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Tamar L. Smith

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Abstract

Numerous theories have been developed to explain the basis, beyond a legal one, upon which the citizen's obligation to obey the law rests. In *The Authority of the State*, Leslie Green has contributed a new theory of obedience, one which explores the bases of civility and tolerance as foundations for obedience rendered to the legal system. This new theory is discussed within the context of a real world problem, one that has distressed the world community for years - the treatment of blacks in South Africa. Does this theory have any significance for citizens caught up in a fundamental and serious conflict with a legal and political system that claims their obedience?

THE OBLIGATION TO OBEY LAW: A NEW THEORY AND AN OLD PROBLEM[©]

BY TAMAR L. SMITH*

Numerous theories have been developed to explain the basis, beyond a legal one, upon which the citizen's obligation to obey the law rests. In *The Authority of the State*, Leslie Green has contributed a new theory of obedience, one which explores the bases of civility and tolerance as foundations for obedience rendered to the legal system. This new theory is discussed within the context of a real world problem, one that has distressed the world community for years – the treatment of blacks in South Africa. Does this theory have any significance for citizens caught up in a fundamental and serious conflict with a legal and political system that claims their obedience?

The concept of political obligation provoked an historical discourse which began with Socrates, and which continues today. To this discourse, Leslie Green contributes his book *The Authority of the State*, in which he offers his own theory of state authority and political obligation.¹ Essentially, the issue under discussion has been the moral justification for state authority and its claim to citizen obedience. As Green observes, the state professes to wield supreme authority over society: "It claims to bind many persons, to regulate their most vital interests, and to do so with supremacy over all other mechanisms of social control."² Most theorists will agree that

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* This paper was written while Tamar L. Smith was a student at Osgoode Hall Law School. Ms. Smith also earned a B.A. at Vassar and a B.A. in Law at Oxford.

¹ L. Green, *The Authority of the State* (Oxford: Clarendon Press, 1988).

² *Ibid.* at 1.

members of a society are quite obviously legally bound to obey the law; the issue is whether there exists a moral obligation to do so. Within the context of the modern state, with its claim to supreme authority, there persists the problem of defining the moral character of the state-citizen relationship, and of justifying the power of the former over the latter.

The existence and scope of an obligation to obey the state, its rules and regulations, is variously founded upon consensual, contractual, participatory bases, or on some combination of each. Theories offered by Hobbes, Locke, Mill, Hume, Rostow, Singer, and numerous other political philosophers capture the more traditional approaches to the state-citizen relationship and the obligation to obey the law. In *The Authority of the State*, Green comprehensively surveys the traditional formulations of political obligation. Although firmly entrenched in political philosophy, these theories, as Green notes, are disregarded by contemporary theorists in their move away from normative political theory. Green does not profess to agree with these traditional theories. Indeed, he succinctly identifies their weaknesses in his consideration of the past attempts to explain and justify state supremacy. However, Green does acknowledge the importance of their pursuit: "[T]he stability of the modern state together with the increased scope of its claims mean that the consequences of being wrong about the nature and justification of its authority are more profound. In this respect modernity has increased the stakes in social and political theory."³ Unlike the general resignation expressed by modern theorists toward the existence of the nation-state, its apparent permanence and rule, Green is willing to question the moral standing of the state and to examine critically the citizen's obligation within the context of a political system.

The consensual theories, such as those formulated by Plato,⁴ Kant,⁵ and, more recently, Rostow,⁶ argue that the source of the

³ *Ibid.* at 2.

⁴ Plato, *Crito* (New York: Bobbs-Merrill, 1981).

⁵ H. Reiss, *Kant's Political Writings* (Cambridge: Cambridge University Press, 1970).

⁶ E. Rostow, "The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience" in E. Rostow, ed., *Is Law Dead?* (New York: Simon and Schuster, 1971).

obligation to obey the law lies in the act of consent: an act presumed to precede membership in society. Individuals, having freely chosen to join in society with others, and with knowledge of the nature of its political and legal system, consent to render their obedience to the state. The weakness of the consent-based theories is clearly their consideration of the world's circumstances. As Green observes: "The state of nature would be very difficult to reach from our present position. We have backed away from the precipice."⁷ In other words, there is neither choice nor consent involved in the individual's situation in society. At best, one has a choice of leaving one society for another. Moreover, even this cannot imply some sort of blanket approval or consent of government practices, precisely because individuals must necessarily end up in a society, whether or not they approve or consent to the political system.

In considering the lack of choice in a "world of states," Green voices his criticism of the view that residence constitutes an expression of consent in realistic terms:

[I]f most people are happy to consent while you are not, then it may seem that you have no choice but to submit to the inevitability of some state's authority. But this is not correct. Even if one would perish outside a state or there is no viable exit route, it does not follow that one must accept its authority in order to live inside it. One always has the option of conditional submission without consent.⁸

The choice, upon which the consensual theories are based, is therefore illusory. And with the dispersion of the illusion must go the obligation it attempts to support.

The contractual approach to political obligation is clearly represented in the theories of Hobbes⁹ and Locke,¹⁰ who found political obligation upon the agreement to divest oneself of natural liberty in exchange for communal protections. According to Hobbes, the act of covenanting with others to vest in a person or a body the authority to govern and command obedience binds, not only the

⁷ Green, *supra*, note 1 at 2.

⁸ *Ibid.* at 175.

⁹ T. Hobbes, *Leviathan* (New York: Bobbs-Merrill, 1958).

¹⁰ J. Locke, *The Second Treatise of Government* (New York: Bobbs-Merrill, 1952).

original covenantee, but "all that is his."¹¹ Locke disagrees with automatic succession of the compact, but only to the extent that there must exist some form of tacit consent before an individual may be deemed to have accepted the social compact.¹²

The contractual approach to political obligation appears to avoid the problem of illusory choice. By conferring upon the original contract an enduring power to bind, individuals are either under an obligation to obey by virtue of their birth, or by merely choosing where to settle. However, to assert simply that an agreement is forever binding or revalidated by non-opposition defies all principles of contract law and of basic morality. The consent of one cannot bind a third party, for the doctrine of privity precludes this. Tacit consent cannot be interpreted as acceptance of an offer to contract. These theories founder upon the problem of choice in the sense that they are based on a legal concept which requires that a choice exist. Individuals neither have a choice in being born, nor in settling in some society somewhere. To say that they become contractually bound by either event, therefore, repudiates the most fundamental rules of contract law and, most importantly, the basic principles of human ethics.

In surveying the contractual approach to political obligation, Green focusses his criticisms upon the more practical aspects of the theories. He indicates that a contractarian argument envisions rational persons agreeing to state authority out of self-interest. The practical weakness of this vision is simply stated by Green: "Given purely individualistic goals and an instrumental conception of rationality, it follows that to treat the state's requirements as binding is to be overcommitted to them, to be bound to them in a way that their point cannot justify."¹³ As a social theory, then, the contractual arguments for political obligation are not vindicated when the practice of rational, individually motivated beings is examined.

The participatory perspective on political obligation is expressed in Jefferson's assertion that unless citizens can participate

¹¹ Hobbes, *supra*, note 9 at 165.

¹² Locke, *supra*, note 10 at 68.

¹³ Green, *supra*, note 1 at 154.

responsibly in the making of laws, they are not morally bound to obey them.¹⁴ Singer has since reformulated this notion into the principle of fair compromise, where the act of participation in a vote creates an obligation not to dispute the outcome of the procedure.¹⁵ Again, there is an implicit illusion of choice which lends a certain plausibility to the concept of "fair compromise." If individuals vote, they voluntarily choose to submit themselves to the outcome of the procedure and to the state's authority. If they choose not to vote, then presumably, they choose to live outside the state's jurisdiction. Green attacks the participatory argument on the ground of consent. He first indicates that, because there is no necessary connection between voting and consenting to the state's authority, "the right to vote is not conditional on one's acceptance of the state's authority."¹⁶ And second, whether one votes or not, one will be governed by the preferences of those who do.

The traditional theories clearly fail to discover the source of a general obligation to obey the law. They attempt to, but do not convincingly, explain why this obligation might exist as a condition of living in society. The failure is, perhaps, most clearly revealed in Green's observation that there need not necessarily be, nor is there, an exact correlation between political authority and political obligation: "A state may exist even when some of its claims have no justification. A state cannot exist unless it claims authority with some success and general compliance. But equally it may have some failures: it may claim authority over some people over whom its authority is not justified."¹⁷ Green accepts that certain features of the theories surveyed might provide justification for political authority. However, this authority does not concomitantly signify an obligation to obey imposed upon all:

A suitably socialised extension of consent theory will ... provide an adequate justification of political authority, one superior to the classical conventionalists, contractarian, and consent-based accounts. ... It is clear, however, that its scope will

¹⁴ Rostow, *supra*, note 6 at 48.

¹⁵ P. Singer, *Democracy and Disobedience* (New York: Oxford University Press, 1974) at 56-61.

¹⁶ Green, *supra*, note 1 at 172.

¹⁷ *Ibid.* at 239-40.

still be narrower than any of those theories, for it is unlikely to be able to deliver the conclusion that everyone is so bound.¹⁸

The traditional theories, because they insist upon universality, a general binding obligation upon all members of a society, fail to discover and represent the citizen's true moral relationship to the state.

From theories based on norms, consent, and contract to establish a general, binding obligation to obey, there has been a movement toward theories proposing an individualist and diluted obligation to obey law founded on the idea of a permissible attitude toward law. Most notable of these theories is that of Joseph Raz. Raz writes that there exists no general obligation to obey, there is only an independent attitude of respect for law which, if adopted, provides a reason to obey.¹⁹ Green, in *The Authority of the State*, asserts a weaker, consensual attitude termed "civility": "Mutual tolerance of minor and occasional injustice is an essential part of a shared commitment to political institutions. ... Limited mutual forbearance is part of what it is to belong to a political community."²⁰ Having concluded that political obligation is restricted as a correlate of justified authority, and that it cannot be viewed as a general phenomenon, Green, like Raz, construes deference to and compliance with the law, not as an obligation imposed by some objective force, but as an individual virtue.

Both Raz's posited attitude of respect for law and Green's virtue of civility presuppose a sophisticated understanding of political morality. Raz teaches that respect for law is an attitude with two components: cognitive respect, which consists of appropriate cognitions concerning the moral value of the law; and practical respect, which indicates a disposition to obey in recognition that, as a matter of principle, it is right to do so. Green argues that a more critical, yet restrained, attitude toward law is the permissible one: "It commends a willingness to deliberate about the character of injustice before disobeying and condemns those forms of rigorism

¹⁸ *Ibid.* at 219.

¹⁹ J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979) c. 12-13.

²⁰ Green, *supra*, note 1 at 266.

which will tolerate nothing but perfection in human institutions."²¹ It is this attitude which leads to mutual tolerance and political restraint when confronted with minor or occasional injustices. It is one facet of social cohesion, of a shared commitment to tolerate and to aim to improve imperfect institutions.

Green's theory of civility quite clearly moves beyond the logical and even fictional problems which undermine the traditional theories. Consent, contracts, or conventions which bind all of the people all of the time create a fictive account of political obligation. Rather than searching for such non-existent signs, Green approaches the issue of obedience with realistic observations, recognizing that, outside legal sanctions, there exists no force requiring absolute obedience. In formulating an alternative to a general obligation to obey, Green preserves, to a greater degree than Raz, an element of independence of thought for the individual. As he states, civility does not require a "surrender of judgement."²² Thus, while Raz would have the individual defer to the moral value of the law as a blanket reason for obedience, Green suggests that the law be assessed critically before any action is taken. Individuals are therefore not required, as with Raz, to adopt a static attitude toward the law. They may conclude that the law is grossly unjust and drop any suggestion of tolerance or civility. In contrast, Raz represents the combined cognitive and practical components of respect for law, which results in obedience without questioning the law on every occasion.

While Green contributes significantly to the movement away from general political obligation toward an individualized attitude toward the state and its laws, his theory remains subject to two important weaknesses intrinsic to both the traditional theories and the later "attitude" theories. As noted, the classical theories are based upon an illusory choice.²³ Upon critical examination, it is evident that this illusion cannot bear the weight of a general obligation to obey. However, as the traditional theories falter, so do their successors. In reacting against the traditional general

²¹ *Ibid.* at 265.

²² *Ibid.*

²³ See *supra*, at 858-63.

obligation theories, the later individualistic theories fall into the same trap of illusory choice. The obvious implication of focussing upon the notion of a permissible attitude to law is that those who reject this attitude are justified in completely disregarding the law, while continuing to enjoy the privileges and benefits of living within society – a wholly unrealistic and unacceptable formulation.

This weakness is, perhaps, most attributable to the nature of the individualist theories. These theories appear to represent a reactionary extreme. They admit there is no choice to living in society. There exist too many obstacles to theories which claim that a general obligation to obey binds all. The only alternative, these new theories imply, is to find some rationalization to explain why people obey the law in the absence of any obligation. It would be far too dissatisfying to admit that people obey "just because," even though no obligation or profound, as opposed to prudential, reason to do so exists. These theories, therefore, rationalize away the phenomenon of obedience through the medium of attitude. Those who obey have chosen to adopt the permissible attitude toward the law.

That these theories merely provide rationalizations is revealed by their attempt to construe obedience hermeneutically. If this approach is followed rigorously, then the clear outcome is that, whether one calls it obligation or attitude, the majority of people obey without critically considering their attitude toward the law. And they do so without analysing whether they have a choice or a duty in obedience. The majority, in other words, generally lack the sophisticated understanding of political morality required by Raz and Green. To claim that it is an intuitive understanding would be equally as fictive as the traditional theorists.

The second weakness, rendering both these and the traditional theories untenable and unhelpful in understanding political obligation, is their focus upon the question *Why*. All these theories, either expressly or implicitly, address the question "Why do, or should, people obey law?" which presumes the illusory choice: it presumes that people had some choice in entering into the obligation in question, or in entering the society enforcing the obligation. From a realistic perspective, this question is irrelevant. We live in society. Society is necessarily organized by rules to facilitate the myriad of relationships created therein. It matters not

what original basis governs our obedience. The critical questions are: In what circumstances should we obey, or not; what kind of society or set of rules is deserving of our obedience; and what is a just society?

These theories all offer hypothetical accounts of the obligation to obey law based upon a non-existent choice. Without retaining links to the reality of actual life, they do not offer a useful analysis of the nature or scope of political obligation. Indeed, although they focus upon the question *Why*, they do not even convincingly explain why individuals should, in their short lives, endure minor or gross injustices inflicted by the state. Why should consent or some antiquated contract bind? Why should tolerance govern one's political conduct? To invoke reasons of honouring one's word, commitments to others, or the virtuosity of mutual tolerance does not persuasively justify the extent of power that the state wields over citizens. The significance of the real choices that people do have within society is overlooked by these theories. The theorists considered may be said to lack a social theory. They fail to address the phenomenon of "society," as it exists and is governed, and the significance of this governance.

What is needed is a study of political obligation which moves beyond theoretical questions of how individuals are bound to obey, to questions of when they ought to obey, when not, and what sort of government they should be expected to tolerate, or not. In short, it seems that theorists have consistently focussed upon the wrong aspect of the state/individual relationship. Emphasis should be shifted to choices which realistically exist – such as the character of society and the form of government accepted or desired – in order to discover the nature and scope of an obligation, or reason to obey law. To ask when there might exist an obligation to obey law is to ask for what purpose the law must be obeyed. This, in turn, raises the question of the ends of government, and its role in the lives of those who submit to its rule. These questions demand a more substantive inquiry and response.

Such a shift in emphasis would be, not only productive, but far more significant to a broader range of world societies. This is evident once the oppressive political regime or the unjust legal system is considered. In his book, Green clearly restricts his remarks and his theoretical focus to those living within a stable,

democratic, and reasonably just political community. His only thought, for those caught within an unjust system, is to observe that "it is true that a state's authority cannot be justified if it rules unjustly."²⁴ His aim is, admittedly, to "isolate a central case of authority relations."²⁵ The point of contention is that a more worthwhile aim lies, not in examining those conditions which are already tolerable, but in considering the position of those trapped in intolerable situations.

It is quite easy to consider obedience, permissible attitudes to law, and critical assessments of its moral value within the context of a peaceful, democratic society, where circumstances of fundamental and widespread hardship do not predominate. Such suffering does not play a significant role within the lives of the majority, who lead uneventful or comfortable lives within an unoppressive system. Few dilemmas, few fundamentally destructive situations, or deprivations are created or imposed by the political system of the stable, unoppressive society. Thus, the question of the source of an obligation to obey is of purely theoretical interest to the few who study it. Indeed, when Green speaks of the increased stakes in social and political theory arising out of the stability of the modern state, it seems self-evident that those stakes are nowhere higher than with respect to the unjust regime clothed with the stability or established character of the modern state. To assert that such a state's authority is unjustified, and say no more, is not only simplistic, but it is of particularly little insight or help to those living in that state. It might well be an affront to those endeavouring to understand and change that legal and political situation.

A clear illustration of this point is provided by South Africa. To say that the political situation in South Africa is far more disturbing, pathological, and deserving of serious attention than that in Canada or the United States, for example, seems indisputable. It is a country with a constitution authorizing discriminatory treatment of "population groups," notably Blacks.²⁶ It is a country with no Bill of Rights to protect fundamental civil rights and one where the

²⁴ Green, *supra*, note 1 at 4-5.

²⁵ *Ibid.* at 3-4.

²⁶ *Republic of South Africa Constitution Act 1983*, ss 14, 16a, 100, Schedule 1.

Constitution ensures that recourse to the courts to challenge the validity of any statutory law is precluded. Section 34 of the *Republic of South Africa Constitution Act 1983* limits the courts' jurisdiction to consideration of government compliance with the technical provisions of the Constitution in the passage of any Bill.²⁷ The substance of laws, however, is expressly made immune to such scrutiny. It is a country whose government exercises its constitutional powers in a manner designed to deny consistently to the Black population basic social, educational, economic, and political rights and opportunities. It is a country where the minority oppresses the majority through the enactment and enforcement of constitutionally valid laws. It is a country where protest, unrest, and violence are a familiar occurrence. As Millard Arnold observed: "On the one side the South African government stands poised with the strongest military and police force in all Africa. On the other side stand twenty million people with no weapons, no political organizations and all of their leaders incarcerated or dead."²⁸

Clearly there is something radically wrong in South Africa. The difficulty in this situation lies, not in recognizing that something is wrong or even what exactly is wrong, but in quantifying how wrong it is and in deciding what to do about it. Is the treatment of Black South Africans so wrong that any means are justified to combat and change it? Or is it only so wrong as to justify political, non-violent resistance and change within the system? In other words, is there an obligation to obey the law on the part of Black South Africans, regardless of the nature of the political system under which it is said to exist? Or does the existence of certain circumstances abrogate any reason or obligation to obey, or to operate within the system to effect change?

Neither the traditional theories of political obligation, nor the more recent individualistic ones, offer an applicable, appropriate, or even relevant comment upon the South African or any similar political predicament. From the perspective of Green's theory, the only answer that might result is that Black people would be justified

²⁷ *Ibid.*, s. 34.

²⁸ M. Arnold, ed., *Testimony of Steve Biko* (London: Maurice Temple Smith, 1979) at xxv.

in denying the legitimacy of the state's authority because its governance is unjust. But what does this mean? At what point does a system merit the label "unjust"? Does this label imply that revolution is a perfectly justified response and that any means may be used to combat the unjust regime? Certainly, the issue is far more complex than notions of tolerance and civility can comprehend.

The greatest weakness of Green's theory is that it does not profess to address the unjust, oppressive regimes. Yet, it is precisely these pathological situations which test the limits of political obligation, which confront it with stresses unheard of in the stable western democracies, and which are overlooked or brushed aside by so many political theorists, past and present. The situation in South Africa demonstrably raises questions that are of particular significance to the debate on political obligation. It indicates the need to shift the emphasis of the discourse to the circumstances in which individuals ought to obey, and to the questions: To what end is obedience rendered? What conditions may be justifiably imposed upon people in pursuit of that end? By considering these questions, a more realistic and broadly applicable conception of political obedience, its purposes and scope, may be produced. Clearly, to dismiss the politically aberrant situations, which raise such practical and relevant issues, in favour of examining those where lives are not daily threatened by the government, where daily confrontation with state authority is not the norm, is a disappointing approach to perpetuate in the discussion of political obligation. A new perspective is needed, one that moves beyond philosophy to social and political theory and practice.