Book Review

Obligation and Mutual Respect

A Theory of Law. By Philip Soper.* *Cambridge: Harvard University Press*, 1984. Pp. ix, 190. $16.50

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Both the mugger and the tax collector take some of our money, whether we like it or not. But our response to them differs (unless we adhere to anarchism or radical libertarianism). Whereas we respond to the mugger with outrage, our response to the tax collector involves a certain sort of respectful attention (even if combined with a bit of healthy irritation). In order to explain and justify the difference in our attitudes, Philip Soper proposes to generate a definition of law that entails a *prima facie* (though not necessarily overriding) obligation to obey its mandate.[1] The book develops the notion that legal theory and political theory ought to be connected: An answer to the question of what law is should explain why we have some reason (apart from fear of sanctions) to obey the law. This assumption contrasts starkly with the prevalent contemporary approach, which assumes that one can describe the nature of legal systems without presuming a *prima facie* obligation to obey the law. Indeed, a popular approach to legal theory often issues in a negative result in political theory—the conclusion that we have no *prima facie* obligation to obey the law.[2]

Soper begins by criticizing various approaches to legal theory on the grounds that they cannot adequately distinguish law from mere force or coercion (the tax collector from the mugger). He then proposes a certain condition (absent from various legal theories) as necessary for a normative

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1. P. SOPER, A THEORY OF LAW (1984) [hereinafter cited by page number only].
2. *See, e.g.*, A. SIMMONS, MORAL PRINCIPLES AND POLITICAL OBLIGATION (1979).

model of law: Officials must make a good faith claim that legal directives serve the common good.[3] Further, Soper posits this feature in conjunction with a second condition—that citizens recognize the enterprise of law as preferable to the state of nature—as jointly sufficient to generate an obligation to obey the law. Soper thus develops what he calls a "political theory." Employing these two ingredients, Soper constructs a theory of law which shows "what law must be if it is to obligate."[4] The first part of this review sets out what I take to be Soper's theory. The second part presents a critique and a suggestion for a revision of the theory.

I. SOPER'S THEORY OF LAW

A. *Legal Theory*

The legal theorist, according to Soper, seeks to provide a *definition* of a legal system, not just a description or characterization of actual legal systems.[5] Thus, the legal theorist must uncover the *essential* features of a legal system. Austin's classical positivistic explanation identifies the essence of law with command: laws are orders backed by threats.[6] A potential problem with Austin's command theory stems from its inability to distinguish the mugger from the tax collector. Both issue orders backed by threats, but our attitude toward the tax collector differs significantly from our attitude toward the mugger.

Such positivists as Kelsen and Hart attempt to improve on Austin's theory by adding a normative element.[7] A "normative" system seeks compliance primarily for reasons other than the fear of threatened sanctions. In order to transcend the coercive model, however, the modern positivist must, first, define a normative attitude on the part of both officials and participants distinct from that minimal normative (uncoerced) attitude "implicit in any exercise of de facto power."[8] Second, and more importantly, the modern positivist must present this stronger normative element as an *essential* aspect of a legal system. Otherwise, Soper claims, the endeavors of the positivist will have contributed nothing to the definition of law and will have lacked any relevance whatever to the participants who interact in the legal system and have an interest in knowing why the law *qua* law obligates.

Kelsen meets the first of these requirements: "[H]e distinguishes the

3. P. 55.
4. P. 13.
5. Pp. 20-26.
6. *See* J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (1832).
7. *See* H.L.A. HART, THE CONCEPT OF LAW (1961); H. KELSEN, THE PURE THEORY OF LAW (M. Knight trans. 1970).
8. P. 26.

type of normative attitude toward law—a moral one—from the minimal attitude of voluntary acceptance that one finds even in the case of gangsters."[9] Yet Kelsen identifies the normative attitude toward the law as a presupposed basic norm "according to which one ought to behave in conformity with the [legal] order."[10] Kelsen's basic norm appears to be no more than a general moral attitude of acceptance of the existing regime. Kelsen provides no further explication of the basic norm except for the observation that the norm exists in orders that have some "lasting effectiveness."[11] Soper argues that Kelsen's claim that the appropriate moral attitude arises in a regime with lasting effectiveness qualifies neither as a semantic truth, "such as the claim that bachelors are unmarried men," nor as a universally true empirical generalization, "such as that all swans are white."[12] Thus, Soper claims that Kelsen has not met the second requirement for transcending the coercive model: identifying the normative as a *necessary* aspect of the law.

Hart attempts to transcend the coercive model through "variations on a theme sounded by Kelsen [which] consist almost entirely of a more detailed description of the normative attitude that characterizes rules of obligation and of legal order."[13] Hart claims that laws are rules accepted by officials. As Soper points out, Hart's description of the citizen's obligation to obey the law differs considerably from his description of the official's obligation to enforce the rules.[14] Thus, in Soper's view, Hart makes a significant distinction between the normative attitude of the officials and that of the citizen:

> Rules of obligation of citizens are characterized by serious social pressure to act in ways that are thought essential to a prized feature of social life and that typically conflict with self-interest. In contrast, official acceptance of rules "may be based on many different considerations: calculation of long-term interest; disinterested interest in others; an unreflecting inherited or traditional attitude; or the mere wish to do as others do."[15]

Soper criticizes Hart's characterization of the two obligations as different. In particular, he objects to the weakness of the requisite attitude on the part of the officials. If rule acceptance by officials can consist of nothing more than allegiance to a system for reasons of self-interest, "even to

9. P. 28.
10. P. 27 (quoting Kelsen).
11. *Id.*
12. P. 29.
13. P. 30.
14. P. 31.
15. P. 31 (footnote omitted) (quoting H. HART, *supra* note 7, at 198).

the point of their openly admitting that 'morally, they ought not to accept' the system but 'for a variety of reasons continue to do so,'"[16] then the attitude of officials need not differ from that implicit in the coercive model (the command theory). Their obligations (as well as those of citizens) thus, may consist of nothing more than "prudential obligations."[17] If officials can harbor such attitudes toward the law, then citizens need not have even *prima facie* moral obligations to obey the law, and "You ought to obey the tax man" becomes the normative equivalent of the mugger's "You ought to hand over your money."[18]

Hart, thus, goes a step further than Kelsen in complying with the first requirement for transcending the coercive model: Hart describes more specifically the normative element in the law. But his description allows that officials fail to have a belief in the justice of the laws and, consequently, does not explain why citizens (or "insiders" in the legal process) are obligated to obey the law *qua* law.

Soper thus explains the positivist's reluctance to posit a particular kind of normative attitude as essential to the concept of law:

> [T]o defend the conceptual claim about law and the belief in justice, one must similarly be able to explain why it might matter to people that this particular attitude toward law should exist. In doing so, one may find it impossible to avoid engaging in evaluation and substantive moral argument, departing from the purity of the positivist's program to account for the importance of the attitude toward the law in the only way that makes sense—from the viewpoint of the insider himself.[19]

The problem with positivism (at least as presented by such theorists as Austin, Kelsen, and Hart), according to Soper, is that it "purports to identify law but fails to explain how it differs from force."[20] Conversely, the classical natural law theorist (who accepts the slogan that unjust law is not law) *can* distinguish force from obligation, but he cannot "identify law apart from the substantive moral inquiry into justice."[21] This sort of natural law position runs counter to our intuition that directives can be legal, and indeed can generate obligation, even if they are not substantively just.

16. P. 39 (quoting H. HART, *supra* note 7, at 199).
17. P. 31.
18. P. 31.
19. Pp. 37-38.
20. P. 51.
21. P. 51. It is unclear to me that any of the so-called natural law theorists, including Aquinas, held that unjust human law does not constitute human law simply because it does not coincide with natural law. *See Aquinas, Concerning the Nature of Law*, in PHILOSOPHY OF LAW II (J. Feinberg & H. Gross eds. 1980).

Soper discusses very briefly the ideas of two contemporary legal theorists in the natural law tradition—Fuller and Dworkin.[22] These theorists insist upon some inherent connection between law and morality. Although disagreeing with particular features of their accounts of law, Soper distills from their approaches the idea that officials have an obligation to justify their legal decisions (and their applications of rules) and to do so by reference to an underlying moral and political theory.[23]

For Soper, the accounts of Fuller and Dworkin point to the main element lacking in legal positivism: a sincere belief by the officials that the legal directives are morally justified—a belief that they "aim at serving the common good."[24] In Soper's view:

> It is this claim of justice, rather then [sic] justice in fact, that one links conceptually with the idea of law. . . . With the positivist one may agree that the actual justice or injustice of a system of norms does not determine whether the system is legal; with the non-positivist one shares the conviction that a legal system is more than a set of effectively enforced norms, voluntarily accepted by officials and summarily imposed on subjects.[25]

Soper asserts that this attitude of officials constitutes the ingredient required in order for law to obligate citizens.

B. *Political Theory*

Soper turns to what he calls "political theory" to justify his claim that the ingredient he proposes to add to legal theory, the good faith claim of officials that their directives serve the common good, is not only *necessary* in order to generate obligation, but also that, when combined with another condition, the recognition of the enterprise of law as preferable to the state of nature, this ingredient is *sufficient* to generate obligation.[26] Soper iden-

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22. Fuller and Dworkin present their theories respectively in L. FULLER, THE MORALITY OF LAW (1963) and R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

23. Although Dworkin goes further and claims that the moral justification should take a certain form—requiring judicial intervention only and always to protect determinable, pre-existing rights—Soper does not insist upon this view about the content of the justification.

24. P. 55.

25. P. 55 (footnote omitted).

26. According to Soper:

> I have thus far shown only that any theory of law that lacks this feature will be unable to distinguish legal from coercive systems and will distort many of the persistent features of the normative attitude toward law that one finds among both subjects and rulers. In that sense the official claim to justice would be a necessary feature of a normative model of law even if description alone were the goal. But the more meaningful goal, I have said, is definition. Thus there remains the task of explaining why this feature is essential to the idea of law. Accordingly, Chapter III shows that the requirement of an official claim of justice is necessary and, in conjunction with a second condition, sufficient for political obligation.

tifies the fundamental question of political theory as "Why do I have a *prima facie* obligation to obey the law?" In his attempt to justify the attitude of "minimal respect" for the law, Soper begins by discussing the deficiencies of various standard approaches to political theory. He then presents an alternative account which proposes two features of a legal system as sufficient to generate legal obligation.

Soper first explores the "utilitarian defense of obligation":

> 1. Legal systems, by providing minimal protection for life, liberty, and property, are preferable to the alternative of no law at all.
>
> 2. No legal system can survive in the face of widespread disobedience.
>
> 3. Therefore one has a *prima facie* obligation to obey the laws of any legal system.[27]

Soper finds this argument unpersuasive because the utilitarian's obedience emerges from a desire to avoid an unfortunate outcome and not from the nature of law itself.[28] Political theory demands an answer to the question of why I should obey law *qua* law.[29]

Soper next argues that consent-based arguments also fail to account for political obligation for familiar reasons. Few people give explicit consent, and one cannot plausibly suppose that their behavior indicates tacit consent.[30] Arguments from estoppel fail as well because others do *not* rely on my conforming to the law; others fear sanctions, and so they will conform to the law even if they know that I *will not*.[31]

Soper goes on to consider the argument from unjust enrichment (a version of which draws from Rawls' and Hart's "principle of fair play").[32] This general argument derives an obligation to obey the law from the notion that accepting the benefits of a legal system without reciprocating with allegiance to the system constitutes unjust enrichment. Soper high-

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P. 56. This summary of his overall strategy is somewhat confusing. If Soper has (in the Chapter on Legal Theory—Chapter II) already shown that any theory of law lacking the official attitude of justice will be unable to distinguish law from mere force, then he has *already* shown that this feature is *necessary*, if law is to obligate. Thus, I believe that Chapter Three (Political Theory) is better conceived as being addressed to the *sufficiency* claim.

27. P. 60. Soper claims that M.B.E. Smith attributes this argument to the utilitarian.

28. The argument is invalid because the premises connect widespread disobedience with the loss of benefits from a legal system but the argument concludes that one should obey particular laws. The argument implicitly, yet untenably, presupposes that any particular violation of a law threatens destruction of the entire system.

29. P. 61. This point is due (among others) to Robert Paul Wolf.

30. Pp. 65-67.

31. Pp. 67-69.

32. Pp. 69-74.

lights what he considers the critical flaw in this argument: Since not all submissions to law are beneficial, the argument does not generate a *general* obligation to obey. I would have an obligation to obey laws that benefit others but not necessarily all laws. This argument fails to give an account of one's *prima facie* obligation to obey law *qua* law.

But Soper believes that we can learn from the failure of the unjust enrichment paradigm. Unjust enrichment theory applies an argument to particular laws that could more appropriately apply to the total system of laws. Soper uses this point to construct his theory of political obligation. Though one cannot maintain submission to each law as beneficial, one could plausibly suppose that to have some state—some legal system—is better than to have none.[33] Soper's theory of political obligation thus differs from both the paradigms of consent and unjust enrichment. In constructing his theory, Soper claims to be "directly appealing to the beliefs and attitudes of rational individuals in situations analogous to the situations confronted in the case of law."[34]

In developing his political theory, Soper also borrows from the unjust enrichment paradigm's approach to the motivation and behavior of participants in the legal system. "The strength of the argument from unjust enrichment," Soper insists, "depends largely on the motives and actions of both the benefactor and the recipient."[35] Political obligation, in the context of such argument, seems most plausible in cases in which the benefactor acts in good faith and the recipient values the benefits bestowed. Soper's conception also makes such attitudes on the part of 'benefactors' and 'recipients' the touchstone for political obligation.

Soper uses the analogy between the obligation to obey one's parents and the obligation to obey the law. He claims that the obligation to obey one's parents arises "not from what they have done for me"[36] but rather out of a separate concern for one's parents. At one extreme, there is one's love of one's parents:

> At the other extreme the appeal need be only to the child's recognition of the value of some family, some parent or guardian, compared to the alternative of none at all. . . . To this basis for respect for the general enterprise one need add only one additional requirement in order also to lay a basis for respect for the particular person and particular enterprise: the requirement that the parent is trying

33. This supposition entails the defeat of anarchism.
34. P. 77.
35. P. 74.
36. P. 78.

> in good faith to act in the interests of the child by acting in the interests of the family as a whole.[37]

Soper thus lists the pertinent features of the confrontation with the law (and with one's parents) as follows: 1) There is a job that I concede must be done, and 2) The person who happens to be in charge is trying to do that job in good faith, taking my interests equally into account along with the interests of others who also find themselves part of the same scheme.[38] Soper claims that, in such situations, the desires of the authorities that I conform generate a *prima facie* obligation for me to conform—an obligation of "respect."

Stated more specifically, the two features of legal systems that suffice to generate obligation are: 1) Having a legal system is preferable to no law at all, and 2) Those in charge are making a sincere effort to govern justly.[39] Of course, the second feature coincides with the feature identified in the discussion of legal theory as necessary for the distinction between law and mere force.

Now let us return to the question of what distinguishes the tax collector from the mugger. A mugger who does not purport to serve the interests of his victim (presumably the typical mugger) we justly greet with outrage. But how about a mugger who sincerely believes his actions serve the interests of all, including his victim? We still do not respond to this mugger with respect, and Soper claims that we do not because the mugger does not represent an effective and uniquely established social force—a sovereign.[40]

So the sincere claim to be ruling justly does not suffice to generate obligation. Obligation also requires the establishment of effective power, which produces an acceptable level of order and security. On this account, a gang of robbers could become a legal system to which one owes obedience in virtue of 1) having a monopoly of force, which produces order, and 2) sincerity in believing that it is ruling justly.[41] With respect to generating obligation, Soper argues that this gang of robbers is relevantly similar to a government.[42]

37. Pp. 78-79.
38. P. 79.
39. P. 80.
40. P. 88.
41. P. 89.
42. The theory thus contrasts with "historical" theories which look to whether the establishment of the regime has taken place justly.

C. *Clarifications and Implications.*

What if a system established order but the rulers made no claim to rule justly (or made an obviously insincere claim of this sort)? Under Soper's theory, since such a system would not generate obligation, the system would not count as law. Although one might feel inclined to consider this system a legal system (even if an objectionable one), Soper's considered view is that one could reasonably doubt the legality of such a system, though he does not purport to establish that the system is not legal. One might have different interests in defining a legal system. There is first the interest of the person who wishes to avoid sanctions—or at least predict their incidence. Holmes identified this interest with that of the "bad man," and the bad man's interest here coincides with that of the prudent man.[43] Relative to this interest, the system in question should qualify as legal. But the desire to produce a legal theory might arise from another, equally important, interest—the interest of the moral person in knowing what he ought to do.[44] Soper claims to have shown (in his discussion of legal and political theory) how the expectations of officials can create moral obligations only in certain circumstances. Hence, with respect to the interest of the moral person in knowing what he ought to do, a purely coercive system *need not* be characterized as legal. Soper has identified an interest at least as important as that of avoiding sanctions which might lead to inclusion of the proposed ingredient in the definition of law.

Soper discusses various applications and implications of his theory. He claims that the theory has the interesting consequence of allowing for the derivation of certain "natural rights." According to Soper, natural rights are "rights against the state which can be invaded or ignored only at the cost of losing the title of law."[45] The natural right to minimal order and security, for example, derives from the first requirement for political obligation: the preferability of the enterprise of law over the absence of law. A system that does not afford individuals minimum safety has no claim to superiority over anarchy and consequently cannot obligate so as to qualify as legal in Soper's theory.

The requirement of sincere belief in justice generates a "right to discourse." Soper argues that the legality of, and thus the obligation created by, a system depends on the existence of a sincere belief by officials in the justice of the ruler. The officials holding such a belief must be willing to respond to normative challenge with normative justification of their coer-

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43. For a useful discussion of Holmes' bad man, see Wilcox, *Taking a Good Look at the Bad Man's Point of View*, 66 CORNELL L. REV. 1058 (1981).
44. P. 92.
45. P. 132.

cive orders; sincere belief by officials implies willingness to engage in a certain sort of normative discourse. Thus, a directive issued by a sovereign who does not permit discourse is not a *legal* directive—and therefore violates an individual's natural rights.

II. An Evaluation of Soper's Theory

Soper attacks positivism for failing to specify the nature of the normative attitude on the part of officials in systems classified as legal. For the positivist, officials of a legal system may have *any* normative attitude. Soper proposes to replace this requirement with a more demanding one. A weak formulation of the requirement would go as follows: Officials must sincerely believe in the moral justifiability of their directives. This formulation would state that the officials' normative attitude must be sincere and involve a claim to moral justification. A stronger formulation of the requirement would provide that rulers sincerely believe that their directives serve "the common good" (or "the interest of all"). This formulation would require that officials hold a sincere moral belief *of a certain sort* (though one may define the common interest in numerous ways). At different points in the book, Soper uses different formulations; as I shall try to show, they seem to have different implications.

If rulers adopt prudence as a ruling strategy but do not believe in the moral justifiability of their strategy (they might deem their behavior amoral or immoral), then they might simply be pursuing policies which favor their own interests (or which they believe will do so). Some of what Soper says suggests that such rulers do not deserve to be obeyed because they lack a sincere belief in the morality of their directives. He says:

> If legal systems may be based solely on rulers' self-interest, even to the point of their openly admitting that 'morally, they ought not to accept' the system but 'for a variety of reasons continue to do so,' there is no possibility for further dialogue between rulers and dissenting subjects.[46]

Soper seems to suggest that the fact that the rulers consistently advance their own interest points to the fact that they do not have a sincere moral belief in the correctness of their directives. This latter fact inhibits the emergence of a sense of obligation toward the rulers.

The weak version only requires that the officials hold a sincere moral belief in the correctness of their decisions, but not necessarily that the officials believe such decisions serve the "common good." Indeed, rulers

46. P. 39 (footnote omitted).

might consider a given policy both morally justified *and* in their own best interest. They may, for instance, adhere to moral egoism or class egoism or to any number of elitist or racist moral theories positing certain privileges for individuals with characteristics they possess. Such rulers would satisfy the weak version of the requirement.

To illustrate the implausibility of the weak version of the constraint, consider a ruler who pursues self-interested policies and indeed regards them as *not* morally justified. Call him Ruler I. Suppose that Ruler II pursues exactly the same (self-interested) policies but does so believing in their moral justifiability (but *not* in virtue of their serving the common good). Let us further say that Ruler II realizes that his policies are severely harmful to the interests of some groups (even in the long-term). Under the weak version of Soper's constraint, Ruler II's regime classifies as a legal system (given that the regime achieves minimal security) but Ruler I's does not. The distinction here between law and coercion derives not from the *content* of the policies but merely from their official justification.[47]

This weak construal of the requirement of sincere belief by officials in the moral correctness of their rules renders Soper's legal theory inadequate. Why exactly should the difference in attitudes between Rulers I and II make only Ruler II's society legal? Could one plausibly suppose that, with respect to the purely factual question of what law is, one should distinguish between the two societies? I do not see why. The only way in which one could make the difference significant, as far as I can see, consists in assuming that legal systems must *obligate* (as, of course, Soper does).

So let us make this assumption and again ask whether we ought to classify as legal Ruler II's society but not Ruler I's. I still resist the distinction between the two societies. Suppose I am a black person and both societies have apartheid. Now why should the fact that Ruler II has a belief in the moral correctness of apartheid generate an obligation for me to obey him, whereas I would have *no* obligation to obey Ruler I? After all, the policy is equally objectionable (and against my interests) in both cases, and both rulers sincerely realize this.

47. I assume that Ruler I deems the policies "normatively" (though not morally) correct. One might wonder how a belief in the moral correctness of a policy can differ from a belief in the mere normative correctness of the *same* policy. I do not know exactly how to characterize the nature of *moral* beliefs, but a common attempt consists in characterizing them in terms of such properties as generalizability or "ultimacy." That is, some would say that moral rules must be generalizable in a way in which other rules, say the rules of prudence, *need not* be. And some (though not all) would argue that moral reasons provide "overriding" or "sufficient" reasons for action. However exactly one characterizes moral judgments, Soper reasonably assumes that one ruler might deem a certain policy morally justified, whereas another, such as Ruler I, might deem the *same* policy normatively though not morally justified.

It is true that Ruler I falls prey to a certain sort of criticism to which Ruler II does not. A person who acts against his moral beliefs is *criticizable* for doing so. But this difference between the two rulers does not seem to generate an asymmetry in *my* obligations to them. Neither purports to serve my interests. I believe, then, that the weak construal of the constraint makes Soper's legal theory unpersuasive—the theory unreasonably distinguishes between Rulers I and II.

Interestingly, when Soper argues that his constraint provides the ingredient that (together with the security condition) generates a sufficient condition for obligation, he seems to have the *stronger* constraint in mind. When he argues that his two conditions suffice to generate obligation, he often supposes that the ruler believes that the directives are not merely morally justified, but also in the interests of all. Using the stronger formulation, Soper says:

> Instead of interpreting the definition to limit 'law' to those ordinances that do in fact serve the common good, one interprets it instead to require only that legal directives aim at serving the common good, however wide of the mark they may fall. Legal systems are essentially characterized by the belief in value, the claim in good faith by those who rule that they do so in the interests of all.[48]

Also, he says such things as: "One must be able to imagine rulers confronted with a discrepancy between their own narrow interests and the interest of those they rule and choosing in the face of that discrepancy to pursue the latter. Such a choice results in law and obligation."[49] And later "[a]s a result, the second test for obligation—the sincerity of the attempt [of the ruler] to rule in the other's best interests—becomes once again the critical test for the citizen."[50]

If Soper's conditions suffice to generate obligation, they do so only under the stronger interpretation of the "sincere moral belief" constraint. I believe that his claim that the conditions suffice for obligation relies (sometimes implicitly) on the stronger interpretation. However, even on the stronger interpretation, the conditions might not suffice to generate obligation.

Let us imagine that Ruler III sincerely believes that apartheid serves the best interests of everyone, including those of the black community. Does his sincere belief that his directives serve my interests generate a *prima facie* moral reason to obey? I am not sure what to say, given the

48. P. 55.
49. P. 124.
50. P. 136.

actual effects of the policies. One could argue that the sincere belief that the policy furthers my interests generates a *prima facie* obligation, even if the actual effect of the policy creates an all-things-considered obligation *not* to obey. So let us grant that a sincere belief by Ruler III that his directives are not only morally justified but advance my interests, together with the security condition, suffices to generate a *prima facie* (though not necessarily overriding) reason for me to obey.

One cannot, however, consider this condition as *necessary* for law. It seems too much to demand that rulers believe that their directives benefit *all* classes (or serve the "common good") for a system to qualify as legal. Ruler IV may believe in the moral justifiability of his policies, and that they systematically favor certain classes of individuals both in the short-term and the long-term. Further, I assume that Ruler IV believes that the policy does not create excessive hardships for any group, and that, in fact, the policy does not create such hardships (as opposed, say, to slavery or apartheid). Surely, one should classify such a system as a legal system. But if so, then the criterion of sincere official belief that the directives benefit all groups cannot constitute a necessary condition for law, at least on a natural interpretation of what it is to "benefit all groups" or "serve the common good."[51]

What is the difference between Rulers II and IV, in virtue of which I claim that I would owe Ruler IV but not Ruler II obedience? They both lack the belief that their policies serve the common good. But Ruler II realizes that his policies are actually severely detrimental to a certain class, the black people. In contrast, although Ruler IV does not consider his policies maximally beneficial to the disadvantaged group, he does not see them as severely detrimental to this group either. Perhaps the following explains the difference between my attitudes toward Rulers II and IV: Ruler II believes that his polices (though morally justified) significantly harm me, whereas Ruler IV holds no such belief. Perhaps the ruler's belief about the severity of the deprivation to me makes the difference—the ruler need not believe that he is maximally serving me, but perhaps he must believe that he is at least protecting certain basic interests of mine. In this way, he shows me at least "minimal respect."

The example of Ruler IV suggests a revision of Soper's constraint which seems to be in the spirit of his approach: The officials must believe

51. Soper might reply that anyone who believes that a policy is morally justified ipso facto believes that it is in the "best interests of all." Under this view, there is no difference in meaning between claiming that a policy is morally justified and that it is in the best interest of all. (Soper seems to make this move on pp. 120-21.) Whereas this move would block my objection that the conditions are not necessary, it would dilute the concept of believing a policy to be in the common interest and collapse the two interpretations. The objection would again be that the two conditions are not *sufficient* to yield obligation.

that their directives are morally justified and do not impose severe or excessive burdens on any class. This interpretation of the constraint is somewhat less demanding than the "strong" interpretation of Soper's constraint, but more demanding than the weak interpretation. I am not sure, however, whether Soper would accept such an interpretation or whether it adequately explains legal obligation.

My discussion so far can be summarized as follows. Soper presents two conditions—a "security" condition and a "sincere belief" condition—which he considers jointly necessary and sufficient for any legal system that obligates. But one can interpret the sincere belief condition either weakly or strongly. If interpreted weakly, Soper's legal theory fails—he must distinguish between one's obligation to Rulers I and II. A moral belief by the official does not generate obligation simply *qua* moral belief. Thus, the conditions do not jointly suffice to obligate. The sincere belief condition, interpreted strongly, commits Soper to saying that I owe obedience to Ruler III. Even if this is plausible, the conditions are now not jointly necessary; one would not owe Ruler IV obedience on this theory. The stronger interpretation enhances the sufficiency claim but undermines the necessity claim. On my suggestion, officials must sincerely believe both that their orders are morally justified and that they do not impose significant burdens on any class. This suggestion has some hope of providing both a necessary and a sufficient condition for obligation.

Let us look more carefully at the possibility that a sincere belief in the moral correctness of the directives converts force into law. I have claimed that the mere fact that officials sincerely believe themselves capable of morally justifying a directive does not generate obligations on the part of citizens—one doesn't owe obedience to Ruler II rather than Ruler I. But I have agreed that Ruler I is accessible to a certain sort of criticism to which Ruler II is not: He is acting against his moral beliefs. We might want to say that we respect Ruler II in a way that we do not respect Ruler I. Insofar as obligation might come from respect, can this justify the claim that Ruler II deserves obedience?

I do not believe so, since there is as yet no *mutual* respect. Nothing in Ruler II's behavior evinces any respect for me, and though he is perhaps more laudable than Ruler I, it remains unclear why this would generate any sort of obligation on my part. (In contrast, one may construe Ruler III's belief that his policies advance my interest as showing respect for me.) Soper does, however, suggest a kind of argument which might establish the required attitude on the part of Ruler I. He says:

> It is not the actual correctness or justice of the purposes invoked that is crucial to law but the fact that purposes are invoked at

> all—that reason and justification rather than fiat and will dominate the manner in which rules are formulated, defended, modified, and reformulated. The conceptual claim need only be that there is a link between law and a particular process of rule justification rather than between law and any particular substantive outcome that may result from the process.[52]

On one version of Soper's theory, he holds that sincere moral belief generates respect and thus obligation; but now a certain willingness to defend the belief appears to generate the obligation. This version would follow from the first if sincere moral belief implied a willingness to discuss and defend the belief. But sincere moral belief obviously does not imply a willingness to engage in discourse. A willingness to engage in discourse follows only from certain substantive propositions of moral theory.

Soper himself is aware of the problem raised above, saying, "[o]ne is tempted to ask which is the more important ingredient in the argument for obligation: sincerity or mutual tolerance?"[53] In response, he says two different things. First, "[d]iscourse is necessary to ensure that belief is honest, particularly in light of the ease with which self-deception is possible."[54] But of course this means that in order for me to know that I have an obligation, the ruler must engage in discourse with me; the argument does not show that the *obligation itself* comes from the discourse. Second, Soper says, "[b]ut discourse is also necessary because the reason that honest belief deserves respect stems from the individual's recognition of and tolerance for value disagreement; if that recognition and tolerance is not mutual, obligation again does not result."[55]

Soper's considered view here seems to imply that obligation derives not from mere sincerity of moral belief, but from the willingness to engage in a certain sort of discourse. I wish to make two points about this claim. First, if one identifies this as Soper's considered view, then his theory involves a much stronger claim than it might appear to, given many of his formulations and comments. Just any sincere moral belief (even a belief in the justice of rules) on the part of officials will not do. Officials must have a particular substantive moral belief, the belief in "tolerance for value disagreement" and the advisability of discourse.

Second, even given this stronger claim, I do not think that we have isolated a sufficient condition for obligation. Consider again Ruler II. He has a sincere belief in the moral justifiability of apartheid. In addition, suppose that he is willing to explain to me his reasoning and to listen to

52. Pp. 53-54.
53. P. 141.
54. P. 141.
55. P. 141.

my objections. Yet he continues to believe (sincerely) that the policies do not serve my interest, and of course, they do not serve my interest. And we can suppose that he will most likely not change any of his views as a result of talking to me. Why should Ruler II's willingness to discuss his iniquitous (though sincerely held) moral belief generate an obligation on my part to obey? If a policy has sufficiently harmful consequences for me, and the ruler sincerely believes the policy to be detrimental for me, then why does his willingness to explain his reasoning to me generate even a prima facie obligation for me to obey him?

So even if we add the condition that the ruler value tolerance and discourse to the sincere belief constraint, I do not find that we have a *sufficient* condition for obligation. Ruler II still might seem to differ crucially from Ruler III, who sincerely believes that his directives further my interests. But of course I have already claimed that the condition that the ruler sincerely believe that his directives serve the common good is too strong—one cannot point to the condition as necessary for law.

III. Conclusion

Soper's approach differs strikingly from those of other contemporary legal theorists. He assumes from the beginning what many of us surely believe—that we have some reason to obey law *qua* law. He posits an ingredient which might serve as a bridge between legal theory and political theory. But the ingredient admits of different interpretations. Insofar as "in the common good" has substantive content, it is too much to require that officials believe their policies serve the common good, in order to have law and obligation; and insofar as "in the common good" just means "morally justified," it may be too little to ask. When one construes substantively "in the common good," many cases will arise in which officials simply could not have a belief that their directives serve such a common good; different policies serve the interests of various groups (even in the long-term) very differently. I have suggested a refinement of Soper's theory, clearly within the spirit of it, which may render it more plausible (especially in the context of conflicts of interest).

I believe that Soper pays insufficient attention to the robust possibilities of such conflicts of interest and their implications for his theory of obligation. And I want simply to suggest that this imbalance may result in part from the model's focus on the family. Remember that Soper refers to the "requirement that the parent is trying in good faith to act in the interests of the child by acting in the interests of the family as a whole."[56] In a family, genuine conflicts of interest certainly do emerge, but the interests

56. P. 79.

of the various members of the family are more closely related than those of the various classes of most societies. When my parents suffer, I tend to suffer also, and when I hurt, they do too. Interests are connected more intimately in a family than in a society, and if one ignores this distinction, one might underestimate the possibility that officials might pursue a policy which they sincerely believe to be morally justified but not in my interest. Given that expectations of different classes do not tend to be "chain-connected" (in Rawls' term) or to move together as the interests of various members of a family might, Soper clearly owes us a more explicit account of "common good" in order to allow for a proper evaluation of his theory. While I have suggested some deficiencies in Soper's theory, I have not impugned the general project (which I think has much interest): to say what law is in such a way as to explain why I have reason to obey it, and to undertake an explanation not in terms of utility or complicity, but in terms of mutual respect.