Between the Paternalism of Perfectionism and the Pessimism of Positivism:
Tacit Consent and Political Obligation in a ‘Love it or Leave it’
Voluntary Association (a.k.a. State)

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All positive undertakings pursued by the state, such as redistributive taxation, social programs which benefit some, but not all citizens, and a whole host of other justice-related measures argued for by moral philosophers, are one or two degrees of separation from the question—why have a state at all? One obvious response is that states are necessary is to solve a variety of coordination problems that arise when human beings live together. It is an arrangement to the benefit of the governed to have a division of labor wherein governors make determinations wherein any single determination would be better than no determination—which side of the road cars should drive on, where to put roads, etc.—and figure out an efficient technocratic means of implementation. But, it would be a stretch to say that positive programs undertaken in the name of justice were simply a solution to a coordination problem found in a state of nature. In all but the most perfectionist accounts of human nature, individuals form a state not to achieve lofty, humanitarian goals that require high levels of cooperation and self-sacrifice, but in view of some calculated advantage to themselves.

In the social contract tradition, the idea of free consent has often been used to define the circumstances under which self-interested individuals would and would not form a state. Of course, the classic problem of the consent-based view is that most individuals do not have the experience of living in a state of nature, coming together, and giving their actual consent to a political setup which each agrees is preferable to the status quo. Even in most historical situations in which a new state is founded, actual consent is not relevant. A person or group claims political authority over a geographical territory, and the state is legitimized over time
through various formal and informal mechanisms. And so, there must be some way other than actual consent to justify the state and its various activities.

Of course, in a society where all laws were just and everyone agreed that there was a duty for all citizens to comply with just laws, justifying the state would be a problem of theoretical interest only. But in actual societies, particular laws—even those aspiring to justice in their content—are often met with opposition. If a society has an active police force and a functional judicial system, ideological opposition to particular laws is of no great practical consequence, since citizens tend to comply with even those laws with which they do not agree. But, how to justify laws that do not enjoin voluntary support and are thus merely coercive? This, according to Jonathan Wolff, is “the most pressing problem of political obligation, the stubborn residue for any liberal individualist theory which makes the will of the people, in some form, central.”¹

One common liberal strategy is to invoke the notion of hypothetical consent. This is the idea that citizens could have consented to their political setup due to its inherent reasonability, but that they do not actually need to for political obligation to be morally binding. However, the ensuing implication is that, as Wolff puts it, “The decisions of the irrational simply need not be taken into account, and, in their cases, paternalism is quite justified.”² If labeling someone “irrational” means that it is justifiable to exercise coercive political power over him against his will, then rationality would seem to be privileged to the innate liberty of individuals on the hypothetical consent doctrine. This notion seems to run contrary to a political theory which starts and ends with the idea of the free individual.

Theories of political obligation based on tacit consent, however, are able to avoid the charge of paternalism by conceiving of the state as a voluntary association in which actual

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² Ibid., 163.
individuals express a preference for staying rather than leaving, and thereby count as consenting to the state’s political authority. In this paper, I defend a tacit consent-based theory of political obligation, arguing against those who are too dismissive to even be called the theory’s critics. The paper proceeds as follows. The first two sections are devoted to a critique of hypothetical consent and a defense of tacit consent. I then discuss common objections to the “If you don’t like it, leave!” account, and conclude with an account of civil disobedience that clarifies the nature of political obligation.

**Hypothetical consent and the public justifiability problem**

The concept of public justifiability is often used by liberal theorists to moderate the potential paternalism of hypothetical consent and keep the free individual’s place in liberal political theory central. For these theorists—sometimes called contractarians—that political obligations are capable of being actually justified to actual individuals rebuts Dworkin’s famous assertion that “hypothetical contract is not simply a pale form of an actual contract; it is no contract at all,” countering charges of paternalism by making it a normative requirement that the reason to obey the law is capable of being known to citizens. Contra the classic “publicity test” critique of utilitarianism—viz., the idea that some ought to be sacrificed for the sake of the whole is not justifiable because publicizing this principle would result in its rejection by the sacrificed

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4 I follow Geoffrey Sayre-McCord’s definition wherein “[w]hat binds the [contractarian] tradition together...is the conviction that moral norms or political institutions find legitimacy, when they do, in their ability to secure (under the appropriate conditions) the agreement of those to whom they apply” (“Contemporary Contractarian Moral Theory” in *The Blackwell Guide to Ethical Theory*, ed. Hugh LaFollette [Blackwell, 1999], 247-267. Though there are obviously many affinities between moral contractarianism and political contractarianism (e.g., see Cynthia Stark, “Hypothetical Consent and Justification,” *The Journal of Philosophy* [June, 2000], 313-334), here I am only concerned with political contractarianism. Finally, though Sayre-McCord’s definition could technically apply to a liberal political theory that relies on tacit consent (as in, tacit consent contractarianism), since the contemporary understanding of contractarianism usually involves hypothetical consent and public justifiability, I will refer to “tacit consent theories/theorists” to keep argument from getting terminologically muddy.

individuals—hypothetical consent as a ground of political obligation is held to be publicly justifiable because it conceives of individuals as free, equal, and possessing inherent worth.

However, on the “You would have consented, therefore you are obliged” account, that individuals actually do perceive and assent to the rationale underlying consent is of subsidiary importance to the content of the rationale itself. However, one can have a public-spirited sense of justice and still reasonably disagree that any injustice is legitimately within the scope of the state to correct. And so, the idea of a just state which uses political institutions to further the cause of justice, and grounds political obligation in hypothetical consent, will not necessarily be affirmed by all actual rational and public-spirited citizens. Aside from this being a theoretical difficulty for contractarians, if the goal is to be persuasive in a public reason setting, hypothetical consent just does not work very well. But the theoretical difficulty is significant. A citizen whose understanding of liberty implies that the reach of the state is limited may comply with positive justice-oriented laws for pragmatic reasons, but to her, such laws are commands issued by the sovereign backed by threat of punishment, to use Austin’s famous formulation, rather than duties which carry moral weight. From a contractarian point of view, this is unacceptable; such a citizen simply fails at having a public-spirited sense of justice.

Everything thus far has already been stated in various ways by the many critics of contractarianism who have come forward in recent decades. And yet, hypothetical consent contractarianism still enjoys widespread acceptance as a theory of political obligation. Some,

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7 This is Waldron’s formulation—see op. cit., 138. Also, note that the rationale underlying consent is not to be withheld; it must be actually available should citizens demand it. Rawls, for instance, acknowledges that some persons would not wish to spend the time that it takes to engage in philosophical reflection about the fundamental rationale for coercive laws, which seems decidedly more liberal than the account of civic education in Ch. 30 of Hobbes’ Leviathan, wherein citizens are taught the ground of laws and the rights of sovereign representative whether or not they would prefer doing something else. (See Rawls 1993, op. cit., 67.)
faced with such difficulties, have dropped the public justifiability requirement in order to save contractarian reasoning. ¹⁰ But, as I will try to show, such a move is unappealing. Contemporary Smithians have spilled a lot of ink about spectators, ideal and actual, and the scenario I am about to discuss perhaps fits in with such analyses. However, unlike those who argue that spectators should be neutral, or naturally in an impartial situation in which they are neutral parties to the dispute at hand, I find it more useful to consider the point of view of a citizen who is skeptical of the policy proposal under consideration. ¹¹ This approach, as it seems to me, is more closely engaged with the world of political practice, where most of the topics that present-day moral and political philosophers think about—global justice, inequality and redistribution, war, democracy, human rights, the claims of minority groups, etc.—are ones on which many citizens already have strong a priori opinions. And if they do not, experience suggests that most are likely to come up with and vocalize a strong opinion after several minutes of discussion.

Imagine, then, the likely effect of contractarian argumentation upon an ordinary citizen who happens to be skeptical of the political enterprise which her interlocutor claims is a requirement of morality (we can even specify, à la Rawls, that she has a sense of justice):

**Ordinary Citizen:** It sounds like this idealistic project that you’ve been going on about is going to cost taxpayers a pretty penny.

**Wise Moral Philosopher:** Yes, but as I’ve just told you, it is just for taxpayers to finance the project because the project is itself just.

**Ordinary Citizen:** Yes, you’ve told me, it’s just because it benefits persons whose lot in life is tied to circumstances that are arbitrary from a moral point of view. But this sounds to me like you’re trying to tiptoe around the fact that something can be just to some, but unjust to others. Those circumstances are not my fault—why is it just for the state to make me pay? Two wrongs don’t make a right.

**Wise Moral Philosopher:** Well, the state exists to serve the interests of the people…

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¹⁰ Freeman (op. cit.) is a quintessential example, and although to perhaps a lesser degree, so is Waldron (op. cit., see 146).
Ordinary Citizen: Agreed.

Wise Moral Philosopher: But “the people” does not just mean you; it means all people. By consenting to live under government (which, mind you, is only hypothetical, as you never demonstrated your consent), you are agreeing that the state should do whatever is in the interest of all people. Just because my justice-related proposal does not benefit you personally, there are others who have a strong justice-based interest in its being realized.

Ordinary Citizen: You and I just don’t see eye to eye on what is and is not the state’s business. When people are poor, or have a rough lot in life, people like myself should give them money. If poor people need more, that means that we should give them more.

Wise Moral Philosopher: But do you want the state to be just?

Ordinary Citizen: Yes, I want it to give accused criminals a fair trial, count all votes in an election, and so forth.

Wise Moral Philosopher: Well, if you agree that a state should be just with respect to those things, and about things that affect you, then you should understand that it should be just with respect to things that affect other people, which might require a monetary sacrifice on your part.

Ordinary Citizen: You keep talking about justice and how some people are poor and unequal, but when I think about global justice, I think about how I send money to Oxfam, and the work that Oxfam does in the developing world. The thing about global justice and domestic poverty relief is that people can decide for themselves how much to give. Some might have dying parents with high medical bills, or have kids in college, which should be taken into account if we’re talking about justice. And so, I don’t agree that an argument that a state should be just implies that it should try to correct all the wrongs in the world. The word “justice” in our Constitution only applies to justice within those domains that are specifically assigned to the state. Not every injustice that happens in a society is within the scope of state power.

Wise Moral Philosopher: My point is that if the state has the capacity to be an agent of justice, then it is just to exercise this capacity.

Ordinary Citizen: And my point is that this may be unjust.

The wise moral philosopher may be technically correct, from a moral point of view, that if the state is a cooperative enterprise, then this implies that state power has a wide scope in terms of the projects that a state may undertake in the name of the people, and that individuals have a moral obligation to support the state in such undertakings. But, that the state is a cooperative enterprise is a fairly hefty assumption, and it is not clear that arguments based on this assumption, for instance, Kant’s claim that—
[b]y the fundamental principle of the State, the Government is justified and entitled to compel those who are able, to furnish the means necessary to preserve those who are not themselves capable of providing for the most necessary wants of Nature.\textsuperscript{12}

—would hold much weight with those who do not already intuitively agree with it.\textsuperscript{13}

And so, one need not reject the moral content of hypothetical consent liberalism — individuals are obliged to be cooperating members of just social schemes—to think that something else is needed to ground actual political obligations and justify the state. Moreover, if moral philosophers are concerned with increasing the sum total amount of justice in the real world (which itself is arguably a demand of justice incumbent on those who have chosen “moral philosopher” as their profession) then it is not enough to be analytically rigorous, deriving sound arguments from plausible baseline assumptions. Moral philosophers ought to also try to be persuasive to non-moral philosophers, not just out of non-instrumental deference to the subjects of their inquiry, but because doing so is strategically necessary if their ideas are to have a chance of being realized in the world. And from the standpoint of a non-moral philosopher who is skeptical of the justice of justice-oriented state undertakings, the idea of a cooperation-based social contract in which the poor, as well as the well-off, take part is not necessarily motivating “in a moment of calm reflection” (as per Stilz) for individuals “with a sense of justice” (as per Rawls).\textsuperscript{14} This is a problem, as it would seem that hypothetical consent would require initial assumptions so uncontroversial, and reasons so compelling, that any human creature with the ability to reason would assent to them.

In contrast, the great advantage of a tacit consent approach to political obligation—what we might call the “If you don’t like it, leave!” justification of the state—is its viability from the


\textsuperscript{13} Kant’s own discussion of public justifiability comes on \textit{Perpetual Peace}, (London, 1903), Appendix II, 185.

standpoint of public reason. As a “freestanding political conception,” it is able to satisfy the publicity requirement that is the Holy Grail of many contractarian theories.\textsuperscript{15} Since it is wholly political, it is compatible with a plurality of moral, philosophical, and religious worldviews, and able to ground the state’s role in the dispensation of justice without the use of thought experiment-based reasoning. Let us turn, then, to the particulars of the theory on whose basis the wise moral philosopher can gently remind the ordinary citizen of her right to move elsewhere.

\textit{Tacit Consent and Political Obligation}

If not the idea of hypothetical consent, what obliges citizens to cooperate with the intents and purposes of the state? My response is simple. Political obligations generate from the free consent of actual citizens. Consent is in most cases tacit. Tacit consent is signaled by the fact that a citizen has the right to leave the state, and does not.

As an alternative to contractarianism, basing social contract theory on tacit consent is not simply unpopular; it is not usually even entertained as a plausible thesis.\textsuperscript{16} Efforts to rescue the tacit consent approach by interpreting voting, the payment of taxes, or other forms of political participation as signs of consent have hardly been considered successful.\textsuperscript{17} And so, a few definitions and qualifications are in order. “Cooperation with the intents and purposes of the state” refers to a wide range of political activities, from paying taxes for public goods which directly or indirectly benefit oneself, to complying with positive laws, with general norms and regulations implemented in response to coordination problems, and with positive undertakings by the state which contribute to the common good, buffer against the tyranny of the majority,

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\textsuperscript{15} Freeman, op. cit., 34. For him, only a freestanding political conception “provides a basis for public political justification.”
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\textsuperscript{16} As Murphy puts it, “[C]onsent theories of political authority are almost universally rejected as explanations for any practical authority that political institutions possess” (\textit{Surrender of Judgment and the Consent Theory of Political Authority}, \textit{Law and Philosophy} [1997], 116).
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\textsuperscript{17} A. John Simmons, “Tacit Consent and Political Obligation,” \textit{Philosophy & Public Affairs} (Spring, 1976), 289.
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protect individual rights, administer justice, and so on. This last category refers to a wide range of state-sponsored activities which benefit some (but not all) citizens, and yet are financed by taxpayers—public defenders for the criminally accused, public schools, state-financed homes for the mentally ill, salaried state employees who work in agencies focused on issues specific to a minority of constituents, public contributions to universities, federal loans to qualified college students, and of course, negative taxation or progressive taxation and redistributive public goods not listed. All of such activities are sometimes justified with reference to the idea that everyone benefits from programs which improve the lot of a few. This is the Kantian idea that “[t]he Sovereign, as undertaker of the duty of the People, has the Right to tax them for purposes essentially connected with their own preservation. Such are, in particular, the Relief of the Poor, Foundling Asylums, and Ecclesiastical Establishments, otherwise designated charitable or pious Foundations.” Here, “them” and “their own” refers to the people as a whole. And as much as Kant dislikes the “serpent-windings of Utilitarianism,” there is a sense in which such logic could serve to justify any program undertaken in the name of the people so long as it is claimed to maximize aggregate welfare. However, such misses the obvious fact that public schools mostly benefit families with children who are not enrolled in private schools. Veterans programs mostly benefit veterans. While one could say that a society with the upcoming generation educated to a certain level, and a society that takes care of its veterans, benefits all who live in it in an albeit indirect fashion, this seems to miss something fundamental about the nature of the social contract in a highly complex modern democracy. Not everyone actually benefits—or is supposed to benefit—from everything that the state does. But, the idea is that I benefit some of

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18 Kant 1887, op. cit., 186.
19 Ibid., 195.
the time and you benefit some of the time, according to the vicissitudes of particular state undertakings, as well as the vicissitudes of our two individual lives.

Free exit, of course, is a constitutional right in some, but not all liberal democracies. However, whether or not constitutionally enumerated, that there is a free right of exit is the main condition that must be satisfied for consent to be considered freely given. Theorists who argue that the right of exit is illusory in modern-day liberal democracies due to the nature of family and communal ties, or that the cost of exit is too high for it to be a genuine possibility, or that there are no unoccupied territories in the world, miss the fact that people can, and do, emigrate precisely to escape their political situations. That this is not common in modern-day liberal democracies just makes the point even stronger that by not exercising the right of exit, by not even thinking about exiting, an individual is indicating her subconscious satisfaction with her government. Such is not the case in all countries. When states are perceived as illegitimate because the rule of law is not in place, because institutions are dysfunctional, and/or because the government is corrupt, if exit is allowed and there is somewhere to go, people do flee. It is true, of course, that not all costs associated with exit are monetary. Familial and communal ties are important reasons for individuals to stay. But, when exit is intended to be permanent, the right of exit is often exercised by an extended family or a community rather than the single individual.20 And, if an individual wishes to argue that exit costs are prohibitively high and is literally referring to the financial burden of moving to another country, such thinking overlooks the economic advantages that she has enjoyed by virtue of being born into a generally law-abiding and peaceful society.21

20 There has been a huge body of empirical research bearing out this claim which, for the sake of brevity, I will not cite here.
21 Cf. Barbara Fried, “‘If You Don’t Like It, Leave It’: The Problem of Exit in Social Contractarian Arguments,” Philosophy & Public Affairs (Winter 2003), 48. I take the point that the exit tax is perhaps too high in countries like the U.S., as I think that exercising the right of exiting for tax reasons is perfectly valid, provided that one indeed renounces her residence. Whether one is an ideological libertarianism or ideological egoist, I see no moral reasons why the individual should not be allowed to exit his
Of course, one who seeks out a professional opportunity or an adventure in another country is not necessarily trying to escape her state. There is a moral difference between a 21st century skilled American worker who decides that it would be exciting for herself, husband, and kids to spend an interlude overseas as she works for the Hong Kong branch of McKinsey, and a fin de siècle Italian family who, sensing increasing instability stemming from mafia-related violence, the corruption of their government, and the general ineffectuality of the rule of law, decides to flee Sicily for America, one family member at a time. In sociological studies of migration, however, it is common to discuss “push” factors, viz., why people emigrate from their native countries, and “pull” factors, viz., why people immigrate to a particular country. Taking this into account, it is not just that the fin de siècle Italians were exercising their right of exit; they also sought economic opportunity. Social scientists advocating the neoclassical economic theory of migration would hold that fin de siècle Italians were mostly seeking economic opportunity, which if true, could imply a parity between their decision to leave and that of the 21st century skilled worker, challenging the claim that emigration can often be understood as an exercise of the right of exit, and accordingly, the validity of a theory of political obligation grounded in the non-exercise of the right of exit. However, it has become commonplace in recent years to point out the shortcomings of the neoclassical theory. Most notably, it overpredicts when people will move. Between EU countries, for instance, there are low levels of migration, but wage differentials are great enough that, if the neoclassical theory were true,
migration should quite high.\textsuperscript{24} We can therefore speculate that for a given EU resident, though migrating might improve her salary, she perceives her own country to be reasonably legitimate, and that there are many benefits to remaining in her native land. Further, since the main claim of neoclassical theories is that when individuals are deciding whether to stay or go, they consider whether it is possible to meet basic material needs, and calculate their chances of upward mobility in the future, an upshot of the neoclassical theory may be that for individuals to perceive their state to be legitimate, it may have to play a greater role in economic matters than libertarians or anarchists would like. And so, the neoclassical approach is not as devastating to the present theory of political obligation as appearances might suggest.

\textit{The Tacit Consent Approach: Initial Challenges and Difficulties}

A prominent challenge to a theory of political obligation which rests on tacit consent is outlined in Hume’s “Of the Original Contract.” Hume’s usurper scenario goes as follows. A usurper conquers a people and banishes its lawful prince. For a decade, the usurper maintains “so exact a discipline in his troops, and so regular a disposition in his garrisons that no insurrection had ever been raised, or even murmur heard against his administration.”\textsuperscript{25} Then, the lawful prince is restored, and the people are overjoyed at his return. If tacit consent is what underpins political obligation, then what legitimized the authority of the prince legitimizes the authority of the usurper, since in both cases, from the fact residence is inferred the tacit consent of citizens. As Gauthier interprets the lesson of Hume’s usurper:

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The tacit contractarian claims that the benefits of government cannot be had without acceptance of its costs—the duties of justice and obedience. But although this be true, it does not follow that the acceptance of these benefits from the
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\textsuperscript{24} Arango, op. cit., 287.
\textsuperscript{25} Hume, op. cit., 477.
person who actually has power to confer them commits one to consent to his right to confer those benefits, and hence to one’s duty to obey him in return.26

In spite of Locke’s earnest attempt in his Second Treatise to show that all legitimate governments emerge from the mutual agreement of free individuals, and that the ideated social contract is more relevant to the beginnings of legitimate governments than force or violence, we can observe, empirically, that the history of many existing states is precisely that of usurpers and “lawful” princes taking turns claiming authority (through military advantage) in a given geographical territory. As Machiavelli’s account in Chapters VII and VIII of The Prince suggests, with time, a usurper can become a legitimate prince, so long as the people feel ingratiated to the prince for his protection. The parameters of the usurper scenario, then, presuppose Hume’s eventual conclusion. It is conceivable that, had the usurper reigned for fifty or sixty years, and the entire time, treated the people as they had been treated under the lawful prince, his right to confer benefits would have been eventually legitimized. And, given the general contours of medieval history, it is reasonable to suppose that Hume’s lawful prince himself probably had no hereditary link to whoever was the first prince to claim authority in that area, and that his right to rule descended from a usurper.

The issue, then, with Hume’s claiming that the people could be interpreted as tacitly consenting to the usurper is precisely that people are frightened into obedience. What else could account for the fact that no murmur is ever heard against the prince’s administration? If the existence of disciplined troops is irrelevant to lack of dissent, then perhaps it is possible to infer citizens’ consent, and to say that there is no problem with prince’s claiming the right to this consent. However, if liberty is present, the masses do tend to grumble, even in the best of situations. Therefore, we should probably infer that the disciplined soldiers scare the people into

submission. And submission, it seems safe to say, is not the same as tacit consent. Moreover, Hume mentions the existence of garrisons. Are the garrisons there to protect homes and private property? Or to make sure that residents do no flee with their possessions in the middle of the night? Whether the former or the latter is the case is vital to assessing whether tacit consent is being signaled; if there is no right of exit, there can be no tacit consent. Alas, Hume omits this important detail.

Before leaving off Hume, however, the larger argument of Of the Original Contract should be considered—namely, that it is not consent, but the advantageousness of government, that is the source of political obligation. According to Hume, consent is conceptually redundant, since a government to which individuals would freely consent is another way of describing a government which benefits individuals. This thesis is widely endorsed, but it has several shortcomings. To begin with, consent places individuals themselves at the fore of the analysis. A political theory which conceives of individuals as free undermines its own credibility by putting the task of legitimizing the state in the hands of moral philosophers, who then use their expert knowledge to determine what is advantageous to individuals and what isn’t. The economic concept of a revealed preference liberates the individual from the moral philosopher’s paternalism, and allows her to confer legitimacy on the state by choosing not to exercise her right of exit. The value that tacit consent contractarianism activates, then, is personal responsibility: the rhetoric of “If you don’t like it, leave!” reminds individuals that residence is a matter of choice, a choice which may reasonably be interpreted as their consent to a system wherein political determinations are made by a procedure meant to represent the will of the majority.

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27 Locke emphasizes this time and time again in Ch. XVI of his Second Treatise.
28 It is endorsed by contractarians who adhere to a principle of fair play without utilizing the notion of hypothetical consent.
29 This is a point that Pitkin makes in her discussion of Tussman; see “Obligation and Consent—I,” American Political Science Review (Dec. 1965), 997.
But, the idea of the free individual is not the only motivating rationale for a theory of political obligation which demands consent on top of the receipt of benefits. Consider the following passage from Plato’s *Crito*:

Then the laws will say: “[A]fter having brought you into the world, and nurtured and educated you, and given you and every other citizen a share in every good that we had to give, we further proclaim and give a right to every Athenian, that if he does not like us when he has come of age and seen the ways of the city, and made our acquaintance, he may go where he pleases and take his goods with him; and none of the laws will forbid him or interfere with him… But he who has experience of the many in which we order justice and administer the State, and still remains, has entered into an implied contract that he will do as we command him…”

Hume dismisses the argument of the *Crito* with the glib remark that Socrates “builds a Tory consequence of passive obedience on a Whig foundation of the original contract.” However, in labeling Socrates’ acquiescence to Athen’s death penalty as “passive obedience,” he misses the overall point. Anyone who is born and raised in a country comes to know its laws over time. Most of the time, one is simply an observer to crime and punishment. But, when the outcome of the legal procedures used to try and punish others disfavors oneself, there is all-too-human tendency to claim unfairness. The stakes are lower when we turn from criminal justice to positive state undertakings, but the logic is similar. The ordinary citizen may uncritically support spending federal money on researching the cure for a disease with which her spouse struggles, but moral myopia may lead her to question whether social programs like Medicaid are a justifiable use of her taxpayer dollars. Political obligation usually only comes under critical circumspection in those moments when an individual does not like how the state’s policies apply to her. And so, the argument that the law is binding because it provides benefits is too quickly punctured by reasoning extrapolated from Hobbes’ Foole. If we cease to judge the state as

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31 Hume, op. cit., 487.
beneficial, would we not also cease to judge ourselves as bound by the state’s laws? The non-exercise of the right of exit is a true test of whether the individual assents to the idea of the state as a whole, abstracting from particular circumstances. After all, if individuals were to dither between consent and non-consent based on self-interested calculations apropos of every law passed and judicial or technocratic decision rendered, there could be no state at all.

Nowhere in Plato’s oeuvre does it seem that the free individual is the apposite conceptual starting point for political theorizing. Why, then, is freely given consent the basis for Socrates’ argument that the laws of Athens morally (and not just literally) command his obedience? My response hearkens back to an earlier point about the salience of the idea of consent from the standpoint of public reason.32 As is the case with many of Plato’s dialogues, the dramatic context of Crito plays with the relationship between truth and persuasion. Crito takes place at dawn on the day that Socrates is slated to die. This is a moral moment of great consequence: Crito has already arranged a bribe with the guard that Socrates may freely escape; and the only thing that remains is to persuade Socrates to leave the jail. Crito employs a variety of reasons as to why Socrates ought not die—it would make Crito and Socrates’ other friends appear miserly since bribery was a common practice, Socrates has a duty to raise his children, Socrates’ trial and sentencing were both absurd, and so on. Against such arguments, it is simply not persuasive that Socrates is bound to the law based on a calculated assessment of the benefits conferred by the state over the course of his life. After all, what is capital punishment if not an absolute negation of all benefits conferred by the state thereto? Kantian moral reasoning could explain why it is unjust to except oneself from laws which one wills that others would abide by, but such an

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32 Hume, of course, seems to disagree that the logic of tacit consent is rhetorically salient. With much hyperbolic bravado, he claims, “Were you to preach, in most parts of the world, that political connexions are founded altogether on voluntary consent or a mutual promise, the magistrate would soon imprison you as seditious for loosening the ties of obedience; if your friends did not before shut you up as delirious, for advancing such absurdities” (op. cit., 470). However, that “If you don’t like it, leave!” (or alternatively, “Love it or leave it!”) is even a political trope suffices as a response to Hume on this point.
argument contains such an exacting standard of morality that it hardly seems a credible basis for Socrates’ response to Crito. And so Socrates reminds Crito that before his trial, he had every opportunity to leave Athens and settle elsewhere; the laws of Athens are thus not “rudely impose[d]” on him. If Hegel’s assessment about the place of the individual in Greek political thought is correct, it is not clear to me that this is necessarily an important consideration. Nevertheless, Socrates’ argument leaves Crito speechless.

And so, let us conclude this set of objections with the observation that free consent, and not just the acceptance of benefits, generates political obligations according to a political theory premised on the idea of an individual’s freedom, offering a solution to the problem—if the free individual is prior to the state, how can there be coercive laws? Such cannot be explained easily with reference to benefits alone, since political obligation would seem to terminate with benefits. And, even against the backdrop of a political theory that does not take the free individual as its basis and end, though benefits and consent may indeed be conceptually redundant, the idea of consent is nevertheless powerfully explanatory of an individual’s obligation to obey positive laws and abide by majoritarian decisions which have been determined using fair procedures.

Another prominent objection to the tacit consent approach can be stated as follows: tacit consent has no intentionality, and therefore is not consent at all. In Crito, Socrates voices the idea (speaking for the Athenian Laws) that “as you never leave, you may be supposed to love” the city of Athens. However, such is clearly a tendentious supposition. Socrates tells Crito that, throughout his life, he has known of other cities and their political orders, and has nevertheless chosen to remain in place. But, most citizens are not Socratic citizens—most stay not because they have made a rational assessment of all the available alternatives, but out of

33 *Crito*, op. cit., 65.
34 Ibid.
sheer inertia. Inertia is not tacit consent, as A. John Simmons argues. In his essay “Tacit Consent and Political Obligation,” Simmons considers a situation which paradigmatically seems to capture our ordinary, everyday understanding of tacit consent with the example of a committee chairman who proposes rescheduling a meeting, and asks if there are any objections.35 Forced to actively consider whether to signal their non-consent, the silence of the members of the committee shows their having tacitly consented to the time change. For Simmons, this scenario demonstrates that, in our ordinary, everyday usage, consent must be deliberate and intentional in order to actually count as consent, and for it to be a binding ground of political obligation.

Some have tried to rescue the tacit consent theory of political obligation by claiming that ordinary acts of citizenship such as voting are sufficiently intentional and thus count as consent. In Plamenatz’s words, for instance: “[T]he purpose of an election is to give authority to the people who win it…if you vote knowing what you are doing and without being compelled to do it, you voluntarily take part in a process which gives authority to those people.”36 Such is not good enough for Simmons, however. “One may, and probably the average man does, register and vote with only minimal awareness that one is participating at all, and with no intention whatsoever of consenting to anything,” he writes. “Talk of consent in such situations can be no more than metaphorical.”37 However, that consent must necessarily be intentional for it to count as consent is a debatable point. It is true that from the standpoint of consent being given by free subjects and thereby functioning as a promise, it is better if subjects are aware that they are signaling consent through their non-exercise of the right of exit. “If you don’t like it, leave!” thus can and should play a greater role in the political rhetoric of modern-day liberal

37 Simmons 1976, op. cit., 289.
democracies. However, if it does not, and subjects unthinkingly stay, they nevertheless still may be counted as consenting, and thereby promising to comply with the positive laws and undertakings of the state.

Before fully defending this view, let us further complicate things by admitting that, yes, consent is a peculiar sort of promise. Most philosophical accounts of promising focus on the content of a promise, whether promises are morally obliging if extenuating circumstances make the promise difficult to fulfill, whether one is morally obliged to fulfill an immoral promise, and so on. Such inquiries focus on the relationship between the act of promising and the decision whether to carry out, or not carry out, the content of the promise. When it comes to consent, in contrast, every time a traffic light is obeyed, or goods are paid for, this may be interpreted as making good on a promise, though the original promissory act is difficult to pinpoint. Obsession with the original act of promising has led Simmons and others to deconstruct facially analogous scenarios. Four friends meet for bridge every Friday night for a year; is it an unspoken promise, or something else, that obligates Sally to give the others notice if she must cancel? Simmons thinks that there are other moral reasons besides the structure of promise-making and promise-keeping that explain why Sally should tell her friends if she plans to miss Friday’s bridge session. Similarly, there are moral reasons to follow positive laws—e.g., it is wrong to steal—that have nothing to do with consent.

Alas, there are too many points of departure between the bridge player scenario and the modern state—an intimate group of friends versus a mass society, a highly voluntary initial situation versus an initial situation that does not begin as voluntary for any given individual, but becomes voluntary over time, etc.—for the former to be considered a reasonable source from which to draw inferences about the latter. Let us instead consider the following scenario. An

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38 Simmons 2001, op. cit., 76.
individual is born within a certain geographical area wherein positive laws obtain and are enforced by punishment. He is socialized into complying with these laws, and in most cases—in modern day liberal democracies at least—does not leave for any reason other than a job or a vacation. *Qu’est-ce qui peut le rendre légitime?* If an individual is confronted with the idea, “If you don’t like it, leave!” and considers it, then consciously decides that the benefits of remaining under the present government and subject to present positive laws are worth it, it seems clear that we might count him as having given his tacit consent. But even if he never considers that alternate political arrangements are available to him, this does not change the fact that this choice is available to him, and that he is free to consider this choice. In his *Essay Concerning Human Understanding*, Locke distinguishes between acting voluntarily and acting intentionally. According to Locke’s definition of liberty, a citizen in a modern-day liberal democracy is free to leave. Freedom is simply “our being able to act, or not act, according as we shall choose or will.” But, Locke’s observations about willing and intentionality fit the commonsensical notion that many times, we do not *choose* to will; we just *will*. In Locke’s words, “For to ask, whether a man be at liberty to will either motion or rest, speaking or silence, which he pleases, is to ask, whether a man can will what he wills, or be pleased with what he is pleased with? A question which I think needs no answer...” For Locke, an act itself is an expression of the act’s intentionality. Intentionality and a given action—or a given inaction—are usually tangled together. Thus “free will” is a phraseological portmanteau: freedom pertains a state wherein we have the power to change our course of action; will refers to the act of choosing, which oftentimes does not involve thought, but is nonetheless an expression of a preference. And so, a man who is walking walks freely, and thereby expresses his preference for walking (rather than

40 Ibid., §25, 159.
41 Ibid., §14, 154.
sitting). Though he was not confronted by the idea “Perhaps I should continue walking!” his action is voluntary, though it is not intentional.

Simmons and I disagree, then, about whether intentionality or voluntariness is at the heart of consent. It seems to me that consent sometimes can be intentional—Simmons’ committee example is a perfect illustration—but ordinary language usage does not require this. For instance, consent is often associated with sexual acts. Two adults, in the heat of passion, remove their clothes and begin to enjoy the pleasures of one another’s bodies. No words were uttered; neither was confronted by the idea, “Ought I engage in conjugal relations with this person right now?” Though there was no intentionality, no silent thinking of the words of assent, their act may be still said to be voluntary. Now, often intentionality does in fact travel with consent, which is perhaps where the confusion lies. One partner may think, “Is this really a good idea? I have to wake up early tomorrow morning,” or “Is this really a good idea? Our marriage is falling apart,” and nevertheless deliberately choose to disregard his or her concerns and proceed.

Intentionality, though, is not a necessary condition of consent. The only necessary condition of consent is the voluntariness of the action, which obtains even in the absence of intentionality, so long as the act to which consent is relevant is the free expression of a preference.

Are consensual acts different from voluntary acts? In most cases, not really. In the situation described above, the terminology of consent is helpful mostly to raise awareness about situations of non-consent—concerning teenage date rape, for instance. The language of consent reinforces insights that the language of voluntariness could probably handle on its own: a young girl who is drunk or passed out is not in a position to act voluntarily, and her failing to resist a young man’s advances should not be construed as her choosing to proceed. Political consent is unique, however, because it is in most cases a situation of voluntary inaction rather than
voluntary action, and is moreover voluntary without being deliberate or intentional, and yet is said to be obligation-generating. But, we can see how this can be the case by asking—why does an individual not consider leaving? The answer, it seems, is that the benefits of staying in a liberal democracy are so compelling that leaving is hardly worthy of serious consideration. As states decline in their ability to safeguard individual rights, enforce the rule of law, create economic opportunity, etc., it will occur to a greater percentage of the population that the right of exit is in fact an option. This does not mean that states in decline garner greater consent, since a greater number of individuals perform an actual cost-benefit analysis and decide to stay. Rather, what this means is that political consent may be subconscious, but still valid as a ground of obligation, as an individual has voluntarily accepted the benefits of government.

Let us summarize thus far. (1) Political consent is usually tacit.\(^{42}\) (2) Tacit consent is indicated by the fact that an individual does not exercise her right of exit, though she is free to do so. (3) When individuals do not exercise the right of exit, it is because they perceive their government to be legitimate. (4) Legitimate governments bring a variety of benefits to the individual. (5) Because the individual has consented to accept and continue to accept these benefits, she is obliged to continue play by the rules of the system which brings such benefits about. And finally, we can add: (6) The analogy between “consenting” and “promising” is useful only up until a point. It can explain why an individual who has consented to accept benefits ought to continue to play by the rules of the system which has benefitted her, even if, all of a sudden, the existence of the system seems like a burden. However, though consent might be structured like a promise if spelled out—“I will abide by the rules and regulations of the political system of which I am a part in exchange for the benefits, past and future, that the existence of government brings about”—its content is much less determinate than, say, “I will help you move

\(^{42}\) Though in the case of naturalized citizens, it is actually expressed.
the piano into your foyer next Monday.” Moreover, political consent is not a promise that is fulfilled just once; it is fulfilled every time I stop at a red light, drive on the correct side of the road, etc., and continually demands ref fulfillment with thousands of instances of doing and forbearing every single day. And so, the analogy between consenting and promising is precisely that: an analogy.

It may be the case, however, that a citizen thoughtfully determines that she does not consent to the authority of her state, and seeks out ways to exercise her right of exit. But, that she initiates this process does not necessarily mean that she will be successful. Perhaps she applies for immigration to another country but is not accepted. Or perhaps she begins researching other countries whose governments she might consent to, and learns that the obstacle to her consent within her native land is replicated in every other country to which she might go. Should we really impute consent to those who want to leave, and fail? I do not think that we should. It is possible to retreat into political exile within one’s own country as an expression of the right of exit. Here, there sometimes may be pragmatic reasons to obey positive laws, but the law is not binding. If one chooses to exercise one’s right of exit from within, however, this should be a matter of clear and deliberate choice. Furthermore, the choice should be consistent: one may not vacillate in and out of internal expatriation based on an opportunistic assessment of the circumstances. And finally, one should abide by strict ethical guidelines which should be familiar to (some) anarchists. The first rule of internal expatriation might be stated thusly: Take no benefits. And the second: Have an expansive view of what counts as a benefit.

Much more could—and should—be said on the topic of internal expatriation. For now, however, let us turn to a final objection to a tacit consent account of political obligation.

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43 Note that under U.S. law, one cannot formally renounce her citizenship and remain in the United States; internal exile is therefore be an informal ethical decision rather than something governed by a legal process.
The Ordinary Citizen Commits an Act of Civil Disobedience

Thus far, I have argued that, if tacit consent has been voluntarily given, as indicated by the non-exercise of the right of exit, individuals are obliged to comply with positive laws and support state institutions and undertakings. However, states often err, which raises the question, how can citizens be obliged to comply with immoral laws? Are we to conclude, with Kant, that—far from having duty to resist a law that is immoral, or at the very least, detracts from happiness—people “should do nothing but obey”?  

Such, of course, points to the great advantage of the hypothetical consent approach. By positing criteria independent of the law for determining the justness of laws and institutions, modern contractarians like Rawls are able to specify that we are bound “comply with just institutions” and “further just arrangements not yet established, at least when this can be done without too much cost to ourselves.”  

Of course, it is difficult to imagine an institution which is perfectly just; thus Rawls amends his account to include institutions which are “as just as it is reasonable to expect in the circumstances.” The individual, then, has “a natural duty to do his part in the existing scheme” if it is or is on the way to becoming a just scheme, but the natural duty of justice does not apply to blatantly unjust political determinations that nevertheless have procedural validity. A Northern abolitionist would not have an obligation to refrain from sheltering an escaped slave, as per the letter of the 1850 Fugitive Slave Act.

However, on most contractarian doctrines, the justness of laws is not determined by individual citizens, but by moral philosophers who establish criteria to which (as they claim) rational citizens would hypothetically consent. And so, let us suppose that the justice-oriented

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44 Kant, “On the Common Saying: ‘This May be True in Theory, but it does not Apply in Practice,’” Political Writings, ed. H.S. Reiss, tr. H. B. Nisbet (Cambridge, 1991), 80. See also Fried’s complaint that the tacit consent-based view inadvertently validates the status quo (op. cit., p. 45, 62, 65, and 70).
program for which the wise moral philosopher was arguing is one of those “further just arrangements not yet established” which is not of too much cost to citizens. A cadre of wise moral philosophers lobby for the measure, and the resultant bill is passed, but our ordinary citizen, put off by what she claims is the paternalism involved in the rationale for such legislation—viz., she would see that this is a just arrangement, if only she were rational and sufficiently endowed with a sense of justice—decides to commit an act of civil disobedience, underreporting her taxes for the precise amount that she figures the law to cost her.

In order to evaluate this scenario, we should first ask explicitly, what \textit{is} political obligation? Contractarians claim that political obligation is compliance with laws for moral, and not just pragmatic, reasons. Legal positivists and philosophical anarchists claim that there are only pragmatic reasons to obey the law—any moral rule that happens to be codified as positive law is morally obliging because it is a moral rule, and not because it is a positive law. There have been many attempts to reconcile the competing accounts of contractarians and legal positivists. Let me outline one approach which strikes me as plausible, which I will liberally call “If Habermas were a tacit consent theorist….”\footnote{Habermas, of course, is a hypothetical consent contractarian rather than a tacit consent theorist. His discourse principle involves a thought experiment wherein the legitimacy of particular laws (and not just society’s “basic structure”) is granted if actors engaged in rational discourse governed by moral norms could eventually assent to their validity. Like Habermas, I see it as desirable to strike a balance between legal positivism and a monolithic conception of liberal political morality. But, though Habermas is thinking precisely of its public justifiability in his conception of the discourse principle (cf. \textit{Between Facts and Norms}, tr. William Rehg [Cambridge MA: 1996], 126), it is not in fact self-evident that “If you were to engage in a process of deliberation under certain ideal conditions, then you would understand your political obligations” would pass a publicity test.} On this account, individuals who have indicated their tacit consent do not have a moral obligation to comply with positive laws strictly, but rather, a moral obligation to comply with the spirit of the cooperative political enterprise; the logic here is that “the democratic constitutional state is not reducible to its legal order,” to use Habermas’ words.\footnote{Habermas, “Civil Disobedience: Litmus Test for the Democratic Constitutional State,” \textit{Berkeley Journal of Sociology} (1985), 106. Here, of course, my Habermasianism comes into full relief. “In spite of its coercive character,” writes Habermas, “law must not compel its addressees but must offer them the option, in each case, of foregoing the exercise of their communicative freedom}
political enterprise translates into a moral obligation to follow the letter of the law. Sometimes, it does not. And so, if the state is justified in subjecting the ordinary citizen to the same fate that it once subjected Thoreau, and putting her in jail, it is because act of civil disobedience is not in keeping with the spirit of the cooperative political enterprise. Since presumably her intention in committing an act of civil disobedience is to persuade others that the wise moral philosopher’s vision is problematic from the standpoint of justice, many legitimate means of expressing her dissent are available. She may petition her representatives, arrange a letter-writing campaign, congregate with other dissenters in the nation’s capital in order to show her non-support of the measure, and so on. Underreporting taxes, on its own, is not a public act of civil disobedience. It is not in keeping with the spirit of a cooperative political enterprise to simply go against what has been determined by valid procedures unless one is at the same time advancing what one believes is a righteous cause. In sheltering a fugitive slave, for instance, a Northern abolitionist was a part of an entire network of individuals who were cooperating in order to subvert a law which many considered unjust. Thoreau wanted the world to know that he objected to the Mexican American War, and was disappointed to be bailed out of jail after just one night. If the ordinary citizen too endorses the motto, “That government is best which governs least,” she should at the very least write a letter accompanying her tax return stating precisely this, and welcome a stint in jail as a way of drawing awareness to her campaign.

My overarching claim, then, is that there is an obligation incumbent on citizens to shoulder the burden of justice-oriented state undertakings if they voluntarily remain in a state which institutes such undertakings using valid procedures, but that this obligation is not absolute. 

and not taking a position on the legitimacy claim: of law, that is, the option of giving up the performative attitude to law in a particular case in favor of the objectivating attitude of an actor who freely decides on the basis of utility calculations” (Habermas 1996, op. cit., 121). As I interpret this passage, not all laws—not even laws that are morally intended by those who originally lobbied for them—are going to be ones which an individual thinks she has a moral obligation to obey. However, though she is not morally motivated by the idea of this particular law as if she were its author, she may except herself from the moral affirmation of the law, and at the same time, morally affirm the idea of the political community as a whole.
I am more committed to preserving the space for contestation wherein the process of abolishing the Fugitive Slave Act was initiated than imposing my theoretically-derived just arrangement from without. And so, what preliminarily began as a philosophical defense of “If you don’t like it, leave!” now has become, less pithily, “If you don’t like it, leave—or make use of the democratic process and/or a variety of morally acceptable means of civil disobedience (no bombs, please) to get your point across, and we will see in a hundred years who was on the right side of history.” Progress is not inevitable, of course. If the ordinary citizen’s position wins out, this does not mean that it is correct according to a moral philosophy wherein one has a duty to think expansively about what one can do to promote justice and alleviate suffering. And so, an account which is firmly grounded in what Michael Oakeshott called “the politics of skepticism”—perfectionism is unwise, philosophical rationalism is a form of perfectionism—ends up being, in an albeit strange register, a politics of faith.

**Conclusion**

In modern-day liberal democracies, voluntary consent grounds an obligation to support initiatives undertaken by the state in the name of welfare and justice for some, but not all, citizens. This consent is not hypothetical, as many contractarians hold. Rather, it is tacit, and indicated through the non-exercise of the right of exit. Citizens receive many benefits by living in a liberal state, and in order to accrue those benefits which are advantageous to oneself, this means shouldering the burden for benefits which are advantageous to others. Living in a liberal state and accepting the attendant benefits therein means consenting to a complex system wherein burdens and benefits variously transpirate and precipitate. So long as justice-related endeavors and undertakings are instituted using valid procedures, then the obligation to support these projects obtains.