

CHAPTER 13

LAW AND OBLIGATIONS

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LAW is a realm of obligation and duty.¹ It may require us to fight wars, to refrain from assault, to pay taxes, to keep agreements, to take care, to report crimes, to protect the environment, and to take its judgments as binding and final. Creating, varying, and enforcing such obligations is not the only business of law. It also secures rights, confers powers, defines terms, and so forth. While it would be wrong to suggest that these can somehow be reduced to obligations, it is none the less true that they can only be fully understood with reference to them. To grasp the significance of the power to contract, for example, one must understand that it gives rise to duties to perform or pay damages. To understand the right to free speech, one must see that it grounds in others a duty not to silence. To understand the definition of a 'minor' one must understand the obligations from which such persons are exempt, and those they are powerless to create or change.

The obligatory character of law is central for another reason. Legal obligations may conflict, not merely with narrow self-interest, but with many other important obligations. The duty of military service may conflict with the duty to care for one's family, the duty to send one's children to school with one's religious duty to promote the faith. The law's own attitude to such conflicts is clear: its requirements are to take priority, except where it permits otherwise. But should we accede to this peremptory attitude, and on what grounds? Obviously enough, particular legal obligations may require things that on their merits ought to be done anyway: they are demanded by morality, efficiency, courtesy, and so forth. But some want to add another argument. They say that, in addition to any such considerations, we also have a moral obligation to do any and all of these things *because* they are required by law, at least when the

¹ For present purposes I use these terms interchangeably.

legal system is reasonably just. That is, they appeal to what the western philosophical tradition calls a doctrine of 'political obligation'. Whether such a reason exists is of both philosophical and practical importance, for the law's own view about the content and exigency of its obligations is enforced, as Locke said, by any penalties up to and including death. Nowhere are the stakes higher.

The tradition was confident of the existence of political obligation and doubtful only about which of two main grounds justify it. Voluntarist theories find their most influential expression in the writings of John Locke, who holds that we have duty to obey the law when, but only when, we consent to its rule. The competing approach, defended by Locke's critic David Hume, maintains that our voluntary acts are here irrelevant, and that the obligation to obey is sufficiently justified by the value of government under law. Of course, these two alternatives were not universally endorsed, but until recently serious doubts were entertained only by anarchists and others who reject the rule of law. The contemporary emergence, and perhaps even dominance, of a third position is therefore of great interest. A number of legal and political philosophers who do value government under law have become sceptical, and reject both the Lockean and Humean traditions in favour of the view that there simply is no general obligation to obey the law as traditionally conceived.² Here, I explore the grounds of such scepticism and gauge its implications for legal theory.

1 OBLIGATION AND THE NATURE OF LAW

The ordinary concept of law comes to us, as Donald Regan puts it, wearing a 'halo',³ on prominent display in the familiar contrast between the rule of man and the rule of law. Perhaps then there is an intimate connection between the obligation-imposing character of law and its positive valence? Could the explanation for the halo simply lie in the fact that law's requirements are also *morally* obligatory? If so, this might suggest a constraint on legal theory. Philip Soper once held that, 'actual obligation is one of the phenomena of legal systems for which theory must account'.⁴ And Ronald

² See M. B. E. Smith, 'Is There a Prima Facie Obligation to Obey the Law?', *Yale Law Journal*, 82 (1973), 950–76; J. Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979); A. J. Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979); J. Feinberg, 'Civil Disobedience in the Modern World', *Humanities in Society*, 2 (1979), 37–60; R. Sartorius, 'Political Authority and Political Obligation', *Virginia Law Review*, 67 (1981), 3–17; L. Green, *The Authority of the State* (Oxford: Clarendon Press, 1988).

³ Donald H. Regan, 'Law's Halo', in Jules Coleman and Ellen Frankel Paul (eds.), *Philosophy and Law* (Oxford: Blackwell, 1987), 15–30.

⁴ Philip Soper, *A Theory of Law* (Cambridge, Mass.: Harvard University Press, 1984), 4. Soper modifies his view in 'Law's Normative Claims', in Robert P. George (ed.), *The Autonomy of Law: Essays on Legal Positivism* (Oxford: Clarendon Press, 1996), 215–47.

Dworkin still maintains that, 'A conception of law must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially powerful'.⁵ From there it may seem a short step to Lon Fuller's conclusion that law cannot be what the positivists think it is, for how could there be 'an amoral datum called law, which has the peculiar quality of creating a moral duty to obey it?'⁶

In fact such views misrepresent the constraint that the obligatory character of law places on legal theory, for they elide three different questions. First, how should we understand the *normativity* of law—the pervasive use of normative terms, including 'obligation' and 'duty', in stating and describing the law? Secondly, what could give the law *legitimacy*—what might justify its rule, including its ultimate use of coercive force? And finally, the question of *obligation*: should the law's subjects take its requirements as morally binding? Though often confused, or at any rate fused, these are different and partly independent problems for jurisprudence.

1.1 Normativity

A theory of law should explain the character and meaning of statements like the following: 'The statutes of Canada must be published in French and English,' 'Citizens of Georgia have an obligation to abstain from sodomy.' But to say that these are simply moral obligations is to say both too much and too little. It is too much since it is notorious that people make such statements without taking the requirements in question as stating any valid moral reason and even while regarding them as quite wrong. It is too little, because it assumes rather than explains what it is to have a moral obligation in the first place.

To have an obligation is to have a reason to act or to refrain from acting—a reason with which one is in some sense *bound* to conform. But in what sense? The exigency of legal obligations is plainly not to be found in their weight or importance: it is as certain that I have a legal obligation not to destroy your junk mail misdelivered to me as it is that this is a trivial matter. On the other hand, courts have extremely weighty reasons not to introduce conflicting rules into the law, yet they have no legal obligation to refrain from doing so. Obligations thus display what H. L. A. Hart called '*content-independence*': their existence does not depend on the nature or significance of the actions they require or prohibit.⁷ But if the exigency of obligations is not a

function of their content, then what is it? Three theories have been especially influential.

On *sanction-based* accounts, to be under an obligation is for it to be likely, or ordered, or justified, that one will suffer a sanction for acting or failing to act in a certain way.⁸ Advanced by Hobbes, Bentham, Austin, J. S. Mill, O. W. Holmes and Kelsen, sanction theories are now nearly friendless. The difficulties are well known.⁹ First, all versions depend on an implausibly wide notion of a sanction, including not only punishments but also civil remedies as such compensation and even mere nullity. Secondly, legal duties do not leave it to the option of the subject whether to comply. 'You have an obligation not to steal' cannot merely mean 'If you steal you will be punished', for judges are not indifferent between people, on the one hand, stealing and being jailed, and on the other hand not stealing at all. Thirdly, legal duties are not bounded by the probability of detection and we refer to obligations when it is certain that no sanction will follow and even when there is no provision for sanction of any kind, as when we say that the highest courts have a duty to apply the law. Finally, while sanctions do provide reasons for acting, they are reasons of the wrong kind. The reason for avoiding a sanction is the disvalue of the sanction discounted by the probability of suffering it. But this variable quantity depends on both the content of the sanction and on the goals of the agent, whereas duties are independent of both.

Such considerations led Hart to suggest that while sanctions might figure in a partial analysis of 'being obliged' to do something, they cannot explain 'having an obligation'. Sanctions are important because they are one of the most dramatic expressions of law's power, its most important technique of reinforcing the duties it imposes—not because they explain what it is to have a duty. Instead, Hart defends a *rule-based* theory according to which we have obligations only when we are subject to social practice-rules of a certain sort. A practice rule exists only when there is regularity of behaviour, deviations from which are criticized, such criticism is regarded as legitimate, and at least some people treat the regularity as a standard for guiding and appraising behaviour and thus use characteristically normative language in referring to it. Not all practice rules are obligation-imposing, however; most are just ordinary customs and conventions. Hart claims that obligations require the presence of three further features: the required behaviour is enforced by serious or insistent pressure to conform; it is believed important to social life or to some valued aspect of it; and it may conflict with the interests and goals of the subject.¹⁰ Since these beliefs and

⁸ A helpful discussion of these variants, and objections thereto, is P. M. S. Hacker, 'Sanction Theories of Duty', in A. W. B. Simpson (ed.), *Oxford Essays in Jurisprudence: Second Series* (Oxford: Clarendon Press, 1973), 131–70. For Hart's reply to Hacker, see his 'Legal Duty and Obligation', in *Essays on Bentham*. However, it is not possible to bring everything Hart says about obligation in this essay into a consistent relationship with his other writings. See in particular his puzzling endorsement of something like a sanction theory at p. 160.

⁹ See H. L. A. Hart, *The Concept of Law*, 2nd edn., ed. P. A. Bulloch and J. Raz (Oxford: Clarendon Press, 1994), 26–49, 82–91.

¹⁰ *ibid.*, pp. 85–8.

⁵ Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986), 90.

⁶ Lon L. Fuller, 'Positivism and Fidelity to Law—A Reply to Professor Hart', *Harvard Law Review*, 71 (1958), 630, repr. in Joel Feinberg and Jules Coleman (eds.), *Philosophy of Law*, 6th edn. (Belmont, Calif.: Wadsworth, 2000), 100.

⁷ For Hart's first statement of this idea, see 'Legal and Moral Obligation', in A. I. Melden (ed.), *Essays in Moral Philosophy* (Seattle: University of Washington Press, 1958), 82–107. His position is later refined in 'Commands and Authoritative Legal Reasons', in his *Essays on Bentham* (Oxford: Clarendon Press, 1982), 243–68.

practices may have as their objects any standards of conduct whatever, the content-independent character of obligations is preserved. The practice theory thus proposes a general account of legal, moral and conventional obligations: *what it is* for an act to be obligatory is the same in each context, though the criteria that determine *which acts are* obligatory vary.

While the practice theory avoids most of the pitfalls of sanction-based accounts, it is in the end no more acceptable.¹¹ People speak of obligations when they are well aware that there are no relevant social practices, as might a lone vegetarian in a meat eating society. The practice conditions may be satisfied in cases where there is no obligation but only generally applicable reasons, as when victims are regularly urged to yield their wallets to a mugger. Most important, the fact that there is an obligation to φ is a reason for φ -ing; yet outside certain special cases the fact that there is a general practice of φ -ing is not a reason for doing as that practice requires. Hart's last writings therefore restrict the scope of the practice theory to the realm of conventional obligations, where the fact of common practice is a non-redundant part of the reason for conforming to it. But not all legal obligations can be understood as merely conventional—many reinforce behaviour that would be mandatory even in the absence of customary conformity, such as the obligation to abstain from rape.¹²

A more plausible account is *justification-based*. On this view, obligations are characterized by the sort of justifications that they purport to offer: content-independent and binding reasons for action. Their bindingness combines two features. First, obligations are *categorical* in force; they apply to the norm-subject independently of his own interests or goals. In view of the use Kantians make of this notion, it is worth emphasizing that there is nothing intrinsically moral in the idea of a categorical reason for acting: 'Shut up!' is a categorical imperative. The second feature is noticed by Hobbes and Locke in their discussions of the nature of political authority.¹³ Obligations require that the subject set aside his own view of the merits of acting and comply none the less. The best elaborated and most persuasive account of this feature is due to Joseph Raz.¹⁴ Obligations are categorical reasons that are protected by *exclusionary* reasons not to act on some of the competing reasons to the contrary. They are reasons for acting, together with 'second-order' reasons *not* to act on some other

reasons. Two cautions should be noticed. First, the excluded reasons must be presumptively valid; if a certain fact in itself provides no justification for doing something, then one needs no special reason not to act on it. Exclusion rules in the law of evidence, for example, direct one not to rely on certain considerations that would otherwise be relevant; one does not appeal to them to explain why we should not draw inferences from irrelevant or invalid considerations. Secondly, obligations exclude *some* contrary reasons—typically at least reasons of convenience and ordinary preference—but they do not normally exclude all. An exclusionary reason therefore is not a reason of absolute weight, but a reason of a different order. The binding character of obligations thus depends not only on the power of the justifications it offers for doing something, but also on its power to exclude from consideration competing contrary considerations.

A justificatory account of obligation is not free of controversy, and it is subject to refinement, but it makes good on the deficits of the sanction-based and rule-based theories. It accounts for some familiar features of obligations, and it gives a credible picture of the practical conflicts referred to at the outset—we can think of these as practical assessments made from different viewpoints, distinguished by the sorts of considerations they permit or exclude. As we might put it, '*legally speaking* there is an obligation to φ ' means that from the point of view of the law there are binding reasons to φ and exclusionary reasons not to act on some of the reasons to the contrary. But this might not represent all relevant reasons from the moral point of view—perhaps some of the reasons that law purports to exclude are precisely the most morally salient reasons. To say that something is taken as, or put to us as, a binding, content-independent reason is not to say that it is one, so there is no commitment to the unacceptable thesis that all legal obligations are of their nature moral obligations though, as with the practice theory, there is a unified explanation of obligations in these different realms.

1.2 Allegiance

The normativity of law thus involves questions about how law presents itself to us. Questions of allegiance, which have dominated Western political philosophy at least since the seventeenth century, bear on how the law's subjects should respond. But what exactly is the issue of allegiance? Hume, to whom that term is due, refers indifferently to the 'moral obligation to submit to government', the duty to accept 'the authority of the rulers', the rulers' right to punish, and the 'blind submission' owed by subjects.¹⁵ He treats these as roughly equivalent ideas and draws no distinctions among them. Certainly they all find a place in ordinary moral reflection about the

¹¹ Ronald Dworkin, *Taking Rights Seriously* (Cambridge, Mass.: Harvard University Press, 1978), 48–58; Joseph Raz, *Practical Reason and Norms*, rev. edn. (Princeton: Princeton University Press, 1990), 53–8.

¹² Even with respect to conventional obligations, the practice theory ultimately fails, for conventional rules provide only ordinary reasons for acting, not binding ones. I explore various aspects of this issue in the following papers: 'Law, Co-ordination, and the Common Good', *Oxford Journal of Legal Studies*, 3 (1983), 299–324; 'Authority and Convention', *Philosophical Quarterly*, 35 (1985), 329–46; and 'Positivism and Conventionalism', *Canadian Journal of Law and Jurisprudence*, 12 (1999), 35–52.

¹³ Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (Harmondsworth: Penguin, 1968), pt. II, ch. 25: 303; John Locke, *Two Treatises of Government*, ed. P. Laslett (Cambridge: Cambridge University Press, 1963), II, s. 87: 367.

¹⁴ See Joseph Raz, 'Promises and Obligations', in P. M. S. Hacker and J. Raz. (eds.), *Law, Morality and Society: Essays in Honour of H. L. A. Hart* (Oxford: Clarendon Press, 1977), 210–28; and Joseph Raz, *Practical Reason and Norms*, 35–84.

¹⁵ David Hume, *A Treatise of Human Nature*, ed. L. A. Selby-Bigge (Oxford: Clarendon Press, 1967), 547, 548, 554.

law; but are they really interchangeable? Other philosophers do not make that assumption. Locke, for example, holds that one may be entitled to coerce others without any positive authority over them, at least where this is licensed by the 'executive power of the law of nature'.¹⁶ Hobbes maintains that the state is entitled to coerce people who have no duty to submit, since the necessity for self-preservation voids all positive obligations.¹⁷ Those possibilities suggest that we should at least distinguish the question of what justifies the rule of government—the problem of *legitimacy*—from the question of what justifies the duty to obey—the problem of *obligation*.¹⁸

Questions of legitimacy bear on both the scope and the location of authority: by what right does the law make and enforce its requirements? By what right does *this* legal system, among all actual or possible claimants, do so over *these* subjects? Questions of obligation involve the moral justification for taking law at its word and rendering the obedience it demands: treating it, as explained above, as a categorical and binding reason to act, not only thinking, but also acting, from the legal point of view. It is important to see that obedience is therefore more than a willingness to 'support and comply with' the law, in Rawls's phrase. One may comply with the law by doing what it in fact requires, without knowing that there is law or what it requires. Such a coincidence between law and behaviour is both common and desirable, since a reasonably just legal system should often require us and motivate us to do what we have independent reason to do. While it is true that compliance without obedience is usually sufficient to avoid sanctions, one obeys the law only if one is actually guided by it.

Whether there is an obligation of obedience is thus a matter of whether we should act from the legal point of view and obey the law as it claims to be obeyed.¹⁹ What it claims is supreme power to determine our rights, obligations, powers, and liberties, and to have our compliance independent of our individual assessment of the merits of what is required. This obligation lapses if the regime is fundamentally illegitimate, but it is supposed to survive at least minor and occasional injustices of its laws. That there is such an obligation is assumed or at least avowed by officials, though the extent to which they share views about its grounds is hard to discern.²⁰ Judges speak and act as if those subject to the law have a duty to obey it, unless they are exempted by some other legal or legally recognized principle, and they treat sanctions as reinforcing motivation and not as an option.²¹ As Donaldson MR put it, 'The right to

disobey the law is not obtainable by the payment of a penalty or a licence fee. It is not obtainable at all in a parliamentary democracy . . .'.²²

The official point of view is significant, for it is one of the main sources for evidence about the content of political obligation, the other being traditions of argument within the community. Identifying and understanding these is a crucial task for descriptive legal theory. And since every description of an object is a selection from among all possible facts about it, every description displays evaluative considerations in determining which facts are salient.²³ At the same time, however, it is not a matter of first-order moral or political argument. When we ask the moral question how we should respond to law's requirements, we are concerned not with how it might be desirable for law to address us, but with how it does.

The most insistent critic of this view is Dworkin. He rejects the descriptive enterprise and with it the ordinary concept of obligation, suggesting instead that law is binding only in some 'more relaxed way'.²⁴ One can get a feeling for just how relaxed this is from his view that understanding the law is *never* a matter of trying to grasp what it requires of us, but rather a matter of 'Each citizen . . . trying to discover his own intention in maintaining and participating in that practice'.²⁵ Obedience does not involve a citizen's response to the law demands, but rather a 'a conversation with himself', and thus 'Political obligation is . . . a more protestant idea: fidelity to a scheme of principle each citizen has a responsibility to identify, ultimately for himself, as his community's scheme'.²⁶ While it is not possible here to explore these ideas fully, a few remarks are in order. While it is true that whenever I interpret something I am the interpreter, that hardly makes me the hero of every story. That my interpretative ambitions are mine does not show that *content* of my interpretation is an attempt to discover my intentions in participating in that practice. We often interpret practices in which we do not participate, and what it might mean for an ordinary citizen to 'maintain' the practice of law is obscure. Even in a democracy that effectively guarantees political participation, ordinary citizens are *law-takers* in much the way that consumers in a competitive market-place are price-takers: each is confronted by legal requirements that respond to his will, if at all, only in concert with the will of others. Thus, each individual subject no more decides to maintain the practice of law than each individual speaker decides to maintain the meaning of words. To identify the law's requirements with what each individual would do well to imagine it requiring, were the matter up to him, is to give a misleading picture of the structure and depth of the moral conflicts referred to at the outset of this chapter. Like some

¹⁶ Locke, *Two Treatises*, II, ss. 8–9: 312–13.

¹⁷ Hobbes, *Leviathan*, pt. II, ch. 14: 199.

¹⁸ On the distinction see especially Kent Greenawalt, *Conflicts of Law and Morality* (New York: Oxford University Press, 1987), 47–61, and William A. Edmundson, *Three Anarchical Fallacies: An Essay on Political Authority* (Cambridge: Cambridge University Press, 1998), 7–70.

¹⁹ Joseph Raz, *Authority of Law*, 233–49.

²⁰ See Mark Hall and George Klosko, 'Political Obligation in the United States Supreme Court', *Journal of Politics*, 60 (1998), 462–80.

²¹ *U.S. v Macintosh*, 283 U.S. 605 (1931), at 623. See discussion of this material in Hall and Klosko, 'Political Obligation in the United States Supreme Court'.

²² *Francombe v Mirror Group Newspapers Ltd.* [1984] 2 All ER 408 at 412.

²³ I follow Amartya Sen, 'Description as Choice', in his *Choice, Welfare and Measurement* (Oxford: Blackwell, 1982). For a contrary view about the role of evaluation in description see John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980), 3–19.

²⁴ Dworkin, *Law's Empire*, 429 n. 3.

²⁵ *ibid.* 58.

²⁶ *ibid.* 413. For criticism on this point see G. J. Postema, '“Protestant” Interpretation and Social Practices', *Law and Philosophy*, 6 (1987), 283.

Hegelians, Dworkin does not actually confront the problem of obedience; he avoids it.

Having distinguished legitimacy and obligation, the question arises what the relationship is between the two. There is clearly no moral obligation to obey an illegitimate legal system—not even an explicit promise would bind one in a Nazi or Stalinist regime. (Though one may have moral reasons for compliance with particular edicts.) But while legitimacy is thus necessary for obligation, the converse is not true.²⁷ I am justified in resisting unlawful arrest, but have no authority over the offending officer. The Allies were justified in coercing the Nazis and enforcing the Nuremberg judgments, but had no right to command German citizens. Dworkin disagrees. ‘No state should enforce all of a citizen’s obligations’, he writes,

But though obligation is not a sufficient condition for coercion, it is close to a necessary one. A state may have good grounds in some special circumstances for coercing those who have no duty to obey. But no general policy of upholding the law with steel could be justified if the law were not, in general, a source of genuine obligations.²⁸

One of these claims is not controversial: there are moral obligations that law should not enforce, for example, ordinary promises, fidelity to one’s lover, and so on. If the law were sufficiently invasive in such matters it would lose its legitimacy. The other points however are doubtful. Dworkin supposes law should be enforced only if it is a source of valid obligations. But that condition is surely too narrow, for it is also a proper function of law to secure conformity with weighty moral reasons, whether or not they are independent obligations, and coercive sanctions are sometimes the best way to do that. One may believe that law should protect the environment and punish polluters without thinking this is a matter of prior moral obligation: it may not be obligatory at all—it may be an ordinary moral reason of great weight—or its obligatory character may be a consequence of rather than a reason for law’s intervention.²⁹ In any case, these points—that coercive law must be legitimate and must be justified by moral reasons—are quite different from the idea that legitimate coercion must rest on a prior obligation *to obey* and, in the face of the Lockean objection, they lend nothing to its credibility. States properly coerce members of other states over whom they neither claim nor exercise any authority. That being so, there must be something like a prior moral right to enforce the requirements of justice. It does not matter whether we follow Locke as far as thinking this a natural right to *punish*—perhaps the concept of punishment is too closely bound up with the idea of positive authority to be disentangled.³⁰ But the essential point remains: within a general theory of allegiance, legitimacy and obedience are different issues.

²⁷ See further, Green, *The Authority of the State*, 71–5, 149–53, 242–3.

²⁸ Dworkin, *Law’s Empire*, 191.

²⁹ On the capacity of law to create moral wrongs, see Tony Honoré, ‘The Dependence of Morality on Law’, *Oxford Journal of Legal Studies*, 13 (1993), 1–17.

³⁰ Thomas D. Senior, ‘What if There are No Political Obligations?’, *Philosophy and Public Affairs*, vol. 16, 260–8.

1.3 Justification

Law’s claims are therefore substantial and invite moral scrutiny. Unless the obligation of obedience is supposed to be primitive,³¹ we should be able to ground it in some familiar moral principles. But law is not the only social institution that claims obedience, and the plausibility of its claims cannot be assessed without considering further its nature. Are we therefore dependent on an adequate theory of the nature of law before we can assess the validity of a duty to obey?

Soper once held that ‘the idea about what law is already entails the conclusion about the obligation to obey’³² and, as we have seen, Fuller thinks that an ‘amoral datum’ cannot create a duty to obey. That, however, is too simple. Even if law is austere a matter of fact, that tells us nothing about whether there is an obligation to obey the law as determined by such facts. After all, whether or not someone has promised, and what he has promised to do, are also matters of fact determined by what he has said and done and by the conventions about such words and commitments. But promises generate obligations to perform. There is no reason why the same might not be true of law as positivists conceive of it. Contrariwise, the existence or content of law may depend on morality and yet this might not entail a general duty of obedience. Even if there is a necessary connection between law and morality, that might only mean that every true legal system is necessarily legitimate or, more weakly, has systemic value. None the less, the Fuller–Soper position points to an important truth. Although political obligation is not entailed by law’s nature, it is constrained by it. As we have already seen, recognizing an obligation of obedience involves more than paying careful attention to law, or treating it as food for thought, or as valuable advice. But we cannot know whether there is a duty to obey *the law* unless we know something about law and the role it plays in human life. So aren’t we back in Soper’s bind? Not exactly, for there are significant features that are recognized by any plausible theory of the nature of law, but which stop short of determining such a theory.

First, law is *institutionalized*: it is the product not only of human thought and action and in that sense a social construction; it is more significantly the product of institutionalized thought and action. Nothing is law that is not in some way connected with the activities of institutions such as legislatures, courts, administrators, police, and so on. Neither ideal social norms nor general social customs, but only an institutionally relevant subset of these, count as law. Institutionalization is a matter of degree; the highly centralized and differentiated institutions of modern legal systems are but one possibility. Nor need we suppose that law is exhausted by

³¹ E. F. Carritt maintained, ‘all attempts to explain this recognition of political obligation in terms of something else lead to confusion, self-contradiction, and the evident misdescription of facts which we cannot doubt’. *Morals and Politics* (Oxford: Clarendon Press, 1935), 2. But even a basic obligation can be non-reductively illuminated.

³² Soper, *A Theory of Law*, 8–9.

institutional facts. Those are matters in dispute among legal theories—Hart says that law is just those standards that courts are bound to apply in accord with their own customary practices; Dworkin holds that it includes any moral reason that is good ground for a court's decision. But on the general idea of the institutional character of law, positivists and modern natural lawyers are in agreement.

Secondly, law has a *wide scope*. It is a significant part of our concept of law that it is not limited to the affairs of a small group, such as a club, nor does it only attend to one restricted domain of life, such as baseball. Law governs high-stakes, open-ended domains, and is capable of regulating the affairs not only of small 'face-to-face' societies but large, dispersed, loosely structured organizations of many millions of people. Whether law chooses to exercise as much authority as it can is another question. Most modern legal systems, and all legitimate ones, are legally limited, but we should have no illusions about their power or importance: they not only claim power to regulate but *actually* regulate the most vital interests of all within their territory.

Thirdly, law is *morally fallible*.³³ It may require behaviour that is iniquitous, such as fighting in immoral wars. It may proscribe behaviour that is innocent, such as homosexual activity. It may fail to impose obligations that we all should bear, such as a duty of easy rescue. And it may do morally desirable things, such as taxation for public goods, in unjust ways. Morality always stands in appraisal of law, and not the other way around. Again, this is neutral between positivism and natural law. No one claims that law is morally infallible, and even if there is some necessary connection between law and morality, this is not it. The explanation for the fallibility of law may take competing forms, but the general idea is another of the deepest features of law for which any competent theory must account.

These three features do not specify a theory of law—they do not even suffice to distinguish law from all other forms of social order. They are jointly compatible with the most stringent legal positivism or the most capacious natural law. But together with the analysis of obligations, they help anchor an account of allegiance to law and release us from Soper's bind. From the fact that we are considering a moral obligation of obedience, it follows that we are seeking a binding and content-independent moral reason for compliance, one that is universal in the sense of covering all subjects of the law and all occasions on which their compliance is required. From the fact that it is obedience to *law*, we know that these requirements are broad-ranging, morally fallible, and are connected with institutions that are in some way distinct from the ordinary flow of social life. One last constraint follows from the doctrine of legitimacy. Legitimacy is a necessary condition for obligation, and legitimacy is a matter of both the scope and the location of authority. Although Swedish law may be sufficiently legitimate, Canadians have no obligation to obey it—not even if it should address itself to them. The obligation of obedience is thus understood to bind individuals to

³³ H. L. A. Hart, *Law, Liberty and Morality* (Stanford, Calif.: Stanford University Press, 1963), 3–4; and David Lyons, *Ethics and the Rule of Law* (Cambridge: Cambridge University Press, 1985), 66–8.

a *particular* legal system, the one of which they are citizens or subjects.³⁴ 'Particularity', as it is often called, does not presuppose or entail that reasons for obedience are agent-relative in character; it may be a consequence of the local urgency or efficacy of agent-neutral considerations, for example, the duty of beneficence or justice. Particularity seeks to reflect the common understanding that there is a special relationship between individuals and their legal systems, one that will tell in case of conflict between the requirements of their own system and any other. How can law which is institutionalized, wide-ranging, and morally fallible generate universal, particular, and binding reasons to act? That is the problem of political obligation. As we shall see, it is a very difficult problem.

2 VOLUNTARY OBLIGATIONS

2.1 Consent

A distinctive theme of Western political thought is the idea that political obligation is justified only by the consent of the governed.³⁵ In Hobbes, Locke, Rousseau, and Kant we find many variations on the claim that our duties to law are determined by some form of individual agreement, whether express or tacit. Promises, contracts, oaths, and vows all fall into this general area. In its core meaning, consent of these sorts is not only voluntary, it is performative: it is given with the intention of changing the rights, duties, powers, or liabilities of another, and it succeeds in part because it is known to be done with that intention.³⁶

Allowing that consent may bind, it does not automatically follow that it does so in this context, for there are limits to what even competent adults can commit themselves to. This is the core of Locke's argument in the *Second Treatise*. If there are promissory powers we necessarily lack then we can never be held to have validly exercised them. On any plausible view, the capacity to enslave oneself is such a power. Thus, absolute governments are always illegitimate. Locke's argument suggests a more general worry, however, for there are other boundaries to our normative powers, including defeating conditions such as mistake, coercion, or duress. Precisely because law has a wide scope and is morally fallible, the promise to obey may seem

³⁴ It is of course possible to owe particular obligations to more than one legal system. For discussion and defence of the particularity requirement see Simmons, *Moral Principles and Political Obligations*, 31–5, and Green, *The Authority of the State*, 227–8.

³⁵ For helpful discussion of the voluntarist tradition see Patrick Riley, *Will and Political Legitimacy* (Cambridge, Mass.: Harvard University Press, 1982).

³⁶ Cf. Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 80–2.

fatally open-ended and, if irrevocable, hazardous. Perhaps then its validity is limited to situations with further safeguards, including periodic reaffirmations of consent, if not Renan's *plébiscite de tous les jours*. And what should we say about duress? It is notorious that loyalty oaths tend to proliferate in the very circumstances in which they are invalid. The extorted professions of loyalty in seventeenth-century England or in the McCarthy years in the United States bound no one, and the same is true now of those demanded of refugee immigrants or military conscripts. Some have argued, following Hume, that such problems are endemic because people rarely have any choice but to live under their law. While that may be a sound objection to the idea that continued residence itself counts as consent, it does not show that express consent never binds. As Harry Beran argues, those who freely assume full membership of their political community when there is a right to exit and secession and space for internal dissidents cannot be said to be forced to remain.³⁷ And we must not conflate the correct idea that most people have no effective choice but to stay in their country with the suggestion that they have no effective choice but to acknowledge an obligation to obey it. Mere compliance with the law is normally sufficient to avoid coercive pressure.

To show that political consent is not inevitably defeated does not, however, show that it is valid. We also need to explain why we should want a power to bind ourselves to government in the first place. Hume challenges the Lockean to account for the moral obligation to obey the law:

Your answer is, *because we should keep our word*. (. . .) I say, you find yourself embarrassed, when it is asked, *why are we bound to keep our word?* Nor can you give any answer, but what would, immediately, without any circuit, have accounted for our obligation to allegiance.³⁸

Contrary to what Hume here implies, however, Locke does have a non-redundant theory about this.³⁹ It is not conspicuous in the *Second Treatise* because it is not necessary there, where the central question is about the limits of any possible promise, and not the justification for keeping promises in general. But Hume's objection is of interest for what it reveals about his view of consent. He thinks promising is solely a matter of 'public utility', by which he means the 'apparent interests and necessities of human society'.⁴⁰ We must keep our promises only because promising is an instrumentally useful institution; but in complex societies the very same is true of government, which cannot exist without the 'exact obedience' of its subjects.⁴¹ We therefore have a duty to obey whether or not we have consented. Both of these artificial virtues 'stand precisely on the same foundation' and 'being of like force and authority, we gain nothing by resolving the one into the other'.⁴²

³⁷ Harry Beran, *The Consent Theory of Political Obligation* (London: Croom Helm, 1987).

³⁸ David Hume, 'Of the Original Contract', in *Essays, Moral Political, and Literary*, ed. E. F. Miller (Indianapolis: Liberty Classics, 1985), 481.

³⁹ See *Essays on the Law of Nature*, ed. W. von Leyden (Oxford: Clarendon Press, 1958), 183.

⁴⁰ Hume, 'Original Contract', 481.

⁴¹ *ibid.* 480.

⁴² Hume, *Treatise of Human Nature*, 481, 'Original Contract', 481.

Though this argument seems to have persuaded many, it is fundamentally flawed. Hume's quarrel with a rationalistic meta-ethics here obstructs his understanding of the substantive morality. To defend the necessity of consent one does *not* need to show that promising is natural or primary, but only that it has special value in the circumstances. The fact that two normative practices have ultimate foundations of the same type does not prove that one is not necessary for the validity of the other, any more than the fact that two rooms rest on the foundations of one house proves that one can enter the second without passing through the first. In defending consent, theorists appeal to two different sorts of considerations. First, there are instrumental reasons for wanting deliberate control over our duties. When their incidence depends on the will of those who bear them, there is generally less chance that they will be harmed. That is admittedly not the only way to protect subjects, but it is a good one when the stakes are as high as they are in the case of allegiance to law. It is true that the requirement of legitimacy also does some of this work—however, legitimate governments are still imperfect governments, and consent enables individuals to limit their commitments if they need to. It also empowers those who wish to change their allegiance from one legitimate government to another to do so forthwith, without awaiting the slow growth of other sorts of moral ties.

But this is not the whole story. Such instrumental considerations do not explain the role of promising in all contexts. To require that people can marry only with their own consent, for example, obviously has instrumental benefits; but the exchange of promises has a further role as constitutive of a valued relationship and as a solemn expression of its beginning. Hume's instrumentalism conceals these functions, but perhaps we see them at work in Locke's suggestion that while almost any receipt of law's benefits will count as 'tacit' consent to obey, only actual explicit consent will make people 'members' of a commonwealth.⁴³

Those are the main reasons for thinking that consent, if given, could bind. But *is* it given? It is by many officials, by voluntary immigrants, and by others in special cases; but many do nothing that can properly be counted as consent. The career of consent theory in the face of its evident failure of universality is a history of its extension, dilution, and ultimately subversion. Consider only the two most famous salvage attempts to produce 'tacit' consent on the part of those who apparently do no such thing. Continued residence was suggested already in the *Crito* and famously and fatally elaborated by Locke:

every man that hath any Possession or Enjoyment, of any part of the Dominions of any Government, doth thereby give his *Tacit Consent* (. . .) whether this his Possession be of Land, to him and his Heirs for ever, or a Lodging only for a Week, or whether it be barely travelling freely on the Highway.⁴⁴

⁴³ Locke, *Two Treatises*, II, s. 122: 394. For commentary see A. John Simmons, "'Denisons' and 'Aliens': Locke's Problem of Political Consent", *Social Theory and Practice*, 24 (1998), 161–82.

⁴⁴ Locke, *Two Treatises*, II, s. 119: 392.

This fails because performative consent is tied to certain conventions: it must be *recognized* that ϕ -ing in circumstances C counts as consenting, and the individual must ϕ intentionally or at least knowingly invoke that convention. One cannot consent by accident. Owning property or benefiting from the rule of law notoriously does not mean that the subject thereby undertakes a duty of obedience, so if it generates any duty to obey it cannot be by a voluntary route. Esoteric arguments to the effect that it *ought* to bear this meaning simply concede the point. Participation in politics, the other main candidate, fares no better. Not only is participation itself nowhere near universal, no one—certainly not the police or courts—thinks those who do not vote have no, or even weaker, obligations to obey. Thus the common analogies between participation and promissory estoppel are misguided.⁴⁵ It may be that in ordering a meal I induce a restaurateur to serve me in the expectation of payment, but it is also crucially true that those who do not order, or who order while announcing that they will not pay, do not get served. In politics, in contrast, the responses and expectations of others are not correlated to one's degree or kind of participation. Whether or not one has voted, run for office, or served on a jury, one is met with the very same demands for and expectations of obedience.

Consent to a legitimate government thus provides exactly the sort of reason the tradition has in mind: it generates a content-independent, binding reason to comply and it establishes a special relationship with a particular legal system. Perhaps that is why Hume, who thinks consent both improbable and unnecessary, none the less concedes that among the possible foundations for obligation consent is 'the best and most sacred of any'.⁴⁶ That it cannot yield a duty of anything like the right scope sets legal theory off on the search for an alternative.

2.2 Expressive Theories

Even if the obligation to obey must be voluntary, it does not follow that it must be the result of a performative act intended to assume an obligation. It may be enough that obligation is in some way a necessary consequence of a contingent relationship voluntarily created.

What I shall call 'expressive theories' adapt the second function of promising to a non-performative context. The most popular model here is friendship.⁴⁷ While people usually choose their friends, they do not do so in order to have people to owe duties to. Indeed, such a reason for making friends is incompatible with true friendship. But once one has friends, one has obligations to them—obligations of support, honesty, and reciprocity. Whatever other reasons one might have for fulfilling these obligations, doing so also expresses and is known to express loyalty to one's friends.

⁴⁵ e.g. Peter Singer, *Democracy and Disobedience* (New York: Oxford University Press, 1974), 45–59.

⁴⁶ Hume, 'Original Contract', 474.

⁴⁷ Raz, *Authority of Law*, 250–61.

Expressive theories offer the most plausible non-reductive interpretation of the traditional arguments from gratitude or community.⁴⁸ On such views we are bound to obey because that is an appropriate expression of emotions that we have good reason to feel: gratitude to the law for all that it gives us, respect for its good-faith efforts to guide us, or a sense of belonging to a community under law. Joseph Raz suggests, 'A person identifying himself with his society, feeling that it is his and that he belongs to it, is loyal to his society. His loyalty may express itself, among other ways, in respect for the law of the community.'⁴⁹ When such an attitude is permissible—when the law is legitimate—and when it flourishes it is a genuine source of obligations.

Although expressive obligations are sometimes valid, they none the less fail to justify the duty to obey the law. They leave unexplained why *obedience* fittingly expresses gratitude or loyalty to law. It is not enough to say 'it just does', as we might to one who asks why the word 'dog' refers to dogs. In addition to any conventional aspects, certain relationships have internal necessities that make expressive behaviour appropriate or inappropriate, and these necessities depend on the nature and purposes of the relationships in question. Consider Locke's objection to attempts to ground the duty of obedience in such notions as the biblical injunction to honour one's parents:

A Man may owe *honour* and respect to an ancient, or wise Man; defence to his Child or Friend; relief and support to the Distressed; and gratitude to a Benefactor, to such a degree, that all he has, all he can do, cannot sufficiently pay it: But all these give no Authority, no right to any one of making Laws over him from whom they are owing.⁵⁰

Locke's claim that one should *thank* a benefactor, *respect* the wise, or *defend* a friend are not claims about what is conventional, but about what is fitting in view of the nature of the relationship in question; that is why they do not call for the kind of authority and obedience we see in law. For Locke, obedience *is* fitting in other contexts, for example, the relationship of parent and child, or creator and created. Children do not choose their parents, nor creatures their creators, and they owe them obedience, if they do, on grounds that have nothing to do with voluntarism.

Moreover, even where there are conventional aspects to the expression of gratitude, respect, or loyalty to the law, and where obedience is a possible expression of those feelings, it does not follow that obedience is the only or best way to show it, as Raz acknowledges. Our idea of the appropriate expression of gratitude is not determined by the subject–state relationship. Only in rare and highly ritualized cases is there a mandatory way to express respect, such as in prescribed forms of dress or address in court. In our cultures, the conventional meaning of obedience is actually more complex, for our moral heritage is not only Hebrew but also Greek. Alongside

⁴⁸ See A. D. M. Walker, 'Political Obligation and the Argument from Gratitude', *Philosophy and Public Affairs*, 17 (1988), 191–211, and G. Klosko, 'Political Obligation and Gratitude', *Philosophy and Public Affairs*, 18 (1989), 352–8.

⁴⁹ Raz, *Authority of Law*, 259. See also his 'Government by Consent', in J. R. Pennock and J. W. Chapman (eds.), *Authority Revisited: Nomos XXIX* (New York: New York University Press, 1987), 76.

⁵⁰ Locke, *Two Treatises*, II, s. 70: 356.

the idea that obedience to law is a proper expression of the devotion of a people, we have also inherited the idea that it displays a servility inappropriate in a city of free and equal citizens. These conflicting meanings typically leave the individual considerable latitude as to how to express the attitudes in question.

Finally, feelings of gratitude, loyalty, and respect are most at home in the personal contexts that form the paradigms for expressivism. Their extension to the institutionalized and bureaucratic realm of law is generally far-fetched. We must remember Hart's lesson that the alienation of law and life is a standing risk in modern society, that the law is precisely *not* a smoothly fitting part of *Sittlichkeit*, or the soul of a nation, and this flows not from corruption or injustice but simply from the estrangement of law and people that is inevitable when law is bureaucratized, technical, and arcane.⁵¹ For all of these reasons, expressivism seems destined to fare little better than performative consent in grounding obligations to obey.

2.3 Fairness

The last significant move within the voluntarist tradition abandons the claim that obedience depends on either performative or expressive acts, and retreats to the position that it flows from a mere willingness to benefit from the reciprocal compliance of others. The element of will thus remains, though in an attenuated form compatible with the bureaucratic and alienated nature typical of legal cultures. Perhaps the most influential contemporary theory of obligation, the theory of fairness or fair play was defended by Hart⁵² and most influentially elaborated by Rawls thus:

Suppose there is a mutually beneficial and just scheme of social cooperation and that the advantages it yields can only be obtained if everyone, or nearly everyone, cooperates. Suppose further that cooperation requires a certain sacrifice from each person, or at least involves a certain restriction of his liberty. Suppose finally that the benefits produced by cooperation are, up to a certain point, free: that is, the scheme of cooperation is unstable in the sense that if any one person knows that all (or nearly all) of the others will continue to do their part, he will still be able to share a gain from the scheme even if he does not do his part. Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not to take advantage of the free benefits by not cooperating.⁵³

The validity of that general moral principle has sometimes been doubted. Robert Nozick, for example, offers a variety of counterexamples intended to show that without consent the receipt of benefits cannot bring an obligation to reciprocate: 'If each day a different person on your street sweeps the entire street, must you do so when

your time comes? Even if you don't care that much about a clean street? Must you imagine dirt as you traverse the street, so as not to benefit as a free rider?'⁵⁴ He invites similar scepticism about a duty to help provide music through a public address system, or to pay for books that someone has thrust on you. In fact, such cases do not meet the Hart–Rawls conditions: they are mere externalities, or independent of co-operation, or unjust in their distribution of benefits and burdens.⁵⁵ Most important, however, in none of them can the beneficiaries plausibly be said to 'accept' the benefits. Admittedly, Rawls never specifies what that condition requires, but Simmons's proposal that they must either try to get the benefits and succeed, or take them knowingly and willingly seems broadly consistent with the spirit of the principle.⁵⁶

The role of the acceptance condition is controversial,⁵⁷ but it is common ground that without it fairness does not create voluntary obligations. (We shall see below, in Sect. 3.2, where it actually leads.) Acceptance does not, of course, *reduce* fairness to consent: those who jump subway turnstiles accept the benefits of public transportation without intending to assume any obligation to pay their fair share. But the acceptance condition none the less renders fairness vulnerable to the very same objection as the consent principle: not enough people perform the relevant action. Many benefits, including law and order, national security, public health and so on, are what Simmons calls 'open benefits' that could be avoided only by extraordinary changes in one's life style, by internal exile in a remote part of the country, or by emigration (which will only take one to another country and another set of compulsory benefits). This is not to deny that some people willingly accept the benefits of co-operation and are therefore bound in fairness to do their part. Some immigrate in search of them, or assume roles and positions calculated to yield them. And even if a minimum package of benefits is standard and unavoidable, many actively pursue more—their children enjoy compulsory schooling but also clamour for places in public universities. Although the basic moral principle is valid and relevant in such cases, it simply does not carry the obligation to obey as far as law reaches.

Finally, unlike both consent-based and expressivist theories, fairness is insufficiently particularized, for such benefits as people do willingly accept do not always respect the boundaries of legal systems. Americans tune in to the Canadian Broadcasting Corporation, Canadians to National Public Radio, and everyone uses the internet. With greater transnational communication and co-operation, such benefits are only likely to expand. No doubt some particularization of our duties can be explained by the fact that many systems of co-operation are local; but this rough and ready truth does not track the claims of law.

⁵¹ Hart, *Concept of Law*, 117.

⁵² H. L. A. Hart, 'Are There Any Natural Rights?', *Philosophical Review*, 64 (1955), 175–91.

⁵³ John Rawls, 'Legal Obligation and the Duty of Fair Play', in S. Hook (ed.), *Law and Philosophy* (New York: New York University Press, 1964), 9–10.

⁵⁴ Robert Nozick, *Anarchy, State and Utopia*, (New York: Basic Books, 1974), 94

⁵⁵ See Simmons, *Moral Principles and Political Obligations*, 118–36.

⁵⁶ *ibid.* 106–8.

⁵⁷ Richard J. Arneson, 'The Principle of Fairness and Free-Rider Problems', *Ethics*, 92 (1982), 616–33.

3 NON-VOLUNTARY THEORIES

While other variations on voluntarism are no doubt possible, it is difficult to see how any such theory can survive the objections to consent, expressivism, and fairness, for these flow from a common problem. It is of the essence of voluntarism that it is rooted in the wilfulness of political arrangements, and the jurisdiction claimed by law seems bound to overreach the contingent relations established by individual choice. To Hume, that suggests an obvious conclusion:

[I]t being certain, that there is a moral obligation to submit to government, because everyone thinks so; it must be as certain, that this obligation arises not from a promise; since no one, whose judgment has not been led astray by too strict adherence to a system of philosophy, has ever dreamt of ascribing it to that origin. Neither magistrates nor subjects have form'd this idea of our civil duties.⁵⁸

Hume's objection to consent may be generalized, for all voluntary obligations depend on the beliefs of the subject. One cannot promise by accident—'no man can either give a promise or be restrain'd by its sanction and obligation unknown to himself'⁵⁹—but neither can one unwittingly express an attitude or accept a benefit. So Hume is right to say that lack of the relevant belief negatives a voluntary obligation of obedience. But Hume also claims that there must be an obligation because 'everyone thinks so'. Notice that this second appeal to belief is of logically different status from the first. *Absence* of the first-person belief that one has performed the relevant voluntary act negates the claim that one has a voluntary obligation. But the *presence* of a belief that there is a non-voluntary obligation does not validate it. The fact, if it be one, that 'everyone thinks so' may suggest that *there is* an obligation to be justified, but it cannot itself be a *ground* of that obligation. Because non-voluntary obligations are belief-independent, common opinion is not decisive one way or another. What we therefore need is some moral principle that applies in these circumstances and is capable of generating obligations of obedience to law. The most influential candidates are of two types.

3.1 Associative Obligations

The smallest departure from voluntarism retains one of its main features: the contingency of social relations. For the voluntarist, this is explained by the fact that such relations are created if not deliberately then at least willingly. For the associationist, these are merely special cases. Following the philosophical idealists through the lush overgrowth of organic metaphor, they emphasize the gradual growth and

development of significant relationships like family, religion, and community. Common moral thought holds that family, for example, owe each other special duties of loyalty, respect, and support that partly constitute their relationship but which do not, or at any rate need not, arise from agreement. There is an important truth here, for we are often less engaged in choosing, pursuing, and revising our goals than we are in adapting and accommodating ourselves to the contingencies the world throws up—for example, even those who choose parenthood do not choose their particular children with their unique constitutions and temperaments.⁶⁰ A theory of allegiance to law ought surely to find some way to accommodate this reality.

Like communitarian theories of justice, with which they have certain affinities, associationist doctrines of obligation are often vague, asserting that people in organic associations feel obligated by their membership, but without articulating any moral reasons that might ground those feelings.⁶¹ One version focuses on the obligations attached to social roles. There are two problems about role obligations, and they are often poorly distinguished.⁶² First, there is the question of validity: what establishes that the duties attached to a station are binding even when one is conscripted into it? Most associationist theories overemphasize this issue and treat the problem of role obligations as if it were a matter of explaining why non-voluntary duties ever bind. But that is a false problem. Anyone who recognizes that there are voluntary obligations must also recognize non-voluntary ones, for the duty to keep agreements cannot itself be founded on agreement. Moreover, there may not be any general obligation to perform the duties of one's station; these may be justified piecemeal by different considerations in different cases. The apparent general duty may simply be an intermediate conclusion summarizing a range of unrelated reasons, including the dependence of others on one's performance.

The second problem is about content. Why should we acknowledge a role consisting of just *these* duties? Associationists sometimes argue as if in explaining how non-voluntary obligations are possible we have automatically explained why their scope and content should be determined by social roles, but that plainly does not follow. Dworkin ventures an answer to this question. He says that we have 'a duty to honour our responsibilities under social practices that define groups and attach special responsibilities to membership . . .'.⁶³ These duties are not consent-based; their content and liability depends on group practice rather than on individual agreement, and practice not only identifies but in some way also justifies the duties, provided that certain conditions hold. First, every true community must be a bare community

⁶⁰ See Charles Larmore, 'The Idea of a Life Plan', *Social Philosophy and Policy*, 16 (1999), 96–112.

⁶¹ A. J. Simmons, 'Associative Political Obligations', *Ethics*, 106 (1996). C. H. Wellman, 'Associative Allegiances and Political Obligations', *Social Theory and Practice*, 23 (1997), 181–204.

⁶² Cf. Michael O. Hardimon, 'Role Obligations', *Journal of Philosophy*, 91 (1994), 333–63.

⁶³ Dworkin, *Law's Empire*, 198. I discuss Dworkin's account in greater detail in 'Associative Obligations and the State', in Allen Hutchinson and Leslie Green (eds.), *Law and the Community: The End of Individualism?* (Toronto: Carswell, 1989), 93–118, and draw on that argument here.

⁵⁸ Hume, *Treatise of Human Nature*, 547.

⁵⁹ *ibid.* 549.

satisfying the minimal conditions for group life as defined by social practice.⁶⁴ Next, its members must think that their obligations are special, personal, and derive from some good-faith interpretation of equal concern for the well-being of all members. These conditions are said to justify associative obligations as such: 'If the conditions are met, people in the bare community have the obligations of a true community whether or not they want them . . .'.⁶⁵

No doubt political associations bear certain similarities to other non-voluntary relationships: people rarely choose their states, they do not agree with all their laws, nationality structures their identities, political relationships grow organically, and membership in a state may in some cases have intrinsic value. But there are also significant disanalogies. Once again, the institutional nature of law militates against any secure fit between legal order and social life. If parenthood or neighbourhood are associations, they are so in a sense that brings them closer to the desires and needs of their occupants. Subjects of the legal system do not normally stand to those institutions as neighbours stand to their neighbourhood. Then there is the matter of scope. In the paradigmatic cases of associative obligations there is a degree of social intimacy that cannot be expected in law. As Rousseau puts it, 'The more the social bond is stretched, the slacker it becomes'.⁶⁶ Should that not give us pause?

Dworkin's account avoids this problem. He denies that the conditions for associative obligation involve actual beliefs or desires of members of the association, or even of anyone at all. They are 'interpretive properties': 'practices that people with the right level of concern would adopt—not a psychological property of some fixed number of the actual members'.⁶⁷ That is to say, a bare community becomes a true community if a certain complex argument holds true, irrespective of its members' attitudes. Dworkin's rhetoric aside, this is obviously at some remove from associative obligations and the organic view of social life that inspires them. Such obligations seek to explain the moral force of the contingent and accidental; when they fall out of a necessary interpretative imputation that no one may actually endorse, detached from the lives of its subjects, it is plain that we have left associative obligations far behind.

Nor is it clear how the problem of content is to be resolved. Dworkin's paradigm for associative ties is the non-voluntary association of siblings—fraternity is the exemplar that he has in mind. But the content of fraternal or sororal obligations lies in the neighbourhood of mutual aid or respect, not obedience. That is why the usual associative model for obedience relations is not in fact the horizontal association among siblings but the vertical hierarchy of parent and child. However, the normal arguments for parental authority have nothing to do with communal association: they are instrumental or expressive. Perhaps there is an expressive element in Dworkin's theory, for he requires that as a condition of legitimacy a community

⁶⁴ Dworkin, *Law's Empire*, 207–8.

⁶⁵ *ibid.* 201.

⁶⁶ *The Social Contract*, bk. II, ch. 9, trans. M. Cranston (Harmondsworth: Penguin, 1968), at 90.

⁶⁷ Dworkin, *Law's Empire*, 201.

display the virtue he calls 'integrity': a principled coherence expressing a doctrine of equal concern for its members. That virtue may be admirable; it may contribute to legitimacy. But while someone's having integrity may win them our respect, admiration, and emulation, it does not follow that it is wrong for us to interfere with their projects and ambitions, nor does it give them any claim to our obedience.

It is a final worry for any associationist view that it is liable to generate conflicting communal obligations, as it perhaps did for Antigone, caught between her sisterly and religious duty to bury her brother and her ruler's command forbidding it. As subjects are often also sisters and patriots parishioners, associative obligations are endemically competing.⁶⁸ These conflicts, unresolvable from the point of view of each association, suggest why communitarianism is, as Dunn rightly says, a feeble and sentimental solution to the problem of political obligation:

Religious and social solidarity, so far from being the solution to the problems of political instability, are virtually the source of that instability. The point of political obligation was precisely to contain, to bring under rational and humane control, the diffuse but vivid menace which these wider imaginative binds represented.⁶⁹

3.2 Necessary Institutions

In all accounts canvassed thus far there is a pressure in the direction of arguing that political obligation is somehow inevitable or necessary. The final theory overtly embraces this idea. In Hume, but also at points in Hobbes or Kant, we find the view that law is a necessary institution without which the most prized things of life would just be impossible, and that an obligation of obedience is a necessary condition for the existence of law. That thought pulls us away not only from every form of voluntarism, but from contingency itself. The fundamental argument is stated by Elizabeth Anscombe: 'If something is necessary, if it is, for example, a necessary task in human life, then a right arises in those whose task it is, to have what belongs to the performance of the task'.⁷⁰

There is a forensic problem of identifying the necessary institutions. Hobbes and his successors propose a rationalistic method: an institution is necessary if suitably motivated and situated people would agree to adopt it. If sound, such an argument identifies what we have reason to believe, want, or do; it does not of course show that we actually believe, want, or have done it. In contrast to an actual contract theory which is a species of consent, hypothetical contractarianism lies wholly in the realm

⁶⁸ The importance of obligations to secondary associations is emphasized by Michael Walzer, *Obligations: Essays on Disobedience, War, and Citizenship* (Cambridge, Mass.: Harvard University Press, 1970), 4–23.

⁶⁹ John Dunn, 'Political Obligation', in David Held (ed.), *Political Theory Today* (Stanford, Calif.: Stanford University Press, 1991), 29.

⁷⁰ Elizabeth Anscombe, 'On the Source of the Authority of the State', *Ratio*, 20 (1978), 17.

of the rational (though, in its most influential versions, a thin and even foolish view of rationality).⁷¹ Others follow Hume's empiricism:

A small degree of experience and observation suffices to teach us that society cannot possibly be maintained without the authority of magistrates, and that this authority must soon fall into contempt, where exact obedience is not paid to it. The observation of these general and obvious interests is the source of all allegiance, and of that moral obligation, which we attribute to it.⁷²

And here we may also include the speculative teleologies of Aristotelian theories according to which political activity is necessary to the full development of human nature.

Though there are therefore different ways of identifying the necessary institutions, with somewhat different results, most accounts share certain features. One well-developed representative is due to George Klosko.⁷³ Although he wants to ground obligation in reciprocity, he rejects as too stringent the idea that the benefits of law must be accepted, or even flow from some scheme of co-operation. His idea is rather that there are certain 'presumptively beneficial public goods', goods that anyone would want and which require social co-operation to produce. Now Klosko appears to treat this in a Hobbesian or Humean way, as defined by reference to the wants of the subjects; but a generalization of his approach could adopt an objective theory of benefit, grounded in reasons that apply to everyone rather than reasons of which they are aware. And thus not only self-interest or personal needs, but also security for the interests of others or the public may be among the presumptively beneficial effects of law.

There is no doubt that some of what law does is in this way essential—above all, it saves us from the parlous circumstances of a state of nature. But law's ambitions are more expansive than that. It also does things that are permissible but not necessary: it prohibits cruel treatment of animals, enacts residential zoning, declares official languages, establishes national holidays, supports education and the arts, creates honours, and promotes exploration of the heavens. And in the service of what is mandated by necessity, law draws lines and distinctions that are themselves merely permissible—it defines an age of consent, an acceptable level of risk imposition, formalities for wills and marriages, and so on. It is important to notice that neither the vast range of permissible state activity, nor the permissible determinations, to use Aquinas's term, of necessary activities are fixed by the requirements of legitimacy.

What then is the connection between the necessary and the permissible? Klosko's view is that the state must provide the necessary goods, and if it does that, it may also provide discretionary ones provided that it does so fairly. But that is not exactly the

issue: the question is not whether it is legitimate to provide optional goods, but whether there is the same obligation of reciprocity to contribute to their provision as there is to the necessary ones. One cannot argue that the optional goods are all essential for the necessary ones: it is hard to see how space exploration is necessary to airline safety. But there is a more fundamental objection here. Even where there are instrumental relationships between the two kinds, they do not transmit obligations from ends to means. If *A* has an obligation to ϕ and χ -ing is a necessary, or even highly desirable means to ϕ -ing, it does not follow that *A* has an obligation to χ . If I have an obligation to pay you five dollars tomorrow, and the only way I could pay is to give you the five silver dollars my mother gave me as a present, it does not follow that I have any obligation to pay you in silver. Obligation imposing reasons are not transitive across ideal, or even necessary, means to their fulfilment.

What's more, it is unclear what *is* necessary for law to fulfil its socially necessary functions. It is sometimes alleged that law needs exactly what it demands. As Creon puts it in *Antigone*: 'Whoever is chosen to govern should be obeyed | must be obeyed, in all things, great and small | just and unjust', failing which there is only anarchy: 'This is why cities tumble and the great houses rain down | this is what scatters armies'.⁷⁴ Hume similarly holds that the authority of the magistrate cannot survive without 'exact obedience'. But all such claims founder on the fact that what is actual must be possible. Law does not in fact enjoy exact obedience, and disobedience in certain small or unjust things does not bring cities to ruin. It is obviously possible for legal systems to withstand certain kinds and quantities of disobedience, and when that brings more good than harm there can be no objection on grounds of necessity.

This is wholly consistent with the thought that legitimate government is a necessary and beneficial institution. The only issue is whether a policy of general obedience is a necessary policy. In many areas of life we need an efficacious common policy, and no such settlement can survive if everyone should pick and choose when to comply. All of that is true. But an argument that *some* policy is needed is not an argument in favour of a *particular* policy. And the policy that we are considering here, that of taking all of the law's requirements as binding, is but one of the options. There is no reason to think that in all legitimate states, at all times, and for all people it is always the optimal one. The state's own view is something like *actual-rule* utilitarianism: the thesis that obeying the actually existing set of legal obligations is always best. Where law is both institutionalized and morally fallible, this is the least plausible form of consequentialism going.

I mentioned above that although Klosko sees his doctrine of presumptive public goods as an elaboration of fairness, its logic actually pulls away from that theory. Let us pursue this idea further. If law's benefits really are so important then we should not remain indifferent to their provision. If there are things that everyone desperately

⁷¹ See Amartya Sen, 'Rational Fools', in his *Choice, Welfare, and Measurement*.

⁷² Hume, 'Original Contract', 480.

⁷³ George Klosko, *The Principle of Fairness and Political Obligation* (Lanham, Md.: Rowman and Littlefield, 1992).

⁷⁴ Sophocles, *Antigone*, trans. Dudley Fitts and Robert Fitzgerald (New York: Harcourt, Brace and Co., 1940), 46.

needs, and if co-operation is needed to provide them, then surely it is wrong to fail to provide them. While the principle of fairness prohibits free-riding, it does not show that one must enter any given scheme of co-operation in the first place. Those who jump turnstiles are free-riders and violate the obligation to pay their share; but those who walk instead of taking the subway do not. Klosko's argument for the crucial importance of presumptive goods—goods that are the very foundation of social life—thus has little in common with a fairness-based theory. In fact, it leads in the direction of Rawls's mature thought, which abandons fairness in favour of an obligation based on the natural duty of justice:

This duty requires us to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves. Thus if the basic structure of society is just, or as just as it is reasonable to expect in the circumstances, everyone has a natural duty to do his part in the existing scheme. Each is bound to these institutions independent of his voluntary acts, performative or otherwise.⁷⁵

This is about as far as one can plausibly move from voluntarism. Yet the duty to comply with just institutions may not always counsel obedience. Even in a reasonably just state, and even with respect to those laws that are, from the point of view of justice, non-optional, there may be cases in which disobedience is licensed by natural duty. Reasonably just legal systems may have local and occasional injustices, provided these are not too severe. What would be wrong with complying with these laws only as far as such compliance is necessary to ensure respect for the administration of justice?

Moreover, the idea that we must comply with just institutions that 'apply to us' seems unacceptably broad. John Simmons argues convincingly that an institution can apply to me and be just and yet fail to bind me to comply with its rules. An Institute for the Advancement of Philosophers cannot benefit me, however justly, and then demand that I pay its dues.⁷⁶ He concludes that Rawls fails to distinguish a weak, purely descriptive, sense of 'application', meaning that one falls within the scope of an institution, and a stronger normative sense according to which the institutional duties are not merely addressed to me, but are binding for me. As a voluntarist he thinks that could only result from my agreement or at least acceptance of its benefits.

This seems plausible if we are thinking of purely optional benefits. But according to Jeremy Waldron,⁷⁷ the example reveals an ambiguity between two senses of 'just'. Although the Institute *operates justly*—it fairly distributes the benefits it provides, it does not discriminate, and so on—it is not an institution whose activities are *required by justice*. On the contrary, it is clearly optional from that point of view. But, asks

Waldron, if the aim of the Institute were to give aid to the homeless, and if this were required by justice rather than charity, and if that institution were an efficacious means of doing this, would we not have a duty to assist it, irrespective of any agreement or benefit on our own part? If Hobbes or Kant are right that the rule of law itself is not an optional extra but a matter of the direst necessity, and if we suppose that this necessity is most urgent with respect to those with whom we regularly interact—our neighbours—might there not be a 'range-limited' duty to obey any institution able to secure it?⁷⁸

Although the distinction between an institution that behaves justly and an institution that achieves justice is important, so too is the distinction between an institution that does justice and an institution that *only* does justice. As I argued above, it is false to suppose that all of a reasonably just state's activity can be accounted for in this way. Thus, natural duty and necessity arguments both fall to the same objection: the conditions of legitimacy set the boundary of the *permissible* in law, not the *mandatory*. To show, against libertarian partisans of minimal government, that there is nothing wrong with state-subsidized moon-landings, national parks, or art galleries is not to show that these are required by justice. A natural duty argument will thus only ground a narrow obligation to obey the law—an obligation to obey those laws that are intimately connected with the requirements and administration of justice.

All necessity arguments thus suffer from an underlying problem: they try to get the theory of legitimacy to do too much work, a tendency that stems, strange as it may sound, from overvaluing justice. Despite the recent consensus that justice is the 'first virtue of social institutions', political institutions also have other virtues and are liable to other vices. The fact that we have a notion of tolerable injustice—one worth putting up with for the sake of other benefits—suggests that justice should sometimes take a back seat to other ideals. Law should indeed do justice, but it should also protect animals and the environment, maintain aesthetic ideals, encourage excellence of character, and promote the general conditions for human flourishing. Law's capacity to do such things is limited—some can only be promoted indirectly—and how it goes about it is constrained by the conditions of legitimacy. But within those limits law may properly set obligations for us, and here the natural duty of justice is ill placed to follow.

4 SCEPTICISM AND ITS SIGNIFICANCE

The accumulated failures of all voluntary and non-voluntary theories strongly suggest that there is no obligation to obey the law. How can legal theory tolerate such

⁷⁵ John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971), 115

⁷⁶ Simmons, *Moral Principles and Political Obligations*, 148.

⁷⁷ Jeremy Waldron, 'Special Ties and Natural Duties', *Philosophy and Public Affairs*, 22 (1993), 1–30.

⁷⁸ *ibid.* 14–16.

scepticism? Hume writes, 'nothing is a clearer proof, that a theory of this kind is erroneous, than to find, that it leads to paradoxes repugnant to the common sentiments of mankind, and to the practice and opinion of all nations and ages.'⁷⁹ Klosko too thinks this is among our deepest intuitions: 'the existence of strong general feelings that we have political obligations . . . is supported by our most basic feelings about politics. I take it as obviously true that most people believe they have obligations to their governments.'⁸⁰

Does this suggest that scepticism about obligation must fail to achieve a 'reflective equilibrium' between our considered judgments about cases and a systematizing normative theory?⁸¹ Shouldn't we accept our most basic pre-theoretical judgments, what Rawls calls our 'provisional fixed points' in argument: fixed because we are not to abandon them lightly, but provisional because they might, in principle, yield to a sufficiently persuasive theory? Perhaps. But the Rawlsian problem of coherence is not really in play here.⁸² The 'fixed point' that these philosophers detect is not a judgment about a *case*—as it is when we demand that utilitarian theories explain why we should not punish the innocent. On the contrary, what feels fixed is a *theory*, namely, the theory of political obligation. No one argues that the sceptic's theory cannot be brought into equilibrium with casuistic judgments about when the law should be obeyed. There is no suggestion that a sceptic cannot explain why we should sometimes obey a law that is pointless or unjust; it is understood that in such cases he may appeal to content-dependent considerations, such as the risk of setting a bad example, upsetting expectations, or causing unfairness. The sceptic's claim is simply that such considerations do not generalize to a content-independent, universal obligation to obey. What scepticism actually conflicts with is the theory that everyone has such an obligation—but that is no more relevant than the fact that utilitarian theories of punishment conflict with retributivism. Agreeing with one's competitors is not a condition of reflective equilibrium.

A Humean *reductio* cannot therefore be justified in this way; it must instead rest on confidence in the method of common opinion in moral philosophy. The cogency of such arguments cannot be addressed here. Luckily, we do not need to, for there is in fact no convincing evidence to show that a belief in a general duty to obey is part of common, as opposed to official, moral consciousness.⁸³ Of course, subjects generally do have pro-attitudes towards their legal systems, but we should be careful in pronouncing about their content. In some general remarks on philosophical method, Thomas Nagel writes, 'Given a knockdown argument for an intuitively unacceptable

conclusion, one should assume there is probably something wrong with the argument that one cannot detect—though it is also possible that the source of the intuition has been misidentified'.⁸⁴ Sceptical arguments about political obligation fall into the second alternative. The most plausible source of the intuition is three more general theses, all sound, and all consistent with scepticism:

- T1. There is normally good reason to do what law requires.
- T2. Some people have moral obligations to obey the law.
- T3. There are some laws that everyone has a moral obligation to obey.

What is false is only:

- T4. Everyone has a moral obligation to obey all the laws.

Denying T4 denies what some subjects take to be true, and what officials put it about as true: that there is always a binding, content-independent moral reason to do as the law requires of us. This will, in appropriate cases, make a difference to our practical reasoning, and it will make an even more significant difference to our understanding of the relationship between the individual and the law. Chaim Gans doubts this. He thinks sceptics deny that there is a general obligation to obey on the basis of trivial or esoteric examples—'jaywalking at three o'clock in the morning'—whereas these are not cases in which anyone ever cites the obligation to obey to begin with.⁸⁵ Rather, we see it at work when bad laws should none the less be obeyed, or when civil disobedients acknowledge that political obligation establishes a special justificatory burden. Yet here, Gans complains, the sceptic actually *agrees* on the outcome—he insists, as I did above, that in such cases there may be special reasons to comply with law. '[I]t would seem preferable to interpret people's views on practical issues in the way which best supports their practical implications, rather than rejecting these views and then resurrecting all their significant practical ramifications, in the manner of the anarchists.'⁸⁶

This is, however, a misunderstanding. First, the theories are not extensionally equivalent: the sceptic insists on considering countervailing reasons that the believer in political obligation excludes and that will make a difference at the margin in a variety of cases. Secondly, the esoteric cases do matter, for they are the crucial tests. Where obedience is pointless, where there is reason to disobey and no content-dependent reason to obey, there we should expect to see the force of political obligation. These test cases are different from the crazy hypotheticals put forward in some other areas of philosophy, for instance, those that invite us to speculate about what we would 'intuitively' say about personal identity after teleportation. There is no science fiction in speed signs in the desert. We have experience of them; we know what we

⁷⁹ Hume, 'Original Contract', 486.

⁸⁰ Klosko, *The Principle of Fairness and Political Obligation*, 22, see also 68.

⁸¹ Rawls, *Theory of Justice*, 19–21, 46–53, 578–86. Cf. N. Daniels, 'Wide Reflective Equilibrium and Theory Acceptance in Ethics', *Journal of Philosophy*, 76 (1979), 256–82.

⁸² I argue this point more fully in 'Who Believes in Political Obligation?', in W. A. Edmundson (ed.), *The Duty to Obey the Law* (Lanham: Rowman and Littlefield, 1999), 301–17.

⁸³ The best study is T. R. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990). I argue that it fails in 'Who Believes in Political Obligation?'.

⁸⁴ Thomas Nagel, *Mortal Questions* (Cambridge: Cambridge University Press, 1979), p. x.

⁸⁵ Chaim Gans, *Philosophical Anarchism and Political Disobedience* (Cambridge: Cambridge University Press, 1992), 90.

⁸⁶ *ibid.* 90–1.

would say; and anyone not in the grips of a theory will see that it strongly suggests that there is no general obligation of obedience.

It is also doubtful that the significance of political obligation is displayed in real cases of civil disobedience. It is striking that, as far as one can tell, every significant theorist who defends the obligation of obedience thinks his own jurisdiction is sufficiently just to trigger it. Locke wrote to make good William's claim; Hume wanted to include even China and Persia. It is clear that contemporary philosophers who defend political obligation have in mind their own countries, or countries very much like them. (One is reminded here of Kelsen's remark about the ideological drift of natural law theories: everyone who believes there are moral requirements for the validity of law also believes that his own legal system, properly understood, satisfies them.)⁸⁷ The idea that political obligation is normally thought to erect a significant moral hurdle against disobedience is puzzling. David Lyons rightly asks, 'how could philosophers of good will have assumed that moral justification was required to disobey laws supporting chattel slavery, racist colonialism, or Jim Crow?'⁸⁸ Indeed, it is unhistorical to think that Thoreau, Gandhi, or King thought their societies reasonably just and that disobedience called for special justification. But it is equally true in our day that the Greenham Common women, or ACT-UP, or the Seattle protestors, thought their societies radically defective and denied any moral inhibition to disobedience beyond establishing the justice of their cause. Political obligation seems as idle here as it does elsewhere.

The answer to Fuller's question is therefore clear. How does it come to be that law has the unusual quality of creating an obligation to obey it? It doesn't—there is no such obligation. To the different question of how law seems obligatory and what its halo consists in we have other answers. Our theory of normativity will give us some interpretation of the obligation-statements that are so central to law, and our theory of legitimacy will explain how and when law is justified in enforcing its rule. Beyond this, however, the general problem of an obligation to obey will just drop out.

Soper wonders whether that is coherent. He asks, 'How could it be that the practice of law, in the claims it makes, is so out of step (and presumably has always been out of step as long as states have existed) with moral philosophy?'⁸⁹ Perhaps the practice of law is not so deferential to philosophy, or perhaps statements of legal obligation are not always made with their full force. The fact that law must be put forth as morally obligatory does not entail that it must *be* morally obligatory. Compare the case of papal authority. Suppose a sceptical argument to the conclusion that popes lack the infallibility they claim—suppose that atheists or the reformed Christian churches are right in thinking this an unjustifiable pretence. Would this in any way

⁸⁷ Hans Kelsen, 'Law and Morality', in his *Essays in Legal and Moral Philosophy*, ed. O. Weinberger (Dordrecht: D. Reidel, 1973), 92.

⁸⁸ David Lyons, 'Moral Judgment, Historical Reality, and Civil Disobedience', *Philosophy and Public Affairs*, 27 (1998), 48.

⁸⁹ Philip Soper, 'Law's Normative Claims', 231.

undermine our confidence in the *character* of the claim? Would it suggest that the pope doesn't really claim any such authority after all? That is implausible. It is a familiar feature of many social institutions and roles that their nature is determined by what their occupants say and do, rather than by the validity or plausibility of those claims.

At this point there may be a temptation to acquiesce in the failure of the theories while resisting its significance. Jonathan Wolff is among those who succumb: 'I do not think that it is a flaw in a theory of political obligation if it has the consequence that some people are left without political obligations. To see this we should start by asking why universal political obligation was thought so desirable in the first place.'⁹⁰ The error here is simply that it is not a question of what is desirable, but of what it is. When we are attempting to understand deep features of our institutions, conceptual reformism is out of place. This is not to deny that our concepts may change. Popes did not always claim infallibility—that was a nineteenth-century innovation—and they may someday abandon it. There are, however, limits to how far an institution can change while retaining its identity. (Could a pope abandon the doctrine of apostolic succession?) Perhaps law will cease to claim authority, judges will no longer insist on the duty to obey, and we will all treat it as a price system. But in that case law itself will have changed, and our interest in its obligations will simply fade out.

5 THE PLACE OF OBLIGATION

How then should we respond to law's claims? In some circumstances, we may endorse Thoreau's robust rigorism: 'It is not desirable to cultivate a respect for the law, so much as for the right. (. . .) Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the instruments of injustice.'⁹¹ That is the right answer in an unjust regime. In more benign circumstances, however, the mixed policy indicated by T₃ would be justifiable: there may be core areas and issues with respect to which one should accept an obligation of obedience and others that demand watchful attention. This is not a 'pick and choose' strategy, but neither is it political obligation, although depending on the scope and content of the core, it may approach it (this may have been Hart's view).⁹²

⁹⁰ Jonathan Wolff, 'Political Obligation, Fairness, and Independence', *Ratio* (n.s.) 8 (1995), 97.

⁹¹ Henry David Thoreau, *Walden and 'Civil Disobedience'* (New York: New American Library, 1960), 223.

⁹² 'The recognition of an obligation to obey *the law* must as a minimum imply that there is at least some area of conduct regulated by law in which we are not free to judge the moral merits of particular laws and to make our obedience conditional on this judgment. In a modern state it seems most

Beyond this, we should acknowledge that good citizenship under law is a complex ideal. It involves obligations, but also of virtues, supererogations, and ideals. Does that suggest that the problem of political obligation is ill-posed? Bikhu Parekh claims that 'political obligation properly so-called has little to do with the obligation to obey the law' but is better understood as 'an obligation to take an active interest and to participate in the conduct of public affairs, to keep a critical eye on the activities of government, to speak up against the injustices of their society, to stand up for those too demoralized, confused and powerless to fight for themselves, and in general to help create a rich and lively community'.⁹³

It is pointless to quarrel over words. The standard term for the duty of obedience is 'political obligation', though John Dunn may be on the mark in calling that 'a nineteenth-century name for a typically seventeenth-century problem'.⁹⁴ It is certainly not a theory of civic virtue, nor does it exhaust the obligations that conscientious citizens owe their law. But broadening the scope of 'political obligation' to include these other virtues and duties will not answer the sceptic, for on no plausible theory does political obligation not *include* the duty to obey the law. Without the central duty of obedience, a more comprehensive theory of political obligation is simply unmotivated.

We might, however, draw a different lesson from Parekh's observation: it may be that a single-minded focus on political obligation has occluded other important relationships to the law. Some desirable actions, traits and dispositions are not obligatory at all. Reflecting on his fellow Scots' tepid and sometimes tentative allegiance to the Hanovers, James Boswell wrote:

However convinced I am of the justice of that principle, which holds allegiance and protection to be reciprocal, I do however acknowledge, that I am not satisfied with the cold sentiment which would confine the exertions of the subject within the strict line of duty. I would have every breast animated with the *fervour* of loyalty; with that generous attachment which delights in doing somewhat more than is required, makes 'service perfect freedom'.⁹⁵

That aspiration is laudable. Good citizenship aims for more than the calculating rigour of duty. It also seeks the virtues of civility, including tolerance where intolerance would be permitted, and the supererogatory acts that Boswell so admires. But beyond obedience and beyond civic virtue, there may still be other obligations in play.⁹⁶ Consider an analogy. A thriving market economy cannot survive merely on the punctilious observation of the obligations of property and contract; it requires

plausible to suggest that this area is that which includes matters of defense and economic welfare but excludes, say, matters of religion or esthetic taste.' Hart, 'Legal and Moral Obligation', 82–107.

⁹³ Bikhu Parekh, 'A Misconceived Discourse of Political Obligation', *Political Studies*, 41 (1993), 243.

⁹⁴ John Dunn, 'Political Obligation', 24.

⁹⁵ James Boswell, *A Journal of a Tour to the Hebrides with Samuel Johnson* (London: J. M. Dent, 1901), 189.

⁹⁶ In *Authority of the State* I mistakenly assumed that what is not an obligation of obedience must be a matter of virtue only.

also customary practices that cannot be provided by law or the market—what Durkheim calls the non-contractual foundations of contract. Many of these lie in the realm of political culture, and establishing them afresh is very difficult, as post-Soviet Europe has taught us. But there are also other exigencies of civil society: we must be open to dealing with strangers, we must deal in good faith, and we must not exploit inevitable loopholes in our agreements. It is not too much to regard these as social obligations antecedent to the market. Law does what it can to support and reinforce them, but it is helpless to create them *ex nihilo*.

Much the same holds true of the rule of law. The excessive focus on obedience has concealed at least three other sorts of obligations that underpin legal order.

1. *The obligation to facilitate the rule of law.* Natural duty theorists are correct to emphasize this, and wrong only to treat it as the foundation for obedience. Law itself supports the obligation to facilitate the rule of law, by imposing duties to report crimes, or to refrain from obstructing the police, or to avoid contempt of court, or to serve as a juror or witness. But there are many more occasions on which we can further or hinder the rule of law than there are occasions when we can obey. What's more, we can undermine the rule of law *without* disobeying. In the anti-poll tax days, the Scottish Labour Party mounted a 'Stop It' campaign, urging people not to withhold payment but to return their forms querying everything possible in an effort to make the tax unadministrable.⁹⁷ While some frivolous or vexatious queries may be prohibited by law, the administrability of any tax scheme counts on a considerable degree not only of voluntary compliance, but also limiting questions and objections that one is legally entitled to make.

There is a temptation to equate the rule of law with a system in which there is both willing compliance and, when that fails, rigorous and fair-minded enforcement. But, paradoxical as it seems, from the perspective of the rule of law there can be not only too little compliance, but also too much. Officials undermine it when they over-police areas in which it is proper to prohibit but wrong aggressively to enforce: indecency offences, jay-walking, drug use. Subjects undermine it when they obey when they should resist. Obedience is part of the rule of law, but not the whole, and not always the most important part.

2. *The obligation to know the law.* A second neglected obligation is logically prior to obedience. One cannot be guided by a law that one does not know. Of course, many legal systems disallow (for good reason) the defence of ignorance of the law and in that sense presuppose that subjects know it. But I have in mind something deeper—a basic acquaintance with the most significant legal institutions and traditions of one's own state. This is not necessary for the existence of law—as Hart argues, all that is needed from ordinary subjects is general compliance. Nor is it necessary for human

⁹⁷ See Richard Bellamy, 'The Anti-Poll Tax Non-Payment Campaign and Liberal Concepts of Political Obligation', *Government and Opposition*, vol. 29 (1994), 27.

perfection: it is permissible to take little interest in the law, and to tend one's own garden. But the rule of law cannot flourish where everyone withdraws in that way, even if each has some valid reason for so doing.

In spite of all the discussion of the arbitrary and even inconsistent⁹⁸ character of Holmes's suggestion that we understand law from the point of view of the 'bad man', little has been said about why the instrumentally motivated merit the criticism implied in his term 'bad'. If law really were a price system, this would make no sense. To explain it, we need to account for the importance of law's subjects being properly motivated by the law. There is nothing wrong with most people having no grasp of interstate trucking regulations or the requirements for certifying a class-action lawsuit—if they need to know they can ask their lawyers. But there is surely a moral deficiency in a society committed to the presumption of innocence, to proof beyond reasonable doubt in a criminal trial, to due process of law, or to the obligation not to discriminate and in which many people have no idea that these principles animate their legal system, what they involve, or how they are justified. And if that suggests that there is an obligation to know the law, then law must be knowable and we must strive to make it so, as Bentham continually insisted.

3. *The obligation to develop the law.* Finally, most discussions of the duty to obey proceed as if law were static. But law is dynamic and, as Kelsen says, it regulates its own creation. All the considerations about the necessity and value of the rule of law suggest that it should be also adapted to fulfil those values in changing circumstances. In such cases, valid reasons for stability in legal institutions, including ease of administrability and protection of expectations, are to be excluded in favour of the substantive values that the law should pursue.

The obligation to develop the law bears on citizens generally, but it is addressed most urgently to legislative and adjudicative officials. It is sometimes doubted that it applies to the courts. Fuller writes, 'Surely moral confusion reaches its height when a court refuses to apply something it admits to be law . . .'.⁹⁹ But this is an oversimplification. Courts have the power not only to apply law but to change it. They may do so intentionally, through the exercise of their equitable jurisdiction, their powers to overrule or distinguish cases, and by applying the doctrine of desuetude. They may also do so unintentionally through the gradual crystallization of new legal rules. The silence on these matters among students of legal obligation may be due to simplistic views about the judicial role and crude theories of the separations of powers, but it is

impossible to doubt that it is also a result of the continuing domination of the problem of obedience.

That is only a sketch of some important obligations that are too little discussed; it does not purport to establish their foundation or draw their limits. But perhaps it suggests that we have been too concerned with the obligation of obedience, and that it is time to think more broadly about what we owe the law. One benefit of scepticism about political obligation is that it may release our thinking from that familiar harness, and encourage exploration of these, and other, obligations to the law.

⁹⁸ Inconsistent, because such a point of view can give no principled reason for focusing on legal institutions—prediction of the activities of the courts—as against any other social power-holders, and in this case we cannot do what Holmes says we should do: understand law as a matter with 'well defined limits' ('The Path of the Law', *Harvard Law Review*, 10 (1897), 457, repr. in J. Feinberg and J. Coleman (eds.), *The Philosophy of Law*, 174). Predictions about the interference of the powerful do not respect these limits.

⁹⁹ Fuller, 'Positivism and Fidelity to Law', 86.