

In a just state, [the moral obligation to obey the law] is a mere shadow of other moral duties. It adds nothing to them. Since the [moral] obligation to obey exists only in a just state, it is at best redundant.” (Joseph Raz)

Explain the apparent paradox highlighted by Raz, and consider its possible solution

Raz claims that the view that there is no obligation to obey the law in a country with a good and just legal system has the “air of paradox,¹” since in short, the more just the laws the stronger the logically prior moral motivations of subjects of the system will be to *conform* to them, the stronger and more wholly independent of any general obligation to *obey* the law due to its status as *law* these motivations for conformity, not obedience, will be. That essentially in Raz’s terms, whilst all legal systems must make a claim to legitimate authority, whether in fact they do in any given context represent a legitimate authority and thus entail an obligation to obey the law because it is law as enacted by such an authority depends on whether the normal justification thesis has in fact been satisfied, and thus cannot rest on any general moral obligation. The key then to the solution Raz presents to the apparent paradox is acceptance of the notion that any given rule’s status as law makes no practical difference to a subject’s decision to respect it. In order to decide both if the paradox as drawn by Raz and indeed his offered solution to it are accurate it is necessary to interrogate more deeply his, and possible alternative, conceptions of the nature of legal authority and essentially its relationship with the moral deliberations of its subjects. In doing so, I will seek to demonstrate that whilst it may be accurate to deny that a *general* obligation to obey the law can be satisfactorily rooted in any conception of the nature of legal authority, the paradox as presented by Raz may in fact be overdrawn. That to claim a moral obligation to obey the law “adds nothing” to pre-existing moral duties is to misconceive, or at least to misrepresent, the true relationship between legal authority and these moral duties and that ultimately, a more instructive solution to the apparent paradox lies not in branding the concept of a moral duty to obey the law as redundant, but to

¹ Raz, ‘The Authority of Law’ chapter 12

seek to more accurately identify the circumstances under which it may in fact arise.

As Raz himself observes, “probably no master argument can prove the non-existence of such a moral obligation to obey the law, all that can be done is to illustrate the kind of difficulties such an argument has to overcome.²” Indeed, it should be remembered that the parameters of Raz’s task as set by him are not that exacting, requiring him only to disprove the existence of a general obligation applying to *all* the laws subjects and to *all* the laws on *all* occasions to which they apply, not the existence of *any* such obligation arising from legitimate legal authority in *any* of these circumstances. As such, it may be first instructive to determine whether it is plausible, and indeed accurate, to claim that we may ever have a legitimate practical authority entailing a moral obligation to obey it before addressing Raz’s claim that we cannot *generally* make this claim of legal systems.

Woolf asserts that no such legitimate practical authority can exist since its claim to provide exclusionary reasons for action for its subjects is ultimately inconsistent with “all men’s continuing obligation to achieve the highest degree of autonomy possible.³” He adopts Kantian conception of man’s autonomy as “a combination of freedom and responsibility⁴” which involves only his submission to laws that one has made for oneself which ought to mean he “will never view the commands of the state as legitimate, as having binding moral force⁵.” An initial interrogation of Raz’s concept of practical authority in response to Woolf’s approach here indeed seems to confirm that Raz is more accurate in capturing the essence of the subjects’ approach to and relationship with practical authority when making decisions. Raz claims that it is not inconsistent with autonomy to submit to legitimate practical authority since you can autonomously take a decision to do so under circumstances where it is appropriate. Specifically in Raz’s terms, where the normal justification thesis is satisfied and the nature of the authority is such that its relative expertise means it is legitimately able to provide exclusionary

² *Ibid.*

³ Woolf, ‘In Defence of Anarchism’ at p12

⁴ *Ibid* at p10

⁵ *Ibid.* at p18

reasons for action or is so placed to properly solve co-ordination problems within a political society. Woolf does make valid recognition of these aspects of a legitimate practical authority but when coupled with a stubborn adherence to an episodic account of autonomy he is led to a mischaracterization of the relevant apparent paradox involved with legitimate practical authority as being rooted in our growing need for the values legitimate authority can provide paradoxically coupled with a growing awareness of our own autonomy which precludes endorsing any such submission to practical authority, “the paradox of man’s condition in the modern world is that the more fully he recognises his right and duty to be his own master, the more completely he becomes the passive object of a technology and bureaucracy whose complexities he cannot understand.”⁶ What Raz’s conception of legitimate practical (including legal) authority offers us philosophically then is a more satisfactory account of the way in which we normally approach decisions; namely in a diachronic manner advertent to the relative advantages that autonomously submitting to authority may offer us⁷. Indeed, a testament to the logical superiority of a notion of practical authority that allows for, without conflicting with, autonomy is the fact that clearly not all reasons for any given decision are necessarily dependent reasons and thus pre-empted by a practical authority’s directive. There may be other first-order exclusionary reasons which may be relevant to a decision which are not so pre-empted leaving logical room for the autonomy of the subject.

In accepting then Raz’s initial characterisation of legal authority as capable of providing a satisfactory account of how subjects approach decisions we are not necessarily bound to accept with it his specific account of the non-general circumstances in which legitimate legal authority arises. In short, we must interrogate his notion of the contingent normal justification thesis as exclusively profiling the scope of legitimate legal authority and thus any obligation to obey the law if we are to satisfactorily conclude that such a

⁶ *Ibid.* at p17

⁷ One possible practical problem for Raz’s account for the way in which we may autonomously submit to legitimate practical authority here when applied specifically to legal authority is the fact that legal authority is a coercive authority and as such the autonomy of the subject in submitting to it may be threatened. However, Raz’s point still stands in conceptual terms.

general obligation adds nothing to independent pre-existing moral duties to conform to legal standards.

In keeping with the parameters of Raz's claim, it may be enough here to demonstrate that alternative conceptions of the capabilities of legitimate legal authority to make a practical difference in the deliberations of its subjects are insufficiently universal to root a general moral claim that the law be obeyed. In this vein, it is asserted that conceptions of a general obligation to obey the law as rooted in social contract, gratitude and promissory estoppel notions are rightly rejected by Raz and indeed M.B.E. Smith⁸ as capable of representing any such general principle. That whilst it is true that most governments do confer substantial benefits on their subjects, most benefits of governments are "not accepted by citizens but are rather enjoyed regardless of whether they are wanted."⁹ That further, residence and use of the protection of law do not constitute any "usual kind of consent to a government nor any usual kind of promise to obey its laws." To illustrate the accuracy of these rejections more practically one may look to the obvious frailties of such 'consent' arguments cast in terms of implied promises via the democratic process, that voting establishes a prima facie obligation of obedience. That ultimately it does seem counter-intuitive to endorse the logical implication of such arguments that those who are eligible to vote have a stronger obligation to obey the law than those who are ineligible. As Hayek points out in his rejection of Stuart Green's arguments based not on an idea of implicit agreement but explicit manifestations such as persons in receipt of licences etc¹⁰, "only those individuals who have taken the crucial step of receiving a permit could possibly be said to have promised to have conformed to its terms and conditions."¹¹ It seems clear then that no general moral obligation to obey the law can successfully be rooted in a concept of promise or consent.

It is suggested however that one should be less inclined to endorse Raz's equally rapid rejection of a general moral obligation to obey the law

⁸ Smith, Yale Law Journal 'Is There A Prima Facie Obligation To Obey The Law?'

⁹ *Ibid.*

¹⁰ Stuart Green, 'Why it's a crime to tear the tag off a mattress: Overcriminalisation and the moral content of Regulatory Offences' (1997) 46 Emory Law Journal 1533

¹¹ Douglas Hayek, '*Malum Prohibitum* and Retributivism' in 'Defining Crimes' at p83

based on a principle of fairness embodied in legal authority. That, by suggesting that it would be unfair to allow the legally disobedient to benefit from the obedience of the law-abiding, theorists such as Finnis and Hart go beyond suggesting that legitimate practical authority is compatible with autonomy but further, that other values may be equally worth pursuing along with autonomy such as those of fairness which arise via “the mere existence of a co-operative exercise [such as a legal system] and thus give rise to a *prima facie* obligation¹²” to obey the law. Whilst Raz and Smith unite in pointing out that there may be circumstances when any such disobedience is both trivial and unnoticed and thus does not affect the interests of the law-abiding, their subsequent claim then that no unfairness arises seems not to be the necessary logical result. That the normative quality of a system which allows for such disobedience alongside the obedience of others remains unfair, whether noticed or unnoticed, prejudicial to the law-abiding’s interests or not. Perhaps a stronger argument against the assertion of a general moral obligation to obey the law rooted in fairness rests in the fact that some such instances of disobedience, even when noticed by the law-abiding, would not in fact attract their criticism which we must come to associate with an accurate notion of what it is to be under an obligation identified by the very presence of such an internal critical reflective attitude. That as such, any such argument from fairness fails to challenge the core of Raz’s claim that no such *general* moral obligation exists. Perhaps however, his failure to properly advert to the possible scope of an argument for such a moral obligation in some circumstances premised on the moral concept of fairness leads us to at least question whether the paradox he draws may in fact be overdrawn, that to suggest that any moral obligation adds “nothing” to pre-existing moral duties may in fact not hold in a larger number of cases than he gives credit for.

It is with this approach in mind that we may perhaps more accurately interrogate Raz’s characterisation of the capability of legal authority to make a difference to subjects’ deliberations and his outright rejection of other attempts to root a general obligation to obey the law in a generalised moral aspect of legal authority.

¹² Smith, Yale Law Journal ‘Is There A Prima Facie Obligation To Obey The Law?’

Finnis suggests that, “the ultimate basis of a ruler’s authority is the fact that he has the opportunity, and thus the responsibility, of furthering the common good by stipulating solutions to a community’s co-ordination problems.¹³” That under this conception of legal authority we can root at least a *prima facie* moral obligation to obey the law precisely because it is legally authoritative and thus acknowledged as upholding this moral value in furthering the common good. However, as Raz points out, “Finnis properly explains why the law is a way of achieving co-ordination but he never even attempts to show that co-ordination requires obedience to the law;¹⁴” That in other words, there are areas in which the law and legal authority do not make any difference to your moral deliberations, essentially where *mala in se* exists we do, and perhaps more fundamentally we should, carry out our own moral analysis not to act in such a manner, not to murder, not to rape etc. Indeed, there is undoubted strength in Raz’s claim here that it would in fact be morally repugnant for one not to engage in an independent moral evaluation of the reasons why it is wrong to murder or rape etc. This core of *mala in se* crimes and thus persistent barrier to establishing that the law does or indeed, should, always make a definitive practical difference to one’s deliberations in deciding whether to respect a legal rule and thus the establishment of a wholly *general* moral obligation to obey the law is fully acknowledged.

However, what I would like to suggest here is that Raz overstates this paradox, that with a more complex understanding of the relationship between *mala in se* and *mala in prohibitum* offences and particularly the ‘wrongfulness’ of what Duff characterises as ‘hybrid offences¹⁵’ incorporating both types of wrongs, one can develop a potentially richer notion of the way in which legal authority can and *should* make a practical difference to one’s deliberations, adding real substance both to the fairness and co-ordination arguments adverted to above.

Duff’s own examples of such hybrid offences of drunk driving and statutory rape are illustrative. Hayek describes their characteristics in these

¹³ Finnis, ‘Natural Law and Natural Rights’ Chapter 12

¹⁴ Raz, ‘Ethics in the Public Domain’ Chapter 9

¹⁵ It is in fact Hayek in a critique of Duff’s work that attributes such a term to the concept as presented by Duff, Hayek, ‘*Malum Prohibitum* and Retributivism’ in ‘Defining Crimes’

useful terms, “persons can (and frequently do) commit these offences without doing anything wrong prior to or independent of law [for example, he who sleeps with a girl below the age of consent *knowing* she is mature enough for her age to consent]. This is not the case with pure *male in se* offences. But some instances of these offences *are* wrongful prior to and independent of law [for example, he who sleeps with a girl below the age of consent knowing she lacks the maturity to consent]. This is not the case with pure *male prohibita* offences.¹⁶” In searching for the ‘wrong’ in committing such offences, I would suggest that two elements of Duff’s argument can be identified and to some extent separated out, the first corresponding with arguments above in terms of solving co-ordination problems and the second corresponding more with fairness principles used to attempt to ground a general moral obligation to obey the law.

The first related to the ‘wrongness’ identified by Duff as stemming from the offender’s inability to *know* that their sexual partner is sufficiently mature for example or to use Duff’s own example “to *know* that they are safe after drinking that much alcohol at that speed.¹⁷” The point, as stressed by Duff, is not just that human beings may miscalculate his own, or other’s capabilities, but rather that one runs an unreasonable risk in assuming he is well placed to decide such matters, to decide when the *mala in se* will in fact be committed. In this way, one may see how a legal authority is capable, necessary, to solve a more widely conceived notion of when co-ordination problems arise¹⁸. That it is insufficient and inaccurate to merely point to the existence of male in se crimes as minimalizing to a trivial degree the extent to which legal authority can and ultimately *should* make a definitive difference to ones’ deliberations on whether to conform to a legal rule as authoritatively laid down. Of course, as pointed out by Hayek, who adopts a distinctly Razian sceptical approach to the notion of legitimate authority, the importance of any such re-casting of the co-ordination principle, or indeed the fairness principle to be addressed below, for rooting a *general* moral obligation to obey the law “depends on how many

¹⁶ Hayek, ‘*Malum Prohibitum* and Retributivism’ in ‘Defining Crimes’ at p75

¹⁷ Duff, ‘Criminalizing Endangerment’ in ‘Defining Crimes’ at p61

¹⁸ Indeed, Hayek himself acknowledges the overlap between co-ordination problems and hybrid offences, see Hayek ‘*Malum Prohibitum* and Retributivism’ in ‘Defining Crimes’ at p86

crimes can plausibly be construed as hybrids.¹⁹ Indeed, as conceded above, it seems such an approach cannot be fully generalised since pure *male in se* offences undoubtedly persist and the normative difference between the offender who knows his sexual partner is sufficiently mature and he who knows she is not remains, drawing attention to the central critical internal attitude which must characterise any such general moral obligation²⁰. However, Hayek's own acceptance of the "notorious difficulty of contrasting *male in se* from *malum in prohibitum*"²¹ and recognition that these non-pure *male in se* offences represent a significant part of our legal rules serves to strongly suggest that Raz's characterisation of the apparent paradox and its solution may be over-drawn, or at least fails to advert to a more sophisticated notion of the role of legal authority in many deliberations about whether to obey legal standards by suggesting it can add 'nothing' to such deliberations.

Indeed, whilst Hayek attempts to suggest that it is a false premise for Duff to assume that the legal authority is normally the more appropriate body to solve any such co-ordination problem above the deliberations of the subject himself in situations other than temptation [of sex or drink for example,] that "we should not be persuaded to endorse the argument by comparing non-rational defendants with ideal legislatures,"²² surely Raz's apparent paradox should withstand such a comparison since his claim is that the more just the state, the stronger the pre-existing moral duties to conform and thus the more any moral obligation to obey the law because it is law pales into the shadows of these other moral duties.

A second, and perhaps stronger, element to Duff's search for the wrong involved in committing hybrid offences is his identification of the attitude of 'civic arrogance' that it entails, *unfair* when adopted for its failure to "assure" each other that we are ensuring we act safely by complying with the legal rule as authoritatively cast. That "a recognition of fellow citizenship (and

¹⁹ Hayek, 'Malum Prohibitum and Retributivism' in 'Defining Crimes' at p77

²⁰ This point is adverted to by Hayek himself under the guise of what he calls the 'proportionality' difficulty involved with subjecting the two normatively different types of behaviour to the same penalty. See Hayek, 'Malum Prohibitum and Retributivism' in 'Defining Crimes' at p81

²¹ *Ibid.* at p66

²² *Ibid.* at p78

the dangers involved in allowing exceptions to the law's demands should *motivate*²³ me to accept such laws, even if I believe (truly) that they are unnecessary in my case.²⁴ Indeed, it seems to fit at least to some degree, with the nature of a community's disapproval of particular derogations from legal standards that it is to adopt a morally repugnant attitude not to regard oneself as bound by the same rules as the other subjects of the system.²⁵ It is in this sense that an argument along the lines of civic arrogance may in some cases root a moral obligation to obey the law. That when understood in these terms, this is how it "substitutes for the wrongness that is absent in hybrid offences [where there is no *mala in se* as such]²⁶" Whilst again it may not be possible to extend such a principle to all offences beyond hybrid ones, the scope to extend this moral attitude relevant to one's practical deliberations, beyond hybrid offences to some extent into *malum prohibitum* ones may seem wider than the co-ordination based approach adopted above and lends substance to the fairness principle explored above²⁷.

These excursions into the nature of the practical role legal authority can make, under different principles, to deliberations about whether to obey the law do seem ultimately to fail to root a general moral obligation to obey the law. Indeed perhaps the closest we may come to Raz's elusive 'general' argument for why this is so lays in a true understanding of what it means to be under an obligation. That it involves a critical attitude towards the disobedience of others which simply does not naturally always exist in response to all actions of unlawful disobedience.²⁸ However, this does not

²³ Emphasis added

²⁴ Duff, 'Criminalizing Endangerment' in 'Defining Crimes' at p62

²⁵ One such example may be that we readily criticise those who tax evade, not centrally because of any knock-on effect such a deprivation of funds for the state will have on one's own quality of life but from the feeling that it is unfair for one to adopt an attitude whereby they decide whether they should abide by the rules submitted to by others for overall gain.

²⁶ Hayek, '*Malum Prohibitum* and Retributivism' in 'Defining Crimes' at p81

²⁷ Hayek suggests that "the principle of fair play will succeed in explaining the wrongfulness of *mala prohibita* offences in only a small handful of cases." However, it is suggested that his assertion fails to advert to the true moral nature of the obligation not to display civil arrogance by disobeying the law. That in fact we would naturally criticise he who disregards Sunday trading hours to make a gain for himself precisely because he has taken it upon himself to decide he need not be subject to the same rules which govern the other traders. – See Hayek, '*Malum Prohibitum* and Retributivism' in 'Defining Crimes' at p88

²⁸ Indeed, on the classic example, it seems intuitive that we would not criticise the cyclist who jumps a red light in the middle of the night where there is clearly nobody about.

render such explorations futile. What a proper understanding of the practical difference legal authority can, and indeed should make, in some circumstances to the moral deliberations of whether to obey the law *because it is law* does allow us to do is both to reject the exaggerated scope of Raz's apparent paradox that such moral obligations add 'nothing' to other moral duties, and further to enter into a more sophisticated analysis of when such a moral obligation to obey the law does in fact arise.