Legal Philosophies

Second Edition

For my son Hugh

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Preface to the second edition

Since the first edition of this book was written, seventeen years ago, there have been many developments in the theoretical and practical problems addressed by legal philosophers. At that time, the labels 'Critical Legal Studies' and 'Feminist Jurisprudence' were scarcely known. New sections have accordingly been added to chapters 8 and 20. Philosophers have discovered new terms in which to debate the ancient search for the foundations of the objectivity of morals, hence the new section on 'Moral Truth' in chapter 2; and a new section on 'Communitarianism' in chapter 20 takes account of a revived theoretical and political invocation of the demands of 'community' in opposition to individualist liberalism.

Michael Hartney's translation of Hans Kelsen's last posthumously published work, *General Theory of Norms*, the posthumously published postscript to the second edition of Herbert Hart's *The Concept of Law* and the publication of Ronald Dworkin's *Law's Empire* have led to the complete rewriting of chapters 6, 9 and 14. Thanks largely to the initiatives of Joseph Raz, the relation of law to other departments of practical reasoning has taken on fresh vitality, and a new section on 'Law's Normativity' is included in chapter 9.

Law's proper place as the enforcer of moral standards has been set new challenges by developments in embryonic research and the practice of surrogacy, taken account of in chapter 10. The House of Lords' path-breaking repudiation of its previous attitude to Parliamentary materials in interpreting statutes has been explored in chapter 12. Alterations, minor or substantial, appear throughout the rest of the book.

The purpose of the book remains the same: to provide a bill of fare for the beginner in jurisprudence, moral or political philosophy. I gave my reasons for believing such an introductory work to be needed in the preface to the first edition. Students, with whom the book has proved popular, have

Jensen O. C. *The Nature of Legal Argument* (1957)
Lee S. *Judging Judges* (1989)
Levi E. H. *An Introduction to Legal Reasoning* (1948)
MacCormick D. N. *Legal Reasoning and Legal Theory* (1978)
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Pound R. 'Common Law and Legislation' (1907) 21 Harv L Rev 383
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Sartorius R. E. *Individual Conduct and Social Norms* (1975) ch 10
Schauer F. *Playing by the Rules* (1991)
Shuman S. I. 'Justification of Judicial Decisions' (1971) 59 Calif L Rev 723
Stoljar S. J. 'The Logical Status of a Legal Principle' (1953) 20 U Chi L Rev 181
Stone J. *Legal System and Lawyers' Reasonings* (1964) chs 6-8
Wasserstrom R. A. *The Judicial Decision* (1961)

16 The duty to obey the law

Is there a moral duty to obey the law? Most public men say there is. In the history of speculative thought, adherents of widely different social perspectives have said that there is. Socrates went to his unjust execution proclaiming such a duty. St Paul, writing to the Christians at Rome, affirmed a religious obligation to obey the secular law. St Thomas Aquinas states that human law ought to be obeyed unless it contravened natural law, and even then it was generally right to obey 'to avoid scandal'. Bentham, who rejected natural law and advocated that all law should be subject to criticism by reference to the standard of utility, recommended the following maxim: 'Obey punctually, censor freely.'

The House of Lords, in upholding an order requiring a journalist to disclose the source of his information, was unimpressed by the argument that he, as a matter of conscience, considered that his obligation to keep his promise not to disclose outweighed his duty to obey the law. Such a doctrine would, in their Lordships' view, directly undermine the rule of law and is completely unacceptable in a democratic society.[1] The European Court of Human Rights has since ruled that the order violated the journalist's right to freedom of expression which is protected by Article 10 of the European Convention of Human Rights.[2] But, of course, that court did not rule that breaking the law for conscience sake is a human right. It upheld what it took to be a legal right under the Convention. One court may decide that another court has misinterpreted the law, without questioning that 'the law' (properly interpreted) should always be obeyed.

Yet, if you look around you, you find people of impeccable character who break the law and see nothing morally objectionable in so doing. An

1 *X Ltd v Morgan-Grampian Ltd* [1991] AC 1.
2 *Goodwin v UK* Case 16 1994/463, (1996) Times, 18 March.

acquaintance of mine tells me that he drives to work every day in excess of the speed limit; it does no one any harm, and he'd never be on time if he did not. People I know, of the highest respectability, enter into informal transactions with builders and decorators on a cash basis, so as to avoid the value added tax which they are legally obliged to pay, and see nothing wrong with it. And, of course, radical critics of our political and legal institutions see nothing morally objectionable in breaking the law; it may be 'imprudent', but never 'wrong', to defy the establishment by flouting its laws. On the other hand, the same critics will be heard condemning official acts, or the actions of employers, on the specific ground that what they do is 'illegal' and therefore 'wrong'.

If someone affirms that there is a moral duty to obey the law, or implies that there is by the nature of the criticisms he makes of others, but at the same time breaks the law and sees nothing wrong with it, is he a hypocrite? Some believers in the duty might say this, or, more charitably, that he has made a mistake about the moral position in his own case which reflection and discussion might correct. If he dwells on the advantages which we all derive from legal institutions, he will come to understand the importance of co-operation and setting a good example. In this way moral education will at last lead him to realise that it is wrong (and not just illegal) to break traffic and tax laws.

But nowadays there are writers who take an opposite view. Our good citizen – be he supporter of the establishment or radical critic – is not mistaken when he says that there is nothing wrong with breaking the law. There is nothing wrong with it – not, at least, just because the law is broken. The only mistake lies in the belief that there is ever any moral duty to obey the law as such. The root cause of this mistake is a failure, so it is argued, to distinguish the act from its legal quality. Of course, there are good moral reasons against many acts which also happen to be illegal – like murder or theft – but it is not because they are illegal that we are morally obliged to abstain from them.

To assert that there is a moral duty to obey the law means affirming that there are moral grounds why one ought to perform any act which the law prescribes or abstain from any act which the law prohibits. Affirming this proposition leaves open the question whether the duty is absolute or qualified in some way. There are probably few people who would support the duty in its absolute form – that is, assert that the moral reasons for obeying the law could never be outweighed by moral reasons pointing towards disobedience. It is implausible to attribute to Socrates or St Paul the view that an ordinance of the state flatly contrary to one's religious duty should be complied with. St Thomas was explicit on the point. Democratic politicians would allow that it might be right to disobey the laws of undemocratic regimes, and probably also that protest against unjust laws of democratic regimes can sometimes legitimately include some kinds

of lawbreaking. So the real issue is whether there is or is not a prima facie duty to obey.

If I have in my left hand a book of Jubbjubb etiquette – something totally unknown to you – and in my right hand a book of your country's law, and I announce that I am going to open each at random, will you allow that there are moral reasons indicating obedience to whatever comes out of my right hand which plainly do not obtain in the case of the left-hand book? Or is your conscience equipoised between the two books – that is, until you hear the prescription read out, there is no way of knowing whether there will be moral reasons to comply? And remember: the question is not just one of probabilities. You might allow that, given your previous acquaintance with English law, there is more than a 50:50 chance that something required by it is something which there are moral grounds for performing. That is not enough. For one to be able to affirm that a prima facie moral duty to obey English law exists, one must be satisfied that, whatever comes out of the English law book, there are reasons (stateable in advance) why it is morally right to comply – albeit that, once the prescription is known, other moral reasons may tell against.

The present discussion must be distinguished from the topic dealt with at the end of chapter 9, above – that is, law's alleged normativity. We saw that there are a variety of positions from which it is asserted that a conceptual connection exists between 'legal' and 'ought to be obeyed', only some of which would clothe 'true law' with full-blooded moral status. Such conceptual claims, even if sound, contribute nothing to the moral dilemmas of daily life with which we are here concerned. In the case of tax and traffic laws, the citizen may have no difficulty in recognising what the law is, but still be perturbed about the moral question of compliance. Can critical morality furnish an extra-legal platform on which a distinct duty, directed towards the law, can be stood? Four concepts have been invoked – gratitude, promise-keeping, fairness, and the promotion of the common good. Of course, one could deny ultimate moral status to any one (or all) of these concepts and so raise the discussion to the abstract level of alleged bases of 'moral truth' (see chapter 2, above). It is fashionable, however, to proceed as follows: granted, *arguendo*, that such concepts have objective standing within an acceptable critical morality, does a prima facie moral duty to obey the law follow?

The appeal to gratitude is conservative or romantic. Your country and its laws have conferred great benefits on you. The least you can do is to obey all its laws, unless some good ground for not doing so can be shown. As to this, it may be argued in reply that the concept of gratitude, as ordinarily understood, does not carry us so far. One may be grateful to one's parents, and obligations of many kinds may be said to flow from such gratitude – but not the obligation to do everything they tell you to do, nor even to give reasons why you should not do what they say. Even

supposing one accepts that there is a prima facie duty to obey a benevolent parent – that is, to comply with her directions unless some countervailing reason exists – the relationship to legal authorities is different. Gratitude to them, if such there be, is more like the gratitude we owe to a friend who has conferred a favour in the course of a co-operative relationship. Certainly, we should do as much for him, but there is no question of taking his orders even as a prima facie moral guide.

The argument from promise-keeping is as old as the concept of the social contract, which for something over 300 years has been toted about in political philosophy. Men who enter into a political compact with a government promise obedience in exchange for protection and other benefits – figuratively speaking. Anyone receiving the benefits commits himself to this social contract, and so impliedly promises obedience. Variants of this argument allege that anyone who takes part in democratic processes, for instance by voting, impliedly promises to obey the law. Granted that promise-keeping, in the absence of good reasons to the contrary, is morally required, it follows that obedience to the law is morally required.

The most sophisticated version of the social contract in modern political philosophy is contained in John Rawls's theory of justice, discussed in chapter 20, below. As we shall see, Rawls argues that a society is just if it is governed by principles which people would have agreed to in a state of ignorance about their particular position in society. Where a society is just or nearly just by this test there is, he says, a 'natural duty' of all citizens to support and further just institutions. This natural duty includes doing what is required of one by society's institutions, including the law. The duty exists independently of any actual promise to obey because, behind the veil of ignorance about their own situation, people would have agreed to it. So long as the basic structure of society is reasonably just, the duty extends to obeying unjust particular laws – provided they do not exceed certain limits of injustice, such as by making unjust demands only of a particular group or by denying basic liberties. When these limits are exceeded, conscientious refusal to obey the particular law is justified; and, in the case of blatant injustice, 'civil disobedience' of it or other laws may be warranted. Civil disobedience is a public, non-violent act aimed at bringing about a change in the law or the policies of the government. Unlike 'conscientious refusal', civil disobedience may warrant breaking laws which are not themselves unjust in order to draw attention to those which are.

Opponents of such lines of argument usually point to the simple 'fact' that receiving benefits, or voting, or getting the social set-up you would have agreed to in advance of knowledge of your position, are not equivalent to promising to obey. If you join a club and promise to observe the rules, you are acting wrongly, prima facie, if you break them. But a state organised under law is not like a club. We have no choice about belonging.

In this context, there may be a difference between ordinary citizens and persons exercising official roles. If we accept that nothing a citizen does, and nothing that happens to him, is equivalent to a promise to obey the law, we might wish to distinguish the case of someone taking up a position as a judge or a minister or a town councillor or a policeman. Perhaps, given the nature of their legally-defined roles, taking up office is for them equivalent to a promise to obey all the laws – or, at any rate, all the laws directed to them in their official capacity. Rawls argues that, quite apart from the natural duty of citizens to obey the laws of a reasonably just society, officials have a special 'obligation' to do so. All obligations arise from the 'principle of fairness', which is a distinct principle to which people would have agreed from behind the veil of ignorance:

> '[T]his principle holds that a person is under an obligation to do his part as specified by the rules of an institution whenever he has voluntarily accepted the benefits of the scheme or has taken advantage of the opportunities it offers to advance his interests, provided that this institution is just or fair.'[3]

Some may find a principle of fairness of this sort acceptable, independently of the contractarian basis Rawls offers for it, and might wish to extend it to all citizens. For them, 'fairness' would be a moral ground for the duty to obey the law, distinct from promise-keeping. Society may not be like a club in the sense of an association people join voluntarily, but it could be argued that a comparatively beneficent state has other qualities of non-political associations: it confers benefits and, in order to do so, imposes burdens. Those who support the closed shop in industry – that is, compulsory union membership for all employees – often do so on the ground that it would be unfair if people took the benefits of higher wages and improved conditions negotiated by the union without paying subscriptions. The argument is not that they ought to pay because they have promised to, but that they ought to promise to pay because it would be unfair if they did not. Similarly, some would argue, you ought not to take the benefit of a well-managed traffic system, or the benefits derived from tax expenditure, without submitting to the laws. You have a duty to obey the law, not because of anything you owe the government, but because of something you owe your fellow citizens. If they all comply and you benefit, it is unfair if you benefit without complying.

To this argument, various sorts of answers are possible. An anarchist would deny that the legal institutions confer any benefit at all. Those who

3 *A Theory of Justice* p 342.

regard the state's institutions (at least in a democracy) as on the whole beneficial, counter the argument of fairness by pointing out that it cannot apply where submitting to a legal restraint in fact does no one any good. If I am driving along a deserted road, how can it be unfair in me to exceed the speed limit, even if I know that other people have regularly observed it? What one makes of this sort of example depends on how typical one thinks it is. If it is commonly the case that occasions of law-compliance benefit no one, then the analogy with the 'fairness' implications of day-to-day co-operative transactions breaks down. If, on the other hand, one supposes that compliance with the law usually confers some benefit, even if the benefit is not immediately obvious to the actor, then one can make out a case for saying that fairness requires that you obey the law (whatever it is) unless on the particular facts its total uselessness is made evident.

You have to be satisfied of two things before a prima facie duty to obey the law can be said to be founded on the moral concept of fairness: first, that laws have generally beneficial effects; second, that most other people obey, so that you would be taking an unfair advantage if you do not. Just as, in the closed shop case, for the fairness argument to be appropriate – and there too, as with the law, it might be outweighed – you have to be satisfied, first, that the union does confer benefits, and second, that all other employees (or the great majority) are paying their subscriptions. It is rumoured that there are industries in which theft of material by workers, or misappropriation of resources for private purposes by managers, is so common that such conduct is no longer thought of as 'wrong'. If that is true, it might well be that someone whose conventional law-breaking actions are challenged on moral grounds would say: 'But everybody does it'. That would amount to a denial of any duty based on fairness.

Notice, however, that the fairness argument for a moral obligation to obey the law (unlike the consequentialist arguments we are about to consider) does not require showing that compliance on the particular occasion will do anyone any good. Suppose a ban on using garden hose-pipes is instituted when there is a water shortage. The ban applies to 1000 households. 999 comply, which has the effect of saving sufficient water even if the thousandth citizen uses as much water as he likes. It would still be 'unfair' for him to disregard the ban, even if (indeed, especially if) he knew that his neighbours would continue to observe it.

Perhaps the commonest justification for the duty to obey the law is appeal to the public good. If people break the law, the collective welfare of society is diminished: therefore, we are morally obliged to obey. In the parlance of moral philosophy, such arguments are called 'utilitarian', and their soundness is often challenged. It is not difficult for critics of the argument to think of examples where (on the face of it) total welfare would be diminished rather than increased by obedience to law. The law requires everyone to declare every item of income in his tax return. Supposing a man has received a small payment from a friend for performing some minor service, such as mowing a lawn or decorating a house. (Suppose also that he knows that most people do not declare such income, so that no argument of fairness would be relevant.) How is the public good affected if he breaks the law by omitting this item from his tax return? If he did comply, a little more tax would be collected from him by the authorities, and incremental benefits flowing from expenditure of state revenue would accrue. But against that would have to be set the disadvantage to himself and his family of having to forego the money collected – this, like all consequences to individuals, is a relevant consideration for the purpose of a utilitarian calculus in a way in which it is not for a fairness argument. He might claim that the loss to him and his family would outweigh any trivial benefit to others; and he could certainly make out this claim if he could show that the increase in administration costs required by collecting the extra sum would actually swallow up the addition to the state's revenue.

Those defending a utilitarian basis for the duty to obey the law may challenge this sort of hypothetical case on the ground that it naively limits those consequences which have to be taken into account. In particular, it ignores the effects of bad example. Even if my lawbreaking directly does more good than harm, indirectly the reverse may be true because, following this example, others may break the law in circumstances where manifest harm is done, or I myself, on other occasions, may follow my own bad example with bad effects on the public good. *Ex hypothesi*, the man concealing the extra income will not produce bad consequences by way of bad example in the particular context of tax evasion, because I have assumed that he knows that most other people already cheat in this way. But his impressionable children, for instance, may get the idea that you need not obey the law where your own resulting loss will be greater than any tangible benefit to others. Dad will have explained that point when filling in his tax return last night, and so today they will shoplift from large stores, calculating (perhaps mistakenly) that their gains will be greater than the losses to the company which owns the store. (If they were familiar with the terminology of theoretical economics, they would base such a view on 'marginal utility'. They would point out that, given their comparative poverty and the comparative wealth of the company, the next pound gained by them has more value than the next pound lost by the company.)

The argument from bad example attempts to justify the duty to obey the law on the basis of what is known as 'act-utilitarianism'. An act is morally wrong if it will have worse consequences than some other act open to the actor on the occasion. The argument suggests that an act of law-breaking is wrong by this test because its consequences include imitation in the way of further law-breaking, and some of the further acts of law-breaking will have bad consequences. Its plausibility depends on one's

assessment of the generalisability of the effects of 'law-breaking' as a class of activities. If one takes the view that breaking some kinds of laws in no way leads, through bad example, to breaking other kinds of laws, this argument cannot found a duty to obey the law as such.

Sometimes consequentialist arguments for a duty to obey the law are stated in a particular form which makes it easy for the moral philosopher to shoot them down, as when someone says: 'You shouldn't evade your taxes, for what would happen if everybody did it?' To this the moral philosopher can answer that the wrongness of an action can never be established merely by pointing out that, if everyone did it, the consequences would be bad: if everyone caught the 9am train to Paddington tomorrow, there would be chaos; but that does not show that my catching it is in any way morally questionable. This misses the difficult but crucially important question, which is whether law-breaking is potentially imitative behaviour, in a way which train-catching is not. The argument should not be stated: 'What if everyone did it?' but: 'Other people will do it if you do.' This is an empirical proposition, whose truth cannot be tested in the philosopher's armchair. Is it in fact plausible?

Everyone would agree that some acts of law-breaking have bad effects on the collective welfare (whether through imitation of bad examples or otherwise), and that some do not – like the lone car driver exceeding the speed limit on the deserted road. It could be argued that everything turns on the particular situation, so that, before I open the law book, there is no way of knowing whether it will be right or wrong to obey any particular prescription: therefore, there is no prima facie duty to obey the law as such. To this it might be answered that, in many cases, it will be impracticable for the actor to assess the consequences of obedience or disobedience, that the consequences of disobedience are usually worse than the consequences of obedience, and that therefore one ought to obey the law (whatever it says) unless the consequences of doing so can be proved to be harmful. One's judgment on the question must turn on one's impression of whether consequences of law-breaking are or are not easily assessable at the moment when the issue of obedience or disobedience arises.

The other typical form of utilitarian argument is 'rule-utilitarianism': an action is right if required by a rule, where general observance of the rule would have best consequences. The difficulty with this kind of argument in the particular context of obedience to law is that it is hard to exhaust all possible formulations of rules about obedience in order to compare their respective consequences. Clearly, a rule that one should always obey will have better consequences than a rule that one should always disobey – the latter rule would be too onerous even for the most dedicated rebel, for one could not move about without being morally obliged constantly to smash things, hit people and break contracts. However, a rule requiring one to obey (with certain exceptions) would probably have better consequences than a rule requiring one always to obey. The problem is to formulate all the exceptions. They would presumably relate to occasions on which law-breaking did no harm, either directly, or indirectly through setting bad examples. In other words, on the issue of obeying the law, there are no considerations relevant to rule-utilitarianism which are not involved in a discussion of act-utilitarianism. The important points concern the actual consequences of obedience or disobedience to different kinds of laws, whether influence through bad example is a plausible source of consequences, and whether assessment of consequences is likely to be so impracticable that one ought to assume a moral presumption in favour of obeying the law.

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17 The historical school and non-state law

Jurisprudential controversies about the nature of law commonly assume, expressly or tacitly, that the law we are talking about is the law of the modern state. Is that not perhaps too parochial? Should we not be careful to ensure that our conception of law is wide enough to encompass the 'law' under which man lived before the modern state evolved, as well as the 'primitive law' of non-state communities? Besides these, are there not other systems of non-state 'law' for which our conception must account, such as the laws of churches, universities, clubs and, above all, public international law and other supra-state international legal orders?

The literature of jurisprudence speaks of a movement of thought among legal theorists of the 19th century as the 'historical school'. The members of this school, like the legal positivists, rejected natural law, but not for the same reasons. They agreed with the positivists that law was not discoverable by abstract reason, but they did not accept that it was the product of deliberate choice. Law was the outcome of historical processes, and could only be understood in their light.

Membership of this school is usually said to include German 'romantic' writers, like C. von Savigny (1779-1861), on the one hand, and Sir Henry Maine (1822-1888), on the other. In fact, Savigny and Maine had little in common, beyond the view that history matters in our understanding of what law now is. There is, of course, nothing unusual in those who agree that we should learn lessons from the past finding that they have quite different views of the lessons it teaches.

The central tenet of the German romantic school was that law resides in the spirit of the people, the *volksgeist*. It was an error to suppose that a legislator stood above the community and imposed his will. He was an organ of the people, giving effect to its intuitions. This entailed that law both did and should vary from one country to another, since different