

## Mark Tunick, "The Scope of Our Natural Duties"

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### I

[87] Jeremy Waldron argues that "we have a natural duty to support the laws and institutions of a just state." We owe this not because we ever promised to support these laws and institutions, nor because fair play requires we support the cooperative ventures from which we receive benefits. "The law does not predicate its demand for compliance on any contingency such as consent or receipt of benefits."<sup>1</sup> The claim is that we have a general duty to promote institutions of a just state wherever these institutions may be, a duty that does not depend on our having special ties to these institutions, special ties of the sort we have to the institutions of our own government. The natural duty theory itself cannot explain "how a particular institution comes to be the one to which individuals owe obedience and support."<sup>2</sup> Consent may very well account for that. Waldron, drawing on Kant, argues that we need to establish and support some coordinating institutions to avoid injustice. But because of the nature of coordinating institutions, only one system may be legitimate.<sup>3</sup> The one that is may be legitimate purely by virtue of its "sheer existence" as "dominant and unchallenged." It is to this organization that we consent. Consent may establish *which* institutions dominate, but is not the ground or basis of obligations--natural duty is. "Because we are not to regard remaining in the state of nature as a permissible option, we may not say that whether we are bound to legal institutions is a matter of whether we happen to promise our cooperation. Our cooperation in establishing and sustaining political institutions is morally required. That is the backbone of the natural duty position."<sup>4</sup>

Many of us think we are not bound to just any government, and the natural duty theory, in having us support institutions of any and all just states, fails to account for the special ties we think we have, for "why Britons have a special duty to support the institutions of Briton."<sup>5</sup> This is the 'special allegiance objection'. Waldron does not deny that we do have special ties, but, he argues, these ties are not essential to our having certain obligations or duties. "If the criminal justice system of a country is fair, everyone everywhere has a duty not to obstruct it, whether they owe any particular allegiance to that system and live under its laws or not."<sup>6</sup> On the natural duty theory, we may have special ties to our state that motivate us to fight for it and praise its virtues, but these special ties are not the source of our duty to support its institutions and laws. We have a duty not to undermine the administration of justice anywhere and, the argument goes, [88] only the idea that this duty is natural, required by the moral imperative of establishing and sustaining just political institutions, can account for this.<sup>7</sup>

The argument that we have a natural duty "to support laws and institutions of a just state" is intended to provide reasons for acting (or not acting) in certain ways. The theory can

reasonably demand only that noncitizens comply with and not obstruct the enforcement of applicable laws. A reasonable interpretation of the "support" requirement would have to exclude onerous demands such as military service. Waldron does not claim that a New Zealander must risk life and limb to preserve France's laws and institutions. As we do not need to appeal to the idea of a natural duty to justify compliance with many laws or in many cases to justify the demand not to obstruct just institutions), I shall question the advantages of the natural duty theory, especially in light of some of its drawbacks and ambiguities.

## II

The theories of acquired obligation to which the natural duty theory stands as an alternative provide reasons for obeying laws and conforming with the demands of institutions, but reasons only for those who stand in a special relationship to those laws and institutions. According to these theories, obligations are contingent either on the receipt of benefits or on explicit or implicit consent. One apparent advantage of the natural duty theory is that it seems to account for the moral fact that we are bound to obey the institutions and laws not *only* of the state to which we have special ties but of all just states. There are two reasons to be skeptical about whether this really is an advantage of the natural duty theory. First, it is not obvious that there is this moral fact to explain; second, even if we were to agree upon this moral fact, the natural duty theory does not necessarily best explain it.

The advantage of the natural duty theory over theories of acquired obligations is that it can account for our being morally bound to the just laws and institutions of states that are not our own. Waldron thinks it is "obvious" we are morally bound in this way: "A New Zealander visiting France is morally bound to obey just provisions of French law."<sup>8</sup> But there are other ways to characterize the relation besides the relation of 'having a moral obligation' or 'having a duty'. We might say the New Zealander "has to," "must," or "is required to" obey; or that he "morally ought to" obey; or perhaps that he "prudentially ought to" obey French law. Once we see the different ways we can depict relationships between an individual and institutions or laws which operate under the authority of a government with which the individual has no special ties, it is no longer obvious that "has a duty" or "is morally bound" is the most appropriate characterization.<sup>9</sup>

Even if we agree a New Zealander *is* morally bound to obey just provisions of French law, there remains a second difficulty for the natural duty theory: it may not provide the most persuasive account of *why* the New Zealander is morally bound. We can say that New Zealanders consent to **[89]** French laws in applying for a visa; or that their duty to obey arises from the principle of fairness--New Zealand visitors enjoy the benefits of French laws while in France, and fairness requires that they contribute by obeying these laws.<sup>10</sup> The natural duty theory, as Waldron acknowledges, is not the only theory that might account for why we must obey laws in countries we visit. I shall eventually argue that compared to consent and fairness theories, it has the distinct *disadvantage* that the conditions which must obtain for the natural duty theory to establish a moral reason for complying with any law or institution are ambiguous

and difficult to apply, more so than the conditions for the consent and fairness theories. For the latter theories we need to know whether someone consented, or whether the benefits and burdens of a cooperative venture have been distributed fairly to decide whether one has a moral reason for obeying, and both of these conditions seem easier to know than whether a state, or its laws and institutions, are just. In this and the following section I consider whether, leaving aside its ambiguities, the natural duty theory persuasively accounts for the obligation to obey law and not obstruct just institutions in states not our own.

Any account of the moral reasons to obey law needs to be sensitive to the fact that there are different sorts of laws and that our reasons for obeying any one in particular may depend on the nature of the law. We do not need a natural duty theory, or theories of acquired obligation either, to account for why New Zealanders must obey laws proscribing *malum in se* crimes. This class of laws proscribes actions that are wrong for reasons other than that the actions are proscribed by law. It is wrong to break these laws regardless of whether the state under whose authority the laws are enforced is just or not. New Zealanders must not murder, rape, or steal while in France, not because they have a duty to obey laws of a just state, but because it is wrong to murder, rape, or steal. There are moral reasons for refraining from certain actions, reasons that are decisive without regard to whether the actions are proscribed by law. Neither natural duty, consent, nor fairness theory best characterizes the moral reason a New Zealander has for obeying this class of French laws. That reason is the same both for those who do stand in a special relation to the government under whose authority the laws operate ("insiders") and for those who do not ("outsiders"). Even if a state were to hang pickpockets, the injustice of its sentencing scheme does not diminish the moral reason for citizens or noncitizens not to pickpocket (or murder or rape) in that state. If the natural duty theory is taken to be a statement of the conditions necessary for an obligation to exist, and thus as an account of when disobedience is justified, it would wrongly conclude there is no duty to obey laws against murder or rape in a state whose institutions and laws are not just. If the natural duty theory is not taken to provide the necessary conditions for obligations, then the theory loses some utility as an account of political obligations and the conditions of justified disobedience.

A second class of laws reflect not moral judgments but, rather, local conventions, conventions that are morally arbitrary but which may be use-[90]ful in coordinating action. For example, New Zealanders visiting France must drive on the right side of the road, as dictated by French convention. Here, too, the natural duty theory fails to provide an appropriate account of the reason noncitizens have to obey such laws. Our reasons for driving on the right side of the road when this is accepted convention have nothing to do with the justice of the institutions of the state. To flout this convention is not to undermine justice since there is nothing just or unjust about driving on one side of the road or another.<sup>11</sup> It may be to flout laws and institutions of a just state, but whether the laws and institutions of a state are just has little bearing on whether we should comply with a particular demand of the state when the demand itself is neither just nor unjust. Taken as an account of the necessary conditions for obligations, the natural duty theory wrongly implies that we need not obey traffic laws in a state whose institutions and laws are not just. A more plausible reason to conform with this class of laws is prudential, to avoid suffering a

penalty. If in flouting French driving conventions we intend to be malicious--using our vehicle as a weapon to inflict harm--then we are not merely imprudent, we can be judged immoral. But in this case our moral wrong is best seen as the wrong of causing gratuitous harm, not of violating a duty to obey just laws.

There are reasons to obey traffic laws even in an unjust state. The natural duty theorist, acknowledging this, still might want to say that the fact that a state is just is itself *a* moral reason to obey its traffic laws. But as it is neither just nor unjust to obey such laws, the natural duty theorist better avoids the problem of seemingly justifying disobedience of traffic and other morally arbitrary but important laws of unjust states by acknowledging that there is a class of laws there are non-moral reasons to obey and about which the natural duty theory has nothing to say.<sup>12</sup> The natural duty theory has us look at the justice of the institutions of a state in determining whether outsiders have a moral reason to obey laws. But the reason for obeying a significant number of laws is not contingent on the justice of a state's institutions.

### III

The best moral reason we may have for obeying many laws--that not doing so would wrongly cause gratuitous harm to others--does not necessarily provide grounds to support just laws and institutions in other ways than by obeying particular laws. The natural duty theory may account for why we must support just laws and institutions not merely by complying with their demands, but by not obstructing their smooth operation, or otherwise supporting them, such as by paying taxes, sending donations, serving in the military, or singing praises.<sup>13</sup> Waldron does not claim there is a natural duty for noncitizens to do any of these latter acts (though he does not explain why not), and defends only the following formulation of what the theory requires: "if the criminal justice system of a country is fair, everyone everywhere has a duty not to obstruct it."<sup>14</sup>

[91] Waldron gives two examples, our intuitive responses to which are supposed to support this duty not to obstruct justice. The first, the *Rainbow Warrior* example, goes like this: In 1985 French officials arranged a bombing of a Greenpeace ship docked in Auckland harbor, the *Rainbow Warrior*, which had been obstructing French testing of nuclear weapons. New Zealand sought to convict the French operatives responsible for the bombing but French officials obstructed New Zealand's efforts. Waldron argues that "many would say" it was wrong of the French officials to obstruct New Zealand's criminal justice system, and he says this thought seems best captured by the principle of a natural duty not to obstruct just institutions. He adds that no argument from consent or fair play could support this thought.<sup>15</sup>

In the second example, of the 'playful anarchist', a rich playboy bribes judges of a foreign country "for the sheer fun of it." Waldron, voicing what he takes to be the appropriate intuition, says that "surely this action is wrong," and argues that it is wrong because the playful anarchist "has violated a duty he has not to undermine the administration of justice--*anywhere*. Neither consent theory nor the principle of fair play can explain what is wrong with his gratuitous interference."<sup>16</sup>

Two questions are in order: does Waldron have the right intuitions in these examples? If so, does the theory of natural duty best explain or capture these intuitions?

Waldron seems to have the right intuition in condemning the playful anarchist, but his intuition regarding the *Rainbow Warrior* example is less obvious. Waldron himself seems less certain; he says not that the French officials were "surely" or "of course" wrong, only that "many would say" it was wrong of them to obstruct the New Zealand investigation. Why might we hesitate? Because the French officials were protecting operatives who were defending what France took to be its right to test nuclear weapons. To the French officials, New Zealand's investigation protects the interests of a group itself obstructing justice by interfering with France's rights. So we may be ambivalent in our judgment of the French officials. The French officials allegedly obstructing just institutions in New Zealand might dispute the charge that they were obstructing *justice*. This could account for their failure to cooperate with the investigation, and for their political efforts to retrieve their operatives. Justice here may well be in the eye of the beholder, especially where circumstances are as complex as in the *Rainbow Warrior* crisis. The natural duty theory, requiring that justice be promoted, is unlikely to yield definite moral prescriptions in such cases. Waldron, who does not explicitly acknowledge this difficulty, avoids it altogether with his other example. His playful anarchist does not even pretend to do the right thing. He obstructs justice "for the sheer fun of it." It is easy to agree that this is wrong.

But why is it wrong? The principle that we have a natural duty to support laws and institutions of a just state is one account of why, but there are others. Suppose the consequence of the playful anarchist bribing a judge is that the judge lets off an evil and ruthless kingpin, notorious for selling [92] drugs laced with lethal poison. Even if this fun-loving anarchist does this for the sheer pleasure of it, in fact he may be indirectly responsible for the deaths of those who snitched on the kingpin and who will soon be killed once the kingpin is released from state custody, as well as for the deaths of the thousands of people who will use the drugs the kingpin will sell. Given these facts, our intuition that the playful anarchist is wrong to obstruct justice is convincingly accounted for either by a principle of utility or by the moral principle that it is wrong to deliberately cause avoidable harm. Either of these principles is more appropriate than the natural duty theory because the judgments each yields are not contingent on either the justice of the institutions and laws of the state for whom the judge works or the empirical determination of the effect of general nonenforcement of bribery laws.

Waldron gives a consequentialist justification for the natural duty to support just institutions: justice should be promoted because it is valuable. An act that undermines laws furthering just distributions is wrong, he writes, "because of its consequences."<sup>17</sup> We have a duty to avoid the bad of injustice. The anarchist's bribe leads either to a better, a worse, or an equivalent state of affairs, and is wrong only if it leads to a worse state. Waldron's position seems to be that a world with bribes is worse than a world without, so we must defend the rule 'no bribes', even if the consequences of a particular bribe are trivial. Because he casts his theory in 'natural duty' terms, appealing at the point where the argument turns consequentialist to Kant,

rather than explicitly invoking rule-utilitarianism, Waldron deflects attention from the familiar objections to rule-utilitarianism. If the argument is that bribing the judge, here, would undermine institutions needed to ward off anarchic violence, its defender needs to support this empirical claim and deal with the standard objections to rule-utilitarianism. If the argument is that there simply is a natural duty not to obstruct justice regardless of the consequences of that obstruction, the defender needs to explain the basis of that duty if it is not the avoidance of anarchic violence, and needs to consider the objection that strict adherence to rules can lead to substantive injustices.

Insofar as the natural duty theory links the obligation to obey particular laws to the justice of laws and institutions generally, it may have the disadvantage of asserting a duty where there is none. It may lead to false positives. Suppose a New Zealander visits Georgia, where it is against the law to engage in consensual homosexual sodomy. The New Zealander, brought up to respect the value of alternate lifestyles and diverse forms of sexual expression, believes it is not morally wrong to violate this law, a moral conviction, let us suppose, shared by most New Zealanders. Must the New Zealander obey the law against sodomy?

According to one formulation of the natural duty theory, he must comply with the laws of a just state. The state of Georgia may be reasonably just even though it establishes laws under a principle of legal moralism. Georgia's institutions and laws, in conjunction with federal institutions and laws, protect its citizens and visitors from conflicts that would bring them back to the state of nature. It is precisely to avoid such conflict that we have a natural duty, on Waldron's view.<sup>18</sup> The implication of the theory is that our New Zealander is morally bound to obey the sodomy law. That result is disturbing, and many will say that absent any compelling moral reason to justify this particular law, such as evidence that the proscribed activity causes harm to others, the only reason the New Zealander has to obey this law is prudential--to avoid capture, conviction, and punishment. The New Zealander has no other moral reason to obey this law. We might think that a citizen of Georgia with the same moral convictions as the New Zealander also has no nonprudential moral reason to obey this law, again contrary to what the natural duty theory dictates. Yet unlike the New Zealander, the citizen of Georgia had a chance to change the law and is in some sense responsible for its existence. This might account for some duty of the Georgian to comply with the law. If so, there *is* a distinction in the status of the duties of insiders and outsiders for which the natural duty theory itself cannot account. In some situations insiders might have a duty *not* to obey a law of a just state, just because they have a special tie to that state. In 1979 a French citizen violated a French law restricting access to certain documents, a law enacted in the name of privacy. The Frenchman believed he had a duty to violate this law in order to acquire and make public documents revealing how the French administrative state had carried out arrests, seized property, and sent people to death camps in Nazi Germany. He claimed to have a "Frenchman's right to speak out."<sup>19</sup>

The natural duty theory might be reformulated to avoid the previous objection that it leads to false positives by asserting a duty to obey when there is none. The theory might hold only that we must support laws and institutions essential for establishing and maintaining a just

state. The Kantian argument on which Waldron draws is that "the pursuit of justice is a moral imperative"--we must avoid the "violence, suffering, and anxiety" that would occur absent coordinating institutions.<sup>20</sup> Not all laws and institutions provide this protection--nor do all applications of laws which in general do. Since nonenforcement of the anti-sodomy law should not transform Georgia to the anarchic state of nature, the theory may not require we support this and similar laws.

This reformulation has the further advantage of making more explicit the natural duty theory's consequentialist underpinnings. Appealing to the phrase 'natural duty' tends to mystify the basis of the duty.<sup>21</sup> By reformulating the theory so that it establishes a duty only to support laws the disobedience of which would tend to promote violence and disorder, the theory remains anchored to its underlying justification and is not given free reign to admonish all acts of disobedience under the mystical guise of 'natural duty'. Of course reformulating the natural duty theory in this [94] way, while desirable, also sharply limits the scope of natural duties, making these duties contingent on a determination of the effect of nonenforcement of particular laws. What I take to be the most persuasive moral reason to comply with most criminal statutes--to avoid causing harm--provides a reason not to commit wrongs that is *not* similarly contingent on the consequences of wrongdoing for the maintenance of legal institutions and prevention of Hobbes's great fear.

#### IV

In assessing a moral theory an important consideration is whether it is unambiguous and offers clear guidance. The natural duty theory is usually formulated as a duty "to support the laws and institutions of a just state."<sup>22</sup> This declares that we must support whatever institutions and laws operate under its authority that apply to us. As such, the duty declares that

if a state is just (or fair), or if the political institutions and laws operating under the authority of the state are just (or fair), everyone everywhere has a natural duty to support these institutions and laws.

This formulation is problematic, I have argued, because there are many instances where the reason to obey a law is not contingent on the justice of a state or its institutions and laws generally. Many of the African-Americans rioting in Miami and East Los Angeles in the late 1980s and early 1990s regarded their state and its criminal justice system as unjust. If they were right then, on the theory of natural duty so understood, they had no natural duty to support U.S. laws and institutions. Some of the rioters, oppressed by a system that treats them unfairly, refused to comply with some of the laws of their state as an act of political protest, and the natural duty theory may offer them some support. But the theory, in its formulation above, appears wrongly to support those joining in the riots, blacks and whites, who violated property laws by looting simply because the police were too busy to offer any resistance. That the criminal justice system as a whole treats people unfairly, or that one's society is unjust, does not justify harming or otherwise violating the rights of innocent people.

In other passages Waldron suggests that the natural duty theory requires us to support the institutions and laws that apply to us only if these institutions and laws are just,<sup>23</sup> which could be the case even if we would not characterize as just the state under whose authority the institutions and laws operate, or if these institutions and laws are not authorized by any state at all.<sup>24</sup> This might imply that we must conform with a particular demand made by a law or institution only if the particular demand is just in the particular situation it is made. In other words,

If an institution or law makes a just demand, everyone everywhere has a natural duty not to obstruct compliance with the demand.

[95] This is a more promising formulation of the natural duty theory. But even stated in this way, it remains problematic. For one, the rationale for the claim that there is a natural duty--that we have a duty to establish and support coordinating institutions to avoid a state of anarchic violence--lends support to this formulation of the theory only when it can be shown convincingly that failure to comply with a particular demand might threaten the preservation of a society of ordered liberty. But leaving aside the problem that arises from connecting the idea of a natural duty with a consequentialist rationale, another problem remains: the natural duty theory does not itself tell us how to decide whether legal or other institutional demands are just. Consider again the *Rainbow Warrior* example. The French officials might be unable to agree that New Zealand is a just state, or that New Zealand's criminal justice system is fair or just, but even if they could, they could argue that subjecting the French operatives to a criminal investigation when they were acting to uphold France's rights is unjust, or wrong, or that the criminal proceeding promoted a substantive injustice. The natural duty theory provides no way to resolve such disagreements. It simply assumes that there is a scheme that is just "from an impersonal point of view,"<sup>25</sup> remaining silent when this is not the case. This is not in itself an insurmountable problem for the natural duty theory. But it may be a more difficult task to show that the conditions for a natural duty (in any of its possible formulations) obtain, than to show that the conditions obtain for a consent-based obligation or an obligation of fairness. Given that the natural duty theory does not clearly establish the conditions for justified disobedience and is not needed to explain why noncitizens must obey laws for which there are other compelling moral reasons, and at times asserts a duty where none exists, the very difficulty of knowing when the requisite conditions for a natural duty obtain may offset some of the advantages the theory may hold over competing accounts of political obligations.



## Notes

1. Jeremy Waldron, 'Special Ties and Natural Duties', *Philosophy and Public Affairs* 22:1 (Winter 1993), p. 3.
2. Ibid., p. 7.
3. Ibid., p. 28.
4. Ibid., p. 29.
5. Ibid., p. 5 note 10; citing Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), p. 193. This is one of the objections A. J. Simmons makes of John Rawls's earlier version of the natural duty position; see *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979), 143-56.
6. Waldron, p. 10; cf. p. 17.
7. Ibid., p. 10.
8. Ibid., p. 8.
9. "Is morally bound" is ambiguous. It might mean either "morally ought to" or "has a moral obligation to." Obligation implies a particular binding relationship--one of the roots of "obligation" is *ligare*, "to bind." See Richard Brandt, "The Concepts of Obligation and Duty," *Mind* 73:374-93 (1964), p. 386. Brandt, however, notes that there are correct uses of 'obligation' where the idea of such a bond is not present (p. 387). Waldron is casual about the use of 'obligation', 'duty', and 'must'. For discussion of how the concepts these words point to are distinct from each other and from the moral ought, see, in addition to Brandt, Richard Dagger, "What is Political Obligation," *American Political Science Review* 71:1 (1977), 86-87; Carole Pateman, *The Problem of Political Obligation: A Critique of Liberal Theory* (Berkeley: University of California Press, 1985, orig. 1979), 28; Richard Flathman, *Political Obligation* (New York: Atheneum, 1972), 34-39; James Mish'alani, "'Duty', 'Obligation' and 'Ought'," *Analysis* 30:2 (Dec. 1969), 39; and A.J. Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: P.U.P., 1979), 7-9.
10. Waldron, p. 8.
11. Here I disagree with Waldron, who is less discriminating in his use of 'just', pp. 8, 23.
12. There may be other moral reasons to obey such laws, for example, that we consent to such laws, or that obedience is demanded by fairness. Of course the natural duty theorist wants to avoid appealing to these reasons.
13. Waldron leaves it unclear what the duty to "support" institutions requires. Early in the essay he suggests our duty is to comply with the law (p. 3). Toward the end of his article he suggests our natural duty is a duty to *establish and sustain* political institutions that promote justice. But the examples he uses, which I discuss below, support only a duty *not to obstruct* institutions. This itself is an ambiguous requirement. In his discussion of the *Rainbow Warrior* example, discussed below, Waldron notes that French officials failed to support New Zealand's investigation by refusing to provide requested information; they also might have positively obstructed justice by urging their operatives to lie (though apparently whether they did this is disputed). Finally, the French asked other governments to place economic pressure on New Zealand to release the operatives. We may disagree about whether the first and last acts were 'obstructions' according to the natural duty theory. As to the act of deception, if it took place, the

natural duty theory provides one account of why this was wrong, but so does the moral maxim that it is wrong to lie.

14. Waldron, p. 10.

15. Ibid., pp. 9-10.

16. Ibid., p. 10.

17. Ibid., p. 18.

18. Ibid.

19. *New York Times*, "Documents Expose French-Nazi Complicity," April 7, 1993, p. A1.

20. Waldron, p. 28.

21. One striking statement of how the adjective 'natural' mystifies is given by Jeremy Bentham in his *Anarchical Fallacies*, "A Critical Examination of the Declaration of Rights," Art. II, where he refers to 'natural rights' as "terrorist language."

22. Waldron, p. 3.

23. Ibid., pp. 8, 9 and 10.

24. This ambiguity, that the theory can be construed to demand obedience only of just laws, but also of particular unjust laws that are part of a just state, can be read into Rawls's earlier formulation of the natural duty theory in *A Theory of Justice*. Rawls says (a) we have a duty to support and comply with just institutions; but also (b) if the basic structure of society is just, then we have a duty to support the existing scheme (p. 115).

25. Waldron, p. 18.