CONTRACTARIANISM AND THE JUSTIFICATION OF CIVIL DISOBEDIENCE

NELL W. SENTER

I will criticize the social contract basis of Rawls' theory of justice as T. H. Green might have criticized it.[1] I rely on Green's theory of political obligation for two reasons: (1) Such a theory brings out the lack of harmony between Rawls' social contract view and his understanding the conception of justice as related to a moral end in human civil communities. This disharmony helps explain the inconsistencies in Rawls' discussion of civil disobedience. Rawls has spoken of the understanding of civil disobedience as derived, on his account, "from the standpoint of persons in the original position."[2] Persons in the original position can have no understanding of civil disobedience because the moral setting necessary for such an understanding, and for the complementary notion of the civil good, is missing. (2) Green's approach to the place of justice in civil communities points in the direction of an understanding of the place of a legal system in civil communities. This understanding seems to me to be underneath the notion of the civic good that is reflected in justifiable acts of civil disobedience.

Rawls' account of civil disobedience rests on his view of political obligation as founded in the social contract view and the veil of ignorance. Rawls, in the final sections of his book, bases the conception of justice on one's understanding of himself and others as moral agents, interested in a life in which moral autonomy is possible. He writes:

> . . . a person's good is the successful execution of a rational plan of life . . . each knows that in a society he will want the others to have the moral sentiments that support adherence to these standards of life.[3]

These last remarks are noticeably similar to T. H. Green's theory of political obligation in *Lectures on the Principles of Political Obligation.*[4] Rawls' social contract theory, however, is in sharp contrast to Green's view. Green argued that it was impossible to ground a conception of justice or of the civic good in "a person's good" as "the successful execution of a rational plan of life" and *also* and begin with a social contract view, as Rawls does.

Green states:

> The capacity, then on the part of the individual of conceiving a good as the same for himself and others, and of being determined to action by that conception, is the foundation of rights, and rights are the condition of that capacity being realized.[5]

The notion of the civic good, or of justice, is, for Green as for Rawls, tied to "the fulfillment of man's vocation as a moral being."[6]

On Green's view, all social institutions, including the State and the law, serve the moral end of helping to maintain certain conditions of life. These are the conditions within which it is possible to live a moral life, the Socratic good life, as one conceives of it. Rawls has argued in much the same way, but given Green's understanding of moral ends in a civil community, he would argue that such an argument that begins with the conception of persons in the original position is fallacious.

Rawls describes this position as follows:

> In Justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. . . . Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does anyone know his fortune in the distribution of natural assets. . . . I shall even assume that the parties do not know their conceptions of the good . . .[7]

This is the veil of ignorance that, on Rawls' view, conveys the idea that the principles of justice are agreed to in an initial situation that is fair. It is within this original position, under the veil of ignorance, that the choice of the first principles of a conception of justice is made. Therefore, on Rawls' view:

> Our social situation is just if it is such that by this sequence of hypothetical agreements we would have contracted into the general system of rules which defines it.[8]

On this view, the answer to the question, "Does this institution serve the civic good?" is "If it is in accordance with the civic good as conceived of in the original position." On Green's view, this understanding of justice can have no relation to the conception of the good life as the end of all social activity, which conception determines what is in the civic good. Green argues that:

> . . . there are no rights antecedent to society, none that men brought with them into a society which they contracted to form . . .[9]

The concept of mutual rights, as recognized by persons *within* a community, is conceptually tied to the notion that laws, and the community in general, serve the moral end of furthering the possibility of the moral life. That is, political rights and the corresponding notion of the civic good require a moral setting in a civil community.

In Green's words, "the capacity to conceive of a good as the same for oneself and others" is the foundation of a notion of the civic good. This capacity is dependent upon mutual recognition by members of a community of each other as moral agents. The reason for this dependence

is, as Green explains, that only *persons* can be conscious of their own moral good and that of others, and thus of a common good that the community can serve. This *common* good is a life so regulated that individuals can, within reasonable limits, pursue their own idea of the moral life. The crucial understanding of a person as a moral being can only arise in the context of a civil community, in which individuals are regulated by law. Green explains that:

> the conception of the moral person, in its abstract and logical form, is not arrived at till after that of the legal person.[10]

Green is claiming that the concept of a person as a member of a community governed by laws is logically first—prior to that of a person as a moral agent. Yet, that latter concept is itself necessary as the foundation of a legal system and a civil community that serves a moral purpose. This is why Green stated, as I have quoted, that the capacity to "conceive of a good as the same for himself and others" is "the foundation of rights," and that "rights are the condition of that capacity being realized."[11]

Rawls cannot reach the conception of the moral person necessary to the conception of justice as he understands it because, Green might argue, he begins with a state of affairs in which the notion of the moral person is completely alien. As Green says of the social contract theory in general:

> Such a theory can only be stated by an application to an imaginary state of things, prior to the formation of societies as regulated by custom or law, of terms [such as "conception of justice"] that have no meaning except in relation to such societies.[12]

Furthermore, Rawls' cannot reach the conception of justice that underlies what he calls "constitutional order" without the understanding of a person as a moral agent that is missing in his original position, where all are under the veil of ignorance. No natural rights, and thus no natural duties as Rawls refers to them, can be established on this theory for, as Green explains:

> 'Natural right,' as right in a state of nature which is not a state of society, is a contradiction. There can be no right without a consciousness of common interest on the part of members of society.[13]

The most Rawls can derive from his theory are powers of individuals, but no rights and reciprocal duties upon which to rest a state of justice. Green continues:

> Without this [consciousness of common interest] there might be certain powers on the part of individuals, but no recognition of these powers by others as powers of which they allow the exercise, nor any claim to such recognition; and without this recognition or claim to recognition there can be no right.[14]

Thus, the understanding of the state—the civil community and its regulation by a system of laws—as contributing "to the fulfillment of man's vocation as a moral being, to an effectual self-devotion to the work of developing the perfect character in himself and others" is, finally, missing on Rawls' theory.

On Green's theory, the justification of a legal system, and of the establishment of political obligations and rights in general, rests on the function the law serves: namely, to make the moral life possible. The use of "justification" in Green's account seems to me inappropriate. Justifications are appropriate when needed or called for. A legal system is, in many respects, a condition of human life as we understand it. This was partly Socrates' point in the *Crito* when he referred to the laws as his parents.[15] Justifying the existence of legal systems in general, rather than a particular one, such as that of South Africa, is much like justifying the existence of civil communities. Asking for such a justification presupposes that we can imagine life without legal systems or civil communities. In certain philosophical moods, we can and do describe such a state of affairs. Doing so is, in many ways, like imagining the "original position" in a state of nature. It is unclear that anything is learned about legal systems when we do admit the possibility of a life without them. In any case, asking for a justification of the existence of any legal systems at all is asking for a special, and unfamiliar, kind of justification.

However, Green's claim that a legal system can only be understood against the background of the purpose it serves, namely, to make it easier for individuals to live up to their own moral expectations, seems to me an important one for understanding civil disobedience. H. L. A. Hart makes much the same claim about the function legal systems serve of making it possible for persons to predict their lives and make choices that have legal effect, such as marriage and entering agreements. In *Punishment and Responsibility: Essays in the Philosophy of Law*, he says that a legal system allows: "the adjustment of claims between a multiplicity of persons." This incorporates the idea that:

> each individual person is protected against the claim of the rest for the highest possible measure of security, happiness, or welfare which could be got at his expense by condemning him for a breach of the rules and punishing him.

Hart continues that when considering punishment, the law must consider the following point of view:

> that of society not as harmed by the crime but as offering individuals including the criminal the protection of the laws on terms which are fair, because they not only consist of a framework of reciprocal rights and duties, but because within this framework each individual is given a *fair* opportunity to choose between keeping the law required for society's protection or paying the penalty. . . . this system not only enables individuals to exercise this choice but increases the power of individuals to identify beforehand periods when the law's punishments will not interfere with them and to plan their lives accordingly.[16]

Green is not saying, and his view is not committed to the claim, that any particular law is law only in so far as it accords with a system of Natural law. Green denies that there is such a system independent of community's systems of laws. A Natural law theory of law requires a theory of what the moral law is as an independent system, of how it is recognized, and who, so to speak, legislates it. Also, it entails that law enforce morality. Green need not be committed to a claim that law should enforce morality, although without further explanation, it is not clear that Green's view is inconsistent with that claim. At least, understanding a legal system against the background of its role in furthering the possibility of living a good life as one conceives of it is not the same as understanding a legal system as *enforcing* morality. It is possible to provide the requisite setting for such a life by, as Hart has pointed out, regulating one's life so as to allow choices and predictability without fashioning a legal system so as to do the work of social moral sanctions, such as prohibiting homosexual acts or requiring church attendance.

As I interpret Green, and if this is a misinterpretation my own view departs from his at this point,[17] it is not a consequence of a legal system's serving a moral purpose that any legal system that inhibits the possibility of moral life is not, by definition, a legal system. An example of such a legal system would be either one that is morally corrupt, e.g., serves only the interests of the ruler, or one that is so inefficient that it is impossible to predict its effect on one's life. Rather, given the necessity of understanding a legal system against a moral background, such legal systems would be open to moral condemnation because of their failure to help to make the moral life possible. This is an important consequence. On accounts of human institutions such as the one described by John Ladd in "Morality and the Ideal of Rationality in Formal Organization,"[18] a legal system as a formal organization would not be open to moral evaluation. One can expect legal systems *as such* to increase the possibilities of living as a moral agent. Thus, on this view civil disobedients are reflecting an understanding of the role laws play in their lives, if they are concerned with retaining their moral autonomy. The civic good, on this view, is part of this concern, given the role of a legal system in promoting the civic good. Their understanding need not reflect a Natural law theory of law nor the equation of law and morality. Yet, civil disobedients are insisting that law not be separated from its moral function. This is part of the importance of stressing that legal systems, and other "formal

organizations," are human institutions. As such, they serve human needs. Thoreau is certainly reflecting this understanding of law when he insists that "if it [a law] is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law."[19]

Again, I emphasize that this understanding of law does not result in all cases of civil disobedience being justified, nor in all cases of conflict between conscience and law being finally decided in the favor of conscience. However, the burden for expecting and calling on a legal system to serve the needs of the community, which needs include acting as free moral agents, is rightfully placed on the shoulders of individuals within the community.

NOTES

[1] I wish to thank Professor A. D. Woozley for his helpful criticisms of an earlier version of this paper.

[2] John Rawls, *A Theory of Justice* (Cambridge, Massachusetts: The Belknap Press of Harvard University, 1971), P. 383.

[3] Ibid., pp. 333 and 337.

[4] T. H. Green, *Lectures on the Principles of Political Obligation* (Ann Arbor, Michigan: The University of Michigan Press, 1967).

[5] Ibid., p. 47.

[6] Ibid., p. 43.

[7] Rawls, *op. cit.*, p. 12.

[8] Ibid., p. 13.

[9] Green, *op. cit.*, p. 47.

[10] Ibid., p. 44.

[11] Ibid., p. 47.

[12] Ibid., p. 48.

[13] Ibid.

[14] Ibid.

[15] Plato, *The Crito*, line 50-51, Jowett's translation.

[16] H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (New York and Oxford: Oxford University Press), pp. 21-23.

[17] Green's views on civil disobedience as given in pp. 145-53 are not radically different from mine.

[18] *The Monist*, Vol. 54 No. 4, October 1970.

[19] Henry David Thoreau, "Civil Disobedience" in *Civil Disobedience: Theory and Practice*, ed. Hugo Bedau (New York: Pegasus, 1969), p. 35.

Texas Christian University