

Joint Commitments and Individual Participation*

The people made the Constitution, and the people can unmake it. It is the creature of their own will, and lives only by their will.

Justice Marshall

Social life is perpetual becoming.

Emile Durkheim

I. Introduction

Margaret Gilbert has extended the rich sociological scholarship of joint commitments in a very promising way to explain the nature of political and legal obligations.¹ According to this theory, there are *plural subjects* existing, which are created by the commitment of their members to do certain thing *J* together. Joint commitments come into being in various ways, and individual consent of the members will often but not always be the mean for that. When such plural subjects are committed to do *J* their individual members are *individually obliged* to *J* by virtue of their joint commitment. According to Gilbert this obligation from joint commitment always exists and is grounded in the joint commitment itself alone. In this she differs from the other writers in that tradition such as Michael Bratman and Scot Shapiro. Her other novel contribution is that building on this obligation she moves beyond the philosophy of action into the field of political philosophy to extend the joint commitment theory to large and anonymous society and to legitimize the political and legal obligations of citizens to their states.²

To achieve this Gilbert relies on the Durkheimian and Simmelian concepts of social groups. Thus she does not focus on the individual members but on the group as a whole which is considered to be the proper subject of the obligations, especially of political and legal obligations. The group of people who are committed to *J* together form a specific unity, which is the *plural subject* of a joint commitment to *J*. Accordingly, any state can be seen as a plural subject consisting of its citizens who are jointly committed to maintain its institutions or, in the words of legal positivism, jointly committed to heed its Rule of recognition. The advantage of this view is that the standard ‘no agreement’ objection to the contractarian accounts of state can be avoided as joint commitments do not always require individual consent to be formed. Indeed, to substitute agreement with joint commitment is a very subtle way to avoid this problem, yet it is not entirely successful, unless we turn a completely blind eye to the complex relationship of individual members with the respective plural subject.

When we consider the individual constituents of a plural subject it seems that the plural

* I have benefited considerably from the discussion of an early version of this paper at the Jurisprudence Discussion Group at Oxford University in May 2004 and especially from the comments by Danny Priel.

¹ See Gilbert, Margaret, *On Social Facts*, Routledge, 1998; *Living Together*, Rowman & Littlefield, 1996 and especially *Sociality and Responsibility*, Rowman & Littlefield, 2000.

² See Margaret Gilbert, *Reconsidering the “Actual Contract” Theory of Political Obligation* in *Ethics*, Vol. 109, No2, (1999), pp236-260, included as chapter 6 in her *Sociality and Responsibility*, hereafter *Actual Contract*. In the present paper I do not argue with the joint commitments tradition, but only with Gilbert’s attempt to extend it to states. None of the other authors who write in this tradition apply it to political obligations.

subject account of state runs into several problems that Gilbert fails to address. The first is the membership problem. The theory claims that if one is member of a plural subject committed to J, he is always obliged to J (and accordingly has no such obligation if he is not member of plural subject) therefore Gilbert should suggest a proper criteria to identify who are members of the plural subject (whenever the later is sufficiently large and anonymous). This problem is created by her negligence of another problem. She never cares to explain by virtue of what *act* previously unrelated people come to join a plural subject. If no individual act is needed for an individual to become member of an existing plural subject, then it will follow that no individual act is necessary to create a new plural subject either. But this would mean that plural subjects exist independently of their members, which suggests some kind of organicism which is explicitly rejected by Gilbert³ as well as by the predominant part of the contemporary scholarship. The third problem, related to the second is that people who acquire obligations without their consent seems at odds with the concept of freeborn people which is so dear to the Western political tradition. This is the liberty problem. Finally, there is the morality problem, as joint commitments are often formed in blatant contradiction to morality, yet that does not prevent them for creating obligations for the individuals.

Despite of these difficulties, the suggested account of state as a joint commitment of the citizens to uphold certain rules seems very useful for the positivist legal scholarship, therefore the present paper will suggest a possible solution to one of them, which can possibly help to solve the others. I am not satisfied with this solution; nevertheless I am confident that on solving this question depends the whole plural subject theory of state. Therefore I will first suggest a solution to the problem, then I will discuss the avoidability of the problem and finally I will suggest reconsideration of the theory

II. Joint Commitments and Plural Subjects

Examples of Joint Commitments

It is commonly observed that there are various obligations that are acquired by people as they often participate in different co-operative actions without any consent on their part. In this way, people together become one 'plural subject' of the joint action and are jointly committed to the co-operative action. The people who have become members of this plural subject may have obligations with regard to the commitments of the whole they are part of. An orchestra is a typical example of a plural subject, where all of the members have joint commitment to the co-operative activity and accordingly all of them have a duty *towards the orchestra* to perform their part whatever this part happens to be. This is obligation for every single one of them which arises from her being part of a plural subject committed to perform common activity.⁴

The orchestra is indeed something different from its constituent members and can be easily seen as plural subject with its own distinct intentions that do not fully coincide with any of the individual intentions of the members (nor with that of the median member or with any aggregate of members' intentions). Yet this is an easy case as its existence is apparently based on certain kind of wilful consent of every single one of the individuals to become member and

³ In *Actual Contract*, p 254, she distinguishes her account from theories which ground obligations in the 'birth context.'

⁴ The latter differentiates the plural subject account from fair play accounts (like that of Rawls), where duties are only towards the fellow co-operators and not to a separate group entity, and from the communitarian theories (like Horton's one for instance), where the source of obligation is the belonging to a community that is determined by birth.

take up these obligations. Gilbert argues that similarly people may become jointly committed even without individual consent. The best example here is of two professors who develop the custom to go out and dine together after each departmental meeting and “after many *ad hoc* arrangements understand that they are jointly committed to having dinner together after departmental meetings.”⁵ While the individual dinners in the beginning were based on agreements, there is no agreement for the general rule established in this way to dine together every time in the future. Yet from some point professors may see themselves obliged to do it. If they both *feel* that they have such obligation, the argument goes on, then this *is* real obligation, which people have *acquired*, yet it is not based on their consent to be obliged. Indeed all friendships, with all numerous obligations that may arise from them, are acquired in similar non-consent based way.

The ultimate example is a squad that is drafted, usually against the will of the soldiers. Once they start behaving like a single unit, they have constructed the plural subject ‘squad’ and its members have the obligation to act in compliance with the joint commitments it may have. Indeed, if one does not, the other members of the unit will rebuke him (even though they are equally unhappy to be in the squad!), and according to Gilbert, they will be right to do so.⁶ Any social group may be seen as established in this way and any social rule can be grounded on such obligations from joint commitments. Gilbert maintains that the state is of this type of co-operative enterprise, where the population becomes jointly committed to heed the law. Thus she explains the authority of state⁷ and the acceptance of the Rule of recognition.⁸ People become jointly committed in the co-operative action they often refer to as *their country* in exactly the same way as the professors to their common dinners.

Reconstruction of joint commitments

So joint commitments do exist and cannot be analysed in terms of an aggregate of personal commitments, a joint commitment is different from each individual commitment. Gilbert is correct to observe that “plural [subject] is unified in such a way as to count as the subject of a single intention – the intention that is ours”⁹ and that “‘we intend to do A’ ... is not equivalent to ‘each of us intends to do A.’”¹⁰ In Scott Shapiro’s words joint commitment is one where “each participant is committed to meshing his or her subplans with the others, not only in order to ensure his or her own successful completion of the task, but also to ensure the completion of each other’s contributions.”¹¹ Gilbert identifies three features of joint commitments – they ground individual obligations (with the respective standing of any member to rebuke violators¹²), they require permission from the others to step out, and they are compatible with contrary personal intentions of the members. Thus, the joint commitment transcends the individual intentions even in the simplest case when members have all expressly agreed to be committed: “In the case of joint commitment, the single thing that constrains the practical reasoning of both parties is something over which neither party has

⁵ *Actual Contract*, at p.243

⁶ At this point the liberty and the morality problems become apparent.

⁷ Especially in her *Actual Contract*.

⁸ See Chapter 5 in *Sociality and Responsibility*, pp. 71-97).

⁹ *Sociality and Responsibility*, p.15

¹⁰ *ibid.*

¹¹ Scott J. Shapiro, *Law, Plans, And Practical Reason* in *Legal Theory*, Volume 8, Issue 04 (2002), pp387-441 p. 398.

¹² Every participant “clearly has some special standing in the matter, by virtue of shared intention” (*Sociality and Responsibility*, p. 16) and also “If I fail to act according to our joint commitment, you – as one of us – have the standing to rebuke me – as one of us” (Gilbert, “Collective Preferences, Obligations, and Rational Choice” in *Economics and Philosophy*, 17 (2001), pp109-119, p. 116).

absolute control ... [it is] under the control of both parties together.”¹³

The extension of this plural subject account from a small group to a state can be reconstructed as follows:

1. There is such a thing – plural subject, which is a group of people who may become jointly committed to do something. Such group is different from and may exist independently of its individual members.
2. Plural subjects commit themselves to jointly perform certain activities like walking together, dancing, being a nation.
3. When the plural subject is committed all of its individual members are committed to act accordingly.¹⁴
4. This joint commitment remains in force until rescinded (jointly) and members cannot change individually the joint commitment of the group.¹⁵ I will call this *stabilization* of the commitment and will revisit the significance of this point later.
5. Individual members of the plural subject are *obliged*¹⁶ to perform what is required by the joint commitment for *no other reason* but the fact of the commitment, for its own sake). Indeed, it seems that whenever the commitment for the whole exists such as its parts cannot change it alone they should be considered to be bound by it.
6. Sometimes people consider themselves citizens of a state which is “their” state. In other words, they consider themselves jointly committed to heed certain rule as Rule of recognition i.e. to abide to whatever this rule identifies as law of the land.
7. As this law itself has universal claim *everybody* has obligation to abide to it.

Analysis of joint commitments

This is according to the author herself, *weakly voluntaristic theory*;¹⁷ weakly, for it allows for coerced consent¹⁸ but still voluntaristic, for it is different from the theories “that do not require one to act in any particular way at all, such as the theory that your political obligations

¹³ *Sociality and Responsibility*, p. 29.

¹⁴ This is the joint order argument, see *Sociality and Responsibility* pp. 55-56.

¹⁵ This is joint abrogation argument, *op. cit.* p. 57. This is intuitive as whatever individual members do after they have become jointly committed is irrelevant; only when they act together they change the ‘will’ of the group. The difference between the two subjects – the group and the individual member – is what stabilizes the shared intention so it may not only transcend the individual intentions but exert pressure on them. (I shall call *stabilization* of the commitment and will return to it in the conclusion.

¹⁶ The assertion of this is an important difference of Gilbert’s. In response to her Michael Bratman acknowledges the pressure for stability of intentions (See his *Shared Intentions* in *Ethics* vol. 104 No. 1 (1993), p. 110) yet he rejects the claim that joint commitments are always sources of nonconditional individual obligations to comply. For the time being I will take that such obligations exist for granted but in the conclusion will return to the significance of this claim and will discuss the possibility of the joint commitment itself to ground obligations without being supported by ‘substantial’ reasons like fairness, common good etc.

It may be noted that Bratman usually speaks about shared intention, while Gilbert – about joint commitments, yet this difference of terms does not seem to allow us to accept that the former does not, while the latter does create obligations. Indeed Gilbert acknowledgingly takes Bratman’s shared intention thesis as starting point, and Bratman reexamines his thesis in response to Gilbert (See *Shared Intentions and Mutual Obligations* in his *Faces of Intention: Selected Essays on Intention and Agency*, Cambridge University Press, 1999, pp130-141. There he once again concludes that shared intentions do not necessarily entail obligations and shows two cases when they clearly do not – in presence of coercion and of disclaimer. He also suggests *the purposive expectation creation* as a possible condition, which added to the shared intentions may amount to obligation. This and other additional conditions that may warrant obligations will be discussed later.

¹⁷ *Actual Contract*, p. 254.

¹⁸ Scott Shapiro avoids such bold statements in his version of the theory of joint commitment, claiming that intentions cannot be coerced, “unless coercion is understood by the participants to be a method for enforcing uncoerced intentions” (*op. cit.* p. 411). Similarly Michael Bratman explicitly excludes the ‘Mafia’ case where one is coerced to participate (*op. cit.*, p. 104).

are wholly determined by the context of your birth, or the theory that one is obligated to obey just institutions.”¹⁹ The joint commitments are not always based on consent, and even when they are, the obligations may be much broader than the consent may possibly cover. Example of this is marriage, where people find themselves bound to do things that none of them ever intended. Once the plural subject is established, its further commitments may arise in different ways – democratic or authoritarian. The best example of the latter is “when asked about his vacation plans, George might turn, in ignorance, to his wife, Rosa, and ask “What are our plans, love?”²⁰ Apparently there are many types of joint decisions that do not involve real consent, yet they are well established and heeded by the society. The lack of consent is not immediately incompatible with freedom, for once we have a commitment to do something together, in this case, to live together, this necessarily includes making decisions together, with the decision-making mechanism being democratic or authoritarian or whatever comes about. Yet these obligations may still be justified, because people intended to create such plural subject and to be bound by variety of unexpected obligations and submit to variety of decision-making mechanisms.

Plural subjects: virtues of circularity

This is also a *performative account*, because the attitude of the members towards the obligations creates these obligations: Gilbert says that there is about as much obligation as it is felt to be.²¹ What is very useful here is that social obligations depend on the empirical fact of people feeling obliged. This can be suitably extended to political obligations, which arise when many people share feelings of obligation to their country. This concept is powerful for it allows the theory of joint commitment to succeed where many other fail under critics like Robert Nozick and A. John Simmons. The claim of the latter that the widespread sense of obligation is unfounded cannot hold against Gilbert, for the belief here is self-fulfilling and cannot be correct or incorrect.

If the leader of a boat club announces that “our club” has to participate in some race, members *may* feel obliged that they have to go even if every single one of them personally prefers to do something else. And if, and only if, they *do feel obliged*, then they really are obliged to go for that race. This is always valid, provided only that they believe that the group they consider themselves members of, is. Certainly, if club members subject the joint commitment to some criticism and find out that none of them is willing to waste time with this race, they may rescind the joint commitment, but they will do that together, and this will be a new commitment, namely not to do what they were previously committed to. Note that the leader (or in fact any other member) can announce that “we” are committed, and support that with previous practice, with some statute of the club, some promise that he has made as representative of the club, or even without any explanation at all. Indeed it may be the case that members just say “forget it” – then no joint commitment will arise. Yet there are plenty of cases when joint commitments do arise in this way and people do feel obliged to honour them.

It should be also noted that Gilbert’s account is *circular*: (1) One is defined as a member of a group by associating himself with certain commitment i.e. norm, accepted by this group; then one is deemed to be bound by this rule only because he is member. This circularity is virtuous for all who either identify with the group (regardless of the commitment that constructs it) or who accept the commitment, thus becoming part of the group (regardless of any prior

¹⁹ *Actual Contract*, p. 254

²⁰ *Sociality and Responsibility*, p. 23

²¹ *Actual Contract*, p. 258

identification with the group on other grounds).²² Indeed this circle seems plausible description of how groups and their obligations can co-originate, and Gilbert provides numerous examples when plural subjects do emerge and become committed in this way. In historic perspective this circularity may explain the construction of many cooperative enterprises, political organizations or existing social rules. When added to H. L. A. Hart's concept of law, this circularity is very powerful – people of the country are jointly committed to uphold the Rule of recognition (i.e. to treat whatever it identifies as binding) disregarding the way this joint commitment has historically come into being.

Gilbert's critique of Hart

While advancing the plural subject thesis Gilbert maintains that the proper subject of shared intentions and joint commitments is the group, not its constituent members²³ and sees a plural subject behind all kinds of collective enterprises, including the collective enterprise to uphold certain social norm. She argues that the problem of the authority of Rex I that Hart claims to solve only reoccurs on a different level. "How can [Rex] achieve a right to specify what is to be done for the group as a whole? Hart's solution – in terms of social rules as he characterizes them – rears this problem at the level of social rules. Assuming that social rules involve issuing of a fiat by someone or something, we have [the] problem: Who or what can appropriately issue a fiat for a whole group?"²⁴ According to her not only Hart's concept, but any other individualistic concept cannot do that successfully.²⁵ Instead, we have to focus on a group i.e. plural subject because only it may commit itself to abide to the rule; when it does, its members have respective obligation to abide to the joint commitment. According to her definition "[t]here is a social rule if and only if the members of some population P are jointly committed to accepting as a body a requirement of the following form as a body: members of P are to do A in C."²⁶

One important feature of social rules is that people are entitled to exert pressure on others to achieve compliance,²⁷ yet nothing in the Hartean account of rules seems to provide justification for such pressure.²⁸ According to Gilbert a social rule may very well be a standard for behaviour of certain group of people as Hart says, but it does not necessarily entail that there is a justified "claim for each member against every member for conformity"²⁹ with the standard (at least not any more than there is one in case of "habitual obedience" to command). She maintains that something more is necessary – a *joint commitment to uphold the rule*.

To accept something as a rule means to subject oneself to the behavioural standard stipulated by that rule. Beyond the individual case to accept something as a rule means that a plural

²² Thus the plural subject theory is in danger of collapsing either into the classical contractarian theory, or into a communitarian one and seems vulnerable to the standard objections to both of them. In order to find a subtle way between the two it must find a satisfactory solution to the problem who are the proper members of the plural subject.

²³ Drawing on the Durkheimian and Simmelian tradition she describes the social group as one involving "a connection between individuals so close that it justifies one in saying that the relevant people constitute a unit" (see *Sociality and Responsibility*, p. 1 and more in her *On Social Facts*).

²⁴ *Sociality and Responsibility*, p. 81.

²⁵ *Sociality and Responsibility*, p. 71

²⁶ *Sociality and Responsibility*, p. 84.

²⁷ H. L. A. Hart, *Concept of Law*, Oxford: Clarendon Press, 1961/1994, pp. 54-56.

²⁸ See Gilbert's reconstruction of the features of social rules according to Hart – *Sociality and Responsibility*, p.73. These are the *regularity* of behaviour feature, the *standard of criticism* feature, *pressure thought justified* feature and the *felt bindingness* feature.

²⁹ *Sociality and Responsibility*, p. 76

subject (e.g. “people”, “society”) becomes committed to *create and impose* a requirement to itself (themselves together). Traditionally in the legal theory only individuals are subjects of commitments therefore in a larger society it is increasingly difficult to extend the concept to a whole group as many people cannot be shown to be individually committed to any rule. Here Gilbert’s concept of plural subject helps, for if it can be shown that a group is committed to uphold a rule (which is an observable fact), every member of this group should be committed accordingly.³⁰ Only if we see the whole social enterprise as joint commitment as described above the justification of punitive pressure follows.

In case of a state it is easily observable that “many people take themselves to have certain obligations by virtue of the fact that certain country is *their* country.”³¹ When some people believe they are obliged *together* they form a plural subject – nation – which is *obliged as a body* to heed the Rule of recognition of that nation. Accordingly, each *individual* member of that state is obliged to pursue the joint commitment to heed this Rule of recognition (i.e. to act according to the standards identified by this Rule of recognition). Hence, each of the members obliged in this way may justly be subjected to pressure to conform by his fellow members.

By virtue of the concept of plural subject we can conclude *from the social fact* that there are some people who are committed to heed the Rule of recognition that there is individual *obligation* of each member of the plural subject. Plural subject theory allows two significant transitions: from the individual *beliefs of many* people to the collective *obligation of the relevant group* of people and back to individual *obligation of each member*. The concept of “accepting as a body” allows us to get rid of the need for individual acceptance. Whether people accept something as a body is observable social fact, and the contractarian problem with the ‘no agreement’ objection is avoided. It is fairly easy to see people in each country accepting *as a whole* their laws, or their Rule of recognition, even though it will be impossible to see all of them individually accepting it.

III. Problems of the Plural Subject Account

Even though the concept of plural subjects seems so promising it raises four problems. The most immediate two of them were already made obvious. These are the individual liberty problem and the morality problem.

Morality problem

Gilbert is correct to observe that Hart’s *Concept of Law* says little to justify the claims for performance and corresponding right of the fellow members to exert punitive pressure. However, she does not say enough to *justify* it either. Her assertion that “when there is a social rule, each member of the population in question has a claim on every other member for conformity ... each member is obliged to every member to conform to the rule”³² is ultimately a descriptive one, not normative. It also has little more to say in answering why members of plural subjects are *just* to exert pressure to achieve conformity to the joint commitment than Hart’s claim that they do so to maintain the standard of behaviour.³³ What she offers is

³⁰ The problem arises again, for the question ‘who is committed’ is supplanted by the question ‘who is member.’ I will return to this later in this paper. Thus Gilbert’s theory shifts the problem of political and legal obligations from the field of jurisprudence to the field of sociology – how people become subjected to the law depends entirely on what social groups are, and if they are *able* to commit themselves as a whole, their individual parts will be committed as well.

³¹ *Actual Contract*, p. 236, emphasis of the original.

³² *Sociality and Responsibility*, p. 86.

³³ Both of them encounter the well-known Humean problem: neither from the fact that a group has a standard, not from the fact that a plural subject *is* committed to pursue a common activity, a conclusion may be drawn that

another essay in descriptive sociology after all. Perhaps she will satisfy herself (as legal positivists including Hart himself do) to observe the cases where a joint commitment to uphold the Rule of recognition is a social but not moral fact, as natural lawyers may want it to be. This is still plausible if she is really satisfied to set aside the normative questions why we have to honour such obligations and do we have a *prima facie* moral obligation to obey the law. However she is quite ambiguous on this issue. She maintains that “one is morally required to respect one’s obligations of joint commitment, all else being equal”³⁴ yet if they contradict other moral rule “one is morally required not to respect them.”³⁵ She is aware of this difficulty and at least once she says that these questions are open.³⁶ However answering *these* questions is the very purpose of any account of political obligation: it should be unambiguous whether we have a moral obligation to obey the law or not³⁷ and this is precisely what Gilbert seemingly tries in her article on the Actual Contract.

Liberty problem

I am sympathetic to the conclusion that if one is member of a group i.e. of a plural subject, and this plural subject is committed to do something, one is obliged to act in compliance with this joint commitment. For Gilbert however this is always and unconditionally so, which seems quite unacceptable within the liberal paradigm that is embraced by the western societies we live in.³⁸ If we still want the notion ‘human freedom’ to have some meaning, it must matter how the joint commitment itself is constructed and how individuals become members and respectively parties to it.

The easiest way to solve the liberty problem is to dismiss Gilbert’s account entirely³⁹ and say that no such obligations exist, and even if people believe they do, they are simply wrong. But the examples discussed above show that there are at least some cases when we feel obliged and seemingly we are right to do so. Another easy way is to see some weird ‘implied consent,’ justifying such obligations and people will appear to be free as long as they are consenting in this way. However to find something implied wherever we need it is not solution, but avoidance of the problem.

Gilbert does not address the liberty issue, perhaps she does not see any problems with obligations based on the *feelings* of their subjects; that is why she maintains that her theory is weakly voluntaristic. Indeed, as long as the joint commitment depends on the attitude of the members, it seems ultimately compatible with their freedom. Yet even though the plural

members *ought* to comply and have to be punished if they do not. Yet the second seems more plausible – if people believe that an *ought* is true, they *ought* to behave accordingly. The meaning of the joint commitment is that people are committed to treat an *is* as an *ought*. Of course the substance of this ought is arbitrary and is not empirically derived. .

³⁴ *Actual Contract*, p. 247. Similarly p. 258

³⁵ *Ibid.*, p. 247

³⁶ *Actual Contract*, p. 259

³⁷ Gilbert may claim that her theory only explains the nature of political and legal obligation and not the moral obligation to obey the law (even though the title of her article clearly places among the theories of moral obligation to obey). But if this was the case what is the nature of the *obligation* of joint commitment in point 5 in the reconstruction of her theory above? If this is a legal obligation, then plural subject theory it is a tautological: individual members of plural subjects have legal obligation to obey the law because so the law requires. And if this is not legal but “other” obligation what else it may be, if not moral? Further, she keeps on repeating that pressure for compliance is *justified*, which again needs moral grounding (any attempt for justification of obligation begs for external grounding for otherwise the argument will be apparently circular).

³⁸ Ironically I can use Gilbert’s own terminology to justify an obligation for anyone of us to refute her theory: we are jointly committed to heed the liberal principle that persons are born free and each one of us has to rebuke theories that contradict to this principle.

³⁹ It would be enough to dismiss point 5 of the reconstruction above.

subject as a whole may come into existence when sufficient number of people believe it does, the individual attitude is not good enough to determine the personal scope of the obligations. Two persons, who have similar status in a group jointly committed to something, may have quite divergent attitudes towards their obligations.⁴⁰ And certainly feelings, unlike joint commitments and shared intentions, can reside only in individuals.⁴¹

Gilbert cannot see this problem because she embraces a Durkheimian perspective, which allows her to see people becoming members merely *by reference*⁴² to certain feature they have in common.⁴³ From such a perspective the existence of “We, the people” who feel and behave like citizens of a country is enough to create the respective obligations not only for everyone who shares this feeling but for everyone who shares a feature that those believing consider characteristic. The whole group commits itself and so becomes everybody who may be considered by the committing members to be also committing member: “members of the population can express their readiness to be jointly committed in a particular way with the other members – whoever precisely these may be.”⁴⁴

However for those of us who do not rush to embrace such perspective wholeheartedly some additional conditions have to be met for a plural subject to be constructed. We can accept that the belief of sufficient number of people that they constitute a group jointly committed to do *J* makes *them* committed to *J*. Such joint commitments do exist. Here the circularity of Gilbert’s argument demonstrates its virtue, because it allows us to avoid the need of any pre-existing social groups (which is less and less possible in the complex and diverse modern societies. Plural subjects are created by the very same joint commitment: “The relevant joint commitment is a commitment ... to constitute as far as is possible a single entity with a certain psychological property (in this case accepting or requiring something).”⁴⁵ And also “a given population may in principle constitute a social group by virtue of having a given rule.”⁴⁶ Due to this circularity no quasi-organic bonds are necessary for the plural subject to emerge and persist. Only its joint commitment to perform some cooperative action binds it together. The plural subject and the relevant commitment co-originate and persist because of the interlocking intentions (to use Bratman’s phrase) of members. Seemingly the plural subject theory is sufficiently liberal not to need any nation and any obligations acquired merely by belonging to groups.

However, this subtle avoidance of the need for *a priori* groups who commit themselves raises the question precisely who is jointly committed and by virtue of what she becomes jointly committed. When two strangers sign a contract, it is clear that the two of them become the

⁴⁰ Here Gilbert significantly diverges from Bratman, whose conditions characteristic for joint commitments include individual intentions and awareness. “*Each agent* needs also to embrace as her own end the efficacy of the other’s relevant intention (*Shared Intentions*, p. 109, emphasis added). Moreover, his assertion that: “I intend that we *J*, because you intend that we *J* and this is common knowledge between us” (*op. cit.*, p. 106 - view 4) seems to provide a *substantive* reason for such obligations, which places him closer to the fair play theories rather than to Gilbert’s self-justificatory commitments.

⁴¹ Gilbert could develop theory of shared feelings analogical to the shared intentions theory. Yet they will have again to recourse to something in the individuals, which is common or shared. Such recourse is inevitable because of the obvious lack of separate psychological substrate of the society.

⁴² “one may also be party to a joint commitment [with] others *under some particular description*” (*Sociality and Responsibility*, p. 82, emphasis of the author) and “should the relevant description cease to apply to a given person, he or she will automatically be freed from the commitment” (*ibid.*, p.83).

⁴³ Like for instance “inhabitants of this island.” In her account seemingly there is no conceptual problem for people having blue eyes to become jointly committed in precisely the same way, it will suffice if they start to believe they are jointly committed.

⁴⁴ *Actual Contract*, p. 243.

⁴⁵ *Sociality and Responsibility*, p. 85

⁴⁶ *Ibid.* p. 86

plural subject of joint commitment to fulfil the duties stipulated in it. But whenever we turn to larger plural subjects, individual intentions to be jointly committed are increasingly unobservable (and often unavailable). Gilbert inevitably has to (and does!) turn not to the intentions but to some other (non-voluntaristic!) *properties* of the relevant people. However this shift supposes some non-voluntaristic bonds between them i.e. ultimately she must recourse to some prior non-political communities bound by some organic bonds. Even if a kind of organic perspective could provide solution to this conceptual problem, still the practical question of identifying the proper members of a given plural subject remains.

Membership problem

Even if it was conceptually plausible for free people to acquire obligations by virtue of their qualities (such as their identity, for this is what reference to a property means) there is still the question *when* a person enters or leaves the plural subject and the respective joint commitment. Gilbert says that members cannot unilaterally break away at all, but apparently one can, when she acquires a foreign citizenship even if this was prohibited. Treating people as members of *their* respective groups is simply impossible because there are too many cross-cutting commitments to concurring plural subjects and because there are different degrees of membership, with some people marginally belonging to the group, or marginally feeling obligations to it.⁴⁷ Finally, the principle of reference is often unidentifiable – are “we, the people of this nation” or “we, the inhabitants of this territory” making up the relevant plural subject? Gilbert may wish to dismiss these questions saying that she provides a theory how the state can possibly oblige us, and does not have to address such practical details. However, a theory of political obligations, which cannot determine the personal scope of the obligations is liable to appear less than adequate.

For the purposes of descriptive sociology the discussion could be closed by excluding those who do not easily become committed. Thus Scott Shapiro limits the members-parties to his version of joint commitment theory to officials: “If the claim that legal practice is a [Joint Intentional Activity with Authority] has any chance of being true, then the class of participants will have to be restricted to legal officials. This is so because there are legal systems where large segments of the population conform to the law out of nothing more than fear of punishment and evade the law if and when they can. While such individuals are responsive to the directives of those in authority, it would be a cruel joke to interpret their behaviour as motivated by a commitment to the joint activity.”⁴⁸ This limitation of the parties to a political joint commitment can solve the membership as well as the other problems, but it is implausible as it apparently renders legal rules to commands to officials, which is a well outdated concept. Even if one may agree with such result, this is certainly not Gilbert’s position for her obligations of joint commitments are all-inclusive. But to include certain people in a joint commitment altogether, she must either embrace a stronger organicism and recourse to pre-political bonds between them, which she avoids, or take up individualist perspective and show how *everyone* becomes committed, which she never does. In the next part of this paper I will take the middle way and will suggest how every individual may become jointly committed but with the help of pre-existing, though not political, groups.

Identification of the act

These three problems are exacerbated or perhaps created by one important fallacy that Gilbert

⁴⁷ There also are plenty of subgroups around so, if the plural subject theory is taken seriously, whenever a subgroup emerge, it should not only have right to self-determination, but its very emergence would lead to automatic secession.

⁴⁸ *op. cit.* 387-441, p. 418

makes: she fails to identify *by virtue of what act* the joint commitment is created and people have become members of the respective plural subject. She offers numerous examples how joint commitments are constructed, but never goes beyond the separate cases to show a pattern. This is not too surprising, given her conceptual position in which there is little place for individualistic considerations. In the rare cases when she encounters the issue, Gilbert maintains “it is sufficient, roughly, for the parties to express their personal readiness to be jointly committed”⁴⁹ and “mutual expressions of readiness may thus lead us to the creation of a joint commitment.”⁵⁰ She maintains that no consent of the parties is necessary, but to express such “readiness to be committed” is the very definition of consent.⁵¹ As it is essential for the plural subject theory to avoid the need for consent, she must find something different from this ‘readiness.’ Moreover, this act cannot be any tacit or implied consent for the whole theory would collapse in another version of the social contract theory and accordingly will run into the well-known ‘no consent’ problem. Yet apparently some individual action from each of the participants is necessary for the joint commitment to be formed.

IV. Acts of Participation

In this part I will try to find a way out of these interrelated problems. First, I will analyse the examples of joint commitments of few persons to identify by virtue of what they come to bind the participants. Next, I will consider if the same individual act that is identified behind the construction of small scale plural subjects can be seen behind larger and anonymous ones. If this is so, the identified *act of commitment* will be proposed as criterion for membership afterwards. Third, the liberty problem will be reconsidered with regard to the suggested solution of the membership problem. The morality problem will not receive special attention in the present article. Finally, a modified version of the plural subject theory will be suggested and evaluated. In the final part of the paper I will offer a re-evaluation of the joint commitment concept in general and will suggest what I consider its valuable contribution to the theory of political obligation.

The Act of Commitment

Let us analyse the most obnoxious of Gilbert’s examples where “soldiers” are kidnapped to make up a squad.⁵² Once the individuals for one reason or another start to speak of themselves as ‘the squad’ and to behave like one, the plural subject is created. Whether this is really so is a social fact and depends on the actual behaviour. However, even if ‘they’ do, this will not always mean that every single one of them does. Only if *everyone* conforms with what the majority does, he can be seen as part of this plural subject. For otherwise what would have to do with Jack the fact that everybody else of the so far unrelated sum of strangers behaves like a squad?! Gilbert does not pay sufficient attention to one important step in the creation of plural subject – if plural subject itself is created only in the process of becoming committed, then there is no way for anyone who has not individually taken part in its creation to become

⁴⁹ *Actual Contract*, p. 246

⁵⁰ *ibid.*

⁵¹ In the Concise Oxford Dictionary of Current English, 9th ed., ‘consent’ is defined *inter alia* as “express readiness.” Indeed in many of her examples every law student will see a mere non-verbal agreement. Gilbert often asserts that joint commitments differ from agreements, but fails to explain how. One of these attempts is “A joint commitment can arise more informally than an agreement can, through a more gradual process” (*Sociality and Responsibility*, p. 87). But the law recognises many cases of informal and gradual processes which lead to binding *agreements*. The will to agree can be expressed in many ways, and only in the early Roman Republic these were limited to special solemn proclamations.

⁵² See in her *Collective Preferences, Obligations, and Rational Choice*, p. 112.

part of it. The circular co-origination of the plural subject and the relevant joint commitment can account for individuals who become committed as well as for the formation of a plural subject independent of its members, but cannot account for the transition from a group of unrelated individuals to a plural subject without people individually doing something about it. This is the vice of the so far virtuous circularity.⁵³

Therefore Jack cannot possibly become member of the squad unless he himself individually performs some relevant act i.e. before starting to behave like a member. Recall that the plural subject is constructed once the people start to behave as single body. This should be valid for the individuals as well - they become members after they start behaving as such. Only after an individual starts behaving in conformity with the others (for whatever reason) he becomes member jointly committed with the others. At this point this requirement may seem trivial yet it makes the account essentially different as without it it was sufficient for Gilbert to observe the marching group in order to claim that all individuals who may appear to be obliged really are.⁵⁴ According to the proposed modification, people become jointly committed only when they start to *participate* in some joint activity. This *participation* of every individual is what creates the joint commitment itself, and what makes the individual jointly committed; it is neither her 'expressed readiness,' nor her 'consent.'

With or without consent, once a joint commitment is constructed, it binds all participating individuals who form a plural subject and they cannot leave it at will. But this is true only for those who have become members of the plural subject by means of their own individual participation. In this way the plural subject account does not appear communitarian – people participate in some cooperative enterprises, and by virtue of their participation, become jointly committed to certain joint enterprises. They have obligation to act in conformity with the commitment only by virtue of the commitment itself. *It should be emphasized that their participation is not justification of each of the obligations that may follow*⁵⁵. It is only the mechanism for inclusion of agents in the plural subject and to acquire the master obligation to conform to the relevant commitments of this subject. It should be also noted that the fact that one has participated is a social fact, not a moral one i.e. no normative claims should be based on it.

Social Meanings of Participation

Participation is different from consent in many ways but the one that is important here is that the acts of participation may have social meaning⁵⁶ that goes well beyond the intention of the agent. Therefore, the act of participation together with the social meaning attached to it may do what the missing consent cannot.⁵⁷

⁵³ A recourse to some special prior bonds between the relevant people can help but then plural subject theory verges on the collapse into mere communitarianism. I will return to the pre-existing bonds latter.

⁵⁴ As was explained above, Gilbert acknowledges that individuals have to express readiness to become jointly committed. Yet she never considers the case of somebody with the relevant description who does not express such readiness. Moreover, when she turns to larger plural subjects she expressly says that not everyone has to be observed to have expressed such readiness.

⁵⁵ If this was so the theory would collapse into another version of the fair play accounts.

⁵⁶ Robert C. Ellickson suggests the following very useful analogy: "A legal positivist interprets the "legality" of an action as a prediction of what law enforcers would do in response to the action. By the same token, the "social meaning" of an action could be construed as a prediction of how ordinary onlookers and others would sanction the actor with informal rewards and penalties" (*Law and Economics Discovers Social Norms*, 27 J. Legal Stud. 537, N61).

⁵⁷ In this sense the suggested account may look even less individualistic than Gilbert's. Indeed, instead of "readiness" that seems personal, meaning is objective and imposed over and even despite of personal intention.

Let us take Gilbert's example of Joe inviting Lisa to dance. There is social convention that whenever on a college party one is invited by a fellow student for a dance, one generally "accepts" the offer. Because of this custom when Joe invites Lisa to dance she has no free choice but is forced to accept as effectively as if he had approached her with a gun. Indeed, once Joe makes the invitation there is no neutral option: first, she can refuse, but this in the given context may embarrass and offend Joe (and even when she does not want to dance with him she may not necessarily want to offend him); second, she can accept and bear him for the next few minutes against her will; or third, she may make up some excuse (like 'I don't like this song'), but this is again different from her real will.⁵⁸ This awkward situation is created by the social custom she has never agreed to. The example may look superfluous, but all of us can remember many occasions when it was difficult to say 'no,' and even if in the majority of cases we have said so, there would be sufficient number of cases when we yielded and "agreed" against our will.

This 'acceptance' has two important consequences. First, for the particular case it creates the plural subject 'dancing couple' and Lisa cannot abandon it before the end of the song. Here Gilbert maintains that joint commitments cannot be abandoned as this will be breach of our *obligation* of joint commitment (in everyday language we often call such behaviour betrayal). Gilbert maintains they are binding in their own right: "by virtue of his involvement in a joint commitment with Lisa, *and that alone*, Joe gains a special standing in relation to Lisa's actions, and vice versa." Thus Lisa has acquired an obligation with no voluntary acceptance. Her behaviour may look as 'accepting' an offer to dance but is short of genuine acceptance. Nevertheless, the resulting obligation is equivalent to the one created by a genuine consent and she is already part of a co-operative activity and has the respective obligations, acquired through her social behaviour but with no consent.

The second consequence of this forced "acceptance" goes beyond the case of the individual dance. As was expounded above, by any of the options she faces when invited, Lisa reaffirms the social convention: an anthropologist watching the party and describing the life of college students will observe her behaviour and will figure out that there is the custom to accept invitations exactly because of her behaviour. Her reaffirming the convention with her participation is a good reason for her to have moral obligation to obey further and follow all of the steps required by the rules of the dance. In a way, by following the imperative of the social custom, Lisa's action becomes a universal rule in its own turn.⁵⁹

Like the consent, participation is voluntary, but the existing social conventions attach additional meanings to our actions so through participation we may end up committed to more than we have intended or would agree to. Thus *social meanings attached to our participation*

Yet both are equally objective as in Gilbert's version societal context will determine what counts as expression of readiness as well.

⁵⁸ The third choice may be seen as conventional way to escape from doing what one does not want. The first option – to refuse and have her preferred outcome at the expense of Joe's embarrassment (which is pretty rational and often is the case) – may be seen as act contra convention, but only in long run. Indeed, for sufficient time the convention forcing Lisa to dance may be changed or eased. Yet for this particular occasion the refusal will be seen by Joe and by everyone present not as a challenge to the convention, but as offence against him. Thus, even this "act of free will" has its conventional meaning. If Lisa says simply "no way" people around may start asking her "Why? What's wrong?" This reaction not only proves the existence of such convention, but, if the people around are curious enough and the questions too impertinent, it may amount to Lisa's embarrassment, which for our purposes can be seen as sanction for the breach of the convention.

⁵⁹ This argument may seem weird when we speak about legal rules and political obligations. But it is obvious for all other social norms, which are not drawn from designated formal sources, but are inferred from observation of behaviour.

are bridging the gap between consent and the obligation that follows from participation. This should be made clear by the example of the dance, but is even better demonstrated by the case of the dining professors. When doing something we may be aware, half-aware or completely unaware of its social meanings and respective obligations.⁶⁰ When living in a society, the existing social customs and rules may trick us into non-consent based obligations, yet this fact does not jeopardise our liberty. It seems acceptable to see our freedom intertwined with responsibility for all consequences of our behaviour, including such consequences that impose limits and loss of freedom. After all, all behaviour consists of incurring various burdens and limits on our freedom.

Certainly, our knowledge of the social conventions is important – if we are completely unaware of the consequences of our behaviour, we seemingly will not be freely bound. On the other hand, our ignorance of the laws normally does not excuse us from untoward consequences. We have no obligation to know these conventions yet if we know them we have better chance to avoid being tricked into commitments we do not want. Furthermore, by the very conformity of our behaviour we not only acquire individual obligations, but also confirm and further develop the social rules that attach these consequences to our behaviour. So we may see Lisa acting upon the convention as acting upon a maxim that becomes universal rule.⁶¹

Political Obligations Through Participation

Individual participation as a way to commit people jointly seemingly can be extended to large scale plural subjects. People who consciously consider themselves members of their state and behave as such, construct the plural subject nation: “any particular members of the population would have good reason to suppose themselves to be parties to a relevant joint commitment with other members of the population.”⁶² They are jointly committed to the collective project of heeding the law of the land and respectively have obligation to abide to it. The Rule of recognition is a joint commitment to uphold these rules (with the respective enforcing institutions). It is a joint commitment of some of the relevant citizens, and the fact that they believe that they are jointly committed on Gilbert’s performative account is enough to make them really be. As long as there are *some* people jointly committed to do that, social rules exist and oblige these people to abide to them. Thus, these rules exist as such before and independently of the participation of any given citizen. The plural subject ‘state’ does not need to emerge by the participation of all; it emerges from the respective acts and beliefs of those who genuinely accept it.⁶³

People who do not share these feelings but still participate in social interactions are legitimately treated by their fellows in the same way. Contractarian theories are notoriously unable to show how everyone makes the relevant volition but here this is not necessary. Peoples participation, with the relevant meaning attached to it, is sufficient to extend the

⁶⁰ The only condition for this participation is to be free in the ordinary meaning of the word – free from coercion. It is a truism at certain level - if we freely participate in something, we are free - and a paradox on another – the more we freely participate, the more bound by joint commitments we are.

⁶¹ It might be interesting to consider the case where the agent’s act is accompanied by disclaimer excluding the unintended consequences. According to Bratman such disclaimers block the emergence of obligations. Yet this is not substantial challenge to the suggested account as attaching disclaimers to *all* of our actions will be practically impossible: disclaimers are discrete acts, therefore they cannot be sufficiently frequent to invalidate the social meanings, which are continuous.

⁶² Actual Contract, p. 253.

⁶³ Gilbert’s theory needs much broader base: “A joint commitment is not the creation of any one of those who are subject to it ... Once the commitment is in place thanks to the *action of all*, each is subject to it” (Sociality and Responsibility, p. 83, emphasis of original).

membership in the plural subject to those who lack the relevant attitude.⁶⁴ The social meaning involuntarily attached to it is enough only for the inclusion in existing plural subjects. The Rule of recognition is a social fact, therefore for its existence it is enough to observe sufficient number of people who are jointly committed to treat whatever it identifies as law. It is binding not only for them but also for everyone who participates in social relationships with them. This is how commitment of people by reference may eventually happen.

The non-conformist case

Thus, the state emerges by the commitment of those of its citizens who do support it but legitimately obliges all of the rest if they take some substantial part in the respective joint enterprise. Let us now consider the case of the deviants, who do not consider themselves obliged to heed the law and who take a good care not to engage in the relevant forms of participation. We may have a very recluse individual Dustin, who lives alone in the woods and carefully avoids any kind of social engagement. Yet if he ever needs to exchange his homemade produce for something else, he will have to start participating in a social relationship, namely a contract, which is already regulated by certain laws and customs, and in this way he becomes party of the joint commitment to obey the laws. This is so because the other party does not know his attitude and status in the general joint enterprise, but she attaches the *conventional* meanings to Dustin's transactional behaviour. The social meaning of making an offer includes many things that Dustin does not wish to accept, but this is what in the given society the act of offering will mean. His act, even though intended to have limited meaning, subjects his future behaviour to the existing legal regulation of the modalities of the contract including recognition of the authority of the courts in case of dispute. Thus, by participation in purely private transaction Dustin becomes part of the joint commitment to maintain state together with all relevant bureaucracy.

It might be argued, that Dustin will participate in few relationships and few laws will be become binding for him. Yet, by his private transaction Dustin will not merely become committed to one particular field of law, but will become member of the joint enterprise of the citizens of the country to uphold the law. It may look too far-reaching to maintain that by a single barter he becomes subjected to the law of cybercrime, yet by the barter he becomes committed to abide to the law of contract, *whatever this law of contract happens to be*, that is to abide to whatever is identified by the Rule of recognition as law of contract. As the legal system is a coherent whole governed by its master rule, once Dustin joins the commitment to uphold one law, he is inevitably committed to heed the Rule that determines the binding status of this law. The case is equivalent to that of the dining professors, who after a number of agreed dinners find themselves jointly committed to a general rule to dine together. The laws are binding because of the Rule of recognition and accepting a law as binding ultimately means commitment to heed the Rule of recognition that identifies this law as binding.

The Participatory Commitment Thesis

The suggested concept of commitment through participation seems indispensable addition or logical extension to the plural subject theory. In this modified version of the the theory political obligations are created and acquired by free people participating in social relationships; by behaving like citizens or like members of a nation they create that nation and become jointly committed to continue to obey the laws of that nation. This social contract is

⁶⁴Note that if there is no critical mass of members of the plural subject who are genuinely and wilfully committed, the relevant joint commitment will collapse. Remember that the plural subject account is performative and there are not much more obligations than are believed to exist (see p. 5 above and the reference to the *Actual contract*, p. 258).

actual, contemporaneous, explicit (in the sense that it is concluded by certain identifiable actions with known meaning) and direct. The account is still voluntaristic as participation is within control of the agent, though it is weakly voluntaristic, as it involves no genuine consent and as the meaning of the acts of participation is not within his reach. People who neither behave like citizens, nor like members of the social community may argue that they are not in principle committed to obey the law. Yet in practice no one can ever succeed in remaining sufficiently isolated to avoid the membership.⁶⁵

The concept of commitment through participation seems able to solve some of the problems of the plural subject account identified above. Participation is an act that can be objectively observed and evaluated, it does not depend on the subjective attitude or intentions of people, nor it imputes to them whatever a philosopher needs to bind them. Thus it is a direct answer to the question of the act, by virtue of which persons become jointly committed. The factuality of participation solves the membership problem. The fact of individual participation is a good criterion for any small scale plural subjects: individual participation neatly determines the personal scope of the obligations of joint commitment. In the large scale case, it extends the application of the Rule of recognition to virtually everyone, which makes it all too inclusive as criterion for membership, but thus it legitimises the universal claim for authority of the state, which is precisely the aim of every theory of political obligation.

As for the liberty problem the case is more ambiguous. As participation is in the control of the responsible citizens their submission to social norms by participation seems compatible with freedom. Even those who embrace the strongest view of liberty and see obligations and freedom as complete antipodes, should be satisfied as they can see the liberty traded away by participation in exchange of some other things valuable for the individual. Furthermore, as was already hinted above, participation in various social activities that are governed by social rules and social conventions confirms these rules and conventions or develops them further. Thus, participation rests well together with another prong of liberalism, namely the requirement for self-governance. By reaffirming the customs the participating people govern themselves.⁶⁶

Yet on the other hand on this account freedom of people ultimately depends on the meaning of their actions as it is determined *by others*. This determination is not made by any specific authoritative subject external to the agent but by the whole society, which includes the agent concerned himself. Yet this still is at odds with the commonsense meaning of liberty. This problem is unavoidable if we are looking for objective measure for the individual obligations, then something should be determined externally, i.e. by others. The other liberty-related concern is the already discussed unavoidability of participation, even in the case of most outistic individuals. By participation we become jointly committed, and as we cannot avoid participation we will always be committed and legitimately obliged to the state. This inclusiveness is sought by every theory of political obligation to match the universal claim for obedience made by states. But this very unconditional universality is seen by many as denial

⁶⁵ Here the recognition of the right to exist of these people is an interesting issue. It needs not be effective right – the standard objection to contractarian theories, that people cannot really exit because it will be too costly for them to do so, becomes self-defeating. If people cannot leave their country because of the other relationships they have, then these very relationships justify their political obligations; if they cannot effectively exit, they have no right to exit any way. Only when they are so unsocialized that they can exit at no cost they may have a right to. Therefore recognition of an abstract right to exit should suffice.

⁶⁶ This seems a promising way to apply the Kantian imperative for moral behaviour to the concept of participation as confirmation (or as determination) of the social rules in order to go beyond the bare positivism and establish a case for moral obligation to obey the law. I will address this issue in my future work.

of liberty.⁶⁷

If these two concerns – objectivity and inclusiveness - lead to the conclusion that in the plural subject theory there is no real freedom, so it is. In response to the first Ken Binmore’s observation that humans were social animals long before they were recognizably human should be considered and we might be satisfied with such freedom-in-society. Yet the presented theory is liable to the criticism that it is not a theory of state compatible with the common notion of liberty but a new concept of freedom different from the most intuitive understanding of the word freedom, which is something akin to the state of nature.⁶⁸ -If this is so the suggested participatory theory of plural subject can be regarded merely as another interpretation of the status quo. Even if this is so, its advantage is that it is sensitive to individuals and to freedom, while Gilbert’s account is not. Her plural subject theory is blind to the problem, and here it was made relevant only by disclosing the membership problem. The most modest claim that this paper makes is to have changed the perspective and to have reconciled the plural subject account with the liberal paradigm.

V. Conclusion

Gilbert’s attempt to develop a plural subject account of political obligation is impressive yet inconclusive. For every theory of obligation the most important question is for the proper subject of this obligation. If the subject is the individual, we have to establish that *every* relevant subject becomes committed in one way or another. Although this needs not be by consent, it necessarily involves *some* individual act, and whatever this act is, the difficulties to show that in a large and anonymous society everybody concerned actually performed it have so far always been insurmountable.

In my view this problem cannot be solved by a theory akin to the joint commitment tradition as the latter is still too voluntaristic. According to many other writers in this tradition, Michael Bratman in particular, the individual intention is what matters and it can never be convincingly argued to be present in all of the relevant people. Plural subjects cannot overcome the standard objections as it also depends on will. Even when collectivised in Gilbert’s way the question whether Tom is obliged or not cannot be answered without examining something he himself wilfully did. So this way is a non-starter. The obvious way to overcome the problem with the lack of universal consent/intention/whatever is to recourse to the groups as a single subject of obligation. There is a rich tradition, with Hegel and Scruton⁶⁹ to name the most famous and most recent representatives, grounding political authority in the groups. It is beyond the scope of this paper to discuss the fallacies of these theories; Gilbert is not amongst them anyway, for she denies that plural subject theory bears on organic groups. By advancing her plural subject theory Gilbert actually does not try to solve this problem. She seemingly believes to have avoided it by changing the subject of obligation – the millions of

⁶⁷ In an early version of this paper I explored the view that if someone succeeds in avoiding participation, the state will have duty to accommodate him and accordingly I maintained that participation is not only membership criterion but also a condition for the legitimacy of authority over every single individual. However as in practice no one can avoid participation this is redundant as condition. Hence, political obligations of a citizen are unconditional on this account. Only the quantitative dependence of the political obligations and the available beliefs in them (see p. 5 above and the reference to the *Actual contract*, p. 258 quoted several times here) can serve as such condition on a “macro” level – if its overall support in the group is too low, the joint commitment collapses.

⁶⁸ I am very grateful to Danny Priel for the suggested criticism and the parallel with Jerry Fodor’s criticism of Daniel Dennett in *London Review of Books*, Vol. 25 No. 5, (6 March 2003).

⁶⁹ Roger Scruton has made quite obnoxious in my view attempt to ground political communities on national bonds in his *Defence of the Nation* (See *The Philosopher on Dover Beach*, 1990)

relevant citizens are substituted by a single plural subject whose intentions and commitments are easy to observe.

However this group either must have existed before and independently of any commitment, which in communitarian, or must be created by the commitment itself, as Gilbert argues, but this is circular. Gilbert may argue that I rise a chicken-and-egg problem, and the joint commitment and plural subject co-originate in a stepwise process but then we go back to the nagging practical problem of who is in and who is not committed. Thus the problem with the individuals is not solved but only shifted on different level: we face it not when we have to certify the existence of the commitment but when we have to determine the scope of the group.

Facing the alternatives where either everyone one must do something to acquire the relevant political obligation individually or a pre-existing i.e. organic group must embrace it and oblige all of its members I have suggested a combination of the two. I have advanced the thesis of pre-political community of meaning within which individuals bind themselves somewhat inadvertently. Thus groups created by participation commit themselves politically. On one hand, these groups are created by something that is less than consent (so it is more readily available). On the other, they are not ones that a person has to belong to by birth but are constructed (or at least maintained) by herself (so it is compatible with freedom).

This middle way is possible because it relies not on will, but on the perception about that will. It is a common knowledge what the law is, and it is a common knowledge (observable fact) that people abide to the law. If the conforming behaviour is interpreted as agreement, the lack of individual will is surmounted. Certainly if everybody exhibit anticonforming behaviour the rule will cease to be rule because of the lack of will to heed it in its subjects. Conversely, as long as they predominantly conform, the relevant will can be presumed.⁷⁰

Certainly this way is unacceptable for those who believe that the high social cost of the nonconformist behaviour amounts to coercion, so there is no free choice (or no choice at all) to heed the law. Contractarian theories have always been liable to this criticism and Gilbert's as well as mine are no exception. Yet the choice is by all means wilful act and not a fiction. It is an empirical fact that people individually and jointly choose to heed the law. This way is unacceptable also for those who regard the reliance on communities of meanings as advancement of a hidden identity agenda. I myself am not completely satisfied with this recourse to pre-political groups but otherwise we have to recourse to some kind of circularity in their creation.

⁷⁰ Answering the criticism that the choice to conform is not free, we can regard the conformist law-abidance as choice in prisoners' dilemma. Indeed if all citizens refuse to conform they will be free but as the individual costs of nonconformist behaviour are too high people choose to submit to the law.