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THE MORALITY OF OBEDIENCE

*Joseph Raz**

A THEORY OF LAW. By *Philip Soper*. Cambridge, Mass.: Harvard University Press. 1984. Pp. ix, 190. \$16.50.

Over the past few years Professor Soper has published several articles displaying an acute power of analysis, a fair-minded treatment of the views of theorists for whom he has little sympathy, and a capacity to cut through the detail of complex arguments and reach to their heart.¹ In them he was moving towards an independent stance. This elegantly written book contains the fruit of this search.

The book can be divided into three parts. The first, mainly in chapter one, discusses method in legal philosophy. The second, consisting mainly of chapters two and five, unravels Soper's views on the nature of law. The third, mainly in chapter three, is a completely new argument for the existence of an obligation to obey the law — any law, be it good or bad, just or unjust. Chapters four and six interpret and support defenses of the novel doctrines advanced in the rest of the book. Each of the main themes is introduced through a discussion of the work of some of the theorists Soper disagrees with. The book in all its parts is Soper's response to the challenge he addresses to all legal and political theorists: What is the difference between law and a merely coercive order? All other theories are found wanting. Either they fail to identify the difference or they fail to explain it, they fail to see its point. Soper's ambition is to remedy both defects. I will not try to summarise the book, but will concentrate on the main message conveyed by each of its parts.

I. PROBLEMS OF METHOD

Soper's novel theory of law belongs to the recently fast-expanding family of theories holding that the answer to the question "what is law?" depends at least in part on evaluative considerations. But perhaps uniquely among adherents of this approach, he believes in the viability of the alternative approach. It is possible, he implies, though pointless, to inquire into the question "what is law?" in a way that is devoid of evaluative presuppositions. It is here, I shall argue, that he

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1. See, e.g., Soper, *Legal Theory and the Problem of Definition* (Book Review), 50 U. CHI. L. REV. 1170 (1983); Soper, *Metaphors and Models of Law: The Judge as Priest*, 75 MICH. L. REV. 1196 (1977); Soper, *Legal Theory and the Obligation of a Judge: The Hart/Dworkin Dispute*, 75 MICH. L. REV. 473 (1977).

goes astray. Perhaps paradoxically, this mistake leads him to misidentify and exaggerate the role of evaluative considerations in a theory of law.

Trouble starts with the first introductory chapter. Soper raises the question which has always proved to be the Achilles' heel of philosophy: What is it good for? His answer is that there is no possible point to legal philosophy if it is not to answer the question "what ought one to do?" From this he concludes without further ado that its task is to answer the question: "What is law that I should obey it?" Indeed he sees this as no more than a restatement of "what ought I to do?" (p. 7). The question "what is law?" which is addressed in the rest of the book is understood as a quest for such a description of the law which will make obedience to it obligatory. The first step towards a theory was accomplished. One fundamental tenet of law was discovered: Necessarily, law is such that it is obligatory to obey it.² I shall call this Soper's basic maxim.

Chapters four and six show that he does not regard the methodological argument for the basic maxim as sufficient. While the basic maxim is one of the main props for his theory of law, its own acceptability depends on the acceptability of his legal and political doctrines. The whole argument of the book hangs together. One result of this is that my strictures on the basic maxim depend on the cogency of my rejection of the other theses of the book. Still one has to start somewhere, and what better place can there be than Soper's own starting point.

Soper is quite modest about his claim. He thinks that at the end of the day whether or not the law is such that it is necessarily the case that one has an obligation to obey it is like the question whether the drawing which can be seen as either duck or rabbit is a drawing of a duck or of a rabbit.³ It is not clear, however, whether Soper is really seeing a duck or a rabbit. Let us assume that the purpose of legal theory is to advance the inquiry into what we ought to do. Does it follow that describing the essential features of law as a political system of authoritative rules, determining, among much else, when the use of force is permissible, prejudices the issue (p. 10)? On the contrary, there can be no progress in deciding what is to be done in the political sphere except by focusing attention on the prominent features of social institutions, features which may make a difference to the issue of obedience.

If the law is to be obeyed it is because of its character as a system (contributing to) organizing social relations by special means or

2. This conclusion is implicit in Soper's revised statement of the question: What is law *that I should obey it?* See also p. 13 ("I believe that the phenomenon of prima facie obligation is universally associated with the institution of law . . .").

3. P. 14. See generally ch. 6.

through the operation of special institutions. If it ought not to be obeyed then this too is due to those same facts. By identifying the law at the outset as a system we are obligated to obey, Soper does not advance the inquiry. He does not provide us with any considerations which may determine what ought to be done. We are offered by him the advice: If an act is required by law, then, other things being equal, we are obligated to perform it. But we pay a high price for it. We lose our grip on the question "what is required by law?" We thought, and Soper appears to endorse this thought (p. 2, and elsewhere), that at least the answer to this is clear. Law is a system of rules which are recognised and used by some or all of its subjects. We have ways of identifying the ways they do so. We may travel to Outer Mongolia, to Chile, to South Africa, to Uganda, or to any other country in the world. While being ignorant of many nice questions concerning its law we will find it rather easy to identify its central legal institutions and regulations.

Not so if we accept Soper's basic maxim. This will require us first to establish whether those regulations ought, morally speaking, to be obeyed. Only if we are duty-bound to obey them (or perhaps only if that country's citizens are so obligated) are they law. The question of the existence of a moral obligation is not one we can answer simply by observing which are the country's legislative and judicial institutions. It is not a matter on which we can take the word of the country's lawyers or citizens as settling the issue. Even if they accept Soper's theory of law we cannot assume that their judgment of whether they are living under a legal system is trustworthy. It is quite possible that the vast majority of those subject to Nazi rule thought that Nazi rules ought to be obeyed. It is more than possible that if they did, they were badly in the wrong.

If we follow Soper we will find that legal theory does not tell us what is the law of Germany or France or of any other country, for that is not its job, nor does Soper claim that it is. But equally the views and conduct of the legal officials of those countries, the opinions and actions of its legal profession and of its citizens, will not determine what is its law. If the identity and content of the law of a country cannot be determined by reference to the opinions and conduct of the population, the legal profession and the legal institutions of that country, then we are as far from knowing what we ought to do as we ever were. Soper's basic maxim, far from advancing our understanding of what we ought to do, blocks our way to answering that question.

Where then did Soper go wrong? Why did he not see that the road to an answer to his main question, "what ought to be done?", goes through solving a whole series of subsidiary questions each of which advances us some of the way? We need to know the economic concomitants and the emotional make-up of monogamous marriages

before we can judge whether we ought to get married or not. We must establish the consequences of training in academic institutions and of apprenticeship methods of training before we can judge which form of training to prefer for ourselves or for others. Similarly, we ought to establish the prominent features of law as a political system before we can decide whether it ought to be obeyed.

The methodological separateness of the question "what is the law?" from the question "ought it to be obeyed?" does not mean that the answer to the first does not advance the second. On the contrary, the first must be separate from the second in order to advance it. As I mentioned at the outset, Soper's mistake is to think that if the questions are separate they are unconnected. For him the view that one can provide a theory of what the law is without advance commitment to a particular answer to the question "ought it to be obeyed?" means that the theory of law is not in any way tied to the normative quest. This is a deep mistake. A theory of what the law is strives to identify its central, prominent, important features. What makes a feature prominent or important or central is inescapably and inevitably an evaluative question. It is important if it bears on what matters. In large measure it is precisely the fact that certain features are relevant to what one ought to do which marks their importance.

It is crucial to remember, however, that we can and often do know that a feature of a scheme or an institution is relevant to its evaluation without knowing whether it makes it good or bad. The fact that primary education is compulsory is recognised by all as important to its evaluation, regardless of whether they take it to be one of the strengths or a weakness of our educational arrangements.

In recent publications I have argued for a theory of law based on these methodological perceptions.⁴ But they are far from new. While not all the theorists generally identified as legal positivists endorsed them, they stood at the cradle of legal positivism. Bentham never disguised the fact that his utilitarianism was the spring of some, though not of all, of his main jurisprudential doctrines. His doctrine of the individuation of laws and his views on the natural arrangement of the law, for example, are directly dependent on his utilitarian faith. Significantly, both are designed to bring out aspects of the law which are of practical concern, without prejudging whether they show the law to be good or bad.⁵

A theory of law is, as Soper and others claim, tied to the normative quest. But the tie to be productive must be partial and indirect. Gen-

4. See *THE CONCEPT OF A LEGAL SYSTEM* 213-16 (2d ed. 1980); *THE AUTHORITY OF LAW* 37-52 (1979); *Law, Authority and Morality*, *THE MONIST*, forthcoming July, 1985; *The Problem about the Nature of Law*, 21 *W. ONTARIO L. REV.* 203 (1983).

5. See *J. BENTHAM, A FRAGMENT ON GOVERNMENT* (2d ed. London 1823) (1st ed. n.p. 1776).

eral evaluative considerations inform us what features are relevant to the question "what ought one to do?". We then look to the law, as a social institution familiar in our culture, the likes of which is also to be found in other countries of different cultures, and see how it fares in terms of these features. Once that is done we have answered the question "what is law?" in a way which advances our ability to decide whether we ought to obey it, without prejudging it.

II. MISUNDERSTANDINGS

The above simplified account of the way the normative quest affects the theory of law is much too crude. But it serves to vindicate my opening remark that Soper's failure to see that the theoretical inquiry into the nature of law is indissolubly impregnated with evaluative presuppositions leads him to misconceive the role such presuppositions should play in it. It also prevents him from seeing the force of theories he is most concerned to criticize. While I do not wish to comment in detail on Soper's review of the leading theories of today, it is necessary to show how the distortion embedded in the basic maxim sometimes leads to misinterpretation.

The task of criticism is discharged in chapter two. Its first half deals in some detail with several major tenets of Austin's, Kelsen's and Hart's legal theories (and with some views of mine). The second summarises his critique of theories of this kind, introduces his own view and dismisses in a rather summary fashion both Fuller and Dworkin.

Of the two the first half is by far the better. It displays the full power of Soper's mind, his penetrating insight which fastens on to essentials, uncovers unstated presuppositions, and highlights connections and continuities in the various philosophical traditions. He writes for those familiar with the work of the theorists under consideration. All those who have the required knowledge to appreciate his arguments will find the works discussed illuminated by the penetrating beam of Soper's searching gaze. And yet, unfortunately, even that impressive discussion is marred by some important distortions and misunderstandings. Let me give a few examples.

Soper claims that Hart must justify his view that acceptance of the rule of recognition by the officials is a necessary feature of law by showing that this feature is important given human concerns and interests. He thinks that Hart's answer "is the suggestion that the puzzled or ignorant person might want to conform to society's expectations regardless of accompanying sanctions" (p. 24). By this Soper means conformity for conformity's sake. This greatly distorts Hart's meaning. His point is that to understand society one has to see it as members of that society see it. Legal officials do not see themselves as gunmen writ large. They accept the system. That fact is understood in the society at large. This is not an empirical generaliza-

tion but a conceptual truth. Law is a public institution the general features of which (*i.e.*, the features which make it law) are known to the public (though the public may not think of them as the features which account for the legal character of the law). Hart does not spell out but takes for granted that we all know that the difference between an institution resting on acceptance and one resting on the threat of resort to physical force is relevant to many human concerns. Clearly whether one wishes to judge (morally or otherwise) the behaviour of the officials, or to judge the viability of the institution, or to judge its likely response to various contingencies, one would be greatly influenced by whether it rests on acceptance or on force.

Soper is right to say that the difference will be important to those subject to the law who wish to decide whether they ought to obey it. But Hart does not suggest that the difference is more important to the ignorant than to the wise, nor that it is relevant only to those whose instinct is to follow the herd. He was merely pointing out the existence of such people. Because they do exist an account of law is correct only if it makes room for them. An account based on a stronger notion of recognition, one which claims that the law exists only if its subjects believe in moral reasons for the validity of its rules, is vitiated by not making room for such people.

Soper's mistake is typical, for it shows how his single-minded concentration on the question of why one should obey the law blinds him to the existence of wider human interests. Similarly, his implied assertion that according to Hart it is desirable that both officials and subjects have "normative allegiance" to the law⁶ is a lapse which may betray a fundamental misunderstanding of Hart's theory. Hart does indeed say that acceptance of the rule of recognition by officials is a necessary feature of law. But he neither says nor implies that it is desirable that they or other members of the community should have this attitude. To say so is, according to Hart, not to *explain* the concept of law but to *commend* the existence of law and to commend obedience to it wherever it exists. For all we know from Hart's theory of law he may be a radical anarchist who regards any attitude of normative allegiance as thoroughly immoral.

Similar misunderstandings plague the second part of chapter two as well. They are aggravated by Soper's tendency to lump all the theories he disagrees with into one or two archetypes. Soper's adversary is the legal theorist or the positivist. It turns out that the positivist thinks that an obligation to obey cannot exist without coincidence of normative outlook (p. 40, and elsewhere). Soper agrees that this cannot mean that the positivist believes that the law is to be obeyed only if it has some moral merit. Coincidence of normative outlook means agreement in judgment about the merit of a law; it means that one is

6. See p. 38 (toward the foot of the page).

obligated to obey only laws which are just and good. I know of no one who held such a view. All the political and moral theorists I have any acquaintance with held that either consent or the fear that disobeying bad laws may lead to breakdown of law and order are grounds of obligation.

It also appears to Soper that "the legal theorist's determination to remain neutral" on the question whether there is an obligation to obey "equates belief with reality: all that is necessary for a system to be normative in the appropriate legal sense is for officials to display the appropriate normative belief, however false or even insincere" (p. 49). If the appropriate legal sense of normativity means a moral obligation to obey the law then anyone who says that belief in an obligation entails its existence is indeed guilty of confusing belief with reality. But he could hardly be accused of neutrality on the issue whether such an obligation exists. If, on the other hand, the legal sense of normativity is that the law is normative because it rests on acceptance, and not on force, then the theorist is neutral but far from confusing belief with reality he is at pains to keep them apart.

Misunderstandings of the same kind appear elsewhere in the book. One example will serve. Soper seems to attribute to Kelsen the view that law differs from organised coercion because it rests on the general belief of the subject population in its justice (pp. 31, 95). But Kelsen was anxious to dissociate himself from such views.⁷ The beauty and subtlety of Kelsen's view is that he believed that, like beauty, normativity is in the eye of the beholder. Those who interpret a coercive system as a system of law regard it as normative. They presuppose the basic norm, *i.e.*, the rule that the law is valid and ought to be obeyed. Kelsen is uncommitted as to whether all or any of the law's subjects make this presupposition. It is not part of the conditions for the existence of law that they do, and certainly not that they should.

III. A THEORY OF LAW

I have claimed that the foundations of legal theory are necessarily value-laden and that this fact was recognised by some of the founding fathers of legal positivism. It was recognised by Bentham, who also saw that evaluative considerations may well lead to the endorsement of a value-free criterion for the identification of the law. What is law and what is not is a matter of fact. That it is a matter of fact is determined, in part, by evaluative considerations. Soper, I have claimed, makes the existence of law a moral question, and thus he contradicts his own view that what is law is determined by the views, attitudes and actions of those subject to the law. Examination of this point is neces-

7. See H. KELSEN, *PURE THEORY OF LAW* 7, 218 & n.83 (2d ed. 1967).

sary to vindicate my comments in section one, and will lead us into the heart of Soper's theory of law.

Soper is aware that a theory of law which defines it as necessarily moral, that is, a theory of law based on what I described as his own basic maxim, is untenable. He distinguishes between his own theory and some other natural law theories: "Instead of defining law to ensure that it always obligates, one seeks an account that explains why it has any tendency to obligate at all. In this way an independent concept of law is preserved, distinct from that of morality" (p. 59). I shall refer to this as Soper's methodological principle. As Soper himself observes, it is essentially the approach which I dubbed "the derivative approach":⁸ "That is, my claim is not that 'law' is itself a moral concept, like 'justice,' but that, like 'promise,' it is identified by nonmoral features (supreme force and belief in justice) which necessarily have moral worth" (p. 92).

Soper then proceeds to suggest that I reject the derivative approach. This is a mistake. While discussing various conditions that the derivative approach must meet, my purpose was neither to criticise nor to endorse it⁹ but to point out that it is compatible with some of the tenets of legal positivism. Indeed it is compatible with the only essentially positivist thesis that I was willing to endorse, namely the "sources thesis." The sources thesis asserts that the identification of the content and existence of the law is a matter of fact. This is precisely Soper's own assertion, or implication, in the two previous quotations from his book. If his theory lived up to his own aspirations it could join the list of other natural law theories, like those of Fuller and Finnis,¹⁰ which are compatible with the sources thesis, thus vindicating my claim that it is a mistake to think that the legal positivist and the natural law traditions are inherently incompatible.

By endorsing the basic maxim Soper contradicts his own description of his own theory. He endorses the definitional approach which precisely does "define law to ensure that it always obligates." The tension between these two incompatible methodological positions shows at the heart of his explanation of law.

The book contains a one page section entitled "A Theory of Law." Its distilled message is: "Legal systems are essentially characterised by

8. The derivative approach regards the existence of law as a matter of fact and proceeds to argue that, given valid moral premises, the facts necessary for the existence of law assure it of some moral value. Whether or not this claim, strictly interpreted, is true, the thought of a legal system devoid of all moral merit is no less fantastic than the thought of a legal system which is perfect beyond improvement. It is surely the case that all legal systems have both merits and demerits. My objection was to the belief that if all legal systems have some moral merit then it follows that there is an obligation to obey them. See J. RAZ, *PRACTICAL REASON AND NORMS* 165-70 (1975).

9. See *id.*

10. See generally Soper, *Legal Theory and the Problem of Definition*, *supra* note 1 (review of J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980)).

the belief in value, the claim in good faith by those who rule that they do so in the interests of all Law combines the organised sanction with the claim to justice by those who wield the sanction" (p. 55). I shall follow Soper and will refer to the quotation as Soper's theory of law. Is this theory inconsistent with legal positivism as Soper claims? Since belief in value may be misplaced, since what a person believes is essentially on the factual side of the fact/value divide, the theory appears to be a positivistic one making the existence and contents of law depend exclusively on matters of fact.

Compare, for example, Soper's theory of law with my views on the matter (which he regards as a species of positivism). I am not the first to have argued that "the law claims authority. The Law presents itself as a body of authoritative standards."¹¹ Soper's theory seems to differ from my view in two respects. First, he claims whereas I do not that a system of rules is a legal one only if the people in authority believe in the claim to authority which the law makes. Second, he attributes to those in authority, and I do not, the belief that they govern in the interest of all. Of these (and the context of our respective remarks makes clear that they are the only) differences between these views of ours, the first is real but apparently insignificant, and the second, significant but apparent only. Let me explain.

Whatever mileage Soper hopes to make out of the first difference in constructing his argument for an obligation to obey the law, its real significance is minimal. He agrees that ordinary common sense is unlikely to deny a legal system that status on the ground that its officials are all too often hypocritical in their profession of belief in the value of the system they operate.¹² It would be readily admitted on the one hand that a legal system all of whose officials are entirely and systematically hypocritical is a most unlikely possibility, and on the other hand that it is more than likely that in many countries some legal officials are hypocritical. Either way, whether it is an essential feature of law that its officials believe in its value or merely that they claim that they do, both properties are on the factual side of the fact/value distinction. Thus, the first difference between Soper and myself is apparently rather insignificant and fails to show where he deviates from well-tested positivist paths.¹³

Soper's assertion that law exists only if the rulers claim to rule in the interests of the governed marks a more substantial disagreement between us. In arguing that a claim to a right to rule is a mark of law, I was mindful of the possibility of theocratic states whose governments govern in pursuit, as they see it, of divine commands and interests which may radically conflict with the interests of the governed. The

11. J. RAZ, *THE AUTHORITY OF LAW* 33 (1979).

12. *See, e.g.*, pp. 154-61.

13. But see p. 742 *infra* for my explanation of why this appearance is misleading.

latter may be regarded as immaterial except when they coincide with the higher interests or happen to serve them. I was also aware of the theoretical possibility of a government coming to the conclusion, as did Moses regarding the whole generation of the Israelites in the desert, that the interests of a whole generation have to be sacrificed for the sake of future generations. On a plain reading of Soper's theory of law (as explained on p. 55) such societies are not governed by law. They fail to qualify not because of the atrocities they perpetrate (remember that the sacrificial policies they pursue may be enthusiastically supported by the entire population), but because of the morality their rulers uphold.

As the following chapters make clear, this important disagreement between Soper and me is only apparent. Soper notes that slaves and conquered people are often oppressed by regimes that believe in the justification of slavery and other forms of exploitation and oppression.

Officials who accept the beliefs that underlie such moral judgments are acting in the interests of justice and fairness as they see it, and in that sense in the interests of all (including the disadvantaged group) Thus, tempting though it may be to derive a substantive constraint from a theory that requires acting in the interests of all, the constraint is empty, as formal equality always is. [P. 121.]

The temptation here mentioned is indeed to be resisted. But not for the reason stated. Soper seems to misunderstand his own theory. His theory of law does not establish a right that governments should act in the interest of the governed, nor does it establish a duty on them to do so. It merely claims that if they do not, then they are coercive orders rather than legal ones. He gives no reason to think that coercive orders cannot do a lot of good, nor does he attempt to show that they are not, in some circumstances, preferable to legal orders. The fact that we all take for granted that normally the reverse is the case is neither here nor there.

The temptation Soper mentions should indeed be resisted. But the interest of the passage I quoted lies elsewhere, for it withdraws the only aspect of his definition of law which separates his view from mine. Soper, it seems, has an idiosyncratic view of people's interests. It is a commonplace that morality sometimes calls on people to sacrifice their own interests for the sake of others. Soper disagrees. On the evidence of the passage quoted above, it appears that he thinks that a soldier who volunteers, out of moral conviction, to go to a certain death in order to save his friends is really pursuing his own interest, which happens to be to sacrifice himself.¹⁴ Given that understanding of people's interests, Soper's theory of law amounts to saying that

14. Soper's argument at pp. 149-50 suggests that if my volunteer acts for other reasons he may not actually be pursuing his own self interest. Soper says there that a tyrant who puts his own interest above morality (which in the circumstances imagined requires him to rule in the interest of his subjects) is not acting in their interest even though he believes himself to be acting

"legal systems are essentially characterized by . . . the claim in good faith by those who rule that they do so" (p. 55) in pursuit of valid moral principles (whether or not these serve the interest of the governed in the ordinary understanding of such interests).

Am I saying that Soper's theory is really a familiar variant of legal positivist themes? Not quite. My claim is that the distinctive part of his theory of law is not in the doctrine he calls his theory of law but in his theory of natural rights. The latter theory is explained in chapter five, which is misleadingly entitled "Applications." In fact, this chapter introduces for the first time a doctrine which, while being presupposed by the political principle explained in chapter three, is not supported by it. This doctrine lies at the heart of Soper's philosophy and is one of his two major novel theses in the book.¹⁵

Natural rights "are rights against the state which can be invaded or ignored only at the cost of losing the title of law" (p. 132). Note the accuracy of this explanation. Natural rights are moral rights, and to establish their validity as rights one resorts to moral argument; one consults, as it were, one's moral theory. Moral rights are natural ones because they coincide with the necessary conditions without which a social order is not a legal but a coercive one.¹⁶ Hence, the doctrine of natural rights reveals Soper's view of the necessary features of law. It, more than his theory of law, illuminates the difference, according to him, between a legal and a coercive order.

Soper claims to discern two such rights: a right to "that minimum of security that underlies the judgment that any legal system is better than none" (p. 130), and a right to discourse (pp. 134-43). Soper says little about the content of his alleged natural rights. My main difficulty is not, however, with their content but with the reasons for thinking that they are natural rights in the sense explained.

So far as I can see Soper has one argument for the naturalness of the right to security and two in support of the naturalness of the right to discourse. I emphasise that naturalness is the only issue Soper discusses because his way of writing may mislead many readers into taking him to claim that he has established the existence of rights to

correctly and justifiably. The difference is, presumably, that he does not think that it is morality which calls on him to prefer his interests to those of his subjects.

15. I assume that his statement that the court is "an institution the primary function of which is to assume this responsibility of justifying the manner in which sanctions are imposed and disputes resolved" (p. 113) only sounds novel because of its rhetorical exaggeration. Presumably Soper would admit that the difference between a department of information and propaganda and a court is that while both explain the way sanctions are applied and disputes resolved, only the second applies sanctions and resolves disputes.

Another controversial thesis he endorses is that "the essential difference between court and legislature consists in the constraint placed on the former, but not on the latter, to reach decisions in accordance with preexisting (presumably legal) standards. Judges find the law; legislators make it" (p. 110). Unfortunately Soper does not explain or defend this claim.

16. See pp. 130, 132.

security and discourse against all governments, rights which are legally binding independently of any legislation or judicial recognition. Nothing could be further from the truth. Soper assumes without argument that people have rights to minimum security and to discourse against their government. He argues that these are natural rights, that is, that a government which violates them would be administering a system of coercion rather than law. But nowhere does he argue that natural rights are legal rights. All his argument purports to show is that the rights are not violated in law. But rights can remain inviolate without being recognised as rights. A country which does not have conscription, to give but one example, does not violate anyone's right of conscientious objection, assuming people have such a moral right. It does not follow that it recognises a legal right of conscientious objection. For all that Soper tells us neither of his natural rights need be legal rights.

Let us turn to Soper's arguments for the naturalness of his two natural rights. The reason to regard the right to minimum security as a natural one is that without such security, having a system of law is no better than having no such system. Therefore, as we shall see below, if there could be such a law undermining minimum security, there would be no obligation to obey it. This contradicts the basic maxim (*i.e.*, that law is such that it is obligatory to obey it). Therefore there can be no such law. The startling aspect of this argument is that it flatly contradicts Soper's methodological principle. It now turns out that organised force and the rulers' belief in the moral rightness of their actions is not enough to assure a social order of legal status. It may still be nothing but a gunman situation writ large unless it also assures one of minimum security.

Soper gives us no reason to believe that a social order meeting the only two conditions stipulated by his theory of law cannot infringe people's right to minimum security. On the contrary, he seems to recognize that it can do so.¹⁷ He needs not a contingent argument, like Hart's, to the effect that law which systematically violates minimum security is unlikely to survive. He needs a conceptual argument establishing the conceptual impossibility of there being law which infringes the right to security. The only argument Soper makes is that one would not be obligated to obey it were it to exist. Thus, Soper is impaled on the horns of a dilemma. Either he gives up his methodological principle and admits that his conception of natural law is definitional — he identifies the essential features of the law because of their moral significance, and their moral significance is his only reason for regarding them as essential to law. Or he has to abandon his basic maxim and concede that it is not necessarily the case that there is an

17. See p. 183 n. 15 & 17 (The case of slaves whose interests are sacrificed: for them no personal security is assured.).

obligation to obey the law. The question "what is law that I should obey it?" has no answer, for it rests on a false premise.

Soper's arguments for the naturalness of the right to discourse fare no better. One relies on an empirical generalisation: rulers who deny the right to discourse are unlikely to be sincere believers in the moral rightness of their own actions (p. 135). Whatever one may think of this as an empirical generalisation is immaterial. The naturalness of the right can be established only by an exceptionless conceptual necessity. The second argument is to the effect that denial of a right to discourse shows that the rulers do not respect their subjects (pp. 136-40). This lack of respect absolves the subjects of the obligation to obey the law, according to the political theory to be discussed below. From here the argument is identical to that for the right to security. If there could be such a law it would be a law one is not obligated to obey. Therefore, it would contradict the basic maxim. Therefore it cannot exist. Violation of the right to discourse can be purchased, then, only at the price of losing the right to the title of law. Therefore, the right to discourse is a natural right.

Given these premises, so it is. Unfortunately the premises land Soper again in the same dilemma. He must either drop his methodological principle and allow that he holds certain features to be essential for law for no other reason than that they endow it with moral value, or he must discard his basic maxim and allow for the existence of non-obligating law.

It may be worth noting that Soper holds that respect for their subjects is a conceptual condition of the sincerity of the rulers' belief in the moral justification of their actions. His notion of sincerity is such that it is impossible for rulers both sincerely to believe in the moral justification of their actions and to lack respect (that is, lack the respect which expresses itself in the right of discourse) for their subjects. So whether a person is sincere or not turns out not to be a matter of fact, but of morality. Something like the following may be a generalised statement of the principle Soper seems to presuppose: Only those who respect others are capable of having sincere beliefs on the morality of action affecting those others. Given this interpretation of sincerity (though I am unclear as to why Soper adopts it), the first apparently innocuous difference between his theory of law and my view of the matter turns out to be of major significance.

IV. THE OBLIGATION TO OBEY THE LAW

It is plain, on the other hand, why Soper thinks that respect for the subjects is a condition of legality. His argument for an obligation to obey the law, the second major innovation of the book, depends on it. Three premises entail a *prima facie* obligation to obey the law (pp. 78, 80):

- (1) "[T]he enterprise of law in general — including the particular system, defective though it may be, that confronts an individual — is better than no law at all."
- (2) There is "a good faith effort by those in charge to govern" in the light of valid moral principles. [This second premise understood in Soper's special way includes, as we saw above, a further premise:]
- (3) The rulers respect the ruled.

The advantage of law over no law at all is, according to Soper, that law secures minimum safety. He consciously endorses a Hobbesian position on this issue in order to make sure that he does not pitch his claim for the law too high. Much needs be said about Soper's premises. Having discussed them briefly in the previous section we should, however, press on. Do the premises support his conclusion? His conclusion is very far-reaching. It will establish not merely an obligation to obey the law in an essentially decent society; it reaches further and asserts an obligation to obey any legal system which observes his two natural rights. At times Soper makes it appear as if these conditions establish quite a lot, as if they establish mutuality of respect between rulers and their subjects and the genuine attempt by the rulers to further the interests of all their subjects in a rational, reasoned and open-minded way. Most of the time, however, Soper is cautious enough to warn against such a reading of his theory. Though law necessarily observes the two natural rights, they are very minimal. It appears, for example, that even Nazi Germany conformed to the conditions of legality sufficiently to impose on most of its subjects an obligation to obey (p. 92). Can his meagre premises support so strong a conclusion? Can the obligation to obey depend to such an extent on the convictions of the rulers, regardless of the morality of their actions?

Soper's basic idea is simple. There is a job that needs to be done, the job of government. Someone is faithfully trying to do it. Other things being equal, such a person deserves one's respect. So far so good. The problem starts when we try to understand why that respect involves an obligation to obey the law. I believe that Soper is trading on two recognised sources of respect and obligation. First there is respect for an enterprise which is not merely a valuable enterprise, but also *my* enterprise. Every individual's attitude toward his own government should be not merely that they have a job which they are doing their best to carry out. There is a common enterprise in which both rulers and subjects should engage, the enterprise of promoting the good of the community. The rulers are trying to do their share. They may be failing, but at least they are trying in good faith. Their failure does not violate one's natural rights, and therefore has not deprived the common enterprise of all its point. It is in this spirit that Soper refers to respect for law based on "equal commitment to the search for truth and humility about the correctness of one's conclu-

sions" (p. 82).¹⁸

The second recognised source of obligation Soper is invoking is the duty not to frustrate and upset people who are doing their best. They deserve that one should spare their feelings. The rulers would be hurt and offended if their best efforts on our behalf were to be met with rebuff in the form of disobedience. Therefore one is (*prima facie*) obligated to obey in order to spare their feelings. In this vein, which dominates in the book, Soper observes that while "disobedience cannot easily be linked to societal disintegration; . . . it can be linked in an ascending scale of sadness, disappointment, concern, anxiety, and fear on the part of those who think the laws are important and my obedience desirable" (p. 86). Therefore, the more they care about my compliance the stronger my duty is to comply (pp. 87, 153).

I can see no way of merging these two underlying strands, if indeed I am right to find them in Soper's argument. Moreover, neither of them can support Soper's conclusion. Respect for law out of a sense of participation in a joint enterprise is, in its proper place, a real moral concern. It should indeed lead one to uphold laws which one finds to be less than ideal. One reason is the humility and the sense of one's own fallibility that Soper mentions. Another is the fact that, in many cases in which one's action makes a difference to a joint enterprise, one does more to promote the good and prevent evil by supporting the partners to that enterprise than by opposing them. Soper is aware that this last consideration cannot be the foundation of an obligation to obey the law, however weak.

First, it is simply not the case that one's actions in breaking the law always make a difference to the enterprise. Quite often they do not. Furthermore, it is not necessarily the case that citizens and governments are engaged in a joint enterprise. The divergence of opinion about morality between me and a Nazi government or between me and a fundamentalist Muslim government is so great that I would deny that just because they believe in the rightness of their action there is some joint pursuit in which we are partners (assuming that I am their subject).

Nor is Soper's argument from humility and fallibility any help. While aware of one's own fallibility one is also aware of the fallibility of the government. One should be cautious in believing oneself right and the rest of the world wrong, especially in matters in which others have greater expertise or experience or judgment. We discount our own opinions for such reasons many times every day. But we judge the action of others and their credentials before we trust them. Do the

18. At times Soper sounds as if he sees the situation as one in which respect for law is merely the pursuit of long-term self-interest, *see* p. 84, but such passages are really concerned with the truth of the premises of his argument enumerated above. They are liable to mislead if read as explanations of why those premises support the conclusion.

considerations of humility show that one should support racist policies, even if only *prima facie*? Would not such support make one participant to a racist enterprise? I confess that neither these nor any other examples can really carry the day against a claim that there is a *prima facie* obligation. All objections seem easy to deflect on the ground that they merely show that the obligation is overridden, not that it does not exist. But certain forms of racism and other iniquities perpetrated by legal systems all over the world, even those which meet Soper's conditions of legality, are such that the very belief that one has a *prima facie* obligation to go along with them makes one guilty by association.

Ultimately the first source of obligation, participation in a joint enterprise, fails to establish an obligation to obey, for such participation merely requires doing that which contributes to the success of the enterprise. But Soper argues for an obligation to obey those whose actions lead to the failure of the enterprise. Respect for them as joint entrepreneurs requires frustrating them rather than obeying them. A sense of a shared enterprise gives one license to act against one's partner's wishes where but for the partnership one would not be allowed to interfere. If we go on an expedition together, I may be entitled to use force to restrain you from some very damaging action which will lead to the expedition's failure even though I may not use the same means to save a stranger from failure in an enterprise of which I am not a part. This explains why citizens care more than foreigners about evils perpetrated by their own government even when they do not suffer from them. It explains why citizens feel free to engage in civil disobedience whereas visiting foreigners do not. Respect arising out of the existence of a joint enterprise may actually undermine any obligation to obey an unjust government rather than support it.

Soper's second source of obligation, the need to spare the feelings of the rulers,¹⁹ is both too strong and too weak to serve as a foundation of an obligation to obey the law. It is too weak because it applies

19. In a footnote Soper explains: "I have cast the theory in terms of respect for 'those in charge' only because that is the limiting case of law; in most cases, those who accept the system and thus deserve respect will include citizens as well as officials." P. 179 n.36. Naturally the argument has to hold in the limiting case if it is to be valid at all. That is why Soper concentrates on the limiting case, and why I commented on it in those terms. Paradoxically Soper fails to notice that the conditions which he rightly regards as normal, *i.e.*, in which sections of the population share the attitude of those in charge, do not strengthen his argument at all. The respect for the rulers, he claims, is based on the fact that they are the rulers, that they do their best to carry out a necessary job. By-standers may share the values and attitude of the rulers. But being by-standers they do not deserve that respect. (It is arguable that voters, or at least those who actually vote, are themselves among the rulers. J. Austin, for example, held that the British sovereign is not Parliament but those who have a right to elect it. I am not arguing who should count as a ruler. My only concern is with the claim that similar respect is owed to members of the public who share the attitude of the rulers toward the law.) They do, of course, deserve the respect that is due to all humanity. But then it does not matter that they are citizens of one's own country. On that argument the population of Poland ought to obey the laws of Poland in order not to hurt the feelings of Chernenko, or those of the commander-in-chief of the Soviet army. Most of the

only to law-breaking acts the commission of which will be or is likely to become known to the officials. Right now, sitting by myself in the study late at night, I can think of some dozen offences I can commit within the next half hour of which no one will know if I choose not to let my secret out. Besides, the vast majority of violations of law are infringements of private rights. The overwhelming majority of these will never reach official notice, and were always known to be most unlikely to do so.

In any event, Soper's argument applies only if the rulers mind if their laws are not obeyed. I do indeed hope that they do mind. I myself, and almost everyone I know, mind if valuable laws are recklessly disregarded or deliberately flouted. If Soper does not count the need to spare my feelings as a ground for an obligation to obey the law this is presumably because I am not involved in the legal system in the way which will make my feelings count. But if so it is reasonable to assume that one should give special consideration only to those feelings of the rulers which result from the fact that they make and enforce the law, the feelings which are not shared by ordinary citizens. (One would not feel obliged, for example, to spare the rulers' feelings in private matters entirely unconnected with their official functions just because their official functions obligate us to spare their feelings.) One should, in other words, avoid engendering feelings of unappreciated or frustrated authorship (which distinguishes the rulers from the rest of us). One may well doubt, however, whether such feelings are widespread among the rulers. Many of them are just doing a job. They care about success or failure. But one would have to be very presumptuous to assume that one's petty violations would make a difference to their feelings, or that they are likely to make such a difference.

Another thought is relevant here. Do we really want to encourage the sort of feelings that Soper's argument presupposes? It is true that we do not like "the unthinking invocation of ritual and rote" (p. 153). But for myself I would replace it with a dedication to the task coupled with a sense of moral responsibility, and would shy away from the personal involvement which leads to continuous frustrations when others fail to do as one wishes. This last attitude on which Soper models his political theory is both undesirable and, luckily, rarer than he thinks.

Soper's argument is too strong because it does not apply to the law alone. Much governmental business nowadays is carried out not by the use of public law powers but through the conduct of economic policies. Those have little to do with the achievement of minimum security for people. Nor do most laws have much to do with that task.

points I make in the text against the argument from respect to the rulers apply to any arguments based on respect to those who share their views as well.

If it is better to have law, however imperfect, than to have no law at all, then it is also better to have government, even with imperfect policies, than to have no government at all. So if there is *prima facie* obligation to obey the law, there is also a *prima facie* obligation to follow government policy recommendations. If the President advises all employees to forgo any wage demands in the coming year, then there is a *prima facie* obligation to do so. There can be little doubt that in a case like this he will be frustrated and upset if people do not take his advice. I venture to regard this as a *reductio ad absurdum* of Soper's argument.

CONCLUSION

There is much in the book that I did not mention. In particular I did not comment on the excellence of many of Soper's critical discussions. His discussion of the frequent abuse of considerations of certainty (pp. 102-07), for example, should be taken to heart by all the positivists and realists who all too often rely on the need for certainty in a most unthinking manner. While focusing on the book's novel ideas I could not do full justice to its value in stimulating discussion and re-examination of old ideas. I failed to discuss Soper's use of paradigms and his revival of the provocative paradigm of parental relations as a model of political authority. There is much in the book to delight as well as to infuriate. This reader's ultimate conclusion is, however, that Soper has failed to make good his aspiration to provide us with a cogent new theory of law and political obligation.²⁰

20. I am grateful to Kent Greenawalt for letting me see his comments on chapter three, to be published in the proceedings of the March 1984 Hart conference in Jerusalem.