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LEGAL THEORY AND THE OBLIGATION TO OBEY

Philip Soper*

Contributions to this symposium will undoubtedly share, with other recent discussions of the issue, the assumption that one does not need to decide what law is before deciding whether there is an obligation to obey it.¹ More precisely, the assumption seems to be that our ordinary, pre-analytic understanding of "law" provides a completely adequate base for discussions about law's moral authority. The more refined disputes about the nature of law that dominate analytical jurisprudence can thus be ignored.

I have suggested elsewhere² that this assumption is unwarranted. By connecting questions about the nature of law and questions about the obligation to obey, one improves one's chances of understanding both issues. In this paper, I reenforce this claim by showing that the assumed lack of connection between legal and political theory can be defended only if one accepts further, debatable propositions about, for example, the moral relevance of the manner in which force is exercised or about how values and facts relate. I happen to think that some of these further propositions are false. But even if they could be defended, they are at least sufficiently doubtful to require that they be defended, not simply assumed. Either way, then, discussions of political obligation that ignore the

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debate about the nature of law must remain incomplete.\(^3\)

I. Setting the Stage

One might think one can talk about the obligation to obey without first deciding what law is because everyone knows what law is. By analogy, one does not ordinarily preface discussions about the obligation to keep promises or to obey one's parents with extensive inquiries into what a promise or a parent is. Presumably, the pre-analytic phenomenon in these cases is too familiar. The difficult problem is the evaluative one (why should I keep my promise or obey my parents), not the descriptive one (what is a promise or a parent).\(^4\) A person who had trouble with the evaluative question because he did not know what a promise or a parent was would be viewed much as a child or a foreigner who had not yet mastered the language.

The concept of law, however, puzzles people in a way that finds no parallel in these other cases. While there is some discussion in the literature about what a promise is,\(^6\) it does not come close to resembling, either in quantity or in persistence of opposing views, the literature on the nature of law. In the face of that fact, saying that everybody knows what law is only introduces another puzzle: namely, that of explaining what the nature of law debate is all about.

This last observation points to a second possible explanation for ignoring the nature of law debate. One might think that the debate among legal theorists is addressed to an entirely unrelated issue, so that no matter how that debate is resolved, conclusions about the obligation to obey will remain unaffected. A parallel might be a biological debate about what constitutes a "parent." One could concede the importance of that debate to the biologist, without implying that it is also important for the question of filial obligation.

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\(^3\) By focusing on the structural question of the relationship between political and legal theory, I offer in this paper only preliminary clarifications about, rather than substantive views on, the question of the obligation to obey the law. For my views on the substantive issue, see id. at 57-87.

\(^4\) I shall later qualify this statement as to promises. Philosophical investigations into the basis for promissory obligation often do wrestle with the question of what a promise is. Indeed, I rely on the promissory parallel to support the view that there is a similar connection between legal and political theory. See infra part IV.

\(^6\) See infra notes 28-30 and accompanying text.
The biological question, for example, might arise because of a peculiar set of purposes or classification needs of the scientist. Thus, the ethical question may inquire into parental authority using a paradigm of “parent” that does not generate dispute even among biologists. The biological dispute, in contrast, may represent uncertainty at the boundaries of a classification scheme, leading to debate about the utility of stipulating that a borderline case be included within the same general category that includes the paradigm.

For many, the nature of law debate is like this hypothetical biological debate. Persistent disputes about what law is make little sense except as arguments for and against the wisdom of stipulating that “law” will include certain borderline cases, such as customary or international norms. Because these debates, which are themselves normative rather than factual, occur at the borderlines, they have no relevance for the question of political obligation in a standard case of law or legal system.

But this explanation, which sees legal theorists as concerned only with classification problems at the borderline, is also problematic. It assumes that there is agreement on the standard case of law, when in fact much of the continuing dispute stems from controversy about what to take as the “standard” or central case. Moreover, even when there is agreement that a particular system is “legal,” there is disagreement about what that conclusion entails. Are the “laws” of this legal system best described as the commands of a sovereign, or as rules voluntarily accepted by officials, or as the best momentary expression of the society’s underlying political and moral principles?

If these disputes about the nature of law are unrelated to those concerning the obligation to obey, it cannot be because one of these deals with borderline cases while the other deals with central

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7 A good example of how disputes about the nature of law can stem from disputes about the central or “focal” case may be found in J. Finnis, NATURAL LAW AND NATURAL RIGHTS 3-22 (1980).
cases. Both purport to deal with central cases. It must be assumed that what sets legal theorists apart—how best to describe the familiar phenomenon of law—has no bearing on the moral issue because even in the central case, the descriptive issue is independent of the moral one. The assumption, in short, must be that no plausible concept of law could affect conclusions about the obligation to obey. That assumption implies a view about the range of the plausible among competing concepts of law.

II. Assumptions About Law

One view about the nature of law would clearly affect conclusions about the obligation to obey. That is the view that “law” is a moral term that applies only to directives that require one to do what is already best or morally correct. Directives that do not survive this moral test of adequacy are not law. Any discussion, then, that concludes that there is no obligation to obey the law implicitly assumes that this moral definition is just not a plausible concept of law. That assumption is easy to defend. The natural law “slogan” which the definition entails is probably one that not even classical natural law theorists advanced as a proposition about the meaning of the term law. The claim that there is an obligation to obey the law is not, like the claim that there is an obligation to do what is right, true by definition.

Discussions about the obligation to obey must also assume the implausibility of a second view of law: namely, the view that law is nothing but force. This view, which might be thought the polar opposite of the view that law is a moral concept, would make arguments about the obligation to obey equally pointless, not because such arguments would be elaborate tautologies, but because it just seems too clear that directives backed by force alone do not create moral obligations to comply. Discussion could end before it began if the kind of fact that “law” referred to was no different from the confrontation with any gunman.

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11 See J. Finnis, supra note 7, at 363-66.
12 The view that law is indistinguishable from the simple gunman’s order has probably not been held by any legal theorist. Both John Austin and Thomas Hobbes, whose models of law might be thought closest to the gunman model, insist on a degree of effective monopoly on force which arguably makes the “gunman writ large” morally distinguishable from the ordinary highwayman. See infra text accompanying notes 13-14. Whether the critical, Marxist literature that attacks state legitimacy by analogizing to the gunman is meant as a seri-
This second assumption—that law involves something more than de facto power to enforce directives—is also easy to defend. Laws and legal systems differ from casual confrontations with force in one respect that few deny: namely, in the degree of control over force. Legal systems exist only if they are by and large effective in exercising a purported monopoly over force. And this additional feature has been sufficient, at least since Thomas Hobbes,\footnote{See T. Hobbes, Leviathan (Paris 1651).} to make the possible moral value of law worth serious discussion whereas the moral value of the confrontation with just any old gunman is not.

I am now in a position to describe the more dubious assumptions that seem to underlie the belief that one can talk about the moral legitimacy of law without considering disputes about the nature of law. The latter disputes are primarily located within the two extreme views just described which make “law” either a moral term or a term that refers to de facto force alone. John Austin added to the simple view of law as force the feature of supremacy which makes the phenomenon worth taking seriously as a possible source of moral obligation.\footnote{See J. Austin, supra note 8.} H.L.A. Hart rejected the view that law is nothing but the “gunman writ large,”\footnote{See H.L.A. Hart, supra note 9, at 7.} describing it instead as a system of officially accepted rules. Ronald Dworkin modified Hart’s account by including features that make legal rights a function of a society’s political and moral principles as well as its officially accepted rules.\footnote{See R. Dworkin, supra note 10, at 14-130.}

If the differences among these theories, which represent a wide spectrum of debate in legal theory, can be safely ignored in talking about law’s legitimacy, it must be because none of these descriptive differences has any moral significance. Whether laws are commands or rules or the political principles of a particular society has no significance presumably because in all three the moral problem is the same: since the commands or rules or moral views of a particular society can all be wrong and even evil, how can there be an obligation to obey them?
III. Assumptions About the Obligation to Obey

"Law" for the moral or political theorist, then, is simply the gunman writ large. It does not matter whether the gunman comes in the form of a personal sovereign or a set of officials, nor does it matter whether the gunman's exercise of power is justified by the society's political and moral standards as well as its accepted rules.

To say that these variations in legal theory "do not matter" is to point to other assumptions, this time about the problem of political obligation. The problem of political obligation, it is assumed, is to justify compliance with directives that mandate doing the wrong or even the evil thing. If the act required by law were already the morally correct action under the circumstances, then there would be no need to ask whether there is an additional moral reason to comply simply because of the act's legal status. 17

This problem of finding moral reasons to comply with wrongheaded directives 18 helps explain why none of the disputes within legal theory seems to concern the political theorist. What matters to the political theorist is the apparent discrepancy between what is demanded and what ought to be, and that discrepancy may arise under any of the competing descriptions of law that legal theory provides.

The reason this discrepancy seems inevitable lies in part in the assumptions about law previously noted. 19 If law is a factual phenomenon, then the dichotomy between fact and value ensures that establishing that something is required by law leaves open the question whether one ought to comply. That is why the discrepancy seems theoretically or logically inevitable. Whether the discrepancy is only "apparent" depends on the kind of fact that law is. If it is the kind that always has some moral value of the sort that yields an obligation to comply, then the is/ought discrepancy

17 This constraint is implicitly or explicitly accepted by all the sources cited supra note 1.
18 I use the term "wrongheaded" instead of "evil" to make the problem easier to assess in practical terms. Almost no one seems to think that the obligation to obey the law, if any, would be absolute. Like all moral obligations, it could conflict with other moral duties, and in appropriate cases be outweighed. Thus the obligation at best could only be prima facie. That being the case, one will not be able to test intuitions about the obligation to obey by imagining evil laws of the sort that horror stories and Nazi Germany inspire. In those cases, the obligation to obey, if any, is so overwhelmed by the conflicting moral duty as to escape detection.
19 See supra part II.
disappears or, at least, is moderated. Arguments about the obligation to obey are, thus, arguments about whether the seemingly inevitable discrepancy between moral and legal obligation can be shown to be only apparent.\textsuperscript{20}

At this point, assumptions about the problem of political obligation diverge. One group of arguments assumes that the problem about the discrepancy between what law is and what it ought to be is so difficult that it can never be solved in the general case for all legal systems, and that the only interesting question is whether it can be solved in any case. Can any legal system, even the best system one can imagine, plausibly be said to yield a moral obligation to comply with wrongheaded directives? Arguments that take this as the critical question I shall call \textit{particularized} approaches to the problem of political obligation. To be contrasted with these are \textit{generalized} approaches that attempt to show a moral obligation in all legal systems.\textsuperscript{21}

Familiar examples of the particularized approach include all consent-based theories as well as theories about the obligation to obey within a democracy.\textsuperscript{22} Such theories represent the particularized approach because legal systems can and do exist that are not democracies and to which some citizens do not consent.

The generalized approach is probably the more familiar and classical one, illustrated, for example, in Hobbes’s arguments about the importance of security in the coercive state.\textsuperscript{23} This approach, in essence, elevates the additional feature that distinguishes law from just any coercive directive into a feature of central importance in the moral debate: is the value of a relative monopoly over force sufficient to yield a moral obligation to comply? Of course, if

\textsuperscript{20} I follow Joseph Raz in distinguishing between “definitional” and “derivative” approaches to the attempt to connect law and morality. See J. Raz, \textit{Practical Reason and Norms} 165-67 (1975). In part V of this paper, I consider how a derivative approach is possible.

\textsuperscript{21} Note that the particularized approach still assumes that the problem is to account for obligation in the case of misguided or unjust laws. Thus, though one is invited to imagine the best possible legal system, one still assumes that it is a legal system that sometimes gets things wrong and requires morally inappropriate acts. This is not because one assumes a perfect system is impossible, but because if such a system did exist, the problem of political obligation need not arise: one can obey because the act is right without worrying about the moral relevance of the fact that it is also required by law.

\textsuperscript{22} Indeed, arguments about obligation within a democracy often attempt to infer consent from the act of voting, so that they become only one kind of argument from consent.

this classical approach could succeed in establishing an affirmative answer to this question, the particularized approaches would become unnecessary except, perhaps, as ways of drawing attention to different degrees of obligation in different legal systems.

The distinction between particularized and generalized approaches should not be allowed to obscure the assumptions that both approaches share about the nature of law. In both, law is a factual phenomenon, characterized in all cases by the relative monopoly on force. Both approaches, moreover, seem to assume that the additional alterations that legal theorists want to make in this Austinian model have no bearing on the duty to obey. I have already suggested some general reasons for this assumption, but it is worth considering more particular reasons.

It is tempting to suggest that the reason legal theory can have no relevance for the generalized approach is because one cannot add any feature to the basic one of monopolized force without turning the solution into a particularized one. If only rules accepted by officials or only rules or commands justified by reference to received political theory obligate, then the obligation to obey will exist only in those legal systems, not all legal systems. But this explanation will not do. Unlike voting or consent, which are clearly contingent features of particular legal systems, the features identified by theorists such as Hart or Dworkin are defended as part of the concept of law: they can be declared inapplicable to the general case only by engaging in the nature of law debate.

The irrelevance of legal theory must be due instead to the perceived moral irrelevance of the facts in dispute. The facts that are disputed among legal theorists seem to be facts about how power is exercised: through the will of a sovereign, or through an appeal to accepted rules, or through an appeal to received political and moral principles. Under the particularized approach these facts do not make a difference worth talking about, though other facts like voting or consent might. Under the generalized approach, factual variations on how power is exercised are likewise dismissed as irrelevant, although another fact is potentially very significant: namely, that force is monopolized and a measure of security provided.

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24 See supra p. 895.
These differences in the facts assumed to be morally relevant suggest that one will get different answers to the question of why legal theory is irrelevant to the moral debate depending on whether one adopts the generalized or particularized approach. One standard version of the particularized approach, for example, assumes that no description of an externally imposed demand for compliance can ever entail an obligation to comply. Obligation can exist only where some possibility for mutual interaction exists, hence the focus on consent or voting.\textsuperscript{26} Under this view, the features in dispute among legal theorists are irrelevant because they are about how to characterize external force; they are not features that describe or entail individual participation in the creation or application of force.

The generalized approach, in contrast, takes seriously the possibility that factual features of the world, which one had no part in bringing about, may nevertheless have universal value that requires moral acknowledgement. But the single value that this approach recognizes as a candidate for such acknowledgement in the case of law is security from the private violence that Hobbes thought characterized the state of nature. That value is largely independent of the way that force is exercised: all that matters is that the force is effectively monopolized.

Both approaches to the obligation to obey thus dismiss legal theory for different reasons. Yet, each dismisses it because of the same feature: legal theory deals with perceived differences in the manner in which force is exercised or justified whereas moral theorists assume that how the force is exercised is irrelevant. The is/ought discrepancy that the moral theorist must reconcile does not depend for him on how it came about, but only on the fact that it exists. Holmes's dog may know the difference between being kicked and being stumbled over; political theory, at least as practiced under the assumptions described here, does not.

IV. THE PROMISSORY PARALLEL

In attempting to evaluate the above assumptions, it may be helpful to compare the obligation to obey law with the obligation to keep a promise. Promise, as noted,\textsuperscript{27} is for many a standard case

\textsuperscript{27} See supra p. 897 and note 22.
of obligation; political theorists usually take for granted that if one can show consent to the state in acts such as voting one can ground political obligation. In fact, however, explaining why promises obligate leads to problems remarkably similar to those involved in deciding whether there is an obligation to obey the law. Noting these similarities may caution against the tendency to treat inquiries into promissory and political obligation as radically different. 28

Consider first the problem of defining promise. I have suggested that there is little dispute about what a promise is. That suggestion needs qualification. There may, in the case of promise, be nothing resembling the quantity of literature on the nature of law, but in both cases there are remarkably parallel arguments to the effect that propositions asserting an obligation to obey or to keep a promise are analytic. The best example in the case of promise is John Searle’s controversial piece entitled, appropriately enough, How to Derive ‘Ought’ from ‘Is.’ 29 Searle stresses that to promise just means to undertake an obligation to perform; to promise is not, for example, simply to state one’s future intent. Thus from the fact that a promise was made one can derive an obligation to perform. The argument has persuaded few 30 because it either leaves undefined the notion of obligation or leaves unanswered the question why one should respect a convention in the first place. The meaning of promise may, by convention, involve a certain moral commitment; but that definition only entails the conclusion that society will think I have an obligation if I make a promise, not that I “really” have one. There is more to be said about this, but not here; I shall briefly return to this debate later to consider its connection to the problem of political obligation. 31

The problem of promissory obligation also resembles that of political obligation in arising out of a similar theoretical discrepancy between the act required by the promise and the morally correct

28 For a rare and useful comparison of promissory and political obligation which also stresses the structural similarity of these concepts, see Pitkin, Obligation and Consent, in PHILOSOPHY, POLITICS, AND SOCIETY 45, 73-80 (P. Laslett, W. Runciman, & Q. Skinner eds. 4th ser. 1972).


30 For a review of the debate prompted by Searle’s paper, see P.S. ATIYAH, PROMISES, MORALS, AND LAW 106-122 (1981).

31 See infra p. 906.
act. The discrepancy arises for the same reason as the discrepancy in law. What one promises to do, or what the law requires, is a question of fact; what one ought to do is a moral question. Only if a promise is the kind of fact that invariably has appropriate moral worth can the discrepancy be reconciled.

This similarity in the nature of the two problems results in similarity in the suggested solutions. One of the standard arguments for the obligation to obey, as noted, begins with the widely accepted view that legal systems have at least some positive value in the security they promote. This value, it is said, stands as a counterweight to the harm that results from obeying a particular bad law. So too, in the case of promise, the obvious utility of the promissory convention is to be weighed against the utility of breaking any particular promise that has turned out to have overall bad consequences. In both cases, the purported solutions encounter similar objections: not every act of disobedience, and not every broken promise, will have harmful effects on the legal system or the promissory convention. Thus one’s only obligation is to obey law or to keep promises whenever it is beneficial to do so—not simply because something is required by a law or a promise. At this point various forms of act- or rule-utilitarianism or nonconsequentialism may be consulted to see if this objection can be met. My interest here is not in the ultimate conclusion, but in the similarity of the argument in the case of both promise and law.

This structural resemblance may seem surprising. The reason that promise seems an easier case of obligation for many people is that promise involves the voluntary participation of the promisor in creating (describing) the act required, whereas the act required by law need not result from voluntary participation or choice. But to make this difference critical in explaining why there is obligation seems to assume what is in issue: why does a voluntary choice bind? If the explanation sounds in terms of “autonomy,” what is there about that concept to explain why an initial decision prevents a later change of mind? If there are answers to these questions, they are likely to be found in rational appraisals of the situation, not in an arbitrarily assigned moral priority to the earlier exercise of will which is, after all, just another fact. If factual phenomena, such as keeping promises or obeying laws, have moral

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32 See supra text accompanying notes 21 & 23.
value, obligation results from that fact; whether or not one brought the underlying phenomena into existence seems secondary.

If there is room to disagree with this last conclusion, it is probably because of a more fundamental disagreement about whether ethical judgments rest ultimately on appeals to voluntarism (consent) or rationalism. When consent is hypothetical, moreover, as in the "social contract," these distinct grounds are difficult to separate: the claim that all rational people would agree freely on certain judgments is persuasive only because of the rationality of the argument. In this respect, there is a final parallel worth noting between promissory obligation and what I have called particularized and generalized approaches to the problem of political obligation.

One is likely to adopt the particularized approach if one believes that obligations arise only from some voluntary participation in the creation of the relevant facts. In the case of law, that belief requires one to focus on cases where citizens actually consent to the state or participate through voting in decisions about how the state's power should be used. The parallel approach in the case of promise would abandon the attempt to show that every intentional act of promising carries a moral obligation and would focus instead only on certain promises: those that are given freely and with sufficient appreciation of the potential consequences. In contrast, the generalized approach would suggest that invoking the promissory convention always carries a moral obligation, even though the promise is coerced or is given hastily without consideration of its consequences.

The parallel in this last example between promise and the obli-

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33 This point has been made repeatedly in connection with John Rawls's theory of justice. See, e.g., Dworkin, The Original Position, 40 U. Chi. L. Rev. 500 (1973).

34 It may be no coincidence that Hobbes, who advances a generalized solution to political obligation, see supra text accompanying note 23, seems to do the same for promissory obligation. See T. Hobbes, supra note 13, at 69 (promises obligate even though they are coerced). When W.D. Ross introduced the notion of prima facie obligation, his claim that promises always carried such obligation also appeared to represent the generalized approach. See W.D. Ross, The Right and the Good 16-47 (1930). Subsequent critiques, noting "excusing conditions" that prevent many promises from imposing even prima facie obligations, represent the particularized approach. See, e.g., Brandt, Toward a Credible Form of Utilitarianism, in Morality and the Language of Conduct 107, 131-132 (H. Castaneda & G. Nakhnikian eds. 1963). As the text notes, the two approaches become indistinguishable if one decides to make the excusing conditions part of what a promise means.
gation to obey is not, however, exact. It seems much easier to argue that it is part of the meaning of promise that the words be uttered freely and with a minimum appreciation of their import. To say "I promise" under duress or unknowingly is just not to make a promise. By this means, the distinction between the particularized and generalized approaches vanishes: all the "excusing conditions" that prevent obligation attaching under the particularized approach become part of what it means to make a promise, so that the conditions for obligation turn out to attach generally to all promises. The reason that the same collapse does not occur in the case of the obligation to obey is that, unlike promise, law is not the kind of fact whose creation depends on voluntary participation of all citizens. Thus, unlike the case of promise, the basic ethical division between voluntarists and rationalists cannot be avoided by making voluntary participation part of the description of the phenomenon of law.

This discussion reveals another set of assumptions that must be made by those who talk about the obligation to obey without discussing the nature of law. Describing how force is exercised, I said, is at the heart of the nature of law dispute. Explaining why one has an obligation to obey wrongheaded laws is at the heart of the moral debate. The moral debate ignores the nature of law debate apparently because how power is exercised does not affect the question of what one should do when power is being exercised inappropriately. The question that the promissory parallel raises is whether the manner in which power is exercised might be morally relevant. If it is, then two consequences follow. First, the nature of law issue will have to be confronted to see who is right about how best to describe or define the general phenomenon of law. Second, if the proper description is one that includes morally relevant facts about how force is exercised, then the same collapse between particularized and generalized approaches that is possible in the case of promise may also be possible in the case of law. All of the morally relevant factors that turn arbitrary force into legitimate force may turn out to be part of what we mean by "law," so that the particular solution also becomes the general solution.

Why might the way in which force is exercised be relevant? For the rationalist (or the "voluntarist" who argues from hypothetical

35 See supra p. 898.
consent), that question requires considering the moral relevance of some features of law that legal theorists currently dispute. Is it plausible to claim, for example, that rational people would agree to comply with even erroneous directives issued through a system that monopolizes force as long as the directives are issued and defended in a certain way, such as in the good faith belief that one is pursuing justice for the society as a whole? Should good faith disagreement about whether the law is just lead the dissenting citizen to acknowledge a rational, prima facie basis for complying with such laws? If he were in charge, would he be justified in expecting similar compliance from those who disagree with his judgment about what justice requires?

For the true voluntarist, the questions are somewhat different. First, of course, the voluntarist must explain why law is the kind of fact that can create obligation only if there is voluntary participation in its creation. In doing so, one must be careful not to think that only a linguistic point is at stake. Thus, some philosophers use "obligation" to describe moral constraints that result from voluntary undertakings and "duty" to describe other moral requirements. They would say, for example, that one has a moral "duty" (not "obligation") to aid others in appropriate cases and not to cause unnecessary suffering. 36 This linguistic point about the distinction between "obligation" and "duty" has largely become irrelevant to the problem of political obligation: the question for most people today is whether there is any moral reason to obey law qua law. 37 Whether the reason to obey is thought of as yielding an "obligation" or a "duty" is secondary to establishing that the bond in question is a moral one. The voluntarist, then, who intends to participate in this debate cannot simply be making a semantic point in claiming that law will not obligate without some voluntary participation. He presumably means that the confrontation with authority, unlike the confrontation, say, with a starving person, is not the kind of fact that can create an obligation or duty or moral reason to comply in the absence of voluntary participation.

With this clarification, the question for the voluntarist becomes whether there is any analogy between the features in any of the models of law that divide legal theorists and the features that lead

37 See, e.g., J. Raz, supra note 1, at 235.
to moral duty in other cases. Can force be exercised in a manner that shows respect for individual choice and autonomy similar to the respect the voluntarist finds in consent? Would, for example, good faith attempts to defend legal directives as just or to relate them to received political and moral principles of society make up for the lack of actual consent?

V. FACTS AND VALUES

The problems of explaining why one should keep a promise or obey the law arise from viewing both law and promise as facts whose moral worth must be established. The generalized approach, which tries to establish this connection between fact and value in every law or promise, appears impossible for many just because it seems to imply an illegitimate bridging of the distinction between fact and value. If we are not going to actually derive values from facts, then would it not be a strange coincidence if every instance of a certain factual phenomenon (every promise, every law) turned out to have associated moral value regardless of content—that is, regardless of the act promised or the act required by law?

In the rest of this paper, I describe a view of the relationship between fact and value that may help counter current skepticism about the possibility of generalized solutions. In brief, I suggest that the skeptical view ignores that the terms we use to designate factual phenomena, such as promises and laws, are open-textured in ways that permit creative decisions about the extension of these terms as new cases are encountered. Thus, if there are good reasons for thinking that certain central cases of the phenomenon in question have moral value, and if maintaining that connection between fact and value is itself important, we may decide to limit the factual term to apply only to phenomena that do have the associated moral value.

It is important to see how this picture of the relationship between fact and value differs from two other attempts to produce generalized solutions. One such attempt is illustrated in the natural law view, discussed above, which makes "law" itself a moral concept. That view guarantees a generalized solution to the question of law's moral worth but only at the expense of doing violence

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38 See supra p. 894.
to the ordinary view that "law" is a factual, not a moral concept. It avoids the problem of explaining how facts and values relate by eliminating the factual side of the equation and making all the variables moral ones.

A second attempt at generalized solutions does just the opposite by turning values into facts. Searle's attempt to derive obligation from the fact of promise is, for many people, an example of such a mistake. From the fact that a promise is given, one can infer, at best, that people will think one has an obligation, not that one "really" has one. If in reply one insists that there is no "reality" to obligation apart from the facts of convention, one makes the opposite mistake from the one made under the natural law view. Instead of doing violence to the ordinary use of "law" by turning that concept into a moral one, one now does violence to the ordinary view of "moral obligation" by turning the moral concept into a factual one.

The alternative view I am suggesting is best illustrated again by the case of promise. I noted above that the problem of promissory obligation is for many people a more plausible candidate for a generalized solution than the problem of political obligation. Indeed, the same critics who argue that one cannot logically derive obligation from the fact of promise typically conclude that promises do nevertheless obligate. This conclusion is not analytic, but synthetic—a matter of applying value judgments about the kinds of facts that obligate to the case of promise. What is worth stressing here is why this persistent association of moral value with promise need not be simply a surprising coincidence. It is not simply a coincidence because we find it easy to build into the notion of what counts as a promise many of the qualifications that are necessary to ensure that it obligates (the speaker is not acting under duress, for example, or making a basic mistake of fact).

It is tempting to conclude that if we are controlling what will count as a "promise" by reference to whether it entails the appropriate moral conclusion we have, after all, turned promise into a moral concept. To see why this need not be so, consider an analogy

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30 See supra pp. 901-03.
40 See, e.g., Hare, The Promising Game, in Theories of Ethics 115, 126-27 (P. Foot ed. 1967); Narveson, Promising, Expecting and Utility, 1 Can. J. Phil. 207, 228-31 (1971); see also N. MacCormick, Legal Right and Social Democracy 204 (1982).
involving less controversial data, though hardly less controversial philosophy. A true generalization differs from an analytic truth in part because the empirical claim admits the possibility of a counterexample. Even if one thinks that all swans are white, one can without contradiction imagine a nonwhite swan. One cannot do the same for, say, a married bachelor. Similarly, if the claim that promises always obligate is an empirical generalization, counterexamples should be possible. One may imagine an apparent promise which, it turns out, is an exception and does not generate obligation.

The trouble with this analogy is that, unlike “swan,” which presumably has a fairly stable scientific definition that controls the meaning and distinguishes universal generalizations from analytic truths, concepts like “promise” and “law” are not easily pinned down. We are less certain about the features that constitute the central case and thus may find that decisions about the extension of the term, and thus about the meaning of the central case itself, remain to be made as new cases are encountered. It is this uncertainty about the concept that opens up the possibility of a promise that does not obligate: if we do imagine or encounter a putative promise that does not seem to obligate according to our moral theories, we face an open question as to whether the features which prevent “obligation” attaching should lead us to conclude that this is not a promise after all.

It is important to note the difference between this process and one that would either derive values from facts or eliminate the distinction entirely. If we made the decision about the connection between promise and obligation once and for all, resolving never to count as a promise any expression of intent that did not obligate, presumably we would have turned promise into a moral concept. What prevents that from happening is the constant possibility that we might in a particular case make the opposite decision: confronted with a case of putative promise that did not obligate, we might nonetheless decide to call it a promise and amend the moral generalization that all promises obligate.

If this view is plausible, it suggests that the controlling value judgment in these cases is likely to be, not only about promises,
but also about language: why might it be important to keep the association with value that we find in the paradigm case of promise constant in all cases to which the term “promise” is extended? If we could answer that question without waiting to encounter unenvisioned cases, we could simply make it a matter of definition. But leaving the definitional decision open encourages reevaluation of both our existing moral theories and our existing classification scheme, thus helping us better understand our purposes and the effects of language on those purposes.

The suggestion about promise may apply as well to law. Indeed, it is possible that a wide variety of “factual” concepts may be so persistently associated with moral value that we have come to connect our descriptions of the events with the moral implications in a way that does not permit easy separation. The abortion debate, for example, does not have to turn on whether or not one thinks the fetus is a “person.” Yet there is a tendency for both sides of the debate to want to keep the persistent association between that term and certain moral conclusions. Why that connection might be important to maintain is a separate and complicated issue. If it should turn out that we have made a similar connection between law and the obligation to obey, then the conclusion that a given description of facts or legal theory does not carry the requisite moral weight will count against describing the facts or the theory as a case of law—count against, but not dictate the choice.

A belief in this possibility of a moral connection between some of the more pervasive institutions of society and what one “ought” to do may underlie the persistent attempts to associate obligation with the very notion of what a promise or a law is. Current skeptical conclusions about the existence of an obligation to obey presumably assume that we have not made such a connection and that there is no good reason to think we should. My only purpose here is to emphasize how different this assumption is from the assumption that facts and values are separate and that law is a factual, not a moral, concept. Even if law is a fact, the question is whether

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42 I am indebted to Donald Regan for this example. Other examples of factual terms that seem to have associated normative meanings are suggested by James B. White in support of his somewhat different claim that the line between fact and value cannot be rigidly maintained. See J. White, WHEN WORDS LOSE THEIR MEANING 22 (1984) (“university,” “judge,” “family,” “teacher,” “poverty,” “disease,” and “happiness”).
it is the kind of fact that one might have independent reasons for describing in terms that will always prove morally relevant to the question of what one ought to do, not as a matter of logical entailment, but as a matter of understanding which facts have value for humans. Why we might have made such a connection, and, hence, whether this final assumption of political theory is justified, is another story.

43 See J. Finnis, supra note 7, at 34.