

Session 8 Smith, “Is There A Prima Facie Obligation to Obey the Law?”

Identifying the Question

- *Not:* Does the fact that some act is against the law provide us with a reason to believe (i.e. *evidence*) that it is wrong? (The “lawyer’s question”.)
- *Not:* Is the fact that some action is illegal an *overriding* reason not to perform it?
- *Not:* Do we ever have a *particular* obligation to obey particular laws on particular occasions?
- *Rather:* “Is the moral relation of any government to its citizens such that they have a prima facie obligation to do certain things merely because they are legally required to do so?” (p. 952)
 - Smith wants to know if the fact that some action is legally required (or illegal) can ever in itself provide us with *a reason* (possibly one that can be outweighed) to perform it (not to perform it).
 - But it isn’t so easy to spell out what kinds of cases the qualifier “merely because they are legally required” is supposed to exclude.
 - The fact that some act is illegal (e.g. not wearing a bike helmet) may give me a reason not to do it that I wouldn’t have if not for the law if the law makes it likely I’ll be punished for doing it.
 - The fact that some act is legally required (e.g. driving on the right) may give me a reason to do it that I wouldn’t have if not for the law if the law helps secure certain benefits of acting that way (by solving a coordination problem).
 - Are these examples of reasons I have to perform the acts merely because they’re legally required? Or does Smith want us to imagine some act we would have no reason to do *even holding all the consequences of performing the act constant*, except for the fact that acting that way would be satisfying a legal requirement? (E.g., stopping at a stop sign in the desert? Arguably: paying income taxes on a relatively small salary...)
 - Also, Smith argues that while we may sometimes have particular obligations to obey particular laws on particular occasions, there is no “generic” obligation to obey the law. But he doesn’t always consider *narrower* (and so perhaps more plausible) generic obligations than the obligation to obey all laws at all times (or all laws issued by just governments).

The Arguments For the Obligation to Obey

(1) *The Gratitude Argument*: We are obligated to obey the law because we're obligated to be grateful to the government because of the good things it does for us, and obeying the law is the best way of showing our gratitude. Smith:

- We don't owe gratitude for goods we receive that we never asked for, that we may not want, and that weren't given to us out of concern for our well-being.
- Even if we do owe the government gratitude, that doesn't mean we're obligated to do whatever it tells us to do (we owe our parents gratitude, but we needn't therefore do everything they tell us to do).

(2) *The Argument from Fair Play*: When a person receives a benefit from a *justly organized cooperative enterprise* whose *success depends on near universal obedience* to its rules, and that obedience involves some *sacrifice*, and he intends to continue receiving its benefits, then he *acts unfairly* if he refuses to obey those rules (Rawls). The government represents a cooperative enterprise of this sort among all citizens: we benefit and intend to keep on benefitting from it, those benefits depend on the fact that most people obey the law, and obeying the law involves some personal sacrifice (of liberties). So fairness requires that we, too, obey the law.

- According to Rawls, we owe this not to the government but to our fellow citizens – fellow participants and burden-sharers in the cooperative enterprise.
- The obligation to obey arising from fairness is independent of obligations based on considerations of utility or promising or consent.
- *We must be assuming that the benefits I get from the cooperative enterprise exceed the costs to me of doing my "fair share".)*
- *Also: It seems clear that I'm not obligated to contribute to all cooperative enterprises from which I benefit: if, for example, my friend forms a start-up company that does well enough to allow her to buy an apartment in New York, which she lets me use on occasion, I'm not thereby obligated to invest in the start-up. If I have any obligations arising from considerations of fair play in cooperative enterprise, they must arise only with regard to those enterprises in which I am a willing participant, an insider. But it's not at all easy to say what makes someone count as a participant in such a scheme. Is it enough to take advantage of the benefits, or do I have to have been involved in setting up the enterprise – do I have to have somehow "signed on"? Are citizens clearly voluntary participants in the state in the relevant sense? Is it enough to be a non-voluntary participant? How should we understand that?*
- Smith: In any case, Rawls wants to make the claim that considerations of fairness obligate willing participants in such a cooperative scheme to "do their part" even when failing to do their part – failing to obey, in this case – would have no impact on the success of the scheme and so would in no way harm the fellow cooperators (my fellow citizens) whose past obedience was partly responsible for my benefit. If my disobedience harms no one (directly or indirectly), then considerations of fairness cannot require me to obey: "surely, the fact that [one cooperating member] benefited from [another cooperating member's] submission does not give [the

second member] the right to insist that [the first member] obey when [the second member's] interests are unaffected." (p. 956)

- *Smith seems to be relying on an unstated premise that we cannot be treating someone unfairly if we do them no harm. Do you agree?*
- *Is it unfair for me to receive a benefit at no cost when a similar benefit comes to you only at a cost, and I get my benefit only because you bore the cost? Would it be fairer if I also bore the cost, even if my doing so leaves me worse off without making you better off? (Leveling-Down Objection)*
- *Could a principle or maxim of "free-riding" in this manner pass a Kantian universalizability test? That is, how should we answer the question, "what if everyone did that?" Does it matter?*
- *Are there other ways to explain what's wrong, intuitively, with, e.g., violating anti-overfishing regulations? Pollution regulations? Etc. (Consider utility-based arguments appealing to very small or imperceptible harms or risks of harm...) (See also the generalization argument...)*
- Smith: In any case, things are much more complicated than Rawls allows: in any actual cooperative scheme, different participants will have complied more or less in the past, will have sacrificed different amounts, and will benefit different amounts. All this makes it seem like they should be obligated to contribute different amounts (that is, make differing sacrifices in the future for the sake of the scheme). *But what would that mean for a supposed fair-play-based obligation to obey the law?*
- Also, actual legal systems are rarely *fully voluntary cooperatives*, rarely require even *near universal compliance* to survive, and often contain laws which its to no-one's benefit to obey (e.g. laws outlawing homosexual acts). Rawls' account may explain some kinds of obligations arising from small, voluntary, near-perfect cooperative enterprises, but couldn't explain political obligation in the modern state.

(3) *The Duty to Support Just Institutions*: Rawls later conceded, for some of the reasons mentioned, that the fair play argument might only explain the obligations of *officers* of the state to *uphold* the laws. The duty of the vast majority of ordinary citizens to *obey* the law must have a different source: a "natural" duty to support just institutions.

- Smith: again, even office-holders can be obligated to obey only when failing to contribute would harm those from whose prior obedience they have already benefitted.
 - *Here, something like consent to the rules, or a promise to uphold them, might be a more promising explanation of the obligation.*
- The duty to support just institutions also cannot give rise to any obligation to obey the law when disobedience would not threaten the success/survival of the institution (which must surely apply to most cases of disobeying the law – at least if we consider them individually).

(4) *The Argument from Consent*: We're obligated to obey the law because we (perhaps implicitly) promised or consented to doing so.

- Smith: But most citizens simply don't consent or promise, even implicitly, to obey the law – they don't intend their speech or behavior to communicate a promise to obey. And that's what's required for promises or consent.
- What might implicit or indirect consent consist in? Voting with one's feet? (That's makes withholding consent very difficult.) How about actual voting (or voluntarily refraining from voting)? (Plamenatz, Gewirth.)
 - Smith: But why think that by participating in an election we choose to grant authority to the people who win it (*especially if we did not vote for them*), and why think that even if our participation amounts to our voluntarily granting such people (*de facto*) authority, why think that granting them that authority generates an obligation to obey?
 - *Also: if voting is supposed to amount to implicit or indirect consent, and not-voting is also supposed to amount to consent, how can I withhold consent? There cannot be meaningful consent that cannot be withheld.*
- *Perhaps there is another thought in the background here: maybe the idea is rather that if you take democratic majority rule to be a legitimate decision procedure for a government to adopt, you cannot consistently refuse to accept its decisions when you're on the losing side. What do you think of that argument?*

(5) *The Act-Utilitarian Argument for the Obligation to Obey:* Effective government is necessary for securing the general good; effective government requires obedience; so obedience to the laws always promotes the general good. Therefore, we have an obligation to obey the law.

- Smith: It simply doesn't follow from the fact that effective gov't is beneficial and requires general obedience that obedience *always* promotes the general good – certainly not that obedience is *optimific*. At most, the act-utilitarian argument can establish that we have a specific prima facie obligation to obey the law when doing so would in fact *be* optimific. But this doesn't establish a *generic* obligation to obey.
 - *I'm not sure we can't tease a (narrower) generic obligation to obey out of the act-utilitarian argument: e.g. we're always obligated to obey the law whenever we're more likely to comply with our underlying reasons by using it as guidance than by acting on our own assessment of those reasons directly...*

(6) *The Generalization Argument:* An act cannot be morally indifferent unless it would be morally indifferent if everyone did it. But everyone's breaking the law is not a matter of moral indifference – it would be disastrous if everyone broke the law. So each person has a prima facie obligation to obey the law.

- Smith: As it stands, the generalization argument makes a mistake: there are plenty of harmless, morally neutral things that it would be bad if everyone did (e.g. produce food, consume food without producing any, always let someone else leave the elevator first).
- If the argument is to have any plausibility, we need to identify the right level of generality at which to describe the principle governing our action.

- But “what if everyone broke the law?” targets the wrong description of the act (after all, it would also be bad if no one *ever* broke the law). We need to ask *what would happen if people broke the law when doing so would have the best consequences*. That wouldn’t have disastrous results, according to Smith.
 - *Is he right about this? There are, arguably, some valuable practices that depend on people’s not engaging in act-utilitarian reasoning, even if they are perfect act-utilitarian reasoners – promising may be an example. It’s arguable that obedience is another example: the law could not serve its useful purpose if people obeyed it told them to do what was independently most utility-producing... (although punishment may play a role here...)*
- Smith considers a possible rejoinder: The disastrous consequences would arise if everyone obeyed the law only when *they thought* it best on the whole – because people aren’t very good judges of what’s best on the whole: that’s why we need the law!
 - Smith says this overestimates the difficulty in applying the AU formula. He also says that nothing he says implies that people will succeed in living up to their obligations: *in other words, the objector might be right to be worried, but doesn’t establish an obligation to obey: at most it shows that things might go best if people behaved as if there were such an obligation.*

(7) *The Rule-Utilitarian Argument*: There is a prima facie obligation to obey the law within a given society if and only if general acceptance of the rule “Obey the law” (as a rule of prima facie obligation), would have better consequences than if any other rule or no rule were generally accepted. It would have better consequences in most societies, so in most societies, there is a prima facie obligation to obey.

- Smith disagrees with the empirical claim: the combination of people’s own motivations to do the morally right thing, and their fear of sanctions of illegal behavior, would mean that most people would obey the laws even when they didn’t accept a prima facie obligation to obey.
 - *Wouldn’t some kinds of illegal behavior, such as tax evasion, be much more widespread?*
 - *Also, if people didn’t recognize the obligation to obey, wouldn’t they protest punishment for disobedience?*

Smith’s Arguments Against the Obligation to Obey

(1) Smith begins by discussing *degrees of wrongdoing*, and arguing that we can determine how *strong* the obligation is, by asking two questions:

- Is an act that violates the obligation and fulfills (or violates) no other *seriously wrong*?
- Is an act that is already wrong on other grounds made *seriously worse* if it also violates the obligation?

(2) Then he argues that applying the test to the supposed obligation to obey the law shows that it is at most a *very weak* obligation:

- When we consider cases of violations of the law where no other moral factor comes in, we think such acts at most minor moral wrongs (e.g. running the stop sign on the empty road).
 - *But: Is this question-begging?*
- When we consider violations of the law that are also, independently, morally wrong (e.g. murder), the additional fact that the act is illegal makes at most a trivial difference in our moral evaluation of the act.
 - *But is this right? It seems right in the murder case; but it's less clearly right in other cases: e.g., tax evasion. Also, there are some actions which would perhaps be immoral if they were illegal, but aren't given that they're legal (e.g. the actions of police officers, prison guards, lawyers...)*

(3) Smith argues that if the prima facie obligation to obey the law is at best a very weak obligation, we'd do best to ignore it. Also, we should revise our thinking about some matters, like civil disobedience, and the degree to which punishment of harmless illegal activity should be punished.

- *But that's a difficulty: if rethinking the obligation should make us rethink punishment, then the argument he made before, that in the absence of an obligation the threat of punishment would still secure the benefits of obedience, starts to lose some of its force.*

(4) Smith ends by considering the suggestion that while there may be no prima facie obligation to obey the law, the fact that some act is illegal may give us a reason to believe it's morally obligatory to refrain from performing it.

- Smith argues that it can at *most* give us such a reason in cases where we have nothing else to go on. *But why?*
- *Also: if it can be shown that the law can give us reasons for belief in this way, it might also be argued that the law can, derivatively, give us reason to obey, if we think we can be obligated to do what our evidence suggests it would be best for us to do (e.g. doctor case).*

(5) Smith leaves us with a problem: If there indeed is no prima facie obligation to obey the law, we cannot appeal to the obligation to explain the notion of *legitimate authority*: Legitimate authority cannot be authority whose distinctive claim give commands that impose obligations is *true*.

- *What else might make an authority legitimate?*
- *If there is not general obligation to obey the law, what could justify punishment of disobedience by the state?*
- *Could any state that punishes disobedience despite the absence of an obligation to obey be considered legitimate?*

Finally: why should we be looking for a generic obligation to obey the law? Haven't we by now identified lots of different ways in which laws could give us reasons to obey in individual cases?

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