

# Michigan Law Review

---

Volume 84 | Issue 1

---

1985

## The Natural Duty to Obey the Law

Kent Greenawalt  
*Columbia University*

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Natural Law Commons](#)

---

### Recommended Citation

Kent Greenawalt, *The Natural Duty to Obey the Law*, 84 MICH. L. REV. 1 (1985).

Available at: <https://repository.law.umich.edu/mlr/vol84/iss1/2>

This Article is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact [mlaw.repository@umich.edu](mailto:mlaw.repository@umich.edu).

# THE NATURAL DUTY TO OBEY THE LAW

Kent Greenawalt\*

*In this Article, Professor Greenawalt examines the strengths and weaknesses of arguments asserting the existence of a natural duty to obey the law. He begins by defining "natural duty," and then investigates this concept in the theories of John Finnis, John Rawls, Tony Honoré, Philip Soper, and John Mackie. Drawing upon the similarities of these theories, Professor Greenawalt questions the nature, reach, and force of the natural duty to obey, considering, among other things, whether the duty extends to laws that are unjust or to laws with which few others comply, and examining more generally when duties should be understood as not depending on consequences. He also examines the tension between natural duties and the possible beneficial effects of disobedience, concluding that the natural duty to obey the law does not always override considerations of consequence.*

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. THE OBLIGATION TO OBEY AND NATURAL DUTY.....	3
A. <i>An Alternative to Social Contract, Fair Play, and Utilitarian Accounts</i> .....	5
B. <i>Critical Features and Possible Bases</i> .....	7
II. FIVE THEORIES.....	8
A. <i>Traditional Natural Law</i> .....	8
B. <i>A Natural Duty to Support Just Institutions</i> .....	10
1. <i>Principles of Justice in the Original Position</i> .....	10
2. <i>The Natural Duty in Nearly Just Societies</i> .....	12
3. <i>Content of the Duty to Support Just Institutions</i> .	13
C. <i>Necessity as a Ground of Duty</i> .....	17
D. <i>Respect for Officials Exercising Authority</i> .....	20
E. <i>An Underived Obligation to Obey the Law</i> .....	23

---

\* Cardozo Professor of Jurisprudence, Columbia University. A.B. 1958, Swarthmore College; B. Phil. 1960, Oxford University; LL.B. 1963, Columbia University. — Ed. This article is drawn from a book length manuscript on *Conflicts of Law and Morality* that is scheduled to be published in late 1986 by Oxford University Press. My continuing work on the general topic has been generously supported by the Richard Lounsbury Foundation. A summer research grant in 1985 from the Samuel Rubin Foundation gave me time to do a near-final draft. My work on both the article and book was completed in the autumn of 1985, while I was Visiting Lee Distinguished Professor at the Institute of Bill of Rights Law, Marshall-Wythe School of Law, College of William and Mary. I am very grateful to each of these institutions for assisting this work. I am also grateful to Stephen Munzer, John Simmons, and Paul LeBel who gave me helpful comments on previous drafts.

F.	<i>The Common Threads</i> .....	24
III.	A GENUINE DUTY CONCEIVED IN NONCONSEQUENTIALIST TERMS .....	25
	A. <i>The Realm of Duty and Ought</i> .....	26
	B. <i>Can One Consider the Likely Compliance of Others?</i> .....	27
	C. <i>The Acceptability of Noncompliance by All Those Similarly Situated and the Bases for Determining Moral Standards</i> .....	31
	D. <i>Classes of Laws and Applications</i> .....	36
IV.	THE LIMITS OF A NATURAL DUTY TO OBEY .....	38
	A. <i>Unjust Laws</i> .....	38
	B. <i>Unjust Regimes</i> .....	45
V.	RESOLUTIONS AMONG COMPETING MORAL GROUNDS: THE ABSENCE OF CLEAR PRIORITIES .....	48
	A. <i>Does the Duty to Obey Take Priority as a Duty to the State?</i> .....	48
	B. <i>Deontological Standards and Consequential Calculations</i> .....	51
	C. <i>Laws Infringing Moral Rights</i> .....	58
	CONCLUSION .....	61

## INTRODUCTION

Though scholarly skepticism has been expressed during the past two decades, lawyers and others have often supposed that people have a moral obligation or duty to obey the law. This article is about one possible basis for that moral constraint, a natural duty. The article has a number of interrelated objectives. In it, I try to show briefly why theories of natural duty are so important in this context, how these theories differ from other moral bases for obedience, what the strengths and weaknesses are of particular arguments about a natural duty, what features unify apparently disparate approaches, what assumptions need be made for an account based on natural duty to succeed, and how far the range of a plausible account reaches. The discussion is directly aimed at illuminating the narrow topic of a proper public conception regarding obedience to law, but I believe it teaches much broader lessons about how to analyze the existence and extent of debated moral duties.

This article proceeds in the following steps. In Part I, I introduce the concept of a "natural duty" to obey the law and contrast it with certain other proffered sources of duty. In Part II, I investigate five

theories about obedience to law that I group together as ones of natural duty. This investigation involves both exposition and criticism and eventuates in a drawing together of the common threads. In Part III, I explore the critical assumptions that are necessary to support a natural duty to obey. I conclude that such a duty does exist but explain why it does not reach even all applications of just laws under just regimes. I then turn, in Part IV, to unjust laws and unjust regimes, concluding that for application of the duty no sharp line can be drawn on the basis of the justice of a law or a regime. Finally, in Part V, I consider the power of the natural duty when it is in competition with beneficial effects of disobedience. I conclude that the duty to obey should not be conceived as invariably overriding conflicting considerations of consequence.

## I. THE OBLIGATION TO OBEY AND NATURAL DUTY

The very subject of an obligation to obey the law may seem to have an academic cast. Who can doubt that people should usually obey the law? Killing innocent people is morally wrong, so one has a moral duty to comply with the law against murder. Who can doubt, on modest reflection, that disobeying the law is sometimes morally permissible? Every effort to aid fugitive slaves escape to the north was not morally wrong. If obedience to law is often but not always morally required, and if an individual faced with a choice whether to obey must consider various moral claims, what exactly is the point of thinking about an abstract moral duty to obey?

The twofold answer concerns both individual choice and the general relations of citizens and governments. The question about a duty to obey focuses on the moral force of the law itself.<sup>1</sup> Does the existence of the law make a significant moral difference? When the act the law forbids would be morally wrong in any event, the issue is whether the legal prohibition adds to the moral reasons why one should not perform the act. When the forbidden act would otherwise be morally

---

1. I do not attempt a definition of law here. I assume that "the law" that citizens are called upon to obey consists primarily of rules of behavior adopted by officials in the society. For this purpose, the now familiar account of law developed by H.L.A. Hart in *The Concept of Law* (1961) is apt. For the subjects of this article, it is not necessary for me to determine the place of principles and policies in legal interpretation or to decide if individual laws or systems of political directives could be so devoid of requisites of "legality," such as consistency and comprehensibility, that they would not qualify as "law." I do assume here that substantive immorality alone does not disqualify a rule from being "law;" and I also assume, contrary to Philip Soper's view, see *A THEORY OF LAW* (1984), that law can exist even when those who issue legal rules do not believe they are just or for the common good. The differences between myself and Professor Soper over "defining" law are not critical to the discussions in our two articles. [Compare Soper, *The Moral Value of Law*, in this issue, at note 4. — Ed.]

preferable or indifferent, the issue is whether the legal prohibition makes its performance a moral wrong. Thus, the presence or absence of a duty to obey in particular circumstances can be important for individual choices about obedience. The second significance of the duty concerns what citizens owe more generally to their rulers and fellow citizens. One of the fundamental questions of political philosophy is whether all citizens, or all residents,<sup>2</sup> have a duty to comply with government directives. Thinkers have often supposed that obedience to law is a critical aspect of what one owes as a citizen, and that members of societies do have a duty to obey every law, or every just law, or every law of a just government, or every just law of a just government. Inquiry about any claimed source of duty should be sensitive to these two aspects of concern. Whether the source of duty reaches some choices about obedience and whether it reaches, perhaps with limited qualifications, all choices about obedience are both important questions. I try to keep both in mind as I proceed to analyze claims about a natural duty to obey.

A natural duty is one that arises because one is a person or a member of a society, or because one occupies some narrower status, such as that of parent. Natural duties are distinguishable from moral constraints, such as the obligation to keep one's promise, that rise because one has voluntarily subjected oneself to them. Sometimes the term "obligation" is itself restricted to moral constraints that are voluntarily undertaken or owed to specific persons, but the phrases "obligation to obey the law" and "political obligation" have not traditionally been so confined,<sup>3</sup> and I do not adopt the restrictive usage here. No doubt, drawing the line between natural duties and voluntarily undertaken moral constraints is not simple, both because many social positions are voluntarily chosen<sup>4</sup> and because natural duties may be said to lie behind ones that are voluntarily undertaken;<sup>5</sup> but these complexities need not concern us.

Natural duties have been understood as something more than a general moral injunction to promote desirable consequences. Though one might conceive of a straightforward utilitarian approach to morality as asserting a single natural duty to do what will have the best

---

2. For the most part, I do not try to analyze what degree of participation in a society renders one subject to a duty to obey. I assume that for most purposes citizens and permanent alien residents are on a similar footing.

3. See generally A. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 7-16 (1979).

4. Two people may choose to become parents.

5. One might speak of people as having a natural duty to keep promises, though the obligation to keep any particular promise results from an individual's choice.

possible effects, utilitarian accounts are typically understood as competitors to accounts based on natural duty which, in ways indicated below, do not make the morality of acts depend on an overall balance of consequences.<sup>6</sup>

A. *An Alternative to Social Contract, Fair Play, and Utilitarian Accounts*

The possible significance of a natural duty to obey the law is partly a consequence of the perceived failure of other approaches to establish any general obligation to obey. Briefly,<sup>7</sup> the traditional liberal social contract theory that obligation rests on people having explicitly or impliedly consented to obey the law founders on the implausibility of claims of general consent. Promise and consent do figure importantly in the respect that some people, especially officials, owe to some laws; but they do not reach the relations of many citizens to many laws.

Another voluntarist theory, that a duty of fair play requires compliance with rules by those who have chosen to accept benefits provided under the rules, has enjoyed some prominence in recent years. In emphasizing fairness to fellow citizens, that duty shares an element with versions of the natural duty to obey. The critical respect in which it differs is in making a duty to obey conditional on the subjective attitude that a citizen has toward the general benefits that law and government afford to everyone. The duty of fair play reaches more situations than a promissory obligation, but it also fails to cover all citizens and all applications of all laws.<sup>8</sup>

Within liberal theory, the main competitor to a social contract theory of social relations has been utilitarianism; it suffers from different problems as an account of obedience to law. At least the simple form of act utilitarianism must be viewed as an alternative to a theory of obligation to obey rather than as one form of such a theory. If the basic standard for morality is that one should promote good conse-

---

6. In this article, I pass over the terminological question whether an act should be judged on the basis of actual consequences, foreseen consequences, or reasonably foreseeable consequences. J.J.C. Smart has a clear discussion of this problem, *An Outline of a System of Utilitarian Ethics*, in J. SMART & B. WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 46-49 (1973), and adopts a terminology that distinguishes forms of evaluation. In *The Perplexing Borders of Justification and Excuse*, 84 COLUM. L. REV. 1897, 1907-11 (1984), I consider whether acts that produce unpredictably bad consequences should be regarded as justified or excused.

7. These other theories of obligation are treated in Greenawalt, *Promise, Benefit, and Need: Ties That Bind Us to the Law*, 18 GA. L. REV. 727 (1984). I engage in a more extensive examination in K. GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (to be published in 1986 by Oxford University Press).

8. The outer edges of a duty of fair play come close to the natural duty discussed here. The article does not attempt to draw any precise line between the two approaches.

quences, one need not obey the law when obedience will have no worse consequences than disobedience. The moral reason to obey will not arise in a significant number of instances.<sup>9</sup> Nor does the existence of the law have intrinsic moral significance, though it will often be a relevant moral factor. If act utilitarianism is the soundest moral theory, no general duty to obey the law in the sense usually conceived exists. A further problem concerns the status of consequential reasons. Contrary to the import of simple act utilitarianism, most people do not believe they are under a duty always to promote the best consequences. They think they are morally free on many occasions to promote the interests of themselves and those they love in preference to the overall balance of interests. Thus, even when the balance of consequences points toward one act, people often do not consider themselves under a duty to perform that act. If the only reason to obey the law concerns the overall balance of consequences, many people will not regard themselves as under a *duty* to obey even when obedience will promote the best consequences. Of course, people might be wrong, the ambit of duty may be much wider than most of them understand; but only if its encompassing notion of duty is correct can an act-utilitarian theory of obedience establish a genuine duty to obey whenever the consequences of obedience would be favorable. For reasons that are hinted at but not explored in this article, I think that notion of duty is incorrect and that therefore purely consequential considerations often do not establish a duty to obey even when obedience would be overall desirable.

Rule utilitarianism is a more promising theory of why people have a duty to obey, and much that is said in this article could be used to develop such an account. I do not explore systematically the differences between accounts based on natural duty and rule utilitarianism, though I comment near the end on my understanding of some critical variances.

---

9. One possible sense of a prima facie duty to obey, a sense analogous to legal usage about evidentiary burdens, might be acceptable to act utilitarians. Such a duty would support obedience in the absence of further information or argument about whether obedience is right or wrong. A utilitarian living within a generally good system, believing that obedience of most laws most of the time is desirable, might well assume that lawful behavior is morally desirable unless contrary reasons suggest themselves. But this assumption would have negligible practical importance, because one will never identify an act as a violation of law and nothing else; understanding other features of the act, one will be able to perceive moral reasons for and against performing it.

In Part II of *The Moral Value of Law* in this issue, Professor Soper apparently supposes that if people assume that some explanation or justification is called for when one disobeys, it follows that people believe there is a prima facie obligation to obey. But if people think obedience is morally proper in the great majority of instances, they might expect an explanation for disobedience without believing that there is always a moral reason in favor of obedience. In other words, they might accept a prima facie obligation only in the "evidentiary" sense, not in the stronger sense that interests Soper.

### B. *Critical Features and Possible Bases*

Having viewed, however summarily, the difficulties with act utilitarianism and the contrast between it and natural duties, we are ready to look more closely at three critical features of a natural duty to obey the law. First, the triggering conditions of such a duty do not involve appraisals of consequences in individual cases. If, for example, one has a natural duty not to lie, one need not appraise the likely consequences of telling a particular untruth to understand that the duty applies. I do not mean to suggest that consequences are irrelevant to whether lying is, all things considered, called for; the duty not to lie may be outweighed by the sufficiently favorable consequences of lying. But one knows that the duty not to lie counts for something even if lying will do no harm.

The second feature of a natural duty to obey is closely related to the first; it has at least some power to overcome a balance of favorable consequences. If one has a duty not to lie, one should not lie when one estimates that slightly better consequences will result from lying than from telling the truth. At the extreme, a duty might be thought absolute with respect to desirable consequences, "trumping" the most powerful considerations of consequence; but all it needs to count as a duty is to have *some* trumping capacity.

The third critical feature of a natural duty to obey is the appropriateness of blame for failure to perform. If, without an excuse, one fails to perform a duty, one is blameworthy. In this article I assume that a failure to perform a morally preferable act is not always blameworthy. This basic idea has been captured by the notion of supererogatory acts. Giving half my salary to charity may be morally preferable to spending the money to enhance the quality of my own life, but a failure to donate is not deserving of blame. Rather, the person who does contribute so much has engaged in a praiseworthy supererogatory course of action. Sometimes the phrase "supererogatory acts" is used to describe only especially heroic or sacrificial actions, but I shall include in that category all morally preferable actions that are not demanded by duty. Under a theory that people have a natural duty to obey, a failure to obey the law is blameworthy; it is not treated as a failure merely to do morally preferable, supererogatory acts.

As we shall see in more detail below, theories of natural duty can rest on diverse foundations, and a plausible challenge to my whole enterprise is that I am treating similarly theories whose foundations are radically different. I hope I can demonstrate that the points of commonality are great enough to warrant this common treatment, but I wish to note at the outset some different techniques of grounding



duties, which are relied upon more or less explicitly in the accounts of natural duty that follow. One may relate duties to a theory of human nature and human good that is claimed to be rationally ascertainable. One may assert that the duty is established by a universally valid intuitive sense; or that such a duty is a premise of a particular culture or stage of history. One may rely upon a fit between the disputed duty and other acknowledged moral duties or claim that recognition of the duty would be generally efficacious. Finally, one might offer a constructivist account that asserts that the duty would be chosen by free and rational persons under certain specified conditions. These strategies are not mutually exclusive, and, as we shall see, some theories employ two or three of them in combination.

The potentiality of a natural duty to obey is the possibility that it can generate a genuine duty in circumstances in which social contract and fair play fail because they do not apply; and utilitarianism fails, if it points toward obedience at all, because it offers only a weaker consideration relevant to moral preferability rather than duty. Unlike voluntarist theories, the natural duty, if sound, can apply to every citizen and perhaps every law. It may suffice to establish a general duty to obey the law, something the voluntarist theories cannot achieve. For these reasons, theories of natural duty warrant careful attention.

## II. FIVE THEORIES

### A. *Traditional Natural Law*

By traditional natural law, I refer to the longstanding position in moral and legal theory that human law is in some sense derived from moral norms that are universally valid and discoverable by reasoning about human nature or true human goods. Rooted in Greek and Roman ideas, this view has dominated centuries of Christian thought. Given its most influential systematic explication in the writings of St. Thomas Aquinas,<sup>10</sup> it remains the prevailing Roman Catholic position and is accepted in various forms by many others of different religious persuasions. I shall concentrate heavily on the account given by John Finnis in his *Natural Law and Natural Rights*,<sup>11</sup> a comprehensive and sensitive modern exposition of this traditional view. This concentration no doubt obscures important divisions among natural law theorists,<sup>12</sup> but since what unites them is, for our purposes, much more

---

10. T. AQUINAS, *Treatise on Law*, in *SUMMA THEOLOGICA* (1945).

11. J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980).

12. For readers familiar with modern legal philosophy, I note that the views of Lon Fuller and Ronald Dworkin accept too little of the traditional position to count as natural law theories in the sense I use here.

important than what divides them, this limited focus is warranted.

According to natural law theory, laws are rules for the common good, the common good embracing the good of individual members of the community.<sup>13</sup> Human beings need authority and rules to coordinate activities of any complexity, to guide those who are ignorant, and to curb antisocial selfish inclinations.<sup>14</sup> Political authority and the law of the state are thus necessary to promote human flourishing and are natural institutions to promote the common good.<sup>15</sup> Since individuals have a duty to promote the common good, they have a duty to support those who exercise political authority and to obey valid laws. As Finnis puts it, one aspect of action for the sake of the common good is being a "law-abiding citizen" and to be a law-abiding citizen requires obeying the law even when one does not see an independent reason to do what the law requires.<sup>16</sup> Though the moral obligation to obey each law is "variable in force,"<sup>17</sup> the reasons that justify creating laws that are "relatively impervious to discretionary assessments" are "reasons that also justify us in asserting that the moral obligation to conform to legal obligations is relatively weighty."<sup>18</sup>

Implicit in the idea of the common good is a notion of reciprocity. The promotion of the community's common good involves the promotion of the good of each member.<sup>19</sup> Thus in being a law-abiding citizen, someone is contributing towards the effectiveness of an institution that is necessary for his own welfare. His duty to obey the law is related to the benefits the existence of law confers on him. These involve both the intrinsic good of social relations and goods that he can pursue on his own if given respect and support.

Two distinctive features of traditional natural law theory are its "realism" about the origins and survival of actual political authorities and its stringency about what counts as a law carrying a moral obligation to obey. Recognizing that many governments originate in force and treating effectiveness as the most critical ingredient of authority, natural lawyers have claimed that the obligation to obey can arise under all sorts of governments.<sup>20</sup> Particular laws, however, that are

---

13. See T. AQUINAS, *supra* note 10, at *On the Essence of Law*, (Question 90, Second Article); *On the Power of Human Law*, (Question 96, Fourth Article).

14. See J. FINNIS, *supra* note 11, at 231-32.

15. See *id.* at 245-52.

16. *Id.* at 314-17.

17. *Id.* at 318.

18. *Id.* at 319.

19. See Alasdair MacIntyre's reference to the "notion of the political community as a common project . . ." A. MACINTYRE, *AFTER VIRTUE* 156 (2d ed. 1984).

20. J. FINNIS, *supra* note 11, at 246-52.

not addressed to the common good, or suffer other defects that make them unjust, do not generate the moral obligation that follows from just laws.<sup>21</sup> As we shall see below, natural law posits a different reach to the duty to obey than each of the other theories I discuss.

A fundamental question about a natural law duty to obey is whether an underlying assumption about self-evident human goods or the teleology of human beings is maintainable. This article skirts that question, but its examination of the other theories of natural duty lends support to the idea that the receipt of benefits as a member of a community can generate a duty to contribute to the good of the community by obeying its rules. Whether the duty to contribute to the common good by obedience applies if obedience on a particular occasion will not contribute to that good is a troublesome problem that is examined after the other theories are set out.

### B. *A Natural Duty to Support Just Institutions*

John Rawls, in *A Theory of Justice*, treats a natural duty to promote and support just institutions as the general moral basis for obedience to law in a nearly just society.<sup>22</sup>

Though I shall claim that Rawls's natural duty can be detached from most of what he says about substantive principles of justice, the duty is presented as an aspect of a comprehensive theory, and I begin by placing it, however briefly, within that theory.

#### 1. *Principles of Justice in the Original Position*

As one aspect of his theory of justice, Rawls claims that the natural duty to support just institutions fits with conclusions about justice in social institutions. Suggesting that the principles of justice for a liberal democratic society are ones that would be chosen in an "original position" by persons under a veil of ignorance about their places in society, natural talents, particular interests, and emotional propensities,<sup>23</sup> Rawls argues that people in the original position would reject

---

21. See *id.* at 351-66; T. AQUINAS, *supra* note 10, at *On the Power of Human Law*, (Question 96, Fourth Article). Augustine, and other members of the early Christian church, tended to take a more absolute view of the duty to obey political authorities. See H. DEANE, *THE POLITICAL AND SOCIAL IDEAS OF ST. AUGUSTINE* 89-91, 142-52 (1963).

22. J. RAWLS, *A THEORY OF JUSTICE* 333-55 (1971). This approach departs substantially from the fair play account of political obligation found in his earlier writings. *E.g.*, Rawls, *Legal Obligation and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (S. Hook ed. 1964). A duty of fair play, or fairness, is still treated as important for the, mostly better-placed, members of society who "gain political office and . . . take advantage of the opportunities offered by the constitutional system." J. RAWLS, *supra*, at 344.

23. The devices of the original position and veil of ignorance are designed to draw out principles that we would accept in reflective equilibrium, a point at which discrepancies between our

utilitarianism as the operative principle for judging social institutions,<sup>24</sup> choosing instead the principle that inequalities are acceptable only if they are to everyone's advantage, that is, only if those who get less than others still get more than they would under more egalitarian conditions.<sup>25</sup> For societies capable of fulfilling the basic wants of individuals,<sup>26</sup> all of three more specific, and now familiar, principles of social justice would be applicable: the priority of equal liberty, fair equality of opportunity, and the allowance of differences in wealth and organizational power only if these serve the interests of the worst-off class of society.<sup>27</sup>

These principles of social justice provide the background against which natural duties of individuals would be determined. Rejecting utilitarianism as an appropriate guide for individual action,<sup>28</sup> persons in the original position would wish to guarantee just institutions effectively, and would accept among natural duties a duty to create and support just institutions. Rawls's most precise statement of this duty is: "first, we are to comply with and to do our share in just institutions when they exist and apply to us; and second, we are to assist in the establishment of just arrangements when they do not exist, at least when this can be done with little cost to ourselves."<sup>29</sup> Since just political institutions will include a principle of majority rule, and majority votes are bound to produce some results that minorities regard as un-

---

general moral principles and our intuitions about particular moral conclusions are reconciled after they are adjusted to fit with each other. J. RAWLS, *supra* note 22, at 48-53. The conditions of the original position are also set on the basis of a reflective equilibrium that reconciles their apparent appropriateness with the appropriateness of the results they yield. *Id.* at 20. In writings since *A Theory of Justice*, Rawls has clarified the status of the conditions of the original position and of the principles derived from it. These are not claimed to rest on any universally valid theory of human nature or rational choice, but rather on the "basic intuitive ideas that are embedded in the political institutions of a constitutional democratic regime and the public traditions of their interpretation." Rawls, *Justice as Fairness: Political not Metaphysical*, 14 PHIL. & PUB. AFF. 223, 225 (1985). The agreement in the original position represents a conception of persons as "free and equal." Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 552-54 (1980).

24. J. RAWLS, *supra* note 22, at 60-90. Rawls claims that those in the original position will want to assure that their welfare will not be sacrificed for the welfare of others. They will also recognize that in actual societies, public acceptance and approval of the utilitarian principle would generate frustrations and resentments that could be avoided by acceptance of the "difference" principle, which imposes less onerous strains of commitment and is more stable. *Id.* at 175-83, 496-504.

25. I understand Rawls to claim that this "more general conception of justice," *id.* at 62, would be accepted in the original position during the process by which the parties arrive at more specific principles.

26. *Id.* at 542-43. At an earlier stage of development, liberty might not be given priority.

27. *Id.* at 60-90.

28. *Id.* at 333-42. One ground for the rejection of utilitarianism at the level of individual choice is the inapt fit between it and a nonutilitarian theory of justice. *Id.* at 334.

29. *Id.* at 334.

just, putting up with such laws is the price of effective majority rule.<sup>30</sup> The duty to support just institutions will include a duty to obey even laws that are unjust, so long as they “do not exceed certain limits of injustice.”<sup>31</sup> Rawls’s account of natural duty is one aspect of a constructivist theory that uses shared premises of liberal democratic cultures to determine principles that would be chosen in an initial position of equality.<sup>32</sup>

Though they are embedded in a unified and complex theory, the essential arguments that Rawls presents for a natural duty to bolster just social institutions would have force even if justice in social institutions were conceived differently.<sup>33</sup> Imaginary beings in anything like an original position would want principles of moral duty that would help maintain just and desirable<sup>34</sup> social institutions.<sup>35</sup> Since the original position analysis is designed to draw out the reflective moral intuitions of actual people about justice, actual people would, if Rawls is right, acknowledge that were they to live in a just political order they would have a duty to support that order.

## 2. *The Natural Duty in Nearly Just Societies*

What relevance does such a theory of natural duty have for members of societies who judge their institutions to be less than ideally just? That would seem to depend on the degree of injustice, the potentialities for greater justice, and perhaps the relation between injustice and the members of society whose possible duty is involved. Since Rawls develops the natural duty in a section of the book that deals with disobedience in nearly just societies and treats that general problem in a way markedly similar to earlier articles of his concerning modern liberal democracies,<sup>36</sup> we may conclude that he thinks the citizens of such societies lie under the natural duty.<sup>37</sup>

---

30. *Id.* at 350-62.

31. *Id.* at 351.

32. *See* note 23 *supra*.

33. Rawls indicates that “it would be possible to choose many of the natural duties before those for the basic structure without changing the principles in any substantial way . . . .” J. RAWLS, *supra* note 22, at 110.

34. I add the word desirable here to cover the possibility that persons in an original position might opt to have a government promote a particular conception of the good, making judgments that did not involve justice between persons, as usually understood.

35. However, a separate principle of this sort might not be needed if utilitarianism were selected as the appropriate principle for justice in social institutions.

36. *See especially* Rawls, *supra* note 22. The ground of the duty has altered, but the reasons why the duty applies to unjust as well as just laws remains essentially the same.

37. Though all of these democracies fall short of Rawls’s principles of justice in what they actually accomplish and in what are taken as guiding principles, they do approximate these prin-

In judging the degree of injustice that would obviate the duty for some or all citizens, one would presumably need to consider the set of alternatives. If the institutions of society *A* and society *B* fall substantially short of ideal justice, but institutions in society *A*, because of historical conflicts and class resentments, are about the best that can be achieved, whereas the institutions in society *B* represent a sharp and reversible deterioration from much better institutions, the natural duty to support existing arrangements might apply in society *A* but not in society *B*.

Though Rawls, contemplating a society that accepts proper principles of justice that benefit everyone, does not emphasize the reciprocal dimension of his natural duty, a duty to support institutions that are generally just might well be weakened if the unjust features of those institutions worked regularly to one's disadvantage. Within fairly just political orders, the strength, or existence, of the duty for particular individuals may depend partly on whether those individuals are, overall, gainers or losers from injustice. If, for example, the political order in the United States still operates with substantial unfairness towards native Americans, their duty to support the political order may be less than that of the average citizen.<sup>38</sup>

### 3. *Content of the Duty to Support Just Institutions*

Having indicated the possible relevance for nearly just societies of a natural duty to support just institutions, I turn to the nature of the duty, the situations that it reaches, and a particular criticism leveled against it as a basis for obedience to law. I want first, however, to disentangle compliance with the rules of just institutions from other weaker or more controversial aspects of the duty that Rawls explicates.

We can identify three different elements of the Rawlsian duty: compliance with just institutions that apply to us, doing our share in those institutions, and promoting just institutions that do not exist. The compliance element is the only one comfortably viewed as involving a strict moral duty, a duty that requires the performance or non-performance of specific acts and whose application does not depend on likely consequences. The duty to assist in the establishment of just institutions that do not exist cannot plausibly be understood as a duty

---

ciplis in important respects. Also, the duty to support existing institutions may generally be stronger in societies that are *more* just.

38. See generally Ball, *Obligation: Not to the Law But to the Neighbor*, 18 GA. L. REV. 911, 912-14 (1984); Olsen, *Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929, 961-64 (1984).

to contribute to every enterprise promoting more just institutions. Rawls considers beneficence to be in the realm of supererogation rather than in the realm of duty;<sup>39</sup> if he is right that we do not always have a duty to support the welfare of others at our own modest expense by contributing to each worthwhile charity, it is highly doubtful that we have a duty to contribute to each effort to enhance justice. Even were one to think of a weak "imperfect" duty that could be satisfied in various ways, the moral reasons for promoting just institutions would not require choices of specific acts. And such a duty would certainly not demand aid to efforts that were predictably bound to be wholly ineffective.<sup>40</sup>

Similar qualifications can be raised about any duty to "do our share in just institutions," at least when our share is not as precisely defined as the civic responsibility to vote. The duty to do our share is, moreover, subject to an independent objection. Rawls's own emphasis on doing one's share reflects a belief that participation in public affairs is an aspect of good citizenship and the good life. Though the benefits gained from the political order might be claimed to ground a positive duty to participate actively, such an assertion collapses if one considers alternative altruistic life styles. A person who withdraws from public life and devotes himself to medical research or to prayer for humankind, trying to better the human predicament in ways quite different from active political participation, is not violating some duty to his fellows.

The duty to comply with just institutions that apply to us is different from those other two parts of the duty to support just institutions. Not depending on a controversial positive duty of political participation, it can rest on a negative duty not to do injustice or to undermine just arrangements; it can yield clear directions for choice in particular instances; and its application may reasonably be understood not to depend on whether particular acts of disobedience will have bad consequences. Circumscribed to include only compliance, the duty to support just institutions that apply to us resembles the natural law duty to obey the law.

The existence of pockets of injustice within generally just political orders presents a kind of conceptual barrier to understanding the duty to support just institutions as including a general duty to obey the law. The underlying substantive difficulty is this. Most actual political

---

39. J. RAWLS, *supra* note 22, at 109, 117.

40. Possibly actions might be required that themselves would have no measurable effect but that taken together with similar actions would have a positive effect. *See generally* D. PARFIT, *REASONS AND PERSONS* 75-78 (1984).

processes are unfair in important respects, most pervasively in the preponderant influence of the rich and powerful, but also in such details as the ability of powerful committee chairmen in the United States Congress to see that great benefits go to their own localities. These imperfections partly undermine the more just aspects of the political order. A person who refuses to comply with some law that directly derives from those imperfections, or who disobeys some other law to expose the imperfections, may take the view that his aim is not only to discourage individual unjust outcomes, but also to *improve* justice in the processes by which decisions are reached. Even if actors limited their considerations to support of just institutions, compliance with law would not always be morally preferable to noncompliance.

Whether this conclusion is consonant with saying that the duty to support just institutions generates a *general* duty to obey the law depends on how the conclusion is framed. If we said simply that, on balance, the duty to support just institutions sometimes tips in favor of disobedience, the duty to comply would not sound general.<sup>41</sup> If instead we looked at the duty to comply as separate, and perhaps acknowledged that disobedience has some tendency to undermine the society's just political institutions, we could conclude that the duty to comply remains in force, though outweighed on the occasion by the need to enhance the justice of political institutions in some narrower respect. I shall assume that the duty to comply can be so understood and that the possibility of competing claims within the rubric of support of just institutions does not itself undercut the notion of a general duty to obey.

Rawls's assumption that the natural duty to *comply* provides a genuine alternative to obligations based on voluntary undertakings has been challenged by John Simmons, who objects to Rawls's view that we have a special duty when just institutions *apply* to us.<sup>42</sup> He points out that usually a moral duty of support does not arise simply because an institution, say a professional association, purports to apply to us; we must voluntarily accept the application of the institution before such a duty arises. If voluntary acceptance were needed to generate the natural duty to support just institutions that apply to us, the duty would be much less general than Rawls supposes, and would actually collapse into obligations arising from voluntary acts. On the other hand, were the duty to be understood as not depending on voluntary acceptance, an institution's forcing itself upon us would not be morally

---

41. Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 784 (1984) casts the natural duty of justice in this way.

42. A. SIMMONS, *supra* note 3, at 147-52.



relevant, and we should have as much duty to support just institutions that do not apply to us as those that do.<sup>43</sup> Simmons pointedly concludes that citizens would then have no special duty to support the just political institutions of their own countries in comparison with the just political institutions of other countries.<sup>44</sup>

At least as far as the compliance component of the duty to support just institutions is concerned, Simmons' challenge is inapt. The duty to obey the law may exist even if everything he says about the failure to establish a special duty to one's own government is correct. A duty not to undermine just institutions may well reach our relations with the governments of other countries, when we visit those countries or have other relations with them.<sup>45</sup> And, even if in principle our duties to other governments do not stand on a different basis from our duties to our own government, citizenship or chosen residence could make a powerful difference to the precise import of those duties, since one's particular status reasonably affects what justly can be demanded and expected.<sup>46</sup>

Moreover, we have strong reason to suppose, contrary to Simmons' basic theoretical claim, that special duties can be generated by application of institutions that do not involve voluntary acceptance. His examples draw on institutions that virtually everyone assumes should not morally be applied without such acceptance. But there are other institutions as to which people believe compulsory application is morally appropriate, notably the family (up to a certain stage in life) and the state. As I shall explore further in connection with Tony Honoré's claim about a duty based on necessity, when the nonvoluntary application of an institution to a person is morally appropriate, it may give rise to duties that do not relate to institutions that do not apply to that person.

---

43. Though Rawls evidently is thinking mainly of people who will be reached by just institutions, he is not clear whether the duty to help establish just arrangements that do not exist extends to just arrangements that will not apply to us even when created. Simmons assumes that Rawls posits a general duty to promote just institutions whatever the scope of their application, but that Rawls thinks this duty is weaker than the duty to support just arrangements that apply to us. Simmons himself concludes that unless the arrangements have been voluntarily accepted, the duties are of equal force, indeed are reducible to a single duty to promote just institutions. *Id.* at 154.

44. *Id.* at 155-56.

45. One might say that the political arrangements of those countries apply to us to the extent of our relations with them.

46. Rawls talks of a natural duty to render aid that applies generally, J. RAWLS, *supra* note 22, at 114, but it does not follow that when a rescue must be made, an ordinary beachgoer and a designated lifeguard should regard their responsibilities as the same. Assuming that a compulsory draft for military service is morally acceptable, a country may reasonably demand service of residents but not visitors.

These focused inquiries about Rawls's natural duty to comply with just institutions leave us with a more general question: Does the duty to obey the law depend on likely or possible effects of disobedience on just institutions, or must one obey the law whenever the rules of the just institutions demand it? Neither every refusal nor every known refusal to adhere to the norms arrived at by majority rule threatens the principle of majority rule.<sup>47</sup> Though Rawls often talks of violations of the duty as if they will really tend to undermine just institutions, he also conceives of the duty as meeting the requirements of a traditional theory of political obligation, one that posits a general duty of citizens to obey the law. Since Rawls makes no mention of the possibility that noncompliance with laws might fall outside the natural duty if it has no predictable effect on just institutions, and because of Rawls's broader adherence to Kantian ethics, we can assume that Rawls understands the duty to apply in a way that does not depend on factual evaluations in particular instances,<sup>48</sup> but whether that way of conceiving the duty is persuasive is as troublesome and important here as with respect to traditional natural law and the theories I now proceed to discuss.

### C. *Necessity as a Ground of Duty*

Tony Honoré has suggested that the duty to obey laws arises out of necessity.<sup>49</sup> He claims that certain relationships give rise to special duties in the absence of any voluntary act: an uncle has a duty to see to the care of an orphaned nephew; a woman made pregnant by a rape and unable to have an abortion has a duty to care for the child. The basis for the duty of the person deemed to be suitable to render care or supervision is the "need for an individual, a thing, or an institution to be cared for or supervised."<sup>50</sup> The state is required to take care of native-born citizens; its relationship to them is nonvoluntary, based on necessity. The individual has a corresponding duty to comply with the requirements of his fellow citizens represented by the law. Rather than positing any general theory about true or valid claims of morality and political morality, Honoré tries to establish the connection between the debated duty to obey and a more generally accepted duty.

---

47. We can even imagine a society in which law observance is so widespread that actors who commit peaceable instances of disobedience and then submit to punishment might actually strengthen the political processes by increasing sensitivity to issues of justice; and this might be true even if their own claims of injustice are illfounded or trivial.

48. Compare Richards, *supra* note 41, at 784, whose account of the duty is otherwise closely similar to Rawls's but who asks if obedience will actually advance and not retard justice.

49. Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 VA. L. REV. 39 (1981).

50. *Id.* at 51.

Honoré's general argument that duties of care can arise because of special nonvoluntary relationships is persuasive. These responsibilities arise because physical proximity or convention places individuals in the position of being counted upon to render care; the individuals have genuine moral duties to satisfy those expectations.<sup>51</sup> In theory, the special position of being a citizen could, in like manner, lead to one's being counted on in ways that would create a moral duty; but Honoré's progress from his plausible premises to his conclusion that citizens have a prima facie duty to obey all laws is less than compelling. To distill the potentially sound elements of Honoré's account, we must reject some of what he actually says.

The main argument Honoré makes in favor of the duty of necessity moves from the obligations of those who become alien residents to the duties of native-born citizens. A noncitizen impliedly consents to obey "because he knows that the state and its citizens would not agree to his coming or remaining except on the condition that he agree to abide by its laws."<sup>52</sup> The native-born citizen, for whom the state is actually obligated to care, must have duties toward the state that are at least as substantial.

Honoré is mistaken about what can fairly be supposed about resident aliens. Entry for residence may imply a general attitude of compliance to law, but given uncertainty and disagreement about morally required and morally ideal attitudes toward the law, any attempt to sum up a general consensus knowable by citizens and immigrants about the attitude immigrants should have toward the law is bound to fail.<sup>53</sup> The remainder of Honoré's argument is also crucially flawed. Though native-born citizens generally have obligations as powerful as those admitted by the state, states can strike bargains with outsiders that impose obligations not rightly imposable on citizens. For example, a state with too many doctors might reasonably condition an alien doctor's immigration upon agreement to practice in a remote area, even though requiring native-born doctors to practice in that area might be an unacceptable constraint upon liberty.<sup>54</sup> Since citizens may not have all the duties that can result from a bargain between the

---

51. David Lyons suggests that these duties derive from a more general duty to help others in need. Lyons, *Need, Necessity, and Political Obligation*, 67 VA. L. REV. 63, 70 (1981).

52. Honoré, *supra* note 49, at 58-59.

53. Of course, a particular society might meet this challenge by communicating to alien residents more precisely what is expected of them, though vagueness is likely to inhere in any general oath. See Greenawalt, *supra* note 7, at 744.

54. With native-born prospective doctors, the state might make a similar bargain by agreeing to pay the expenses of medical education in return for such an agreement. For powerful criticism of any sharp and enduring differences between resident aliens and citizens of the sort involved in guest worker programs, see M. WALZER, SPHERES OF JUSTICE 52-61 (1983).

state and aliens who seek to be residents, the latter's supposed duties do not settle the duties of citizens.

Another simpler argument intimated by Honoré fits better with the general thrust of his essay. The basic idea is that the state is in the position of badly needing the citizen's support reflected in compliance with law; out of the state's need, and the performance of its own duty to care for the citizen, the citizen's duty to comply flows. Unfortunately, powerful disanalogies exist between this application of the "duty of necessity" and the "ordinary" examples from which Honoré draws. In the latter, a discrete person needs help, and if the individual with the "duty of necessity" to provide it fails, someone is likely to suffer. This model may apply to laws that protect important rights of individual citizens, such as the right to bodily security. Since a single violation defeats the state's aim of protection, the state really does need the compliance of everyone. As to such laws, however, one might speak more directly of a moral duty not to violate the justified expectations of individuals, including expectations generated by legal rights; reference to the state's need seems superfluous, unless the point concerns some broader effects of violations.

The notion of necessity to comply fits much less well with other laws. As to some, failure to comply by one individual may not interfere with the state's positive efforts at all (one person evades the draft or customs laws), *unless* the state's *need* is conceived to include fairness in allocation of the burdens it imposes. As to other laws, a failure to comply may have some extremely slight, *de minimis*, overall effect (e.g., one's failure to pay \$10,000 in taxes increases the national debt by that amount). For both of these sorts of laws, no single individual's compliance is really "necessary." Nor is his compliance "necessary" in regard to "rights-protecting" laws if one thinks of the broader purposes that concern the state rather than damage to the individual victim.

If necessity seems too strong a word for each citizen's compliance with law, the state does need general obedience if it is to function effectively; the benefits conferred on individual citizens by the state may well be sufficient to generate some duty to comply with its rules. On this point, Honoré's theory links to traditional natural law and Rawls's natural duty of justice. Since Honoré puts his theory forward as one that supports a *prima facie* duty to obey the law generally and in all societies,<sup>55</sup> it is broader than traditional natural law in reaching

---

55. See Honoré, *supra* note 49, at 48. Honoré does not deny that the duty to obey can be outweighed, but he supposes that it has some force in every instance.

unjust laws and broader than Rawls's approach in reaching unjust regimes. Honoré's account of an obligation to comply that does not leave citizens free to assess whether compliance with particular laws, and compliance on particular sorts of occasions, contributes to the needs of their fellows starkly raises the persuasiveness of nonconsequential versions of this sort of duty to obey.

#### D. *Respect for Officials Exercising Authority*

Philip Soper, like Honoré relying on reflective moral judgments rather than presenting a comprehensive theory of morality, has developed an account of obligation that marks an interesting variation on some of the themes discussed so far.<sup>56</sup> Soper urges that since coercive government is necessary for human beings, those who try to govern in the interests of their subjects are not committing a moral wrong against them. Subjects should respect the good faith efforts of those with authority to govern in their subjects' interests and a crucial way to show this respect is by obeying their directives. Subjects have a prima facie obligation to obey the law because those with authority care about whether the law is obeyed and they deserve respect.

An analogy to the family drawn by Soper helps to clarify the approach.<sup>57</sup> A sensitive daughter in a good family recognizes the need for parental authority, and understands that her parents are trying to exercise their authority in her interest. Since her refusal to comply with their directions will cause them disappointment or unhappiness, the love, or at least respect, that she feels for her parents provides an important moral reason to do what they direct. This reason reaches the many situations in which the only way her disobedience will adversely affect her parents' self-interest is by causing psychological pain.<sup>58</sup>

For the citizen, "[a]cknowledgment of the value of law arises out of a rational appraisal of one's own self-interest in the maintenance of a coercive social order."<sup>59</sup> If that person's interests are taken into account along with those of other subjects, and if officials have a good

---

56. See P. SOPER, A THEORY OF LAW 75-90 (1984); see also Soper, *The Obligation to Obey the Law*, in ISSUES IN CONTEMPORARY LEGAL PHILOSOPHY: THE INFLUENCE OF H.L.A. HART (R. Gavison ed.) (to be published in 1986 by Oxford University Press). I provide a more extensive analysis and criticism in Greenawalt, *Respect, Fair Play, and the Obligation to Obey*, in *id.* In that piece, I take up some problems that are addressed in Professor Soper's article in this issue but not in mine.

57. P. SOPER, *supra* note 56, at 77-79.

58. Putting the point this way falsifies the strong sense of identification that many parents feel with respect to their children. Reduced to the practical level, Soper's theory reaches a parental directive to do homework as well as a directive to set the table.

59. Soper, *supra* note 56.

faith belief in the justice of the system, then, according to Soper, the person owes respect to the officials exercising authority.<sup>60</sup> Obeying the law is one important way to show respect. Recognizing that the conditions he sets will be met by most modern governments, Soper argues that the "respect" reason for obedience does apply even to a regime the citizen regards as substantially unjust, as well as to unjust laws within a just regime.<sup>61</sup>

At first glance, Soper's choice of respect for officials appears an odd choice for a general theory of obligation. In most circumstances, the success of the project in which an official is engaged is a much more powerful reason to comply than possible affront to officials.<sup>62</sup> Soper does not deny this; he does not contend that respect for officials is uniquely powerful as a source of obligation. Its significance lies in its breadth. Soper realizes that compliance will often not matter to the success of the endeavor, but in his view respect is always implicated and therefore is capable of underpinning a general obligation to obey the law on every occasion of application.

We may profitably broaden Soper's account to include respect for citizens who are also contributing their parts to the maintenance of law;<sup>63</sup> violations of law may be an affront to them as well as to officials exercising more specific responsibilities within the legal order.

To succeed as a theory of general obligation, Soper's approach must meet two possible challenges. One challenge is that showing respect is too weak a reason to amount to a duty. Soper apparently does not wish to claim that showing respect for officials is a duty in some strong sense, only that it is a good reason for obeying the law. On this interpretation, his notion of a *prima facie* duty is very weak.<sup>64</sup> Soper himself suggests that a moral reason for doing something is not sufficient to establish a *prima facie* duty if the act would be an independent wrong, like murder, or submission to a wrongful demand, as in paying a robber.<sup>65</sup> But even apart from these special situations, we do not

---

60. *Id.*

61. *Id.*

62. Soper illustrates his theory with a lifeboat passenger who awakens to find someone (not an officer) in de facto control. Soper stresses as a reason to comply with directives "the impact on the person who stands in front of me trying to do his best to accomplish ends thought to advance the interests of the group as a whole, including myself." P. SOPER, *supra* note 56, at 80. How little the feelings of the person exercising de facto authority count here in comparison with the success of the endeavor!

63. Soper concentrates on officials because their acceptance of rules is a minimal condition of law, see Soper, *supra* note 56, and Soper wants to tie an obligation to obey to what counts as law. See Greenawalt, *supra* note 56, for criticism.

64. This is confirmed in Soper's *The Moral Value of Law*, in this issue. [For Professor Soper's response to the challenges made here, see *id.* at Part III. — Ed.]

65. See P. SOPER, *supra* note 56, at 85. Each murder makes some contribution to the prob-

have a prima facie duty to do whatever there is a moral reason to do; more particularly, we do not have a duty to do everything that those performing socially useful functions ask us to do and would like us to do. Were the category of prima facie duty that broad, it would include voting Republican in every election, whether or not the balance of moral reasons usually favors voting Republican. Perhaps Soper might meet this difficulty by including as part of a prima facie duty the idea that the doing of most acts to which the duty applies would be morally preferable, but his notion of duty is weak in yet another sense. Suppose that responding positively to most requests for charitable contributions would be morally preferable, still we do not have a duty to contribute each time because we do not have a moral duty to perform every morally preferable action. If respect for officials and law-abiding citizens is a weak moral reason for obedience that, standing alone, makes obedience only morally preferable; a person is free to disregard the reason without being subject to blame, even when no competing moral reason exists. On this interpretation, Soper's theory is much less stringent in its constraints upon citizens than other theories that citizens have a general duty to obey.

An effort might be made to meet this difficulty by claiming that what we owe officials and law-abiding citizens is much stronger than what we owe candidates and those who solicit for charities. Such a claim would emphasize that officials and citizens are performing a designated role in a scheme that includes us and is for our benefit, that *this* involvement on our behalf puts us under a duty to show respect for their efforts. Such a claim brings us to an emphasis on reciprocity as the source of duty, and would make Soper's theory much closer to the other three approaches we have examined than it initially appears.

A second challenge to Soper's theory is that the respect reason does not apply to many instances of violations of law. Many violations will not affront anyone because they remain secret; many other trivial or technical violations that are known also cause no affront to any individual.<sup>66</sup> Understood as a theory about causing disappointment and resentment in actual individuals, the theory falls short of providing an argument about consequences that reaches every instance of law violation.<sup>67</sup> Soper can meet the challenge of nonapplication to

---

lem of overpopulation; most payments to robbers go to persons in some need. These moral reasons do not establish a duty to act.

66. These points are explored in greater depth in Greenawalt, *supra* note 56.

67. One might talk of remote likelihoods that someone will be affronted, but if that is sufficient to support utilitarian reasons for obedience, then the likelihood of creation of bad habits or bad examples to others are much more straightforward utilitarian reasons that will apply in every case.

many instances of law violation only if respect for officials can be cast in a deontological way that does not depend on the likely consequences of a particular violation, a problem that, as we have seen, also affects the other theories discussed.

### E. *An Underived Obligation to Obey the Law*

Another possibility, offered by John Mackie, is a duty to obey the law that is not derivable from any more basic, more general, moral principle.<sup>68</sup> Believing that conventional morality desirably includes a *prima facie* obligation to obey that cannot be derived from any body of philosophically plausible moral principles, Mackie says that the obligation should be conceived as an independent one.

Under Mackie's more general theory,<sup>69</sup> which denies that objective moral prescriptions exist, humans should develop<sup>70</sup> moral prescriptions that will serve their purposes. Moral norms are needed to resolve situations in which one person's self-interest dictates violation of practices that if generally observed promote the welfare of all. Moral norms, thus, discourage people from stealing when that would serve their interests. According to Mackie, notions of reciprocation, e.g., that because others don't steal from me, I shouldn't steal from them, are much more effective psychologically than any principle of universal benevolence of the sort posited by utilitarianism.<sup>71</sup> The norm that one has "a *prima facie* obligation to obey the law as such is a further, though more extensive, reciprocal norm, like those that prescribe gratitude and loyalty to friends, collective action or forbearance, and honesty about property."<sup>72</sup> Though not derivable from any more general norm, the obligation to obey is significantly connected to other moral principles, and might be defended in part in terms of a "coherence" justification that draws from other norms of reciprocation. Like the other theorists discussed in this chapter, Mackie begins with the desirability of law and law observance, and seeks to draw out a nonconsequential principle that one is obligated to obey the law on every

68. Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143 (1981).

69. Outlined in *id.*, the theory is more fully developed in J. MACKIE, *ETHICS* (1977).

70. Mackie talks of "inventing" moral prescriptions that serve human purposes. But the idea of invention should not be taken too literally. People tend to develop moral principles that will make life in society tolerable, and the relatively small minority that understands the relation between human needs and moral principles may sensibly promote those that are useful in a more self-conscious manner.

71. This is not Mackie's only objection to utilitarianism. See J. MACKIE, *supra* note 69, at 125-48.

72. Mackie, *supra* note 68, at 153.



occasion of its application. Like Honoré and Soper, Mackie does not place unjust regimes or unjust laws outside the boundaries of the duty.

#### F. *The Common Threads*

Each theory of a natural duty to obey that I have explored rests on the importance of government for human life and the need of government to be obeyed. Each, with varying degrees of explicitness, posits some reciprocal relationship of benefit and duty, the benefits given by the government underlying the duty to obey. Like the duty of fair play,<sup>73</sup> these theories emphasize benefits conferred on citizens; they differ from that duty in placing greater emphasis on the *need* for obedience, in paying less attention to particular balances of costs and benefits, and in not making the duty depend on attitudes one has about the benefits received. Like utilitarian approaches to obedience,<sup>74</sup> these theories assume that government is valuable and that obedience contributes to its effectiveness. With the possible exception of Soper's approach,<sup>75</sup> they differ from utilitarianism in claiming a stronger source of obligation than the simple accomplishment of good consequences. They also differ in not making application of the obligation turn on the likely consequences of particular violations.

Although the theories vary significantly in their underlying fundamental assumptions about the nature of political morality, the steps by which they arrive at the duty to obey are remarkably similar. In each obedience is positively valued because it contributes to an essential social objective. Mackie most straightforwardly relies on that logic, but it is also to be found in Honoré's notion of necessity. Soper emphasizes respect, but the duty to show respect by obeying derives from the value of law.<sup>76</sup> Natural law theory does not claim that obedience to law is self-evidently good or an obvious aspect of human nature; rather, obedience is needed if humans are to accomplish their true purposes or achieve the goods that are self-evident. In Rawls's account, the contractors in the original position do not begin with obedience,

---

73. See Greenawalt, *supra* note 7, at 754-64.

74. *Id.* at 744-54.

75. As indicated above, it is doubtful if Soper himself intends any stronger sense of obligation, but if he does not his sense of duty is weaker than that ordinarily employed.

76. Though the importance of the task in which officials are engaged generates the duty of respect, Soper's argument for the duty does not explicitly rely on the need for obedience. Given all he says the duty might come into play even if society would be unaffected by widespread disobedience. Thus, I may be unfairly stretching Soper's own account by including him among theorists who make the *contribution* of obedience to an essential social objective critical. We could interpret, or transform, that account, however, to emphasize the long-term harmful effects if officials are not given respect.

the duty to obey is a means to support the effectiveness of just institutions.

In each theory, then, the good consequences of widespread obedience underlie the duty to obey.<sup>77</sup> Yet each theory, Soper's possibly excepted, supposes that the duty is more stringent than whatever moral reasons ordinarily exist to promote good consequences, and each theory also supposes that the duty comes into play even when, predictably, disobedience will cause no harm and obedience will achieve no good consequences. These two steps, from consequential reasons to a duty of some stringency and from consequential reasons to a nonconsequential duty, are the subject of the next section.

### III. A GENUINE DUTY CONCEIVED IN NONCONSEQUENTIALIST TERMS

Should the reason for obeying the law, whether it be the common good, support of just institutions, maintenance of necessary authority, or the showing of respect for officials and law-abiding citizens, be conceived as giving rise to a nonconsequential duty to obey the law on all occasions? An answer that such a duty exists requires a positive answer to each of four narrower questions, which I consider in turn. (1) Should the underlying reason to obey be understood as giving rise to a moral "ought" rather than just a moral "preference" that renders obedience to law a matter of supererogation?<sup>78</sup> (2) Should a person deciding whether to obey have to disregard whether others who are similarly situated are likely to obey? (3) Should a person have to disregard the practical acceptability of everyone who is similarly situated disobeying the law? (4) Should a person take as the relevant unit for consideration all laws and all applications or narrower classes of laws and applications? All the questions but the first concern whether a duty to obey the law should be understood in a nonconsequentialist way. The second and third questions address general reasons why duties might be cast in that way; the last question focuses on the particular issue of obedience to law, and considers how broad reasons for and against nonconsequential duties apply to it. Lying behind each of the four questions are more abstract and pervasive theoretical problems about the substantive content of ethics, about how one judges between competing claims about how moral duties should be formulated.

---

77. See note 76 *supra* for a qualification about Soper's duty to show respect.

78. See generally J. FISHKIN, *THE LIMITS OF OBLIGATION* 10-24 (1982). By speaking of an act as a "matter of supererogation," I mean only that obeying would be morally preferable but not required. As indicated in the text at page 7, I do not restrict supererogatory acts to acts that are particularly praiseworthy.

Though these background problems are implicated in every question, they are raised most sharply in connection with the second and third questions, and I address them explicitly in those contexts.

### A. *The Realm of Duty and Ought*

The first threshold that the theories of duty examined in Part II must surmount is why the reasons they present should be viewed as giving rise to moral "oughts," rather than regarded simply as relevant to morally preferred supererogatory acts. Often the promotion of desirable consequences is praiseworthy, but the failure to promote them is not a subject of blame. What answer, if any, may be given to the person faced with a choice whether to obey who asks: "No doubt, my obeying will have good consequences, promoting the common good, helping the government work, strengthening just institutions, and avoiding affront to concerned officials, but if I need not devote most of my resources to charity, why ought I to obey?"

The correct answer to this query lies in the notions of reciprocation on which each theory more or less explicitly relies. What is crucial is that the demand is being placed on us under a necessary scheme in which we are fairly involved and whose aim in part is to benefit us.

The nature of what is promoted and the presence of demands on us are not themselves sufficient to place us under a moral duty. If I can promote the common good or just institutions in a remote country by making a financial contribution to a political organization within that country, I have no more duty to do so than to contribute to a hospital within the country; barring extreme need, these possibilities both fall within the zone of supererogation. Nor would a moral "ought" arise if the country passed a law requiring all foreigners with a certain level of income to make a prescribed contribution; a demand by a remote organization that does not benefit me cannot turn my assistance into a duty. Were I the indirect, unintended beneficiary of the country's internal economic policies, say a consumer who ends up paying less because of an export subsidy, I would still have no duty to contribute in return. The situation may not even be fundamentally changed by my being one of those whom an organization does seek to benefit. If a government freely gives money to relieve a drought in another country, the beneficiaries may have some vague duty of gratitude,<sup>79</sup> but the donating government is not in the position of being able to create duties with specific content.

---

79. Of course, if such contributions are a slight step toward rectifying an unjust global distribution of wealth, gratitude may not be called for.

The crucial components for a duty to comply with demands are (1) that benefits are combined with my being, in some sense,<sup>80</sup> a member of the community that the organization mainly serves, (2) that I am someone that the organization has a duty to benefit, (3) that the organization's demands are properly placed on people like me regardless of their voluntary adherence, and (4) that the effectiveness of the organization depends on people like me complying with its rules.<sup>81</sup> The notions of reciprocity that these conditions embody lie close to a formulation of the duty of fair play,<sup>82</sup> differing mainly in not depending on the attitudes the person has about the benefits he is receiving. That these conditions can generate a moral "ought" or duty even in the absence of willing acceptance of benefits is supported by the broad theoretical analysis presented in Part III. C. below.

### B. *Can One Consider the Likely Compliance of Others?*

One aspect of conceiving the duty to obey in a nonconsequential way is that a potential actor is barred from considering the likely compliance of others. Such a preclusion has often been understood to rest on a moral principle of generalization: "If the circumstances of the case are such that the consequences of everyone's acting in that way in those circumstances would be undesirable, then the act is wrong, and it is irrelevant that the consequences of one person's acting in that way in those circumstances would not be undesirable."<sup>83</sup> To understand the force of this principle, we need to delineate its scope and the kinds of situations to which it applies.

Initially we need to narrow the principle a bit to exclude three sorts of situations. The principle is of no help when an actor must choose between two alternatives and general conformity with either of these would be highly undesirable.<sup>84</sup> The principle is not relevant

---

80. I do not address some of the subtle questions concerning the minimal involvements necessary to make one a member of the community. Perhaps if I am visiting another country, and the law of that country undertakes to protect the personal property of visitors in the same way as it protects the personal property of residents, I have a natural duty to comply that extends at least to laws protecting personal property.

81. I am dubious that even these conditions are enough to generate a strong duty to show respect to officials, especially since most officials occupy their positions for largely self-interested reasons.

82. See Greenawalt, *supra* note 7, at 754-64.

83. M. SINGER, *GENERALIZATION IN ETHICS* 137 (1961). Singer actually calls this a generalized principle of consequences which he distinguishes from a broader principle of generalization. The distinction is not important here. Some difficulties with any broad version of the generalization principle are illuminatingly discussed in J. FISHKIN, *supra* note 78, at 97-149.

84. See M. SINGER, *supra* note 83, at 72, discussing "invertible" situations. If desirable consequences *depend* on different people doing different things, the principle offers no guide for individual choice. Edna Ullmann-Margalit observes that these situations are not true "Prisoners'

when someone considers a course of action, such as celibacy, that most people have no desire to follow,<sup>85</sup> one does not have to restrain himself from his preferred course of action if the self-interested actions of others will more than meet general human needs. The principle also should not be conceived to apply when an overall harmful act is already so widespread that one's engaging in it does no added harm. If everyone else's walking has destroyed the grass, one ceases to have a duty to avoid crossing the plot on which grass once grew and might grow again were everyone to stop their walking. In contrast, the generalization principle may be offered as an answer to the person who says, "It is all right if I disobey the law because almost everyone else is obeying." The answer takes the familiar form: "But what if everyone did that?"

In many situations, the principle of generalization will not be the only argument against disobedience. If a violation involves a known infringement of an individual right, a harm is being done regardless of the compliance of others. If noncompliance, say failure to pay a tax, makes a slight negative difference to the government's budget overall, one's own act of disobedience will have undesirable consequences, though they may be hard to trace. In some circumstances, disobedience up to a certain threshold may do no harm, but disobedience beyond that threshold is seriously harmful;<sup>86</sup> if an actor is not sure whether the threshold has been reached, the risk that his disobedience will exceed it is a strong reason to obey. Finally, arguments about bad habits and examples need not rest strictly on a generalization principle, since those arguments urge that one's apparently harmless act may have subtle and indirect undesirable consequences.

Reliance on generalization is decisive when plausible arguments about the particular act's harm are wholly lacking or require bolstering.

#### Illustration 1:

A law prohibits pollution of rivers. Peter knows that if everyone for

---

Dilemma" problems, and that it is the latter to which the generalization principle applies. E. ULLMANN-MARGALIT, *THE EMERGENCE OF NORMS* 57-58 (1977).

85. Because everyone's remaining celibate would mean the termination of the human race, it would be better if everyone tried to have at least one child than if everyone tried to have no children; but so long as the self-interested inclinations of others lead them to have children in excess of the number that would be ideally desirable, the prospective celibate commits no moral wrong by refraining from having children. See K. BAIER, *THE MORAL POINT OF VIEW* 209-10 (1958); H. SIDGWICK, *THE METHODS OF ETHICS* 487-88 (7th ed. 1962). The principle of generalization is relevant only if enough others, but for their sense of restraint, would like to engage in the act so that the negative consequences would occur if everyone who wanted to engage in the act did so. The principle may not apply even then if others obey only because they fear getting caught disobeying a rule.

86. See D. LYONS, *FORMS AND LIMITS OF UTILITARIANISM* 63-75 (1965).

whom it would be convenient discharged a particular substance into the river, the water quality would suffer; but he also knows that most others will not break the law and that his own discharge and the discharges of the few others breaking the law will not undermine the quality of the water *at all*.<sup>87</sup> Peter is confident he can keep his own discharge secret from others, and that, in that event, it will cause no harm whatsoever.

The principle of generalization renders the discharge wrongful despite its harmlessness.

The principle has sometimes been offered as a, or the, central truth of ethical thought,<sup>88</sup> one supported by Kant's fundamental principle that one must act according to principles that one could universalize.<sup>89</sup> However, a minimum notion of universality, implicit in ethical language and thought, does not establish the principle of generalization. That minimum notion does bar claims based on particular names and places. I am not allowed to do something simply because of who I am, *unless* being who I am makes me different from a moral point of view from other people;<sup>90</sup> if my situation is identical with that of someone else, I am under the same moral constraints as the other person.<sup>91</sup> What this minimal notion of universality does not preclude is Peter's taking the following position: "Any person who knows that the compliance of others will render his own discharge harmless is morally free to make it." Since Peter's moral standard, which makes the likely compliance of others part of the morally relevant conditions of his own situation, satisfies the minimum notion of universality, something more is needed to show its unacceptability.

It might be suggested that denial of the principle of generalization is somehow incoherent. The idea is that if Peter can justify his non-compliance on the basis of the compliance of others, then each of the others could do the same, and everyone could disobey, bringing about the harmful consequences. But this claim of incoherence is mistaken. Peter *knows* that not everyone will assess the situation just as he does; he takes as a matter of fact the responses and likely responses of others. Anyone in the same circumstance could morally make a similar assessment, but each person doing that would also know that most

---

87. This is a threshold example in which the actor is sure the particular threshold has not been passed.

88. See generally M. SINGER, *supra* note 83.

89. "Act only on that maxim whereby thou canst at the same time will that it should become a universal law." *Id.* at 9.

90. An extreme existentialist might say that a determination about what a person should do has no conclusive bearing on what anyone else should do, but he probably would not deny the proposition in the text; rather, he would assert a moral uniqueness about each individual and situation that precludes judgment that two situations requiring choices are essentially similar, or urge that moral principles yield no correct choice even in the initial situation.

91. See J. MACKIE, *supra* note 69, at 83-90.

people's patterns of behavior will be set for the short-term future. If more people do start to make the discharges then discharges may become harmful, but *until* they do so, or predictably are about to do so, any potential discharger may make the same moral assessment as Peter and engage in the discharge without bringing about harmful consequences. The claim that the principle of generalization is incoherent is circular; the claim's crucial assumption, that a person should not employ a perspective of moral evaluation that leads to the result it does only because he knows that others similarly situated are not making the same evaluation, turns out to be the principle of generalization the claim is meant to support.

The principle of generalization may be grounded in the impracticality of moral principles that make duties turn on the harm of one's own act in light of the compliance of others<sup>92</sup> and on fairness.<sup>93</sup> In the next subsection, I explore how arguments of impracticality can be formulated; I need only mention here that grave dangers of self-serving evaluations would almost certainly infect moral standards like that proposed by Peter.

The idea of fairness lying behind the principle of generalization is that it is unfair for me to get an advantage that people just like me from the moral point of view are foregoing. If one thinks in terms of fairness, both the celibacy case and a case in which all others are already making the discharge stand revealed as fundamentally different from the case in which the restraint of others makes my potential act harmless. In the celibacy case, no one *need* exercise restraint and in the excess discharge case no one *is* exercising restraint. The purpose of generalization is very close to that of the duty of fair play. The principle of generalization is broader than the duty of fair play, however, since its application does not depend on one's willing acceptance of benefits or upon mutual expectations about restraint that characterize cooperative schemes.<sup>94</sup>

---

92. See generally E. ULLMANN-MARGALIT, *supra* note 85, at 53-62. She assumes that moral norms designed to resolve the difficulties of Prisoners' Dilemma situations will include a generalization principle.

93. In his treatment of claims about the relevance of universalization, C.D. Broad found many such claims to be misfounded and urged that those that were well-founded rested on fairness. Broad, *On the Function of False Hypotheses in Ethics*, *INTL. J. ETHICS*, Apr. 1976, at 26.

94. One is tempted to say that the principle of generalization does not require a cooperative scheme whereas the duty of fair play does. But I have suggested elsewhere that the duty of fair play reaches schemes that are cooperative only in a broad sense. Greenawalt, *supra* note 7, at 756-60.

C. *The Acceptability of Noncompliance by All Those Similarly Situated and the Bases for Determining Moral Standards*

Establishment of the generalization principle alone does not settle that a duty to obey the law should be conceived in nonconsequentialist terms. A person contemplating disobedience may claim that if everyone similarly situated disobeyed, no harm or tendency toward injustice would occur. Such a claim would most clearly arise if the law was highly unjust, but that situation is put aside here. A law might instead be exceedingly trivial without being unjust in the usual sense, and a person might conclude that widespread disobedience of that law would have no negative effect. I shall focus on what is perhaps the more common case of a law that has many applications that are important and some that are not important. Imagine that Diana is a sober driver who is considering at 4:00 a.m. whether to exceed a 30 m.p.h. speed limit that she thinks may safely be exceeded by any other sober driver at that time; or that she is wondering whether to walk on someone's posted land in the woods, believing that similar unseen violations by others would do no harm. Diana, unlike Peter in the pollution illustration, can define her situation in a way that makes no reference to whether others in like circumstances actually do comply and she can contend that regardless of the degree of compliance by others, her disobedient act and others like it will do no harm. Diana can also claim that she is not taking advantage of others.

If Diana can make those judgments, what reason is there for her to think she has a *prima facie* duty to observe the law on occasions like these?<sup>95</sup> She might question whether the basic ground for obedience, e.g., promotion of the common good or support of just institutions, has any moral weight when the ground clearly does not apply. Put more abstractly, her question is: How can a moral reason that derives from the desirable consequences of most acts in a certain class turn into a nonconsequentialist duty to perform every act in the class?

One possibility is that the duty to obey is itself presently understood by most people in a nonconsequentialist way. In fact, attitudes towards law are complex and ambivalent, and whether one could capture any general understanding is doubtful. In any event, a finding that people believe in a general duty to obey might cast some sort of burden on those who would reject this view, but that finding alone would not be sufficient to withstand moral criticism that a true, or

---

95. Of course, she might quickly concede a *prima facie* duty in the weak sense of a starting presumption that would operate *until* she saw that the basic ground of obedience did not apply.



better, conception of the reasons to obey would be formulated in terms of likely consequences in particular instances.

Another possibility for understanding the duty in a nonconsequentialist way is that it derives from some more extensive nonconsequentialist duty<sup>96</sup> or fits closely with a number of related nonconsequential duties. The theories outlined here do not rest on a claim that a duty to obey can be derived from some uncontroversial more general duty,<sup>97</sup> though the line between a derivation and a coherence justification is by no means distinct. As Mackie's work most sharply suggests, the relation between a citizen and the state is not quite like other relations. Arguments about a duty to obey often proceed by drawing some analogy to another sort of relation. Honoré, for example, talks about necessity as a source of duty in family relations, and Soper draws on family relations to illustrate the duty to show respect for those in authority. Often it will be somewhat arbitrary whether at the end of one's efforts one posits a general duty (e.g., necessity) and says that the duty to obey the law is a subcategory of that duty, or whether one asserts, as Mackie does, that related and complementary duties exist in various spheres.

Someone who bases the argument for a duty to obey on its coherence with other accepted duties might claim that a nonconsequentialist understanding fits best with the understanding of the related duties. One way to resist this sort of "fit" argument would be to concede the crucial linkage between obedience to law and other duties, but urge that all of them would better be understood in consequential terms. A different response would be to detach the duty to obey the law from the duties to which it has been related. Let me provide a specific illustration in terms of Soper's analogy to the family. When people have a close personal relationship, failures to obey the directions of those in authority are likely to lead to covering lies and restrained communication. For this reason, the duty to obey of teenagers, as well as that of smaller children, might best be conceived as one that does not rest on predictable consequences in particular instances. But most undiscovered violations of law do not subtly damage any personal relationships between actors and officials, so this particular reason for a deontological duty is much weaker in that context. Thus, one willing to concede

---

96. A claim that citizens have promised to obey the law could be so understood. The obligation to obey would derive from more general promissory obligations.

97. Mackie says explicitly that the duty is not derivable from other duties, and Rawls speaks of an independent natural duty. Finnis, Honoré, and Soper do each relate their duty to obey to some broader duty, but either the broader duty is itself dubious or the derivation is by no means obvious.

that respect within the family gives rise to a deontological duty might resist the extension of that conception to respect for officials.

A final way to argue that the duty to obey is nonconsequential is to claim that, considered by itself, that conception of the duty is superior to a consequential one. What exactly constitutes superiority, if it is not based on "fit" or on present understanding of the duty to obey? A person might urge that revelation shows that God has instructed us to conceive our relation to the law in a nonconsequential way; but such forms of argument are an inapt way to justify conceptions of public morality in a pluralist society, and none of the positions summarized in Part II is cast in this matter. Those theories are based, rather, on the assumption that the relevant moral norms will be most effective in promoting human good if they are understood in nonconsequentialist terms. Mackie explicitly advances such a standard as the criterion for judging moral positions; and Rawls's device of the original position works to a similar effect.<sup>98</sup> Honoré relies in part on the supposed ill effects of people not believing in a *prima facie* obligation to obey,<sup>99</sup> and in his exposition of natural law, Finnis tries to show how moral principles promote the common good.<sup>100</sup>

To say that a norm will be most effective if cast in nonconsequentialist terms is to say something other than that it would be most effective if perfectly followed; the norm must also be one that will have actual appeal to human beings and is capable of being complied with well enough to make the results under that norm preferable to those that might be achieved under an alternative.

The argument that a nonconsequentialist understanding will be preferable to a consequentialist one could be made in various ways. The clearest argument is one that shows that a consequentialist understanding would be obviously self-defeating in some significant respect. Finnis offers such an argument about promise-keeping.<sup>101</sup> Imagine that people decided to keep promises only if doing so would be beneficial, or at least would satisfy the psychological expectations of the person to whom the promise was given and of other concerned persons. Such an attitude might lead people to break promises with relative freedom when only the promisor and promisee knew of the promise

---

98. The import of his analysis is to persuade us that the natural duty to support just institutions is the best moral principle to protect just institutions. His specification that principles of morals must be ones that can be publicly announced and taught also supports the conclusion that the true principles are those that will work best for people.

99. Honoré, *supra* note 49, at 42-43.

100. J. FINNIS, *supra* note 11, at 297-350.

101. *Id.* at 298-308; see also G.J. WARNOCK, *THE OBJECT OF MORALITY* 33-34 (1971).

and the promisee has died<sup>102</sup> or will be unaware of the breach. But if people know that promises are freely broken in these settings they will know that promises made to them that must be carried out in such contexts will not be very reliable. The practice resulting from these attitudes will deprive them of confident expectations and will therefore substantially undermine the benefits that promises afford to those who wish to control future events indirectly.<sup>103</sup> A consequential attitude toward the keeping of promises<sup>104</sup> will thus seriously erode the social benefits of the institution of promises.

A consequentialist understanding of a duty might fall short of this sort of logical difficulty and still be self-defeating in a practical sense. Something along these lines might be said in defense of the generalization principle. Given people's uncertainty about how others similarly situated will act and about when dangerous thresholds are reached, and given their propensity to underestimate the harms of their own individual actions, a broad principle that people should consider the likely compliance of others might consistently lead to inadequate levels of compliance exactly when widespread compliance is needed.

One can make both these sorts of arguments about the self-defeating character of a consequentialist understanding without reference to particular features of a society or its stage of history; but we reach much more difficult terrain in deciding what conception of the duty will best promote human good when we address circumstances in which everyone similarly situated could disobey the law with no ill effect. Here, resolution most plainly turns on how many of these circumstances there are, how clearly they can be identified, and how great the damage is from misidentification. If these circumstances are few and difficult to identify and if people have a strong propensity to think that acts they would like to perform fall into this category, then a nonconsequential understanding will work better. On the other hand, if legal regulation of life is so pervasive that many instances of violation have no harmful tendency (i.e., would not do harm even if engaged in by all similarly situated) and if people can identify these instances with a high degree of accuracy, a consequentialist understanding will be most sound. An overall judgment about a preferred understanding will rest on the extent of legal rules and the degree of

---

102. I pass over here the reality that many people who believe in an afterlife will suppose that promisees who have died are capable of being disappointed or angered.

103. It is doubtful *how great* an effect such attitudes would have on the institution of promises. One consequence would be fewer secret promises with more promises being made in front of people likely to know if they are violated.

104. I am talking here about the basic obligation to keep a promise, not whether that obligation can be outweighed by strong competing consequential considerations.

disinterestedness and acuity of the population. For purposes of comparison, one thinks of norms urged on children; parents will be much more likely to build consequential elements into norms urged on older children, "Do this only if . . . ," than into norms urged on younger children, "Never do this." A population with a good understanding of various aspects of law and its benefits might appropriately be able to rely on a standard that was more consequential than a less well informed population.

If one were trying to evaluate what type of standard would work best in a society, one would also have to consider linkages with related duties and present attitudes about the duty to obey. The duty to obey the law could not be viewed in isolation. Suppose that a consequential understanding would work best in the society if viewed alone, but that people could not compartmentalize to this degree and that acceptance of such an attitude for obedience to law would erode desirable nonconsequential understandings about related matters.<sup>105</sup> Further, a certain cost in uncertainty and instability would be involved in shifting from one sort of understanding to another, so it might be better for the society to maintain its present understanding about obeying the law than to shift to one that would be slightly better but for these costs.

The last few passages may suggest a conscious manipulation of notions of duties that is unrealistic, much in the way that Mackie's talk about inventing morality is unrealistic.<sup>106</sup> But that is not their intended import. I am not concerned directly with what people in a position to influence moral thinking should do; rather I am trying to answer what it means to say that one conception of a duty is correct or superior to another. And if the answer about proper public morality is to be put in terms of benefits to human beings, I see nothing short of an inquiry as complex as the one I have suggested. Even this inquiry omits a crucial and difficult element, namely, how large is the community that counts. Some limited moral notions might be particularized in terms of individual countries, but since we are all part of a larger intellectual community with a shared moral discourse,<sup>107</sup> one's inquiry would have to attend to the institutions, practices, and attitudes within that larger community.

I have sketched the outlines of an adequate theoretical answer to

---

105. If, for example, Alasdair MacIntyre is right that virtues like truth and courage must be exercised without regard to consequences if they are to produce what he calls "internal goods," see A. MACINTYRE, *supra* note 19, at 188-93, an argument might be mounted that moral duties generally will best be conceived in nonconsequential terms.

106. See note 70 *supra*.

107. Obviously the *degree* of sharing is strongly affected by language, geographical location, economic development, and particular cultural traditions.

the question of how a duty that depends on the generally desirable consequences of obeying the law might best be cast in nonconsequentialist terms. Since the answer bears a resemblance to rule utilitarianism, I should briefly note how the approaches in this article differ from it. At least in most versions of rule utilitarianism, actors within the society consciously think in terms of what rules of action, if followed, will have desirable effects. The theories we have examined explicitly or implicitly assume that social life will be benefited if the duty to obey the law is conceived by actors in terms that do not depend on desirable consequences at all. The morality publicly announced and taught would not refer to appraisal of consequences as the standard of whether that duty exists. People would not think in consequentialist terms when they make most moral decisions. The reference to overall desirable consequences would come in only at the level of philosophical inquiry whether moral principles conceived in nonconsequentialist terms are sound (and that would not be an inquiry in which most people would engage).

#### D. *Classes of Laws and Applications*

The theoretical adequacy of a line of argument for a nonconsequential duty does not itself show that a duty to promote the common good or support just institutions underpins a duty to obey the law on every occasion of its application or that such a duty should be understood as a separate duty of reciprocation. Unless the claim is put in terms of benefits to the rest of our moral notions, the theories in this article could establish such a duty only if certain factual predicates are joined to the broad theoretical base. It must be true that more limited beliefs about a duty to obey would result in an inadequate level of compliance.

An initial difficulty with such a view is that in most modern legal systems, many legal norms are substantially broader than the reach of the behavior they are really supposed to discourage. Ease of drafting and simplicity of administration lead officials to adopt rules that neither the drafters nor the enforcers expect to be enforced in their full scope.<sup>108</sup> In respect to the outer coverage of such rules, it is unrealistic to say that the law *seriously demands* the behavior that it formally prescribes and that it would properly be taken to prescribe by courts interpreting the rules.<sup>109</sup> For some other rules that are enforced across their full range, such as certain parking violations, officials may be

---

108. This problem is explored in much greater depth in chapter 2 of K. GREENAWALT, *supra* note 7.

109. A court rightly interprets a 55 m.p.h. speed limit as proscribing driving 58 m.p.h.,

indifferent whether the rule is initially observed or the penalty for violation is paid. Similarly, prompt compensation for breach may sometimes be regarded as adequate satisfaction of a civil law duty. If, in all these instances, concerned persons, officials and citizens alike, neither expect nor insist upon adherence to the law's terms, the idea of a moral duty to comply with those terms is implausible.

Even if one focuses on legal rules that are enforced and as to which payment of damages is not regarded as equivalent to initial compliance, the notion of a general duty to obey faces problems. Given all the other moral reasons for which many people have duties to obey many laws, and given all the occasions in modern societies with highly complex and technical legal norms when disobedience of law will not inflict harm on others, undermine just institutions, or take advantage of others, a general duty to obey is probably not needed to sustain adequate compliance.<sup>110</sup>

Lest too much turn on individual calculation, one might understand the duty as an obligation to comply with laws of the state directed toward what are the state's proper ends — including security, liberty, justice, and welfare<sup>111</sup> — when one's compliance and that of one's fellows may reasonably be thought necessary to success. Such a duty, incorporating the generalization principle, would not reach evidently foolish laws or applications of laws when general noncompliance plainly will not interfere with the state's legitimate ends.

I have been assuming in the previous discussion that the duty to obey is conceived of as being of at least moderate strength. That is the assumption of each of the theories in this chapter with the exception of Philip Soper's. This assumption obscures yet another complexity: the relation between the coverage of a duty to obey and the strength of the duty. Suppose, on the one hand, that someone said that all he meant by a general duty to obey was a moral duty of however slight strength in favor of obedience, one that might give way in many cases to very slight reasons, including selfish reasons, to disobey. Violation of such a "duty" would warrant only slight blame, and even that would be appropriate only in the absence of competing reasons. If the general duty resolves itself to such a minimal "ought," one might very well concede a general duty to obey all laws, the concession amounting to

---

although the hope of legislators and the practice of police may be that only those going over 65 m.p.h. will be stopped and prosecuted.

110. See Dauenhauer, *On Strengthening the Law's Obligatory Character*, 18 GA. L. REV. 821, 824 n.9 (1984), suggesting that "exaggerated claims concerning the duty to obey a provision of the law have the effect of weakening that duty."

111. See Pennock, *The Obligation to Obey the Law and the Ends of the State*, in LAW AND PHILOSOPHY, *supra* note 22, at 77.

little more than that basic ideas of reciprocity provide some rather vague reason for obeying the law. If, on the other hand, a general duty to obey is put forward as a moderately strong moral "ought," one that can be overridden only by substantial reasons in favor of disobedience, then there is good reason to resist the assumption that such a duty is implicated on every occasion on which we must choose whether to obey the law.

Our inquiry has indicated just how complex the notion of a general obligation to obey the law is. I conclude that no such general obligation exists if the obligation is taken in its traditional sense as at least a moderately strong ought. Yet, a natural duty to obey does exist; and it requires obedience of law in some circumstances in which no other theory of obligation generates a duty to obey.

#### IV. THE LIMITS OF A NATURAL DUTY TO OBEY

The discussion thus far has assumed that a duty to obey may be outweighed by competing reasons. The injustice of a particular law or of the overall government can undoubtedly function in this way, supporting a reason for disobedience that may override a duty to obey. The issue for this Part is whether injustice more directly establishes a limit on the natural duty to obey itself. If such a limit is sound, the original duty may be understood not to reach these situations of injustice at all. Whether the natural duty reaches an unjust law or regime is, in part, a substantive moral issue, but one that also involves tricky problems of conceptualization.

I consider first whether a duty that would otherwise be applicable extends to unjust laws, and then turn to the problem of unjust regimes.

##### A. *Unjust Laws*

Three of the theories of natural duty, Honoré's duty of necessity, Soper's duty to show respect, and Mackie's independent obligation to obey the law, are claimed by their proponents to reach both unjust laws and unjust regimes. Rawls's natural duty to comply with just institutions concerns only nearly just constitutional orders, but reaches unjust laws within these orders. The natural law theory of a duty to obey to promote the common good does not place critical emphasis on the justice of a political order, but is claimed to be inapplicable to unjust laws.

If within an acceptable political order an unjust law is adopted, why should there be any moral reason to comply with it? The answer we get from Honoré, Mackie, and Rawls is fairly simple. Citizens will

have a hard time drawing a line between just and unjust laws, and if they perceive their duty to obey as reaching only just laws, they will end up disobeying many just laws that they think are unjust.<sup>112</sup> Further, the entire legal system has great value for social life, and disobedience of even unjust laws will have a tendency to undermine the effectiveness of law and of fair political processes, if these exist. On abstract grounds similar to those just discussed for not permitting citizens to judge the consequences of particular acts of disobedience, these theorists urge that, so far as the original duty to obey is concerned, citizens should not conceive of a sharp division between just and unjust laws. The injustice of a law may provide reasons strong enough to disobey, but these reasons will *outweigh* the duty to obey, not eliminate it altogether.

Soper's emphasis is on the good faith of officials. If they are performing the valuable task of governing and try to govern in the interests of all the people, they are owed respect for their efforts even when they perform occasional injustices. Whether, as Soper apparently assumes, this reasoning reaches injustices that the officials recognize as such is dubious,<sup>113</sup> but it does explain why showing respect constitutes a moral reason to obey when the injustice of a law is not recognized by those who adopt and enforce it.

In contrast to the position that the duty to obey attaches to unjust as well as just laws stands the traditional natural law view, capsulized in the somewhat misleading phrase that "an unjust law is not really a law." As we shall see, that view is a good bit more complex than is

112. They will, of course, also obey some unjust laws that they think are just; but these laws would be obeyed if they conceived their duty as reaching all laws, just and unjust; and the obedience of unjust laws raises different questions than the disobedience of just laws. Hence, I do not focus on it in this discussion.

113. In his book, *supra* note 56, Soper emphasizes the good faith of officials in respect to the overall political order; but if an individual is confident that the good faith of officials does not extend to a particular law or segment of the laws, why the individual should show respect by obeying in regard to that law or laws is not clear. To take a practical example, an individual within a system he regarded as acceptable might think that officials act in good faith with respect to most laws but that when it comes to laws limiting sexual acts among adults, officials willfully impose their own blind prejudices or pander to the prejudices of a narrow-minded minority of voters. I do not understand why respect for officials in other contexts should require obedience to these laws if the individual's appraisal is correct.

In his article for this issue, Soper talks of a citizen who "believes that those who have enacted and stand behind the law have in good faith considered the morality of the law and believe that the action required is morally defensible and for the common good." *The Moral Value of Law*, at text following note 26. This passage intimates that there may be no reason to obey a particular law if the "good faith" of officials is lacking as to it. Since Soper believes that what is properly called law always carries a moral reason to obey, the impact of this position would be that some "legal" norms within an overall system of law might not count as law. Of course, it is possible that *some* officials will have good faith about any law, and this may be enough for Soper to ground the moral reason to obey.



often recognized, but it does deny, in some sense, that the duty to obey the law reaches unjust laws.

The most familiar passage on this subject is one from Aquinas, and it provides a good starting point for analysis.

[L]aws framed by man are either just or unjust. If they be just, they have the power of binding in conscience. . . . Now laws are said to be just, both from the end (when, namely, they are ordained to the common good), from their author (that is to say, when the law that is made does not exceed the power of the lawgiver), and from their form (when, namely, burdens are laid on the subjects according to an equality of proportion and with a view to the common good). . . .

On the other hand, laws may be unjust in two ways: first, by being contrary to human good, through being opposed to the things mentioned above: — either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. Such are acts of violence rather than laws, because, as Augustine says [De Lib. Arb., I,5], *a law that is not just seems to be no law at all*. Therefore, such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right . . . .

Secondly, laws may be unjust through being opposed to the divine good. Such are the laws of tyrants inducing to idolatry, or to anything else contrary to the divine law. Laws of this kind must in no way be observed . . . .<sup>114</sup>

According to Aquinas laws may be contrary to human good not only when they are directed at objects other than that good but also when they exceed the lawmaker's authority and when they impose unequal burdens. Because a "law" that exceeds the lawmaker's legal authority will not usually be considered a norm requiring obedience within a legal system,<sup>115</sup> we may put that kind of defect aside. We may also assume that inequality of burden connotes a substantial injustice about comparative burdens and benefits. Not each small deviation from an ideally just distribution can reasonably be enough to make a law unjust and not binding in conscience. Finnis adds another

---

114. T. AQUINAS, *supra* note 10, at *On the Power of Human Law* (Question 96, Fourth Article) (emphasis in original). Though Aquinas quotes Augustine in this passage, the latter took a more absolute view of the duty to obey. See H. DEANE, *supra* note 21, at 89-91, 142-52.

115. "Ultra vires" laws are not typically treated as if they never existed, but usually someone who refuses to comply with such a law is not considered to have done anything illegal. The notable exception to this principle in American law concerns disobedience to injunctions whose substance exceeds a court's power. The rule requiring obedience seems to be a compound of the perceived need to protect the authority of courts and the existence of techniques to get invalid injunctions vacated fairly quickly. See *generally* Walker v. City of Birmingham, 388 U.S. 307 (1967).

criterion of injustice: not treating people as capable of self-direction by failing to afford them an opportunity to understand and comply with the law.<sup>116</sup> And we might add from the natural rights tradition that an important category of unjust laws are gross violations of conscience.<sup>117</sup>

The question that concerns us does not arise when some higher, constitutional, standard renders invalid a state or administrative rule that is unjust in some respect; such legislation fails to be law within the legal order itself. The issue is whether a law that meets all the criteria of validity within a legal order<sup>118</sup> but remains deficient from the standpoint of justice raises the duty to obey.

Although Aquinas quotes Augustine to the effect that an unjust law "seems to be no law," he does not suggest that it is ineffective for all purposes<sup>119</sup> or that it may be totally disregarded. In contrast to a law that is opposed to Divine good and may not be observed, a law that is contrary to human good does not bind in conscience, "except perhaps to avoid scandal or disturbance . . ." Aquinas himself does not explicate this cryptic qualification, but reflection indicates a variety of relevant moral considerations that the law may generate. One kind brought to mind by the words "scandal or disturbance" concerns the desirability of avoiding disruption of the social fabric. If the government is generally just, and disobedience of an unjust law would threaten its stability, that would be a strong reason for compliance.

Unjust laws can also affect morally proper behavior by rendering others subject to legal sanction. Imagine a law requiring racial separation that a member of the dominant white racial majority rightly believes is unjust.<sup>120</sup> This person realizes that members of the oppressed black minority are hesitant to discourage overtures by whites with whom they have contact, and he also recognizes that officials learning of proscribed racially mixed gatherings inflict severe penalties on

---

116. J. FINNIS, *supra* note 11, at 353.

117. See Richards, *supra* note 41, at 771-77. One might, of course, say that any unacceptable violation of conscience is not a promotion of the common good, but one would need to recognize that some violations of conscience are reasonably thought to promote the welfare of the majority.

118. The issue is most straightforward in a legal order, such as that possessed until recently by Great Britain, in which no higher standards of validity exist. British constitutionalism has been altered in this regard by adherence to European conventions under which British laws may be reviewed by supranational organs. Even in the days of parliamentary supremacy, the law of Great Britain included standards of fairness and justice to *interpret* legislation; such interpretations were subject, of course, to being overridden by clear Parliamentary mandate.

119. The point is emphasized in J. FINNIS, *supra* note 11, at 363-66, who most helpfully relegates the dispute whether an unjust law is really a law to its proper, subsidiary, position.

120. Any system that accepts racial separation is almost certainly disqualified from being an "acceptable" system, at least at this stage in history. One can imagine more debatable illustrations of the same point that would apply to systems that are acceptable overall.

blacks and do little to whites. For a prominent white person the existence and enforcement of the law significantly alter his moral responsibilities toward the blacks with whom he might associate.

We must conclude that elaborating the distinction between just and unjust laws cannot possibly resolve all questions about the moral appropriateness of compliance or disobedience. In his careful treatment of the subject, John Finnis accepts this judgment, but nevertheless contends that unjust laws "simply fail, of themselves, to create any moral obligation whatever."<sup>121</sup> Finnis first qualifies the situations in which unjust laws do not create moral obligation; people are bound to obey otherwise acceptable laws that have been adopted from unacceptable motives, and they are also bound to obey laws that are unjust in their distribution of burdens so long as the distribution does not amount to an injustice towards them.<sup>122</sup> Other unjust laws do not create moral obligation; there may be moral reasons that relate to the common good for obeying, but these are "not based on the good of *being* law-abiding . . . ."<sup>123</sup> The gist of Finnis' position seems to be that because a proper kind of law promotes the common good, a law that fails to promote the common good cannot generate the duty to be law-abiding.<sup>124</sup>

Despite a terminological difference, Finnis has conceded much of the moral substance in the arguments of Honoré, Mackie, Rawls, and Soper; but one practical divergence of moderate significance remains. While Finnis acknowledges that reasons concerning the stability of the whole system may create a duty to obey, apparently a citizen faced with an unjust law may decide if disobedience will actually threaten the law as a whole. He is thus permitted on such an occasion a consequentialist evaluation of the duty to obey, and may disobey if the harmful consequences will not occur. The other theorists posit a non-consequentialist duty to obey even when a law is unjust.<sup>125</sup> To think carefully about this issue, we need to repair to three elements of the nonconsequential duty suggested in Part III: (1) genuine duty rather

---

121. J. FINNIS, *supra* note 11, at 360.

122. *Id.* Finnis apparently has in mind unjust shares of otherwise acceptable burdens, as might exist in an unfair tax schedule, rather than a system that burdens people in a wholly illegitimate way, as in slavery. His conclusion that those who benefit from burdens that are too light have a duty to obey shows how far notions of reciprocity underlie his ideas of promotion of the common good.

123. *Id.* at 361.

124. Finnis himself employs the complicated terminology of a "legal obligation in the moral sense." *Id.*

125. Soper suggests, P. SOPER, *supra* note 56, at 75-90, that his duty to show respect may be understood in either a utilitarian or deontological way, but inclines toward the latter understanding.

than simple moral preferability; (2) applicability regardless of whether bad consequences are likely to occur in the particular instance; (3) power to trump competing considerations of consequence.

Principles of reciprocity for benefits that law and government confer generally are sufficient to generate a duty to obey, making unwarranted disobedience blameworthy rather than merely a failure to do what would be morally preferable. The injustice of a particular law does not automatically remove the reasons for obedience or alter the basic relationships that make obedience a matter of duty. If obedience to an unjust law is morally preferable to disobedience for the sorts of reasons that underlie the duty to obey in cases of just laws, obedience remains a requirement of duty.

Whether the duty should be viewed as applicable regardless of the likely consequences of disobedience is more troublesome. Let us assume first that an actor regards a law as clearly unjust and is correct in that judgment. Obedience to an unjust law will usually, if not always, constitute a kind of support for that law.<sup>126</sup> Obedience will also support the law more generally, which one has a duty to do in a nearly just society. If one has a duty to support just institutions *and* a duty not to support injustice, these two duties come into conflict in the instance of an unjust law. An actor can satisfy one duty only at the expense of neglecting the other. A sensible approach to this dilemma is to attend to the likely consequences of what one does, and gauge whether an act of obedience will in fact benefit the common good and just institutions and will in fact promote the particular law's injustice. Roughly, what would otherwise be viewed as two duties that apply independent of consequences might be treated as cancelling each other out, leaving the actor to weigh the effects of his actions. If, in terms of justice or common good, only beneficial or only harmful consequences would flow from obedience, the actor's duty would be determined accordingly. In the event of a mix of consequences, both duties would still carry some power; absent other considerations, overall duty would depend on whether, overall, justice or common good would be served by obedience. One might conceptualize this conclusion by saying that in the event of a clearly unjust law, the natural duty to obey should be viewed in a consequential way, its application resting on likely actual damage to the common good or just institutions.<sup>127</sup> If the natural duty to obey has some power to override ordinary considera-

---

126. If someone submitted to a law in a manner that plainly indicated a sense of moral outrage at what the law demanded, the act of obedience might not be supportive of the law.

127. Alternatively, one might say that the duty in a nonconsequential form still has relevance, because it does the work of cancelling any nonconsequential duty not to support injustice.

tions of desirable consequences, it would retain that power in this setting. That is to say, if justice overall would be furthered by obedience, one might have the duty to obey despite a balance of welfare consequences favorable to disobedience.

A defender of a nonconsequential account of the duty to obey might claim that my assumption of clear injustice is unrealistic, that part of the point of a nonconsequential duty is to deal with uncertainties and disagreements over whether particular laws are just. Relying on the analysis in the last section, he could urge that a nonconsequential view of the duty is a substantial guard against misjudgment. The implications of this position for cases of perceived clear injustice are somewhat cloudy. Presumably people do have a natural duty to avoid supporting injustice that applies when the law permits either an act of support or an act of nonsupport. It would be logically possible to suppose that the moral duty simply terminates when the law *demand*s an act of support, but given all the injustices that have been demanded by laws in even fairly just societies, the idea that the duty terminates in the face of the law seems implausible. If that is so, an actor who believes that a law is clearly unjust finds himself in the dilemma of having conflicting duties. Resolution would then take something like the course outlined.

The worry about misjudgment could still have application to cases of uncertainty. Perhaps actors should view themselves as under a nonconsequential duty to obey when they are not firmly convinced that a law is unjust.

In a broad sense, I have supported Finnis against the other theorists in the view that the duty to obey is different in its application to unjust laws than it is when it applies most forcefully to just laws. But in the previous section, I have already rejected the idea that the duty applies forcefully even to all applications of all just laws. I have argued that, given the many trivial, foolish, and overbroad laws and the many circumstances in which disobedience, even if widespread, will not undermine the serious aims behind laws, a natural duty to obey does not apply on every occasion of application of just laws. Thus, I agree with the other theorists opposed to Finnis who argue that in terms of a duty to obey no sharp distinction exists between unjust laws and all just laws.

The absence of such a distinction is further shown by a richer analysis of the difference between just and unjust laws. Laws that are just in their general terms may have some unjust applications. Do these create the natural duty in its most powerful form because the law as a whole promotes the common good or do they not create that duty

because the particular feature in question is defective? Often a law could have been better drafted to avoid the unjust feature; but sometimes laws may be drafted as well as they could be, given the appropriate limits on proliferation of exceptions and the needs of enforceability; and yet these laws produce morally unjust results in some cases. Do these laws, wholly appropriate as written, create the strongest kind of natural duty? Presumably Finnis would answer "yes"; but these further subtleties about what it means for a law to be unjust reinforce doubt that a radical difference in the duty to obey depends on whether a law as written does or does not pass the test of justice.

The injustice of a law is highly relevant to whether people should, on balance, obey it, and injustice can directly affect whether the duty to obey is conceived nonconsequentially; but the borderline of just laws does not mark some prominent and rigid boundary in the duty to obey.

### B. *Unjust Regimes*

On the question whether a duty to obey the law ceases to exist if a regime as a whole is unjust, Rawls is opposed to the other theorists of natural duty. They claim, with minimal qualifications in the case of Soper,<sup>128</sup> that the duty exists in all political orders. Rawls, focusing on the duty to comply with just institutions, suggests that the duty applies only within just political orders. Since Rawls's ground of duty is different from, and narrower than, that proposed by other theorists, and since the nature of the duty to obey may affect its application to unjust regimes, the respective positions are not necessarily irreconcilable.

I shall first concentrate on a duty to obey that derives from the necessity of government and the need to promote the common good. Here, we may distinguish between laws as they settle coordination problems and as they lend support to the government in power. Most laws will serve both functions, but one function or the other is likely to predominate. Traffic laws and laws restraining personal violence mainly concern coordination and restraint within the society; a law forbidding citizens to criticize the government or to listen to foreign broadcasts mainly bolsters the government. Laws that concern coordination and restraint among citizens can generate a duty to obey even when the source of authority for law is an unjust regime, so long as the distribution of burdens and benefits among citizens is fair. History

---

128. He says that government must at least take into account the interests of all citizens (though not necessarily in fair proportion) and be believed by officials to be just. Quite possibly, for example, the Union of South Africa and the Soviet Union qualify under these criteria.

teaches us that after foreign invasions or takeovers by autocratic regimes, the basic rules of criminal and civil law of previously democratic societies often do not change very much. The bulk of German criminal and civil law did not change radically under Hitler or during allied occupation, and the Communist countries of Eastern Europe still have criminal and civil codes that are not very different in their proscription of acts that threaten personal security from the codes that have long existed in civil law countries. It would be surprising if the moral duties of citizens with respect to these laws lapsed suddenly with the change in political power. In respect to these kinds of laws, a citizen who lives all his life under a morally illegitimate government may have a duty to obey. Only the existing government is actually in a position to resolve coordination problems; if it does that in a fair way, reasons for obedience that are related to the common good apply.

The conclusion is different when one focuses on laws whose function is to bolster the government. If the regime is unjust, a citizen does not have a duty to those who govern or to fellow citizens to keep the regime in power. This stark formulation requires some clarifications and qualifications, which I shall introduce by examining what I shall call the argument from anarchy.

The argument begins with the premise that any government, or almost any government, is better than anarchy, the absence of government. Citizens who live under even a very bad government are getting something of significant value, and they have a duty to preserve this valuable institution. I shall not pause to examine in depth the proposition that even a very bad government is preferable to anarchy,<sup>129</sup> a proposition with which I agree. The crucial flaw in the argument lies elsewhere. Anarchy may exist for brief periods in turbulent societies but it is not a feasible long-term option for modern human beings. The only realistic alternative to a very bad government is some other government. If we assume that the worst possible government is better than anarchy, it still is worse than any feasible option. Its value and claim to preservation must be judged in terms of feasible options, not in terms of a social state that is not practically conceivable.

What I have said about anarchy points the way to how the overall injustice of a regime should be regarded as affecting a duty to obey government-preserving laws. For this purpose, justice is comparative.

---

129. A serious discussion of that subject would require, among other things, a careful appraisal of what one means by anarchy, of the elements of ordinary government that would necessarily be absent. Roughly, I have in mind the absence of organized coercive sanctions. I believe that small groups of people with common goals and small "primitive" societies can manage without such sanctions, but that a modern large society cannot.

If we grant that liberal democracy is a preferable form of government to other possibilities that now manifest themselves, we must recognize that not every society is ready for and capable of maintaining that form of government. What is a good government for a particular society must be judged in terms of what is possible for that society. And obedience to support a government must be judged in terms of likely changes. If one knows that the only government likely to replace the present one will be more unjust, that is a strong reason to support the present government. One must also take into account the dangers of violence and instability, in deciding whether to disobey in the hope that a better government will emerge. For laws that mainly support the government, the duty to obey turns very much on context, on the degree of injustice, and practically feasible options.

Many laws, such as those requiring payment of income tax, are mixed, serving coordination purposes and supporting the government. One's duty to obey could initially be divided between these two respects and analyzed in the terms indicated above. If coordination purposes generate strong reasons to pay taxes, but one would be justified in declining to support the present regime, a taxpayer who can avoid payment will have to decide whether, on balance, he is warranted in nonpayment or in paying a reduced share.<sup>130</sup>

I need say relatively little about Rawls's duty to support just institutions. The application of that duty must also be understood in comparative terms. If one's society has a constitutional order that is as just as one could hope for in that society, then a duty to support just institutions should reach compliance with its laws. The application of the duty must also attend to subparts of political orders. An oppressive regime might have relatively just administration of ordinary criminal laws. Especially if change in government is not likely, a duty to support just institutions might well require compliance with subparts of the legal system that are just.

The overall conclusion is that the natural duty to obey does not apply only to just regimes, and that the relevance of injustice must be assessed in light of context and alternatives. This conclusion complements my previous conclusion in Part III. D., that the "moral legitimacy" or justness of a government is no sure guarantee that its laws carry a duty to obey in all applications. This discussion indicates that

---

130. In one respect, paying only that amount that will go to coordination objectives would seem an apt resolution. But if half the total amount of taxes are used for support, and a taxpayer pays half his prescribed share, half of his payment may still be used for support. Alternatively, he might pay no taxes to the government, but make voluntary contributions to agencies involved in coordination.



the moral illegitimacy of a regime is no sure guarantee that its laws generate no duty to obey.

## V. RESOLUTIONS AMONG COMPETING MORAL GROUNDS: THE ABSENCE OF CLEAR PRIORITIES

Citizens facing choices whether to obey must often consider conflicting reasons of moral weight. The moral reasons for compliance will include both independent moral grounds to do what the law demands, say refraining from personal violence, and whatever grounds apply for obeying the law as such. Frequently among the latter will be a natural duty to obey conceived in nonconsequential terms. The inquiry in this section is whether any clear priorities exist between that duty and competing moral considerations in favor of disobedience. I explore in turn the possibilities that the duty to obey has priority over all else, that the duty has priority over consequential considerations, and that individual rights take priority over the duty.

### A. *Does the Duty to Obey Take Priority as a Duty to the State?*

Though rarely defended by academic writers on obedience to law, the idea that duties to the state have an absolute or near-absolute priority is one that often infects popular discussions of the subject. This view, which has roots in Christian and classical thought, reflects both the importance and the power of the state. Jesus' injunction to "render unto Caesar what is Caesar's"<sup>131</sup> and St. Paul's claim that because political authority is instituted by God, "every person [should] be subject to the governing authorities,"<sup>132</sup> have often been taken as demanding uncritical submission to civil authorities.<sup>133</sup> Although Christians through the ages have had very different interpretations of the relevant biblical passages<sup>134</sup> and of the citizen's obligations to the state, the basic premise that political authority is ordained by God has been one basis for assigning the claims of the state a high priority. The Aristotelian idea that the state is the highest form of human community, one essential for human flourishing, has similar

---

131. See Mark 12:13-17; Matthew 22:15-22; Luke 20:19-26.

132. Romans 13:1-7.

133. In the early church, of course, Christians refused to obey directives requiring acknowledgment of Roman gods and forbidding Christian services, but disobedience was limited to rules that directly concerned worship; and what disobedience there was did not involve active resistance of the state. See L. BUZZARD & P. CAMPBELL, HOLY DISOBEDIENCE 119-22, 168 (1984). This attitude of submission to the state, which surprisingly survived Roman persecutions, was given systematic defense in the writings of Augustine. See H. DEANE, *supra* note 21, at 9.

134. See L. BUZZARD & P. CAMPBELL, *supra* note 133, at 155-71; Ball, *supra* note 38, at 919-27.

implications. With some modification that idea has been transformed into a central aspect of the Catholic tradition through the writings of Aquinas. The undoubted necessity of the state, the inclusiveness of its control, and the immensity of its coercive force help bolster the view that its claims are highly important. Further, belief that the state itself makes a moral claim to priority, and that it acts properly in overriding other claims when it enforces the law, is sometimes thought to lead to the conclusion that the citizen should accede to this claim of priority.

If there were a powerful basis to support the view that obligations to the state take absolute priority, or do so with highly limited exceptions, we would have a comfortable way to conclude that obedience to law should win out over competing moral claims. But, if we put aside religious assertions based on scripture, which are not a proper basis for developing a shared public morality in a pluralist culture, we discover the absence of any compelling reason for placing moral claims to obey the law on a higher, qualitatively different, level than other moral claims.

That the state employs a coercive force that is not available to other organizations is not by itself reason why its demands have a specially high moral status; nor is the fact that *within the law*, the claims of law take priority. There may be good reasons why the state typically treats the demands of law as overriding competing demands; but, both because many people's moral judgments will conform with those of the state and because the state can win considerable obedience out of fear, the viability of a political order need not depend on individuals submerging other moral demands in the face of state claims. Even if the state claims that its demands have moral as well as legal priority, individuals need not concede the moral validity of this claim.

The more appealing grounds for priority lie in the inclusiveness of the society embraced by the state and the centrality of the state's purposes for human life; but these grounds also do not establish any clear priority for demands of the state. Reflection on the bases of the natural duty to obey suggests one reason for skepticism. The most powerful among them are reducible to duties to one's fellow citizens. Suppose Richard believes that military nuclear weapons seriously threaten the lives of all of his country's inhabitants, or that a particular war involves every citizen of the country in a great moral evil. If a violation of law will help to end one of these conditions, a duty to comply with the law would not necessarily win out over a duty to prevent major harm, or involvement in evil, that is ultimately ad-

dressed to the same group of fellow citizens.<sup>135</sup>

More fundamentally, any notion that a more inclusive relationship necessarily takes moral priority is misguided. Though modern emphasis on a powerful state limited by individual rights may give the notion some credence, the growth of supranational political entities certainly shows that inclusiveness itself is not the only relevant test. A citizen of a Common Market country is not likely to suppose that a duty to all citizens of that economic unit takes priority over a duty to citizens of his own country if the two come into irreconcilable conflict.<sup>136</sup>

If inclusiveness is not critical, perhaps the dependence of other relationships on the state is a basis for the priority of its claims. Within a single society, some institutions, such as local government and legally created corporations, are literally creatures of the state. The demands of the state's law may well take priority over any competing demands of these subsidiary organizations. But many relationships within a state are not subsidiary in this way. Strong family ties, for example, preceded complex political organizations. Even if modern maintenance of these relationships depends on the protections of an organized state, that does not mean that the moral importance of the relationship is less than the moral importance of relations to the state. Especially if one thought the state could survive and accomplish its purposes pretty well on the basis of coercion, whereas families and other institutions depend more heavily on moral commitment, one might think one's moral duties in respect to the latter were as significant as one's moral duties toward the state.

Perhaps the most critical flaw in the idea of the priority of the state involves the variability of moral duties. In practical settings, the strength of moral requirements depends on how they are generated and their situational importance. An explicit promise to faculty colleagues might override a weak natural duty to fellow citizens, even though one's responsibilities toward the state should generally take precedence over responsibilities to one's faculty. A similar outcome may be reached when two duties derive from the same type of moral consideration, say to preserve just institutions. A just government

---

135. It might be argued that the duty to prevent harm gives way to the nonconsequential duty not to disobey. That possibility is discussed, and rejected, below.

136. Insofar as laws within a country that conflict with Common Market rules lose their validity, a citizen who decides to disobey such a (invalid) law is not faced with an irreconcilable conflict.

When the conflict is irreconcilable, the fact that the Common Market has more limited purposes than individual states may be relevant, but the difficulties of many African states in overcoming tribal loyalties suggests that the broadness of the state's purposes is not the only relevant factor.

matters more than a just university; but if a disastrous university injustice could be averted by a relatively minor violation of law, say a sit-in in the university president's office, that would have only the most marginal effect on the preservation of a just government, one might conclude the violation to be worth undertaking.

I do not want to overstate the basic theme of this subsection. Government is extremely important; and ineffective or unjust government can gravely thwart human potentialities. Much of what the government does sets a floor of minimum conduct that should rarely, if ever, be violated. One should take one's responsibilities toward his government and fellow citizens with the utmost seriousness. The duty to obey often carries substantial moral weight, but no easy formula exists for according the legitimate moral claims of the state priority over all other moral claims.

### B. *Deontological Standards and Consequential Calculations*

The most frequent attempts to establish moral priorities involve an ordering between deontological standards and utilitarian considerations. At first glance, the issue itself may seem to be a relatively simple one about the relation between pursuing overall welfare, or some other good, and performing a duty understood in nonconsequential terms. But examination of the nature of some deontological or nonutilitarian duties shows that what initially appears a single question about priorities is actually three basic questions, with some variations.

Some deontological duties are themselves defined in a way that makes consequences relevant. In Section II. B., I briefly discussed the aspect of Rawls's natural duty to support just institutions whose import is to "assist in the establishment of just arrangements when they do not exist," at least when we can do so at little cost.<sup>137</sup> Both "assist" and "establishment" imply efficacious actions, and I have assumed that this duty to enhance the chances of justice in the future does not demand the performance of actions known to be useless toward that end.

Once we understand that a deontological duty may require the promotion of some future state of moral rightness, what I shall call a positive deontological duty, we can also understand the possibility that an act having that effect may violate another duty to avoid a present wrong.<sup>138</sup> The second duty may be cast in nonconsequential terms,

---

137. J. RAWLS, *supra* note 22, at 334.

138. Giving preferences in educational institutions to members of minority races is understood by some people in this way. See generally K. GREENAWALT, *DISCRIMINATION AND REVERSE DISCRIMINATION* (1983).

“always obey the law,” or it may be cast to apply whenever certain negative consequences will occur, “obey the law if disobeying will undermine a just institution.” I shall call such a duty a negative deontological duty, usually not pausing to distinguish between a wholly nonconsequential duty, and one whose application or strength depends on the likely occurrence of some negative consequence.

If one is concerned with the possible priority of negative deontological duties, like the natural duty to obey, one must consider them in possible competition with positive deontological duties as well as with overall desirable consequences. The comparative priority of positive deontological duties and overall desirable consequences is yet another issue, one I shall touch on in passing.

This article makes the assumptions that many duties are cast in terms that do not refer to overall desirable consequences and that these duties should be understood to outweigh a balance of favorable consequences on at least some occasions. These assumptions preclude the easy resolution of priorities available to the thoroughgoing act utilitarian, who asserts that any proper moral norms that are apparently deontological collapse into utilitarian concerns. For him, if justice is not relegated to the status of a subcategory of utility, desirable consequences have priority over justice in any instance of genuine conflict. Once one grants that deontological standards have independent significance, it follows instead that they will sometimes override utilitarian considerations, that sometimes it is right to perform those duties even though favorable overall consequences would result from their violation. Can one say more than this? Must conflicts between deontological standards and utilitarian considerations be resolved according to their respective strengths in various situations, or can more determinate guidance be offered?

One possibility is that true deontological standards, or at least true negative deontological standards, can never be overridden by considerations of utility, or that they can be overridden only by overwhelmingly powerful utilitarian considerations. The appeal of an absolutist position about negative deontological standards is that one should not do what is immediately wrong in order to achieve good objectives in the future. This viewpoint accords negative duties priority not only over desirable consequences generally but also over positive deontological duties. A morality based on such a principle places great emphasis on the distinction between negative duties to avoid wrong and positive duties to promote right and good and on the distinction between the quality of one's own act and predictable consequences of

one's act that derive from the choices of others.<sup>139</sup> Negative duties rate higher than positive ones and one's primary moral responsibility concerns the quality of his own acts, not the predictable reactions of others.

Whatever weight these distinctions should bear in moral evaluation generally, the notion that they will conveniently resolve conflicts over obedience to law is implausible.

Illustration 2:

Doris is driving her car at 10:00 A.M., a time of ordinary traffic for which the 30 m.p.h. speed limit was developed. By exceeding the limit, she will very slightly increase risks beyond those judged generally acceptable. She has a strong reason to exceed the limit because: (a) she is driving a stranger with a painful broken arm to the hospital; or (b) the town council will shortly vote on whether to relax the present speed limit, and her presence is necessary to defeat this undesirable proposal; or (c), same as (b) except the undesirable proposal is to forbid resident aliens from teaching in the local public school. Neither the law setting the speed limit nor more general provisions<sup>140</sup> would be understood to allow speeding in any of these cases.

In this setting, Doris would have a natural duty to obey the speed limit. The negative consequences of her observing the limit are substantial on each assumption, pain for someone or bad legislation, but by no means catastrophic. If the absolutist denies that a modest violation of the duty to observe the speed limit is morally justified, he adopts a position on obedience to law more rigid than that held by most citizens. He might contend that the limit on aliens teaching would be an injustice, but that position is harder to sustain about a speed limit that is too lenient.<sup>141</sup> To argue that shortening the length of someone's pain is a matter of deontological duty would be to erode any sharp distinction between overall bad consequences and positive deontological duties.

What the examples illustrate is that as far as obedience to law is concerned, we are frequently constrained by negative deontological duties that have only moderate power.<sup>142</sup> When these duties conflict either with substantial positive deontological reasons or with straightforward welfare reasons, they will sometimes yield. Not only do the

---

139. See P. FOOT, *VIRTUES AND VICES* 25-27 (1978).

140. I am assuming the jurisdiction in question has a fairly restricted version of the general justification defense.

141. I am assuming that a councilwoman does not have a duty to vote on every issue, and that occasional absence and tardiness do not violate her duties of office.

142. Compare Charles Fried, who limits deontological standards to situations in which they operate with stringency, and supposes that when utilitarian considerations are overwhelming the matter is removed from ordinary moral discourse. By these devices, he manages to put his own position as an absolutist one. C. FRIED, *RIGHT AND WRONG* (1978).

negative duties lack absolute priority, they can, as the three variations in the illustration show and as people's actual views about morally acceptable speeding reflect, be outweighed by considerations that fall short of being overwhelming.

At least part of this conclusion is at odds with John Rawls's suggestion, first made in his original essay on fair play, that "the principles of justice are absolute with respect to the principle of utility . . . ." <sup>143</sup> He meant by this not only that utility cannot justify the creation of unjust institutions but also that "our obligation to obey the law, which is a special case of the principle of fair play, cannot be overridden by an appeal to utility, though it may be overridden by another duty of justice."<sup>144</sup> Although in *A Theory of Justice*, Rawls, as we have seen, casts the general duty to obey as a natural duty to support just institutions, his position with respect to the absolute priority of justice appears not to have altered.<sup>145</sup> Because Rawls's natural duty includes what I call positive deontological aspects, he does not say that compliance with just rules always overrides the promotion of future justice; but he is apparently committed to the proposition that welfare alone cannot warrant noncompliance.

Evaluating Rawls's position about obedience requires care, because neither its precise boundaries nor its grounds are entirely clear. A dominant theme of his social theory is that "an injustice is tolerable only when it is necessary to avoid an even greater injustice."<sup>146</sup> Promotion of overall welfare does not warrant treating people unjustly. As I shall suggest below, the validity of this view is debatable; but even if it is correct, two other claims about the priority of justice do not necessarily follow from it.

The first claim concerns the relative status of positive future-regarding considerations of justice and other desirable consequences. Suppose I am faced with a choice whether to contribute money for political reform or for medical research; does my duty to support just institutions here override utilitarian considerations, if the medical research will contribute to welfare without affecting justice? Such a stark resolution seems implausible; my donation for research would not do an injustice, and is made "at the expense of justice" only in the remotest sense. Since Rawls himself says that duties are not lexically

---

143. Rawls, *supra* note 22, at 13.

144. *Id.*

145. J. RAWLS, *supra* note 22, at 335-36. Joel Feinberg has an illuminating discussion of this topic in *Rawls and Intuitionism*, in *READING RAWLS* 108 (N. Daniels ed. 1975).

146. J. RAWLS, *supra* note 22, at 4.

prior to supererogatory acts of beneficence,<sup>147</sup> he may not suppose that I must here try to promote justice; certainly most people would not regard as some kind of moral mistake a choice to relieve the infirmities of the natural human condition in preference to improving justice.

The second claim about the priority of justice is one that Rawls clearly does make, that obedience must prevail if it is in competition only with welfare considerations. The main point to be made here is that disobeying a law that does not protect individual rights is a special kind of injustice. Usually no other individual is made worse off; no one is subjected to an injustice in the ordinary sense. The only injustice involved is the actor's failure to conform with the duty to comply with just institutions. That this "injustice" is always enough to override favorable consequences is counterintuitive. One aspect of the difficulties is evidenced by uncertainties about the practical import of Rawls' position. He speaks of a natural duty of mutual aid which, since it involves notions of reciprocity and is derived from the original position,<sup>148</sup> might be understood loosely as a duty of justice. In that event, Doris' speeding to relieve the suffering of the stranger with the broken arm could be treated as satisfying a duty of justice, and might be permissible for Rawls. The duty of mutual aid, according to Rawls, comes into play when "one can [provide the help] without excessive risk or loss to oneself."<sup>149</sup> Imagine that by driving the stranger to the hospital, Doris runs a serious risk of losing her job as a truck driver because of a trivial delay in a delivery. That risk might place her action outside the scope of duty into the category of supererogatory beneficence.<sup>150</sup> Surely that shift could not make her speeding *less* justified; if anything, her own need to get back on the job quickly would increase her justification.

The line between disobedience that promotes justice or satisfies a positive duty and disobedience that only promotes good consequences cannot be the line between when disobedience is sometimes justified and when it never is.<sup>151</sup> Indeed, most people think that strong personal reasons also justify their breaking the law when they are confident no one else will be injured and the duty to obey seems relatively weak. Someone who has been unavoidably delayed and can get to a

---

147. *Id.* at 339.

148. *Id.* at 114, 338-39.

149. *Id.* at 114.

150. *See id.* at 117.

151. *See Nagel, Fair Play and Civil Disobedience*, in *LAW AND PHILOSOPHY*, *supra* note 22, at 72, 75. Nagel uses an example of disobedience that will help avoid a restriction on medical research.



crucial job interview on time only by cutting across private property or speeding slightly will do so without believing he has committed a moral wrong.

The more important issues about Rawls's priority of justice lie closer to his main concern, circumstances in which the promotion of utility will involve injustice in a more direct and tangible sense. The underlying conflict in the *Hirabayashi*<sup>152</sup> and *Korematsu*<sup>153</sup> cases has often been thought to involve a conflict of this sort; I shall use a variation on it to consider, first, the dimensions of justifiable government action and, second, the related problem of obedience. Since the actual treatment early in World War II of American citizens of Japanese origin living on the west coast smacked of virulent prejudice and extreme overreaction to any genuine danger, I need to formulate the conflict with assumed facts that eliminate these features.

Illustration 3:

In a west coast city, ten percent of the population is of Japanese origin; the rest of the population is made up of whites and blacks. Early in a war involving Japan as an enemy, saboteurs from submarines have entered the city at night, blown up important military installations and killed hundreds of soldiers. The task of the saboteurs is greatly eased by the presence of Japanese-Americans on the streets at night; authorities are not able by sight to distinguish the members of the two groups. No one doubts the loyalty of any Japanese-American and no prejudice exists against them. A curfew for Japanese-Americans would make a substantial difference to stopping the saboteurs; a curfew for the entire population would have the same, but no greater, beneficial effect. Neither the long term survival of the United States nor its present political institutions is threatened by this war.<sup>154</sup> Authorities aware of all these facts must decide whether to impose a curfew, and, if so, whether to impose it on all citizens or only on those of Japanese origin.<sup>155</sup>

The curfew will substantially aid military efforts and save soldiers' lives, yet imposing a curfew on a minority group that has done nothing wrong seems unjust.<sup>156</sup> Though I shall not argue for the conclusion

152. *Hirabayashi v. United States*, 320 U.S. 81 (1943).

153. *Korematsu v. United States*, 323 U.S. 214 (1944). In a discussion of Rawls's original paper on fair play, Rawls, *supra* note 22, Roland Pennock raised this problem. See Pennock, *supra* note 111, at 77, 82.

154. I add this caveat only to eliminate the argument that successful prosecution of the war is necessary to preserve just institutions in the United States.

155. What I have outlined is part of the justification that was put forward for the measures during World War II. I focus on Japanese-Americans because countries traditionally have exercised substantial power over citizens of enemy countries during wartime, and I want to avoid the complicated questions about the justice of these powers.

156. Indeed, in a literal sense it is a violation of Rawls's principle of maximum equal liberties, though Rawls may not have meant to cover short-run expedients of this sort. I have unrealistically supposed that the sabotage efforts do not threaten civilians to avoid the argument that the unequal restriction on liberty will benefit the Japanese-American citizens themselves.

that such a curfew is unjust, I am relying on the assumption that such restrictions on liberty are more just if imposed on wrongdoers or if imposed on everyone. The curfew here could embrace the entire population, but then ninety percent of the people would be needlessly restricted in their nighttime movements. If the problem represents a genuine conflict between justice and utility, many people would believe the regrettable sacrifice in justice acceptable.<sup>157</sup>

How might a Rawlsian respond? He might say that a curfew that saves soldiers' lives and furthers the war effort is not unjust, but that avenue seems to turn any pressing public need into a matter of justice; and those objectives could be served by a curfew on everyone. What if the narrow curfew is compared with a general one? Would a restraint covering the other ninety percent of the population be unjust as to them because it is unnecessary? To make uselessness the basis for injustice would be to transform a negative consideration of utility into an issue of justice. In any event, broadening the curfew would serve the practical purpose of making the burden fall more equally. If he makes the justice of a curfew for an innocent minority turn on the degree of public exigency and the absence of need for a broader curfew, the Rawlsian categorizes in a way that largely erodes the distinction between justice and utility, making us wonder how significant is any priority of justice over utility. Otherwise the Rawlsian must apparently conclude that the narrow curfew on Japanese-Americans is not a permissible moral option for the government. That conclusion conflicts with the general sense that no such easy ordering resolves dilemmas of this sort.

Related issues arise if someone is deciding whether to disobey the narrow curfew, once it is adopted. Such a person perceives a conflict between a general duty to obey and the injustice of the curfew, and must decide which claim of justice takes priority. One would think that this person should cast into the balance the usefulness of the curfew and whatever damage his violation would cause; but whether Rawls could accept the relevance of those considerations for the individual's duty is doubtful. If a valid claim of justice should never yield in a direct clash with utility, perhaps when two claims of justice conflict, utility cannot determine which should have priority. On the other hand, perhaps the strength of claims of justice and injustice may be

---

157. When the Supreme Court actually passed on the curfew for Japanese-Americans, it decided unanimously in its favor, *Hirabayashi v. United States*, 320 U.S. 81 (1943), a sharp contrast to the three vigorous dissents to the exclusion of Japanese-Americans. *Korematsu v. United States*, 323 U.S. 214, 225, 233, 242 (1944) (Roberts, Murphy, Jackson, JJ., dissenting, respectively).

affected by relevant utilitarian considerations.<sup>158</sup> If a Rawlsian adopts the latter analysis, he admits that utility can figure importantly, if only indirectly, in respect to obedience to law.

Though I have certainly not disproved Rawls's claim about the absolute priority of justice over utility, I have shown that that notion is highly implausible if it means that one must always *promote* justice in preference to utility, or that promoting welfare can never warrant the "weak injustice" involved in much lawbreaking. Though Rawls's more central concern that utility can never justify *causing injustice* is more debatable, I have suggested that (unless the distinction between justice and utility is largely eroded) that position is also probably wrong and that its implications for obedience to law are somewhat uncertain and likely misguided.

My own conclusion is that no simple principle exists for ordering justice and utility or for ordering negative deontological duties and morally worthwhile consequences. About the most that can confidently be said is that if a negative duty is present, consequential reasons to the contrary can override its power only if they are substantial *in relation to* the strength of the duty in that context, and that serious injustice should not be caused unless the utilitarian reasons for doing so are very strong. These formulations may be so vague as to provide little help, but they do realistically acknowledge that negative deontological standards themselves differ tremendously in their moral force, that they can be overridden by substantial considerations of consequence to the contrary, and that justice does not always win out over utility, when the two are genuinely distinct.

### C. *Laws Infringing Moral Rights*

I have thus far concentrated in this section on priorities concerning what one morally *ought* to do, but the significance of clashing moral claims might be to cancel what would otherwise be a duty to obey, leaving both obedience and disobedience within the range of the morally permissible. I now examine a particular possibility of that sort, that when a law violates a moral right to be free of government interference, obedience to that law can never be a moral duty. Phrased differently, the claim is that if one is otherwise morally permitted to exercise a moral right, the improper intervention of the law cannot cancel the moral permissibility of that exercise.<sup>159</sup>

The issue is suggested by Ronald Dworkin's proposal that when a

---

158. One is inclined to say that the injustice of the narrow curfew is at least lessened if it supports vital interests.

159. I am assuming, as throughout the article, that the perspective is one of correct morality,

law violates a moral right, the citizen has a moral right to disobey the law.<sup>160</sup> Since what Dworkin himself means by a moral right in this context is the moral impermissibility of government interference with its exercise, his argument does not actually answer the questions I discuss here, but a broader sense of a right to disobey might seem to imply that disobedience violates no moral duty. Apart from the justifiability of government enforcement, a rights-violating law raises at least three moral questions: can such a law change one's moral duties toward other individuals; can it alter what would be justifiable interference in one's life by other private individuals; can it change one's moral duties toward the government or those it represents?

The first two questions can be answered fairly quickly on the basis of the example of an unjust law barring interracial associations.<sup>161</sup> I have suggested that the unjust law can affect what is a morally preferable act if one's attempts to associate will place others in serious danger. If the danger is great enough, one may speak of a duty not to bring harm to others. Thus, what is undoubtedly a rights-violating law can create conditions in which a full exercise of a moral right to associate would actually be a violation of one's moral duty to other persons.<sup>162</sup> Concerned friends and associates may not coerce one to do one's duty, but they may appropriately engage in activities like blaming and avoiding when they think one is acting immorally. Such activities would be apt here to discourage someone from endangering others, even though the danger flows from a law that violates moral rights.

The more difficult question concerns the person's relationship with the government and with his fellow citizens as citizens. Can a natural duty to obey ever require compliance with a rights-violating law? When the violation of right is as stark as in the law against interracial association, any duty an ordinary citizen owes to his government or fellow citizens is overridden, the forbidden association is not a moral wrong toward the government or the citizenry at large. This point can

---

not presently prevailing social morality. I suppose that correct morality may include notions of moral rights.

160. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 192-93 (1977); see also B. ZWIEBACH, *CIVILITY AND DISOBEDIENCE* 147-48 (1975); Murray, *The Problem of Mr. Rawls's Problem*, in *LAW AND PHILOSOPHY*, *supra* note 22, at 29, 31.

161. See Part IV *supra*, especially text at note 120.

162. I am sliding over a tricky problem in the text. The example assumes that the person making the moral choice is white, and that the dangers of interracial association are much greater for blacks. Still if blacks *freely choose* to associate, can the white have a moral duty not to do so? I am inclined to think that the white would not have a moral duty to refrain from association. But an ordinary right to associate also includes a right to seek out and strongly encourage association. The white, especially if he occupies a powerful social position vis-a-vis the blacks involved, is under a duty not to press for associations that the blacks are hesitant to undertake.

be roughly generalized to cover other violations of moral rights that deny a person's fundamental humanity.<sup>163</sup> One who is treated as subhuman or is required to treat fellow citizens as subhuman cannot have a moral duty to the state or its members to submit to such a constraint.

Not every violation of a moral right is of this dimension, however, and a milder example is needed to test the proposition that one never has a duty to obey a rights-violating rule.<sup>164</sup>

Illustration 4:

All the professors at the Hughes Law School agree that to achieve more coherence in the curriculum, greater central supervision is needed of the subject matter in various courses. All recognize each professor's moral right to academic freedom and agree that reform should not infringe that right. An elected faculty committee produces recommendations for eliminating duplications, including a proposal that the privilege against self-incrimination, which is taught in a heavily attended criminal process course, no longer be taught in constitutional law. Only Professor Ristrante of the six constitutional law professors objects; she thinks that *Miranda v. Arizona* is central to understanding modern constitutional adjudication and that three prior sessions must be spent on coerced confessions and the privilege against self-incrimination if *Miranda* is to be understood. She dissents from the faculty's adoption of that proposal, dropping only a hint of worry about academic freedom. Over the summer she correctly decides that preclusion of matter she considers so vital for presentation of her own views does constitute an impairment of her academic freedom. She deliberates about what she should do.

Would Ristrante act in a morally permissible way if she spent her usual four hours on the privilege and *Miranda*? Given the unanimous faculty sense of the need for central direction and the mutual sacrifices of autonomy, faculty members may have a duty to observe restrictions placed on them though some restrictions may go slightly beyond the hard-to-define borders of academic freedom. Anyone's refusal to abide by the faculty resolution may lead to other refusals by professors whose claims actually fall on the other side of the elusive line between academic freedom and legitimate control, the possible result being practical defeat of this needed reform and recrimination among colleagues. At the very least, Ristrante owes it to her colleagues not to disregard the resolution until she has presented her position about academic freedom in the fullest way possible. In short, the faculty's mis-

---

163. See Murray, *supra* note 160; Richards, *supra* note 41, at 771-74.

164. The example and the following two paragraphs are a modified version of an argument originally made in Greenawalt, *Conflicts of Law and Morality — Institutions of Amelioration*, 67 VA. L. REV. 177, 218-20 (1981).

taken resolution does trigger a duty not to disobey, at least until the issue is fully aired, on the part of someone whose rights it violates.

In this illustration the grounds for obedience to rules very likely include implied promise<sup>165</sup> and are very strong; and the import of postponement or abandonment of this limited slice of academic freedom is not great. Given the variant strength of the natural duty to obey the law of the state, and the ordinary citizen's relative incapacity in most contexts to have his position closely attended to by legislators, showing that a particular breach of a rights-violating law would violate the natural duty to obey will be much harder. But the illustration does establish that no easy generalization about rights-violating laws will suffice; the natural duty to obey will sometimes have enough power to override marginal and correctible impairments of moral rights, changing what would be morally permissible behavior in the absence of a law into morally wrong behavior.

This inquiry, like the others in this section, has left us without some sharp, clear basis for assigning priority to conflicting moral claims that touch obedience to law. We must regrettably accept this evidence of the limited capacity of moral philosophy "to assign weights to . . . the normative requirements of life,"<sup>166</sup> and acknowledge that people facing decisions about obeying the law must do their uncertain best to take appropriate account of the relevant claims without plain rules of guidance.

#### CONCLUSION

I began this article with five theories about one's obligation to obey the law that I grouped loosely under the rubric of a natural duty to obey. I tried to establish that despite rather different approaches to the nature of political morality, these theories shared a dependence on the benefits of law and government, notions of reciprocation, and the need for obedience if law is to be efficacious. Among the central questions about such a duty were whether it should be understood as a genuine duty, with failure to comply being blameworthy, whether it should be understood in a nonconsequential way, and whether it reaches all applications of all laws. Fairly lengthy analysis led to the conclusions that obedience to law should often be regarded as a genuine duty that applies even when no untoward consequences will flow from disobedience; but that the duty so understood does not reach all application of all laws, even when the laws are just and emanate from

---

165. See Greenawalt, *supra* note 7, at 738.

166. P. SOPER, *supra* note 56, at 60.

just governments. I next investigated the relevance of the duty to unjust laws and unjust regimes, here concluding that, though the justice of laws and regimes matter for what one should do overall in respect to a law and though it may affect how the natural duty to obey should be conceived, the duty does retain some force for unjust laws and unjust regimes. Injustice in either respect does not represent a sharp breaking point in the duty's application. Finally, I have considered and rejected the possibility that clear priorities can be established between the duty and competing moral considerations. Perhaps the overall lesson of the exercise is that close examination reveals how complex, and how resistant to easy simplification, are the moral factors that bear on whether one should obey the law.