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

[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

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.

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

[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.

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

[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

[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'.

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

[22] *Francome 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. Senor, '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 austerely 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.