

KIMBERLEY BROWNLEE*

LEGAL OBLIGATION AS A DUTY OF DEFERENCE

(Accepted 4 March 2008)

ABSTRACT. An enduring question in political and legal philosophy concerns whether we have a general moral obligation to follow the law. In this paper, I argue that Philip Soper's intuitively appealing effort to give new life to the idea of legal obligation by characterising it as a duty of deference is ultimately unpersuasive. Soper claims that people who understand what a legal system is and admit that it is valuable must recognise that they would be morally inconsistent to deny that they owe deference to state norms. However, if the duty of deference stemmed from people's decision to regard the law as valuable as Soper argues, then people who do not admit the value of the state would have no duty as such to defer to its norms. And, more importantly, people who admit the value of the state would have a duty *not* to defer to particular norms, namely those norms which violate the values that ground their preference for a state. This critique of Soper operates within his parameters by accepting his claim that moral consistency generates reasons to act. Even on those terms, Soper's defence of legal obligation as a duty of deference is unpersuasive.

Keywords: Deference, Duty, Law, Legal obligation, Moral consistency, Political obligation, Self-respect, Philip Soper

I. INTRODUCTION

In the history of philosophy, many arguments, both voluntarist and non-voluntarist, have been offered for legal obligation (often called 'political obligation'). John Locke, for one, espoused the voluntarist view that we have a duty to follow the law only when we have consented to its rule. David Hume, by contrast, defended the non-voluntarist view that legal obligation

* I wish to thank John Tasioulas, Joseph Raz, Bill Edmundson, Adam Cureton, the editors and referees of *Law and Philosophy*, and the participants of the Society for Applied Philosophy 25th anniversary conference, July 2005, St Anne's College, Oxford.

is rooted in the value of government under law. From these two traditions emerge the principal contemporary arguments for legal obligation including arguments from consent, gratitude, fairness, promise-keeping, necessary institutions, and public good. I have not the space to outline all of these arguments or the many challenges that have been raised against them.¹ I shall take it for granted that such arguments have largely been discredited, and that a critique of legal obligation is better served by examining a not yet overanalysed position offered by a thinker who agrees that the mainstream arguments are unpersuasive, but who nonetheless defends legal obligation. Philip Soper offers a fresh defence of legal obligation as a duty of deference. His view is worth examining, as it is immune to many of the objections raised against the standard voluntarist and non-voluntarist arguments.² Soper does not ground the state's moral authority in the common good or in people's consent or gratitude or equal, personal concern for others. Instead, he grounds the state's moral authority in people's acknowledgement of 'the necessity of an enterprise that requires designated authorities to impose norms, in good faith, on the community at large.'³ On this view, when people defer to the law, they demonstrate not only respect for legal authorities

¹ For a detailed examination and critique of the central arguments for political obligation see M.B.E. Smith 'Is There a Prima Facie Obligation to Obey the Law?', *Yale Law Journal* 82 (1973): 950–976, Leslie Green 'Law and Obligations', *The Oxford Handbook of Jurisprudence and Philosophy of Law*, J. Coleman and S. Shapiro (eds.) (Oxford: Oxford University Press, 2002), pp. 514–547, and William Edmundson 'State of the Art: The Duty to Obey the Law' *Legal Theory* 10 (2004): 215–259. See also A. John Simmons and Christopher Heath Wellman, *Is There a Duty to Obey the Law?* (Cambridge: Cambridge University Press, 2005), pp. 93–189.

² Philip Soper re-describes the obligation to obey the law in terms of a duty of deference. Unlike obedience, which is at home in the realm of commands and coercion, deference requires one to give weight 'to the normative judgments of others even against one's own judgment about the correct action to take.' In doing so, one makes a rational choice to prefer another's judgment to one's own. Before considering political obligation and the authority of the law, Soper examines three non-legal contexts that he argues can be re-described in terms of deference: friendship, promise-keeping, and fair-play. See Philip Soper, *The Ethics of Deference: Learning from Law's Morals* (Cambridge: Cambridge University Press, 2002), p. 169.

³ Soper (2002, p. 164).

and other citizens, but also respect for themselves as persons who regard the law as valuable. Their duty to defer thus derives from *subjective* intrinsic reasons based upon their own core values and principles which may or may not have objective validity.⁴ It would be morally inconsistent, Soper argues, for people who value the state to deny that they owe deference to state norms.

I regard non-voluntarists such as Soper as more formidable adversaries than voluntarists since the latter rely upon an implausible account of political life which ignores that people are born into and raised in political communities without ever directly or indirectly consenting to their membership.⁵ My aim here is to show that, despite the intuitive appeal of Soper's account, it nonetheless fails to give satisfactory grounds for a general moral duty to defer to the law. In brief, my objections show that Soper's duty of deference extends neither to all members of a state nor to all laws.

II. SOPER'S ACCOUNT

Soper's ethics of deference falls within that family of views which characterise legal obligation as associative.⁶ A well-known version of this view is defended by Ronald Dworkin. To summarise Dworkin's position, a community of principle, which identifies integrity as a political ideal, assimilates legal or political obligations to the general class of associative obligations and, thus, provides the best defence of political legitimacy.⁷ This defence is possible in such a community, Dworkin says, because a general

⁴ *Subjective* intrinsic reasons contrast with *objective* intrinsic reasons which derive from a respect for the value of an institution that is objectively valuable. Intrinsic reasons as a class contrast with instrumental reasons which attribute value to an action or commitment only as an instrument for achieving what has intrinsic value.

⁵ C.f. Ronald Dworkin, *Law's Empire* (Oxford: Hart Publishing, 1986), Chap. 6.

⁶ For a sketch of Soper's account as a natural duty theory of legal obligation, see Simmons and Wellman (2005, p. 142).

⁷ Associative or communal obligations, better known as role obligations, are defined by Dworkin as 'the special responsibilities social practice attaches to membership in some biological or social group, like the responsibilities of family or friends or neighbours.' Dworkin, (1986, p. 196).

commitment to integrity expresses a concern by each member for all others which meets certain conditions: communal obligations are felt by members to be special, personal, pervasive, and egalitarian. Although these conditions upon associative obligations are an interpretive property of the community's practices, not a psychological property of its members, nevertheless these conditions must be recognised and honoured by members for that community to be a true community.

Several challenges confront Dworkin's account, some of which I wish to note briefly, as they are relevant to our analysis of Soper's position. First, there is the question of why integrity should ground an obligation to obey to the laws and principles of a society. As Leslie Green observes, while the virtue of integrity may be admirable and may contribute to legitimacy, it does not follow that it generates any claim to our obedience.⁸ Second, there is the problem of voluntariness. Given the importance for Dworkin's true community that members *recognise* the conditions for associative obligations, Dworkin's account seems more voluntarist than he acknowledges, and this exposes him to the charge that his account poorly describes the reality of political life. Third, Dworkin appeals to independent principles of justice and equal concern, which, as John Simmons notes, seem to render superfluous the very local communal obligations that are said to lie at the heart of Dworkin's defence of political obligations.⁹ Although unexamined, these brief comments identify challenges for Dworkin's account, some of which Soper purports to meet.

It is a merit of Soper's view that it evades the challenge concerning the normative force of local social practices. Dworkin's mistake, Soper argues, is 'to tie the interpretive conditions that lead to political obligation too closely to the particular practices of a community, requiring those practices to reveal at some level a continued sense of equal concern for all members', a concern which could only be based upon external moral principles.¹⁰ The ethics of deference, Soper

⁸ Green (2002, p. 535).

⁹ A. John Simmons 'Associative Political Obligations', *Ethics* 106 (2) (1996): 247–273 at p. 260.

¹⁰ Soper (2002, p. 171).

claims, can account for both the apparent normative force of existing local practices and the fact that this force derives ultimately from external moral principles. Under the ethics of deference, although the only practice needed to yield legal obligation is the practice of the state, the reasons for deferring to the state derive from Kantian principles of moral consistency, self-respect, and respect for others. Since the consequences of adherence to the law are not always advantageous, instrumental reasons will inevitably fail to ground a general duty of deference. Only intrinsic reasons based upon one's own values could ground this duty: the intrinsic reasons for deference which relate to one's values and one's need for self-respect are subjective intrinsic reasons, and may be contrasted with objective intrinsic reasons which derive from a respect for the value of a relationship or institution that is itself objectively valuable. As we shall see, however, rooting the duty of deference in people's subjective valuing of the state is problematic for several reasons.¹¹ In the next section, I outline some problems posed by the political anarchist who denies the value of the state and who thus is not morally inconsistent to deny that she owes deference to state norms.¹² In later sections, I identify problems posed by Soper's invocation of a hypothetical legislator, the demands of moral consistency, and the requirement of particularity.

¹¹ A challenge to Soper not discussed in this paper concerns the demands of moral consistency. Simmons maintains that we can question whether moral inconsistency of the sort Soper describes is really morally prohibited. The death squad member, Simmons says, who sincerely affirms the value of the programme of ethnic cleansing in which he is involved, would not do wrong to let a few of his victims to escape on a whim. C.f. Simmons and Wellman (2005, p. 147). I develop my critique of Soper from within his own parameters, accepting his assumption that moral consistency could generate reasons to act. I argue that, even on his own terms, Soper's defence of legal obligation is unpersuasive.

¹² Soper uses the term 'political anarchist' to refer to those who deny the value of a state, and who prefer anarchy and the state of nature to an organised monopoly on coercion (Soper 2002, p. 160, n.1).

III. POLITICAL ANARCHISM

Since the political anarchist denies the value of the state, her values of moral consistency and self-respect give her subjective intrinsic reasons *not* to defer to the law. Similarly, since the indifferent person lacks an opinion on the value of a state relative to a state of nature, her values of moral consistency and self-respect give her neither subjective intrinsic reasons to defer to the law nor subjective intrinsic reasons not to defer to the law.¹³ Consequently, any duty to follow the law predicated on subjective intrinsic reasons would not apply to either the political anarchist or the indifferent person. The fact that these persons have no duty of deference *as such* shows that the ethics of deference cannot support legal obligation as a *general* moral duty of deference (held at all times by all persons within a given jurisdiction). Recognising the problem that the anarchist poses, Soper says that the benefits of the state must be defended to her in objective, not subjective, terms. And yet, since few people are sincere anarchists, Soper decides not to provide an objective defence of the state. He says that,

Though an objective defence of the state as an alternative to anarchy is probably not that difficult to mount, I shall leave the question open and unaddressed here: Few people, after all, are sincere political anarchists, which means that most people will at least have subjective reasons to defer (even if the anarchist is right) so long as the state whose value they acknowledge is properly defined.¹⁴

Soper's reluctance to give an objective account may be due to a desire to minimalise the assumptions about value that he must make in order to defend legal obligation as a duty of deference. I would suggest though that his reluctance also may be due to the fact that specifying genuine values behind the state, including the values of security and coordination, would fill out the claim I make below that persons who acknowledge these values would have subjective intrinsic reasons not to defer to laws that contravene these values. For our present purposes, it

¹³ Subjective intrinsic reasons to defer to the law also find no grip for persons who are undecided about the value of the state or for persons who are incapable of making a judgment about the value of the state.

¹⁴ Soper (2002, p. 166).

is sufficient to note that, were Soper to give an objective defence of the state, it would not necessarily follow that the anarchist or the indifferent person would have a duty as such to defer to all state norms. As it stands, the duty of deference does not apply to all people, and this diminishes its merits as an account of legal obligation.

One might think that, if the duty to defer depends upon people's decision to regard the state as valuable, as Soper suggests, then his view contains an element of voluntarism. The failing in voluntarism, as noted above, is that it relies upon an implausible view of political reality. But, Soper would respond that voluntariness is less critical than is usually thought. Since, on Soper's view, the argument for legal obligation stems from the value of the practice, the manner in which people come to acknowledge that value is irrelevant.¹⁵ Although this response averts a charge of voluntarism, it raises the further issue of identifying what it is about a *particular* state that gives one reason to follow its norms and not those of any other state. I return to this problem of particularity, as Simmons calls it, in Section V.¹⁶

The problem of the political anarchist is not the most pressing objection against legal obligation as a duty of deference. Weightier objections concern Soper's idea of the hypothetical legislator to whom one is said to defer and Soper's suggestion that those who recognise the value of the state have

¹⁵ Soper (2002, p. 111).

¹⁶ C.f. A. John Simmons, *Moral Principles and Political Obligations* (Princeton: Princeton University Press, 1979), pp. 29–32. Simmons says, 'Suppose...that we have an obligation or a duty to support just governments, and that this is what our political obligation consists in. And suppose that I am a citizen living under a just government. While it follows that I have an obligation to support my government, it does not follow that there is anything *special* about this obligation. I am equally constrained by the same moral bond to support every other just government. Thus, the obligation in question would not bind me to any particular authority in the way we want.'

a general duty to defer to the state's norms. Let us consider the legislator first.

IV. THE LEGISLATOR

In an effort to distinguish the ethics of deference from standard theories of associative obligations such as Dworkin's, Soper emphasises that deference is owed not to individual persons with whom one shares a personal bond and whose potential disappointment generates the duty, but to 'a hypothetical person in the character of an actual or ideal (but personally unknown) legislator'¹⁷ who shares one's values on the nature and role of the state.¹⁸ On this view, when one defers to legal norms, the content of which one has not chosen, one defers to the judgments of this legislator who does the job that one would do oneself were the roles reversed, expecting compliance with norms enacted in good faith for the benefit of all citizens. Through deference, one is said to demonstrate respect not only for this hypothetical character, but also for oneself as someone who values the law.

To bring the duty of deference to the hypothetical legislator into focus as an associative obligation, it must be possible for one to put oneself in the legislator's place and to know that one would expect deference from others were one engaged in enacting the same norms in good faith to further values held in common. There are two problems with this. First, it assumes that the legislator's expectations are clear and stable. Were it possible to equate the legislator's expectations as Soper does with legal norms (to pay taxes, to honour contracts, etc.), then these expectations would be clear and relatively stable. But, since the legislator continually must review his stance on complicated issues and competing concerns, his expectations cannot be equated with actual norms. At best, one may make reasonable assumptions about the legislator's expectations by assessing the relative importance he typically assigns to different considerations. But, one cannot know that, when conflicts

¹⁷ By 'legislator', Soper includes all legal representatives involved in developing, enacting, and enforcing the law. See Soper (2002, p. 56).

¹⁸ Soper (2002, p. 170).

arise, the legislator will not act against his prior convictions. Therefore, the expectations that one should conceive of oneself having were the roles reversed are by no means obvious.¹⁹

Second, this account assumes that one shares the values reflected in the legislator's expectations. Soper says:

... the law's expectation of voluntary compliance corresponds to what I would also expect if I were the legislator. The duty to respect the legal norm is a reflection of the duty to respect the values I myself acknowledge in recognising what a legal system is.²⁰

However, it is possible that one might share with the legislator no clearly defined values except a preference for a state over a state of nature. Presumably, then, even if the legislator's expectations were clear, one would be unable to imagine a reversal of roles in which one retains one's self-respect and moral consistency while either enacting norms that the legislator enacts or expecting deference from others to those norms if somehow one enacted them.

Soper's reply to this must appeal to the good faith of the legislator. Good faith is sufficient, he says, not only to exculpate the legislator who enacts a bad norm, but also to give a citizen who regards the state as valuable a duty to defer to this norm though she thinks it is bad. Moreover, good faith is sufficient, Soper claims, to exculpate the legislator and to give the citizen a duty to defer when the citizen disagrees with the merits of the particular state that expects her obedience.

Legal systems, if they are not to collapse into coercive systems, must in short admit that all standards tentatively identified as law by a positivist pedigree will count as valid law only if they are not too unjust and thus remain capable of supporting a good-faith claim that using coercion to enforce the law is morally permissible.²¹

¹⁹ In a similar spirit, Simmons observes '...legislators' motives and expectations are normally both deeply mixed and (partly in consequence) unclear to citizens, making consciously disrespectful conduct quite a difficult enterprise; and, unless they are fools, legislators' expectations certainly do not include universal voluntary compliance with law by the citizenry.' Simmons and Wellman (2005, p. 145).

²⁰ Soper (2002, p. 164).

²¹ Soper (2002, p. 97).

The claim then would be that whatever laws the legislator enacts will not exceed a certain level of injustice, and so one need not be squeamish when imagining a reversal of roles.²²

While we may question Soper's grounds for denying certain norms the status of law, my primary concern is to rebut the suggestion that the moral merit with which he imbues nearly all laws is sufficient to meet my objection. Note that laws need not be substantively unjust to clash with one's core values: injustice is not the only defect that laws can exhibit. For example, a substantively unobjectionable law might be applied to a sphere in which one believes the law does not belong. If the proliferation of such unnecessary laws clashes with one's core values about the proper parameters of state authority, then one could have difficulty imagining oneself retaining one's self-respect while expecting deference to those laws. Moreover, one would have difficulty both putting oneself in the place of the legislator who enacted those laws and recognising the values he implemented as one's own values.

The problems associated with appealing to a hypothetical legislator's expectations need not undermine Soper's account of legal obligation provided that one's value for the state *per se* is sufficient to generate a duty of deference to state norms. As I shall argue, however, Soper's own reasoning entails that preferring a state to a state of nature generates subjective intrinsic reasons *not* to defer to norms that contravene the values behind that preference.

²² C.f. Leslie Green, 'Review of Soper, Philip, 2002, *The Ethics of Deference: Learning from Laws Morals*,' *Notre Dame Philosophical Review* (2003). Retrieved from <http://ndpr.nd.edu/review.cfm?id=1230> on 5 July 2007. Green states 'I confess to a certain disappointment whenever a natural lawyer's build-up to the importance of moral criteria for the existence of law is followed by the let-down assurance that most laws meet the criteria.' Taking the United States prior to the civil rights movement as an example, Green asks 'So which bullet will Soper bite? Will he say that the United States, for most of its history, had no legal system, and that seriously unjust Supreme Court decisions make no law? Or will he say that there is, after all, reasonable doubt whether the racism or heterosexism involves serious moral error? Both strike me as very costly ways of resisting the old idea that the existence of law is one thing, its merit and demerit another.'

V. REASONS AND MORAL CONSISTENCY

Before continuing, let me clarify Soper's notion of legal obligation. Soper understands legal obligation as a mere 'ought', and not the more serious 'obligation'. Whereas oughts point to reasons for action that often must be weighed against other reasons when deciding what to do, obligations suggest a bond between the agent and the person to whom the obligation is owed which pre-empts other reasons for action.²³ According to the ethics of deference, people who value the state have an ordinary reason (a content-independent, intrinsic reason) to defer to legal norms. While I disagree with this conception of legal obligation, I aim to show that, even on this weaker conception, there is no general moral duty to defer to the law. The reasons we have to follow the law may be content-dependent or content-independent, instrumental or intrinsic, and general (to everyone) or specific (to individual persons), but, as I shall argue, there is no reason to defer to the law that has the combined properties of being general, content-independent, and intrinsic.²⁴

Since it is content-independent reasons that interest us, I will but note some content-dependent reasons to follow the law. Content-dependent, intrinsic reasons can be either general to everyone, like the reasons to respect laws proscribing rape or murder, or specific to certain persons, like the reasons doctors have to follow their professional code. Instrumental reasons, by contrast, are *context*-dependent and thus tend to be specific or incidental to a person's situation rather than general. Examples of content-dependent, instrumental reasons are that following good laws often both promotes within the society the values supported by these laws and has positive effects for others and oneself. Content-independent reasons also can be either instrumental or intrinsic. Some instrumental reasons are that one may be punished if one breaks the law and one's breach of law may gravely affect others. Intrinsic reasons of this sort, I argue, can be specific, but not general. A reformed criminal, for example, who

²³ Soper (2002, p. 90). Although legal obligation is an ought on Soper's view, the term 'obligation' is appropriate, he says, to mark its particular feature of being backed by a claimed right to enforce.

²⁴ Here I use 'general' to refer to all people who value the law.

promises his girlfriend not to break the law again if she marries him,²⁵ has a specific, content-independent, intrinsic reason to follow the law (in light of his promise). But, I maintain, he has no content-independent, intrinsic reason to follow the law that he holds in common with all who value the law. Why is that the case?

As noted earlier, the intrinsic reasons that Soper claims ground the duty of deference are *subjective* reasons that derive from people's values and principles of moral consistency, self-respect, and respect for others. The idea that people who value a legal system have a content-independent, intrinsic reason to defer to *all* legal norms would represent an attack on both their moral consistency and their self-respect. First, people who prefer a legal system would be morally inconsistent to argue that they have a duty to defer to norms that contravene the values that ground their preference. Second, such people would show a lack of self-respect to defer to norms that violate their core values. Consequently, people who value the state have subjective intrinsic reasons not to defer to norms that either alone or in combination contravene the values underpinning their preference for a state. These reasons not to defer are indeed subjective, as they allow people who value the state to act consistently with their own values even if moral theory, in some ultimate sense, shows those values to be indefensible. We need neither specify the values that underpin a preference for the state nor show that any laws in a given legal system breach those values to argue that, were such laws to exist, people who value the state would have subjective, intrinsic reasons not to defer to them.²⁶

Now, one might say that this is insufficient to conclude that there is no duty to defer to the law since Soper has defended only an ordinary reason to follow the law. Soper could say that, in a case where a law conflicts with the values that have led one to prefer a state over a state of nature, one has both a reason not to defer to that law and a reason to defer to it, and neither reason determines what one should do all things considered. Put differently, Soper is claiming only that one's valuing of the

²⁵ This example comes from Joseph Raz, *The Authority of Law* (Oxford: Clarendon Press, 1979), p. 237.

²⁶ The only value underpinning the state that Soper notes is that of security.

state is something one must take into account when deciding how to act. This valuing gives one an ordinary reason to defer to the law, but it is a reason which may be overridden or excluded by other reasons.

My response to this is that one cannot divorce one's valuing of the state from one's appreciation for the features of the state that make one value it. If one's respect for one's own values gives one a reason not to follow a law, then that same self-respect cannot also give one a reason to follow that law. Where a law or set of laws contravenes the values that ground one's preference for a state, one has no subjective intrinsic reason *relating to valuing the state* to defer to it. Take, for example, an extreme case. Suppose the legislator enacts a law intended to bring an end to the state; the legislator seeks to undermine the state that one accepts as valuable. In that context, one can have no subjective intrinsic reason to defer to this law even though the state still exists and this law is a product of that state. This is because the law threatens the state which one values. The same is true in less extreme cases where a law threatens, not the state itself, but the values that support a preference for a state. Suppose, for example, the legislator enacts a law intended to render a particular group of persons, such as the disabled or the elderly, vulnerable to certain kinds of treatment such as sterilisation or non-voluntary euthanasia. Such a law could render those persons more vulnerable to certain forms of abuse and harm than they would be in a state of nature which lacks the institutional mechanisms to implement chosen practices. In this case, persons who value a state over a state of nature for reasons of collective and individual security (amongst other things) would have no subjective intrinsic reason to defer to this law even though *ceteris paribus* their own personal security is not at risk. That the security of others, including perhaps their loved ones, is put at risk removes the subjective intrinsic reason these people otherwise might have to defer to this law. In both of the above cases, there may be other good reasons to respect these laws, but there is not a reason of the kind that Soper needs to defend a general duty of deference.

One final challenge to Soper's view is that it commits a person who values a state over a state of nature to a *pro tanto*

duty to defer to the laws of *all* states. In brief, if one's duty to defer to the law stems from one's valuing of the state as better than a state of nature, then one has a duty to defer not only to the laws of the state under whose jurisdiction one falls but also to the laws of all other states since all states are better than a state of nature. This problem of particularity is pressing for Soper given the non-specific nature of his grounds for the duty of deference, which were highlighted in his response to concerns about voluntarism. The problem of particularity is not pressing for voluntarists since consent ties one to the particular state of which one is a member; but this is not true for Soper who denies that voluntarism is what animates the duty to defer. For Soper, the duty to defer follows from one's *valuing* of the (notion of a) state, not one's valuing of any particular state. This valuing thus gives one a generic duty always to defer to all states' norms whether or not one is under their jurisdiction.

Soper might respond by stressing the Hobbesian underpinnings of his view, namely, that what gives a person reason to value the state over a state of nature, and to follow the norms of a particular state, is principally the state's ability to provide security for its members. A foreign state that purports to apply laws beyond its territorial jurisdiction creates no duty to defer if it cannot provide protection for those whose obedience it would otherwise claim.²⁷

Even if we accept the Hobbesian underpinnings of Soper's account, this reply is unpersuasive since it invites us to represent the problem of particularity in terms of a duty to defer to any state that could provide one with adequate security. If a state's ability to provide adequate security is what animates the duty of deference, then one has a duty to defer to the laws of all states that are in a position to play that protective role whether or not one presently resides within their territorial jurisdiction. This would give many, if not most, persons in the world a duty to follow the laws of the United States, if not the laws of any adequately powerful, state neighbouring their own.

²⁷ I thank an anonymous referee for *Law and Philosophy* for highlighting this response.

The problem of particularity might not trouble Soper because the ‘obligation’ to defer is a mere ‘ought’ on his view (and when the source of this ought is a foreign power under whose jurisdiction one does not fall, it is not backed by coercive force). But, if Soper’s ought is so weak that this implication of non-particularity is unproblematic, then Soper’s account cannot be taken seriously as a defence of legal obligation.

VI. CONCLUSION

This discussion has criticised several aspects of Soper’s account of legal obligation as a duty of deference. First, since there are some persons for whom subjective intrinsic reasons to defer to the law have no force, such as political anarchists and persons who are indifferent to the value of the state, this weakens Soper’s account as an account of legal obligation. Second, Soper’s appeal to the hypothetical legislator, which he trumpets as preferable to Dworkin’s appeal to personal bonds, is problematic as an account of associative obligation since it requires one to identify oneself with legislative expectations irrespective of whether those expectations are either clear and stable or in keeping with one’s own core values. Third, there are some laws which persons who value the state have no subjective intrinsic reasons to follow, namely, those laws which contravene the values that ground their preference for a state. Finally, even if subjective valuing of the state could generate a duty of deference to state norms, this duty would fall prey to the problem of particularity since all states that can honour the values that ground one’s preference for a state thereby have a claim to one’s deference. For these reasons, the ethics of deference fails to defend legal obligation as a content-independent, universally borne, moral duty to follow the law.

Manchester Centre for Political Theory
University of Manchester
Manchester, M13 9PL
UK
E-mail: kimberley.brownlee@manchester.ac.uk