

## OBEDIENCE TO LAWFUL AUTHORITY

During the past decade and a half, we in the United States have been forced by civil rights and anti-war demonstrations, the slaughter at Mai Lai, and the Watergate break-in to reconsider the reasons for, and limits to, obedience to lawful authority. What is the justification for such obedience? What are its limits?

The life of Sir Thomas More makes us realize how perennial these issues are. More confronted them when King Henry VIII demanded that he accept the Act of Succession, repudiate papal supremacy over the Church of England, and swear loyalty to Henry. In the course of this talk I shall try to make clear that it would be misleading to say More refused to obey a person having lawful authority. However, I will not primarily discuss More's problems. Nor can I, in the brief time available, provide a philosophically satisfactory and detailed discussion of the whole issue. Rather than present a detailed argument on a small aspect of it, I shall provide a thumbnail sketch of a general approach.<sup>1</sup>

The expression "obedience to lawful authority" may be misleading. It suggests that one has a duty to a person in authority rather than an obligation to comply with legal norms. Some political philosophers write of people in authority having a right to command and of subjects having a correlative duty to obey. A simple example illustrates a difficulty with this account. Suppose Abernathy negligently injures Baker and that under the tort law of the jurisdiction he owes compensation to Baker. Abernathy then has a duty to Baker to compensate him; but if subjects have a duty to obey people in authority, Abernathy has two duties--one to Baker and another to some person (it is unclear who) in authority. However, it is unnecessary to claim Abernathy has a duty to someone in authority, for it adds nothing to his duty to Baker. The same act would fulfill both duties. It is more perspicuous to say that Abernathy has a duty to Baker and that someone is authorized to enforce that one duty.

On Hohfeld's analysis of legal relations,<sup>2</sup> positions of authority chiefly consist of legal powers to establish and to enforce norms. People subject to the norms may find their legal positions thus regulated. In

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<sup>1</sup>For a detailed discussion of the various concepts presented in this speech, see M. BAYLES, *PRINCIPLES OF LEGISLATION* (1978).

<sup>2</sup>W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (1919).

H.L.A. Hart's terms,<sup>3</sup> positions of authority are constituted by power-conferring rules rather than by duty-imposing ones. The general form of such a power-conferring rule or set of rules is as follows: Person X, with qualification Q, may establish or enforce norms N, in a manner or procedure M, for persons Y, concerning topics T, for purposes P. Each of the various elements of the general form of a power-conferring rule is important. For example, a judge occupies a position of authority constituted by such rules. A judge must meet certain qualifications and must apply law in accordance with due process for people and for topics within the court's personal and subject matter jurisdiction in order to resolve disputes peaceably and justly. Only when a judge acts in conformity to the rules specifying these conditions are his orders lawful.

A major consequence of this account of positions of authority is that any obligation to comply with laws and lawful order depends upon the justifiability of the power-conferring rule and not upon allegiance to the persons who occupy the positions of authority. Some of the protagonists in Watergate failed to appreciate this point and thought their allegiance to Richard Nixon was greater than that to the rules constituting the office he occupied.

If the power-conferring rules constituting a legal system are justifiable, then there is a *prima facie* obligation to comply with norms established in accordance with system. A legal system is a decision procedure; it is a method for deciding what is to be done and how people should act. In modern legal systems, the procedures for reaching decisions are quite complex. Nonetheless, the system of legislative enactment and executive and judicial enforcement is to decide certain matters of common policy and conduct.

One cannot consistently accept a decision procedure yet claim that decisions in accordance with it make no difference as to how one should act. It would be like agreeing to settle a dispute by tossing a coin yet claiming what whether it came up heads or tails would be irrelevant to what one would do. The difference that decisions made by acceptable procedures make may be small, merely a willingness to forgo proscribed actions when doing so is inconvenient.<sup>4</sup> Nonetheless, that norms established in accordance with a justifiable decision procedure require conduct must carry some weight in deciding how to act. This weight may be called a procedural *prima facie* obligation to comply with laws and lawful orders. It pertains to all properly established laws and orders of a

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<sup>3</sup>H. HART, *THE CONCEPT OF LAW* 27-33 (1961).

<sup>4</sup>Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A. L. REV. 780, 799-800 (1963).

justifiable system.

However, Barry Smith objects that even if there is a *prima facie* obligation to comply with laws, it is so weak that one should “refuse to count an act wrong merely because it violates some law.”<sup>5</sup> His argument for this claim is as follows: An obligation is serious if, and only if, either an act which violates it and no other obligation is seriously wrong, or an act which violates another obligation is made considerably worse if it also violates the obligation in question.<sup>6</sup> According to these tests, the obligation to comply with laws is not a serious one. It is not seriously wrong to run a stop light late at night when one has clear vision in all directions and no traffic is coming. Nor is it seriously worse to defraud a person if it is illegal than if it is not.

Smith’s argument, however, confuses the wrongness of an act with the harm which it causes or with the mental state with which it is done.<sup>7</sup> There are no degrees of being wrong; there are no comparative expressions of “wrongest.” Yet one may speak of the seriousness or gravity of the wrong done—depending on either the resulting harm or the mental state of the actor. These distinctions are clear in tort and contract law. It is one element of a plaintiff’s case to prove that the defendant acted negligently or defaulted on a contract and another element to prove damages. Intentionally hitting another person is more serious than negligently bumping him, and battery becomes more serious if the victim dies. Some instances of disobeying the law, such as running a stop light in the circumstances mentioned above, are not serious, while others, such as running a stop light when many pedestrians are crossing, are serious.

Some obligations are basically content neutral; that is, within broad limits they are independent of the subject matter. Almost all voluntarily assumed obligations, such as those to keep promises and to perform contracts, are of this sort. If Smith’s argument for the weakness and the dispensability of a *prima facie* obligation to comply with laws were sound, it would also show that each of these obligations is weak and dispensable. Suppose Carver promises to meet Duff at noon sharp for lunch. If Carver is five minutes late, the fact that he broke a promise does not make his lateness seriously wrong. Suppose Carver cheats Duff. The fact that Carver had promised Finney he would not do so does not make his act seriously worse. Thus, by Smith’s tests, the obligation to keep promises also turns out to be weak.

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<sup>5</sup>Smith, *Is there a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950, 971 (1973).

<sup>6</sup>*Id.* at 970.

<sup>7</sup>A. DONAGAN, *THE THEORY OF MORALITY* 152 (1977).

Nonetheless, there are cases in which the fact that one promised to do something makes all the difference between a serious wrong and no wrong. In *Hamer v. Sidway*,<sup>8</sup> for example, an uncle promised that if his nephew refrained from drinking, smoking, swearing, and playing cards or billiards for money until he was twenty-one years old, the uncle would pay him \$5,000. Such restraint by the nephew would not seriously harm him; indeed, many people would believe that such restraint would be good for him. In the absence of such a promise, the uncle would do no wrong in not giving his nephew \$5,000. Yet, his uncle having so promised, the court recognized that because the nephew complied, it would have been a serious wrong for him not to have received the money. Likewise, there are cases in which failure to comply with a law makes all the difference between serious wrong and no wrong at all—for example, compromise jury verdicts, housing rental in violation of a building code to an informed and willing tenant, and admission of hearsay evidence in a trial. Many wrong acts are not mala in se (wrong in themselves) but mala prohibita (wrongs because they are prohibited).

However, even if the prima facie obligation to comply with laws and lawful orders is significant, there are limits to it. The obligation is a procedural one because it rests upon a law or order being established by a justifiable procedure. As the obligation to comply depends upon the justifiability of the procedure, if this procedure is not followed, there is no prima facie obligation to comply. In particular, if a person is not qualified under the power-conferring rules to occupy the position of authority, or he does not follow the prescribed procedures in establishing or enforcing forms, or he attempts to apply them to people not within the scope of his authority, or he establishes or enforces norms on topics beyond his authority, then there is no prima facie obligation to comply. In short, the procedural obligation to comply does not pertain to ultra vires acts.

Some procedurally defective rules or orders may be void ab initio, and others may be voidable. It is useful to distinguish between rules made by legislative or quasi-legislative bodies and orders made by enforcement officials. Procedurally defective rules are void ab initio; they are not norms of the system and create no prima facie procedural obligation to comply.<sup>9</sup> Orders and decisions of courts are voidable, valid until invalidated.<sup>10</sup> A good reason for this difference is to permit people to test the validity of

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<sup>8</sup>124 N.Y. 538, 27 N.E. 256, 11 N.Y.S. 182 (1891).

<sup>9</sup>*Shuttleworth v. Birmingham*, 394 U.S. 147, 151 (1969). See also *Strasser v. Doorley*, 432 F.2d 567, 568 (1st Cir. 1970).

<sup>10</sup>*Walker v. Birmingham*, 388 U.S. 307 (1967).

rules by noncompliance. However, if people were also permitted to resist orders of those in authority who were engaged in the process of determining the validity of the rule, the entire process would break down. The legal system makes the final determination of the validity of rules.

Even if a law or order is in accordance with proper procedures and thus creates a *prima facie* obligation to comply, it does not follow that one's obligation, everything considered, is to comply. Valid laws and orders may be bad or unjust. The purposes for which the law is enacted may be inappropriate ones, or the law or order may be badly designed to promote these purposes--it may even thwart them. Here the substantive merits of law or order are in question. When a law or order promotes appropriate purposes, even if it does not do so as well as is possible, then it is not bad. There are then two reasons for compliance--the procedural obligation and the substantive merits of the rule. When, however, a law or order is substantively bad, its badness needs to be weighed against the procedural obligation to comply and may outweigh it.

It is, of course, one thing to say that there is no *prima facie* obligation to comply with an invalid rule or order; it is another to know whether a particular rule or order is valid. The same applies to valid rules or orders which are so bad that the procedural obligation to comply is outweighed. No one can provide a certain guide to these situations. The best one can do is obtain all the relevant available information and make the best decision one can. Recognizing one's fallibility, one may be cautious and comply with rules or orders when one doubts there is an overall obligation to do so. However, one's reasons for caution are most likely prudential rather than moral or legal.

Tax laws provide a good illustration of how a justifiable decision procedure produces an obligation to perform an act. Assume the state of Upaymia has a justifiable political/legal system. As the system is justifiable, one has a procedural obligation to comply with laws the legislature validly enacts, just as one has an obligation to do what one promises. Suppose the Upaymian legislature validly enacts a law annually taxing all financial holdings outside the state at one one-thousandth of their net value. Before the law was adopted, a person with financial holdings outside the state had no obligation to send the state treasurer a payment each year, but now he does.

Similarly, one may have no obligation to perform an act before one promises to do so. The tax may not be a wise one, but one does not always make wise promises. Yet once the promise is made or the law enacted, there is an obligation to perform the promised act or to pay the tax. Failure to do so may not be a serious wrong. Whether it is depends on the resulting harm or on the mental state of the actor. Nonpayment of five



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