

REVIEW ESSAY

Law, Obligation, and a Good Faith Claim of Justice

A THEORY OF LAW; by Philip Soper.† Cambridge, Massachusetts:
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In *A Theory of Law*, Philip Soper makes a number of bold claims concerning legal and political theory. Among these are claims that (1) legal theory—theory about “What is law?”—has reached a dead end at which it no longer responds to questions of concern to anyone other than professional philosophers (pp. 1-7); (2) political theory—theory about “Why should one obey the law?”—blithely assumes a positivist concept of law that itself guarantees the conclusion that there is no general prima facie obligation to obey (pp. 7-12); (3) legal and political theory should be connected by posing as the central question of both, “What is law that it should be obeyed?” (pp. 7-12, 91-100); and (4) joining these theoretical endeavors permits the development of an adequate and relevant nonpositivist theory of law that also solves the problem of political obligation (pp. vii, 91-100). Soper sets an agenda that is too ambitious for complete philosophical treatment in a book of modest length, but his claims are stimulating and sufficiently developed to be worthy of serious consideration.

Soper's central thesis is that an essential feature of legal systems is the good faith belief of those who rule that they do so in the interests of all—that they seek justice (p. 55). Where a coercive system succeeds in establishing minimum order, the addition of such an official claim of justice makes it a legal system and also generates a general prima facie obligation for persons to obey the law (p. 80-84, 87-88). Thus, legal systems for Soper are just those effective organized social systems that have some legitimate moral claim on us (p. 8).

If Soper is correct, he has developed a distinctive conception of the relationship between law and moral obligation. Positivist theories of law

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hold that no person has any moral obligation to obey a law simply because the law is valid within an effective legal system and claims to impose obligations. Natural law theories affirm a connection between law and moral obligation by confining "law" to natural law and human laws derived therefrom. Unlike the positivists, Soper believes that the concept of law necessarily implies a moral obligation to obey; unlike natural law theorists, Soper believes that this connection does not require moral evaluation when identifying law.

This review essay examines the conceptual connection between law and moral obligation advanced by Soper. It analyzes his arguments critically, focusing on the officials' good faith claim of justice, and concludes that these arguments do not support a general *prima facie* obligation to obey the law. Moreover, it questions whether theories like Soper's, which seek the essential features that define what is meant universally by law, can achieve their goal.

I

THE NORMATIVITY OF LAW

Professor Soper aims to construct a nonpositivist theory of law that is at least as good a theory of law as certain modern positivist theories. The theories of H.L.A. Hart and Joseph Raz, in particular, serve as the prominent points of contrast as Soper develops his theory. The relationship of his theory to positivist theories deserves emphasis because Soper's theory grows from and in some respects is compatible with them. The result is a theory of law with which Hart and Raz no doubt would disagree strongly,¹ but whose roots are very much in the positivist camp.

Soper's theory of law can be seen as a response to the problem identified by some legal positivists as the normativity of law.² Roughly speaking, positivists may hold that law claims to be normative in that it *claims* to impose moral obligations on its subjects to obey the norms (e.g., legal rules) of the legal system. This is consistent with positivist tenets because a mere claim of normativity is a fact that can be found without engaging in moral evaluation when identifying legal systems. Positivists, that is, do not hold that this claim must be valid for a system to be legal. The validity of the claim depends on whether the law does in fact impose such a moral obligation. This question lies outside the legal positivist's domain of concern because it can be answered only by engaging in moral evaluation of the law.

1. See Raz, *The Morality of Obedience*, 83 MICH L. REV. 733 (1985) (review of P. SOPER, *A THEORY OF LAW* (1984)).

2. See generally J. RAZ, *THE AUTHORITY OF LAW* *passim* (1979) [hereinafter cited as J. RAZ, *AUTHORITY*]; J. RAZ, *PRACTICAL REASON AND NORMS* 161-77 (1976) [hereinafter cited as J. RAZ, *PRACTICAL REASON*].

Soper's theory of law is not a positivist theory. It addresses the validity of the law's normative claim and holds that the claim must be valid for there to be law. At the same time, Soper's theory does not require moral evaluation when identifying legal systems. To see how this is possible, consider the following form of argument.³

- (1) Social facts *A*, *B*, and *C* are each necessary and together sufficient conditions for the existence of a legal system.
- (2) Social fact *C* and noncontingent moral fact *D* together are sufficient conditions for the existence of a moral obligation to obey the law.
- (3) If noncontingent moral fact *D* is true, there is a moral obligation to obey the law whenever the conditions for the existence of a legal system are satisfied.

Taken in isolation, (1) could be a positivist theory of law. It identifies law with reference to social facts, not requiring moral evaluation of those facts to determine whether a particular social system is a legal one. This much is common to all legal positivists. For Hart, for example, the principal condition for the existence of a legal system is that the system's officials accept a rule of recognition, which identifies all of the valid legal rules within the system. The officials' acceptance of the rule of recognition is a social fact. Identifying law by finding this fact does not depend on any moral evaluation of the rule or the officials' reasons for using the rule. Even if the officials' acceptance is based wholly on prudential reasons, such as their desire for the income, security, and prestige of an official position, their acceptance certifies the rule of recognition and all of the rules that it identifies as law.⁴

Taken in isolation, (2) could be a political theory of moral obligation. Legal positivists exclude this kind of question from the domain of a theory of law. Whether law obligates morally depends on moral evaluations of facts and is a question for moral and political philosophy. For example, one strong tradition in political philosophy holds that the citizens' consent to a political system creates a moral obligation for them to obey its laws because voluntary undertakings create moral obligations. Consent, however, is not a feature of any positivist theory of law, and no positivist theory entails a necessary connection between law and this kind of moral obligation.

When conjoined, (1) and (2) give the form of a possible nonpositivist theory of law. Any social system which satisfies the legal positivist's conditions for a legal system also will satisfy the political philosopher's conditions for a moral obligation to obey the law. Social fact *C* is a

3. See J. RAZ, *PRACTICAL REASON*, *supra* note 2, at 165-70. Soper recognizes the similarity between his argument and Raz's concept of a "derivative approach" (p. 92).

4. See H.L.A. HART, *THE CONCEPT OF LAW* 89-107 (1961) [hereinafter cited as H.L.A. HART, *CONCEPT*]; H.L.A. HART, *ESSAYS ON BENTHAM* 156-61, 262-68 (1982) [hereinafter cited as H.L.A. HART, *ESSAYS*].

necessary condition in the legal premise and also, together with noncontingent fact *D* in the political premise, is sufficient to create moral obligation. A necessary conceptual connection between law and moral obligation thus could be constructed by expanding the theoretical domain to encompass legal and political theory. The resulting nonpositivist theory of law would grow from a positivist theory of law; legal systems would be just those organized social systems that morally obligate.

The foregoing is a formal sketch of the argument that Soper appears to advance. He does not, however, fill in the legal premise (1) by adopting the elaborate positivist legal theories of Hart, Raz, or others. He is content to work with a rough definition of law (p. 4) that must be pieced together from various comments in the book. For Soper, law in large part appears to be an organized social system in which a single supreme sovereign effectively enforces norms that are voluntarily accepted by officials (pp. 4, 55, 127). This much is familiar legal positivism. Whether he would accept other features of positivist theories, such as Hart's concept of law as a union of primary rules of obligation and secondary rules of recognition, change and adjudication, is unclear.

Soper adds an element to familiar positivism: "[l]egal systems are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interests of all" (p. 55). He clearly recognizes that this good faith claim of justice itself is a social fact that may exist in iniquitous legal systems. The rulers in such systems simply are wrong, but their error does not deprive the system of its character as law (p. 119-22). This element of the legal premise is consistent with legal positivist tenets. It also distinguishes Soper's theory of law from classical natural law, which may require that a system at least be consistent with justice to be properly characterized as legal (pp. 59, 176 n.55).

Soper's reasons for adding the element of a good faith claim of justice as an essential feature of law are interesting. He sharply distinguishes descriptive from definitional theories (p. 20-29).⁵ A descriptive theory points out the features that are common to standard examples of a legal system. A definitional theory selects those features that are essential to the concept of a legal system. Echoing Lon Fuller, Soper uses a notion of definition that emphasizes the human purposes for which the definition is to be used. These purposes determine which features of a phenomenon are important enough to count among its essential parts, and they connect theory with the concerns of people.

Soper believes that the good faith claim of justice would be a neces-

5. See also Soper, *Legal Theory and the Obligations of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977).

sary feature of a model of law that describes law as a system of legal norms, or rules that are claimed to impose moral obligations (pp. 55-56).⁶ This responds to the deficiencies Soper sees in the works of Hart and Raz. In Soper's view, Hart's concept of law is faulty because it fails to distinguish law from the "gunman situation writ large."⁷ Where the officials accept the rules without making a moral claim, the result could be a coercive system in which the officials' acceptance of the rules indicates to the citizen only a likelihood that sanctions will be imposed for violations of legal obligations (pp. 30-31). Soper's theory also differs from Raz's because Raz requires that the law make a moral claim, but the claim may be insincere.⁸ Soper does not think that insincere moral claims can distinguish law from wholly coercive systems. Soper's addition of an official sincere claim to mere acceptance of the rules or a possibly insincere moral claim is his attempt to distinguish law as a normative system from the gunman situation (p. 55).

Soper's main enterprise, however, is conceptual and definitional, requiring reference to our purpose in asking what law is. It is here that his departure from the positivist tradition is stark. An interest in legal theory is generated, he suggests, by one of two practical purposes. Citizens may be interested in knowing when they are likely to encounter official sanctions in order to know what prudential reasons they may have for acting or refraining from acting. Citizens also may be interested in knowing what relevance the law has to their moral obligations in order to act rightly. Soper believes that positivist legal theories ignore the latter interest; the only theory of law that responds to that interest would be one that connects law to moral obligation conceptually.⁹ This leads to the political premise (2) of the argument and the effort to connect legal and political theory.

Soper fills in the political premise with two conditions that, he argues, are sufficient to establish a general *prima facie* moral obligation to obey the law just because it is the law. First, the enterprise of law in general, including the particular legal system that confronts an individ-

6. Unlike Soper, Dworkin, Raz, and others, Hart believes that legal obligation is conceptually distinct from moral obligation. See H.L.A. HART, *ESSAYS*, *supra* note 4, at 127-61.

7. H.L.A. HART, *CONCEPT*, *supra* note 4, at 80.

8. J. RAZ, *AUTHORITY*, *supra* note 2, at 28-33, 155 n.13. On the differences between Hart and Raz, see H.L.A. HART, *ESSAYS*, *supra* note 4, at 153-61.

9. At one point, Soper asserts that the "inquiry into the nature of law has practical interest *only* to the extent that one can use the resulting analysis to aid the moral inquiry: what ought I to do?" (p. 10, *emphasis added*). Later, however, he writes that "[t]he so-called bad man's perspective is always a possible view about the essence of a legal system. . . . One cannot deny the plausibility of the classical positivist's perspective. What one can do is show another possible meaning of 'legal system' that reflects an equally persistent human interest and that succeeds where no other theory has in defending an alternative to the coercive account" (p. 94). I do not think that legal positivism necessarily adopts the bad man's perspective. See *infra* notes 42-47 and accompanying text.

ual, defective though it may be, must be better than no law at all (p. 80). Second, the officials of the system must be engaged in a good faith effort to govern in the interests of the entire community (the claim of justice) (p. 80). This seems to say that the organized social system that claims obedience from a person must be a legal system, which in Soper's theory entails minimum effectiveness in establishing social order and the good faith claim of justice, and that the enterprise of law in general must be valuable. The claim of justice is a social fact which occurs within a legal system defined entirely by social facts. Soper suggests that these facts, together with the moral fact that any system of law is better than no law at all, are sufficient to yield a general obligation of obedience by citizens.

These two conditions are sufficient to yield an obligation in Soper's view because anarchism is wrong (for largely Hobbesian reasons) (pp. 81-83). The officials in charge of the legal system consequently are doing a job that needs to be done, and the officials deserve the respect of all citizens so long as they manifest respect for all citizens (p. 84). If the legal venture is valuable in principle and people of good will can disagree about value, it might seem that law is possible only if citizens respect the good faith judgments of value made by the officials. Soper argues that citizens and officials ought to acknowledge the value of law through a rational appraisal of self-interest in the maintenance of a coercive social order. A system that ignores the individual's self-interest undercuts the basis of the political bond (p. 84). Officials therefore ought to respect the citizens' autonomy by considering citizens' interests in exercising official authority. The principle of respect for persons pursuing moral ends requires citizens to respect officials in return, by complying with the law (p. 84). Thus, respect between officials and citizens must be reciprocal if there is to be law and obligation (pp. 75-84).

The ground for this obligation is not one of the grounds commonly discussed in political theory—consent, gratitude, fairness, utility, or the duty to uphold just institutions.¹⁰ Each of these grounds has been criticized successfully enough to lead many contemporary scholars to deny that there is a general *prima facie* obligation to obey the law.¹¹ Rather, Soper's ground is moral necessity based in reason, value, and the princi-

10. See, e.g., J. RAWLS, *A THEORY OF JUSTICE* 333-42 (1971) (duty to uphold justice); A. WOOLLEY, *LAW AND OBEDIENCE: THE ARGUMENTS OF PLATO'S CRITO* (1979) (consent and gratitude); Brandt, *Utility and the Obligation to Obey the Law*, in *LAW AND PHILOSOPHY* 43 (S. Hook ed. 1964) (utilitarianism); Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185-86 (1955) (fairness); Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (S. Hook ed. 1964) (fair play).

11. See, e.g., J. RAZ, *AUTHORITY*, *supra* note 2, at 233-61; A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1979); P. WOLFF, *IN DEFENSE OF ANARCHISM* (1970); Lyons, *Response: Need, Necessity, and Political Obligation*, 67 *VA. L. REV.* 63 (1981); Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 *YALE L.J.* 950 (1973).

ple of respect for other moral beings when they are acting in good faith for moral purposes (pp. 77-84, 179 n.30).¹² For Soper, the claim of justice generates law that is deserving of moral respect because any moral being who is pursuing moral purposes deserves moral respect (p. 84).

The nature of this moral obligation to obey the law is of great importance, especially to the person interested in knowing what relevance the law has to her moral obligations. It receives less discussion in *A Theory of Law* than one might prefer. Like almost all theories of political obligation, the obligation is not absolute but *prima facie*; it can be overridden by other considerations when a citizen decides how to act on a particular occasion. Soper disclaims any need to clarify the nature of the obligation further (pp. 59-60). The question that guides his inquiry is "[w]hat is it about law that justifies any degree of moral respect at all, however slight?" (p. 59). Consequently, he writes interchangeably about obligations, moral reasons for action, and minimal moral respect.

Anticipating the objection that so modest an account of obligation is inadequate to solve the problem of political obligation, as he claims to have done (p. 157), Soper offers two defenses. First, providing even a minimal basis for the moral authority of law is a contribution in that it links law and morals conceptually (p. 59). Second, once absolute obligations are not involved, "the only problem that remains concerns how much weight to accord the obligation. . . . Moral philosophy, after all, is notorious for its inability to assign weights to, as opposed to characterizing the form and ground of, the normative requirements of life" (p. 60).

Having thus set forth both a legal and a political theory, Soper connects them in his theory of law. Law necessarily claims to impose moral obligations on citizens—it claims to be normative. This claim is valid because the officials' good faith belief in the justice of a legal system is a necessary feature of law and, together with the noncontingent fact that any system of law is better than no law at all, is sufficient in reason to validate the normative claim for any effective legal system. Law and moral obligation, therefore, are linked by conceptual necessity. Legal systems are just those organized social systems that obligate morally, and there is a general *prima facie* obligation to obey the law.

II

THE OBLIGATION TO OBEY THE LAW

Professor Soper's claim to have solved the problem of political obligation and its relationship to law is unpersuasive. He anticipates one

12. Other recent efforts to ground obligation on necessity are Anscombe, *On the Source of the Authority of the State*, 20 *RATIO* 1 (1978) and Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 *VA. L. REV.* 39 (1981).

criticism that generates doubt: his account of minimal respect is too modest. It is not obvious that the problem of obligation would be solved by a theory that shows only that the law deserves minimal moral respect or generates moral reasons for action. Raz, one of the preeminent modern legal positivists, distinguishes sharply between obligations and moral reasons for action.¹³ His well-developed concept of an obligation to obey the law does not allow the officials' good faith claim of justice to yield even a weak moral obligation. Soper should have elaborated his concept of an obligation to obey and shown how it is better than Raz's quite different concept.

Recall Soper's defense of leaving the concept of obligation unanalyzed: once it is conceded that the obligation is not absolute, the only problem that remains concerns how much weight to accord the obligation, not its existence (pp. 59-60). This suggests that the obligation need be nothing more than a *prima facie* moral reason for action, which would be a very weak obligation if it is an obligation at all. It would not, however, be an insignificant reason in theory. There may be many reasons for obeying an individual law aside from the mere fact that it is legally valid, such as the moral content of a law prohibiting conduct that is *malum in se*, or the harmful consequences of disobedience to a valuable cooperative venture established by the law, or the reasonable expectations or reliance of other citizens on one's obedience. There also may be many reasons for disobeying, including prudential reasons such as personal advantages, and other moral obligations such as those to one's family or religious and moral beliefs. The weighing metaphor (pp. 59-60, 79, 114, 151, 159) suggests that the law is a reason for obedience on all occasions at which it claims to govern just because it is the law, in addition to any moral reasons that are connected with the law on some occasions. Soper includes this reason for action in the balancing so that it will at least tip the balance in favor of law-abiding action in a close case.

Whether Soper would restrict the reasons that may outweigh the obligation to other obligations is unclear. Merely prudential reasons for action might be relevant reasons that go into the balance. More likely, at least any other conflicting obligation is to be weighed against the obligation to obey the law, including obligations according to one's own moral theory (p. 114). The injustice of a legal system, for example, itself may have sufficient weight to override Soper's obligation to obey the law (pp. 79, 99).

This is a reasonable if weak concept of obligation, but there is another that deserves Soper's attention. Raz's writings on legal theory are part of a broad effort to develop a philosophy of practical reason

13. Raz denies that law necessarily yields either a *prima facie* moral obligation or a moral reason to obey. J. RAZ, *AUTHORITY*, *supra* note 2, at 28-33, 233-61.

based in a theory of reasons for action. Among his most valuable contributions is the idea of an exclusionary reason for action. Raz distinguishes between first-order reasons for action, which pertain directly to what one should do, and second-order reasons for action, which pertain to first-order reasons. Among the second-order reasons are those that require one to disregard some kinds of first-order reasons when deciding what one should do. Such second-order reasons are "exclusionary reasons" because they require one to disregard some first-order reasons that otherwise would be taken into account and weighed in the balance.¹⁴ A reason for action may be both a first-order reason for taking a particular action and a second-order reason excluding some kinds of reasons for not taking the same action. Such a reason is called a "protected reason."¹⁵

Obligations for Raz are not only reasons for action but also are protected reasons.¹⁶ For example, assume that a seller promises to deliver goods in the future at a fixed price and is under an obligation to keep that promise. The market price rises above the promised price before the time for delivery. The fact that the market rose is a first-order reason for not delivering the goods as promised. An obligation to keep the promise, however, makes the promise both a first-order reason to deliver the goods and a second-order reason requiring the seller to disregard the higher market price in deciding what to do. It is a protected reason. The fact of a higher market price is not to be weighed against the fact of the promise in balancing all relevant reasons for action. Even a great rise in the market price does not override the promissory obligation (unless the promise is so qualified). The seller's opportunity to sell the goods on the spot market at the time for delivery was forgone upon making the promise, and a recapture of that forgone opportunity is a breach of promise.¹⁷

Soper might deny that an obligation is a protected reason. If so, however, it is hard to see how wholly prudential reasons for action could not override the obligation. Thus, a rise in the market price might permit the seller in the hypothetical case to refuse to deliver the goods as promised without violating the obligation. To avoid this counterintuitive result, Soper could agree that an obligation is a protected reason that excludes such wholly prudential reasons from the balance. If so, however, he would hold the Razian concept of obligation in this respect and a further problem would confront him.¹⁸

14. J. RAZ, PRACTICAL REASON, *supra* note 2, at 15-85. For a different strong view of obligation, see J. SMITH, LEGAL OBLIGATION 34-60 (1976).

15. J. RAZ, AUTHORITY, *supra* note 2, at 17-18.

16. *Id.* at 234-35; Raz, *Promises and Obligations* in LAW, MORALITY AND SOCIETY: ESSAYS IN HONOR OF H.L.A. HART 210 (P. Hacker & J. Raz eds. 1977).

17. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980).

18. See J. RAZ, AUTHORITY, *supra* note 2, at 22-24.

For now it must be determined which kinds of first-order reasons are excluded by the obligation. Soper might say that only and all prudential reasons are excluded; it is permissible to balance any other obligations against the obligation to obey the law. Thus, he could continue to hold that other conflicting obligations are to be weighed against the obligation to obey the law and that the injustice of the legal system itself may have sufficient weight to override the obligation.

Raz would disagree. For him, an obligation to obey the law would be an obligation to obey the law "as it requires to be obeyed."¹⁹ Such an obligation can be established only if the law has the legitimate authority it claims to have.²⁰ An essential feature of law is that it claims that legal rules are exclusionary reasons for disregarding reasons for nonconformity. The law often claims authority both to set legal requirements and to determine the conditions under which they are defeated, such as conscientious objection, self-defense, or duress.²¹ Raz says that an obligation to obey the law then would entail a sufficient reason to obey in all circumstances defeated only by reasons which are legally recognized.²² Thus, to obey the law as it requires to be obeyed would be to treat legally unrecognized moral reasons, as well as prudential reasons, as excluded reasons and not reasons to be balanced in deciding what to do.

It is not true that "once it is conceded that the political bond is not absolute, the only problem that remains concerns how much weight to accord the obligation" (p. 60). Raz's concept of an obligation to obey the law raises the questions whether an obligation excludes some reasons from the balance whatever their weight and, if so, which kinds of reasons. Soper's argument does not try to establish that the official claim of justice generates an obligation as strong as that conceived by Raz. Especially since Raz's theory of law in particular is a principal target of Soper's, it would seem that Soper should defend his weaker view of the concept of obligation. For if Raz's concept of obligation in general and an obligation to obey the law in particular is correct, there remains a disjunction between legal and moral obligation even if the law generates a weak *prima facie* moral reason for obedience or a protected reason hin-

19. *Id.* at 236.

20. *Id.* at 237.

21. *Id.* at 30-31.

22. *Id.* at 236. This point of Raz's seems to be descriptive, not definitional. Thus Raz might describe a system which claimed that its norms exclude only prudential reasons for action as a legal system. But this offers no solace to Soper's argument. Soper then could argue that there is an obligation to obey the law in such systems consistently with Raz's claim that an obligation to obey the law is a protected reason to obey the law as it requires it be obeyed. Soper would not deny, however, that a system which claimed that its norms exclude both prudential reasons and legally unrecognized moral reasons is a legal system. He could not argue that there is an obligation to obey the law in the many legal systems that make the stronger claim without disputing Raz's claim about the scope of the protected reason entailed by an obligation to obey the law.

ited to excluding only prudential reasons for noncompliance. In the absence of such a defense, Soper's claim to have solved the problem of political obligation remains questionable.

III

THE GOOD FAITH CLAIM OF JUSTICE

Whether or not Professor Soper could defend his concept of obligation against the foregoing argument, there remains his claim to have established a necessary connection between law and morals by showing that the law deserves minimal moral respect. This claim would be valid if the law necessarily creates a *prima facie* moral reason for action, whether or not it properly is called an "obligation." Such a claim if valid would itself be a considerable contribution because even such a modest connection is denied by Hart, Raz, and other legal positivists, as well as by a number of contemporary political philosophers. It also would succeed in distinguishing law from the gunman situation without requiring that law be defined by conditions involving moral evaluation, thus distinguishing Soper's theory from natural law theories. This theory of law then would deserve a prominent place in the history of legal philosophy.

Soper's argument, it will be recalled, is that moral respect for the law arises from the good faith claim of justice by officials of a minimally effective legal system together with the moral fact that law is valuable. The rejection of anarchism in the idea that law has value, and the requirement that the system be minimally effective in maintaining order, are based largely on familiar Hobbesian and positivist arguments (pp. 80-84, 127) and will not be analyzed in this essay. The novel and crucial idea in Soper's argument is the good faith claim of justice—the belief of officials that they rule in the interests of all. This claim need not entail that the law is just in fact, only that the officials sincerely believe that the law is just or aims at justice in fact. Soper argues that such a belief generates a real moral obligation for citizens to obey, whether or not the officials are correct (pp. 95-100).

It is of course well-accepted that a person's or group of persons' belief that an action is morally right does not itself ensure that the action *is* morally right. Soper's argument seeks to supply a connection between the belief in value and value-in-fact in the legal context. There are, however, problems with the good faith claim of justice as elucidated by Soper to establish a general obligation to obey the law—problems of clarity, generality, and reasonableness.

A. The Problem of Clarity

The official good faith claim relates to the justice of the legal system.

It is supposed to yield a general obligation to obey all laws within the legal system just because they are laws. Two problems confront Soper: that of identifying the officials within a legal system who must hold the good faith belief, and that of explaining what it is about the legal system that the officials must believe to be just. Soper assigns this role to judges within mature legal systems and offers a theory of adjudication to reconcile this role with the other functions of courts (pp. 109-17). The text is ambiguous on what it is about a legal system that judges must believe to be just. By either interpretation, however, it is hard to reconcile his solutions to these two problems while accepting his claim that law necessarily deserves moral respect.

Soper's theory of adjudication acknowledges that judging—applying the rules—is the dominant activity of courts but portrays judging as a means by which courts justify decisions. Courts thus are supposed to “explain why particular sanctions and coercive orders are justified” (p. 113), which requires more than demonstrating the application of legally valid rules. Courts assume responsibility for making the claim of justice on behalf of a mature legal system (p. 113). It is this justificatory function that is primary and distinguishes courts from legislatures (p. 112).

The justification of judicial decisions in cases might involve claims that at least two different features of a mature legal system are just. Possibly the judges would justify decisions by claiming that the substantive rules of law—roughly what Hart calls the “primary rules of obligation”—are just. Or they might justify decisions by claiming that the constitutive rules of the legal system—roughly what Hart calls the “secondary rules of recognition, change and adjudication”—are just.²³ It matters to assessing Soper's claim whether the good faith belief concerns either or both of these sets of rules. Soper says only that the judges must claim that the “rules are just” (p. 113), and he does not adopt or reject Hart's typology of rules. He also does not indicate whether a good faith belief in the justice of either or both sets of rules would be necessary or sufficient.

In the first part of *A Theory of Law*, Soper suggests that the good faith belief concerns the primary rules of obligation, rather than the secondary or constitutive rules. He introduces the good faith belief through a “slight” modification of Aquinas' claim that law is “‘an ordinance of reason for the common good, made by him who has care of the community’” (p. 55). “Instead of interpreting the definition to limit ‘law’ to those ordinances that do in fact serve the common good, one interprets it instead to require only that legal directives aim at serving the common good, however wide of the mark they fall” (p. 55). In the context of

23. See H.L.A. HART, *CONCEPT*, *supra* note 4, at 77-96.

Soper's discussion of natural law (pp. 51-55), this is reasonably interpreted as referring to the rules of obligation.

This interpretation also is supported by Soper's argument for obligation, which is made by analogy to the paradigms of a child's obligation to obey her parents and a lifeboat occupant's obligation to obey the *de facto* captain. For example, given that the enterprise of the family is valuable, he argues that respect for the parent is due when "the parent is trying in good faith to act in the interests of the child by acting in the interests of the family as a whole" (p. 79). Similarly, given that somebody needs to be giving orders in the lifeboat, the occupant has an obligation to obey even if she disagrees about the direction in which to sail (p. 80). The focus in both cases is on the authority's belief in the rightness of the very action to which the obligation pertains. The counterpart in a mature legal system would be the particular judicial decision. It is reasonable to infer that the particular judicial decision must be believed to be just. Such belief could be shown if it were the product of a rule of obligation that is believed to be just.²⁴

Interpreting the good faith claim of justice to require a belief in the justice of particular decisions or the rules of obligation fits well within Soper's theory of obligation. Under this interpretation, a judicial decision would require that the judge sincerely believe that the citizen ought to do the very act that is in question because that act is just. It is relatively plausible within Soper's theory to say that the judge deserves respect when this is the claim. The judge is doing a job to establish minimum order, and the judge believes that the order established by the legal system is a good order in the relevant respect. Given that law is valuable and people of good will disagree about values, moral persons may have a reason to respect judges who make good faith judgments concerning matters of direct concern to them.

To require such a claim of justice by judges, however, creates serious problems for the theory of courts as primarily justificatory organs. The requirement distances the theory greatly from a principal example of a legal system and probably disconnects it from what is meant by adjudication. In the United States, the oath of judicial office normally is interpreted to require only that the judges uphold the law, not that they sincerely believe any legal rules to be just. Judges in the United States legal system may or may not so believe; many are probably agnostic on the question or simply apathetic, and others are devoted reformers who

24. For example, when Soper applies his theory to iniquitous legal systems, such as those which protect slavery, he argues that even the slaves could be under a *prima facie* obligation to obey the law. This would be so if the rulers believe in good faith that the slaves are being accorded their just deserts (pp. 119-22). Here, it is clear that Soper is referring to the primary rules of obligation that are applied to the slaves, not to the constitutive rules of the legal system.

believe they can contribute incrementally to making the rules just. A requirement of a good faith belief in the justice of the rules of obligation must be considered problematic if judges in the United States legal system do not in fact make the necessary claim. It is hard to imagine which other officials do so.

Soper does not consider that the possibility courts are typically concerned only with applying, and not justifying, the rules of obligation undermines his theory of adjudication (p. 114). In response to this possibility, he introduces material that supports a second interpretation of what it is that the good faith belief in justice concerns (p. 114). Here, he denies that an individual judge must bring her own moral and political theory into play in justifying each decision. Rather, the judge brings her own moral and political theory into play in deciding whether the constitutive rules impose on her an obligation to apply the rules of obligation to citizens. This may depend, for example, on a political theory that purports to justify a separation of powers as provided by the constitutive rules. The prevailing political theory, which is believed to justify the constitutive rules, imposes a *prima facie* obligation on each judge to apply the rules of obligation. This obligation must be weighed against the obligations resulting from the judge's own moral or political theory (p. 114). Judges who follow the rules of obligation, whether or not they believe those rules to be just, thus may be committed to the justice of the constitutive rules and consequently to the justice of the system as a whole.

This interpretation is supported, in addition, by several passages that occur in the latter portion of the book, where the implications of the theory are elaborated. Soper says, for example, that the good faith claim of justice is compatible with "pure process theories of justification" (p. 118). Thus, the constitutive rules authorizing procedures for lawmaking may be defended as acceptable "even though the process of following those rules may occasionally generate unhappy results" (pp. 118-19). The reference to "pure" process theories of justification supports the second interpretation, even though the explanation suggests that the resulting rules of obligation may be unjust only "occasionally."

Interpreting the good faith claim of justice as pertaining to the constitutive rules creates its own difficulties for Soper's argument for obligation. It is less distant from common views of adjudication as a law-applying activity in which the justice of the rules of obligation may be irrelevant. As will be seen, however, the idea that judges must be committed to a belief that the constitutive rules are just, according to a political theory sincerely believed to be just, seems too distant from reality. More important, such a belief involves an unacceptable circularity in the argument for obligation.

Judges in a legal system often are committed to the constitutive rules in some way. Whether they believe that they are just in fact, however, is far from obvious. Many judges may believe that the nation muddles through with a system like Dr. Johnson's dog—the remarkable thing may not be that it performs well, but that it performs at all. Many may believe that the system has serious defects but accept it because there is no realistic prospect of constitutional change. Many may believe that it is just from an “unthinking response to inherited tradition or to the dictates of self-interest” (p. 135), which Soper would not regard as a good faith claim. Some may think that there are better alternatives but that the existing system is not iniquitous and should be changed incrementally. Many may have no recognizable political theory at all. None of these beliefs would seem to amount to a good faith belief that the constitutive rules of the system are just in the required morally objective sense. If the judges generally hold beliefs of these sorts, the system in which they are officials would not be a legal system according to Soper's theory.

More important, the second interpretation fits less well than the first interpretation with Soper's argument for an obligation for citizens to obey the law. For on this interpretation the judge need believe only that the rules she is applying to the citizen are valid legal rules within a legal system that is constitutionally just. This might result in an obligation for the judge to follow the rules, apart from any promise to do so. The problem, however, is to show that the citizen is obligated to obey rules of obligation because the judge believes in a political theory that supports the constitutive rules of the existing system. At best, such a connection is attenuated as compared to the situation where the judge believes that the legally required action in particular is just or required by just rules of obligation. At worst, the argument fails.

Soper requires that the judge and the citizen both accept the general proposition that any law is better than no law at all and tries to build the obligation by reasoning from this value (pp. 81-83). Both judges and citizens, however, may hold beliefs concerning the justice of the constitutive rules of the existing system in particular. The citizen may dissent on the constitutional question without endorsing anarchism. The judge in Soper's view nonetheless is to be respected by the citizen only because the judge is an official. The judge's conception of just constitutive rules carries extra moral weight for this reason. But does the fact that the judge is an official justify the special weight to be accorded her judgments of constitutional value in the citizen's moral deliberations?

It is too easy to build on a joint commitment between officials and citizens to a platitude as vague as “the value of law.” The particular job that the judge is doing itself is defined by the constitutive rules that the

dissenting citizen rejects. By hypothesis, it is not a job that the dissenting citizen believes must be done; indeed, the citizen need not believe that any system of adjudication is just. The officials and citizens can agree on the platitude and yet disagree on whether the officials are doing a job that needs to be done. The job itself is a product of contingent constitutive rules.

There is a consequent circularity in the argument that would seem to break the political bond necessary to even the weakest obligation on Soper's argument. The identity of officials and their jobs is a function of the constitutive rules, which would generate obligations for citizens if they are believed to be just by officials. Soper's theory thus seems to suggest that a citizen who rejects the constitutional order but is not an anarchist, and who does not believe that any official in the existing legal system is doing a job that needs to be done, nonetheless owes respect to the officials because they are officials. It is not plausible to say to such a person that the law is distinguishable from the gunman situation because it morally obligates. The extra moral significance attached to the beliefs of officials rests in necessary part on their status as *de facto* authorities.

Soper's argument for obligation thus fails. Within his conceptual framework, the extra moral significance attached to the beliefs of officials might be justified only if the claim of justice must be made by exactly those officials who are doing jobs that must be done if there is to be law. Given that law is valuable, the officials then might be legitimate authorities. Soper believes, however, that a system lacking courts could be legal (p. 113). He does not suggest who else in a system, if anyone, might be doing a job that must be done if there is to be law. Accordingly, the argument for obligation from the good faith beliefs of officials needs further development if it is to succeed in achieving the goal that Soper set for himself.

B. The Problem of Generality

The good faith claim of justice must be a claim that the "rules are just" (p. 113). This may refer to the rules of obligation, the constitutive rules, or, less likely, both. For ease of exposition, the term "rules" henceforth will be used to refer ambiguously to each of these sets. In any event, the relevant set of rules need not be accepted or rejected as a corporate whole. It is more realistic to believe that thoughtful judges will accept some rules and reject others as unjust. Soper's concept of a good faith belief that the rules are just probably does not require an official belief in the justice of all rules, or in the balance of all rules including the specific rules that are invoked on an occasion for action. It probably requires a good faith belief in the justice of the balance of all rules in the

relevant set.²⁵

Even this interpretation, however, is problematic. If a good faith belief in the justice of the balance of all rules creates a general prima facie obligation to obey the law, then citizens would have an obligation to obey a valid legal rule which the officials do not believe to be just. It is difficult to defend such a systemic view.²⁶ A defense is necessary to establish a general obligation to obey the law just because it is the law. This problem has been addressed in many recent debates in political theory.²⁷ In an important article in 1973,²⁸ for example, M.B.E. Smith argued that, "although those subject to a government often have a prima facie obligation to obey particular laws (e.g., when disobedience has seriously untoward consequences or involves an act that is *malum in se*), they have no prima facie obligation to obey all its laws."²⁹ Raz believes that an argument of the general sort that Soper makes could link law and morality conceptually, though in his view no one has made such an argument successfully. A principal objection that he thinks must be overcome is that arguments from the value of a legal system may prove that the system as a whole is of value, but the implications for the moral validity of individual legal rules will vary.³⁰

The problem of generality is that whatever justification is offered for the legal system as a whole or for any set of rules on balance, there may be some legal rules or cases where that justification does not apply. The law and its systemic justification then is not sufficient to establish even a weak prima facie obligation with respect to those rules or cases. An argument might show, for example, that individual rules believed to be just, or derived only from constitutive rules believed to be just, deserve minimum moral respect. It would not follow that other individual rules of the system also deserve respect. An argument is necessary to defend

25. To require a belief in the justice of all rules would deprive too many systems of their identity as legal systems and render the concept of law practically irrelevant in the real world. To require a belief in the justice of the balance of all rules, including the individual rule at stake on an occasion, would imply that the other rules of the same legal system are not law. If Soper had intended this surprising result, one would expect him to have defended it explicitly in *A Theory of Law*.

26. I advance a systemic argument for legitimacy in S. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 199-215 (1985). It differs from Soper's in that it is contingent and depends in part on a coherence theory of legal reasoning. From the perspective of this coherence theory, the very notion of an individual rule is hard to understand. Every stated legal rule is so intimately related to every other legal rule within the system, as well as cases, professional conventions, and politics, that no individual legal rule or judicial decision can be singled out for moral evaluation without distortion. Consequently, the system as a whole is the meaningful object of evaluation. See *infra* note 36.

27. See, e.g., sources cited *supra* note 10.

28. Smith, *supra* note 11, at 950.

29. *Id.*

30. J. RAZ, PRACTICAL REASON, *supra* note 2, at 165-69.

the transfer of respect from the one subset of rules to the remainder of the set. Otherwise, there is no general obligation to obey the law just because it is the law.

One common attempt to resolve this problem is the simple utilitarian argument that legal systems are valuable and cannot survive in the face of widespread disobedience; therefore, one has a *prima facie* obligation to obey all of the laws of any legal system. Soper objects to the non sequitur and the conclusion because a necessary but implausible premise is that any act of disobedience to any specific law of any legal system threatens the entire legal system. He believes that "laws can be and are regularly broken without entailing either widespread disobedience or disintegration of the system" (p. 60). Accordingly, he declines to argue that the necessities of preserving the value of the legal system as a whole and the threat any disobedience poses to that value are reasons supporting the *prima facie* obligation to obey (p. 80).

Soper replaces the utilitarian argument's appeal to the consequences of disobedience for the legal venture with an appeal to "the impact [of disobedience] on the person who stands in front of me trying to do his best to accomplish ends thought to advance the interests of the group as a whole, including myself" (p. 80). Such persons, he argues, deserve respect and are denied due respect if citizens do not treat their laws as at least weakly obligatory (p. 86). The obligation arises from the individual person's own values (her commitment to the values of law, justice, and respect for other moral beings) and reason (the disrespect for officials pursuing the values of law and justice that would be manifested by disobedience) (pp. 75-77).

As a response to the problem of generality, however, this will not do. Nowhere in the relevant passages does Soper distinguish between an official's good faith belief in the justice of the system as a whole (the balance of all rules) and the justice of an individual rule. He develops the obligation by a paradigm case argument in which the paradigms do not raise the problem of individual rules believed to be unjust. The paradigms are those of a child's obligations to a parent and a lifeboat occupant's obligation to the *de facto* captain. In both paradigms, it can reasonably be assumed that the authority does not issue orders that are not believed to be right. There may be no constitutive rules invoked in such settings. His argument is relatively plausible in the paradigm cases.

The analogies, however, break down when applied to the problem of generality in legal systems. The perceived requirements of fidelity to law often do result in the application of both rules of obligation and constitutive rules that are not believed to be just. The argument thus might show that respect is due to officials on those occasions when the rules being applied are believed to be just. In these situations, the analogy to the

family and the lifeboat are relatively apt. The argument does not show that respect is due when the rules being applied are believed only to be legally valid. The problem of generality is not solved because the argument does not establish that minimal moral respect is due for all laws within a legal system just because they are laws.

C. The Problem of Reasonableness

Professor Soper is serious about avoiding any need to evaluate the reasonableness of the rules of obligation or the constitutive rules that produce them. He is prepared to treat coercive systems that enforce laws of slavery or apartheid as legal systems so long as the rulers believe in good faith that, for example, those on the short end of the stick are getting their just deserts. Even the slaves or blacks in such systems would have a *prima facie* moral reason to obey the law (pp. 119-22). He is not prepared to treat coercive systems that practice genocide as legal systems; however, this conclusion is based on the total violation of the victim's personal security, which destroys the minimum order that is necessary for an organized social system to be a legal system (p. 122). The genocide example thus does not impair the integrity of the good faith belief requirement, which remains one of only sincerity and respect for the possibility of dissent.

Two apparent virtues result from carefully limiting the requirement to good faith, interpreting good faith in the spirit of tolerance. Unlike many theories of natural law, the scope of Soper's theory can encompass legal systems like those in South Africa and the Soviet Union, though possibly not Nazi Germany. The theory thus preserves a reasonably good fit between the ordinary usage of the word "law" and the theoretical definition of law better than a classical natural law theory. Moreover, the serious emphasis on good faith belief distinguishes Soper's theory conceptually from some natural law theories. Such theories do require substantive evaluation when identifying legal systems. Soper does not require that the content of the laws or the procedures that produce them even be reasonably justifiable.

These apparent virtues, however, are purchased at a price. The existence of iniquitous legal systems seems generally to require that a definitional legal theory choose between adequate scope and moral quality. Soper's focus on sincere belief strengthens the theory as a definition of law without counterintuitive applications. The same focus weakens the theory as a political theory supporting a moral obligation to obey the law. Consider a legal system in which the officials are sincere but inept and the laws are not reasonably justifiable. According to Soper's theory, an organized coercive system in which the officials have kind hearts and empty heads might nonetheless be a legal system deserving of moral

respect. Good faith (sincerity) does not require that the officials hold reasonable beliefs about the justice of the rules, act reasonably, or be more likely than citizens to contribute to a more just society.

Could this be a legal system, though a poor one, that deserves some moral respect? If the officials' ineptitude led them to wield power in a persistently arbitrary fashion, so as to destroy the minimum order that also is necessary for the system to be a legal system, then Soper probably would deny it the title "law" for this reason and say that it does not merit respect (pp. 122, 125-30). But the officials could achieve minimum order through the moderately consistent application of simplistic legal rules that are not reasonably justifiable but are sincerely believed to be just.³¹ Soper probably would treat the latter system as a legal one deserving of moral respect.³²

The precise concept of obligation matters in evaluating a claim that it is a legal system that obligates. Soper's concept of obligation, as indicated, might be simply a *prima facie* reason for action that does not exclude even prudential reasons for taking a contrary action. He might say that the obligation to obey is easily overridden in a system with sincere but inept officials. However, he does say that the weight of the obligation in a given case will be greater where the officials make the claim of justice with greater confidence (pp. 150-51). Intuitively, even the great confidence of idiots in their beliefs about what I should do hardly should carry weight in my balancing of reasons, even to tip the balance against my prudential reasons in a close case. Soper also allows that the injustice

31. Soper derives a requirement of formal equality from the requirement of a belief in justice (p. 133) and a requirement of consistency from the requirement of sincerity (p. 133). In my view, consistency in the application of a rule and formal equality are two ways of saying the same thing. See Burton, *Comment on "Empty Ideas": Logical Positivist Analyses of Equality and Rules*, 91 *YALE L.J.* 1136 (1982).

32. Soper could respond that the system run by sincere but inept officials is not a legal system because it violates citizen autonomy in a way that undermines the minimum order necessary for the political bond, thus preserving the integrity of the good faith feature. But the ground for this response would be that the law is not reasonably justifiable in its content. Though Soper does derive some natural rights from the necessity that law provide minimum security to persons (p. 122), this tack in effect imports natural law in its classical form into the definition of law through the concepts of order and personal security. A right to privacy or subsistence, as well as bodily security, could be seen as necessary to minimum personal security. Such a response would deprive Soper's theory of its claimed distinction from some versions of classical natural law. As it is, Soper's treatment of natural rights is in tension with his effort to avoid requiring moral evaluation of facts when identifying legal systems.

Soper also could respond that the claim of good faith would not be credible in such a legal system. This would move his argument from the conceptual and definitional plane to the empirical and descriptive plane, a move he would not want to make given the nature of his study and his frequent criticisms of other theorists for doing just that (pp. 20-26). If the hypothetical system were credible, the problem would remain. If a lack of credibility establishes an absence of good faith, then that determination depends on evaluating the reasonable justifiability of the content of the laws. Classical natural law would be imported into the concept of good faith belief.

of the system itself is relevant to determining what is one's ultimate obligation (pp. 79, 99). In a system of inept officials with laws that are not reasonably justifiable, the obligation would be overridden so uniformly that there would be no point to insisting that it exists at all. The latter remark applies as well if the obligation is a protected reason that excludes wholly prudential reasons for taking a contrary action.

The intuitive rejection of obligation in such a system can be explained. We should distinguish between respect for the officials as persons and respect for the law. Soper's argument focuses on respect for officials who manifest respect for citizens—the mutuality of respect between persons. Respect follows for the law because it is due to officials who are trying in good faith to pursue justice for all and claim that law obligates. But minimal respect for persons can be manifested in two ways within Soper's theory. The citizens have an obligation to treat the law as a moral reason for action that must be taken into account in the balance of reasons when deciding what they should do on an occasion. The officials, however, can manifest respect for a person by only considering the interests of all citizens as a body politic without necessarily hearing their views. The officials, unlike the citizens, may manifest respect without including an individual's views in the balance of reasons when forming their beliefs about justice.³³

In a system run by sincere but inept officials, it may be that respect is due to the officials but not to the law. Citizens could manifest such respect by considering the officials' views on what the citizen should do but declining to admit the officials' views—the law—into the balance of reasons for action at all. The law would be a candidate for being a moral reason for action, but whether it is such a reason would depend on independent moral evaluation of the law by the citizen. The law then would be more like advice or a request than an obligation, even in the weak sense of obligation. It could not be said that there is an obligation to obey the law just because it is the law. The law itself could be treated as morally neutral even while mutual respect is manifested by officials and citizens as persons.

Soper's argument for a conceptual connection between law and morals succeeds only if the law is a moral reason for action that must be

33. Soper believes that the officials' good faith belief in the justice of the system requires them to be prepared to respond to normative challenge with normative justification of their coercive orders. At one point, he writes that mutual respect requires that dissenting citizens "must be assured of a right to insist on evidence of the bona fides of belief in the only form in which sincerity can be tested: communication, dialogue, exchange, debate" (p. 134). Later, however, he seems to acknowledge that a legal system that did not permit public debate nonetheless could respect citizens if it permits a truncated debate limited to the value of debate (pp. 138-39). In any event, it appears that the officials at most only need listen, not that they must give weight to any views expressed in public debate. See J. RAWLS, *supra* note 10, at 337-38.

taken into account in the balance of reasons. The system run by sincere but inept officials suggests that this would require something more than an official good faith belief that the law is just within an effective legal system. It would seem to require that the rules of obligation or the constitutive rules actually have some moral value or at least that the officials be warranted in claiming that the rules are just. It could be necessary that the law be consistent with justice in the classical natural law sense,³⁴ that the law be justified by the best moral and political theory,³⁵ or that the officials who decide the law be competent people, using decision procedures that make it more likely that they will contribute to justice than would autonomous citizens.³⁶ In any such situation, moral respect for the law would be dependent on an evaluation of the law and not just the good faith beliefs of officials.

IV

THE AGENDA FOR LEGAL AND POLITICAL THEORY

These criticisms of Professor Soper's theory of law largely accept the terms of reference that Soper set for his study. The study is a conceptual and definitional effort that seeks to identify the essential features of all legal systems. As indicated in the opening paragraph of this essay, however, Soper believes that legal and political theory have been misdirected in recent years and that his study exemplifies a direction that would be more fruitful. Though I believe that Soper has taken a small step in the right direction, a much more radical redirection is needed.

The right direction partly is manifested by the way in which Soper treats the tension between positivist and nonpositivist theories of law. It has been common to think of the relationship between these two great jurisprudential schools as essentially adversarial. The study of jurisprudence examines the great debates between members of rival schools. It is easy for writers in the field somehow to feel obligated to take sides. Soper wisely does not wish to be read as taking sides in a simplistic manner.

Though his own theory is decidedly nonpositivist, Soper is respect-

34. See generally J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

35. See R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130, 206-22, 340 (1977); Dworkin, *No Right Answer?*, 53 N.Y.U. L. REV. 1 (1978).

36. See S. BURTON, *supra* note 26. This approach to legitimacy requires that a legal system as a whole, see *supra* note 26, both enjoy and deserve the respect of the citizenry. A system may deserve respect if it achieves minimum justice in fact and contains open avenues of legal change for all persons, if members of the legal community are doing jobs that in fact need to be done if there is to be order and justice in an existing society, and if members of the legal community employ legal reasoning such that they are more likely to contribute to order and justice than would autonomous decisions by individuals. See also Raz, *Authority and Justification*, 14 PHIL. & PUB. AFF. 3, 25 (1985).

ful of positivist theories in an instructive way. He advances "a theory of law (with the emphasis, but not too much, on the indefinite article)" (p. 15). It will be recalled that his notion of definition echoes Lon Fuller by emphasizing the purpose for which the definition is to be used.³⁷ Soper identifies two human interests in the definitional venture—an interest in knowing what prudential reasons there may be for avoiding legal sanctions, and an interest in knowing how law affects one's moral obligations. Soper adopts the second point of view, that of the moral person, but he does not deny the value of the first point of view.³⁸ Ultimately, he concedes that positivist legal theories may be useful to the prudential person and, thus, to lawyers advising persons with such an interest (pp. 94, 157). It is because positivist theories of law are not useful to the moral person in his view that he offers a nonpositivist theory of law (p. 10).

This posture is a positive step in the right direction, but it does not go nearly far enough. The problems with taking such a small step can be seen if we consider the resulting relationship that Soper sees between the two great schools of jurisprudence. There are actually two sorts of relationships that are apparent in this book. One avoids the traditional adversarial posture but creates its own problems. The other maintains the traditional adversarial posture unnecessarily.

A nonadversarial relationship between theories is exemplified by Soper's use of the image of a drawing that can be seen simultaneously as a duck or a rabbit (pp. 14, 94). He uses this image to explain one way that he sees the relationship between positivist and nonpositivist theories of law. The implication is that there is a single real phenomenon—the law or the drawing—that can be seen coherently as different things. One cannot choose between the two theories on the ground that one better captures the phenomenon than the other because the reach of the theories is largely coextensive. Consequently, Soper does not claim that he has shown that the classical view of law as force is wrong, only that he has offered an equally good alternative theory in respect of its adequacy as a definition of law (pp. 95, 157).

At the same time, however, Soper maintains an adversarial relationship by arguing at many points that his theory of law is better than any positivist theory. The major thrust of this argument is the claim that positivist theories portray law essentially as force and thus fail to distinguish law from coercive social systems. Such a distinction would be made if all law necessarily yielded obligation. He asserts that the central question for legal theory thus should be not "What is law?" but "What is law that it obligates?" (pp. 1-7). The views of a hypothetical "modern

37. See *supra* notes 5, 7-9 and accompanying text; see also Fuller, *Positivism and the Separation of Law and Morals: A Reply to Professor Hart*, 71 HARV. L. REV. 630, 662-68 (1958).

38. See *supra* note 9.

legal theorist," which usually means Hart or Raz, are a frequent target of strong criticism for this reason. In the end, the implication is that one must choose a view on grounds other than a theory's reach in accounting for the phenomenon (pp. 157-61). This reintroduces a strong element of adversarial rhetoric, though he is sometimes content to treat a skirmish as a "standoff" (p. 95).

The assumption seems to be that any theory of law must capture the objective phenomenon of law, as the duck and rabbit interpretations each captures the drawing, in order to qualify as a candidate for one's adopted theory of law. A related assumption seems to be that the concept of law has an essential feature that is common to all of its instantiations. The effort to develop a nonpositivist theory of law that captures largely the same phenomenon as a positivist theory of law while adding an essential feature, however, may be what generates many of the problems that have been identified in Soper's theory. Though it is too speculative to suggest that Soper has distorted and weakened his theory in order to satisfy such criteria, it is easy to imagine how such distortion might occur.

A very weak theory of obligation is necessary if moral obligation is to be an essential feature of all systems commonly thought of as legal. Soper's very weak sense of obligation, for example, permits him to treat iniquitous systems as legal, as does the positivist, with little if any effect on the justification for civil disobedience. His emphasis on a good faith claim of justice, rather than justice-in-fact, also permits him to capture a wide range of what are commonly called legal systems, as does the positivist. In developing the concept of a good faith claim, the ambiguities concerning what must be believed to be just allow Soper to avoid any need to deny that primitive systems can be legal as well as any need to exclude some systems by insisting that courts or other institutions are necessary for law. This again permits a wide scope to the theory. Assigning the role of essential feature to the good faith claim, however, forces the reader to subject that concept to closer moral scrutiny than it can withstand.

To me, it is puzzling why each good theory of law must capture the same phenomenon and identify an essential feature. It is doubtful that there is a phenomenon called law that is constituted by a set of objective features, some of which are essential. Phenomena are partly constituted by our concepts, and the world of real facts can be carved up in many useful ways. There is little reason to believe that there is simply a drawing to be adequately captured by one theory or two.

Why is it not sufficient to say that law is many things? It may be treated as one thing for the purposes of the prudential person and as another thing for the purposes of the moral person. It may be yet a third thing for other persons, such as the legislator who wants to know what

law must be if it is to be effective or the judge who wants to know what law must be if it is to be justiciable. Soper wisely rejects the question "What is law?" to the extent it implies a singular answer. The question "What is law that it obligates?" suffers from many of the same infirmities. Soper's question is only one of a number of questions that legal theory can treat: What is law that it is prudent to obey it? What is law that it will be effective? What is law that it is justiciable? What is law that a student should learn it? What is law that it is just?

There is no reason why a theorist should presuppose that good answers to all of these questions will identify coextensive phenomena. One would expect a good deal of overlapping and interrelationship. The instances of law may not have any feature in common but may have family resemblances.³⁹ A particular rule that is claimed to be law, for example, may be law for the purposes of the prudential person and the judge. Another particular rule may be law for the judge and the moral person but not the prudential person. A third rule may be law for the moral person and the prudential person but not for the judge. A theory of law in the grand sense would both separate these various things that are law and display their resemblances without pointing to any essential feature.

A similar approach is more obviously desirable for contemporary political theory. Until somewhere around 1970, political theorists concerned with the obligation to obey the law sought a single moral ground for a general obligation to obey all law, just because it is law. Perhaps there is progress in practical philosophy, for political theorists since then commonly have concluded that there is no general *prima facie* obligation of this sort (though not without generating some controversy).⁴⁰ On the surface, such a conclusion is counterintuitive to many. Soper's book can be read in substantial part as an effort to deflect just this trend.

These political theorists, however, are far from revolutionary anarchists bent on destroying law. Any of them could acknowledge that there are moral obligations for many persons to obey many kinds of law—law that prohibits acts *mala in se*, law that establishes a cooperative venture that confers benefits on citizens who do voluntarily accept them, law that is consented to by a citizen or official, law that creates reasonable expectations of compliance by one's fellow citizens, or law that makes it reasonable for fellow citizens to rely on one to comply.⁴¹ These

39. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* §§ 65-76 (G. Anscombe trans. 1958).

40. See, e.g., *Symposium in Honor of A.D. Woozley: Law and Obedience*, 67 VA. L. REV. 3-248 (1981); *Symposium: The Duty to Obey the Law*, 18 GA. L. REV. 727-966 (1984); sources cited *supra* notes 10 & 11.

41. See, e.g., sources cited *supra* note 11.

theorists stress that, in each case, the obligation to obey is not sufficiently established simply by pointing to the law. Rather, the ground for the obligation is some moral principle that may be properly invoked due to features of a situation that are only contingently related to the law. Because these features are not universally connected to the law, it is only when they are present in a situation that there is a moral obligation to obey the law.

If theorists who deny that there is a general obligation to obey the law were to review all of the laws of an existing legal system, using each political theory when it is soundly used, they well might conclude that all or very many of the laws of that system were morally obligatory for many people. This would not be a philosophical project, but one connecting legal and political theory in a different way than Soper advocates. A more philosophical project would create a typology of laws that obligate various groups of people, which may be the rough practical effect of the corpus of relevant political theory taken as a whole. There would be many grounds of obligation, and many laws would be morally obligatory on more than one ground. As in a grand theory of law, such a theory of political obligation would both separate the various kinds of laws that are obligatory and display their resemblances without pointing to any essential feature.

The classical question whether there is an obligation to obey the law just because it is law would arise in such a project if there are types of laws that are not obligatory for some persons on any ground of moral obligation. It would probably be relegated to a place of small importance to citizens and officials. The question would be analogous to the question in contract law whether a wholly executory contract should be enforced if it has not been relied upon in any way before it is repudiated. Law professors are forced to pose implausible hypotheticals to raise the question in their classes; there are few if any cases that have arisen and required a judicial decision. This does not make the question unimportant as a matter of theory, but places it in context and redirects scholarly energies along more important avenues.

Such an approach to political theory would retain a conceptual distinction between legal and moral questions for many purposes. Even for those of us who are devoted to the values of law and morality, however, I fail to see why such a distinction should be troubling. Some positivist legal theorists can be criticized for extending at best a lukewarm invitation to engage in moral deliberation about the law. Kelsen's claim that "justice is an irrational ideal"⁴² did appear to link a legal positivist theory with logical positivism's banishment of morals to the realm of meaning-

42. Kelsen, *The Pure Theory of Law*, 50 *LAW Q. REV.* 474, 477, 482 (1934).

less statements. Hart's claim that judges exercise "discretion" when deciding penumbral cases,⁴³ however, may have been misread by some against the backdrop of Kelsen and the widespread moral skepticism of then-recent decades. At least in his later writings, Hart does not deny that judges have moral obligations in deciding hard cases,⁴⁴ and his views on this question are not radically different from Dworkin's in practical effect.⁴⁵ Raz's later writings are deeply concerned with the legitimacy of legal and other authorities.⁴⁶ He is a practical philosopher first, concerned with legal, moral, and political philosophy, even while separating the concept of a legal system to create an object for moral evaluation.⁴⁷

The modern legal positivist's separation of law and morals can even be read as an insistence on the primacy of morals over law. What the law requires can too easily be taken to define the entirety of a citizen's obligations. Political theory should not consider its central problem to be solved by a theory like Soper's, which even if successful would establish a rather meager obligation that can too easily be misunderstood. If it is taken to be more than a *prima facie* reason for action—if it is taken to be a strong obligation—then independent moral deliberation could be devalued as a consequence. Separating law and moral obligation can lead to a neglect of morality. For this reason, positivist legal theories should not be viewed in isolation. The separation also can lead to much richer moral deliberation.

CONCLUSION

I agree with Professor Soper that much legal theory has become too aloof from the concerns of people and that political theory has suffered from inadequate attention to law. I do not agree that the course he has charted leads away from these problems to something more valuable. Replacing the question "What is law?" with the question "What is law that it obligates?," while retaining the theoretical focus on central questions and singular answers, reproduces too many of the very problems from which Soper wishes to escape.

Despite all of the criticisms I have levelled at *A Theory of Law*, I would not want to leave the impression that this is not an important book. Soper undertook a project that needed to be done. As Raz modified Hart's requirement that officials accept the rule of recognition, Soper

43. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 606-15 (1958).

44. H.L.A. HART, *ESSAYS*, *supra* note 4, at 161; Hart, *Problems of Philosophy in Law*, in 6 *ENCYCLOPEDIA OF PHILOSOPHY* 264 (R. Edwards ed. 1967).

45. See R. DWORKIN, *supra* note 35, at 81-130, 340-41.

46. See J. RAZ, *AUTHORITY*, *supra* note 2; J. RAZ, *PRACTICAL REASON*, *supra* note 2.

47. See Raz, *supra* note 1.

has modified Raz's requirement that the officials claim (sincerely or insincerely) that the rules are just. There is at the core of the book an important idea—that obligation can result from the good faith beliefs of officials on the basis of reason and value. If this idea is at present unpersuasive, it may easily be because it needs to be further developed and reset in a different theoretical context.