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PROMISE, BENEFIT, AND NEED: TIES THAT BIND US TO THE LAW*

*Kent Greenawalt***

I. THE PROBLEM

Why should we do what the law demands of us? This question, of enduring concern for lawyers and political philosophers, has pressing public significance in our era. During a time of cynicism about law and government and of shrill assertions of moral rights, we have witnessed the growth of claims that self and group interest warrant law breaking. As easy as it may be to bewail present misfortunes and dangers, respect for law is certainly a serious problem for our time.

Many of you, like me, may discover deep ambivalences in your

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** Cardozo Professor of Jurisprudence, Columbia University School of Law. Swarthmore College, A.B., 1958; Oxford University, B. Phil., 1960; Columbia University, LL.M., 1963. I am very grateful to Dean James Ralph Beaird, members of the University of Georgia School of Law faculty and student body, and their spouses for the warm hospitality with which my wife and I were received during our visit last spring. Trenchant comments and questions during that time increased my understanding of this difficult topic, as did the criticisms of an earlier draft made by Bruce Ackerman, Henry Monaghan, Andrzej Rapaczynski, and members of a Columbia seminar on Conflicts of Law and Morality.

Though this written version is somewhat longer than the oral lecture that I gave, I have not altered its basic style. Among other things, this means that my use of citations has been sparing and that in developing many positions I have settled for simplicity rather than fuller exploration of complexities. In a longer, book-length treatment of this and related topics, I aim to go into a number of matters in greater depth. Because of this work, I should especially welcome further criticisms of the lecture. My continuing work on this subject has been generously supported by a grant from the Richard Lounsbury Foundation.

feelings about this subject. You may suffer frustration at the law's pervasive regulation of life and find yourself uncomfortable with the high school civics nostrum that compliance is always the sign of a good citizen. You may admire those who, in their efforts to combat injustice and preserve our earth for future generations, have the courage to violate the law and suffer the consequences. On the other hand, you may share the concern that if everyone was left free to decide what legal obligations really count, the fabric of our social order would be severely strained.

In contrast to the view that almost any destabilization of established authority is a necessary medicine for a diseased society,¹ I start from three more conservative premises. First, that flawed as it is by substantial injustices and deep irrationalities, our society is still one of the best that human beings have managed to create. Second, the light of history affords no assurance that rapid, radical change will better social conditions. Third, the destabilizing force of widespread disobedience is, therefore, not a good to be embraced but a harm to be feared.

I wish I could say that intellectual study has given me sharper, more definitive guides to when disobedience of the law is justified than have my conflicting sentiments, but I cannot. This is not because theory fails to create insight. Many questions about obedience to law can be answered. The difficulty is that these answers undermine simplistic conclusions, leaving other critical questions unresolved. The modest aim of this theoretical analysis is to demonstrate why certain frequently made assumptions about the duty to obey are mistaken and to provide a coherent framework for people to judge both their own and others' adherence to the law.

In this lecture, I address the fundamental question of whether we have a good moral reason for obeying the law. Understanding why we should obey the law, if we should, is the starting point for resolving conflicts between that duty and other claims upon us.²

¹ I have in mind here many of the scholars who identify themselves as members of the Critical Legal Studies movement.

² In three previous essays I have discussed problems involving such resolutions. Greenawalt, *A Contextual Approach to Disobedience*, in NOMOS XII, POLITICAL AND LEGAL OBLIGATION 332 (J.R. Pennock & J. Chapman eds. 1970), reprinted in 70 COLUM. L. REV. 48 (1970); Greenawalt, *Violence—Legal Justification and Moral Appraisal*, 32 EMORY L.J. 437 (1983); Greenawalt, *Vietnam Amnesty—Problems of Justice and Line-Drawing*, 11 GA. L. REV. 1 (1976). My views have altered considerably since the first article, and the positions in the

I am primarily concerned here with generally applicable laws of the state, but I also consider rules that apply to members of more limited associations, such as law schools and the bar.³ Concern over obligation to obey rules does not begin and end with rules of the state. Moreover, the relation of citizens to the state is illuminated by reference to more narrow associations.⁴

When we ask why we should do what the law demands, we are not asking a legal question. What sanctions are authorized for violations is a legal question, but the question of the obligation to obey the law concerns morality—political morality. The question can be loosely translated as follows: if disobeying a law would be to our advantage and we could avoid any sanction, what reasons would we have to comply?⁵ We might, of course, have strong, independent moral reasons not to do what the law forbids. Intentional killing, for example, is wrong quite apart from the law's prohibition. The question of the obligation to obey concerns our relation to the law *as such*. Its practical import is most clearly seen when we imagine an act that the law forbids that would not otherwise be wrongful. Do we have a good moral reason, something apart from fear of sanction or embarrassment, to refrain from that act?⁶

Abstract talk about obeying the law usually assumes that everyone knows what counts as the law. Occasionally concern is raised about the status of unjust laws, as if that were the only subject requiring clarification. Before falling into this overly simple assumption, I want to raise a flag of caution. What are we to say about criminal law standards that are rarely or never enforced? Sometimes nonenforcement results from a judgment by executive officials that the law is inappropriate or trivial. Perhaps even more

second are advanced with considerable tentativeness. The third article deals with a fairly narrow subject and mainly addresses how those who broke laws out of conscience should be treated.

³ I recognize that because of the role of lawyers as officers of the courts and the role of courts in enforcing professional responsibilities, codes for lawyers are not pure examples of rules governing autonomous associations. Similarly, when a law school is part of a public university, its rules may also be viewed as a part of state law.

⁴ Except when I indicate otherwise in this essay, I do not distinguish between the duties to obey of citizens and resident aliens.

⁵ Alternatively, we might be indifferent to the sanctions.

⁶ In relation to some rules, such as those establishing the side of the street on which to drive, the decision about whether a claim is that one should obey the law as such or perform the act for some other reason is quite tricky, since the law generates behavior in others that makes following the law a matter of physical safety for oneself and others.

often, legislators, pursuing clarity and ease of administration, make the reach of the law broader than the behavior they seriously seek to discourage.⁷ Official action is directed only against core violations. Have we a moral duty to comply with legal requirements that officials do not take seriously?

This puzzle, intriguing as it is, is less complex than the status of civil law duties. Nonperformance of a contract is a breach of legal duty, but many contracts scholars tell us that the law favors economic breaches of contract. Does this mean that our moral duty is fully satisfied by either performance or payment?⁸ Surely we would hesitate to adopt as a *moral principle* Holmes's suggestion that virtually the entire civil law offers choices of compliance or damages.⁹ We do not suppose that the law is indifferent to whether I resist slandering you or slander you and compensate.

How do we decide which legal duties we are supposed to perform? Neither the way a rule is formulated nor the presence or absence of moral sounding language is a sure guide. We might look at the whole fabric of the law and at the attitudes of those who adopt rules, enforce them, and are subject to them. Perhaps in some rough way we could then settle upon those legal rules that are really meant to be complied with and that would implicate a moral duty to obey the law as such, if such a duty exists. With these unsatisfying comments, I shall leave this topic and embrace the typical assumption that we have a solid idea of what counts as the law for the purpose of this inquiry.

The language and conceptual apparatus with which I approach the problem of obedience to law are those of secular philosophy. My goal is to reach beyond prevailing social morality and say something about what *really* are good reasons for obeying. Political philosophers usually search for a single source of obligation that applies to all members of society and all laws. Whether or not that quest promises success, individuals should care about the sources of obligation that apply to them. For this reason, I continue to pay attention to sources of obligation even after I have urged that they

⁷ For example, legislators may have criminalized all gambling in order to facilitate prosecution of organized gambling.

⁸ In one of the infrequent modern discussions of this issue, John Finnis concludes that people do have a moral obligation to adhere to contracts. See J. FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 325-37 (1980).

⁹ Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461-63 (1897).

are not generally applicable.

The task I have set for myself is subject to powerful objections, two of which I shall mention. One is that ethical thought is so completely the product of economic and broader social relations at particular stages of history that all aspirations to objectivity and truth are delusions. Though we are unavoidably intellectual prisoners of our particular time and place, universal aspects of human nature and society are, nevertheless, much more important than this relativist viewpoint supposes. Though standards of morality and even moral concepts may necessarily vary depending upon cultural conditions, many conclusions will transcend particular cultures and stages of history. The next step may require some leap of faith, but I believe that our puny intellectual efforts aspire to and occasionally approximate something that may be called moral knowledge.¹⁰

A second objection is that thought about the law that omits a religious dimension is impoverished.¹¹ Perhaps shallowness will plague the moral life of a community that departs from its religious roots. As Milner Ball has shown us, a religious perspective can deeply influence the ways in which we think about social institutions and problems.¹² Both the notion that political orders are ordained by God and the religious concern for justice and wholeness have obvious relevance to political obligation. I omit the religious perspective here, however, because I want to suggest what we can reasonably expect of each other in a society of diverse religious views. I want to advance claims that can be accepted by persons of radically different religious persuasions.¹³

II. PROMISE, BENEFIT, AND NEED

Most moral theories acknowledge that promise, benefit, and

¹⁰ This paragraph sums up, perhaps cryptically, rather complex views about the consonance of universal moral truth with narrower moral truths applying to particular cultures or stages of civilization.

¹¹ See H. BERMAN, *THE INTERACTION OF LAW AND RELIGION* (1974).

¹² M. BALL, *THE PROMISE OF AMERICAN LAW* (1981).

¹³ Moreover, as to this problem, I find the religious perspective less helpful in settling what one should do morally than providing a very important kind of reason for why one should do what is morally right. For a discussion of the religious perspective on the duty to obey the law, see Ball, *Obligation: Not to the Law but to the Neighbor*, 18 GA. L. REV. 911 (1984).

need are powerful sources of obligation and duty.¹⁴ Different theories make one or another source predominate. For a strict utilitarian, need is crucial: we should always do what will best serve the needs of humanity, including ourselves. Under this theory, the underlying reason why people should keep promises and reciprocate benefits is that such behavior is socially useful. A strict libertarian, on the other hand, might contend that the whole of moral duty can be summed up by negative restraints against violating rights of others and the limitations that autonomous individuals voluntarily undertake.¹⁵ A person of this persuasion sees promises and acceptance of benefits as primary. Needs, to the strict libertarian, are not a direct source of moral duty,¹⁶ though needs could determine how a person should act when he already owes a duty of care.¹⁷ Most people do not feel comfortable with either extreme position. They think both that promises have an independent weight and that one has a moral duty to pull a drowning child out of a shallow pool.¹⁸ Without trying to construct any elaborate theoretical structure to fit all the pieces together, I am going to assume that promise, benefit, and need can all be primary sources of moral duty.

Present disquiet about whether people have a duty to obey the law is based on the sense that neither social contract theory nor utilitarianism supports such a duty. These are the two major strands of liberal political theory, and if they cannot explain why we should obey the law, we have reason to be troubled. I shall first

¹⁴ I do not in this essay draw any distinctions between obligations, duties, and other strong moral "oughts."

¹⁵ *E.g.*, R. NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974). Professor Nozick's book, however, leaves somewhat unclear whether we have moral duties beyond what society can rightfully demand of us.

¹⁶ Matters are more complicated than the text indicates, because needs may bear on the practical scope of the moral rights people have. Thus, even negative restraints against interference cannot be defined without reference to needs of people generally. Each of us may have a right not to be unduly disturbed by others; what constitutes undue disturbance between adjoining apartments will depend on people's needs for music, television, and loud conversation as compared with their needs for quiet. The point here lies close to the idea that judges must often make decisions based on the strength of competing needs. *See Greenawalt, Policy, Rights, and Judicial Decision*, 11 GA. L. REV. 991, 1010-14 (1977).

¹⁷ For example, if persons have voluntarily undertaken the responsibility of being parents, the way they should exercise that responsibility will depend largely on the needs of their children.

¹⁸ I put the point this way because the existence of a duty is more doubtful if danger or serious inconvenience is involved.

discuss promissory and utilitarian approaches to obedience. I conclude that neither approach establishes a general duty to obey the law as such, though each approach, in ways I examine, offers strong reasons for many people to obey many laws. I then explore the duty of fair play, to see if it can extricate us from the impasse in which the traditional theories leave us. That duty, based on acceptance of benefits, does have force on many occasions, but it does not give rise to a general duty to obey. Finally, I briefly consider a number of theories that link benefit and need in some significant way. Those theories are the most promising candidates for establishing a general duty to obey, but I indicate skepticism about whether even they are successful in underpinning a strong moral "ought" that applies to all laws and all occasions.

III. PROMISES TO OBEY

According to traditional social contract theory, a citizen is obligated to obey the law because he has consented to the government in a manner that includes a promise to abide by its decisions. The government derives its authority to coerce from consent, and citizens are bound to comply so long as the government acts within the authority they have conferred. On this account, a person's obligation to obey is based on his autonomous commitment to act in accord with the law: obligation derives from promise. When an obligation is based exclusively on a promise, the limitation on what we can do is self-chosen.¹⁹ A promissory theory of obligation thus fits with the view that human beings are free and autonomous, and social contract theory is one reflection of this liberal conception of human nature.

Despite this theory's deep and centuries-long hold on American thought,²⁰ as a claim about general obligations it is fundamentally flawed in ways familiar to students of political philosophy.²¹ After

¹⁹ On many occasions, of course, promises strengthen already existing duties.

²⁰ The version of social contract theory most familiar to Americans is that of John Locke. See J. LOCKE, *TWO TREATISES OF GOVERNMENT* (2d ed. London 1821) (1st ed. London 1690). As late as 1970, Eugene Rostow could speak of Locke's theory as "the prevailing political theory of modern times and the only modern rival for the doctrine that power proceeds from the barrel of a gun." Rostow, *The Rightful Limits of Freedom in a Liberal Democratic State: Of Civil Disobedience*, in *IS LAW DEAD?* 39, 48 (E. Rostow ed. 1971).

²¹ For another discussion of some of the flaws of consent theories, see Simmons, *Consent, Free Choice, and Democratic Government*, 18 GA. L. REV. 791 (1984).

describing some varieties of promise, I shall briefly rehearse the difficulties with promissory theories of obligation and conclude that most ordinary citizens have not promised to obey. Promise is, however, a very important source of obligation for officials, lawyers, and some ordinary citizens, and I shall explore its significance for them. Finally, I shall inquire whether a more expansive use of promises is warranted.

A. *Express, Tacit, and Implied Promises*

One can be obligated in the way promissory theory assumes if one has made a promise or engaged in a promise-like act and this promise or act is not undercut by duress or some other vitiating condition. Suppose, for example, a law school dean tells Faith, a prospective teacher: "Our practice is that faculty members teach whatever subjects the dean assigns." If Faith responds, "That's all right with me," she has explicitly agreed to comply with the practice. But promises are not always explicit. If the dean explains the practice and says, "If I don't hear to the contrary, I'll assume you have no objections," Faith may tacitly agree by remaining silent and accepting a faculty position. The categories of express and tacit promise are relatively straightforward. In each instance, a person does something that actually signifies his commitment.

Beyond clear instances of tacit promise, we move to murkier waters where both the proper terminology and the force of one's actions become more troublesome. For example, the dean might have simply described the practices of the law school to Faith without asking for any indication of her agreement to them. If two years later, Faith objected vociferously when the dean asked her to teach jurisprudence, the dean might reply: "You impliedly agreed to follow our practice of dean assignment when you accepted the job." What does the dean's statement about implied consent mean?

The dean might mean that both he and Faith understood that when a job applicant is told of conditions of employment and does not object, the acceptance of the job signifies agreement to the conditions. If so, the dean would be claiming that Faith had tacitly promised to comply.

On the other hand, the dean might mean that even though Faith's accepting the position did not signify agreement to the conditions, her acceptance did commit her either logically or morally to comply with them. An example of what I mean by a logical com-

mitment to conditions shows that Faith is not bound in that way. A mother tells her twelve-year-old son that on Friday evening he can attend a particular movie with friends. On Friday, she remarks, "Be home no later than 10:00." He responds, "But you've already agreed I can come home at 10:45, since the movie won't be over until 10:30, and it will take fifteen minutes to get home." The mother's original permission *logically* committed her to the 10:45 hour, even if she did not realize that at the time.²² This kind of logical commitment is not involved for Faith. Since some fortunate law school teachers are not subject to the dean's unfettered discretion about teaching assignments, Faith's acceptance of a teaching position would be logically compatible with freedom from the condition of dean assignments.

The dean might mean, instead, that since Faith did not raise any objection when she could have, her acceptance of the job *morally* committed her to comply with the assignment. Suppose that Albert invites his friend Ernest to share his apartment for a month. Ernest moves in. One afternoon Albert walks in on Ernest having a cup of coffee with another friend. Albert explodes, "I never said you could invite anyone else here!" Ernest answers, "You asked me to share the apartment as a friend. That morally committed you to allowing me to invite my own friends to the apartment." The dean might be making a claim similar to Ernest's based on Faith's acceptance of the teaching job.

One variation on this theme of moral commitment focuses on the reliance of others. Ernest might say he would never have taken the trouble to move in if he had known that he could not invite visitors.²³ Similarly, the dean might tell Faith, "We would never have hired you if we had imagined that you objected to the assignment rule." These appeals are based on the notions of reasonable reliance that underlie the familiar contracts law doctrine of promissory estoppel. In this perspective, the reason why Faith is committed to complying with the assignment practice is because her

²² Of course, it would not be *illogical* for her to say, "In light of what I now know, I retract the original permission."

²³ It is important to note, however, that focusing on Ernest's detrimental reliance is not merely *another way* of looking at his basic claim that Albert had committed himself morally. Even if Ernest had not detrimentally relied (he had been previously staying in a hotel and could easily move back), he could argue that Albert had "implicitly consented" to let him have guests.

actions have led others reasonably to count on her compliance.

When the dean comments that Faith "impliedly agreed," he may not have sorted out these subtle differences. Were they explained to him, he might respond, "I'm not sure which of these possibilities applies, but I know that the course of events puts Faith under the same obligation she would have had if she had explicitly agreed."²⁴

Under all of these claims of implied promise, some act of Faith's is asserted to be the basis of her obligation to comply. I should mention, by contrast, claims based on hypothetical consent or agreement. Some versions of social contract theory purport to describe what institutions *would be* agreed to by people: actual people, people rationally pursuing their own self-interest, or imaginary people denuded of some human characteristics.²⁵ These theories, of which John Rawls's original position is best known,²⁶ do not depend on the special moral force of promises or consent. Rather, the theories reveal independent reasons why an institutional scheme is morally supportable by showing that it is fair or promotes the interests of all or most people. The fact that I might have agreed to some practice under certain circumstances does not establish that I have actually undertaken any obligation to comply.²⁷

B. Promissory Obligations to Obey the Law

For a promissory theory of political obligation to be persuasive, people must have undertaken a promise-like obligation to obey the law. A particular person can be obligated only if he has undertaken to obey. Neither the unanimous agreement of all those originally setting up the legal order nor the agreement of a majority of his present fellow citizens would be enough to obligate a person who has not himself agreed.²⁸

²⁴ I here pass over the possibility that the obligation created by implied agreement might be of *less force* than one created by express agreement.

²⁵ In attempting to draw a sharp analytical distinction between theories of genuine consent and theories of hypothetical consent, I do not mean to suggest that all traditional theorists fall clearly into one category or the other or that a theory resting on genuine consent cannot be profitably reinterpreted in terms of hypothetical consent.

²⁶ J. RAWLS, *A THEORY OF JUSTICE* (1971).

²⁷ A conceivable exception to this principle may occur when there was an actual occasion, say a meeting, at which I would have consented but because of some fortuitous reason, such as an illness, I did not. Then, the fact that I would have consented could conceivably put me in a position similar to that of those who did consent.

²⁸ One or both of these facts could bear on the moral legitimacy of a legal order and

Some people do expressly promise to obey at least some laws. Many elected officials and some appointed officials take oaths of office. Similarly, many professionals, including lawyers, take oaths when they enter their professions. These oaths, however, concern official or professional performance. They do not directly commit one to general law-abidingness.²⁹

Naturalized citizens take oaths with more inclusive import. They promise to "defend the Constitution and the laws of the United States" and to "bear true faith and allegiance to the same."³⁰ Most citizens make no such express promise. A Law Day speaker who swears faithfulness to the law may have promised his listeners that he will obey, and more informal remarks could have a similar effect. Relatively few members of liberal societies, however, go about telling others of their general intention to be law-abiding. True, most Americans have said the Pledge of Allegiance, but it is vague in content, usually said as a matter of rote, and recited mainly in childhood. Whatever force a pledge like this *might be given*, it does not presently constitute a serious promise to obey.

If most citizens have agreed to obey the law, their agreement must be tacit or implied. Yet even a brief examination of the grounds for such agreement reveals their inadequacy. Remaining in one's country certainly does not amount to agreement to obey its laws.³¹ People stay in their homelands because of language, culture, jobs, friends, and family. Their inertia hardly indicates approval or acceptance of government and laws. Nor is residence alone enough to lead others to suppose a commitment to obey has been undertaken. The old bumper sticker message, "America—Love It or Leave It," is an appeal. It does not reflect a common understanding of what remaining in the United States means.

Any argument that based an agreement to obey on receipt of government benefits would similarly be misfounded. Residents have no choice about receiving many benefits. For example, they cannot refuse the general security afforded by police and military protection. Even as to benefits voluntarily taken, the claim of tacit

therefore on a nonconsenter's duty to obey the law, but the duty would not then be a promissory one for him.

²⁹ See Simmons, *Voluntarism and Political Associations*, 67 VA. L. REV. 19 (1981).

³⁰ 8 U.S.C. § 1448 (1976).

³¹ This possible ground, of course, has conceivable application only when emigration is permitted.

or implied agreement has a fatal flaw. People continue to receive state benefits that they could refuse even when their preferred government is overturned by domestic revolution or foreign invasion. Receiving benefits from the state simply does not indicate acceptance of a regime and its laws in the way that starting a game of tennis indicates acceptance of the standard rules.

The most frequent assertion about consent in liberal democracies is that by participating in the government, citizens acknowledge its legitimacy and agree to obey its laws.³² Participating directly in the deliberations and voting of small groups, such as faculties or student councils, may be understood in this manner. A person who is not willing to comply with the outcome is expected to withdraw or at least state his unwillingness to be bound. Voting in the elections of liberal democratic states, however, does not carry this significance. Avowed revolutionaries are permitted to vote, as well as run for office and participate in other ways. Their efforts to manipulate the political processes for their own ends hardly establish their approval of the government and its laws.³³ Nor does an ordinary person's vote in a political election convey much about law-abidingness to fellow citizens. One comment I have never heard from people who are outraged by another's violation of the law is: "Well, if that is his attitude toward the law, he really shouldn't have voted in the last election." In sum, the search is unavailing for acts of ordinary citizens that amount to a tacit or implied promise to obey the law.

The conclusion that most citizens have not undertaken to obey the law leaves two important questions. What is the force and scope of the promises that officials, professionals, and some citizens have made? Should consensual bases of obligation be more widely employed?

³² See, e.g., J. TUSSMAN, *OBLIGATION AND THE BODY POLITIC* (1960).

³³ *But cf.* P. SINGER, *DEMOCRACY AND DISOBEDIENCE* 51-56 (1973). Recognizing that avowed revolutionaries do vote and that their clear statement of nonacceptance of the elected government is sufficient to preclude any implication of consent, Peter Singer nevertheless argues that a person acts unfairly by voting and explicitly declining to be bound. According to Singer, when people are silent, others are justified in assuming their willingness to be bound: the act of participation alone is enough to obligate. *Id.* In support, Singer notes the refusal of radical American opponents of the Vietnamese War to confer legitimacy on the political process by voting in the 1968 Presidential election. *Id.* at 54.

C. The Force and Significance of Promises to Obey

Not everything that appears to be an express promise creates a binding obligation. As the law of contracts suggests, a promise may lack moral force because of the circumstances in which it is given or because of a defect in its terms.

Let us look first at the circumstances of the promise. If the person making a promise does not understand its significance, is incapable of rational judgment, or is forced by a very unpleasant and unfair alternative, the promise is without effect. None of these conditions vitiates the typical oath of office or the tacit promise to perform that officials make simply by taking their offices. No one is forced to hold public office, and the demand that one who chooses such a position agree to perform its duties does not amount to anything like duress.

Determining the validity of the lawyer's oath is a little more difficult. A prospective lawyer has invested a lot of time and money in preparing for that career. A refusal to take an oath to support the law may mean the loss of an opportunity to practice, an alternative that is much more forbidding than not holding a public office. Yet, the practice of a profession is a kind of privilege. The prospective lawyer has ample warning of what is expected when he or she embarks on legal training. Conditioning the privilege of practicing law on a stated willingness to perform certain professional duties is not duress.

The same conclusion applies to the oath of naturalized citizens. A country has no moral obligation to admit most permanent residents to citizenship. Though citizenship makes one eligible for a limited number of jobs that aliens may not occupy and gives additional security against deportation, most legal rights of citizens are also enjoyed by alien residents. The government's choice to extend citizenship only to those who agree to comply with its laws does not amount to duress toward those who would like to become citizens.³⁴

The second way in which agreements to obey might be invalid

³⁴ Given the compelling reasons some people have to become residents and the strong moral reasons that support the government's admission of certain people to residence, the argument that conditioning residence on an oath to obey would constitute duress in some situations would be much more powerful than the analogous argument about the grant of citizenship.

concerns possible defects in their terms. If one looks at the exchange of benefits and burdens, the oaths of officials, lawyers, and naturalized citizens are fair: those who take the oaths receive as much as they promise to give. Nor is what is demanded of the oath-takers unreasonable. Society is justified both in obligating officials and lawyers to perform their social roles responsibly and in limiting citizenship to those who display an evident willingness to act like good citizens. There are, however, troubling aspects of the terms of these oaths that bear on both their force and their reasonable interpretation.

The troubling aspects concern the oaths' breadth and duration. John Simmons has suggested that the promise of naturalized citizens may be understood as one "to obey all valid laws."³⁶ If so, the promise covers all of a society's laws for the rest of a citizen's life. That is quite a promise. Certainly the citizen will not fully keep his promise, because everyone occasionally breaks the law. In all likelihood, the citizen will face at least some circumstances when he believes that the force of the promise does not outweigh conflicting moral claims.

The claim has been made that people cannot reasonably be held to a promise covering a variety of laws for a long period of time.³⁶ Before we swallow that claim too readily, we should note that in its impact on people's lives, a promise to obey laws is no more sweeping than the marriage contract; most of us marry at least once, and we think that our vows have force. The single promise to take someone "in sickness or in health" covers unforeseeable contingencies that those making the promise can scarcely comprehend. Sweeping promises do have force, but the analogy to pledges of marriage helps illustrate the truth that underlies the objection to such promises. External conditions and one's attitudes and beliefs can change drastically over time. People are much less to blame for abandoning commitments when circumstances have altered radically.³⁷ An *irrevocable* sweeping promise may well lose moral force

³⁵ Simmons, *supra* note 29, at 34.

³⁶ See Sartorius, *Political Authority and Political Obligation*, 67 VA. L. REV. 3, 13 (1981) (claim that a naturalized citizen, through his oath of allegiance, is morally obligated to obey all valid laws under the Constitution seems to be false).

³⁷ The doctrines of frustration of purposes and impossibility allow relief from contractual obligations when circumstances turn out very differently from what the parties expected. Of course, in contract law a change in attitudes and beliefs by one of the parties is not a basis

slowly over time,³⁸ carrying more force for expected situations than for unexpected ones.

The certainty that a promise to obey all laws will be broken leads us to inquire whether a conscientious person could subscribe to such a promise. People recognize that the obligation of a promise may be overridden, so when they make one they implicitly acknowledge that unexpected events may require their breaking it. Yet honest people do not make *unqualified* promises if they are sure they will break them.³⁹ A thoughtful person cannot sincerely promise to obey all valid laws on all occasions.⁴⁰ This in itself is a strong reason to construe the vague oath of naturalized citizens in some weaker sense, as, for instance, a promise to support the legal order generally and comport oneself as a law-abiding citizen or as a promise always to assign some moral weight to one's legal duty.

The oath of an office holder is less sweeping than the oath of a naturalized citizen. It demands obedience to the laws that control performance of official duty and covers only the period while the official is in office.⁴¹ Further, although an official may not have a chance to retract the oath, he may resign if his legal duties conflict with his conscience. For these reasons, the power of the oath does not lessen over the term of office, and the oath should reasonably be understood as covering compliance with all official legal duties.

These conclusions do not settle two very important matters. First, they do not settle how one's legal duties are to be under-

for relief.

³⁸ This point is tricky in respect to the marriage contract. While the original promise may lose force over time, duties based on detrimental reliance may increase in force.

³⁹ One might argue that it is all right to make an unqualified promise if you know you are only going to break it a few times. At least in circumstances when one has some control over the scope of the promise, this argument does not seem correct. If I am asked if I will promise never to drink alcohol again, and I know I plan to drink on rare occasions, I should say: "Well, I am willing to promise to drink only rarely."

⁴⁰ Perhaps if one has no control over the language of a promise and must simply choose between promising or not, one may be morally justified in promising to do more than one is willing, if one is willing to do most of what the promise encompasses. The *force* of the promise, which represents a commitment made to someone else, probably is not affected by this mental reservation.

⁴¹ The position I take in the text is arguable. The oaths are not explicitly limited in time. The responsibilities of a good public official, especially a high official, might be thought to include general law-abidingness, which might be thought to extend beyond the term of office. I grant that much should be expected of high officials; I do not believe, however, that a present or past official who engages in illegal acts of prostitution or overreports charitable donations on his income tax form has violated his oath of office.

stood. Must a judge impose a mandatory sentence if it would be harshly unfair in a particular case? A simple reference to legislative supremacy would suggest "yes,"⁴² but respected scholars have urged that the judge's role is more complex.⁴³ Second, my conclusions about the power and significance of the oath do not settle whether an official is ever justified in staying in office and violating his oath. To take an example on which we have the perspective of time, would a judge in a free state in 1840 have been morally justified in intentionally making a false finding of identity to avoid application of a legally valid fugitive slave law?⁴⁴ Perhaps if a breach of an oath touches only a small part of one's total responsibilities, choosing to violate the oath rather than resign is morally acceptable.⁴⁵

The lawyer's oath is limited in scope like that of the official, but extends in time like the oath of the naturalized citizen. Like the resigning official, the lawyer may stop practicing if he finds that performance of his role conflicts with his moral duty. For most lawyers, however, such a choice has momentous consequences. With respect to lawyers, I want to illustrate the problems regarding the force and meaning of an oath through a specific example.

Larry is approached by a group of people who plan to demonstrate against the use of nuclear power at a local civilian facility. They want to make sure that no one gets hurt, but they also want to make sure they will commit a crime for which they will be arrested. Larry is a former member of the county attorney's office and is well-versed in the criminal code and police department practices during demonstrations. He is not personally opposed to the use of nuclear power but respects the conviction of the demonstrators and believes that

⁴² I am assuming that the harsh unfairness does not render the sentence unconstitutional.

⁴³ See M. KADISH & S. KADISH, *DISCRETION TO DISOBEY* 86 (1973).

⁴⁴ It might be argued that the dilemma I have posed is misconceived because the oath would have no effect at all if the judge is required to do a moral wrong. I shall not pause here to defend my own view that even promises to do specific, morally wrong acts have some force. Even if my view is mistaken, a promise to perform a class of acts, most of which are good, may have some force for acts within the class that are bad—particularly if there are also substantial moral reasons that support a person's willingness to treat all acts within the class uniformly. In this context, substantial reasons of political morality do support a judge's adherence to occasional unjust laws.

⁴⁵ A related question is whether it is morally acceptable to take the oath knowing that one will not comply on certain occasions. See *supra* note 40.

their actions are proper in a democratic society. He also thinks he could minimize the possibility of violence by carefully planning with them a trespass that will remain peaceable but will result in arrest. Yet Larry believes that if he does engage himself to this degree, he will be guilty under the state's criminal law of aiding and abetting the trespass, and he fears he will also run afoul of standards of professional ethics.⁴⁶ He wonders whether he will also violate his oath as a lawyer if he helps plan the trespass.

The answer to the latter question may depend on the precise language of the oath. In Georgia, an applicant swears that he will "justly and uprightly demean [himself], according to the laws, as an attorney, counsellor and solicitor."⁴⁷ One possible interpretation is that every conscious illegal act in one's role as a lawyer violates this oath.⁴⁸ But from Larry's viewpoint, he would be acting justly and uprightly, and his technical violation of the criminal law would prevent violence and serve the broader aims of the legal order. Larry may reasonably construe the oath as flexible enough to permit this behavior.⁴⁹ If, however, he understands his oath to foreclose his help in planning the demonstration, the oath will constitute a substantial moral reason for Larry to refuse the help. He will have to decide if that reason outweighs the moral reasons he sees to give the help.

D. Possible Extensions of Promissory Obligations

The groundwork has been laid for some brief conclusory comments about extending promissory obligation to reach most ordinary citizens. If I am right that we do not now undertake to obey

⁴⁶ Both the Model Rules of Professional Conduct and the Model Code of Professional Responsibility forbid assisting a client in conduct that the lawyer knows is illegal. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(7) (1981).

⁴⁷ GA. RULES GOVERNING ADMISSION TO THE PRACTICE OF LAW B-19 (1984).

⁴⁸ Whether this oath itself reaches the standards of professional ethics depends on whether professional ethics are understood to be laws. That question would be critical if what Larry considered doing was a violation of professional ethics but not of any ordinary law. To become a lawyer in New York, one is required to indicate a willingness to conscientiously endeavor to conform one's conduct to the Code of Professional Responsibility.

⁴⁹ If the oath is construed in this way, it could be sincerely taken by someone who expects to give such assistance after becoming a member of the bar.

the law, perhaps a better society would result if we did.

Could the government elicit promises that would have moral force? The answer depends, in part, on the conditions under which the promises were given. Suppose a government either expelled native-born citizens who refused to promise to obey or deprived such persons of all government benefits that can be taken away. The severity and unfairness of these sanctions would render promises to obey without force.⁵⁰ If, however, the government conditioned the privilege of voting on a promise to obey, duress would not infect the result. People can live comfortably without voting, and a promise to obey is reasonably connected to the privilege of voting. Yet there are powerful reasons to oppose such a program. We have seen that an unqualified oath to obey all laws on all occasions is not one that can sincerely be given by thoughtful persons. Wording an oath in a form that is less absolute but still clear in its significance and comprehensible to ordinary persons is virtually impossible. We would be left with some vague undertaking to be law-abiding. Though such an oath might lead some people to take observance of law more seriously, others would be offended by having to subscribe to it. Reliance on oaths of this breadth trenches on values of free belief and expression. Outside the context of an alien's shifting his basic political loyalty, such oaths should not be extracted from citizens in a liberal democracy.

IV. UTILITARIANISM—THE CONSEQUENCES OF OBEDIENCE

A. *Utilitarian Accounts of Obedience to Law*

Within the Western liberal tradition, utilitarianism has been the main competitor to a promissory view of political obligation. Though recent emphases on rights and justice have eroded the hold of utilitarianism on American legal thought, the utilitarian phrase, a balancing of interests, still sums up much of our sense about how social and legal problems should be resolved. To a utilitarian, whether an act is morally right depends on whether it serves people's needs.⁵¹ Everyone has the moral responsibility to

⁵⁰ They might retain force for persons indifferent to the sanctions or happy to provide the promise whether or not sanctions accompanied a failure to promise.

⁵¹ I use "needs" here in a broad sense, not distinguishing minimum requisites for a decent life from possibilities for further enrichment and also not distinguishing actual needs from preferences.

promote overall welfare.

Jeremy Bentham, the father of modern utilitarianism, made happiness the test of welfare.⁵² For our purposes, however, a theory is utilitarian even if the good to be achieved is defined quite differently and even if principles of allocation constrain pursuit of the maximum amount of that good. Thus, both the theory that an act is moral if it creates "the greatest love possible" in any situation,⁵³ and the theory that people's preferences should be equally satisfied count as utilitarian in this broader sense.

Under any utilitarian account, the morality of obeying the law is determined by the comparative consequences of obedience and disobedience. In the familiar version called "act-utilitarianism," the focus is on the individual act: will obedience or disobedience on this particular occasion be more likely to produce desirable consequences? Act-utilitarians do not deny the value of rough practical guides that shortcut repeated calculations. They can accept a "rule of thumb" in favor of obedience, if obedience is generally desirable. Act-utilitarians also do not deny that a person's acts influence his own future choices and the choices of others, so they can give full weight to the possible benefits of habits and examples of obedience.

In contrast to a theory of promissory obligation, however, act-utilitarianism accords no positive moral weight to the fact of obedience per se. In a strict sense, act-utilitarianism is not a theory of duty or obligation to obey the law in general, because it posits no such general duty or obligation. Yet this does not mean that act-utilitarianism is an anarchist theory. If the human need for stability and security is given great weight, act-utilitarianism can yield rather conservative conclusions about obedience to law.

What is called "rule-utilitarianism" is not in such obvious opposition to a general duty to obey the law.⁵⁴ According to this version of utilitarianism, an act is morally right if it can be justified by a

⁵² See 1 J. BENTHAM, *An Introduction to the Principles of Morals and Legislation*, in THE WORKS OF JEREMY BENTHAM 1 (J. BOWLING ed. 1962) (1st ed. London 1789).

⁵³ J. FLETCHER, *SITUATION ETHICS* 96 (1966).

⁵⁴ I do not discuss in the text the version of utilitarianism called utilitarian generalization: that the rightness of an act depends on what the consequences would be if everyone in a similar situation acted in the same way. With respect to that theory, much depends, as it does with rule-utilitarianism, on how broadly or narrowly the relevant situations are classified.

moral rule that would have desirable consequences if followed. The person making a choice first considers desirable moral rules, and then determines which act the appropriate rule indicates.⁵⁵ Is rule-utilitarianism distinct in its practical implications from act-utilitarianism?⁵⁶ The answer depends mainly on the level of generality at which the rules are cast. If a rule-utilitarian permits an indefinite number of qualifications to simple rules based on any significant feature of a situation, his universe of immensely complex rules and applications may dissolve into the act-utilitarian's direct evaluation of consequences for each case. This "collapse" into act-utilitarianism can be avoided by insisting on a certain level of generality.⁵⁷

⁵⁵ I skirt a troubling point that has divided rule-utilitarians: exactly how an actor is to choose relevant rules. With respect to some behavior, following an ideal rule may do good even if the rule lacks widespread acceptance. Other behavior may not accomplish good in the absence of similar behavior by others. For this behavior, focus on an ideal rule seems pointless unless one expects that others may be educated to accept and observe the rule. In any event, moral rules that are presently accepted and observed *and* would ideally be accepted and observed can be supported by the rule-utilitarian regardless of his precise theory of how rules are to be derived.

Donald Regan examines with great subtlety the problem of choosing behavior when not everyone is willing to cooperate in achieving the best consequences. D. REGAN, *UTILITARIANISM AND Co-OPERATION* (1980). Regan proposes a principle of cooperative utilitarianism: "What each agent ought to do is to co-operate, with whoever else is co-operating, in the production of the best consequences possible given the behaviour of non-co-operators." *Id.* at 124 (emphasis omitted).

⁵⁶ I compare rule-utilitarianism with what might be called unembellished act-utilitarianism. Other versions of act-utilitarianism may bring it closer in practical import to a rule-utilitarianism that posits rules of substantial generality. R.M. Hare, for example, has proposed a two-level utilitarianism. R. HARE, *MORAL THINKING* (1981); Hare, *Utility and Rights: Comment on David Lyons's Essay*, in *NOMOS XXIV, ETHICS, ECONOMICS, AND THE LAW* 148 (J.R. Pennock & J. Chapman eds. 1982). Under this approach, act-utilitarian thinkers and educators recognize that most people, including themselves, should make ordinary moral decisions intuitively. They also recognize that desirable general dispositions and feelings need to be inculcated. The substantive principles consonant with those dispositions would not be departed from "without strongest grounds." More systematic utilitarian perspectives would be reserved for the appraisal of moral intuitions and the resolution of instances when intuitions conflict. Thus, in the great majority of instances, people might properly follow their intuitions that observing the legal rights of others and obeying the law are things they morally ought to do, without ever engaging in any sort of utilitarian calculation. In emphasizing the tentativeness and restraint with which people should turn to act-utilitarian calculations, Hare provides a particularly sophisticated account of the role of guiding principles that are more deeply set in people's moral dispositions than the phrase "rules of thumb" suggests.

⁵⁷ Most obviously, the generality could concern classes of instances in which one should behave in a certain way, such as refraining from lying or disobeying laws. Another sort of

If moral rules must be general, an action in conformity with a rule may be "right" even though a violation of the rule on that occasion would predictably produce better consequences. When asked why moral rules must be general, the rule-utilitarian claims that the widespread practice of rule-utilitarianism will produce better results than the widespread practice of act-utilitarianism. As children develop their moral capacities, they need to be taught relatively simple moral rules, and reference to such rules by adults leaves less room for misjudgment. Since our moral vocabulary does and should depend somewhat on the needs of our particular social order, the rule-utilitarian thus offers a reasonable account of why behavior according to a rule that is both teachable and capable of application should be considered right, even if other behavior would promote better consequences in the particular instance.⁶⁸

If teachability and applicability are taken as guides, whether rule-utilitarianism will include among its rules a general duty to obey the law will depend on the exact level of generality at which moral rules about this matter are best cast. That will depend in part on the nature of the political order and the kinds of legal rules a society has.

Various criticisms may be raised against utilitarian accounts of obedience to law. I consider three here. The first is that a utilitarian approach fails to capture all we rightly feel about our responsibility to obey the law. The second criticism is that the whole enterprise of people deciding upon balances of consequences is misconceived. The third, and to my mind most telling, criticism is that, because utilitarianism calls for too much in the way of concern for others, simple consequentialist reasons in favor of obeying the law are often inadequate to make obedience a moral requirement.

generality involves the position of other actors. A person might have to ask himself whether it would be desirable for everyone to break a law, rather than whether it would be desirable for him to break it, given the compliance of others. For a specific example of this sort of generality, see *infra* note 70.

⁶⁸ More doubtful is whether the rule-utilitarian has offered an adequate substantive reason for the particular actor to follow the rule, if the actor is sure that breaking it will promote better consequences.

B. Utilitarian Standards Compared with Existing and Proper Attitudes Toward Law

How would a consistent and disinterested application of utilitarian standards comport with most people's sense of when they should comply with legal duties? A high degree of noncorrespondence would show at least that utilitarianism cannot explain present attitudes toward the law; it might also be evidence that conscious utilitarianism would fail to yield the morally best set of attitudes about obeying the law. Since the possible noncorrespondence mainly concerns the existence of a general duty to obey the law, and since rule-utilitarianism can incorporate such a duty, this concern about utilitarianism most directly involves act-utilitarianism. I shall consider it in that context.

One might initially suppose that a standard of judging each act in terms of the balance of consequences would in principle render vulnerable the whole structure of legal rules and legal rights. A moment's reflection, however, shows why this is not so. Given their obvious limitations, human beings need fairly clear rules to govern many activities. They also need the support of authoritative adjudicators and centrally organized sanctions to ensure that the rules are observed by individuals who might benefit from breaking them. Legal rules, and the rights they create, help establish for a society what one citizen can expect of another, and typically they mark occasions for the intervention of public force. Legal norms are necessary to ensure personal security and create clear domains of personal autonomy. Legal rights, especially of property and contract, are essential for economic planning of any complexity. The usefulness of previously established and generally applicable norms governing classes of circumstances and conferring legal rights is much too obvious for utilitarians to deny.

The utilitarian considerations that underlie the establishment of a legal system would govern the actions of a self-consciously act-utilitarian official. Operating within a system in which strong expectations are desirably created, he would have good reasons for satisfying them. He will want to avoid the resentment, insecurity, and retaliation that occur when individuals are denied the enjoyment of institutionally created expectations. He will not want to damage the system that creates those expectations by flouting its rules. Even when he thinks the outcome prescribed by a legal rule is indifferent or somewhat undesirable, judged apart from the exis-

tence of a rule, the official will usually suppose that the benefits of his conforming to the rule are sufficient to require that course.

Similarly, for the act-utilitarian citizen, no slight advantage to himself or others could justify a violation of law that will disturb legitimate expectations and cause resentment. Further reasons for observance of legal rules by officials and citizens lie in the desirability of inculcating habits of obedience in themselves and affording an example of obedience for others.⁵⁹ Thus, an act-utilitarian approach self-consciously taken by an official or citizen produces very powerful reasons for observing the law.

Still, such an approach may not capture the strongly held reflective moral attitude that good laws have a moral claim upon us that goes beyond the negative consequences of disobedience. David Lyons has suggested that people assume that legal rights created by good legal rules have "moral force" in that they have a power to determine the moral justifiability of actions *independent* of the effect such rights have on considerations of welfare.⁶⁰ Lyons's point might be generalized to include legal rules that do not guarantee legal rights.

Is it so clear, however, that most people do believe the law has moral force in this sense? Public officials responsible for policing and prosecuting violations of the law often let minor, technical violations go without intervention. Necessary allocation of resources is a partial explanation, but some violations are so trivial that proceeding against them would be inappropriate even were ample resources available or enforcement costless for the government.⁶¹ Such an attitude may be taken both when the violations do not directly impair the legal rights of others and when they do, as in the case of a single trespass on someone's land.

⁵⁹ This sentence assumes, of course, that following legal rules is generally desirable.

⁶⁰ Lyons, *Utility and Rights*, in NOMOS XXIV, ETHICS, ECONOMICS, AND THE LAW, *supra* note 56, at 107. Most of the thoughts in this section of my essay are developed more fully in a response to Lyons. See Greenawalt, *Utilitarian Justifications for Observance of Legal Rights*, in *id.* at 139.

⁶¹ At an early point in this essay I suggested that, in some of its reach, the written law may not pose a serious issue of compliance, because compliance is not really expected. See *supra* note 7 and accompanying text. One might by extension say that, because compliance is not expected, the failure of officials to enforce the law sometimes does not pose a real question about nonenforcement. Yet, there is some behavior that the law does seriously seek to prevent, but against which the full engines of enforcement would be inappropriate. One thinks, for example, of minor cheating on income taxes.

Imagining instances in which the rules of law are thought to have no moral claim on adjudicative officials is harder, but the utilitarian may respond that cases get to adjudication only when someone cares a good deal about the application of a rule and that, because of the public nature of their performance, adjudicators need to be consistently faithful to the law. When we think carefully about the attitudes of ordinary people toward the law as it applies to them, we recognize that many persons do not suppose a substantial moral question is raised by unnoticed trespassing upon the land of another or by breaking a (good) law against speeding at hours when driving that speed is not dangerous. Moreover, many people feel no moral qualms about breaking laws that they think are foolish or intrusive on private domains. Reflection on these examples leads one to doubt that most people actually believe in a kind of moral surcharge in favor of obedience of every law, or even every good law, on every occasion of possible violation. This observation undercuts the argument that for most laws utilitarianism is grossly at odds with present attitudes.

The practical problems with applying an act-utilitarian approach are most severe with respect to laws that impose general obligations, such as taxes and currency and customs restrictions. Individual violations of these laws do not make an observable difference. No one is directly hurt, and many violations are unlikely to be discovered. In such circumstances, people may conclude, for example, that no harm will be done by the undisclosed importing of a dutiable item or that their use of money owed in taxes will be better than the use the government would make of the same money.

Of course, such judgments often will be rationalizations of self-interest, but sometimes they will be correct.⁶² Present attitudes toward tax liabilities and import restrictions no doubt vary greatly among societies and in relation to particular legal duties. But any collective legal obligation of this sort, the moral force of which depends for an individual on the usefulness of his own contribution in light of the contributions of others,⁶³ rests on a shaky moral

⁶² One might talk about the long-term corrosive effects of nonpayment and the many ways in which the incidence of nonpayment can be communicated to others, but these utilitarian arguments may rest on doubtful factual premises.

⁶³ One might stipulate that a person cannot consider the likelihood that others similarly situated and with similar preferences will comply with substantive standards that have general application. Under this stipulation, the principle that "it is all right to evade taxes if

foundation. Here, at least, the act-utilitarian approach is out-of-line with how law-abiding citizens conceive their moral duty. For such legal obligations, only rule-utilitarianism (or some other version of utilitarianism)⁶⁴ may be capable of achieving consonance with what are widely deemed to be appropriate attitudes towards law.

C. *Difficulties in Applying Utilitarian Standards*

Whatever its correlation with present or desirable attitudes about obedience to law, utilitarianism cannot be an acceptable theory on the duty to obey the law if it is inherently flawed. The most pervasive objection to utilitarian theory is that interpersonal calculations of welfare are impossible, even in theory.⁶⁵ What is often not recognized is that if this objection is correct, it undermines not only a straightforward consequentialist morality, but also any approach that makes the *application* of nonutilitarian standards turn on balances of consequences,⁶⁶ posits a duty to promote welfare when no other moral standard would be violated, or permits deviation from ordinary moral standards when the overall consequences are harmful enough.⁶⁷ Few people adhere to such rigorous skepti-

one's own use of money will have better consequences than the government's use of it" would not be acceptable, if one's ability to use money better depends upon the government having collected enough money from others to provide vital state services. Such a stipulation may be appropriate, but it requires either a move to rule-utilitarianism or the introduction of some independent moral value relating to fairness.

⁶⁴ In this respect, either utilitarian generalization (with relevant similar situations classed fairly broadly) or cooperative utilitarianism can rectify the difficulty. See *supra* notes 54-55.

⁶⁵ Although I have phrased the point in terms of welfare, this objection would also apply to interpersonal comparisons required to create "the greatest love possible."

⁶⁶ Ronald Dworkin, for example, who is far from being a utilitarian, has acknowledged that what amounts to being fair to one's fellows may turn on a weighing of benefits and harms. Dworkin, *A Reply by Ronald Dworkin*, in RONALD DWORIN AND CONTEMPORARY JURISPRUDENCE 247, 264 (M. Cohen ed. 1983). Indeed, it is hard to imagine how one could decide if activities that impinge on the welfare of others should be permitted without some such weighing. See *supra* note 16.

The claim might be made that such questions can be decided in terms of economic efficiency. If, however, the standard of judgment is present willingness to pay, it is not clear why the present distribution of income and popular levels of understanding should largely determine the answers to such questions. In practice, of course, market imperfections often make confident answers impossible. If the standard of judgment involves an ideal distribution of resources and people with full information who make rational judgments about what will serve their needs, then relevant questions seem to differ little from ones cast directly in terms of overall welfare.

⁶⁷ See C. FRIED, *RIGHT AND WRONG* (1978).

cism when they face practical moral questions: they have little difficulty concluding that one person's loss of life is worse than another's scratched finger. I shall assume that interpersonal calculations of utility have sufficient meaning in enough situations to sustain the diverse moral theories that depend on them.⁶⁸

Whatever may be possible in theory, in practice individuals perhaps are incapable of making the judgments called for by act-utilitarianism. In part, the difficulty is ignorance of future events.⁶⁹ Humans are often unable to tell what consequences, especially remote ones, will occur. This worry may underestimate the usefulness of rules of thumb and may call for too much assurance of what is right and wrong. So long as individuals employ a standard in good faith, a system of morality may work, even though the correct application of the standard is sometimes uncertain.⁷⁰

The objection to individual calculation does not rest on ignorance alone, however. It also reaches human selfishness and powers of rationalization. People have a marvelous capacity to convince themselves that what is in their own self-interest is also in everyone else's interest. Telling people to decide moral questions on the basis of an openminded weighing of all relevant consequences may invite them to rationalize pursuit of their own ends.

Though personal bias may also creep in when someone tries to decide what moral rules should be followed, the opportunities for unconscious special pleading are much reduced under a rule-utilitarian approach.⁷¹ This comparative advantage is bought at a price, however. Rule-utilitarianism sacrifices clarity about the relationship between overarching justifying principles and the morality

⁶⁸ A utilitarian approach could survive a moderate skepticism that some questions involving competing interests have no correct answer. If between two sets of consequences, one could not be said to be preferable to the other, then an individual would be morally free to act in a way that would bring about either set of consequences.

⁶⁹ There is a terminological dimension here. How do we characterize an act whose foreseeable consequences appeared beneficial but which, unforeseeably, turned out badly? Perhaps it is best to say an act's rightness turns on consequences that are foreseeable to a human actor at the time of the act.

⁷⁰ Teachers face similar difficulties when they grade essay exams.

⁷¹ Utilitarian generalization and cooperative utilitarianism, discussed *supra* notes 54-55, also reduce these opportunities by their emphasis on behavior in which many people may engage. Since they do not stress the teachability and general acceptance of moral standards, attempts to apply these utilitarian philosophies might lead to somewhat more rationalization of self-interest than would attempts to apply rule-utilitarianism. These versions of utilitarianism do not suffer the drawbacks of rule-utilitarianism's overemphasis on rules.

of particular acts. Further, its emphasis on rules risks an inability to resolve many moral issues and infidelity to common moral experience, much of which involves weighing of loose competing principles.

D. The Unrealistic Demands of Utilitarianism

Any moral theory that makes overall welfare the ultimate standard for the morality of acts exhibits a fundamental defect, whether overall welfare is mediated by general rules or not. Such a morality asks too much of people, at least if it purports to set standards that most people are really expected to attain, rather than announce an ideal to which the most saintly among us may aspire.⁷²

A morality that talks of duties and strong oughts must be rooted in what is realistically possible for humans. Most people are not capable of according the same weight to the interests of strangers as they do to the interests of themselves and those they love. Nor do most people, in their nonperfectionist moments,⁷³ feel they have failed morally when they pursue interests of their own at the cost of the much stronger interests of strangers.⁷⁴

This difficulty severely compromises a utilitarian account of obedience to law. If the promotion of overall welfare is some kind of perfectionist aspiration that ordinary mortals need not worry too much about, and if benefits to overall welfare are the only basic reasons for obeying the law, then ordinary mortals need not worry too much about obeying the law either. Whatever our precise attitudes toward the law are, we do feel that obedience is often a seri-

⁷² This criticism would not apply to a theory that a nonutilitarian set of moral rules and principles should be accepted because that set's use will best serve the general welfare. For instance, a microversion of such a theory would be the claim that utilitarian goals of punishment will be most effectively served if people think the basic justification for punishment is retribution. A theory of this sort, which did not recommend desirable consequences as an appropriate standard for resolving moral problems, would cease to be utilitarian in the sense relevant here.

⁷³ A serious Christian may view his self-aggrandizement as a continual falling into sin. Most serious Christians, however, continue to overweigh their own interests in daily life without intense psychic pain.

⁷⁴ How many of us feel serious guilt when we spend money on a vacation that might be enough to save more than one life? I am aware, of course, of the free market economic model that suggests that pursuit of self interest will promote the general welfare, but I doubt any serious thinker now supposes that the free market can justify the extent to which most of us in wealthy countries like the United States pursue our own interests.

ous issue that concerns duty or obligation, and not just some weak idea of moral perfection. If the pursuit of overall welfare is one good reason to perform an act, utilitarian perspectives are capable of indicating good moral reasons to obey the law in most instances. Yet, in any of its versions, utilitarianism does not explain why a failure to promote the general welfare that takes the form of disobedience to law is regarded much more seriously than other failures to promote the general welfare.

V. THE DUTY OF FAIR PLAY BASED ON BENEFITS VOLUNTARILY RECEIVED

If neither promise nor simple need affords a satisfying account of why most citizens should obey the law, perhaps their receipt of benefits is a source of obligation. If an individual's acceptance of the benefits of government and law does not amount to an implied promise to obey, perhaps acceptance does generate a duty of gratitude or a duty of fair play to obey. I do not doubt that debts of gratitude may sometimes link benefit to duty, but the relevance of gratitude to the relations between citizen and state is doubtful and the scope of any duty derived from gratitude would be highly uncertain.⁷⁵ I shall, therefore, concentrate here on the theory that citizens who take the benefits of a society have a duty of fair play to their fellow citizens to abide by the rules of the common enterprise. This theory, suggested by H.L.A. Hart⁷⁶ and developed by John Rawls,⁷⁷ has enjoyed prominence in the past two decades.

I shall initially outline the sort of scheme to which a duty of fair play obviously applies and then indicate the difficulties in transferring the concept of that duty to the nonvoluntary relationship between citizen and state. I shall argue that the concept does have relevance in this context, but it does not yield a simple duty to comply with all laws. I shall additionally claim that the duty applies not only to liberal democracies but also to other political orders.⁷⁸

⁷⁵ See A.J. SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* 157-90 (1979).

⁷⁶ Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 185 (1955).

⁷⁷ Rawls, *Legal Obligations and the Duty of Fair Play*, in *LAW AND PHILOSOPHY* 3 (S. Hood ed. 1964).

⁷⁸ Some of the extended applications I suggest might be viewed as applications of a broad duty of gratitude rather than of a duty of fair play. Since the label matters much less than whether the duty exists, I do not pause to examine the possible outer edges of a duty of

A. The Duty in its Clearest Form

Having been left a hard tennis court by the builder, all residents of a new housing development agree that upkeep will be provided by residents who use the court, by paying fifty cents for each hour of use. The Monroes then move in, with no previous awareness of the court or the scheme for its upkeep. They announce that they do not consent to the scheme because use of the court is not worth fifty cents an hour to them. They would nevertheless like to use the court when no one else is doing so. Their use would not add to the cost of upkeep.⁷⁹

May the Monroes morally use the court without paying or by paying less than the fifty-cent rate? If we put aside long term indirect effects, utility would be served by their using the court. Yet, if the other residents fairly decide not to scale down the price for the Monroes, they must choose between paying fifty cents for each hour they play or not playing at all. If they voluntarily accept the benefits of this scheme of mutual cooperation—benefits conferred by the willing payments of others—, they must adhere to the rules of the scheme.

This example illustrates how the duty of fair play can reach situations not covered either by a principle of consent or by simple

gratitude.

⁷⁹ In the hypotheticals in which the duty of fair play seems most clear, a plausible argument that a person is bound by express or implied consent can also be made. If the Monroes were aware of the tennis court scheme and then chose to purchase a house and move into the development, it might be argued that they had impliedly consented to abide by practices within the development, including the scheme for the court's upkeep. The caveat about no previous awareness is meant to meet this possibility, although it might still be argued that the Monroes impliedly consented to all prevailing practices about which they could have learned. Such an extension of implied consent seems dubious to me; but we might imagine instead that the Monroes prior to their purchase consistently said that agreement to buy the property did not carry consent to the scheme. They and the seller, and any development officials involved in approving the purchase, might have agreed simply to leave this issue unresolved when the property passed.

In any event, I present this hypothetical to establish a clear case for the duty of fair play from which variations can be considered, not to establish that the clear case involves no overlap between it and obligations of consent. My purpose would not be undermined even if such an overlap existed. As my subsequent discussion shows, the outer reaches of the duty of fair play include many situations for which no plausible consent argument could be mounted.

calculations of utility. Here, the scheme is undeniably cooperative. It has been voluntarily agreed upon, it is fair, and participation in it and acceptance of its benefits are voluntary. Though people enter the scheme to obtain its benefits, they carry their share of the burdens partly out of a sense of duty to fellow participants. At least when these conditions are met, a person who decides to accept the benefits of the scheme has a duty of fair play to comply with the governing rules.

B. Application to Political Communities and the Law

Writers who have suggested that a duty of fair play to one's fellows underlies one's obligation to obey the law have implicitly analogized political society to the tennis court scheme. The sacrifices of other citizens that benefit us are the source of our responsibility to comply with the rules that govern our life together. The assumption has been that the duty applies mainly to relatively voluntarist political orders, notably liberal democracies.⁸⁰ Yet, in even the most free political communities, neither participation nor the acceptance of many benefits is voluntary. Many important legal duties do not depend on the voluntary acceptance of benefits, and many benefits cannot be refused.

Some benefits provided by the state *are* accepted voluntarily. For example, one may or may not use a state park or museum for which a fee is charged. Other benefits, such as military and general police protection, are open and available to everyone whether they want them or not and regardless of their actions. Still other benefits, such as basic education, involve action by recipients, but that action is compelled. Finally, some benefits may be refused, but the state's control over options leaves little choice. For instance, people may not have to call the fire department when their homes are burning, but the state's monopoly over firefighting forecloses other possibilities for relief. In the political context, acceptance of the few benefits about which one has a really free choice is not sufficient to ground an obligation to obey all or most laws. So the basic

⁸⁰ Rawls presupposes a constitutional democracy and speaks of "a mutually beneficial and just scheme of social cooperation." Rawls, *supra* note 77, at 5, 10. According to John Simmons, "[o]nly political communities which at least appear to be reasonably democratic will be candidates for a 'fair play account' to begin with." A.J. SIMMONS, *supra* note 75, at 136-37.

question is whether a receipt of benefits that is not genuinely voluntary can give rise to the duty of fair play.

When someone does not want a benefit, its receipt cannot give rise to a duty of fair play to contribute one's share.⁸¹ If military defense could be viewed in isolation, a pacifist who abhors that defense would not have a duty of fair play to contribute his share, even if the defense is highly valuable for him as well as his fellow citizens.⁸² But many open benefits are welcomed by most citizens.⁸³ If someone is delighted to receive a benefit, understands the cooperative scheme by which it is supplied, and believes that his required contribution is a fair share, then he may be in the same position as someone who has genuinely chosen to receive a benefit he could freely refuse.⁸⁴

On this account, people who have the right attitudes toward the benefits of political society lie under a duty of fair play to contribute their share. Persons who lack the requisite attitudes only because of ignorance of relevant facts may be said to lie under a potential duty of fair play. This potential duty can be realized when they are given adequate information about the way in which benefits are generated.

Once we accept the idea that the fair play duty can apply to benefits that are not voluntarily received, we can see that the power of the duty is not limited to voluntarist and just political orders.

Constance lives in a village occupied by an invading army. To deal with the village's severe water shortage, the army's commander sets strict limits on use of water and requires each citizen to transport a certain amount of water each day from a stream that is one mile away from the village. Constance thinks both the invasion and the commander's peremptory imposition of the scheme are unjust, but she regards the compulsory aspect of the scheme⁸⁵ and the allocation of benefits

⁸¹ Robert Nozick illustrates the point with a number of ingenious examples. R. Nozick, *supra* note 15, at 93-95.

⁸² Because of other benefits the pacifist receives, he might have a duty of fair play to pay his overall tax assessment, part of which goes for military expenditures.

⁸³ Although I refer in the text to open benefits, the analysis is the same for compulsory benefits and benefits that are "chosen" under less than free conditions.

⁸⁴ See A.J. SIMMONS, *supra* note 75, at 132.

⁸⁵ Some plans are unfair *because* they are compulsory, but not every compulsory plan is

and burdens as fair. She knows that cheating by a few people who fail to bring water or make excessive use of it will not undermine the system. She also knows that most people will observe the restraints out of a sense of fairness to their fellow villagers.

Constance has a duty of fair play to her fellows not to cheat. Her duty arises out of their cooperative behavior that confers on her the benefit of water use.

The moral duty to observe the criminal law illustrates the application of this conclusion in a legal context. Because each person benefits from the restraint exercised by his fellows, each has a duty of fair play not to breach the law. Vast portions of the criminal law, including basic proscriptions of violence, remain virtually unaffected in most countries despite drastic changes in government. One's duty to fellow citizens should not vary radically depending upon whether the regime is liberal democratic, rightist authoritarian, or communist.

Under both the water hauling scheme and the systems of criminal law, each participant benefits in an obvious way. The duty of fair play can also arise even if a whole scheme confers no benefits on the participants. Imagine that the water to be hauled by the villagers is to be consumed exclusively by the invading troops and that, if insufficient water is brought, villagers will be randomly shot. So long as many villagers haul water to protect their fellows as well as to save themselves, Constance is receiving and can accept *this* benefit of the cooperative effort, and thus she has a duty of fair play to do her share.

The duty of fair play is triggered by benefits that the sacrifices of other participants confer. Is there any particular attitude of those participants that is necessary to give rise to the duty? Selfish reasons for entering a cooperative scheme do not undermine the duty. This is evident in the tennis court example. It is highly doubtful, however, that a duty exists if all other participants observe the rules only because of their fear of sanctions or because of some other narrowly self-serving interest.

Two distrustful strangers, *A* and *B*, meet shortly before both are to be attacked by marauding outlaws. Each realizes

that, whatever the other does, he will have a better chance to live if he runs away, so long as coordination is not possible. Each also realizes that if both stay and fight, they will have a better chance to live than if they run away. The following diagram indicates the possibilities:

Chances of Survival

	A Runs	A Stays and Fights
B Runs	A - 25% B - 25%	A - 10% B - 90%
B Stays and Fights	A - 90% B - 10%	A - 60% B - 60%

The strangers distrust each other so completely that neither is willing to count on any agreement to stay and fight. Nevertheless, they do agree that they will simultaneously chain each other to their posts, and they do so. Neither is counting on the other's sense of obligation, and each knows that the other is not counting on him. *B* has effectively managed to chain *A*, but *A* has botched the job. *B* realizes in the midst of the attack that he can run away.

I am inclined to think that, whatever the import of other moral considerations, *B* has no duty of fair play to stay, since neither stranger has asked for nor counted on the other's self-restraint.⁸⁰

The duty of fair play arises when the self-restraint of most participants flows from a sense of what is owed to others and when the actor realizes that his fellow participants are exercising self-restraint. The necessary attitudes need not involve a precise understanding of people's places in a cooperative scheme. It is enough that fellow participants act out of feelings of duty and that the actor have a vague understanding that others are making sacrifices toward common ends. In liberal states enough people obey most

⁸⁰ *A* has at least shown *B* the minimal respect of not pulling his gun on *B* and chaining *B* while he, *A*, remained unchained. But this degree of restraint from doing a wrong to *B*, which *B* has already reciprocated, would not seem to be enough to ground a duty for *B* to stay and protect *A*.

laws out of respect for their fellow citizens and the government under which they live to generate a duty of fair play.

C. *The Scope of the Duty*

The nonvoluntary nature of the political order and many of its benefits does not prevent a duty of fair play from coming into effect, but it does drastically reduce its scope. For a number of reasons, the duty is considerably more limited than a duty to obey all laws on all occasions.

The first and most obvious point is that many laws are not obeyed by most people. In the United States, laws against jaywalking and driving over fifty-five miles per hour on highways come immediately to mind. In some societies, pervasive violations of currency restrictions and tax liabilities occur. Since the duty of fair play requires only that one contribute one's fair share, it does not demand that one comply with legal norms that everyone else flouts.

More generally, what many people may expect of themselves and others may be a hard-to-define tolerable level of observance, with some rules disobeyed to some extent some of the time. One example is the quantifiable matter of taxes. Suppose Paul learns that people on the average do not pay five percent of the income taxes they owe and that most people knowingly avoid between two and ten percent. Whatever Paul thinks about other moral duties (he may, for instance, regard lying on a tax return as immoral), he does not have a duty of fair play to carry a heavier burden than others are carrying.⁸⁷

Even when most people are complying with the law, a person may think that the duty of fair play does not require his compliance. He may suppose that the duty does not arise at all in respect

⁸⁷ The matter is somewhat more complicated. It might be argued that a person owes a duty to fellow citizens who are more conscientious and pay all their prescribed taxes. In this respect, it may make a difference how significant a percentage of the populace the fully conscientious are: the greater their number, the more one may have a duty to respond to their behavior.

Perhaps the attitudes of the fully conscientious are also important. If people who pay their legally prescribed amounts realize they are paying more than their intended *share*, their choice of full compliance may not create a reciprocal duty in others. If the fully conscientious are led to believe that by complying with the legal requirement they are fulfilling *just* their share, then anyone who supports the system that encourages their ignorance may owe them the same level of sacrifice.

to some aspects of the law or that the share demanded of him is too great. Or, he may conclude that he can contribute his share in some way other than obeying the law. Since in political communities one is neither free to refuse most benefits of government nor able to escape most legal duties, the "scheme" does not have the take-it-or-leave-it character of the tennis court arrangement.⁸⁸ For precisely this reason, a participant may not morally have to accept the community's judgment of how much his fair share is or how he should contribute that share.

A person may believe that part of the law is wholly illegitimate. For example, a person with "deviant" sexual inclinations may believe that laws forbidding sexual acts among consenting adults do not impose a mutual restraint for mutual benefit, but rather satisfy the moralistic bent of some people at the expense of the minority of which he is a part, severely inhibiting strong desires that help define his personality. For him, such laws confer no benefits, and he does not depend on the compliance of others. Thus, the laws generate no duty of fair play to comply.

More generally, an individual may believe laws do benefit him, but conclude that the share demanded is too great. In this event, his willing acceptance of open benefits goes only so far as what he thinks his fair share for the benefits is. The duty of fair play compels him to contribute only that much. How he would decide what constitutes his fair share might be highly complex. One question would be whether the total benefits to him outweigh the cost of his share. Unless a person is an anarchist or believes that his society is extremely repressive toward him, he will probably conclude on due consideration that the total benefits he receives from government and law exceed the total costs of his contribution. But this inquiry does not end the matter. He may think that the benefit-cost ratio would be much better under a different sort of government or that what his government does is wasteful or counterproductive beyond a core of virtually invaluable services.⁸⁹ In either event he might

⁸⁸ See *supra* note 79 and accompanying text.

⁸⁹ Many people possess the latter view with regard to military expenditures. Imagine a taxpayer who pays \$4,000 a year that his government spends for military purposes. Believing some degree of deterrence is essential to preserve the country in its present form, the taxpayer regards his first \$1,000 in taxes as buying protection for which he would be willing to pay \$10,000, were the cost that high. But he views the next \$3,000 spent as wasteful or as actually reducing the level of security. "Is your total benefit from national defense worth the

suppose that a good government could provide equal benefits at half the cost.⁹⁰ He might also object to his share of benefits and costs as compared with those of other individuals. If someone decides that overall his mandated share is excessive, then his duty of fair play may extend only to what he thinks would constitute a fair share.

Perhaps I have too quickly circumscribed the scope of the duty of fair play for a person who thinks that a law is illegitimate or that his share is unfair. Perhaps within liberal democracies, citizens should recognize that everyone has a fair and equal share of basic liberties and participation rights, and that these liberties and rights matter most. Thus, the argument would go, citizens who have an opportunity to debate and vote on political issues should regard their overall shares as essentially fair, even if they think their shares of economic burdens and benefits are unfair, and even if they think some legal restrictions are entirely misconceived.⁹¹ This view deserves more careful attention than I shall give it, but it neglects the substantial unfairness of political processes in actual liberal democracies and minimizes the importance for people of nonpolitical social advantages. Decent processes of government *do greatly affect* how someone should view the fairness of his share, but they do not settle the fairness of individual shares.

Suppose that Paul not only accepts the benefits of the law but concludes that the magnitude of his prescribed share is fair. His conclusion may still be insufficient to generate a duty to obey in

\$4,000?" "Yes," he responds. "Is the added benefit of defense worth your last \$3,000?" "No," he answers. People who think a minimal state is essential to security but who object to many state functions may well have a similar attitude about the whole package purchased with their tax dollars.

⁹⁰ If the scheme is imposed by government rather than approved by one's fellow participants, the belief that one is receiving insufficient benefits may not affect the duty of fair play toward other contributors if one believes they are being similarly shortchanged. Suppose an egoistic dictator expends 40 times the justified level for grand buildings and monuments that glorify him. Constance, who knows that the dictator will somehow raise the needed amount, may feel obligated to do her share rather than cast an undue share on others. This situation is closely similar to the water collection scheme that serves the unjust invader. See *supra* note 85 and accompanying text.

⁹¹ One might put this point not in terms of "overall shares" but in terms of the fairness of shares of political power. Violation of law could be viewed as a violation of fair play to do one's fair share in regard to the political system itself. Peter Singer suggests such a view but concludes that many people do not have a fair share of influence in modern liberal democracies. See P. SINGER, *supra* note 33, at 42-45, 112-24.

some circumstances. Paul may believe that some violations of even good laws do not take advantage of his fellows. The tennis court scheme shows that the duty of fair play can be violated though no one is actually harmed. Even these violations, however, "take advantage" of the sacrifices of others without making a similar sacrifice. By contrast, some violations of law need not involve either harm to or taking advantage of others. A person who breaks a thirty miles per hour speed limit at four in the morning or trespasses far from anyone's sight may believe that everyone's acting in the same way would be perfectly all right. He is indifferent to whether others forbear from such acts, since their forbearance would confer no benefit.

In other circumstances, Paul may acknowledge that disobedience does have some adverse effect on the interests of others but think that the overall effect will benefit his fellow citizens. Suppose Paul trespasses at a nuclear weapons facility, fully expecting arrest and conviction. Few other citizens will think that someone who violates the law in this manner has treated them *unfairly* if he sacrifices his immediate interests for their long-term welfare. And even if others do regard following the rules as required by fairness, the individual forced to participate need not accept that perspective.⁹²

Sometimes Paul may believe that acceptance of punishment will satisfy all the aims of a system of restraint and perhaps involve more sacrifice than straightforward compliance. A person may accurately report his income but openly refuse to pay taxes, knowing that the government will be able to exact from him enough to cover the taxes owed and its enforcement expenses. Such behavior does not involve a genuine failure to contribute one's share.

The previous discussion has omitted an important point. Since all citizens generally benefit from a decent legal order, part of the duty of fair play is to help maintain its viability. The duty of fair play thus reaches violations of law that could, if multiplied, undermine law observance, whether or not the duty reaches the particular law involved. This aspect of the duty may usually be much weaker than the requirement not to "take advantage" of one's fellows in some more direct way, but it does count.

⁹² One might argue that though Paul is contributing his fair share in some general sense, he is disregarding his *prima facie* obligation to perform his fair share in respect to maintenance of a fair political system. See *supra* note 91.

D. Conclusion

This review of the duty of fair play establishes its considerable significance as a source of moral duty to obey the law. Nonetheless, it leaves considerable uncertainty about the precise contours of the duty for any individual in respect to the complex responsibilities imposed under a legal order. One claimed virtue of the duty of fair play is that it can explain why we should obey even when others will suffer no harm from our disobedience; as we have seen, the duty does reach compliance with schemes of mutual sacrifice even when a utilitarian would have some difficulty showing that compliance is mandated.

Our review has also suggested a stronger and more positive connection between the duty of fair play and utilitarianism. As indicated in the last section, the most telling objection to a utilitarian account of obedience is that we really do not have an unremitting moral responsibility to promote the general welfare. We are often free to pursue our own interests at the likely expense of the interests of others. The duty of fair play, however, explains that when others have restrained themselves for our benefit, our attention to their interests is a matter of duty or obligation. Whatever may be true about unselfish violations of law that are thought to benefit fellow citizens, violations that are selfish, promote the interests of a small subgroup, or promote the interests of persons outside the society do conflict with the duty of fair play if they involve "taking advantage" of the restraints of the large body of fellow citizens.

VI. RECIPROCITY: RELATIONS OF BENEFIT AND NEED

We have seen that the duty of fair play in the political context rests on an acceptance of benefits with a certain attitude. Whether or not our obedience is really needed by other participants in the scheme is not crucial to our duty to do our share, but the manner in which we may contribute our share might depend on the needs of others.

A closer linkage of benefit and need underlies a variety of other theories about why we should obey the law, four of which I shall mention briefly. The common feature of these theories is that our involvement in a political society in which the government promotes the interests of ourselves and others carries with it a duty to comply with the rules the government sets. These theories differ from fair play by paying less attention to particular balances of

costs and benefits and by not making one's duty depend on the attitudes one has about the benefits received.

First, according to traditional natural law theory, laws are rules for the common good, which includes the good of individuals in society. Both political authority and law are natural institutions necessary to promote human flourishing. An individual's duty to promote the common good includes a duty to support proper political authorities and to obey valid laws.⁹³ Second, John Rawls, in his book *A Theory of Justice*, suggests a natural duty to create and support just institutions as the general moral basis for obedience to law.⁹⁴ The most precise statement of the duty to obey is as follows: "[W]e are to comply with and to do our share in just institutions when they exist and apply to us"⁹⁵ Third, Tony Honoré has proposed that the source of our duty to obey is necessity, the government's need for our compliance.⁹⁶ So put, the theory appears to be exclusively need-based, but Honoré's argument in favor of the duty focuses heavily on the state's obligation to care for its citizens. Thus, the duty of citizens to obey rests significantly on the benefits the government must afford its citizens. Finally, John Mackie, a self-described moral skeptic, has argued that an obligation to obey cannot be derived from other duties and obligations, but that it should be viewed as an independent norm of reciprocation.⁹⁷

These four theories diverge widely in their philosophical premises. They also differ significantly in the scope of the duty they outline. Rawls's duty covers compliance only within just societies, but extends to occasional unjust laws in such societies. The natural law duty pays less attention to the structures of government but covers only laws that meet minimal standards of justice. The accounts of Honoré and Mackie are cast generally, apparently applying to all societies and to all laws within those societies.

⁹³ For a modern natural law account of the duty to obey, see J. FINNIS, *supra* note 8, at 245-54, 260-64, 297-343, 351-66.

⁹⁴ J. RAWLS, *supra* note 26, at 333-55. The duty of fair play, which Rawls had stressed in earlier essays, is presented in his book as important for those who actively participate in the political system and acquire special benefits from it, whereas the duty to support just institutions reaches all members of society.

⁹⁵ *Id.* at 334.

⁹⁶ Honoré, *Must We Obey? Necessity as a Ground of Obligation*, 67 VA. L. REV. 39 (1981).

⁹⁷ Mackie, *Obligations to Obey the Law*, 67 VA. L. REV. 143 (1981).

My main interest, however, is what unites the theories. In each, the duty to obey is broadly consequentialist and depends on the necessity of government for human life; people should obey the law because, if they do not, government will not function as effectively. In each theory, the duty to obey the law in particular instances does not depend on consequentialist considerations: one is supposed to obey even if in a particular instance one's disobedience would have no appreciable negative effect on just institutions or pursuit of the common good.

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? This troubling question takes us deep into the nature of moral judgment. I shall hazard only a few brief comments here.

One possibility for understanding the duty to obey in a nonconsequentialist way is that it derives from some broader, widely-accepted nonconsequentialist duty. This indeed is an option we have already implicitly explored in connection with promise and fair play. Since the four theories I have just outlined do not appear to rest on such a claim,⁹⁸ I shall not discuss such a derivation in this context.

A second possibility is that the duty to obey is itself understood by most people in a nonconsequentialist way. Such a finding, if accurate, might cast some burden of persuasion on those who reject this view, but the finding alone would not be sufficient to withstand moral criticism that a true or better conception of the reasons to obey could be formulated in terms of likely consequences in particular instances.

A third basis for understanding the duty as nonconsequentialist is that such a view fits best with the rest of our set of moral norms. If, on whatever grounds, a person rejected all consequentialist formulations of moral standards, such a person would be strongly in-

⁹⁸ Mackie explicitly says that the duty to obey the law is not derivable from other duties. See *id.* at 151. To Rawls, the duty to obey is an independent natural duty. See J. RAWLS, *supra* note 26, at 333-55. Under traditional natural law theory, the duty to obey does not appear to be a subset of some other duty from which it can be uncontroversially derived. Honoré does talk about necessity as a more general ground of obligation. His other examples, however, hardly seem more clear in their implications than the duty to obey that he posits. See Honoré, *supra* note 96. The existence of a general nonconsequentialist duty based on necessity is at least as doubtful as the existence of such a duty to obey.

clined to view reasons for obedience in nonconsequentialist terms as well. Even short of this position, one might suggest, as did Mackie, that the norm in favor of obedience relates closely to other norms of reciprocity, and that these norms generally are understood in nonconsequentialist ways. If a "fits best" argument for a nonconsequentialist understanding were grounded in current moral conceptions, it would of course lie open to the attack that consequentialist conceptions are sounder. The debate would then be centered on moral norms in general rather than the moral reasons for obeying the law in particular. If a "fit" argument were based on agreed conclusions about sound moral positions in general, it could be resisted only by arguments that tried to show that the reasons for obeying were unlike those underlying moral norms properly conceived in nonconsequentialist terms.

A fourth possibility is that the nonconsequentialist conception of the duty to obey is simply superior to a consequentialist approach. What "superiority" might mean, if it is not based on "fit" with other moral norms or on present understanding of the duty to obey, is itself complex. If one based an argument on an authoritative morality of command, such as the revelation of God's will, one might rest with the claim that God had instructed us to conceive our relation to the law in a nonconsequentialist manner. None of the four positions I have summarized, however, is cast on that ground. Rather, they seem to be based on the assumption that the relevant moral norms will be most effective in promoting human good if they are understood in nonconsequentialist terms. For Mackie, such a standard is used as the criterion for judging moral positions;⁹⁹ and Rawls's device of the original position works to a similar effect.¹⁰⁰ The judgment about which norm will be most effective is something different from a judgment about which norm

⁹⁹ See Mackie, *supra* note 97, at 151-58. Mackie's more general ethical theory is developed in J. MACKIE, *ETHICS* (1977).

¹⁰⁰ Briefly, people who do not know their own particular interests, talents, and place in society—people in an "original position"—choose principles of justice that will best protect the interests virtually all members of society are likely to have. "Natural duties" are similarly chosen to provide the most effective protection to the institutions of justice. The effect of Rawls's analysis, if successful, is to persuade us that the natural duty to support just institutions is the best moral principle to protect just institutions. Rawls's 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. See Rawls, *supra* note 77.

would be most effective if perfectly followed. Rather, the preferred norm must be one that will have actual appeal to human beings and is capable of being complied with reasonably well by them.¹⁰¹ Once the relevance of human psychology is introduced, the further question arises whether one is talking about human nature more or less as exhibited in particular modern societies or human nature as it might exist under vastly different conditions. If the assertion is that for this society at this time a particular moral conception of our claims and responsibilities as members of the society is valid, one would expect the assertion to cover human nature as it presently exists or might exist in the near future.

If we put all this together, we might conclude that underlying these four theories is a common view that given human beings as they are, a nonconsequentialist view of the duty to obey will best serve human goals. At the theoretical level, this answer seems satisfying enough. That is, if social life will suffer significantly unless people conceive of themselves as under a duty to obey all valid laws, there is an ample basis for concluding that such a duty exists.

For these theories to be persuasive, however, factual predicates must be joined to this broad theoretical base. It must be true that more limited beliefs about a duty to obey would result in an inadequate level of compliance. Given all the occasions when disobedience of law will neither inflict harm on others nor take advantage of others, the idea that a general duty to obey is needed to sustain adequate compliance is not convincing, at least if the duty is conceived of as some fairly strong "ought."

This last qualification introduces yet another complexity: the relation between the scope 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 reason of slight strength in favor of obedience, one that might give way in many cases to very slight reasons, including selfish reasons, to disobey. If the general duty resolves itself to such a minimal "ought," one might very well concede a general duty, the concession amounting to little more than that basic ideas of reciprocation provide some

¹⁰¹ Recall the criticisms that act-utilitarianism is too difficult a standard to follow and that all versions of utilitarianism make greater demands on people than they can plausibly be expected to accept.

vague reason for obeying the law.¹⁰² If, on the other hand, a general duty to obey is put forward as a powerful moral "ought" that can be overridden only by genuinely strong reasons in favor of disobedience, there is good reason to resist the assumption that such a duty is implicated on every occasion that we must choose whether to obey the law.

VII. CONCLUSION

I have suggested the importance of various sources of obligation to obey the law, while expressing skepticism about the existence of any single ground of obligation to obey all laws. Those who assume that most people recognize such an obligation of substantial force and who posit the necessity of such a recognition oversimplify a complex reality. At a time when our lives are subject to an incredible number of legal norms, touching unimportant as well as important matters, more selective attitudes toward the moral force of legal norms should be adequate to achieve wholesome levels of compliance, so long as people recognize that duties toward fellow citizens are strongly implicated in serious questions of disobedience. These duties, based on reciprocal relations of benefit and need, constitute the main underpinning of our responsibility to comply with the law and with other rules that govern our lives. These duties and their acceptance do matter greatly in a free society, because legal sanctions alone cannot sustain a viable legal order.

I close with a final caution. I have spoken about the moral weight in favor of obedience. Even when a duty to obey does indisputably exist, it may be outweighed by stronger moral reasons in favor of disobedience. I have said enough to suggest my view that

¹⁰² Even this resolution would not solve every problem concerning a general duty. Suppose we were to conclude that there is always some good moral reason to disobey an unjust law. How would this conclusion affect a tentative judgment that one always has a prima facie duty to obey the laws of a just society? One might say the judgment about a general prima facie duty would have to be qualified for unjust laws. One might say instead that unjust laws themselves have two features (being unjust and being adopted in a just society) that give rise to conflicting prima facie duties. If one takes the latter position, the duty to obey is weakened still further, because it does not even mean that one's responsibilities to fellow citizens *in respect to the law itself* will inevitably tip in favor of obedience.

the strength of the duty to obey can vary greatly and that the strength of necessary countervailing reasons will vary accordingly. But that is a subject for another occasion.