons generally do obey the laws it contains means that individuals accept the laws as externally binding upon them. But an act utilitarian as we have described him cannot in prihciple accept that something other than the utilitarian principle creates obligations. No matter what the law said he should still determine in each instance what he ought to do by applying the utilitarian principle directly to each instance. Whatever obligation that arose in each case would derive from the utilitarian principle and not from any law. Laws would have no special moral significance and there would be no prima facie obligation to obey laws.

A legal system is composed of rules. We shall have to enquire what reasons a utilitarian might be able to use in order to accept a set of rules. In doing so we shall be developing a rule utilitarian account. The most important argument is that order, created by the observance of laws, is essential to human happiness. Sidgwick expresses this in the following way:

> ...the general conduciveness to social happiness of the habit of Order or Law-observance is, as Hume says, too obvious to need proof; indeed it is of such paramount importance to a community, that even where

> particular laws are clearly injurious it is usually expedient to observe them apart from any penalty which their breach might entail on the individual.[2]

The "habit of Order or Law-observance" means the obeying of legal or customary rules which in fact structure and constitute the practices of a society. We of course are interested in the obedience of laws rather than customary rules. The argument expressed maintains that obedience to some system of rules is more conducive to the general benefit than a situation where there are no such rules. A set of laws implies benefits which could not be gained in the absence of laws. Although this may be true, the argument still does not show whether any particular form of the rule of law is better or worse than another. In simple terms, a set of good laws is to be preferred over a set of bad laws; yet it appears that both are equally an instance of the rule of law and hence require obedience. It seems that what is meant is that one would not be justified in choosing a course of action which resulted in the dissolution of all law but not that every system of law necessarily requires full obedience.

A set of laws gives a specific order to society, prohibiting some actions and enjoining others while leaving yet other actions entirely to individual discretion. An argument, as for example in Hume, can be made that the conditions established by most sets of laws are conducive to the net balance of benefit. The advantages in the long

run also outweigh the disadvantages occasioned by particular cases of injustice or bad laws which may happen from time to time.[3] Here it is being assumed that such imperfections are few and minor. The argument holds for sets of laws which are for the most part satisfactory but not for those which are riddled with injustices. According to this argument the obligation to obey laws is rooted in the essential contribution the laws make to the pursuit of happiness. The laws back up and ensure certain moral prohibitions and also create certain strictly legal prohibitions. In doing so they create a context of normal expectations amongst a social group. Nevertheless, the decision processes which create laws are cases of imperfect procedures which may have varying degrees of unwanted outcomes (e.g., bad laws). There is an implicit limit to the obligation to obey in so far as the argument assumes that unwanted outcomes are not so regular and frequent that the system of law becomes an impediment to happiness.

Clearly though, whatever the laws are, if they are to promote happiness however limited, they must be obeyed and they must be enforced. Here lies the prima facie obligation to obey laws. If everyone obeys the laws more happiness is possible than if they do not. Furthermore, even if someone else breaks a law, the efficacy of the legal order as a whole is not immediately destroyed. Only if law-breaking is widespread does the legal system's effect on happiness deter-

iorate. Thus even when some persons break the law, the obligation to obey remains, especially so when those who break the law are subjected to the penalties the law imposes.

The account given suggests that even though some harm may arise in a specific case, one is still to obey. Thus on some occasions, the immediate balance of happiness and harm is not decisive as the act utilitarian might have it. We have something like a rule utilitarian account. The rule that one ought to obey laws has been given a justification independent of individual cases even though some qualifications are implicit with regard to legal systems as a whole.

The critical point comes in assessing specific laws as elements of a specific legal system. Each law is a rule and the long term effects of general conformity to it may be assessed. The law is a good or bad law in so far as it is conducive to happiness under the condition of general conformity. But one must consider whether the assessment that a law is a bad law is sufficient reason to affect the obligation arising from the advantages of having a legal system.

A law then is assessed by the long term effects of its operation. One first asks if the law in question is a good law. If it is a good law, the prima facie obligation to obey laws provides a case against disobeying it. One must then ask about the particular case to determine whether this

case for disobeying is sufficient to override the prima facie obligation to obey laws.

Let us return to our preceding example. The law forbidding public worship for some bona fide religions would be judged to be a bad law since it leads in the long run to less happiness, taking into account all those affected by it, than a society in which the law were not present--i.e., a society where public worship was allowed or even a society where it was not allowed but in which the penalty was not so severe. In this particular case, because the law is a bad law, the utilitarian has some reason for considering whether to obey the law or not. The prima facie obligation to obey laws might be overruled. However, the consideration that grave harm will come to those who are members of the religious groups in question if the law were violated must be taken into account.' So too must the fact that obeying prevents only a small increment of happiness from being added to the whole. As we have outlined utilitarian thinking so far, these two considerations would counsel obedience of the law. The utilitarian must consider the consequences of the specific act in question--i.e., disobeying the law. Thus even though the law is a bad law, the harmful consequences of disobedience confirm the prima facie obligation to obey the law.

If we assume that only one group of persons in the preceding example were contemplating disobeying the law, the

case might be significantly different than if everyone who was forbidden public worship were to disobey simultaneously. In the latter case, one would have a greater expectation that the action of violating the law would have the effect of making the law ineffective and unenforceable and hence of achieving the increment of happiness prevented by the law while lessening the likelihood of grave harm to the members of the religious groups. One recalls the actions taken by Gandhi in South Africa in 1907 and in 1913 in opposing anti-Indian legislation by mass disobedience which ultimately made the laws in question unenforceable.[4]

These considerations bring to light a special feature in rule utilitarian thinking. The consequences of an action by an individual are influenced by the other actions it occurs with. In the case we have been examining, one person or group acting alone produces different consequences from a large number of groups acting in concert. The act utilitarian, in effect, becomes a rule utilitarian when he takes into account other actions that may be done simultaneously. The rule utilitarian is concerned, then, with the coincidence of the contemplated action with other actions of a like kind. If we assume for the moment that one has sufficient knowledge to ascertain what others will be doing, the rule utilitarian argues that when large numbers of people roughly at the same time act against the law forbidding public worship there is a greater likelihood of the law being rendered ineffective.

When one knows that few others will act in this case the action of disobedience will not meet the utilitarian test. Knowledge of what others might do independently of the individuals who are deciding what to do is imperative. In the case we have been examining such knowledge makes the difference between obedience being the right course of action and disobedience being the right course of action. We shall have more to say about this in the sequel.

The account so far avoids the question of justice and the question of which laws lead to happiness and which do not. Not every legal system will have all its laws effectively aiding the pursuit of happiness. Hume implies this when he says that one should obey in spite of minor injustices. The key phrase is 'minor injustices': one must have a standard to separate minor from major injustices. The implication is that the argument for obedience based on the role of order and laws in promoting happiness may not hold when major injustices issue from certain laws.

On the other hand the utilitarian could be interpreted as being firstly concerned with the goodness of a law, not whether it conforms to principles of justice such as impartiality or concerns of desert. These considerations would be secondary to the utilitarian principle. If they could be met by a good law (i.e., one which is better than others in promoting and maintaining happiness), so much the better; but the considerations of justice would not have to be met

if the utilitarian principle were met. Such an interpretation would not be entirely satisfactory because of the weight normally associated with considerations of justice; nor would it be compatible with the time expended by such utilitarians as Mill and Sidgwick in dealing with justice. We shall consider a special case for the role of justice based on Mill's and Sidgwick's arguments.

Justice in their view refers to the essential conditions for the general welfare. As Mill put it, "justice is a name for certain classes of moral rules which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life,...".[5] On this interpretation law and justice are intimately connected with the most fundamental considerations of the utilitarian principle. Laws are concerned with "the most important and indispensible rules of social behaviour."[6] Justice concerns the fundamental condition from the cooperation of individuals--their security.[7]

Nevertheless, not all that is of importance to law coincides exactly with justice. Thus some matters of law will not be matters of justice. A law concerning the protection of endangered species, although it is concerned with over-all net benefit to human beings and hence might be judged a good law, is not concerned with the essential conditions for the promotion of human welfare.

Here, though, we are particularly concerned with the overlap between law and justice. As we have suggested, some unjust laws are to be obeyed in spite of their injustice. Utilitarian considerations are to constitute the limits of the obligation to obey. The injustice of a law in itself is not sufficient to overturn the obligation to obey.[8] Yet because justice concerns the "most indispensible rules", injustice cannot properly be ignored, for injustice in a law implies the violation of those rules which are, according to utilitarianiam, so important for happiness.

Let us look at how the justice of a law might be related to the happiness that results from that law. The prima facie obligation to obey purportedly arises from the contribution of laws to happiness. If a law produces happiness, one has a prima facie obligation to obey it and, conversely, if it does not, that obligation to obey is undermined. But if laws are unjust and justice concerns the essential conditions for happiness, as Mill suggests, it follows that an unjust law cannot lead to happiness for everybody. Hence the injustice of a law would provide a reason to consider not obeying that particular law.

A conflict arises from the need for a legal system and the potential injustice of individual laws. Laws are needed to ensure security because one cannot rely on individuals to take into account the interests of others--i.e., men are not benevolent. One unjust law amid an otherwise just set of

laws may not significantly alter the over-all benefit deriving from the legal system. One must determine which elements of justice, if violated, would significantly alter the over-all benefit.

Mill identifies several elements of justice which he considers to be intimately connected with security and hence, in his view, utility. "In the first place, it is ...unjust to deprive anyone of his personal liberty, his property or any thing which belongs to him by law.... It is just to respect, unjust to violate, the legal rights of anyone."[9.] Of course these legal rights might not be themselves valid and when this is true one must consider a person's moral rights. "We may say...that...injustice consists in taking or withholding from any person that to which he has a moral right."[10.] A third element resides in giving each person that which he deserves--either a good or an evil.[11.] A fourth element involves voluntary agreements: it is unjust to break agreements made in good faith.[12.] And finally Mill maintains that "...it is...inconsistent with justice...to show favour or preference to one person over another in matters to which favour or preference do not properly apply."[13.] This impartiality is particularly important with regard to equality, especially equality of rights. The essential element of justice which distinguishes in the first instance major from minor injustices is the equality of personal rights which each person has and which

he is entitled to have respected by any other person. An individual is the best judge of his own good because he is in the best circumstance to determine what that good is, given his desires and preferences.[14] Since an individual is the best judge of his own good, his liberty to pursue his goals is most essential to his happiness. His liberty in this respect is useless to him without the security of laws and justice. Laws nevertheless infringe on total liberty. Mill believes that laws are justified only to prevent harm to others in the pursuit of happiness. He asserts: "the sole end for which mankind are warranted individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.(sic)"[15]

By use of the several elements and principles outlined above, it is possible to separate bad laws from good laws and to determine which bad laws are unjust and which unjust laws are major injustices. Clearly, individuals have a moral obligation to uphold and promote justice because of its intimate connection with happiness. We are now in a position to ascertain the utilitarian views of civil disobedience as we have defined it. We can determine whether on utilitarian grounds civil disobedience can be a justified response to unjust laws and, if so, when.

B. Civil Disobedience

One's prima facie obligation to obey extends to the point where a set of laws ceases to contribute in the long run to the greatest net benefit. Such a system of laws, besides containing many bad laws, would also contain many unjust laws of both a major and minor character. The system could fairly be characterized as mainly unjust. The limit to obedience must be assessed by individuals. As Kant so clearly saw, men must rule and between those persons who make and administer laws and the governed there can be no human arbitrator. The utilitarian might want to say that when a set of laws is clearly beyond the limit obedience is no longer owed to any law of that set even if obedience is granted for lack of effective means to remedy or replace that set of laws. The obedience, though, would not rest on any moral obligation. It would be prudential conformance to the laws. However, this is a problem of alternatives. If there are no effective means to change the set of laws, it would seem that the utilitarian would have to say that this set of laws, in spite of its flaws, is better than the possible alternatives and hence is the best possible under the given circumstances. This would imply that obedience would be owed even if the obedience were conditional on the impossibility of better alternatives. Still, the obedience offered is more constricted than in the case where the set of laws does contribute in the long run to the greatest net

benefit. Indeed, because the set of laws we have been discussing is so bad, a person might be required actively to seek to create methods of change which could lead to improvement. Such activity would fulfil the duty to promote justice wherever possible.

There are many gradations between a system of laws which is not merely imperfect but invidious and a system of laws which has only few and minor imperfections. Civil disobedience is addressed to these cases where the prevailing system of laws, though containing many imperfections, is per se not justified. The utilitarian standard under such circumstances clearly directs one to promote justice wherever possible. At the same time that standard requires one to support and maintain the system of laws.

Civil disobedience as we have defined it is a public and deliberate violation of a law with the intent of demonstrating or highlighting a particular injustice. The utilitarian must consider the types of consequences which are to be considered relevant to the evaluation of a proposed act of civil disobedience.

The law and order argument claims that one critically important effect of any disobedience is that disobedience undermines the legal system. If this claim is true without qualification on utilitarian grounds, the undermining effect it suggests would be a potent negative consequence which a civil disobedient would be compelled to take into account.

However we believe that from a utilitarian standpoint the claim is not true without qualification.

The utilitarian certainly agrees with the law and order argument in so as he agrees that it would be disasterous if everyone disobeyed laws. Indeed utilitarianism bases the moral obligation to obey on just such considerations. But with civil disobedience it is not the case that everyone will be disobeying all sorts of laws. The law and order argument can only be applicable in utilitarian reasoning if the particular act of civil disobedience can be construed as having actual effects which result in undermining a particular legal system. We must distinguish two senses in which an action might be said to undermine the legal system. The first would be an actual undermining of Hart's condition for the existence of a legal system, in particular, that condition that, for the most part, the laws are generally obeyed. The second would be some form or moral undermining of the legal system, in particular, an undermining of the moral obligation to obey the law.

The first form of undermining involves a causal relation of the disobedience involved in civil disobedience and the general level of obedience to the legal system as a whole. Any actual disobedience--civil or criminal--could be part of a deterioration of Hart's condition that the laws generally be obeyed. The empirical condition for the existence of the legal system requires general obedience and as the frequency

of disobedience increases, the legal system can be said to be in fact undermined. At some point the frequency of disobedience will reach a region where it will become difficult to say whether that legal system still exists. Clearly a civil disobedient must take into account the possibility that his action will be involved in the development of this situation. He must assess the actual situation regarding the general level of disobedience. The problem is primarily one of coordination which we shall take up at a later point. It suffices to say here that this view of the meaning of the law and order argument's claim does not give that claim the strength it would require to support the conclusion that civil disobedience as an instance of disobedience must be rejected as a justifiable course of action.

The second interpretation of the law and order argument suggests that civil disobedience undermines the moral obligation to obey. Clearly, if an act of disobedience actually results in other persons believing that they are not obliged to obey, the act has undermined their beliefs and in this sense may have some effect on the general level of obedience of the kind just discussed above. But, the act has not actually undermined the moral basis of the obligation. From a utilitarian standpoint other persons' obligations to obey are dependent on the long-term effects of the legal system as a whole. Other persons would be mistaken in their view that any act of disobedience means that they are no longer

obligated to obey. As long as the long-term effects of the legal system remain sufficient to meet the utilitarian standard, their obligation to obey is unaffected by others' disobedience. Only if the legal system fails as a whole or in some particular case can their obligation be affected from a utilitarian standpoint. And for a person considering civil disobedience, it is just such instances in which he makes his appeal. The civil disobedience appeals to the bad effects of the particular law he disobeys to justify his action. His action, though, because it aims to demonstrate and highlight, may actually have a positive consequence by undermining that specific law.

A bad law because of its bad effects can reduce the long-term benefits of a legal system of which it is a part. For the utilitarian an action is right if it contributes to long-term benefits. Disobeying a bad law tends to make that law ineffective. If a bad law is rendered ineffective, the bad effects of that law are reduced. If the bad effects are reduced, a contribution is made to long-term benefits. In this sense some grounds for disobedience to bad laws are provided. Disobedience, though, can only undermine a specific law if it does not simply fall into that class of actions that others are not to consider as affecting their obligation to obey. The civil disobedient tries to show that no one is morally obligated to obey the particular law in question -- i.e., he tries to show that the law should not be law because

it is unjust. Our question is whether civil disobedience as defined can be viewed as having an acceptable kind of selective undermining like that outlined above--i.e., can it fall into a class of actions which effectively undermine a law which on utilitarian grounds ought not to be a law and which ought to be undermined or removed?

The definition of civil disobedience requires that the action be against unjust laws. From a utilitarian viewpoint, as we have pointed out above (p. 55), not all unjust laws will be acceptable targets of civil disobedience. For instance, laws regarding parking in specified areas may have the frequent consequence of treating individuals unjustly and yet to violate them publicly and deliberately with a view to having those laws changed or removed would not be justifiable since in the long run parking laws contribute to over-all benefit by regulating the behaviour of persons using cars in certain areas. The harm done by the law is relatively insignificant compared against the law's benefits.

This suggests that the act of civil disobedience would have to be directed at some major injustice. Without any doubt major injustices, as we have discussed them above, undermine the long-term benefits of a set of laws. Minor injustices are compensated for in the long run whereas major injustices are not compensated for and themselves cause great unhappiness. In such cases, the importance of justice militates against an absolute obligation to obey any and all

laws. As Sidgwick puts it, when injustices are not major, "...we cannot draw a sharp line between valid and invalid claims; 'injustice' shades gradually off into mere 'hardship'."[16] As we indicated in our discussion of justice, this means that civil disobedience ought only to be directed against serious infringements of personal rights.

The general considerations we have given provide the basis for a justification of civil disobedience. However, many specifics of the actual circumstances within which the action would occur have a bearing on the effects of any given instance of civil disobedience and hence on whether that action will be justified. The type of regime, the availability of reform processes, the likelihood of success, and the possibility that the action might appear to be simply criminal are four important factors.

For any system of law we may assume that it contains some procedures which we term the normal process of reforms. If this process, which is legal and therefore involves no disobedience, has not been used, one could not know, however limited that process was, whether it would be successful. If it were successful, the injustice would have been rectified without stepping beyond the law and thereby raising questions of obedience. Certainly this would be preferable. Thus it seems that one condition for the justification of any actual instance of civil disobedience should be that the normal process of reform has been tried. Still, the extent

to which and the tenacity with which such processes must be tried will depend on their efficacy, which in turn will depend on the type of regime.

The action of civil disobedience must have some reasonable likelihood of succeeding. If one could not anticipate some positive effect then the action would not be able to contribute to long-term benefits. Under such circumstances civil disobedience would appear to be simply a public disorder which in spite of its character of denouncing injustice would have no effect on that injustice.

Because civil disobedience is a public and deliberate action, it would seem that civil disobedience would be most likely of success in those regimes which assume some sort of public participation or influence on legislation. For instance, although a strict military dictatorship might find itself unable to restrain the discontent evidenced by an act of civil disobedience, it would be unlikely to acknowledge or respond to it. It is, therefore, fair to assume that civil disobedience would be most likely to have the intended effect under more tolerant and responsive regimes. One might go as far as to say that civil disobedience is most pertinent in those regimes which base their rule in a principled way on the support offered by the population rather than on measures of control or coercion.[17] However from a utilitarian viewpoint, this is not a necessary restriction, but one dependent on the assessment of particular

facts about the regime.

As well as the foregoing considerations, the act of civil disobedience must be distinguishable by others from criminal acts--i.e., actions in violation of a law but which have no relation to demonstrating or changing injustices arising from that law. Consider a person who is subject to a military draft law. He is called to service under the act and, rather than serve, goes into hiding. Is his act, which clearly breaks the law, civil disobedience or simply criminal? The act is public, in a sense, and deliberate. However his intention is not clear. He might break the law simply to avoid service or he might believe that the draft law is unjust. If he believed the latter, he could view his act as one of civil disobedience. But his action of hiding which breaks the law would not express his view that the law is unjust. The manner in which he disobeys does not demarcate his action from others who disobey in a like manner, not for the purpose of civil disobedience, but simply to avoid service. If civil disobedience is to be taken seriously and hence have some likelihood of success, it must be clearly demarcated in the view of others from such criminal acts.

It would seem that for instances of serious injustice, if the foregoing considerations are taken into account, the over-all effect could be to rectify the injustice, and to yield increased benefit without undermining the system of

law in any significant way. In fact one could argue in addition that the rectification of the injustices in the law will have the effect of reinforcing support for that system of law. Subsequent to the effects of civil disobedience (i.e., a change in the law which would not otherwise have occurred) the system would appear more legitimate and would contribute more to long run benefit than before. This would move the system more within those conditions which the utilitarian argument for obedience requires.

Let us now return to the case of a law prohibiting certain religious practices including public worship which was outlined above (pp. 45-46). The case is that the religious persons affected do no harm directly to society and that their religious precepts contribute to their individual happiness as well as aiding them to act in a way conducive to the general happiness of others--e.g., through acts of benevolence. We remember also that violation of the law is accompanied by a severe penalty which would be applied to every member of the religious groups regardless of whether they actually violated the law. Would civil disobedience be justified by utilitarian considerations and if so would civil disobedience also be a duty and not just a permission?

A utilitarian must first consider whether the law constitutes a major injustice, for if it were not, civil disobedience would not be justified, as we have shown above.

In other words does the law violate an essential personal right? Religious practices firstly concern the pursuit of an individual's own aims. His participation is a choice which he may be said to make on the basis of his values. The practice of religion is a private matter of the individual. This consideration alone suggests that on the basis of the harm principle legal interference with religion is not justified and constitutes a major injustice because of its interference with private activities. If a law prohibiting religious practices were to be justified, the religious practices in question would have to be shown to be of harm to others. Let us assume that the religious practice of public worship cannot be construed as harming others. The law, then, directly prevents religious persons from pursuing their own happiness in a legitimate way--a right they are entitled to by the harm principle. Since not all persons are religious and since, in the example we are considering, only some religions are affected, the law restricts the right of only part of the population to pursue one's own benefit and does so with no justifying reasons--i.e., arbitrarily. We may conclude, then, that the law involves a major injustice. This injustice in the content of the law is compounded by the nature of the penalty for violation of the law. The penalty is such that even those religious persons who do not engage in public worship will be severely punished. A person is harmed when the harm is

not justified by his actions.

Because the injustice is severe, we have strong reason to believe that the obligation to ob[redacted] this particular law is in doubt. However, for the utilitarian it does not follow that the best course of action is to disobey the law. If we assume that the legal system is basically just, it follows that in the long run it contributes to the general welfare. This particular law regarding religious practices may then be viewed as a serious impediment to the continued success of the legal system in achieving the general welfare. The fact that such a law has come into existence in an otherwise basically just legal system leads one to reflect on the character of the regime which instituted it. If one had grounds to believe that the regime in question were likely to pass similar laws in other areas, the grounds for opposition to this particular law are enhanced.

Let us assume that some public influence through normal reform processes is possible and appears to stand a chance of effecting some change in the law. As we suggested above the utilization of such processes may not always be necessary. However, in this case, because of the severity of the penalty for violation of the law, they appear to be necessary. If they could be successful the risk of grave harm to all religious persons attendant on the use of civil disobedience would be avoided. Such processes would have to be tried and would have to fail before civil disobedience could be consid-

ered. Of course their failure would reflect negatively on the regime in question, casting doubt on its openness to influence, especially so because the injustice appears so clear and substantial.

Distinguishing public worship as an act of civil disobedience from simple criminal activity would be in this case a relatively straightforward matter. At the time of the action a direct statement that the action was intended to show the injustice of the law would probably be sufficient. The key here would be to ensure sufficient publicity for the action.

The final and most difficult condition to meet concerns the likelihood of success. It is important to notice that only those persons who are victims of the law are in a position to violate the law. If a person is not a member of the restricted religions he would not be in a position to engage in public worship. Thus, no one would be in the position of inflicting harm on others as a consequence of his actions on their behalf. Only those who are treated unjustly by the law and by the severe punishment of even the innocent prescribed by the law are in a position to use civil disobedience against the law. The success of civil disobedience will depend to some extent on the nature of the regime and its commitment to the law in question. This factor, however, is more to be discovered by civil disobedience than ascertained absolutely in advance. The

likelihood of success depends primarily on the effectiveness of the action in demonstrating the injustice of the law. In the case we are considering little doubt could be cast on the view that violation of the law by a few or by many would, if the regime extracted the penalty, demonstrate the injustice of the law. Presumably the regime would attempt to punish all those who are members of the religious groups.

This consequence of the action of civil disobedience brings us to the consideration of the action itself. If only a few persons acted in violation of the law and then, if the regime exacts the penalty, those few who have acted bring down upon others great harm. Even though the regime's action is wrong this does not remove the fact that the few civil disobedient persons have brought harm to others. There are two ways a utilitarian may avoid the conclusion that civil disobedience would then be unjustified. Both rely on the notion that a person is the best judge of his own good. If through various means of communication the vast bulk of those persons affected by the law agreed that the law was intolerable and must be resisted, they would in a sense have agreed to accept the harm that could arise from the act of civil disobedience. Thus it could be agreed that only a few would act or that large numbers would act simultaneously. Under this condition, civil disobedience could be justified.

The necessity of agreement amongst those affected by

the civil disobedience has an important consequence. We have established that utilitarianism would justify the action but not whether it is a duty or simply a permission. Utilitarianism cannot in this case require that an individual sacrifice his own good for the benefit of others or society.[18] In the specific context we are discussing sacrificing one's own good is what is involved in the action of civil disobedience. Each individual who is a member of the restricted religious groups, considered on his own, is harmed by the law, but not harmed so greatly as the harm resulting from the penalty of the law. In the immediate sense, given the existence of the law, he is least harmed by the path of obedience. His choice to engage with others in civil disobedience risks incurring the harm from the penalty attached to violation of the law. In this sense he is sacrificing his own good, for a good purpose. Civil disobedience, then, is not a duty, but rather an action which is morally permissible on utilitarian grounds.

We have so far considered civil disobedience on the assumption that no other actions of civil disobedience are occurring. We may now take up the problem of coordination and the effects on stability. In the justification of civil disobedience given above, the effect of the act on the existence condition for a legal system is negligible. However, if other groups in the same society were to engage in civil disobedience against some other unjsut law or laws,

it would be possible for the level of civil disobedience to approach that threshold where the actions resulted in an actual undermining of the legal system because of their combined effect. One anticipates that as the legal system moves from basically just, with few unjust laws, to basically unjust, with many unjust laws, the likelihood of this threshold being approached would increase. If civil disobedience were widespread in this sense, its effects on justice and in increasing net benefit would more than likely be outweighed by the attendant undermining of the legal system. This means that civil disobedience will be justified only when the agent can be sure that few other acts of civil disobedience will occur. This is true even in basically just systems since even in such systems several major injustices could arise, and since the fact that the system is basically just gives greater strength to the obligation to maintain it.

We must note that the effects of civil disobedience on the beliefs of others about the legal system or about the efficacy of civil disobedience as a appropriate action against injustice, although real consequences, cannot be counted as relevant consequences when assessing the moral rightness or wrongness of the action. These others are themselves moral agents and must be held responsible for their actions. They may believe that the example set by successful civil disobedience means that civil disobedience

is appropriate, but they will be right or wrong in their belief depending on the particulars of the situation in which they act. Utilitarianism justifies actions by their consequences and it would be incorrect to think that other persons' actions can be used as justification for one's own actions without considering the consequences of those actions.[19]

A further question may be raised on civil disobedience in basically unjust systems. It would appear that the obligation to obey is seriously limited by the injustice of the system--i.e., the system contributes very little to the net balance of happiness. In this case it might appear that the more the system is undermined the better, since such undermining would render many of the unjust laws ineffective. The problem is that such undermining does not replace those laws with appropriate laws; rather it weakens the legal system beyond the point where it can contribute at all. It leads to instability of great proportions. It must be remembered that the utilitarian also argues that some legal system is better than no legal system and hence that actions which erode the legal system rather than rectifying its flaws would be wrong.

C. Final Remarks

Before assessment can be made of the utilitarian account we must decide what the theory is capable of achieving. Utilitarianism as we have described it provides a basic

criterion of of morality and certain specific derivative principles which indicate which consequences and factors must be taken into account in making moral judgements. We have shown how these principles operate with a specific case. However, two important elements present problems for the account: the role of individual judgement and, closely related to this, the demands for accurate information.

The final considerations in justifying civil disobedience require that the individual have accurate information about the intention of the regime and the actions of other persons in the population. If he cannot accurately assess these, he either cannot make a decision or he risks acting wrongly. If he acts wrongly he either jeopardizes the legal system and hence a very important condition for promoting and maintaining happiness or fails to act to tectify an injustice when it is possible to do so. Since civil disobedience is not a duty, his failure to rectify an injustice is not as serious as jeopardizing the legal system. In the absence of accurate information, the individual contemplating civil disobedience must act conservatively and tolerate the injustice until the information can be obtained.

As is true of any moral theory, individual judgement is required to arrive at a definite answer. However, with utilitarianism no specific rule applies to the case of civil disobedience. In other words, the theory does not arrive

at a specific principle which defines when civil disobedience is the appropriate moral course of action. In this case the reliance on individual judgement is great. Equally so, the consequences of error on the part of the individual are serious. The utilitarian view can give a clear answer where all appropriate knowledge is available, but it requires of the individual knowledge which may be exceedingly difficult to obtain. The most direct alternative to this theory is one in which the demands on individual judgement are curtailed. This is precisely what Kant may be viewed as doing in his attempt to find rules which are authoritative for all individuals and which rely as little as possible on the complex assessment of particular facts.

Footnotes

1. Jan Narveson, Morality and Utility (Baltimore, Maryland: The Johns Hopkins Press, 1967), p. 17.

2. Henry Sidgwick, Methods of Ethics, 7th Edition (London: MacMillan and Company, Limited, 1962), p. 440.

3. David Hume, A Treatise on Human Nature, Edited by L.A. Selby-Bigge (Oxford: Oxford University Press, 1888, 1968), p. 497.

4. M. Gandhi, The Essential Gandhi, Edited by Louis Fischer (New York, N.Y.: Vintage Books, 1962), pp. 84-111.

5. John Stuart Mill, Utilitarianism, in Utilitarianism, Liberty, and Representative Government (London: J.M. Dent and Sons, Everyman's Library, 1964), p. 55.

6. Henry Sidgwick, op. cit., p. 459.

7. John Stuart Mill, op. cit., p. 50.

8. "...justice is a name for certain moral requirements,

which regarded collectively, stand higher in the scale of social utility, and are of more paramount obligation, than any others; though particular cases may occur in which some other social duty is so important as to overrule any one of the general maxims of justice." John Stuart Mill, op. cit., p. 59. An alternative view of the relation of justice and utility, which maintains that each is an independent standard, both of which must be met, is expressed by Paul W. Taylor in "Justice and Utility", in Canadian Journal of Philosophy, Volume 1, Number 3 (March, 1972), p. 327.

9. John Stuart Mill, op. cit., p. 40.

10. Ibid., p. 41.

11. Ibid.

12. Ibid.

13. Ibid., p. 42.

14. John Stuart Mill, On Liberty, in Utilitarianism, Liberty, and Representative Government (London: J.M. Dent and Sons, Everyman's Library, 1964), p. 149-150, and Jan Narveson, op. cit., pp. 159-160.

15. John Stuary Mill, On Liberty, pp. 72-73.

16. Henry Sidgwick, op. cit., p. 444.

17. Cf. Peter Singer, Democracy and Disobedience (Oxford: Clarendon Press, 1973), pp. 7,58-62.

18. Jan Narveson, op. cit., pp. 165-167.

19. Ibid.; p. 158. Cf. R.A. Wasserstrom, "The Obligation to Obey the Law", in H.A. Bedau, Civil Disobedience: Theory and Practice (New York, N.Y.: Pegasus, 1969), pp. 257-258.

Chapter III: Kant

A. What is an Unjust Law?

The fundamental problem of Kant's political ethics is the justification of the use of force. The solution Kant gives is an implication of his fundamental conception of morality. This conception is given in the several formulations of the categorical imperative which he maintains is the fundamental a priori principle underlying all morality. His principle of justice is derived from the application of the categorical imperative to the specific problem of the relation of life in a moral community to the concept of freedom. His principle of justice is: "Every action is just that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law."[1] In order to understand the status of this principle of justice we shall consider the way in which it is derived from the categorical imperative.

The Foundations of the Metaphysics of Morals[2] is concerned with the investigation and establishment of the supreme principle of morality. This principle constitutes a common presupposition of all moral judgements and is given by Kant several expressions, each of which has the form of a categorical imperative.[3] Each of the formulations brings to light slightly different implications of the one supreme principle of morality. As Paton observes Kant speaks as if there were three formulations but in fact appears to give

five, each of which highlights different aspects of Kant's conception of morality.

These formulae are:

I. Act only through that maxim through which you can at the same time will that it should become a universal law.

Ia. Act as if the maxim of your action were to become through your will a universal law of nature.

II. So act as to treat humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means.[4]

III. So act that your will can regard itself at the same time as making universal law through its maxim.

IIIa. So act as if you were always through your maxims a law-making member in a universal kingdom of ends.

Before taking up some of the problems surrounding the differences in these formulae, we shall examine the nature of a categorical imperative and the concept of a maxim. A categorical imperative as expressed in these formulations is an imperative which commands unconditionally. It is meant to apply without reference to conditional or optional purposes or ends. On Kant's view, reason commands in two ways, categorically or hypothetically. The former, the categorical imperative, has the form 'Do X', for example, 'Do not steal'. This applies regardless of the inclinations, desires or purposes that an agent might or might not have.

The command 'Do not steal' does not make any reference to the motives or purposes an agent might have for stealing. A hypothetical imperative has the form 'Do X if you wish Y', for example, 'Take lessons if you wish to learn to play the piano'. Action under a hypothetical imperative is dependent on having certain inclinations, desires or purposes. If a person wishes to learn to play the piano he must take lessons and practice. But he need take lessons and practice only if he intends and desires to learn to play the piano. This is strikingly different from 'Do not steal' which commands that one not steal even if one has a purpose or an inclination or desire to do so for some specific reason.

A person may be motivated or determined (caused) to act in two ways: either mediately through inclination or directly by reason having full dominance over inclinations.[5] A maxim is the subjective principle which in fact moves a person to act. It is a rule of conduct which agents either explicitly or implicitly utilize to direct their actions.[6] In so far as a maxim is a subjective principle, it is viewed as valid for the will of the agent only. For example, a person might act on the maxim: 'I will steal when I cannot afford to purchase what I steal'. This maxim is stated so that reference is made to no other agents. It contains the purpose of obtaining some object and a specification of a particular means and certain conditions for the use of that means--stealing and not being able to purchase the object.

Maxims of this sort are material maxims. A formal maxim is one which abstracts from individual subjective desires. Formal maxims correspond to the condition of being motivated to act by reason having full dominance over inclinations. They are, then, connected to categorical imperatives as a basis for action, while material maxims are connected to hypothetical imperatives because of their reference to inclinations and desires. Maxims, Kant says, "...are subjective...when the condition is regarded by the subject as valid only for his own will. They are objective, or practical laws when the condition is recognized as objective, i.e., as valid for the will of every rational being."[8]. Practical laws, because they are valid for the will of every rational being, constitute the substance of morality. Thus to act morally a person's maxim must correspond to a practical law. Practical laws, in turn, must rest on a categorical imperative because practical laws in order to be valid for the will of every rational being must abstract from individual subjective purposes, inclinations, and desires. The supreme principle of morality which Kant sets out to determine must then have the form of a categorical imperative.

The several formulae which Kant appears to say are all expressions of the categorical imperative need to be understood in their relation to each other. Formula I is of little use as a practical guide to conduct as it has been

sometimes interpreted.[9] It simply expresses the notion that the rational will must be subject to universal laws. Formula Ia illustrates this notion by making reference to laws of nature. A law of nature is a law "...according to which everything happens."[10] A law of nature states a necessary relation in the empirical world. In this formula an analogy is drawn between moral laws and laws of nature: "Everyone must admit that a law, if it is to hold morally, i.e., as a ground of obligation, must imply absolute necessity;...."[11]

Formulae I and Ia, then, state something about the nature of moral laws--namely their universal character. If one's maxim is to be a morally sound one, it must be capable of taking the form of a universal law. Formula II asserts that every person is an end in itself and, if an action through its maxim is to correspond to a practical law, that maxim cannot treat another person solely as a means to the satisfaction of the inclination or desire contained in the maxim. As Paton puts it, "...the will of a rational person is not to be subjected to any purpose which cannot accord with a law which could arise from the will of the person affected himself."[12]

Formula III, which is refered to as the principle of autonomy, expresses the notion that not only is the rational will subject to universal laws, but it is in addition the source of laws: it is self-legislating.[13] Formula IIIa

brings the notion of autonomy into a human context by making reference to the kingdom of ends implied by a multitude of persons who are ends in themselves.[14]

T.C. Williams has argued that the categorical imperative must be viewed as a statement of the principle employed in the spontaneous activity of practical reason--i.e., a statement of the nature of moral acting rather than as an immediate practical guide to making moral judgements.[15] In this sense Formulae I and III are the key statements of the categorical imperative which Kant set out to reveal in the Foundations of the Metaphysics of Morals. They are similar in their import as imperatives but each emphasizes a separate aspect. Formula I emphasizes the compulsion of the moral law--i.e., that the will must be subject to universal law, while Formula III emphasizes that the rational will is author of the moral law. Because the rational will is author of the law--i.e., is self-legislating--and because the form of its imperatives is categorical, the will is autonomous.[16] The categorical imperative abstracts from subjective ends and the will governs itself taking into account that each person is an end in himself. Kant takes Formula III, the principle of autonomy, to be the sole principle of morality which he set out to determine. He says "...the principle of autonomy...is the sole principle of morals...[We] find that [morality's] principle must be a categorical imperative and that the imperative commands

neither more nor less than this very autonomy."[17]. He reiterates this view when he says: "The autonomy of the will is the sole principle of all moral laws and of the duties conforming to them."[18].

Kant reaches this conclusion by arguing from the nature of the determination of the will of rational beings. The will is a kind of causality operating in living beings in so far as they are rational.[19]. Freedom is the property of this causality by which it can be effective as a ground of action independently of external causes. Because it is a kind of causality, freedom does not mean arbitrariness nor does it mean that any action whatsoever may be rightly chosen by the will. Kant argues that the concept of causality implied by the definition of freedom implies the concept of laws, "...according to which something, e.g., the effect, must be established through something else which we call cause,...."[20]. Although the will is free in the sense that it is not determined by external causes, such as the laws of nature and physical necessity, it is nevertheless not lawless. It is governed by fixed laws of the will. This freedom of the will implies that the will is autonomous, that is, that it may be a law-maker for itself in all its actions. This freedom is expressed in Formula III, the principle of autonomy.

Thus Kant argues that freedom of will implies self-legislation of the will, that these two in fact constitute

the autonomy of the will, and that this autonomy of the will implies the sole principle of morality.[21] Kant also argues that in order to conceive of freedom the person must view himself not from the standpoint of the world of physical sense, but from the standpoint of the intelligible world--the realm of reason.[22] When man conceives himself in the realm of reason, he implies that he is free in a certain sense, and this sense of freedom implies that he is autonomous of external causes. The will is a free form of causality, and if it is to be autonomous of external causes it must also not be determined by things external to the will such as desires and inclinations. The categorical imperative which abstracts from desires and inclinations is then the only ground of the rational will. In this sense, rationality--i.e., the standpoint of the intelligible world--is the fundamental basis of the moral law.

The movement from these considerations regarding the principle of autonomy to the principle of justice is twofold. On the one hand the subject of justice is specified by a consideration of the types of duty. On the other hand the principle itself is derived from Formulae III and IIIa. Kant identifies four types of duties: (1) perfect duties to oneself, (2) perfect duties to others, (3) imperfect duties to oneself, and (4) imperfect duties to others. Perfect duties admit of no exception while imperfect duties such as benevolence admit of exception. The various practical laws

which compose morality fall into one of these categories. The category of perfect duties to others involves external actions by the agent which affect other persons. These are the objective laws which one can be compelled to obey by an external force. One cannot be compelled not to commit suicide (a perfect duty to oneself) but one can be compelled to keep a promise made in a contract (a perfect duty to another). The subject of justice is the relation of the will of one man with the will of others with regard to perfect duties to others. If one has a perfect duty to others (i.e., one admitting of no exceptions), this implies a correlative right on the part of those others.[23] Because these perfect duties to others involve external actions, they can be subject to external force in order to ensure that they are fulfilled.

Formula IIIa states 'so act as if you were always through your maxims a law-making member in a universal kingdom of ends'. Since justice has as its subject the relation of will to will and each person is to be considered free, this formula suggests that the central problem of justice is to find a principle which reconciles each person's autonomy and freedom with that of others. Kant says "the concept of justice does not take into consideration the matter (content) of the will, that is the end that a person intends to accomplish by means of the object that he wills;.... Instead in applying the concept of

justice we take into consideration only the form of the relationship between the wills in so far as they are regarded as free, and whether the action of them can be conjoined with the freedom of the other in accordance with a universal law. Justice is therefore the aggregate of those conditions under which the will of one person can be conjoined with the will of another in accordance with a universal law of freedom."[24].

We should note that even though the derivation of this view of justice rests on the various formulations of the categorical imperative, which are a priori, the fact that justice involves an aggregate of empirical conditions means that the principle of justice is not an a priori principle but a practical law. The principle of justice, which we stated above, is "Every action is just that in itself or in its maxim is such that the freedom of the will of each can coexist together with the freedom of everyone in accordance with a universal law."[25]. Since this principle does not function as a maxim itself, it cannot be required by external legislation (or force) that a person adopt this as a maxim. A maxim is a subjective principle and as such is not subject to external force. Kant says "...anyone can still be free, even though I am quite indifferent to his freedom or even though I might in my heart wish to infringe on his freedom, as long as I do not through an external action violate his freedom."[26]. A maxim of acting justly,

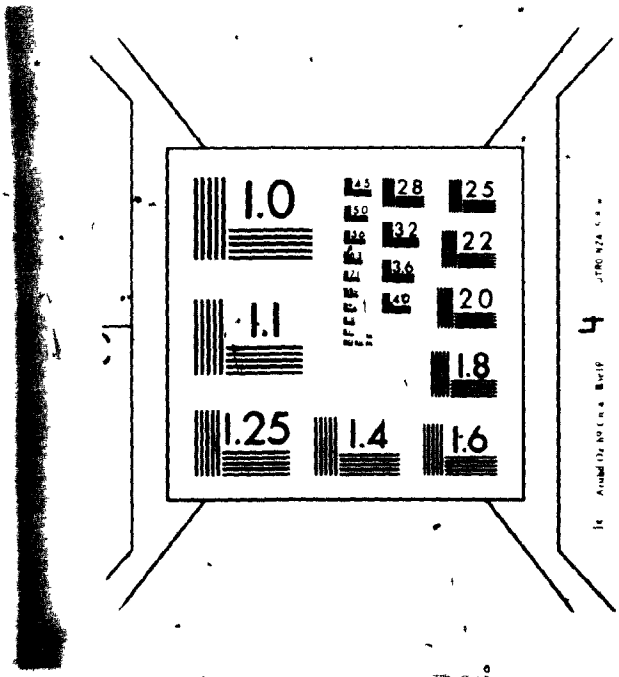
which will be of interest to us in the sequel, is a requirement of virtue and has the form "Act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law".[27.]

Justice, then, because it involves perfect duties to others, is concerned with securing rights. "Rights, considered as moral capacities to bind others, provide the lawful ground for binding others. The main division of rights is into innate rights and acquired rights. An innate right is one that belongs to everyone by nature, independently of any juridical act; and acquired right requires such an act."[28.] The crucial innate right is freedom in the sense of "independence from the constraint of another's will, in so far as it is compatible with the freedom of everyone else in accordance with a universal law...."[29.] An acquired right must be ascertained by the relation of persons under the conditions of justice.

So far Kant has said nothing of positive laws and governments, although these are implied by the notion of external legislation. The subject and principle of justice have been defoned without reference to any public legislative authority. The subject and principle of justice constitute an ideal which any legislative authority must aim at. The exercise of authority by a public legislative body involves the use of force. To apply force to a person is to impair his freedom. Any use of force can be justified

only by reference to those external actions of a person which do not accord with the principle of justice. In other words, force may be justified to prevent injustices. As Kant points out, if anyone hinders the performance of actions following from the universal principle of justice or hinders the maintenance of the condition stipulated in the principle, he does an injustice because such opposition "cannot coexist with freedom in accordance with universal laws".[30] Thus if there is to be any public legislative authority, there must also be some forms of force which, although they are invasions of freedom, nevertheless do not violate the freedom of persons in accordance with universal laws.. Thus Kant distinguishes coercion--the morally justified use of force--from violence--the morally unjustified invasion of freedom.

Kant argues that justice exists prior to any civil state--i.e., one with a public legislative authority. In a condition without such authority, each individual could exercise coercion against unjust acts. This condition however has one grave defect in so far as each individual must judge for himself what is just and what is unjust even though his own particular interest might be best served by unjust acts. This problem arises precisely because man is not a purely rational being but also has inclinations which cause men to abuse their freedom with regard to others.[31] Men need to be both master and judge of actions. Ideally



a man is his own master through his regard for the moral law. But since men are influenced by their desires and inclinations and are fallible, a judge must be external to any particular relation of one man to another man. Without such an external judge there can be no assurance of justice.[32.]

The ideal circumstance with regard to public legislative authority would be the perfect civil constitution in which any unjust acts would be violations of positive law and in which no positive law violated the principle of justice. Kant is aware that such a condition does not exist and may never be fully attained; nevertheless it is a goal to be strived for.[33.] He takes this fact to imply that the main task is to enter into and maintain a condition where there is a public legislative authority, regardless of its imperfections, for it is only in such a condition that there is any hope of securing justice. Thus he gives the following postulate: "If you are so situated as to be unavoidably side by side with others, you ought to abandon the state of nature and enter, with all others, a juridical state of affairs, that is, a state of distributive legal justice."[34.] Kant defines 'distributive legal justice' as a form of court or judicial body which ascertains what the actual law is as it applies to a particular case.[35.] As a court it fulfils the role of external judge. The actual laws with which it deals are established by a legislative authority that, whatever its composition, legislates laws which ought

to conform with the principle of justice but which may not so accord. This legislative authority constitutes the sovereign of any state. In so far as the rule of law created by such a state conforms to the principle of justice in its enactments, it reflects the cooperative harmony implied in the principle of autonomy and Formula III as applied to that which is capable of being externally legislated.

An unjust law then is any law which is not in accord with the principle of justice and hence violates a right by unjustifiably invading an individual's freedom. A law may be unjust in the sense of being an unjust invasion of freedom or in the sense of an attempt to legislate that which cannot properly be the subject of external legislation--e.g., inperfect duties to oneself or others such as benevolence. Kant suggests that the idea of an original contract is useful as a guide to assessing at the legislative level what is just or unjust. However he emphatically maintains that the notion of an original contract is not the foundation of any political obligation.[36] He says:

> It [the contract idea] is in fact merely an idea of reason, which nonetheless has undoubted practical reality; for it can oblige every legislator to frame his laws in such a way that they could have been produced by the united will of a whole nation,.... this is the test of the rightfulness of every public law. For if the law is such that a whole people could not <u>possibly</u> agree to it..., it is unjust; but if it is at least <u>possible</u> that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position... that it would refuse its consent.[37]

Using this notion as a guide Kant gives some examples of unjust laws. He says that it would be impossible for a people to agree to a law which established an hereditary class of rulers out of a class of subjects. A law which imposed a tax on some members of a class but not on others of the same class would be unjust "since an unequal distributions of burdens (amongst a given class) can never be considered just."[38] One cannot on the other hand oppose a war tax which is oppressive as being unjust "since it is at least possible that the war is inevitable and the tax indispensable, so that the tax must be deemed rightful...."[39]

Even though Kant has established an ideal at which political action can be aimed, he is fully cognizant of the practical reality that unjust laws may be promulgated and that it is always a difficult task to bring the civil condition closer to the ideal than it actually is. At the same time, though, his theory puts the justice of laws clearly in the forefront of the assessment of laws. Justice also, as we shall see, is placed in a central position in determining what can be done in the face of injustice.

B. Resistance to Authority and Civil Disobedience

The condition that men actually are in, as Kant is well aware, admits of varying degrees of injustice--in the actual laws established, and in the administration of laws, be they just or unjust. Kant, as indicated in his concern for a perfect civil constitution and through his principle of

justice, clearly believed that individuals had a duty to promote and further justice. But he places so much importance on the civil state as a prerequisite for justice that no action promoting justice could be justified if it violated the existing civil condition.

Kant's specific arguments regarding disobedience deal only with revolution as a possible remedy for injustices perpetrated by the state. He mentions only a few times actions other than revolution which would be justified responses to injustice. However, the arguments he gives against revolution establish, as we shall see, the factors which Kant views as decisive for any form of opposition to established authority, including civil disobedience.

By revolution Kant means the forceful removal of authority from those persons who act as sovereign (the legislative body) or from the judicial body of a state.[40] We may place his arguments under two main headings.

Argument Ia. In order for the forceful removal of authority to be justified, it would have to be possible for it to be a right of the people. If one cannot consider it justified for another to attempt the overthrow of the sovereign or ruler because for a variety of reasons he opposes its actions, one can claim no such right for oneself. Since it is a question of the use of force one must ask if the use of force in this case could be a justifiable invasion of freedom. Whatever is a justifiable invasion of

freedom is also capable of being made the subject of external legislation--i.e., law. If there is to be a right to revolution, then on Kant's view, it must be possible that there could be a law permitting revolution. Such a law, Kant argues, would say in effect that the law (i.e., the supreme legislation) is not supreme, that is, that it does not stand as judge between private individuals. Since this is self-contradictory there could be no such law. There could then be no right of revolution and without there being such a right, revolution cannot be justifiable.[41]

Kant's argument does show that there could not be an actual law stating that revolution was permissible under certain circumstances. Clearly though, this is not what is at issue. The question at issue is whether there are any conceivable circumstances under which there is a moral right to revolution independent of legal permission. Kant appears to equate the moral justification of the forceful removal of authority with the requirement that any action which is to be justified and which involves the relation of one human will to another must be capable of becoming positive law. In Kant's view, what could not be made law cannot, in so far as it involves the relation of will to will (justice), be morally right. Thus he says that since revolution could not be made possible through a positive law, it cannot be morally right. We shall return to this matter at a later point when we consider the weakness of

Kant's implicit views regarding civil disobedience.

Argument Ib. Kant offers one possible counter-argument to his argument against revolution. If one argues that in revolution one attacks only the administrators of legislation, Kant replies that the sovereign already has the right to replace the executive and hence the people usurp the authority of the legislative body if they do so.[42.]

Argument II. The sovereign and the executive bodies viewed as moral persons are established to judge conflicts amongst the members of the community and, if some of those members would choose to resist the sovereign by force, they are in conflict with those persons. No one could then stand as judge in any particular case where the sovereign and the subjects are in conflict. Indeed, Kant says, the members who resist or attack by force, "...act as judges of their own cause, and that is absurd."[43.] What Kant must mean is that those who resist are thwarting the very basis of a legal system backed by coercive authority--that is, that the legal system and its officers are to act as judges of conflicts.

It should be noted that Kant's arguments make no reference to the justice or injustice of the sovereign's acts per se. There is no argument claiming that the nature of the acts being opposed provides any reason justifying the opposition. The burden is placed solely on the acts of opposition as a relation of will to will. Since the

sovereign and the judicial body constitute the rule of law even though it may be imperfect, to overthrow them is to overthrow the rule of law and the legal system by which it is effected. This would be wrong since it violates the postulate of public law (see p. 90). This consideration leads Kant to say that even the most intolerable and unjust government cannot rightfully be overthrown, for this would be in effect to abandon the civil state for the state of nature.[44]

These two arguments leave open the nature of actions opposing injustice which do not involve force or the attempt to act as judge of one's own cause, i.e., to usurp the authority of the legislative authority. Clearly, though, any active resistance is questionable from Kant's standpoint in so far as it involves the use of some force or in so far as it involves usurping legislative authority.

Civil disobedience as we have defined it is a response to injustice in laws. Its place arises when the injustice has been pointed out and the appropriate authorities have failed to act to rectify the injustice. Civil disobedience is distinguished from a demonstration or protest in that it involves the deliberate violation of an existing unjust law.

Argument I. Kant would argue that an act of civil disobedience is in effect an attempt to take legislative authority into one's own hands. It is an attempt to declare what is in fact a law not to be law. It is not simply saying

that the law is unjust and ought not to be law, but it is saying that, because the law is not just, the law in question is not a true law--i.e., not a law requiring obedience because of its conformity with justice. This is to usurp legislative authority. To do so one would have to argue that any person or group can exercise a right of disobedience. To allow this, though, is to say that the supposed supreme legislative authority is in fact not the sole legislative authority. In other words it says that each person may retain the discretion to judge for himself what the law is. But this is no different than the condition of the state of nature. Individuals are not forbidden to examine and form judgements about the justice and injustice of laws, but they cannot take actions which attempt to make those judgements take the place of law.

Argument II. This argument is closely related to the first. Kant says "no active resistance is permitted--no resistance, that is, in which an arbitrary association of the people coerces the government into acting in a certain way".[45] Civil disobedience clearly has as its goal that the government act in a certain way--i.e., that it modify or remove a certain law. It aims to create a situation in which the government will be compelled to act in a certain way. In so far as acts classed as civil disobedience have the effect of coercing a government they would be ruled out by this consideration as well as by those of Argument I.

For instance, the illegal occupation of a building would be ruled out by this argument. The occupation and refusal to leave unless certain acts are done by the government constitutes an attempt at coercion.

Let us look at the case of the law prohibiting certain religious practices. According to Kant's principle of justice, such a law is a violation of justice. It restricts the freedom of individuals with respect to a matter which ought not to be restricted--i.e., the freedom to engage in public worship is a freedom which is compatible with the freedom of everyone else, religious or not. Thus the law prohibiting public worship is an unjustified invasion of freedom and is thus unjust. But civil disobedience--i.e., the continuance of public worship in order to demonstrate the injustice of the law--is an attempt to usurp the legislative power that established the law: in so far as civil disobedience aims to render the law ineffective or unenforceable, it is an attempt at coercion of the government. In either case, it appears that the arguments presented above rule civil disobedience out as a morally justified action toward the government in question. Being a victim of injustice--i.e., being wronged--does not justify acting wrongly.

C. Objections

Kant does allow that protest, public debate and appeals to the ruling authority based on considerations of justice

are permissible as means for opposing injustice. But such methods clearly presuppose some form of receptive government --i.e., one which accepts and considers such appeals from the rule as legitimate and which is not also unjust in that it prohibits public debate and protest. From the utilitarian standpoint outlined in the last chapter, civil disobedience seems most appropriate precisely in such conditions where the permitted forms of appeal and legal protest have failed. For the most part there would seem to be seldom a case in such conditions where means more dramatic than civil disobedience would be necessary to effect the rectification of injustice. It seems clear, though, that under the conditions of a responsive government where legal means of redress are readily available, even if on occasion ineffective, Kant would rule out civil disobedience. As Reiss points out Kant believed that the course of history was tending toward greater justice and toward forms of political rule which would be more in accord with his conception of the ideal constitution. Although this consideration does not in any way follow directly from Kant's views on the basis of moral rules, his belief in it does give some explanation why Kant could suggest that no active resistance to established legislative authority, such as civil disobedience, could be right, without him recognizing clearly the difficulties of his view.

When this historical assumption is reversed to state

that a regime is moving in a retrograde manner away from a basically just system, the problems of his views are made most acute. Under a very unjust regime, the means of response to injustice which Kant permits would more than likely be themselves prohibited by the regime. And if actions such as civil disobedience are morally impermissible as Kant suggests, the people are in fact paralysed with respect to the promotion of justice. When a regime adopts a course of action which appears to be retrograde with respect to justice, the people are again prevented morally from taking action against that injustice. In fact they appear by Kant's arguments to be prevented from maintaining a condition of justice as they are required to do by postulate of public law. Individuals, if they are to act morally, ought to promote justice and obey the moral law. Kant does seem to recognize this when he makes the following unamplified remark. "Obey the suzerain (in everything that does not conflict with internal morality) who has authority over you."[46] The bracketed phrase implies a limitation on the duty to obey the established regime. This at least implies that a government cannot require one to be an agent of moral wrong. This means that at least one could refuse to act in a certain way as prescribed by law if the law meant that one would do wrong by obeying it. On the other hand it does not allow disobedience by those to whom wrong is done. Kant utilizes this principle in arguing that one

is bound to obey even the authority which might be established by a revolution but seems unaware that it implies that one is not obligated to obey when the established authority requires act in conflict with internal morality.

A further problem arises because Kant does not make the clear demarcation of justice from internal morality that his arguments against active resistance such as civil disobedience appear to require. Justice is that part of morality which is capable of external legislation but it still has an internal component. Kant says: "Ethical legislation is that which cannot be external...; juridical legislation is that which can also be external."[47] Considerations similar to these have led J.G. Murphy to argue that when a regime is particularly abusive of its power, it in fact becomes no more than a de facto use of power which does not represent the rule of law involved in the postulate of public law, and hence may be properly resisted.[48] A similar argument may be taken from Kant's definition of what constitutes the justified use of force. Force is justified only if it is used against unjustified invasions of freedom. Unjustified invasions of freedom, according to the principle of justice, follow from unjust laws. Force, then, especially in the sense of civil disobedience which is not violence against persons, could then be used against unjust laws. The justification would be similar to the justification of just laws. Without Kant's

belief that history tends toward more and more just regimes, some such consideration would have to be allowed by Kant. It seems that Kant's principles as derived from the categorical imperative require some such supplementary condition.

This will be made clearer if we examine the implications of Kant's explicit conclusions, leaving aside the ambiguities of his arguments against resistance to injustice. The possible justifications suggested in the foregoing paragraph are considerably more than Kant is explicitly willing to allow. More importantly, if Kant is unwilling to permit resistance in such cases, especially non-violent resistance such as civil disobedience, it appears that even under a regime which is a mere shadow of just rule the individual is allowed virtually no possibility of acting on his assessment of the morality of actions. In effect he is to give up his moral conscience completely to the hands of other men who are in positions of power with no possible effective recourse if they, as Kant recognizes is quite possible, abuse the power with which they are entrusted. Such a consequence seems quite opposed to the spirit of Kant's considerations regarding morality and the nature of moral action.

Moral action is based in Kant's view on the autonomy of the will--its capacity to be rational and to self-legislate. If we assume that an individual sincerely strives to be moral and takes the categorical imperative and its

practical implications seriously, then on Kant's explicit view he is, under an unjust regime, very likely to be required to violate the judgements which arise from his effort to be moral. He may in fact be required to do morally repugnant acts and to tolerate them as they may be applied to him. The individual may judge concentration camps, torture and persecution to be wrong; but he would have to tolerate them and not act against them nor resist them.

Kant's arguments have the unfortunate and problematic consequence that individual moral discretion with respect to the limits of political obligation is completely lost. Rather than implying only that one can never use force to rectify what one believes is unjust, his arguments imply that one can rarely take any effective action to promote justice when it is most lacking and that one's obligation to obey is never to be overruled. If one considers a regime which acts unjustly and arbitrarily in most matters and exacts harsh retribution from political opposition, one is left with no legitimate course of action except acquiescence. Clearly so-called normal appeals are ineffective. Any stronger actions such as civil disobedience to resist unjustified invasions of freedom also are prohibited when they offer a possible, effective means to the elimination of injustices. One must abdicate moral responsibility to whosoever holds power. One must not in effect take moral

responsibility into one's own hands with respect to government.

Kant's arguments against active resistance and their consequences for moral discretion and effective means of opposition derive mainly from the consideration of what is just and the necessary conditions for justice. Though law is a necessary condition for the ensuring of justice, it cannot be derived from this that every actual system of law does ensure justice. If Kant's conclusions are an inadequate response to the problem of unjust laws, we must look in another direction. In some cases the considerations of stability as Kant presents them must be overridden by stronger moral factors. Political obligation must be given more readily identifiable limits. More discretion to assess and to act on that assessment of the justice and injustice of governmental acts embodied in law must be allowed. Further principles must be expounded which satisfy the demands of a duty to promote justice. One must establish principles which delimit and specify the conditions in which active resistance such as civil disobedience may be undertaken. The duty to obey which Kant so forcefully asserts must be balanced against the facts that it is men who make laws and that they are subject to error. Kant has not offered a viable solution. Rawls may be viewed as attempting just the sort of required reconciliation.

Footnotes

1. I. Kant, Metaphysical Elements of Justice (hereafter, MEJ), translated by J. Ladd (New York, N.Y.: Library of Liberal Arts, Inc., 1965), 230, p. 35. References to Kant's works are by paragraph number as given in the translation followed by page number.

2. I. Kant, Foundations of the Metaphysics of Morals (hereafter, Foundations), translated by L.W. Beck (New York, N.Y.: Library of Liberal Arts, Inc., 1959).

3. I. Kant, Foundations, 392, p. 8.

4. H.J. Paton, The Categorical Imperative: A Study in Kant's Moral Philosophy (hereafter, The Categorical Imperative) (London: Hutchinson and Co., Ltd., 1947), p. 129 gives "use" rather than "treat"; however Beck gives "treat". "Treat" seems more appropriate since it avoids the modern idea of "using a person for a specific purpose" and thereby avoids confusing Kant's idea that a person is an end-in-himself.

5. I. Kant, Foundations, 421, p. 38 and 400, p. 15, and Paton, The Categorical Imperative, p. 60, and T.C. Williams, The Concept of the Categorical Imperative (hereafter, Concept) (London: Oxford University Press, 1968), p. 20.

6. I. Kant, Foundations, 421, p. 38, and T.C. Williams, Concept, p. 15, and Paton, The Categorical Imperative, p. 61.

7. I. Kant, Foundations, 421, p. 38, and Paton, The Categorical Imperative, p. 61, and Williams, Concept, p. 20.

8. I. Kant, Critique of Practical Reason (hereafter, CPR), translated by L.W. Beck (New York, N.Y.: Library of Liberal Arts, Inc., 1956), 19, p. 17.

9. H.J. Paton, The Categorical Imperative, p. 138.

10. I. Kant, Foundations, 388, pp. 3-4. See also Paton's discussion in The Categorical Imperative, pp. 146-162.

11. I. Kant, Foundations, 389, p. 5.

12. Paton, The Categorical Imperative, p. 169. See Kant, CPR, 87, p. 90 where he says "...every will, even the private will of each person directed to himself, is restricted to the condition of agreement with the autonomy of the rational being, namely, that it be subjected to no purpose which is not possible by a law which could arise from the will of the passive subject himself."

13. I. Kant, Foundations, 434, p. 51, and Paton, The Categorical Imperative, p. 180, and Williams, Concept, p. 22.

14. Paton, The Categorical Imperative, p. 184.

15. Williams, Concept, p. 130.

16. Paton, The Categorical Imperative, p. 181.
17. I. Kant, Foundations, 440, p. 59.
18. I. Kant, CPR, 33, p. 33.
19. I. Kant, Foundations, 446, p. 64.
20. Ibid., 446, p. 65.
21. Ibid., 446-447, pp. 65-66.
22. Ibid., 444-445, p. p. 74.
23. I. Kant, MEJ, 240, 241, pp. 46-47.
24. Ibid., 230, p. 34.
25. Ibid., 230, p. 35.
26. Ibid., 231, p. 35.
27. Ibid..
28. I. Kant, MEJ, 237, p. 43.
29. Ibid., 237, pp. 43-44.
30. Ibid., 230, p. 35.
31. Ibid., 307, pp. 71-72.
32. I. Kant, "Idea for a Universal History", in H. Reiss (Editor), Kant's Political Writings (Cambridge: Cambridge University Press, 1970), p. 46.
33. Ibid..
34. I. Kant, MEJ, 307, p. 71.
35. Ibid., 306, p. 70.
36. I. Kant, "On the Common Saying: This may be True in Theory, but It does not Apply in Practice", in Reiss, op. cit., p. 79.
37. Ibid..
38. Ibid..
39. Ibid..
40. I. Kant, MEJ, 320, p. 86.
41. Ibid., 320, p. 85.
42. Ibid., 322, p. 89.
43. Ibid., 320, p. 87.
44. Ibid., 307-308, pp. 71-72, and 320, pp. 86-87.
45. Ibid., 322, p. 88.
46. Ibid., 371, p. 139.

47. I. Kant, Metaphysical Principles of Virtue (New York, N.Y.: Library of Liberal Arts, Inc., 1964), 220, p. 20.

48. J.G. Murphy, Kant: The Philosophy of Right (London: MacMillan, The St. Martin's Press, 1970), pp. 138-139.

Chapter IV: Rawls

A. The Nature of Justice and the Duty to Obey

Rawls' theory and its implications for civil disobedience were undertaken with providing an alternative to utilitarianism especially in mind. He proceeds from the view that the utilitarian principle is not adequate as a fundamental principle of justice and from the view that justice, as "the first virtue of social institutions" has a value much more absolute than utilitarianism can grant it. "Each person possess an inviolability founded on justice that even the welfare of society as a whole cannot override,"[1]. Civil disobedience as a response to injustice takes its place in Rawls' theory as an important means for the promotion of justice under certain circumstances and for the stabilization of a just system. We shall outline Rawls' theory so that the nature of those conditions and circumstances with respect to justice and injustice can be seen to arise from Rawls' basic precepts of justice.

Rawls' main concern at the outset is to establish a procedure which will allow a comparative evaluation of alternative principles of social justice according to some established criteria of choice. He does this by adapting the social contract concept of the state of nature. He replaces it with a hypothetical position of choice--the original position. Within this context he assumes that a choice can be made between competing principles of justice. Once this has been done, derivative and supplementary

principles can be generated. It is amongst these latter that considerations of civil disobedience arise.

Since the original position is the decision context for principles of justice, the way in which it is defined has a strong effect on the principles which will be adopted. In Rawls' view the original position is to be viewed as an initial status quo in which free and equal rational agents are to make a unanimous and binding choice for the fundamental principles of social justice which will structure a society in which they will live. The basis for the decision is curtailed by "the veil of ignorance". The parties do not know what their actual condition in society will be. They do not know what their class status, their desires, or natural abilities will be. All particular facts about themselves are unknown. The veil of ignorance is to "...nullify the effects of specific contingencies which put men at odds and tempt them to exploit social and natural circumstances to their own advantage".[2] The main purpose of the veil of ignorance reflects a common presumption about the nature of justice. Principles of justice serve the function of arbitrating conflicts of interest in a way acceptable to the individuals involved. If principles were adopted which favoured one class or group to another group's disadvantage, this presumption about justice would be lost. And Rawls believes that when men know certain facts about themselves, they will argue for principles which favour themselves.

Under the veil of ignorance, there they do not know those facts, they cannot argue effectively in their own favour. All they can do is choose the principles which will assure a minimum of benefits no matter what position they turn out to occupy. The veil of ignorance limits knowledge in a manner relevant to maintaining the presumption that justice arbitrates between individuals for their mutual advantage. The parties know only certain general facts and do not have the particular knowledge to enable them to argue for their own particular benefit.

The original position is an extrapolation of the state of nature in the social contract model. It is extrapolated to provide "...conditions which it is thought reasonable to impose on the choice of principles".[3] The state of nature was constituted by agents in a society which lacked authoritative rule. The argument from the state of nature is that men with their various interests, desires and habits would, because of the problems which arise in the state of nature, agree to an authoritative rule over them. Depending on the writer, this rule takes different forms and is based on different principles. As Rawls puts it, "the initial position...varies depending upon how the contracting parties are conceived, upon what their beliefs and interests are said to be, upon which alternatives are available to them, and so on. In this sense, there are many different contract theories."[4] Rawls' idea is that there is one interpretation

of the original position which leads to his principles of justice and in which these principles by no accident imply certain considered judgements which one would make regarding justice.

We do not intend at this point to consider in detail Rawls' attack on utilitarianism. We shall, however, note some important points. Rawls characterizes and defines utilitarianism as a teleological theory which makes the maximization of the net balance of satisfaction define the right.[5] Whatever the validity of this claim[6] as a characterization of utilitarianism, it remains true that Rawls does not place the utilitarian principle on any other footing than the first principle of social justice. Moreover, he places it in this way as one of many alternatives which could occupy that place. He may be taken to argue that whatever position the utilitarian principle may have in a fully developed normative theory, it cannot occupy the position of the first principle characterizing justice. It may be that Rawls' principles of justice can be viewed as constraints on the utilitarian principle as a general criterion of moral rightness. But Rawls' point is that the utilitarian principle cannot itself fulfil the role assigned to principles of social justice in a society. That role is to provide:

> A set of principles...for choosing among the various social arrangements which determine the division of advantages and for underwriting an

> agreement on the proper distributive shares. These principles are the principles of social justice: they provide a way of assigning rights and duties in the basic institutions of society, and they define the appropriate distribution of the benefits and burdens of social cooperation.7.

Rawls wants to argue that the utilitarian principle cannot fulfil this role. He proceeds to do this by an argument which shows that the utilitarian principle will not be chosen in the original position.

He states the utilitarian principle as the view "that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed (or averaged) over all the individuals belonging to it."[8] In one sense this constitutes a conflation of the utilitarian principle with the concept of justice, whereas Mill and Sidgwick, for example, distinguish justice as a principle subordinate to the utilitarian principle. Rule utilitarians might argue that Rawls' principles as opposed to direct application of the utilitarian principle, if viewed as rules for the ordering of society, would be preferable by the utilitarian principle itself. Hence Rawls' two principles ought to be the rules governing justice in societies. On this view, the only difference between Rawls and the rule utilitarians would be the nature of their justification of the principles. The question remains whether this might turn out to be the case. It is a further and quite separate question whether the argument that Rawls makes in the original position is

in fact a utilitarian argument for his two principles of justice, in which good is by definition the satisfaction of desire, independent of the right, and in which the right is determined by those principles which maximize that good.

In Rawls' view, once the original position is concieved, the following more detailed description of the agents, the decision conditions, and what is to be decided completes the requisite description.

A. The agents are theoretically defined individuals who are:

1. continuing persons (family heads, or generic lines),
2. motivated in their decision by mutual disinterestedness (limited altruism),
3. considered to be of an age past the age of reason for living persons.

B. They are to choose basic principles for the basic structure of society from a few selected alternatives, assuming Hume's conditions of moderate scarcity, and without knowledge of their own particular case.

C. The agreement they are to reach is to be unanimous, binding in perpetuity, and strictly adhered to. General Egoism comstitutes the alternative to non-agreement.

D. The principles they choose must meet five formal conditions: generality, universality, publicity,

finality, and ordering. The last refers to the necessity for principles of justice to settle claims by ranking them.

E. It is assumed that their reasoning is characterized as rational in the sense of "taking effective means to ends with unified expectations and (an) objective interpretation of probability."[9].

Rawls claims that the decision emerging from the original position so characterized is a case of pure procedural justice. There is no independent criterion for the correct outcome, but there is a procedure designed to guarantee that outcome.[10].

Rawls argues for these conditions in part because he believes there is a different characterization of the original position which would lead to the principle of average utility being adopted. He says "...we face here one of the main problems of justice as fairness: namely, to define the original position in such a way that, while a meaningful agreement can be reached (the veil of ignorance along with other conditions removing the bases for bargaining and bias), the constraints imposed to achieve this result still lead to principles characteristic of the contractarian tradition."[11]. To override the utilitarian principle he must therefore show that his characterization of the original position is the preferred one. He must give an independent argument for the characterization of the

original position and then an argument showing that his two principles would be adopted over the utilitarian principle in that original position. We shall consider only the latter, assuming provisionally that the former is effective.

Rawls' two principles of justice in their full form are:

First Principle: "Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all."

Second Principle: "Social and economic inequalities are to be arranged so that they are both:

(a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and

(b) attached to offices and positions open to all under conditions of fair equality of oppostunity."

These two principles are supplemented by priority rules which specify the meaning of the principles and their relation to each other. First Priority Rule (The Priority of Liberty): "The principles of justice are to be ranked in lexical order and therefore liberty can be restricted only for the sake of liberty. There are two cases:

(a) a less extensive liberty must strengthen the total system of liberty shared by all;

(b) a less than equal liberty must be acceptable to those with the lesser liberty.

Second Priority Rule (The Priority of Justice over Efficiency

and Welfare): "The second principle of justice is lexically prior to the principle of efficiency and to that of maximizing the sum of advantages; and fair opportunity is prior to the difference principle. There are two cases:

(a) an inequality of opportunity must enhance the opportunities of those with the lesser opportunity;

(b) an excessive rate of saving must on balance mitigate the burden of those bearing this hardship."[12].

The first principle and the first priority rule are similar to Kant's central principle in that it is concerned with specifying the limits to freedom. The second principle and priority rule deal with the concept of equality and the grounds justifying deviations from equality in respects other than liberty. In formulating these principles, Rawls has utilized an underlying conception of primary social goods. This comcept is introduced in order to permit comparisons of individual positions of equality and inequality. Such comparisons are necessitated if one is to make sense of assessing when two persons are equally provided for. The agents in the original position are charged with the task of selecting principles which will structure society and distribute benefits and burdens. If they are to judge alternate possibilities from their own standpoint, they must be able to compare various positions in the alternate societies. Because in concrete cases individuals want differing goods for their activities and because in the

original position they cannot know what their wants will be, they cannot tell what their expectations would be. On the other hand, they could compare the societies if they had some index estimating expectations for various positions which any individual might come to occupy. Primary social goods--rights, liberties, opportunities, powers, income, wealth, and self-respect, to name a few--serve as this index. It is assumed that all rational agents want these goods regardless of anything else that might be wanted and that all rational agents want more rather than fewer primary goods. Primary goods in this last aspect provide one of the bases for decisions in the original position and, in the principles of justice, define what it is that is relevant to assessments of distributions.

Rawls bases the main grounds for the two principles mainly on considerations of publicity and finality. From the standpoint of finality--i.e., the principles are final and in perpetuity (no opportunity to modify them later)--the agents in the original position do not want to adopt principles which they will not be able to honour later. Because they would not be able to honour principles later if the application of the principles allowed an intolerable condition (or position) to result, the agents would seek to minimize the worst possibilities and to establish a "highest lowest position". In other words, they would adopt a maximin strategy.[13] The two principles, Rawls argues, meet this

condition because they guarantee, absolutely, basic rights. Further, in both the first and second principles, the agents are assured that their basic good will not be sacrificed for others' greater good, whereas the principle of utility might well require this.

At this point it would do well to examine the difference principle in terms of "sacrificing one's own good for the sake of others". At the lower end of the range of positions, the difference principle does ensure that that position is not established for the sake of others' greater benefit (e.g., those in the highest position). On the other hand, at the upper level, the difference principle means that some addition benefits for those at the top must be forgone if they do not contribute "to the greatest benefit of the least advantaged". In this instance, some persons must sacrifice part of their prospective good for the greater good of others, namely, those in the lower position, although it is not a matter of giving up something already obtained but rather gorgoing something that could be. The difference principle thus provides not only an absolute minimum condition but also an important relative upper limit. Rawls, then, argues that the two principles even though they fix an upper limit, nevertheless eliminate the risks involved in a principle (e.g., in Rawls' view, the principle of utility), which could allow exceeding that limit--i.e., the lower position becomes lower. Since the

person in the original position does not know whether he will be in the upper or lower positions, by following the maximin strategy in conditions of uncertainty, he would choose the two principles.

Rawls' second ground depends on the relation of publicity to stability. His argument runs as follows.

1. If a concept of justice (e.g., the two principles) generates its own support, it is preferable to those which do not.

2. A conception of justice is stable when the public recognition of its realization by the social system tends to bring about the corresponding sense of justice.

3. The principle of utility requires a greater identification with the interests of others than the two principles.

4. Conclusion: The two principles will be more stable to the extent that the identification with the interests of others is difficult to achieve.

5. The two principles when satisfied secure each person's liberties and ensure that each person benefits in some way from the social system; they support what affirms individuals' goods.

6. Individuals tend to love, cherish, and support whatever affirms their own good.

7. Conclusion: Individuals will support a system founded on the two principles. (From 1-6)

8. The principle of utility requires some persons to sacrifice their good for the good of others.

9. To sacrifice one's good for the good of others requires that one have an identification with others' interests.

10. It is easier to identify with one's own interests than with those of others.

11. The two principles require only an identification with one's own good.

12. Conclusion: The two principles will generate their own support more easily than the principle of utility.

13. Conclusion: The two principles are preferable to the principle of utility.

Rawls presents a further consideration regarding publicity and self-respect.

1. A desirable feature of a conception of justice is that it should publicly express men's respect for one another.

2. By arranging inequalities for reciprocal advantage and by not exploiting the contingencies of natural and social circumstances within a framework of equal liberty, persons express their respect for one another in the constitution of their society.

3. The two principles arrange inequalities for reciprocal advantage and do not permit the contingencies of natural and social circumstances to be exploited.

4. The two principles enable other persons to express their respect for one another in their constitution (i.e., publicly).

5. Conclusion: The two principles meet condition (1.), that is they form a conception of justice which publicly-- i.e., in their constitution-- allows men to express respect for one another.

Rawls supplements this consideration by a further argument concluding that men will find it difficult to have a strong sense of their own worth in a "public utilitarian" society and hence the two principles are preferable.

Rawls presents further and more detailed arguments for the two principles, but these "main grounds" suffice for our purpose to give the thrust of Rawls' defence of the two principles. We can now proceed to examine how Rawls generates his secondary and supplementary principles--in particular, the duty of justice which involves the duty to obey.

The first point is that Rawls distinguishes duties and obligations. What is more generally referred to as the obligation to obey is in Rawls' terms actually a duty. Duties and obligations apply to individuals and define their ties to institutions and to each other. From the standpoint of Rawls' theory, they are derived subsequently to the principles for the basic structure of society. Their derivation presupposes, in Rawls' case, the two principles of justice. The significance of this serial ordering will

become evident when we consider Rawls' arguments supporting the principles of duty and obligation, for there he requires that those principles be compatible with the two principles of justice.

Obligations arise, he says, entirely from the principle of fairness. The principle of fairness is addressed to the question of when a person is to do certain things. It is formulated as follows:

> ...a person is required to do his part as defined by the rules of an institution when two conditions are met: First, the institution is just (or fair), that is, it satisfies the two principles of justice; and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests.[14]

As Rawls notes, this means that a person comes under an obligation voluntarily, that the obligation is in reference to an institution or practice (e.g., promising), and that the obligation is to a definite individual or individuals.[15] Holding political office in a constitutional regime and marriage are two examples. Between the two, different actions are required by the respective obligations, but in Rawls' view, both arise from the fact that the commitment is undertaken voluntarily and that the commitment's content (i.e., what actions are required) is designated by an institution or practice.

Duties on the other hand do not derive from any one principle, such as the principle of fairness. Many principles give rise to different duties. Characteristically,

duties apply regardless of voluntary acts, independently of any connection with institutions or practices, and are owed not only to specific individuals but to individuals generally as equal moral persons.[16]

The question now arises whether "political obligation" as it is normally conceived is to be an obligation or a duty in Rawls' terms. The prospective condition is formulated as a principle in the following way:

> support and comply with just institutions that exist and apply to us, and further just arrangements not yet established, at least when this can be done without too much cost to oneself. 17.

The central issue, viewed from the standpoint of the original position, is whether this should be thought of as voluntarily incurred (i.e., an obligation), or as applying to everyone irrespective of voluntary acts. In a certain sense contractarians such as Locke view it as a voluntary undertaking. One consents and is thus obligated. Rawls argues that in the original position, presuming his two principles of justice have been chosen, there is no reason to make compliance with just institutions dependent on voluntary acts. The two principles secure basic liberties. In addition the stability of just institutions is enforced by making compliance with them independent of voluntary acts. No one can exempt himself by arguing that he has not agreed to comply. Hence in Rawls' terms it is a <u>duty</u> of justice to comply.

From the standpoint of the original position, because

one is choosing and comparing principles, one must still ask if there might be some alternate principle which would be preferable to this duty of justice. Here Rawls argues that only those principles which match the two principles so as to form a coherent conception (one which does not lead to contrary directives) can be acceptable. Rawls argues that, at least, the principle of utility (in any form) cannot be adopted as the principle for individuals' ties. This would amount to establishing institutions in accord with the two principles and requiring behaviour by individuals in accord with the utilitarian principle. Because persons occupying positions in the institutions have certain requirements placed upon them by the institution, they must consider themselves as governed both by those for institutions and by those arising for them as individuals from the principle of utility. Hence they should on the one hand have to act in accord with the two principles (as office-holders) and by the principle of utility as individuals. Since the likelihood of conflicting directives is high, the agents in the original position would reject the principle of utility for individuals' duties and obligations on the basis of considerations of stability.

B. Civil Disobedience

The duty of justice has two parts: one instructs citizens to support and comply with just institutions and arrangements; the other instructs one to further just

arrangements where possible. In a direct sense, under imperfect systems, which are assumed to be the only systems that in fact exist, this duty of justice can counsel two different and conflicting courses of action. The first part says that if the existing institutions which comprise the basic structure are close to those required by the two principles, we are to support and comply with them. On the other hand the second part directs us to aid, at least in some cases, in rectifying injustices that may arise because the over-all system is imperfact. On the one hand we are to comply; on the other we are to work against its dictates where they are unjust. Clearly the conflict is not immediate. Courses of action to remedy injustice need not always lead to any question of non-compliance. But one can see that if the processes which do not entail non-compliance fail, there is a high likelihood that the two directives will lead to conflict.

Rawls, characteristically, asks what would be decided upon in the original position. Assuming a reasonably just but imperfact system and invoking an appeal to stability, Rawls argues that unjust laws are not necessarily open to non-compliance, "...(just as) the legal validity of legislation...is (not) sufficient reason for going along with it."[18] The parties want to assure stability as well as justice. The two must be placed in some balance, limiting each other. Rawls is arguing that the parties in the

original position would permit certain types of non-compliance when injustice in nearly just societies is beyond certain limits. The non-compliance is, in effect, to keep the system nearly just rather than allowing it to drift to a less and less just society. Since the assessment of the society as nearly just refers to the nature of the basic structure, one can anticipate that the types of non-compliance which might be justified will be influenced by this consideration.

Two of the possible types of non-compliance are civil disobedience and conscientious refusal. These are distinguished by the manner in which they make appeals to considerations of justice. Civil disobedience appeals to the 'sense of justice' of the prevailing majority, assuming that this is coincident with the sense of justice implicit in the basic structure. This is obviously a special case which Rawls adopts in order to avoid unnecessary complexity. Conscientious refusal under the same assumption does not appeal to the 'sense of justice' of the majority. It claims that the majority are mistaken; it does not anticipate changing the injustice. It is an act of personal conscience. Although this takes from the traditional sense of civil disobedience some of its content, in Rawls' context it marks off a special case where the conflict of directives can be balanced.

As we have implied, civil disobedience is a device to

which the agents in the original position would assent in order to ensure greater stability. By allowing that there is a limit to obedience in a nearly just society, the agents in the original position give some assurance that having agreed in perpetuity, they have nevertheless not committed themselves to tolerating a decline from a certain status quo to a worse one.

The first problem is to discern what they would allow to be classed as justifiable actions against injustice which involved non-compliance. Rawls defines civil disobedience as "a public, nonviolent, conscientious political act contrary to law usually done with the aim of bringing about a change in the law or policies of the governments. By acting in this way one addresses the sense of justice of the majority of the community and declares that in one's considered opinion the principles of social cooperation among free and equal men are not being respected."[19]. Although Rawls presents this by way of a definition, each condition has its own basis in view of the problem posed in the original position. The main contention is that the act must not deny the legitimacy of all law: it stands at the edge but remains true to the principle that law is required. So the act is public--it is an appeal to the majority and their own principles and for this reason is openly an appeal to them. It is nonviolent since violence obscures the appeal to justice. Nonviolence reinforces the fidelity to

law. It is conscientious--it asserts a well-considered judgement, worthy of attention. But conscientiousness is not enough on its own; rather it is a necessary but not sufficient condition. The final consideration is the thorniest for it asks about what types of injustices are to be the objects of civil disobedience; it asks for the limit of tolerable injustice--that limit which is implied by the duty of justice. This question is the crux of the balance between stability and justice which must be struck in the original position. Because civil disobedience strikes against the law and is no small act, it should in Rawls' view only be invoked when there are "serious infringements of the first principle of justice, the principle of equal liberty, and to blatant violations of the second part of the second principle, the principle of fair equality of opportunity".[20.]

Civil disobedience in a nearly just society is a last resort--normal appeals must have been seriously undertaken and have failed.[21.] Rawls is not steadfast on this point for there may be extremes where such processes must be assumed ineffectual. In these cases, though, the situation may no longer be one where it can be assumed that the system is basically just. Rawls places these latter cases in a different class, where civil disobediende may have no relevance.

Rawls adds a third condition for a proposed act of

civil disobedience which raises the question of its relation to other acts of civil disobedience. We shall postpone consideration of this condition to consider a feature of civil disobedience in Rawls' theory which he does not explicitly notice. Although the support for civil disobedience comes (1) from considerations of stability in the original position and (2) from the second part of the duty of justice, the second part in its full form includes the proviso that promotion of justice (of which civil disobedience is a form) is not a duty when it might be of "more than little cost to oneself". It is most difficult to see how civil disobedience could ever be of little cost to those who undertake it. They must always take time from the pursuit of their goals; they must expect the penalty of violating the law even if they are upheld and the law is changed. Rawls, when defining duties and obligations, has said "for while we have a duty to bring about a great good, say, if we can do so relatively easily, we are released from this duty when the cost to ourselves is considerable".[22] Such acts as are of considerable cost are in the class of "permissions" and when of considerable cost are supererogatory acts.[23] Hence, since civil disobedience is rarely of little cost, civil disobedience is rarely ever a duty; rather, it is a permission to do a good act which most often is supererogatory.[24] This clearly deviates from the tradition of civil disobedience advocates who justify their

acts by the claim that they have a duty to a higher standard. Although Rawls includes the appeal to a higher standard (the principles of justice as embodied in the sense of justice of the majority), this is not what justifies the action: the action is justified by its place in balancing stability and justice.

C. Final Remarks

The final condition Rawls imposes on civil disobedience comes face to face with Kant's argument against such active opposition and the utilitarian's difficulties with coordination. Rawls notes, as does the utilitarian, that "if [all who might be entitled were to act] serious disorder would follow which might well undermine the efficacy of the just constitution."[25] It is this consideration which Kant takes to be conclusive against active resistance. Kant places stability in a stronger position than the promotion of justice. The duty in Rawls' theory to uphold a basically just set of institutions means that there is a limit on the use of civil disobedience that must be ascertained by discretion. Clearly the circumstance where there might be many equally entitled groups would be rare especially if we assume a nearly just constitution. One might even say, as Rawls does not, that when the cases where civil disobedience is justified increase, the constitution cannot be just: one no longer has a case of a well-ordered nearly just society. But this means, still, that Rawls says with the utilitarian

that civil disobedience is only justified when few other acts of its kind occur. In fact, when considering this problem Rawls introduces distinctly utilitarian considerations.

> There is a limit on the extent to which civil disobedience can be engaged in without leading to a breakdown in the respect for law and the constitution thereby setting in motion consequences unfortunate for all.
>
> Everyone's exercising this right would have deleterious consequences for all,...
>
> ...the effectiveness of civil disobedience as a form of protest declines beyond a certain point...[26.]

In some sense then Rawls' theory sidesteps the issue by claiming to deal only with well-ordered nearly just societies. For surely that is not the point where civil disobedience is controversial. It is controversial where stability is itself undermined by the poverty of justice in the society. For there the powerholders are most tenacious in their opposition to opponents. In this sense the effect of civil disobedience as undermining the efficacy of a constitution be it just or unjust takes on a decisive role. If the majority are acting in such a manner as to undermine or ignore a just constitution then it seems that those who would protest are faced with the dilemma that they are, according to Rawls, not permitted to act if others are likely to protest; yet if they do not, the status quo with respect to justice deteriorates. Rawls recommends that in these cases where the level of injustices relevant to civil

disobedience reaches the point where many would be equally entitled to act it is necessary that they join together to regulate the level of disobedience. It is necessary that they do so in order to avoid the consequences of a breakdown in the respect for law. This, though, appears to make them vulnerable to the majority, especially if that majority is in some sense steadfast in its actions.

At this point, then, the individual contemplating civil disobedience must begin to take account of the same factors that the utilitarian was faced with. Before the act of civil disobedience can be judged right, the coordination of the action with others of its kind must be taken into account because the consequences could turn out to be very harmful. Rawls' considerations begin to coincide with utilitarianism and the problems associated with it.

Utilitarian considerations are introduced in two ways in the final determination of whether to act or not. If civil disobedience in a particular case has met all the primary conditions and is thus a moral permission, the individual must decide by using a form of utilitarian thinking whether it is prudent for him and perhaps others to engage in civil disobedience. Clearly, though, these are not moral considerations: civil disobedience is morally permissible, though not a duty, and the prudential considerations determine only if an individual or group shall exercise that permission. On the other hand, the coordina-

tion problem, where utilitarian considerations also enter, is a moral problem. Civil disobedience will not be morally permissible if large numbers might be acting independently against the same or other injustices and if no agreement is reached to regulate the level of disobedience. We note, though, that the considerations at this point are subordinate, morally, to Rawls' primary principles of justice and duty.

In the case of the law forbidding public worship, prudential considerations regarding the severity of the harm to individuals (the great cost to oneself) militate against participating in public worship as a form of civil disobedience. The law is a blatant violation of Rawls' First Principle and surely undermines the efficacy of a basically just society. If it is an isolated violation of the First Principle civil disobedience would be permissible, but prudence would weigh against taking the permitted action. If it is not an isolated violation of the First Principle--i.e., other violations also exist, civil disobedience will not even be permissible if many others are likely to act against those injustices and if no agreement is established to regulate the level of disobedience. Thus one must know what others are likely to do. Under a basically just constitution, knowledge of others' prospective actions is essential. Rawls' theory, then, requires of the individual the same kind of knowledge as the utilitarian theory--

knowledge which, in the final analysis, may be exceedingly difficult to obtain or be certain of.

If we compare the over-all pattern of Rawls' arguments on civil disobedience with that of the utilitarians, we can discern a parallel: the form of the reasoning is the same but utilitarianism is concerned with a net gain in happiness while Rawls is concerned with a net gain in justice. Rawls is concerned with the promotion of justice and ultimately with assuring the stability of just practices. As an alternative, utilitarianism is concerned with both justice and stability in so far as they promote happiness and not as goals in themselves. Whatever conclusion may be drawn about the utilitarian nature of the basis of Rawls' theory, it is clear that the different considerations which enter into the justification of civil disobedience distinguish them as alternative theories in spite of the similarity of their conclusions about civil disobedience.

Footnotes

1. J. Rawls, Theory, p. 3.
2. Ibid., p. 136.
3. Ibid., p. 120.
4. Ibid., p. 121.
5. Ibid., p. 24.
6. Cf. D. Braybrooke, "Utilitarianism with a Difference: Rawls's Position in Ethics", in Canadian Journal of Philosophy, Volume III, Number 2 (December, 1973), pp. 304-305.

7. J. Rawls, Theory, p. 4.

8. Ibid., p. 22.

9. These considerations are summarized in J. Rawls, Theory, pp. 146-147, and are argued in the same work, pp. 118-150.

10. Ibid., p. 120, p. 136.

11. Ibid., p. 166.

12. Ibid., pp. 302-303.

13. D.A.J. Richards, A Theory of Reasons for Actions (Oxford: The Clarendon Press, 1971), pp. 112-113.

14. J. Rawls, Theory, pp. 111-112.

15. Ibid., p. 113.

16. Ibid., pp. 114-115.

17. Ibid., p. 334.

18. Ibid., pp. 350-351.

19. Ibid., p. 364.

20. Ibid., p. 372.

21. Ibid., p. 372.

22. Ibid., p. 117.

23. Ibid..

24. Cf., though, ibid., p. 375, where Rawls speaks of meeting the duty of democratic institutions. He means, of course, meeting the duty of justice. This does not obviate the effect of the clause 'of little cost to oneself'.

25. Ibid., p. 374.

26. Ibid., pp. 374-375.

Chapter V: Obligation, Stability and Justice

In this chapter we shall bring together certain considerations which have affected each of the three theories and which are of central importance to considerations on civil disobedience. Our view of utilitarianism found that an important condition for the justification of civil disobedience involved the coordination of any proposed act of civil disobedience with other acts of a like kind. The importance of coordination rests on the value of the stability of the legal system. This stability is equated with general conformance to the law--i.e., the fulfilment of Hart's condition that the laws are in fact generally obeyed if a legal system is to be said to exist. Rawls faced the same consideration. In both cases it appeared that the promotion of justice had to be tempered in some way by considerations of stability. Kant, although he put great weight on the moral importance of justice, limited the actions that could be taken in promoting justice by considerations of stability.

Kant, though, appears to have confused conformance to law for any reason whatsoever with conformance based on respect for law. Respect for any given legal system, in the three theories we have considered, is predicated on justice. When a legal system is basically unjust and hence has many unjust laws, that legal system is unworthy of moral respect. Whatever conformance exists, exists for reasons other than

moral reasons. Both Rawls and utilitarianism recognize this important feature of the role of justice in establishing political obligation. When we consider matters of obedience and disobedience to law, the two factors of justice and stability come to the forefront. This fact is, of course, reflected in the conflicting arguments of the law and order position and the civil disobedient's position, which we discussed in Chapter I. The problem was to assess when and in what conditions one might override the other.

Stability, as simple conformance to law, was in Kant's view a necessary condition for the realization of justice in laws. But what Kant seems not to have realized is that one can have a condition where support for law and conformance with it are not coincident with respect for law and where the basic institutions of the society are themselves gravely unjust. In other words, one can have a society where there is no tendancy towards increasing justice, where justice will remain merely an ideal unless it is actively sought after. If the obligation to obey laws is predicated on the value of stability alone, the essential relation of justice and stability whereby the value of stability depends on the degree of justice is obscured. When justice is given a high priority, the obligation to obey laws requires a coincidence of stability and justice. If the basic institutions of the society are just and there is respect for law and hence a stability based on that

respect, only the most serious injustices result in the obligation to obey being overridden. Clearly under these circumstances, Kant's presumption of an historical tendency towards justice is reversed. It is in these circumstances that a serious injustice in the law can in fact undermine respect for the law itself, and thus reduce both stability and the level of justice. The occurence of the injustice casts doubt on the integrity of the regime and its commitment to justice and the rule of law. Both those in authority as well as those citizens who are concerned with justice must have respect for the importance of the law in establishing justice. In the circumstance of a decline of justice, civil disobedience which stands at the edge of the law and aims at restoring justice (which is supportive of respect for law) can be justified if it is an isolated act. Both Rawls' theory and utilitarianism recognize the moral value of justice in considering the limits to the obligation to obey.

Justice, then, for its realization requires the rule of law, as Kant argued, but the rule of law cannot be effective without respect for law. Respect for law reinforces the tendency to conform to law. Fundamentally, then, since one cannot have justice without respect for law and since civil disobedience because it violates law has both an element of disrespect for law and an element of respect for law, Rawls' theory and utilitarianism require that one

must act first to ensure stability and then to secure justice. Civil disobedience shows disrespect for law in so far as it asserts that this or that law ought not to be law and ought not to be obeyed. It shows respect for law in so far as it expresses the desire for laws to be just. There is a sense, then, in which, when respect for law is absent, civil disobedience, because it relies on respect for law, will be ineffective and harmful; the element of disrespect for law involved in it reinforces the background condition of disrespect.

It seems that the value of stability as manifested in obedience to the law tapers off when justice is distinctly lacking in a society. Stability in this sense loses its moral value with respect to the obligation to obey unless it is coexistent with the absence of major injustices. Any argument about civil disobedience which rests on questions of the injustice of the law attacked must claim either that at certain times justice outweighs instability or that stability is not threatened. The law and order type of argument which Kant offers seems to imply that if one has the stability of regular obedience to law then the society will become just. But this is to make the obviously false contention that stability guarantees justice. This is true only when the presumption of an historical tendency towards justice is true. Whether such an assumption is true or not will depend on the assessment of the character of the regime.

Thus, as we saw in the chapter on utilitarianism, the promulgation of a law which constitutes a serious injustice casts doubt on the character of the regime and tends to vitiate arguments based on Kant's assumption. The role, then, of stability considerations is that when an action which has a destabilizing element is being contemplated, it must be considered how the increase in justice which would be predicated upon the action will in effect counterbalance the instability occasioned by the action.

Because stability depends on the degree of justice for its value, it alone cannot secure the obligation to obey in any absolute sense as Kant appears to argue. Once justice is given a primary place in the rationale for obedience to laws, as in Rawls' theory and utilitarianism, stability can be overridden by considerations of justice. In Rawls' argument stability has an important weight because of the assumption of a well-ordered nearly just basic structure. This assumption means that individuals could presume that those who create laws are motivated by a concern for justice. When this consideration does not hold or when, as in our example, it appears that the regime takes actions not so motivated, the justification for the obligation to obey unjust laws becomes weak. One is left not so much with a moral obligation to uphold the law as with a prudential calculation of cost and benefit.

We shall now examine some characteristics of the

theories important to their evaluation. None of the theories bases the obligation to obey on a form of consent. The obligation to obey does not rest on any explicit or significant sense in which a person could argue that a regime has violated the conditions under which individuals consent to government. Rather the theories explicitly take justice and stability as the bases for obligation and for the limit to obligation.

Rawls' theory and utilitarianism both find civil disobedience to be a moral permission and not a duty. In Rawls' case this is so because he argues that one is not required to act against injustice if the action is of more than little cost to oneself. This view expresses a conception of persons which limits the regard they are to have for others. Utilitarianism found civil disobedience not to be a duty because of the harm to individuals which might arise in certain cases and because of the provision that a person is not required to sacrifice his own good for the good of others. However, as the degree of harm which might arise declines utilitarianism can make a case for civil disobedience becoming a moral requirement. When the law is unjust and thus does harm to an individual and the law, as in our example, contains harsh penalties, civil disobedience although permitted is not a duty. But if the penalty is mild, one does not cause more harm to the individual or to others by acting against the law. No one is required to

sacrifice their own good for the good of others and civil disobedience could be viewed as a duty. Clearly, when such a condition holds, the act could not be construed as of more than little cost to oneself and Rawls also might view civil disobedience as taking on the character of a duty. However, in Rawls' theory, this aspect is not readily handled because the action of civil disobedience itself can be viewed as a cost to oneself, especially when one considers the risks inherent in it. Utilitarianism, on the other hand, through the principle that an individual is the best judge of his own good and hence is entitled to disavow that good for specific social purposes such as opposing injustice, provides a way of circumventing the limitation that Rawls argues is necessary. In this sense, utilitarianism coincides more nearly with the often expressed belief of persons who have engaged in civil disobedience that they have a moral duty to act against major injustices.

With respect to this belief, it is possible to view both Rawls and utilitarianism as meaning that one has a moral duty to act against major injustices but that civil disobedience is not always the correct expression of that duty. Equally so, it is possible that this belief, although a strong motive and a morally praiseworthy motive, does not conform to the real moral relations between civil disobedience, law, justice and stability. The problem is a difficult one for, if the justification for civil dis-

obedience which a moral person would require in order to act implies that civil disobedience is not a duty, his motive for acting is undermined. In fact both utilitarianism and Rawls' theory imply that an individual should take his own good as pre-emptive with regard to moral permissions such as civil disobedience. If this view were taken seriously, civil disobedience would rarely occur. The importance ascribed to justice by both theories and the role of civil disobedience in maintaining justice seem to be belied by the view that civil disobedience is primarily a moral permission and not usually a duty.

The way in which utilitarian considerations enter in Rawls' theory under nearly just regimes suggests that when a regime is not nearly just such considerations will take on greater prominence. Utilitarian considerations of the harmfulness and goodness of the consequences of an act of civil disobedience come into play when it is possible that large numbers of acts of civil disobedience might be justifiable; as we have suggested this seems to imply that the number of serious injustices makes the society less than nearly just. In determining whether any particular act of civil disobedience will be justified according to Rawls' principles, one must as a final consideration ensure that not many like acts will occur at the same time. Rawls suggests the adoption of the rule that if many other acts are likely, those who would carry them out ought to make

some arrangement to regulate the level of disobedience. This fails, however, to evade the problem of imperfect knowledge experienced by the utilitarian. One must still know when the rule is to apply, and this can only be ascertained if one knows what others will be doing.

The ambiguity which remains because of the difficulty of ascertaining pertinent facts about others is an ambiguity necessitated by the assessment of stability. Both Rawls' theory and utilitarianism require such an assessment. Such an assessment is required by the acknowledgement of the importance of both stability and justice for the justification of civil disobedience. We may say, then, that these two theories try to establish principles which are capable of giving a precise answer to specific moral problems but which, in the case of civil disobedience, are limited in their application by the difficulties facing individuals in ascertaining the relevant information in many cases. This factor means that, in assessing civil disobedience, individuals are confronted with an important dimension of risk. This again raises the issue of whether justified civil disobedience is a permission or a duty. The element of risk on the one hand supports the view that civil disobedience is a permission in so far as this does not place a burden on the individual of knowing that he might be failing to fulfil a duty through lack of information. On the other hand, the way in which risks militate against action gives weight to

the argument that civil disobedience should turn out to be a duty, for otherwise, individuals would not act against injustice. Kant, by eliminating the possibility of civil disobedience ever being justified, avoids this element of risk only at the cost of the maintenance and promotion of justice.

The variety and complexity of human institutions and affairs means that moral actions such as civil disobedience are set against a wide range of possible circumstances. Utilitarianism has an inherent strength in this regard because of its breadth and flexibility. The advantage here is that utilitarianism acknowledges from the beginning the necessity and final importance of assessing good and harm. Nevertheless, utilitarianism lacks the precision which Rawls gains by carefully limiting and defining a narrow context. The ultimate choice of theories depends on the possibility, as yet unexplored, of combining flexibility with precision while still acknowledging the limitations of the individual in information and courage.

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