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0521810477 - The Ethics of Deference: Learning from Law's Morals

Philip Soper

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## The Ethics of Deference

*Learning from Law's Morals*

Do citizens have an obligation to obey the law? Do legal systems claim citizens have such an obligation? This book challenges the currently popular view that law claims authority but does not have it by arguing that the popular view is wrong on both counts: Law has authority but does not claim it. Though the focus is on political obligation, the author approaches that issue indirectly by first developing a more general account of when deference is due to the views of others. Two standard practices that political theorists often consider in exploring the question of political obligation – fair play and promise-keeping – can themselves be seen, the author suggests, as examples of a duty of deference. In this respect, the book defends a more general theory of ethics whose scope extends to questions of duty in the case of law, promises, fair play, and friendship.

Philip Soper is the James V. Campbell Professor of Law at the University of Michigan Law School.

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# *The Ethics of Deference*

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*For My Children*

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## Preface

*... in general and ordinary cases, between friend and friend, where one of them is desired by the other to change a resolution of no very great moment, should you think ill of that person for complying with the desire, without waiting to be argued into it?* – Jane Austen, *Pride and Prejudice*<sup>1</sup>

*It would not be wicked to love me.*

*It would to obey you.* – Charlotte Bronte, *Jane Eyre*<sup>2</sup>

*To be servile to none – to defer to none – not to any tyrant, known or unknown.* – Walt Whitman, *Leaves of Grass*<sup>3</sup>

*In most cases, comity and respect for federalism compel us to defer to the decisions of state courts on issues of state law.* – *Bush v. Gore* (Rehnquist, J., concurring)<sup>4</sup>

Sometimes when people disagree, conflict can be avoided by walking away. But going one's own way, following one's own lights, though it avoids conflict, does not resolve it. Nor is it likely to be an appealing or even available option when those who disagree are also connected – in a relationship, in a community, in a cooperative venture, in a state. It is in these cases, where context does not permit easy escape, that moral theory has its natural home, guiding argument and discussion and providing the theoretical basis for resolving disagreements through reason rather than force. In the ideal case, argument and discussion lead to consensus, which avoids conflict through a happy coincidence of views with the question of the correctness of those views temporarily relegated to the background. At other times, disagreement may continue beyond the time one can reasonably wait for consensus. Decisions must be made, actions taken, while the question of who is right remains undecided. If walking

<sup>1</sup> Jane Austen, *Pride and Prejudice*, ed. Frank W. Bradbrook (London: Oxford Univ. Press, 1970), 43.

<sup>2</sup> Charlotte Bronte, *Jane Eyre* (New York: Modern Library, 1997), 473.

<sup>3</sup> Walt Whitman, "A Song of Joys," in *Leaves of Grass*, eds. Harold W. Blodgett and Sculley Bradley (New York: New York Univ. Press, 1965), 181.

<sup>4</sup> 121 S. Ct. 525 (2000).

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away and waiting for agreement are both impossible or impractical, another option may suggest itself: Perhaps one should defer to the views of those with whom one disagrees, even though one remains convinced that those views are incorrect.

Giving deference to the views of others is a familiar enough phenomenon, particularly in legal contexts. Appellate courts defer to the factual findings of lower courts, federal courts (usually) defer to state court interpretations of their own statutes, and state and federal courts often give deference to the views of agencies whose actions or statutory interpretations are challenged. Similarly, in nonlegal settings – close personal relationships, for example – one partner may defer to the other in order to resolve an impasse. Sometimes such concessions, as in Jane Austen's hypothetical, are “of no very great moment,” in which case they may serve as examples of simple acts of courtesy, smoothing personal interactions and confirming that parties who care for each other will not hesitate to grant a partner's request and even “change a resolution” without demanding justification. On other occasions, deference may require action of greater moment – action one believes to be morally wrong. In these cases, if one defers despite serious normative disagreement, the action one takes, though *prima facie* wrong, is presumably justified in the end by the case that can be made for deference: The need to act before moral truth can be established provides reasons to act that outweigh the reasons for doing what would otherwise be the correct action.

The context that is most familiar in political theory as a possible occasion for deference of this latter sort is that of the citizen or subject confronting a legal norm he or she believes to be immoral. This conflict of normative judgment between citizen and state is a central focus of this book. And the point of this preface, in part, is to explain how the approach I take here to this classical problem of political obligation differs from standard approaches and justifies, I hope, yet another examination of a long mooted problem.

Consider, first, terminology. It is not uncommon and would not be odd to ask whether one has “reason to defer” to legal authorities in much the same way that one asks whether one has an “obligation to obey” the law. Indeed, as we shall see, the language of deference is often quite naturally in play when one explores the nature of authority and the various reasons for acting in compliance with the advice or requests of those who claim authority. Since political authority is one kind of authority, it should not then surprise that the language of deference could as easily be used in this context as the language of obedience. Certainly those who insist that there is no obligation to obey the law can do so as easily with the language of deference, as the quote from Whitman suggests, as with that of obedience. But this apparent interchangeability of “obedience” and “deference” does not hold in all contexts. Note how odd it would be to suggest that appellate courts, when they defer to the judgments of lower courts, are obeying the inferior court. Similarly, though marriage oaths today may still ritualistically



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invoke duties to “love and obey,” one does not need to confront the peculiar problem of *Jane Eyre* (discovering that the man she was about to marry was already married) in order to conclude that “obedience” in this context is out of place: Modern sensibilities rightly balk at viewing a partnership as intimate as that of marriage as resting on promises to obey rather than on a mutual willingness to explore reasons for deference when conflicts arise.

To hazard a guess about what makes obedience in some of these contexts inappropriate we might say that obey, with its military connotations, is most at home when commands and orders are being given. Lovers and inferior courts do not typically issue orders; they make judgments, to which others should, perhaps, defer. But if this guess is close to the mark, then there may be reason to switch to the language of deference in the case of political theory as well. For as we shall see in later chapters, most legal theorists today agree that law is not accurately represented as a purely coercive system. Legal systems are normative systems: They make normative claims about their right to coerce and typically present their laws as normative judgments about what ought to be done. It is possible that these recent advances concerning the normative nature of law have outpaced, and so are not yet reflected in, the language we use to talk about political obligation. It is possible that by shifting from the language of obedience to that of deference, we can avoid the potentially distorting implications that arise when the conflict between citizen and state is presented simply as a matter of how one should respond to orders and threats.<sup>5</sup>

The preceding suggestion about terminology points to a second respect in which the study of political obligation in this book differs from other standard treatments. Though my interest is primarily in political obligation, Part I of the book is concerned exclusively with legal theory. While it is common these days to acknowledge the connection between these two subjects, it is also common to continue to treat them separately. Questions about the nature of law, even for theorists who defend a connection between law and morality, typically appear in a separate literature from the literature discussing the obligation to obey. But the recent turn in legal theory toward normative models of law has resulted in a curious position about the nature of law that makes exploring the connection between political and legal theory in a single work particularly appropriate now. The curious position, which I examine in later chapters, maintains that

<sup>5</sup> One influential article arguing against the existence of an obligation to obey the law begins by quoting H. A. Prichard's remark that “the mere receipt of an order backed by force seems, if anything, to give rise to the duty of resisting rather than obeying.” See M. B. E. Smith, “Is There a Prima Facie Obligation to Obey the Law?” *Yale Law Journal* 82 (1973): 950 (quoting H. A. Prichard, “Green's Principles of Political Obligation,” in *Moral Obligation* [Oxford: Clarendon Press, 1957], 54). Whether this vision of law as pure force influences Smith's conclusion that there is no obligation to obey is unclear. What is clear is that in the context in which the quotation occurs, Smith's use of the Prichard remark, and the largely discredited vision of law it implies, are essential to his claim that a “reflective man” might naturally assume that there is no obligation to obey.

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legal systems are essentially characterized by claims of authority that cannot be supported by political theory. The oddity of this position, ascribing to law a normative posture inconsistent with political theory, provides the motivation for, and the connection between, the two parts of this book. In Part I, I focus on the kinds of normative claims that are essential to law. In Part II, I explore whether law, whatever its normative claims, has authority. The currently popular view that law claims authority but does not have it is here reversed on both counts: I argue that law does not claim authority but has it. I defend the first thesis in Part I, the second in Part II.

The third respect in which this work differs from other treatments of political obligation is revealed by the title. Though my focus is on political obligation, I approach that issue indirectly by first developing a more general account of when deference is due to the views of others. Indeed, I argue here that two standard moral practices that political theorists often consider in exploring the question of political obligation – the practices of fair play and of promise-keeping – can themselves be seen as examples of a duty of deference. In this respect, the book describes and defends a more general theory of ethics whose scope extends beyond the particular question of political obligation. But the ethical theory is only partial, and the description of the theory forms a large part of its defense. The theory is partial in two respects. First, it supplements, rather than supplants, existing moral theories and thus is not intended as a rival to them. Second, it does not purport to be a comprehensive theory, in the way that utilitarian or Kantian theories often do. It does not, that is, purport to be a guide applicable to every situation in which one might want to know what one ought to do. Instead, the theory focuses on four persistent areas of human interaction that have long served as central cases for inquiries into moral obligation – four situations in which persons often disagree about what to do and why. The aim of the study is to show that these four cases (raising questions of duty in the case of law, of promises, of fair play, and of friendship) share common features that are best illuminated by the concept of deference.

To claim that a concept or theory illuminates existing practices or institutions is not the same as claiming that the theory is correct; existing institutions and practices may, after all, be morally defective. In this respect, the account presented here may appear largely descriptive or conceptual. But the theory is also normative. For reasons explained more fully in Chapter 1, I assume that descriptive or conceptual approaches to the investigation of moral theories are necessary and important ingredients in the defense of such theories. I also assume that an explanation that illuminates existing practices in a common and prized tradition participates in the defense of that tradition, and in that sense is also normative, or “normative-explanatory.”<sup>6</sup> Indeed, in the absence of any

<sup>6</sup> Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), 62–4.

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clear consensus about what makes an ethical theory true, the only arena left for judging moral theories may be that of coherence; Which theory best explains long-established practices, considered judgments, widely shared intuitions?

The central thesis of the book was conceived some time ago during one of a number of leaves made possible through funds provided by the University of Michigan and the Law School. I am particularly grateful, in this respect, to the Cook Trust at the University of Michigan Law School for its generous support, as well as to the Terry and Ruth Elkes Fund for Faculty Excellence. Giving shape to the book's initial conception, however, proved more difficult than expected. One cause of the difficulty was the discovery that my own views changed over time in ways that required modifying or revising work in progress. In earlier work, I focused on legal theory and what I took to be the implications of H. L. A. Hart's description of law as a normative system. I suggested that this view of law made sense only when set against a background assumption that citizens have an obligation to obey the law. Today, the normative character of law seems widely accepted by most theorists, while the claim that there might be a general obligation to obey law remains increasingly suspect. My own views during this time have also changed, but in a direction different from that reflected in the current consensus. It now seems to me that the normative character of law is less robust than that suggested by much of the literature, leading me to a view of law not unlike, I think, one that Hart may have endorsed toward the end of his career. At the same time, my views about political obligation, only hinted at in previous work, have been reinforced and extended to areas beyond that of political obligation alone. The result is the present work, where the focus this time is mostly on moral theory, with legal theory providing the foreground.

The gradual change in views while the book progressed is reflected in some of the chapters. Chapter 2, for example, is an extensive revision of (and a slight departure from the views expressed in) "Legal Theory and the Claim of Authority," which appeared in *Philosophy and Public Affairs*, 210 (1989) and was reprinted in *The Duty to Obey the Law* (William Edmundson, ed.; Oxford: Rowman & Littlefield, 1999). Chapter 3 is a revised version of "Law's Normative Claims," published in *The Autonomy of Law: Essays on Legal Positivism* (Robert George, ed.; Oxford: Clarendon Press, 1996).

Another consequence of the time spent between conception and completion of this project is the growing debt I have incurred to increasing numbers of people over the last few years. Several chapters, for example, formed the basis for lectures or workshops given at law faculties in places ranging from Edinburgh to Osaka and Tokyo to Montreal. Some of the ideas in Chapter 5 were originally tried out on patient participants in a seminar on legal philosophy held a number of years ago at the University of Western Ontario. Comments and questions on each of these occasions invariably proved valuable, and have influenced and inspired the work in ways too numerous for me to recount in detail. I also thank

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several anonymous readers for Cambridge University Press, as well as the general editor of the series, Gerald Postema, whose comments on an earlier draft of this study corrected a number of mistakes and helped me reformulate poorly expressed ideas; the faults that remain obviously do so in spite of their efforts. Finally, I owe an immense debt to my colleagues at this Law School for their support and encouragement over the years, and to the many people in the field from whose published work I have benefited.