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Politics Philosophy Economics 2003; 2; 37

DOI: 10.1177/1470594X03002001423

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London
Thousand Oaks, CA
and New Delhi

1470-594X
200302 2(1) 37-62
030423

Political obligation and military service in three countries

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abstract

Although questions of political obligation have been much discussed by scholars, little attention has been paid to moral reasons advanced by actual states to justify the compliance of their subjects. We examine the ‘self-image of the state’ through Supreme Court decisions in the USA, Germany, and Israel. Because moral reasons are expressed especially clearly in cases regarding obligations to provide military service, we focus on these. In spite of their important constitutional and judicial differences, the three states support military obligations along similar lines, though with some differences. In all three countries, appeal is made to obligations of reciprocity. Individuals must serve in order to provide the important benefit of defense. This ‘service conception’ of political obligation accords norms of fairness or equality a central role, in order to justify the service of particular individuals. Reasons for less emphasis on fairness in Israeli cases are examined, while we claim that the overall similarities of the three countries provide some measure of indirect support to a theory of political obligation based on the principle of fairness.

keywords

political obligation, military service, fairness, principle of fairness, liberalism, state

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Questions of political obligation (briefly, why people are morally required to obey the law)¹ are of more than theoretical interest. As an integral part of their claims to legitimacy, governments assert rights to require wide-ranging performances from their citizens, to enforce these claims with coercive force, and to punish non-compliance. Citizens of legitimate governments (including, presumably, readers of this article) are subject to such commands, ranging from traffic laws to taxes, to the 'ultimate obligation'² to fight for, possibly to die for, one's state. Though governments have the power to compel obedience, they do not claim to rule by force alone, but assert a *moral right* to their subjects' obedience. Since all of us are subject to governmental commands, it is a matter of great importance to know whether and how these can be justified.

In this article, we examine moral claims advanced by three actual governments: the USA, Germany, and Israel. While political philosophers have devoted considerable attention to questions of political obligation, the reasoning of state authorities has received little attention. But if the state is justified in imposing requirements on its citizens, how it supports these is of obvious relevance. Accordingly, we focus on the 'self-image of the state',³ the arguments its officials present in support of obligations. With theorists currently in wide disagreement about the grounds of political obligations,⁴ we believe that the reasoning of government officials should be considered, and that this provides some measure of support for one particular approach to questions of political obligation.

Various aspects of this subject could be pursued. The reasoning of both judges and legislators are worthy of study. But in order to keep discussion manageable, in this article we examine the former.⁵ There are strong reasons for this focus. Although judges are political actors rather than moral philosophers, under certain conditions, they can be led to assume the latter role. Judges are generally entrusted to apply existing statutes or constitutional provisions, rather than to make moral arguments. However, especially in difficult cases, when legal provisions do not afford clear guidance, judges can support their decisions with appeals to moral reasons. This is especially true of the highest (supreme) judicial bodies, and we will confine attention to these. Judges, especially in high courts, can also be presumed to possess central attributes of reliable moral reasoners. They can be presumed to be intelligent, well informed, without personal interests in cases at hand, and with adequate time and resources to deliberate properly. These conditions approximate the requirements of the influential method of 'reflective equilibrium', associated with John Rawls (on which, more directly), while judicial opinions approximate Rawlsian 'considered judgments'.⁶ In addition, because the state has an interest in advancing the most persuasive arguments possible to support its claims, the fact that its agents argue along certain lines rather than others is a consideration in favor of the arguments they present. Because judicial decisions are re-examined by future courts, the fact that a ruling stands and is cited in subsequent decisions is an important additional consideration in its favor.

This being said, the question is what high-court decisions mean for normative theory. We do not, of course, claim that the fact that the state argues according to theory X itself proves that X is valid. But we believe that this should carry some philosophical weight. The factors that are relevant here can be seen in a brief discussion of ‘wide reflective equilibrium’.

Rawls’s method of reflective equilibrium begins with the belief that moral argument is not able to proceed from first principles that are known with certainty, as for example, Plato’s Form of the Good. Thus Rawls argues that principles must be justified on the basis of our moral experience. According to reflective equilibrium, we should proceed from considered judgments, moral judgments, in which we have greatest confidence. Extracting the principles that underlie these, we apply them to additional cases. To the extent that the principles support our opinions about these other cases, we gain confidence in them. But as Rawls says, moral theory is ‘Socratic’.⁷ Principles will likely have to be revised to accommodate new cases, while our intuitions concerning particular cases will likewise have to be revised to accommodate our moral principles. By working back and forth between our principles and specific judgments, modifying each more closely to accord with the other, we can approach the ideal of consistency in our moral thinking. To increase confidence in our principles, we should compare them with other moral principles to which we subscribe, and others enunciated by important moral authorities, for example, Kant and Biblical teachings. Discovery of consistency between our moral intuitions and such principles should strengthen our faith in this overall moral structure. As Rawls says, ‘justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.’⁸

In keeping with the idea of ‘wide reflective equilibrium’, judicial opinions such as those discussed in this article provide an additional source of information to be taken into account. According to Norman Daniels, wide reflective equilibrium attempts to produce coherence in three levels of beliefs. In addition to the sets of considered judgments and moral principles that we have noted, wide reflective equilibrium appeals to ‘a set of relevant background theories’, which are used to help assess the adequacy of competing sets of principles.⁹ Moral structures will evince different degrees of compatibility with various non-moral theories. For example, in the case of Rawls’s justice as fairness, Daniels notes its relationship to theories of the person, of procedural justice, and the role of morality in society.¹⁰ If we can agree about theoretical matters such as these, they could help us to choose between overall sets of considered judgments and moral principles.

We envision an analogous role for evidence about judicial opinions. Because judicial opinions approximate Rawlsian considered judgments, in those cases in which judges move beyond the law and invoke moral principles, their reasoning should be taken into account by normative theorists. There is no hard and fast rule as to the weight judicial opinions should receive. We can imagine different

situations. When there is consensus among political philosophers, based presumably on the force of arguments, they will have little reason to look further, and judicial opinions will be of little interest to them. However, when there is entrenched disagreement among philosophers, we can assume that the positions subscribed to have different strengths and weaknesses, which are presumably weighed differently by different theorists — perhaps for reasons akin to those Rawls describes as ‘burdens of judgment’.¹¹ Under such circumstances, additional considerations could well be taken into account, including judicial opinions.

Intuitively, the amount of force judicial opinions should carry will depend on a number of factors. These include how clearly given principles are advanced, whether these are the sole grounds presented, and concerns of consistency, whether said principles are advanced in regard to different areas of law and, especially relevant here, in different geographical locales. When these considerations (and perhaps others) hold in regard to a particular moral principle, this increases the burden of justification for proponents of different principles. In addition to defending the purported weaknesses in their own theories, they should explain why Supreme Court judges with the qualities noted above consistently find competing arguments more persuasive. Once again, we do not claim that Supreme Court justices are moral philosophers. But in those instances in which there is strong consensus among different courts in different countries, the burden of justification for those who differ could well increase significantly.

In his ‘Prolegomena’ to *The Law of War and Peace*, Hugo Grotius appeals to the practice of actual peoples to help establish the law of nature. Claiming that examples of this sort ‘have greater weight in proportion as they are taken from better times and better peoples’, Grotius focuses on the Greeks and Romans.¹² Though our concern in this article is not with the law of nature, we can follow Grotius’ strategy in a certain sense. In regard to the testimony of philosophers, historians, and other writers, Grotius argues that, ‘when many at different times and in different places affirm the same thing as certain, that ought to be referred to a universal cause.’¹³ We contend that something similar holds in regard to the judgments of high-court judges in different liberal societies. If their moral reasoning on questions of political obligation is similar, in spite of important differences in their judicial systems, this is something that proponents of different principles should be called upon to explain.

In a recent article, Mark Hall and George Klosko examined the reasoning of the United States Supreme Court in regard to political obligation.¹⁴ After exhaustive examination of opinions, they found that the evidence, though somewhat scanty, supports a particular principle of obligation, based on fairness (on which, more below). The US Supreme Court’s reasoning concerning political obligation is most apparent in cases concerning obligations to perform military service. Because cases in this area involve severe burdens (including, possibly, citizens’ lives) and also raise troublesome issues of conscientious objection, American judges have found it necessary to appeal to moral principles. The main decision

supporting conscription is *Arver v. U.S.*, one of the famous 'Selective Draft Law Cases', 245 U.S. 366 (1918). *Arver*, an important decision, presents clear moral reasoning, based on the principle of fairness.

In this article, we subject the reasoning of the US Supreme Court to a comparative test. The fact that the United States Supreme Court finds arguments based on fairness most persuasive raises questions concerning the reasoning of other high courts. If the principles appealed to in other judicial systems, especially in systems quite different from that of the USA, are similar, this should provide additional support for the reasoning of the US Supreme Court.

Thus we examine the major judicial decisions on obligations to provide military service in Germany and Israel, and compare this to the reasoning of the US Supreme Court, as discussed by Hall and Klosko. There are several reasons for this choice of countries. One method of selecting countries would be to choose those most similar to the political system and history of the USA, such as Canada and Great Britain. But such a selection would obviously be of limited value for purposes of comparison. Hence, we chose countries that are more distant cousins to the USA. These countries share the attributes of stable democracy, Western European culture, and the employment of a supreme and final court of arbitration, and yet differ in age, their political and legal cultures, and type of legal system. Although many countries fit this profile, Germany and Israel seem particularly appropriate, and we decided on them. Our hope is that in future articles, we can examine additional countries, of widely different kinds. Along with the USA, Germany and Israel have developed legal and judicial systems in which supreme court judges, generally highly regarded legal scholars, have considerable leeway in interpreting legislation and major responsibilities for protecting human and civil rights. In all three countries, the supreme court has, for historical reasons, high prestige. Although in all three countries the supreme courts operate under diverse political pressures, their landmark decisions are strongly anticipated and studied with interest.

This article is not an exercise in the comparative sociology of law, and we do not assess possible causal factors that led the different courts to reason as they did. Our interest is in moral arguments, which we compare for the reasons stated above. But in keeping with our 'Grotian' approach, we should note that the similarities in the courts' reasoning is in spite of important differences in their countries' legal and political systems. In regard to political systems, the USA has a presidential system, while Israel and Germany have parliamentary systems; Germany and the USA are federal systems, while Israel is not. More to the point, the Israeli and American legal systems are case driven, based on British common law, while Germany's is more highly centralized and deductive, based on old Germanic and Roman law.¹⁵ In spite of these differences, in all three countries, supreme courts are heavily involved in constitutional deliberations. This is as true of Germany, with its strict insistence on legislative supremacy, as of the USA and Israel. Moreover, although Israel, in contrast to the USA and Germany, lacks a

written constitution, the Israeli Supreme Court oversees the constitutionality of parliamentary legislation in light of standards of higher law.¹⁶

In all three countries, the supreme court is the main forum for deliberating normative legal issues, including questions of political obligation and conscientious objection. In contrast to the UK, where conscientious objection is a recognized right, or Russia, where it is not recognized at all, in all three countries, legislatures have taken somewhat vague positions, leaving large leeway to the courts.¹⁷ Thus, in all three countries, court decisions could shed important light on the country's justification for requiring citizens to serve in the armed forces.

Argument here is conducted in four sections. In Section I, we briefly discuss particular theories of political obligation and review the reasoning of the US Supreme Court on obligations to provide military service. Sections II and III are devoted to decisions in Germany and Israel, respectively. As we will see, while decisions in the USA and Germany are strikingly similar, reasoning in Israel is somewhat different, although an important recent case closely approximates those in USA and Germany. We attempt to account for the distinctive features of the Israeli cases, while Section IV presents our conclusions.

I

Before turning to the reasoning of the US Supreme Court on political obligation, we should discuss certain matters bearing on political obligations. To begin with, we should note an important limitation of our particular source of evidence. Supreme Court justices operate within existing bodies of law and, in applying the law to particular cases, assume its validity. Thus Supreme Court cases do not provide responses to the most troublesome challenge facing theories of political obligation, demonstrating that liberal citizens actually have obligations. However, although justices do not provide responses to philosophical anarchists,¹⁸ the fact that they regularly appeal to certain moral considerations rather than others supports the grounds that they prefer — subject to the qualifications noted above. In addition, the fact that certain grounds are *not* put forth in case after case is evidence against them.

In the literature, different accounts of political obligation are advanced and criticized. Leading theories are based on consent, gratitude, fairness, consequentialist concerns, and a natural duty of justice. These theories are generally familiar and need not be discussed here.¹⁹ However, fairness theories are less familiar and should be reviewed briefly. As we will see, for our purposes, the contrast between consequentialist and fairness theories is especially important.

According to a consequentialist or utilitarian theory of political obligation, Jones should obey the law (for example, pay her taxes) in order to advance the public good. Arguments along these lines have been criticized, however, on factual grounds. Under ordinary circumstances, in a large society, Jones's non-compliance would not be damaging to society. In fact, the community would

oftentimes actually be better off if Jones did not comply. If she paid her taxes, her contribution would barely be noticed. But if she did not pay, she would have extra money for herself or other people, or perhaps for some worthy cause, which might contribute noticeably to her own or other people's happiness. As a rule, society requires *general* but not *universal* compliance with its edicts. If a certain level of non-compliance is not damaging to society, it is difficult to require that a specific individual, for example, Jones, comply.²⁰

A fairness theory derives its force from the unfairness of non-compliance rather than harms to society. The principle of fairness was first clearly formulated by H.L.A. Hart in 1955:

when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their submission.²¹

The requirement here is based on equal distribution of burdens and benefits. Under certain conditions, the sacrifices made by members of a cooperative scheme in order to provide particular benefits also benefit non-cooperators, who do not make similar sacrifices. The principle holds that this situation is unfair, and so is intended to justify the obligations of non-cooperators.

Obligations under the principle of fairness are incurred by benefits that arise from cooperative effort. The most notable examples, public goods, can be characterized as 'non-excludable'. They cannot be provided to certain members of society without being made available to a wider population. National defense and relief from air pollution are paradigm cases of public goods. In addition, relevant public goods must be costly to provide, or else people would not have incentives to avoid the costs of providing them, and the question of obligations would not arise.

The distinctive binding force of the principle is opposition to 'free-riding'. If a given citizen, Smith, profits from some public good provided by the cooperative efforts of others, she should cooperate as well, unless there are significant, morally relevant differences between her and her fellow citizens. Smith's requirement to comply holds without regard to its actual consequences for society. Rather, the principle of fairness grounds the obligations a given person incurs in the existence of a cooperative association of her fellows in which each should bear her fair share of the overall burdens.²²

As noted above, when the US Supreme Court has found it necessary to justify political obligations, it has generally argued from fairness. In assessing the evidence, we should make a distinction between what we can call theoretical and practical concerns. While the former encompass arguments advanced for a variety of purposes bearing on political obligations, we will confine attention to the latter, which concern specific state requirements imposed on identifiable individuals. As noted above, among the clearest instances are requirements of military service. Though on a theoretical level, the Court has invoked broad ideas

to the effect that obligations rest on consent (that subjects should obey the law because they have agreed to do so), when cases have concerned the requirements of identifiable individuals to obey particular laws, the Court has argued along particular lines.²³

Two main points should be emphasized here. First, a prominent theme in the Court's reasoning about political obligations is that people have 'reciprocal obligations' to government. They must serve in return for important benefits government provides, mainly protection. The idea that political obligations are 'reciprocal obligations' was first clearly expressed in the 1875 case, *Minor v. Happersett*, 88 U.S. 162 (1875), and has been used by the Court ever since.²⁴ In discussing citizenship, Justice Morrison Waite wrote, for the unanimous Court:

The very idea of a political community, such as a nation is, implies an association of persons for the promotion of their general welfare. Each one of the persons associated becomes a member of the nation formed by the association. He owes it allegiance and is entitled to its protection. Allegiance and protection are, in this connection, reciprocal obligations. The one is a compensation for the other; allegiance for protection and protection for allegiance.²⁵

Many other cases present similar views of obligations. However, identifying obligations of citizenship as 'reciprocal obligations' does not in itself explain their basis. Reciprocal obligations could rest on different grounds, for example, formal exchange, gratitude, or other grounds.²⁶ If the ground was consent, Jones would have an obligation to the state based on some service it provides, because he had explicitly agreed to such an exchange. In regard to gratitude, he would owe the state return on its services because of a need to express his gratitude to it. However, a thorough review of the evidence indicates that, when the Court has explored the grounds for reciprocal obligations in detail, it has argued from fairness.

The Court's reasoning is most clearly articulated in *Arver v. U.S.* Having defended the constitutionality of the draft, Chief Justice Edward D. White, for a unanimous Court, grounds the individual's obligation to comply in fairness. As we have seen, in order to identify a given obligation as one of fairness, the Court must trace it to an association in which mutual benefits result from each person *doing his share* in the collective effort. This formulation is appealed to in *Arver*:

In fact, the duty of the citizen to render military service and the power to compel him against his consent to do so was expressly sanctioned by the Constitutions of at least nine of the states, an illustration being afforded by the following provision of the Pennsylvania Constitution of 1776: 'That every member of society hath a right to be protected in the enjoyment of life, liberty and property, and therefore is bound to contribute his proportion toward the expense of that protection, and yield his personal service when necessary, or an equivalent thereto'. (Art. 8)²⁷

According to the language here, the citizen is required to contribute *his proportion* toward the costs of protection. This line of reasoning is explicit in the

government's argument before the Court in the *Arver* case, which the Court apparently adopted: 'Compulsory military service is not contrary to the spirit of democratic institutions, for the Constitution implies equitable distribution of the burdens no less than the benefits of citizenship'.²⁸ Thus the Court suggests that, with all other people contributing their proportions, it would be unfair of the citizen in question not to contribute his.

Arver presents additional evidence. White refers to 'at least nine' state constitutions that provide for compulsory military service. Perusal of these indicates that Pennsylvania was not alone in using language of fairness. Although all the constitutions (and other sources) White cites do not employ similar language, constitutions of three additional states do. For example, Massachusetts:

Each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws. He is obliged, consequently, to contribute his share to the expense of this protection; to give his personal service, or an equivalent, when necessary....²⁹

As White notes, the authors of the state constitutions traced obligations back to an underlying moral idea that each person should do his share in providing society's collective benefits.³⁰

Other cases in which obligations are examined present similar claims. But *Arver* is the main draft law case, and so perhaps the single most important Supreme Court decision concerning political obligations. *Arver* has served as an authoritative precedent in at least 47 Supreme Court decisions and more than 300 federal lower court and state supreme court decisions.³¹

II

Turning to German public and constitutional law, we find that evidence of fairness as the ground for obligations to provide military service receives even more explicit support from the German Constitutional Court, *Bundesverfassungsgericht* (BverGE), than the US Supreme Court. The former relies upon legal theory, as well as events that trace their origins back to the French Revolution, thereby incorporating not only present German law, but 200 years of legal development into its justification for mandatory military service.

Decisions of the German Constitutional Court in this area have centered on the rights and obligations of conscientious objectors. When the German Basic Law, the *Grundgesetz* (GG), was adopted in 1948, no provisions in the text provided for military units of any kind or a period of mandatory military service.³² The German military, *Bundeswehr*, was eventually created by means of three *Grundgesetz* amendments and the passage of the Military Service Law (21 July 1956). These enactments gave the national government exclusive power over conscription, and made military service a basic duty. The institution of mandatory conscription was followed by a series of court cases regarding rights of individuals

not to serve in the armed forces. A number of constitutional rights cases were brought before the German Constitutional Court concerning the breadth of conscientious objection. The first, and seminal case, was decided in 1960. The plaintiff was a 20-year-old male who had applied for conscientious objector status on grounds of conscience. To support its position, the Court invoked reasoning closely related to the idea of ‘reciprocal obligations’ seen in American law:

Mandatory military service is compatible with the legal and philosophical-political principles that are the basis of the *Grundgesetz*. The *Grundgesetz* is a value-bound structure that recognizes protection of freedom and human dignity as the highest goals of all law. The concept of the human being represented in the Basic Law is not that of an autocratic individual but rather of the *citoyen* — the individual as a member of society and his many duties. It cannot be unconstitutional to enlist citizens to provide for the protection and defense of the rights of society, of which they themselves are direct benefactors.³³

In a 1974 decision, the *Bundesverfassungsgericht* argued that mandatory military service is rooted in the state’s need to provide protection, to which each individual must contribute his part. This decision makes explicit appeal to a norm of equal treatment:

The justification for universal military service is to be found in the fact that the state is able to fulfill its constitutionally-based obligation to protect its citizens only through the aid of those citizens, including their protecting the very existence of the Federal Republic of Germany. The claim to protection of the individual corresponds to his obligation to stand up for the interests of the community as well as to do his part [*seinen Beitrag . . . zu leisten*] in protecting that community, the protection of which the constitution itself is aimed. Universal military service is the expression of the general principle of equality [*Gleichheitsgedanken*].³⁴

Thus the reasoning here parallels that in the American cases. The 1960 decision defends the state’s right to require individuals to provide protection and defense, from which they themselves benefit. The 1974 decision elaborates upon the nature of this requirement. Each male citizen must ‘do his part’ to provide protection, in accordance with the general norm of equality (*Gleichheitsgedanken*), which furthermore encompasses in it, when used by the German Constitutional Court in this context, the principle of fairness. It is not simply that all men are equal before the law and for this reason must serve in the military. Rather, the principle of military obligation is based upon an equality that is directly connected to benefits and obligations. The reciprocal obligation of military service for the benefit of protection offered by the state is not based on consent or formal exchange, gratitude, or some other basis. Rather, it is based on the concept of fairness: if all benefit, then all must share equally in the burdens of contributing.

The role of the principle of equality in military obligations is confirmed by further cases. In 1977, the two houses comprising the German parliament, the

Bundestag and *Bundesrat*, passed a new law regulating the process of conscientious objection. The CDU/CSU opposition within the *Bundestag* called upon the *Bundesverfassungsgericht* to determine the constitutionality of the new law. When the Court handed down its decision, it reiterated many of the reasons seen in previous cases. It is notable that in these cases, the opponents of the law, too, argued according to ‘the general principle of equality’, which they contended had been violated by the unfairly lax burdens required of conscientious objectors.³⁵

In its decision, the Court appealed to recognizable ideas of both reciprocal obligations and a principle of equal burdens of citizenship:

The legislator decided for the introduction of universal military service with the passage of the Universal Military Service Act. This law is based upon a free-democratic tradition that goes back to the French Revolution of 1789 and the reform period in Germany beginning in the nineteenth century. The basis of this tradition is that it is the duty of all male citizens to stand up for and serve for the protection of freedom and human dignity as the highest rights of the community, from which they themselves benefit. This tradition finds its justification in the fact that the state recognizes and protects human dignity, life, freedom and property as basic civil rights, and is able to fulfill its constitutional obligation to protect these rights only through the help of its citizens and their further protection of the very existence of the Federal Republic of Germany. In other words, the individual basic right to protection and the community duty of the citizen to provide for the protection and safety of a democratic constitutional state and its constitutional order correspond to one another.³⁶ It follows from the constitutional moorings of universal military service that a national law which introduces a duty in the form as seen in Art. 12a Abs. 1 GG, not only does not go against the constitution but also actualizes a basic decision, which is a part of the text. . . . [Yet] The more depositions handed in which employ §25a Abs. 1 WplfG [*Wehrpflichtgesetz*], the more the possibility that those who do not declare conscientious objector will be called to serve increases, whereas the exact opposite occurs for objectors. Their possibility of serving civil duty becomes increasingly smaller. Thus, the basic principle of equality is violated.³⁷

Parliament was, therefore, forced to create another reform to the laws governing the process for determining conscientious objection and civil service. In 1983, these laws were complete and once again brought before the Constitutional Court in order to determine their compatibility with the Basic Law. The main contention of the opponents of the new law was that it had increased civil service beyond the normal period spent in mandatory military service. They argued that this difference was incompatible with the principle of equality, as well as the principle of the rule of law.³⁸ In keeping with previous decisions, the Court argued according to ideas of reciprocal obligations and equal distribution of the burdens of citizenship:

In the constitutional make-up of the *Grundgesetz*, the individual basic right to protection corresponds with the communal duty of each citizen to do his part in protecting this constitutional order (s. BVerGE 48, 127 [161]). Mandatory military service, the

enforcement of which is contained in Art. 3 Abs. 1 GG (BVerGE 48, 127 [162]), is an expression of the principle of equality. Its fulfillment is democratic normality.³⁹

In defending provisions for extended non-military service as an alternative to military service, the Court explicitly appealed to a principle of equal burdens:

The normative goal of Art. 12a Abs. 2 S. 2 GG is to secure a balance of the burden of military and civil service.⁴⁰

Lastly, regarding the principle of equality and the conscientious objector status procedure in cases of uncertainty, the Court argued:

The general principle of equality [Art 3. Abs 1 GG, *Alle Menschen sind vor dem Gesetz gleich*] has not been defied because the application for acceptance as a conscientious objector must either be rejected due to a lack of unity amongst the reasons listed (6 Abs. 1 Satz 1 KDVNG) or must go before a committee for conscientious objector status if there is doubt regarding the truth of statements/facts rendered by the applicant (7 Sätze 1 & 2 KDVNG).⁴¹

Once again, the central role of the principle of equal treatment in this entire debate is seen in the fact that proponents of conscientious objection appealed to it. In 1988, two men who had applied for conscientious objector status after already having fulfilled 15 months of basic military service had their case heard by the German Constitutional Court. After they received conscientious objector status, they were required to fulfill 5 months of civil service, since civil service requires 20 months' service, although military service requires only 15 months. Appealing to a principle of equal burdens for all citizens, the Court supported the conscientious objectors' arguments:

§22 S. 1 ZDG, in its regards for military justice/fairness, violates the constitutional law requiring that an equal burden be placed upon all citizens [*Staatsbürgerlichen Pflichtengleichheit*] (Art. 3 Abs. 1 GG), because this paragraph results in a situation in which conscientious objectors who have served some or all military time are worse off than those who have not.⁴²

In these decisions, we clearly see the central role that the norm of equal treatment plays in obligations to provide military service in Germany. In this area, the overall logic of the German Constitutional Court is strikingly similar to that of the US Supreme Court. Mandatory military service is justified as necessary for the provision of essential state benefits, which can be provided only through the efforts of the citizens. The protection the individual citizen receives from the state corresponds with his duty to do his part in providing it, while even those who are exempted from service on grounds of conscientious objection must bear equal burdens. There can be little doubt that the arguments of the German Constitutional Court in this area correspond closely to the principle of fairness. The Court has consistently upheld ideas along these lines, basing them on a tradition dating back to the French Revolution and found at various points in German history from 1813 to the present.

III

Turning to obligations to provide military service in Israel, we see that decisions are both similar and different in important ways. In Israel, there is mandatory military service for Jewish men and women, although some differences in requirements made of the sexes.⁴³ Conscription is regulated by the Israeli Defense Service Law, legislated in 1949 and amended in 1959 and 1986. The law has no provision for conscientious objection by men, but does allow this for women.⁴⁴ However, the law leaves some room for exemption of male conscientious objectors by entitling the Minister of Defense, in Section 28-c, to exempt persons for a variety of reasons, including 'other reasons'.⁴⁵ In the early years of statehood, the number of males demanding exemption as conscientious objectors was extremely low, and the ministry preferred to find pragmatic solutions in individual cases. Intervention by the courts was unusual.

One exception occurred in 1951 when the Supreme Court considered the case of Haim Steinberg, who, in 1949, was convicted by a lower court for refusing to serve in the newly formed army because of his religious convictions. He was a member of the ultra-orthodox Neturey-Karta sect, which objected to the formation of a Jewish state in the Holy Land. The Court recognized him as a conscientious objector and called upon the legislature to regulate the matter of conscientious objection by law, but dismissed his appeal on the ground that Steinberg did not object to military service per se, but to the very authority of the secular state and its laws, a position which, it said, no court could accept.⁴⁶

One reason the Steinberg case was unusual is that in Israel the problem of conscientious objection had been addressed on the political level. During the War of Independence of 1948, Prime Minister David Ben-Gurion, who also served as Minister of Defense, was confronted by religious leaders demanding exemption of students in religious seminaries (*Yeshivot*), whose religious studies were perceived as contributing to the survival of the Jewish people in another way, in light of the destruction of *Yeshivot* in Europe during the Holocaust. Ben-Gurion agreed and this arrangement was instituted.

With religious citizens who wished to be so exempted, the main cases of conscientious objection reaching the Israeli Supreme Court concerned secular men whose refusal to serve was generally selective. They stemmed not from all-out pacifism, which has been quite rare in Israel, but from objections to serving in the territories occupied by Israel since 1967, or to the invasion of Lebanon in 1982. The two landmark cases were *Gad Elgazi v. Minister of Defense and Others*, 1980, and *Yaacov Shain and the Israeli Association for Civil Rights v. Minister of Defense and Chief of Staff*, 1984.⁴⁷

Gad Elgazi was one of a group of 27 high-school seniors who, in 1979, published a letter objecting to the occupation of the West Bank and Gaza Strip and stating that, when called to military service, they would refuse to serve in the occupied territories. They added that by so refusing they believed they contributed

to peace in the Middle East. Adhering to its pragmatic policy, the Ministry of Defense allowed members of the group, when drafted, to serve within the 'green line' separating Israel from the occupied territories. But Gad Elgazi's case caused a change in that pragmatic policy. Elgazi was driven by deceit to the occupied territories, refused orders, and was subsequently subjected to a number of military trials. He filed a petition with the Supreme Court claiming discrimination in light of former exemptions given by the Ministry of Defense.⁴⁸

The Supreme Court left no question where it stood in regard to the individual's obligation to provide military service: 'no military organization can tolerate the existence of a general principle according to which individual soldiers can dictate their place of service, be it for economic or social reasons, or for reasons of conscience.'⁴⁹ Although Justice Cohen, who wrote a separate opinion, expressed dissatisfaction with the lack of a clear policy by the army regarding service in the occupied territories, all three justices agreed that this was no reason to consider as discriminatory the change of practice according to which soldiers were now compelled to serve in the occupied territories. The principles to which Justices Levin and Beiski appealed were essentially consequentialist, especially the need to leave questions of military policy to the army:

we believe we had better refrain from stating an opinion as to the utility-calculations of the authority when it implements its policy; this is a matter for the respondents and their experts to handle and we see no legal reason to contradict its calculations.⁵⁰

Consequentialist arguments are also dominant in the case of Yacov Shain. In 1983, the war in Lebanon gave rise to a wave of civil disobedience. Shain refused reserve duty in Lebanon. While in military prison, he was summoned again to reserve duty there. He filed a petition with the Supreme Court claiming that the second summons was not in line with 'military needs', as specified in the Defense Service Law, but was inflicted on him as a punishment. The state attorney claimed in response that the practice of calling objectors to duty after they had been punished for their refusals stemmed from the need to overcome the phenomenon of refusal to serve in Lebanon, which severely jeopardized the foundations of military discipline and the morale of soldiers serving there.

The Supreme Court rejected Shain's claim that his second summons was not in line with military and security needs, and that the military instructions, updated in 1983, to summon objectors who had already been punished were illegal. The decision, written by Justice Elon, argued on consequentialist grounds:

The purpose of the updated instructions is to see to it that every reserve soldier fulfills his duty and provides military service in accordance with the military and security needs of the IDF, needs which are determined by consideration of the IDF's authorities.⁵¹

Although the word 'every' had been underlined, which indicates awareness by the judge that the refusal by one soldier must be considered in reference to

others, Justice Elon made no direct reference to concerns of equal burdens, of each individual having to do his part, and so to grounds of fairness. His concern was to make sure that the objector's alternative service did not leave him with burdens lighter than those of people who served. And so, concerns of equal treatment were implicit in this regard. But by far, the main emphasis was upon specific additional costs that others would have to bear in a situation in which one soldier's exemption entailed greater burdens for others. Although Elon was concerned with the additional costs inflicted upon others, he did not assess these against a norm of equal treatment:

It is a definite rule that this court does not replace with its judgment the judgment of the formal authority, and this rule applies even more when it concerns the control of this court over professional-planning decisions by the military authorities. It is unthinkable that the IDF — or any other military system — could accept a phenomenon in which soldiers, by being willing to be sentenced for refusal to obey an order of the above kind and serve a term of detention or arrest, would totally foil the execution of the order regarding the place of their service and 'serve' every year a term in prison in lieu of the common reserve service. Accepting it would not only be opposed to the legislator's order, that the soldier must serve at the designated 'place and time' . . . but it may jeopardize the deployment, training and preparedness of the IDF and the execution of its missions, and what is no less severe, the morale of comrades in arms, harnessed to yoke and danger, while their associates are free to go to their home and to their 'prison.' Moreover, the head of the manpower department is right in pointing out . . . that not only isn't the call to reserve duty of those who refused to serve in Lebanon and were subsequently sentenced to a prison term intended to discriminate and punish them, but 'the completion of the days of service comes to equalize between reserve soldiers and [to see to it that] soldiers who do not fulfill their duty to serve would not benefit from their refusal to serve.' Abstinence of part of the soldiers, even if a small part, from their military unit, will result in the rest of the soldiers being forced to fulfill these tasks themselves, or the unit would have to be reinforced by soldiers from another unit. However that may be — the 'protest' of those is done on account of their comrades who will be more busy, will engage in more duties by rotation, will be more on guard, will go less on vacations etc.⁵²

Elon insisted that it was not the Court's task to interfere in decisions by the military authorities and added that the petitioner was not entitled to determine military policy and to decide what the army's security needs were. He surveyed responses to selective conscientious objection, that is, objection to serving in a specific war for ideological reasons, in England and the USA, where this was seen as infringing upon the process of democratic decision-making and as constituting a real danger of applying unequal criteria in military recruitment. He agreed that this danger existed in the case before him, but made sure to differentiate the Israeli context, with its higher stakes and different utility considerations, from those of other countries:

This big and complicated issue of law on the one hand and conscience on the other hand, of the duty and need to maintain military service in order to defend the sovereignty of the state and the security of its inhabitants on the one hand, and refusal to go out to war for reasons of personal conscience on the other hand, must be dealt with in accordance with the special local and temporal circumstances, and the hard security situation of the state of Israel does not resemble the security situation of other countries living in peace within their borders.⁵³

Nowhere were such consequentialist considerations more apparent than in the Supreme Court decision on the petition by Attorney Yehuda Ressler and others demanding to abolish the exemption of *Yeshivot* students from military service. The petitioners claimed that this abolition would shorten their own periods of service in the reserves. Affidavits by military officers confirming this calculus allowed their case to be heard before the Supreme Court, which had rejected similar pleas in the past, on the ground that the matter was political rather than legal. Interestingly, the 80-page verdict does not hint even once at considerations of fairness. Although Chief Justice Shamgar said that the exemption was unthinkable and hard to accept from the normative, national, and human points of view, which presumably stemmed from his realization of how unfair it was, he and his colleagues did not elaborate on this theme any further. They accepted the legality of the exemption, because it could be seen as falling into the category of ‘other reasons’ allowing exemptions in the Defense Service Law.⁵⁴

In evaluating the reasonableness of the Minister of Defense’s decision to grant exemption to thousands of religious students, who according to one affidavit, would fill five armor regiments or two infantry regiments, the Court asked only one question — the degree of harm inflicted upon national security as a result of this decision. The Court demanded a written declaration by the minister on this matter and received an answer that the cost of recruiting these students could outweigh the benefits. The minister claimed that, because of the extreme religious lifestyle of these students, they might not adjust to the alien culture of the army and might have difficulties upholding their religious rites there. Their special upbringing might also make their service inefficient. The Court, however reluctant it may have been, accepted this consequentialist argument. Commenting on the minister’s declaration, Justice Barak wrote that

the Minister of Defense did not ignore the implications the postponement of service for *Yeshivot* students has on the number of regular and reserve forces of the IDF, and on the deployment for the State of Israel’s security purposes, but came to the conclusion not to recruit to the IDF the category of these candidates for service.⁵⁵

He quoted Justice Cohen’s statement on a former occasion, according to which

nobody can predict whether the recruitment of thousands of *Yeshivot* students, who would consider their recruitment to the army a blow to the foundation of their belief, according to which the study of the Torah precedes the duty to serve in the army, will add to the fighting strength of the IDF or, God forbid, infringe on that strength. There

is no confidence that such recruitment, even if it increases the strength of the army quantitatively, would not have long-ranging negative implications on the internal and external survival-power of the state.⁵⁶

Barak added that the Minister of Defense could have reached a different conclusion, one suggesting that the number of *Yeshivot* students receiving exemptions is too high, and that it is necessary to change the policy in this matter. But the dominant consideration in any calculation the minister makes, wrote Barak, must be national security:

In balancing between the different considerations which stand at the foundation of the Minister of Defense's calculation according to section 36 of the law, the decisive calculation must be the security consideration . . . it is only natural that the weight of the extra-security considerations, such as considerations of education, family and other reasons, is relatively light, and only if their harm to security is light, is it possible to take them into account. Therefore, in the last account, the number of Yeshivot students whose recruitment is postponed is important. There is a limit which a reasonable Minister of Defense is not allowed to exceed. Quantity makes quality. In this regard, the petitioners have not [succeeded] in demonstrating that the damage to security is not light.⁵⁷

Barak concluded by proposing that the postponement of service to these students be occasionally re-evaluated in light of the changing security needs of the country.

If we were able to bring our discussion of Israeli cases to a close at this point, our analysis would be relatively straightforward. One will note that, in the Israeli cases, concerns of fairness have been overshadowed by consequentialist considerations bearing on national security. There are three main reasons for this. First, and most obvious, is the 'hard security situation' of Israel, to which Justice Elon refers above. This undoubtedly made issues of security more salient. Although we may assume that the Israeli court shares with the American and German courts the view that fairness is a fundamental value, and Israel's highly respected Supreme Court judges are familiar with notions of fairness in the world literature, their decisions are apparently strongly influenced by what Judith Karp, a former prosecutor at the Attorney General Office, defined as a view of Israel as a 'self-defending democracy.'⁵⁸ As she puts it, the core of this doctrine regards the value of national security and continued existence of the state as a super-constitutional premise against which legislation is interpreted and which every authority is bound to respect and enhance. Underlying this doctrine are the concepts (which Barak, Elon and others often referred to in their decisions) that a state is not bound to agree to its elimination, its judges should not sit idle when confronted with a request for remedy, and no state institution should serve as a tool for those who are out to destroy it. This is the main reason why, we believe, it is hard to find appeals to fairness, however desirable in principle, in the Israeli cases, in separation from practical security considerations.

Second, and more important from our point of view, individual cases in Israel applied readily to large numbers of other people. Even when the particular case under consideration concerned a specific individual, such as Yacov Shain, security considerations were still paramount, since granting an exemption for him had significant implications for a large class of additional potential exemptees. We see this with Shain, while it is even more clear in regard to the religious exemption for *Yeshivot* students.

In important respects the situation in Israel differs from those in other countries, as noted by Justice Elon. According to the logic of collective action, it is often unnecessary for a given individual to contribute to a collective good, because his contribution or non-contribution would make no detectable difference. In the USA and Germany, this logic holds for individual conscientious objectors, even if exemptions for them imply similar treatment for large numbers of like-minded others. In a country of tens or hundreds of millions, ordinarily, how such a class is treated will have at most extremely minor effects, and so norms of fairness and equal treatment must be invoked to justify requiring the contributions of given individuals. Because of its small size and condition of permanent threat, the situation in Israel is different. If exempting a given individual would be generalized to affect thousands of others, there could well be significant implications for national security. And so, judges could refer directly to these, without appeal to fairness.

There is also a third consideration. The salience of fairness as a value in Israeli society is considerably lessened by divisions in society. Israeli Supreme Court judges realize that they face two different conceptions of community: one shared by secular Israelis who believe in the relation between citizens' benefits and duties and the other by orthodox Israelis to whom 'community' relates to a religious state of existence which entails no obligations to the secular state (whose very existence may even be considered a hindrance to the coming of the messiah). Therefore, for this reason as well, even Israel's chief justice may be expected to refrain from invoking notions of fairness in judicial decisions.⁵⁹

However, the evidence of a recent decision shows that more than consequentialist concerns have motivated Israeli courts. The decision in question concerns two petitions: Supreme Court Decision 3267/97 *Amnon Rubinstein and Others v. Minister of Defense* and Supreme Court Decision 715/98 Major (Res.) *Yehuda Ressler, The New Student Union of Tel-Aviv University and 15,604 Students in Various Institutions of Higher Education v. Minister of Defense*. In light of the importance of the issue, 11 Justices of the Supreme Court were on the bench. Their decision, written by Chief Justice Aharon Barak, was unanimous. (One Justice, while joining the decision, added a minority opinion.)

Barak noted that since the Ressler decision of 1986 (discussed immediately above), the number of *Yeshivot* students receiving exemptions had risen to 28,772 (as of August 1997) which constituted 8 percent of all recruits to the Israeli Defense Forces. 'The societal implications of the arrangement are far-

reaching: a deep gap has been created in Israeli society, side by side with an increasing feeling of inequality'. Referring to his 1986 decision, Barak asked whether 'quantity' had now turned into 'quality' and concluded that it had. The Court declared the Minister of Defense's exemptions of so many students illegal, and called upon the Knesset (Parliament) to pass a law within one year to provide a solution to the matter.⁶⁰

As the above reference to 'inequality' indicates, with this decision considerations of equality or fairness were finally brought into the forefront of discussion of military service requirements in Israel. However, it is important to note that in this instance, reference is not primarily to inequality per se, but to a 'feeling of inequality' and its adverse implications. In other words, here too considerations of fairness are subordinated to consequential concerns to some extent. The same is true of the decision's second reference to fairness. Examining reasons for continuing the policy of exemptions, the Court quoted the lawyer for the claimant. The Court noted that claims concerning the adverse consequences of having *Yeshivot* students serve had not been investigated, while, the lawyer added, the existing system of exemptions involved a significant harm to security needs: 'the feeling of solidarity by the people is part of the security doctrine.' Here too, then, the claimants appealed to fairness, but only in reference to its contribution to a feeling of solidarity, and so, again, to national security.

However, as he continued, Barak made a clear and unequivocal appeal to a principle of equality, like those invoked in the USA and Germany:

On the one hand there exists the principle of equality, according to which all members of society ought to contribute in equal manner to its security. The present situation, in which substantial parts are not endangering their lives for the security of the state, creates strong discrimination, and a feeling of deep injustice.⁶¹

Barak mentions that the principle of equality is a central norm in Israel's system of justice, a norm defining the character of the state and of every democratic society. He quotes a former decision he had authored in which he had argued as follows:

the individual joins in the overall network of society knowing that others are doing the same. The need to assure equality is natural to Man. It is based on calculations of justice and fairness. He who asks for recognition of his right, must recognize another person's right to ask for similar recognition. The need to maintain equality is crucial to society and to the social contract on which it is built. Equality guards against arbitrary rule. Indeed, there is no more destructive element for a society than the feeling of men and women in it that they are treated in a discriminatory manner. It harms the integrative forces of society, it harms the self-identity of the individual.⁶²

In this decision, then, Barak appeals not only to feelings of injustice engendered by departures from fairness (which, once again, subordinate fairness to consequential concerns), but also to the norm itself, which he identifies as a central democratic principle. The 'principle of equality, according to which all members

of society ought to contribute in equal manner to its security' can be identified as the principle of fairness. On the face of it, the identification of equality and fairness is not obvious. A claim that the burdens of citizenship should be equal is one thing, while the principle of fairness makes this contingent on equality of benefits, and there is apparently nothing in Barak's words to suggest such a dependence. This, however, seems to stem from the deeply rooted assumption throughout Israel that security threats are shared by all citizens alike (random terror, for instance, may hit anyone anywhere) and thus all citizens benefit from security provided by the state, whether they admit it or not. Thus, in view of the implicit assumption that the indispensable benefit of defense is enjoyed generally, Barak's reference to equality may be seen as tantamount to fairness. The invocation of this norm is a significant departure from previous decisions, although in this context too, Barak drifts back into consequential concerns. In the later part of the opinion, he notes again that the principle of equality carries relatively little weight with religious members of Israeli society, because it clashes directly with considerations of religious freedom for the *Yeshivot* students.⁶³

Thus, we see that the reasoning in the Israeli cases differs from that in the US and German cases in the relative unimportance of appeals to norms of fairness or equality. Though the principle of fairness is invoked in the recent deferment case, in the Israeli cases, this is the exception rather than the norm. Once again, this important difference can be explained by the tangible security implications of individual cases before the Israeli Court, when generalized, as they readily would be.

IV

We have seen that, in spite of the differences between grounds for obligations in Germany, the USA and Israel, in all three countries, military obligations are defended along particular lines. Justices do not say that individuals should serve because they have promised to obey or from gratitude. The fact that particular grounds are regularly *not* appealed to indicates their irrelevance to questions of obligation. Thus, it is striking that the justices regularly connect up specific obligations with correlative benefits individuals receive. An idea of reciprocal obligations is central to arguments in all three countries. Individuals should serve because they benefit from protection that the state provides. This is explicitly stated in the American cases and all but explicitly in the German. Though in Israel, this notion is not put forth explicitly, it generally underlies the Court's consequential reasoning, which repeatedly ties people's service to provision of defense. We have also seen that in all three countries, the individual's requirements to contribute are supported by norms of equality or fairness. Reasons why this receives relatively little emphasis in Israel have been discussed.

The similarities in the cases we have examined lead us to posit what we can call a 'service conception' of political obligation.⁶⁴ Individuals must cooperate in

particular ways because they receive state benefits, the provision of which requires that they do so. In this sense, political obligations are deeply commonsensical. Individual compliance is necessary because particular state benefits are necessary. Were the benefits not necessary, it would be all but impossible to justify requiring compliance. The general principle that is involved (equality or fairness) is directed toward the need to distribute the costs of state services equitably. To some extent, this mode of reasoning is influenced by the nature of judicial decision-making. Particular laws are called into question and so judicial authorities focus on them. Discussion remains focused on particular state benefits and does not rise to the level of general doctrines or deductive appeals. But in spite of this, the moral reasoning of the courts is clear.

As we have seen, in the USA and Germany, connections between state service and individual compliance are directly mediated by the principle of fairness. On this line of reasoning, Jones must comply because it would be unfair of him not to do so. In all likelihood, fairness is invoked in such cases because it is logically required. In a large society, provision of state services does not demand that *all* individuals cooperate. As noted above, the requisite benefits require general, but not universal, cooperation. With the compliance of a certain number of individuals *not* required, it would not be possible to argue that any given individual must cooperate, without appealing to a principle of fair distribution of burdens. With most people required to serve, Jones must do so, unless he can demonstrate significant, morally relevant differences between himself and his fellows. For him not to do so would contravene a norm of equal treatment. The role of fairness is circumscribed in the Israeli case because of the factors discussed above. Most significant, with military service of large groups directly at issue in particular decisions, security implications were real and so mediation by the principle of fairness less needed. But again, in the Israeli context, concerns of fairness were also present, if less salient.

Thus, we believe that there is a large element of similarity between the reasoning of the Israeli and other courts. In all cases, military obligations are of reciprocity, bound up with national security and individual protection. In all cases, these considerations are supplemented by considerations of fairness — strongly in the USA and Germany, although less strongly in Israel, for reasons we have seen.

In closing, we should note an obvious problem with this study. Any far-reaching conclusions we advance require generalization in two senses: we look at only three countries, and at only one particular area of law in each. But as noted above, the three countries are different in important ways and so allow interesting comparisons. Our main justification for looking at military obligations is that they seem to be the most obvious area in which to examine the kinds of moral considerations that interest us. Exhaustive analysis of US Supreme Court decisions shows that this is not only the main area for discussions of political obligations, but for all intents and purposes, the only one.⁶⁵ Still, our conclu-

sions concerning how the state supports the political obligations of its citizens must have the status of hypotheses, until they have been examined further in other countries and other areas of law.

Appendix

Cases: Germany

Bundesgesetzblatt I S. 449–50, 1955.

BVerGE 12 (1960) 45.

BVerGE 19 (1965) 135.

BVerGE 23 (1968) 127.

BVerGE 38 (1974) 154.

BVerGE 48 (1978) 127.

BVerGE 69 (1985) 1.

BVerGE 78 (1988) 364.

BVerGE 80 (1989) 354.

Das Grundgesetz für die Bundesrepublik Deutschland. Bonn: Bundeszentrale für politische Bildung, 1990.

Cases: Israel

Baranowski v. Minister of Defense, H.C. 2700/96, not published.

Elagazi v. Minister of Defense and Others, H.C. 470/80, not published.

Epstein v. Minister of Defense and Others, H.C. 4062/95, not published.

Poraz v. The Tel-Aviv-Jaffa Municipality, H.C. 953/87.

Ressler and Others v. Minister of Defense, H.C. 910/86.

Shain and the Israeli Association for Civil Rights v. Minister of Defense and Chief of Staff, H.C. 734/83.

Steinberg v. Attorney General of the State of Israel, C.A. 5/51.

Cases: USA

Arver v. U.S. 1918. 245 U.S. 366.

Minor v. Happersett. 1875. 88 U.S. 162.

notes

A previous version of this article was presented at a conference on Empirical Research and Legal Realism: Setting the Agenda, Haifa University, spring 1999. The authors would like to express their gratitude to the editors of this journal and the following, for helpful discussions or comments on previous versions of the article: Ernie Alleva, Richard Dagger, Daniel Devereux, Julian Franklin, David Fontana, Leslie Green, Mark Hall, David Klein, Donald Kommers, John Simmons, Steven Wall, and Jonathan Wolff.

1. We treat the question of political obligation as basically interchangeable with why people should obey the law. We also generally use the terms ‘obligation’ and ‘duty’ interchangeably; for discussion of these concepts, see Richard Brandt, ‘The

- Concepts of Obligation and Duty’, *Mind* 73 (1964): 374–93; James Mish’Alanai, “‘Duty,’ ‘Obligation,’ and ‘Ought’”, *Analysis* 30 (1969): 33–41; Herbert L.A. Hart, ‘Legal and Moral Obligation’, in *Essays in Moral Philosophy*, edited by A.I. Melden (Seattle: University of Washington Press, 1958). Because we do not construe political obligations as necessarily grounded in voluntary actions, we view strong moral reasons to obey the law as constituting an adequate theory of political obligation, whether or not these reasons stem from ‘obligations’ in the strict sense. For discussion, see A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), Chs 1–2; George Klosko, *The Principle of Fairness and Political Obligation* (Savage, MD: Rowman and Littlefield, 1992), Ch. 1.
2. Michael Walzer, *Obligations: Essays on War, Disobedience, and Citizenship* (Cambridge, MA: Harvard University Press, 1970), Ch. 4.
 3. Leslie Green, *The Authority of the State* (Oxford: Oxford University Press, 1988), Ch. 3.
 4. See Simmons, *Moral Principles*; Klosko, *Principle of Fairness*; John T. Sanders and Jan Narveson, eds, *For and Against the State* (Lanham, MD: Rowman and Littlefield, 1996).
 5. We hope to discuss legislative debates in future articles.
 6. On considered judgments, see John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), pp. 19–20, 47–8. On reflective equilibrium, see Rawls, *Theory of Justice*, pp. 19–21, 46–53, 578–86; Rawls, ‘Outline of a Decision Procedure for Ethics’, *Philosophical Review* 60 (1951): 177–97; Norman Daniels, ‘Wide Reflective Equilibrium and Theory Acceptance in Ethics’, *Journal of Philosophy* 76 (1979): 256–82. For criticisms of reflective equilibrium, see Richard M. Hare, ‘Rawls’s Theory of Justice’, in *Reading Rawls*, edited by N. Daniels (New York: Basic Books, 1974); David Lyons, ‘Nature and Soundness of the Contract and Coherence Arguments’, in *Reading Rawls*; Peter Singer, ‘Sidgwick and Reflective Equilibrium’, *Monist* 58 (1974): 490–517. For the resemblances between judicial decision-making and reflective equilibrium, see Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977), Chs 4 and 6.
 7. Rawls, *Theory of Justice*, p. 49.
 8. *Ibid.*, p. 21.
 9. Daniels, ‘Wide Reflective Equilibrium’, p. 258.
 10. *Ibid.*, p. 260.
 11. John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), pp. 54–8. It is worth noting that, in one respect, the judgments of philosophers may not approximate Rawlsian considered judgments. Philosophers, invested in their own favored theories, may not be disinterested reasoners. We should also note, however, that in other respects (and for other reasons) individual judges are likely not to be disinterested moral reasoners either. Accordingly, in addition to particular judicial decisions, we are interested in how their reasoning stands up over time and is viewed by subsequent courts. We recognize, however, that desires to abide by precedent can complicate matters in this regard (but see note 15, below).
 12. Hugo Grotius, *Prolegomena to the Law of War and Peace*, translated by Francis Kelsey (Indianapolis: Bobbs-Merrill, 1957), para. 46.
 13. *Ibid.*, para. 40.

14. Mark Hall and George Klosko, 'Political Obligation and the United States Supreme Court', *Journal of Politics* 60 (1998): 462–80.
15. Konrad Zweigert and Hein Kotz, *Introduction to Comparative Law*, second revised edition, translated by Tony Weir (Oxford: Oxford University Press, 1992). The Israeli legal system inherited its basics from the Mandatory legal system. Since the establishment of the state of Israel, a system has evolved which combines common law as well as some Continental basics and Israeli heritage. See Aharon Barak, 'The Israeli Legal System: Heritage and Culture', *Hapraklit* 40 (1992): 197–217. The German BverG often follows previous case law, but is not bound by its previous decisions in the same manner as the US Supreme Court. Accordingly, the repetition of and use by the Court of previous decisions stresses the importance of their arguments. See Hans Boldt, *Deutsche Verfassungsgeschichte*, 2 Bde. (München: Deutscher Taschenbuch Verlag, 1990).
16. Amos Shapira, 'Judicial Review Without a Constitution: the Israeli Paradox', *Temple Law Quarterly* 56 (1983): 425.
17. For Israel, see Michael Keren, 'Justifications of Conscientious Objection: An Israeli Case Study', *International Journal of the Sociology of Law* 26 (1998): 121–37; Yoram Peri, 'Israel: Conscientious Objection in a Democracy under Siege', in *The New Conscientious Objection: From Sacred to Secular Resistance*, edited by C. Moskos and J.C. Whiteclay (New York: Oxford University Press, 1993).
18. Simmons, *Moral Principles*; Robert P. Wolff, *In Defense of Anarchism* (New York: Harper and Row, 1970); and also Green, *Authority of the State*.
19. See especially Simmons, *Moral Principles*, for an excellent discussion of all these theories, though from a highly critical perspective. For a theory based on reciprocity as well, see Lawrence Becker, *Reciprocity* (London: Routledge and Kegan Paul, 1986); but see Hall and Klosko, 'Political Obligation', pp. 466–68.
20. See David Lyons, *Forms and Limits of Utilitarianism* (Oxford: Oxford University Press, 1965), Ch. 5; Klosko, *Principle of Fairness*, Ch. 6; for paradoxical cases, see George Klosko, 'Parfit's Moral Arithmetic and the Obligation to Obey the Law', *Canadian Journal of Philosophy* 20 (1990): 191–214.
21. Herbert L.A. Hart, 'Are There Any Natural Rights?', *Philosophical Review* 64 (1955): 186.
22. The main discussions of the principle of fairness and political obligation are Simmons, *Moral Principles*, Ch. 5; Klosko, *Principle of Fairness*; and Richard Dagger, 'Playing Fair with Punishment', *Ethics* 103 (1993): 473–88. The main criticisms of fairness theories have concerned difficulties in 'accepting' public goods; see Rawls, *Theory of Justice*, pp. 113–6; Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 93–5; Simmons, *Moral Principles*, Ch. 5; Ronald Dworkin, *Law's Empire* (Cambridge, MA: Harvard University Press, 1986), pp.192–3; this objection is dealt with in Klosko, *Principle of Fairness*, Ch. 2. For additional criticisms, see A. John Simmons, *On the Edge of Anarchy* (Princeton: Princeton University Press, 1993), Ch. 8.
23. Hall and Klosko, 'Political Obligation'.
24. *Ibid.*, pp. 471–4.
25. *Minor v. Happersett*, 88 U.S. 162 (1875), pp. 165–6.
26. Hall and Klosko, 'Political Obligation', pp. 474–7.
27. *Arver v. U.S.*, 245 U.S. 366 (1918), p. 380.

28. *Ibid.*, p. 371.
29. Massachusetts Bill of Rights, 1780, Art. 10. Similar language is found in the constitutions of New Hampshire and Vermont; White also cites New York, Delaware, Maryland, Virginia, and Georgia, but we do not find similar language in their constitutions.
30. For discussion of other cases that rely on fairness, see Hall and Klosko, 'Political Obligation', p. 477.
31. *Ibid.*, p. 476.
32. Theodor Maunz and Reinhold Zippelius, *Deutsches Staatsrecht*, twenty-seventh edition (München: C.H. Beck'sche Verlagsbuchhandlung, 1988). For background on German laws concerning military service, see Reinhold Zippelius, *Allgemeine Staatslehre*, eleventh edition (München: C.H. Beck'sche Pub., 1991); Günter Wollstein, 'Die preußische Reformzeit—Das Landwehrkonzept', in *Tradition als Last? Legitimitätsprobleme der Bundeswehr*, edited by Klaus M. Kodalle (Köln: Wissenschaft und Politik, 1981); Donald Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* (Durham: Duke University Press, 1989).
33. BVerGE 12 (1960) 50–1. All translations of German and Israeli decisions are by the authors of this article.
34. BVerGE 38 (1974) 154.
35. BVerGE 48 (1978) 143.
36. 'Mit anderen Worten: Individueller grundrechtlicher Schutzanspruch und gemeinschaftsbezogene Pflicht der Bürger eines demokratisch verfassten Staates, zur Sicherung dieser Verfassungsordnung beizutragen, entsprechen einander (vgl. BVerGE 12, 45 [51]; 38, 154 [167]).'
37. BVerGE 48 (1978) 161 and 175.
38. BVerGE 69 (1985) 1–3.
39. BVerGE 69 (1985) 22: 'In der demokratischen Verfassungsordnung des Grundgesetzes entsprechen einander der individuelle grundrechtliche Schutzanspruch und die gemeinschaftsbezogene Pflicht der Bürger, zur Sicherung dieser Verfassungsordnung beizutragen (vgl. BVerGE 48, 127 [161]). Die allgemeine Wehrpflicht ist Ausdruck des allgemeinen Gleichheitsgedankens. Ihre Durchführung steht unter der Herrschaft des Art. 3 Abs. 1 GG (BVerGE 48, 127 [162]); ihre Erfüllung ist demokratische Normalität.'
40. BVerGE 69 (1985) 30: 'Das normative Ziel des Art. 12a Abs. 2 Satz 2 GG besteht darin, ein Gleichgewicht der Belastung von Wehr- und Ersatzdienstleistenden sicherzustellen.'
41. BVerGE 69 (1985) 47.
42. BVerGE 78 (1988) 367: '§22 Satz 1 ZDG verstoße gegen das Verfassungsgebot der staatsbürgerlichen Pflichtengleichheit in Gestalt der Wehrgerechtigkeit (Art. 3 Abs. 1 GG), weil er dazu führe, daß gediente Kriegsdienstverweigerer stärker belastet würden als ungediente.'
43. Defense Service Law (1949), paragraphs 11, 12.
44. Section 30 of the law exempts from service the mother of a child, a pregnant woman, a married woman, and allows women exemption for reasons of conscience or religious lifestyle. Defense Service Law (Consolidated Version) 1986.
45. Defense Service Law (Consolidated Version) 1986.
46. *Steinberg v. Attorney General of the State of Israel*, criminal appeal 5, 1951.

47. Two less important cases which reached the Supreme Court were *Alexander Epstein v. Minister of Defense and Others*, 1995, and *Sergei Baranowski v. Minister of Defense*, 1996.
48. Yoram Shachar, 'The Elgazi Trials—Selective Conscientious Objection in Israel', in *Israel Yearbook on Human Rights* 12 (1982): 214–58.
49. *Elagazi v. Minister of Defense and Others*, High Court of Justice 470/80, p. 5.
50. *Ibid.*, p. 6.
51. *Yaacov Shain and the Israeli Association for Civil Rights v. The Minister of Defense and Chief of Staff*, High Court of Justice 734/83, p. 399.
52. *Ibid.*, pp. 399–400.
53. *Ibid.*, p. 403.
54. *Yehuda Ressler and Others v. Minister of Defense*, High Court of Justice 910/86.
55. *Ibid.*, p. 456.
56. *Ibid.*, p. 499.
57. *Ibid.*, p. 505.
58. Judith, Karp, 'Finding an Equilibrium', in *Israeli Democracy* (1990), pp. 29–31.
59. See Michael Keren, *Zichroni v. State of Israel: The Biography of a Civil Rights Lawyer* (Lanham, MD: Lexington Books, 2002), Ch. 6: 'Politics, Religion and Civil Rights'.
60. *Amnon Rubinstein and Others; Major (Res.) Yehuda Ressler and Others v. Minister of Defense*, High Court of Justice 3267/97; 715/98, 9 December 1998.
61. *Ibid.*, p. 38.
62. *Poraz v. The Tel-Aviv-Jaffa Municipality*, H.C. 953/87, 42 P.D. (2) 309. Poraz, a member of the Tel-Aviv-Jaffa city council, challenged a decision, forced on the city by the Minister of Religious Affairs, not to include women in the selection committee selecting the city's Religious Council. Barak ruled in favor of Poraz and referred to the need to maintain equality between men and women.
63. *Amnon Rubinstein and Others; Major (Res.) Yehuda Ressler and Others v. Minister of Defense*, High Court of Justice 3267/97; 715/98, 9 December 1998.
64. For the 'service conception' of authority, see Joseph Raz, 'Authority and Justification', *Philosophy and Public Affairs* 14 (1985): 3–29.
65. See Hall and Klosko, 'Political Obligation'.