

## Chapter Sixteen

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### The Obligation to Obey the Law

16-01

The topic of the moral content of law came up in a number of ways in earlier discussions. Among the individual theorists: the natural law theorists, like John Finnis, whose analyses of law are tied directly to when and whether the law “binds in conscience” (Ch. 5); H. L. A. Hart, who defended legal positivism on the basis that the description of law must be separated from its evaluation (Ch. 3); Lon Fuller, who wrote of the “internal morality” of law (Ch. 6); and Ronald Dworkin, who asserted that moral evaluation is integral to any proper description (“interpretation”) of the law (Ch. 7). One can also find the topic in other discussions: e.g. the question discussed in the previous chapter, of what relationship law should have to morality, in terms of which parts of morality should or should not be enforced through the legal system.

This chapter considers the other side of the question. Instead of, “from the perspective of law, what is the place of morality?”, this chapter will consider, “from the perspective of morality, what is the place of law?” In simpler terms, the question is whether there is a moral obligation to obey the law, a moral obligation that attaches to a rule simply because of its legal validity, i.e. its membership in a legal system. With exceptions, most of the writers who discuss a moral obligation to obey the law are considering quite modest claims:

- (1) *Not* that one must obey laws however unjust the legal system—the discussion usually assumes a generally just legal system; and
- (2) *Not* that one must obey the law whatever the circumstances—the obligation is at most a presumptive or “prima facie” obligation, which can be overridden if a stronger moral obligation requires a contrary action.<sup>1</sup>

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<sup>1</sup> Just as one is justified in violating the moral obligation to keep a promise to meet a friend for lunch in order to keep a stronger moral obligation to tend to a sick parent, so one would be morally justified in violating a law if some more important matter is involved (e.g. violating the speed limit to get a seriously ill friend to the hospital).

One way to approach the problem of the obligation to obey the law is to consider what you would do, if, when driving at 3:00 am, you came upon a stop light at an intersection, and you could see that there were no pedestrians and no cars (in particular, no police cars) in sight. Would you stop?

Many people obey the law for prudential reasons: they fear imprisonment or a fine, or they worry that being caught doing something illegal would harm their reputations or their careers. Some people would stop at the stop light at 3:00 am just out of habit: it is easier for them simply to obey the law unreflectively, rather than to take the trouble on each occasion to calculate all the moral or prudential factors. Such concerns are not the focus of the debate on the obligation to obey the law. The question is whether the legal status of a command, authorisation or prohibition, by itself, without more, adds any *moral* reasons for doing or not doing the action indicated.

Various types of arguments have been offered to try to justify the conclusion that there is an obligation to obey the law: arguments based on consent, gratitude, reciprocity, and consequences. These different concepts will be explained in greater detail presently. For the moment, it is worth noting that for all of these arguments, the type of situation like the one described above, coming to an intersection at 3:00 am, will always be the one that gives the most trouble. In this type of situation, disobedience does not seem to risk harming anyone or anything, and the disobedience looks like it would go undetected. This last point is important not only because sanctions for the violator will be avoided, but also because there would not be an argument that our disobedience would set a bad example, undermining other people's respect for the legal system.<sup>2</sup>

#### OBLIGATION AND CONSENT

- 16-02 One of the standard arguments for the obligation to obey the law is based on consent. The argument goes that by some action (or inaction), we have implicitly consented to obeying society's law. This action may be voting, accepting government benefits, or simply not leaving the country.<sup>3</sup> The first response is usually that it is not proper to understand these activities as constituting consent to the laws or to the state, either because the citizens do not perceive the action in that way, or because the citizens

<sup>2</sup> As discussed in Ch. 5, some natural law theorists have argued that there is sometimes a moral obligation to act in compliance even with an unjust law, if disobedience would undermine a generally just legal system.

<sup>3</sup> This last figures both in Plato's "Crito" and in Locke's discussion of tacit consent to the government's authority. See John Locke, *Two Treatises on Government* II, Ch. 8, § 119 (Student ed., Peter Laslett ed., Cambridge University Press, Cambridge, 1988), pp. 347-348.

often do not have reasonable alternatives. For example, our decision not to leave the country may reflect only that we do not have the resources to relocate, or that all the nearby countries are even worse places to live.

Another interesting response is that even if the action in question could be held to constitute consent, that does not end the question over whether the citizen who has acted in this way then has an obligation to obey the society's laws. The argument here has two steps, and both steps must be proven for the argument for a moral obligation to obey to succeed. The two steps are: (1) a certain action (say, voting) constitutes "consent" to obeying the society's laws; and (2) anyone who consents in this way is morally obligated to obey the law. The second need not follow from the first.

The reason the second conclusion may fail to follow from the first is that, as a moral matter, acts of consent may have limited force. If I agree to paint your fence for \$200, most people would conclude that my promise is a consent to undertake the obligation to paint the fence (for the payment named), an obligation I would not have except for my promise. However, the moral evaluation of the situation might change if what I agreed to was to paint your entire house for one dollar, or to kill your father, or to do anything you told me to do over the next month. The mere promise, even taking into consideration the (nominal) exchange payment, is not sufficient to maintain the large moral claim: that because of one's promise, one would have a moral obligation to do something on one-sided terms, to do something immoral, or to give up one's autonomy.

For this particular context, the argument is that the putative act of consent (voting or not leaving, etc.) is not sufficient to justify creating the broad obligation to obey *whatever* the government might enact from *that day onward*. As a moral matter, we might conclude that this is too much to place on a single promise, especially here where the "promise" is an action that has other purposes and meanings.<sup>4</sup>

Arguing over what should be called "consent" too often masks the real moral questions: how do we create moral obligations for ourselves, and what are the limits of those obligations? We cannot merely assume that an expression of assent creates moral rights and duties. Could I consent to being another person's slave (and have that promise/agreement be legally enforceable or morally legitimate)? Could I consent to be killed (and have that assent be sufficient defence in law or morals for my killer)? The extent to which consent can create, waive or defeat legal and moral obligations is itself a difficult theoretical question. It should thus be clear

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<sup>4</sup> For good discussions on the force and limits of consent, see, e.g., Franklin G. Miller and Alan Wertheimer eds., *The Ethics of Consent* (Oxford University Press, Oxford, 2010); Andreas Müller and Peter Schaber eds., *The Routledge Handbook of the Ethics of Consent* (Routledge, New York, 2018).

that in the context of discussing the moral obligation to obey the law, mention of consent can only, at best, offer us a partial response.<sup>5</sup>

One might reply that consent may be insufficient to create a moral obligation to obey *every* regime, and certainly not a truly evil regime, but that it is sufficient to create a moral obligation to obey where the regime in question is generally just. However, assuming for the sake of argument that this is true (and many theorists would *not* concede this claim), this may indicate only that it is the justice of the regime, rather than the act of consent of the regime's subjects, that creates an obligation to obey, and the act of consent works only to limit certain types of legitimate complaint by the citizen.<sup>6</sup>

#### OTHER APPROACHES

- 16–03 A second approach for grounding a general moral obligation to obey the law is consequentialist: there is a general moral obligation to obey, because of the bad consequences to society if people did not have such an obligation. Thomas Hobbes presents the extreme version of this perspective: that the law is to be obeyed, even when it is unjust, because the alternative is the chaos of the state of nature, the war of all against all.<sup>7</sup> A more subtle consequentialist argument comes from A. M. Honoré.<sup>8</sup> He begins his discussion of the obligation to obey the law by trying to refute those who claim that not only is there no such obligation, but that we should not be much worried by this fact. Honoré states that the most difficult moral questions, like the most difficult legal questions, are so closely contested that they are likely to turn on where the burden of proof lies. Regarding the obligation to obey the law, if the initial presumption is that the law should be obeyed, then more often than not, the final moral judgment will be for obedience. However, if, following those theorists who claim that there is no obligation, the initial presumption is that the law need not be obeyed, then, Honoré argues, people will tend more often to disregard the law, leading to an “attitude of disobedience” and the breakdown of the order and cooperation needed for society to function. One response to consequentialist fears is that one need not

<sup>5</sup> See, e.g. Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, Oxford, 1994), pp. 344–353.

<sup>6</sup> Cf. Joseph Raz, “On the Authority and Interpretation of Constitutions: Some Preliminaries”, in Larry Alexander ed., *Constitutionalism* (Cambridge University Press, Cambridge, 1998), pp. 152–193, at pp. 162–164.

<sup>7</sup> See, e.g. Thomas Hobbes, *Leviathan* (Richard Tuck ed., Cambridge University Press, Cambridge, 1996), Ch. 20, pp. 144–145: “And though of so unlimited a [Sovereign] Power, men may fancy many evil consequences, yet the consequences of the want of it, which is the perpetuall warre of every man against his neighbour; are much worse.”

<sup>8</sup> A. M. Honoré, *Making Law Bind* (Clarendon Press, Oxford, 1987), pp. 115–138.

worry too much about the consequences of there not being (or our not believing in or accepting) a moral obligation to obey the law, because sufficient obedience will be obtained by the combination of citizens' fear of legal sanctions and our pre-existing moral commitments (that most of us would choose not to rob and murder, whatever the law might say).<sup>9</sup>

A third argument sometimes offered is one of benefit or gratitude: it is immoral for those who have received substantial benefits from the state (police protection, free education, governmental benefits of some kind, and so on) not to respond with the small obligation that governments ask in return: obedience to the law. The analogy is often made with the duty of gratitude children owe their parents.<sup>10</sup> However, just as we think it doubtful that the gratitude we owe our parents, though substantial (if they have been competent and loving parents), is sufficient to give them the right to determine all of our future choices, so one might reasonably doubt that the gratitude we owe a government is sufficient to give it moral authority over so large a portion of our actions. One might also argue that one can ground a moral obligation on the acceptance of benefits only where someone voluntarily accepts such benefits, and intends to continue to do so; however, serious questions can be raised about the voluntariness of acceptance for citizens born and raised in a particular country (who usually have no power to waive their right to receive, e.g. fire and police protection).<sup>11</sup>

A fourth type of argument grounds the obligation on a straightforward assertion of "a duty . . . to support and to further just institutions."<sup>12</sup> In a way, this is simply the modern echo of the traditional natural law position: "Positive human laws are either just or unjust. If they are just, they have the power of binding in conscience, a power which comes from the Eternal Law from which they are derived".<sup>13</sup> Even if one accepts this obligation on general terms, it is not clear how it yields a *general* moral obligation to obey the law, an obligation to obey *every* law on *every* occasion (recall the car in the desolate area facing a stop light at 3:00 am). Many instances of disobedience simply do not undermine just (or, for that matter, unjust) institutions.

A fifth approach, a fairness or reciprocity argument, differs in a basic way from other approaches. This approach speaks less of a duty owed

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<sup>9</sup> See M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?", 82 *Yale Law Journal* 950 at 969 (1973).

<sup>10</sup> An argument from gratitude, and an analogy to children's gratitude to parents, is offered in Plato, "Crito", 50d-51d, in Edith Hamilton and Huntington Cairns eds., *Plato: The Collected Dialogues* (Princeton University Press, Princeton, 1961), pp. 35-36.

<sup>11</sup> See John Rawls, *A Theory of Justice* (rev. ed., Harvard University Press, Cambridge, Mass., 1999), pp. 295-296.

<sup>12</sup> Rawls, *A Theory of Justice*, p. 334.

<sup>13</sup> Aquinas, *Summa Theologiae*, I-II, Question 96, Art. 4, corpus, in R. J. Henle trans. and ed., *The Treatise on Law* (University of Notre Dame Press, Notre Dame, 1993), p. 324.

to the state (based on consent or gratitude) or owed abstractly (as one might conceive the duty to avoid bad consequences), and more of a duty to one's fellow citizens. H. L. A. Hart wrote: "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefitted by their submission."<sup>14</sup> Our legal community could be seen as a large joint project, where each of us agrees to limit our own liberty, with the understanding that others will similarly limit their own. Someone who disobeys the law, under this view, is unfairly taking advantage of other people's sacrifices, and not keeping an implicit promise to match those sacrifices. However, if a particular act of disobedience (e.g. going through the stop light at 3:00 am) does not clearly harm a fellow citizen and it does not undermine the shared project (by undermining the respect for the legal system), it is not clear why one would owe it to fellow citizens to obey.

#### THE ARGUMENT AGAINST A GENERAL MORAL OBLIGATION TO OBEY

- 16-04 In the course of the Hart-Fuller debate (discussed in Chs. 3 and 6), Fuller challenged the legal positivists on the following terms: if the validity of a law is one thing, and its moral value something entirely separate, then how can the legal positivists speak of there being a "moral dilemma" about whether to obey a morally dubious law?<sup>15</sup> If law is just a label for something which may or may not be morally worthy, then there is no reason to believe that just because something is required or prohibited by law, that by itself is a *moral* reason for doing or not doing that action.

Fuller may have thought of his challenge as a knockdown argument, but a number of recent commentators, including some prominent legal positivists, have accepted, without shame or apology, that the legal status of a norm may give it no intrinsic moral weight.<sup>16</sup> These theorists do not argue that we should never obey the law, or even that there are never *moral* reasons for doing what the law tells us to, only that the moral

<sup>14</sup> See H. L. A. Hart, "Are There Any Natural Rights?", 64 *Philosophical Review* 175 at 185 (1955). For a similar argument elaborated at greater length, see John Rawls, "Legal Obligation and the Duty of Fair Play", in Sidney Hook ed., *Law and Philosophy* (New York University Press, New York, 1964), pp. 3-18.

<sup>15</sup> Lon L. Fuller, "Positivism and Fidelity to Law", 71 *Harvard Law Review* 630 at 656 (1958): "It is like saying I have to choose between giving food to a starving man and being mimsy with the borogoves."

<sup>16</sup> See, e.g. Joseph Raz, *Ethics in the Public Domain* (Clarendon Press, Oxford, 1994), pp. 325-338; Joseph Raz, *The Morality of Freedom* (Clarendon Press, Oxford, 1986), pp. 70-105; Smith, "Is There a Prima Facie Obligation to Obey the Law?"

reasons must go beyond the simple declaration, "because the law says so".

For Joseph Raz, we have a moral reason to do as the law states, if and when we believe that we are more likely to make the morally best choice by following the law than by making our own judgment of the situation. For example, if the question is whether to use a particular detergent or not, with the issue being that this detergent might damage the environment, we might defer to the legislature's judgment, on the basis that they have acted to allow or prohibit the detergent only after hearing scientific testimony to which we do not have access.

For another kind of example, consider pure problems of coordination. These are problems where it does not matter much what is chosen, as long as everyone chooses the same way. A standard example is which side of the road cars drive on. For such choices, there are reasons for acting as the law states, for the government is sufficiently prominent to expect its choices to be followed by citizens.

There are also coordination situations where some choices might be better than others, but there is great value to everyone choosing the same way, even if it is not the optimal choice. An example might be fighting water pollution. As a pollution expert, you might know that the clean-up program the government has chosen is not the best plan, but you also know that the government's plan, enacted in legislation with sanctions for deviation, is the one most likely to be followed by most people, and that everyone cooperating in that scheme is more likely to achieve results than if different persons went off trying to effect different schemes. Under such a situation, you might have good reason to follow the government's plan, even when you know it is not the best.

Of course, the most common situation when one has a moral obligation to act as the law requires is when the action is the moral thing to do, whatever the law might say. For most of us, the reason we do not rob or murder is because it would be wrong, not because the law tells us not to. In such situations, the fact that the law prohibits the action appears to add nothing to the moral calculation that the action ought not be done.

As already noted, those who do not accept that there is a general obligation to obey argue that if ignoring the stop light at 3:00 a.m. causes no harm and does not create a bad example, it is hard to see how the action would undermine a just institution or a joint enterprise. And it is far from clear why any consent we have given, or any duty of fair play or gratitude we might have, should extend to all the government's laws, however trivial the laws or however harmless the disobedience.<sup>17</sup> Additionally, while we may have a moral obligation to obey a legal rule that is coordinating public behaviour for an important collective good (e.g. cleaning up the water supply), we may not (or no longer) have a moral obligation

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<sup>17</sup> See Smith, "Is There a Prima Facie Obligation to Obey the Laws?", pp. 953-964.

to obey where it has become clear that the legal rules have failed to change and coordinate the behaviour of the public.<sup>18</sup>

The types of arguments one comes across (in the literature as well as in classroom discussions) on the topic of the obligation to obey the law often reflect a constant changing of perspectives and questions. To arguments like Raz's, the objection goes: "How can you know that you have a better idea of what is morally right than the legislature has?", or "If everyone made their own choices about how to act, rather than deferring to the legislature, there would be anarchy."<sup>19</sup> There often is a certain "we"/"them" attitude when discussing the obligation to obey the law, with the unstated assumption being that "we" are looking for the correct attitude for "them" to have. It is probably better if the discussion remains on the level of "our" deciding how "we" ought to act (or how "we" ought to go about deciding how "we" ought to act). This is not to say that we should ignore the way self-interest will likely bias people's evaluation of their moral obligations, including our own biases; however, this is only one factor among many in our evaluations, and we should not always err on the side of submission to authority.<sup>20</sup>

In any event, one should not confuse:

- (1) The ethical question: what should I do in this situation?
- (2) The meta-ethical question: how do I determine what is the morally correct thing for me to do?
- (3) The political consideration: from a particular perspective, what is the set of beliefs and attitudes we want or need the public to hold?

This chapter deals only with the first two questions.

M. B. E. Smith, in his work on the subject, argued that even if there is a moral obligation to obey the law, it seems clear that it does not carry significant moral weight. He offers two arguments for this conclusion. First, for most of us a seriously immoral act does not become significantly more or less culpable if we find out that the action is legally permitted or legally prohibited (think of those who defrauded elderly people of their life savings but the legality of their fraudulent actions under the relevant legal regulations was not clear—most people would find those acts of fraud just as despicable even if they turned out to be legally condoned). Second, if one tells a friend about a colleague who has broken a legal rule, but one refuses to say *which* legal rule was broken, most likely the

<sup>18</sup> See Raz, *Ethics in the Public Domain*, pp. 335–336.

<sup>19</sup> This view is present, to some extent, in Honoré's approach, discussed above. For a sophisticated argument that seems to verge on that sort of argument without ever quite succumbing to it, see John M. Finnis, "Law as Co-ordination", 2 *Ratio Juris* 97 (1989).

<sup>20</sup> See Raz, *Ethics in the Public Domain*, p. 335.

friend would be unwilling to condemn strongly until she finds out the legal norm that was violated.<sup>21</sup>

## CONNECTIONS

While the obligation to obey the law is often treated as a separate topic (as it is in this text), in many ways the issue is ill-suited for such treatment. From any discussion of the questions raised by the issue, it becomes clear that one's answer to whether there is an obligation to obey the law will depend on one's conclusions regarding a series of more basic questions: both basic questions of moral theory (e.g. What can/does ground our moral duties: benefit? Consent? Cooperation? Consequences? Necessity and interdependence?); and basic questions of legal theory (How do we determine the existence or validity of a law or legal system?).

For example, if one's starting point is a traditional form of natural law theory, one's conclusion about whether something is "law" (or "law in its fullest sense") will already incorporate much of the answer about whether or to what extent one has an obligation to obey the law (one has such an obligation for just laws, "laws in their fullest sense"; for unjust laws, there may still be a minimal obligation of public compliance so as not to undermine a generally just legal system).<sup>22</sup> Legal positivism offers no comparable guidance. Its motto, that the validity of law is one thing, its merit another, indicates that legal positivists will have to find answers about the moral obligation to obey elsewhere, in whatever moral theory they bring to their deliberations.

## Suggested Further Reading

- William A. Edmundson ed., *The Duty to Obey the Law: Selected Philosophical Writings* (Rowman & Littlefield, Lanham, Maryland, 1999) (contributors include John Rawls, Robert Paul Wolff, M. B. E. Smith, A. John Simmons, Joseph Raz and Philip Soper). 16-05
- , "State of the Art: The Duty to Obey the Law", 10 *Legal Theory* 215 (2004).
- John Finnis, "The Authority of Law in the Predicament of Contemporary Social Theory", 1 *Notre Dame Journal of Law and Public Policy* 115 (1984).
- , "Law as Co-ordination", 2 *Ratio Juris* 97 (1989).
- Leslie Green, "Legal Obligation and Authority", in Edward N. Zalta ed., *The Stanford Encyclopedia of Philosophy*, <http://plato.stanford.edu/entries/legal-positivism/> (2003).

<sup>21</sup> Smith, "Is There a Prima Facie Obligation to Obey the Law?", pp. 969-973.

<sup>22</sup> This is a position of the natural law theorists Thomas Aquinas and John Finnis, as discussed in Ch. 5.

- Ruth C. A. Higgins, *The Moral Limits of Law: Obedience, Respect, and Legitimacy* (Oxford University Press, Oxford, 2004).
- A. M. Honoré, *Making Law Bind* (Clarendon Press, Oxford, 1987), pp. 115–138.
- George Klosko, “The Moral Obligation to Obey the Law”, in Andrei Marmor ed., *The Routledge Companion to Philosophy of Law* (Routledge, London, 2012), pp. 511–526.
- Joseph Raz, *The Authority of the Law* (1979), pp. 233–289.
- A. John Simmons, *Moral Principles and Political Obligations* (Princeton University Press, Princeton, 1979).
- M. B. E. Smith, “Is There a Prima Facie Obligation to Obey the Law?”, 82 *Yale Law Journal* 950 (1973).
- , “The Duty to Obey the Law”, in *A Companion to the Philosophy of Law and Legal Theory* (2nd ed., Dennis Patterson ed., Blackwell, Oxford, 2010), pp. 457–466.
- Christopher Heath Wellman and A. John Simmons, *Is There a Duty to Obey the Law?* (Cambridge University Press, Cambridge, 2005).