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## David Luban on the Obligation to Obey the Law

*Seumas Miller*\*

David Luban in his influential book, *Lawyers and Justice* (An Ethical Study)<sup>1</sup> argues that the justification for an obligation of citizens to obey at least some laws — laws that are not evil, unfair or hopelessly stupid<sup>2</sup> — lies in the fact that each of these laws constitutes an important, or at least, reasonable, co-operative scheme<sup>3</sup> for the members of the citizenry, and that to break such a law is unfair to those who obey it. It should be noted that even if Luban's argument demonstrates that there is an obligation to one's (law-abiding) fellow citizens to obey these laws, he has not shown that these law-abiding citizens have a right to enforce compliance with these obligations.

Luban mentions<sup>4</sup> four conditions in his discussion of the moral obligation to obey a law: (1) the law is generally beneficial — the so-called generality requirement:<sup>5</sup> that is the law benefits citizens and does so in a fair and non-discriminatory way; (2) most citizens comply

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\* Senior Research Fellow, Centre for Philosophy and Public Issues, University of Melbourne. Thanks to Andrew Alexandra, William Barrett and Tony Coady for comments on earlier versions of this paper.

1 David Luban *Lawyers and Justice* (An Ethical Study), (Princeton, N.J.: Princeton U.P. 1988), pp.35-49.

2 *Id.*, p.35.

3 *Id.*, p.41.

4 *Id.*, p.38 and p.41.

5 *Id.*, p.43f.

with the law; (3) citizens accept the benefits of the law; (4) the law is an important, or at least reasonable, co-operative scheme. Luban<sup>6</sup> claims that conditions (1), (2) and (4) are jointly sufficient to establish an obligation to obey a law.

Luban also argues against A.J. Simmons' claim<sup>7</sup> that condition (3) is necessary. That is, Luban rejects the claim that there is an obligation to obey a law only if the person thus obligated had an opportunity to decline the benefit arising from that law, and chose to accept the benefit. Simmons thinks (3) is necessary because being an active participant — as opposed to merely conforming to the law — is necessary, and (3) is a necessary condition for being an active participant.<sup>8</sup>

It is not clear whether Luban accepts Simmons' view that (3) is a necessary condition for being an active participant (hereafter, participant) in a law. What is clear is that Luban, in claiming that (1), (2) and (4) are jointly sufficient to generate an obligation to obey a law, commits himself to rejecting the proposition that being a participant is a necessary condition for having the obligation to obey a law.<sup>9</sup>

Luban's initial point is that the benefits of most laws are in fact thrust upon the citizen; citizens are in general not in a position to reject the benefits laws confer.

But the fact, if it is a fact, that the benefits of laws are thrust upon citizens, does not in itself show that participating in laws is not necessary for being under the obligation to obey the law. In the first place, it might not be the case that a necessary condition for participation in a law is that there has been an opportunity to refuse the benefits.

In the second place, it might be that: (a) participation is a necessary condition for having the obligation to obey the law; (b) there is no participation because the benefits of laws are in fact thrust upon citizens, and therefore; (c) there is no obligation to obey the law.

Luban does not think he needs to *assume* that there is in fact an obligation to obey the law.<sup>10</sup> He takes himself to have an argument against the claim that being in a position to decline benefits is a neces-

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6 *Id.*, pp.38-9.

7 A.J. Simmons *Moral Principles and Political Obligations* (Princeton: Princeton University Press 1979), p.125.

8 Luban *op.cit.*, p.38 and Simmons *op.cit.*, pp.122-5. According to Simmons to be an active or real participant one must have at least tacitly consented or played some sort of active role in the co-operative scheme. Simmons *op.cit.*, p.123.

9 Luban *op.cit.*, p.38.

10 *Id.*, p.39.

sary condition for being obligated to a law. Indeed he takes himself to have a further argument for the stronger claim that conditions (1), (2) and (4) jointly constitute a sufficient condition for having the obligation to obey the law. Let me now turn to Luban's arguments.

Luban argues that there are cases in which it is unfair to free-ride even though there is no opportunity of declining benefits.<sup>11</sup> In such cases one is under an obligation not to free-ride. Luban's argument, if valid, would show that being in a position to decline benefits is not a necessary condition for having the appropriate obligation.

Luban puts forward a number of cases in order to try to demonstrate this point. One such case is that of failing to help clean up glass on one's street, and then making full use of the fact that the street has been cleaned up by others. (The street will be cleaned up by others whatever one does.)

This case is different, he suggests, from failing to assist others to plant and to tend flowers on the median strip of the street. (The case is similar to the street cleaning example in that the others will plant the flowers whatever one does, and one is not in a position to decline this benefit.) Luban suggests that the difference is that in the first example it is essential that the street be cleaned. That is, Luban at this point introduces condition (4). More precisely, Luban suggests that the more important or reasonable a co-operative scheme is, the less it matters if the benefit received is actively accepted. Acceptance does not matter in the glass example, but does in the gardening example. In the glass example, but not the gardening example, free-riding is unfair and disrespectful to one's fellows.<sup>12</sup>

Luban's examples demonstrate that being in a position to decline benefits is not a necessary condition for having the obligation to contribute to a co-operative scheme. However I will argue that being in a position to decline benefits is not a necessary condition for being a participant in a co-operative scheme. Therefore being a participant may well be a necessary condition for being obligated to contribute to a co-operative scheme.

Further, I reject Luban's view that the conjunction of conditions (1), (2) and (4) provides a sufficient condition for having the obligation to obey the law.

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<sup>11</sup> *Ibid.*

<sup>12</sup> *Id.*, p.42.

Before proceeding any further, it may be helpful to get clear about individuals' rights and obligations in the standard co-operative scheme.

In such a scheme there are two levels of 'activity'; the level of contribution and the level of acceptance of benefits. Obligations and rights arise as follows. If an individual contributes to the scheme, then the individual has a right to the benefit. If an individual does not contribute, then he has no right to the benefit, unless by the consent of those who contributed to the provision of that benefit e.g. if they offer the benefit as a gift.

This gives rise to at least three possibilities. In two of these the agents fail to contribute.

Firstly, there is the agent who both contributes and accepts the benefits. This agent is a standard participant and he is under an obligation to contribute.

Secondly, there is the bona fide non-participating agent who refuses to contribute and refuses the benefit. Such an agent is not under an obligation to contribute.

Thirdly, there is the free-riding agent who always takes the benefits, and yet fails to contribute unless it is necessary in order for the scheme to succeed. He is under an obligation to contribute having taken the benefits.<sup>13</sup>

A problem arises in cases in which it is not possible (or not possible without considerable difficulty or hardship) for an agent to refuse the benefit provided by some co-operative scheme. Can agents be obligated to contribute to the scheme if they cannot refuse the benefits? Such problematic cases include Luban's flower example and his glass example.

In cases where agents are not in a position to decline a benefit, what makes any given person a bona fide non-participant — without rights to benefits or obligations to contribute — rather than a free-riding participant who wants to exercise a right to a benefit, but does not want to discharge his obligation to contribute?<sup>14</sup>

What makes an agent a free-riding participant, as opposed to a non-participant, in such cases, is what makes an agent a free-riding partici-

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13 Such an agent needs to be distinguished from the exploiting non-participant, the agent who takes benefits whenever he can but never contributes even if it is necessary for the scheme to succeed. Such an agent is a parasite rather than a free-rider.

14 Simmons *op.cit.*, p.122.

pant in any case, namely, the fact that the agent would contribute if it were necessary in order to provide the benefit. The free-riding participant, unlike the non-participant, would contribute if he had to; for participants — whether free-riders or not — are committed to realising the purpose or end of the co-operative scheme.<sup>15</sup> So Luban's flower example involves a non-participant and his glass example, a free-riding participant. And this is the reason, *contra* Luban, why the agent in the glass example, but not the flower example, is under an obligation to contribute to the co-operative scheme. The agent in the glass example, being a participant, is under an obligation to contribute.

It might be argued that in cases in which the benefit is imposed, there is no way of determining whether an agent is a free-riding participant or a bona fide non-participant.

I reject this argument. There is all sorts of evidence to distinguish free-riders from non-participants. There can be evidence for the agent's willingness to contribute if his contribution is necessary to the success of the scheme. For example, in the Luban glass case, if the free-rider has an expensive car with thin tyres, needs to drive to work, and swept up glass the time before when most people were out of town, then we have evidence that he is a participant seeking to free-ride. (I will say more about the evidence for free-riding in relation to laws, below.) Another kind of evidence would be the agent's attitude to the contributions of other agents. For example, in the Luban gardening example, if the agent said nothing to the neighbours when he noticed that the flowers were not being tended, and indeed were beginning to die off, then we could assume that he was a non-participant in the co-operative scheme. He is not prepared to do anything to rescue the scheme.

I conclude that while Luban has shown that being in a position to decline a benefit is not a necessary condition for having the obligation to obey the law, he has not shown that being a participant is not a necessary condition for having the obligation to obey the law.

Let me now turn to Luban's view that taken together conditions (1), (2) and (4) constitute a sufficient condition for generating an obligation

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15 Elsewhere I argue that co-operative schemes are best understood as a species of joint actions; joint actions involve a collective end which can only be achieved by the actions of the individuals, each agent only contributing if the others do. See my "Joint Action" *Philosophical Papers* vol.xxi no.3 (1992) and "On Conventions" *Australasian Journal of Philosophy* vol.70 no.4 (1992).

to obey the law. (Naturally, if (1), (2) and (4) are (jointly) sufficient, then being a participant is not necessary.)

Condition (2) is that most citizens in fact comply with a law. If most people do not comply with a law, then the law is failing to achieve its purpose and it becomes difficult to see how under these circumstances an individual could be under an obligation to obey it. So condition (2) looks as though it must be a necessary condition for generating an obligation to obey a law. What of conditions (1) and (4)?

Luban terms condition (1) the generality requirement. This condition amounts to Luban's above-mentioned requirement that a law be fair and neither stupid nor evil. For presumably a co-operative scheme which is not stupid, evil or unfair is so in virtue of the following facts. Firstly, it provides a benefit which outweighs the cost of contributing to it, and there is no known and clearly preferable alternative way of securing the benefit. Secondly, it benefits *everyone*, and does not require anyone to contribute a greater share than anyone else in relation to the benefit that person receives. Condition (2), taken in conjunction with condition (1), is not sufficient to generate an obligation to contribute to a co-operative scheme. For, in the first place, the benefit in question may be quite trivial, and contributing to the provision of trivial benefits is not a matter of moral obligation.

In the second place, a given agent may well have some alternative course of action which will provide him with some other benefit which may be of greater importance to him than the benefit to be derived from participating in the co-operative scheme. It is not that the benefit provided by the co-operative scheme is trivial. It is just that some other individually attainable benefit is more important to that agent.

Are conditions (1) and (2), taken in conjunction with condition (4), sufficient to generate an obligation to obey the law? Condition (4) rules out trivial benefits. However there is nothing in these three conditions to rule out the possibility of an agent who does not want to contribute to a co-operative scheme because he wishes to pursue some other individually attainable benefit which is of greater importance to him.

Suppose, for example, that the roads in some neighbourhood become snowed over. The members of the community regularly go out and clear the snow off the roads. But suppose there is a somewhat reclusive composer who is actually prepared to forego driving during the relatively short winter rather than see to it that the roads are passable. The composer's life would be made fairly difficult by impassable roads. For example, he would not get any fan mail, and would have to stock-

pile food. However he would rather this than have to regularly perform the somewhat arduous and time-consuming task of shovelling snow.<sup>16</sup>

Sometimes an agent or agents have an obligation to conform to a scheme which burdens that agent or agents, but which significantly benefits another agent or agents. But such an obligation has little to do with the fairness of a co-operative scheme. Rather it concerns the importance or value of the end realised by the co-operative scheme. Such obligations arise, especially, in cases of need — as opposed to desire for a benefit — and the greater the need, the greater the disadvantage one ought to be prepared to suffer in order to help fulfil that need. The need in question may belong to a majority or a minority of the participants in the scheme.

Suppose that in the snow clearing example it was known to the composer that some other members of the community needed access to a hospital in the city. There would now be an obligation on the members of the community, including the composer, to ensure that the roads were kept clear. But this has little to do with the fairness of contributing to a scheme from which one benefits. The composer is obliged to help the infirm, irrespective of the fact that to do so does not benefit him.

The upshot of this discussion is that there are (at least) two sorts of basis for an obligation to contribute to a co-operative scheme. There is the obligation, if any, deriving from the value or importance attaching to the end realised by the co-operative scheme. Fairness is the other basis of the obligation to contribute. The obligation of fairness derives from the fact that having become a participant in a co-operative scheme, and therefore a beneficiary of it, one is under an obligation to do one's part to realise that benefit. In the case of some co-operative schemes, there is no moral obligation to become a participant. However in some of these, if one is a participant, fairness demands that one contribute. In other cases it is morally incumbent on agents to secure some collective end, irrespective of whether the co-operative scheme that secures this end is a fair one. In still other cases considerations of both fairness and the moral value of the purpose of a co-operative scheme generate obligations to contribute.

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16 This is not an example of the individual having an excuse for not contributing, as would be the case if he were ill or had to mind the children. See Luban *op.cit.*, p.45.

I have argued that Luban fails to demonstrate that: (a) being an active participant is not a necessary condition for being under an obligation to obey a law, and; (b) conditions (1), (2) and (4) (above) are sufficient for generating the obligation to obey the law.

I have also argued that one source of Luban's problems is a failure to adequately accommodate the distinction between the fairness of a co-operative scheme and the value of the end that the scheme might realise. I want now to argue that a further source of Luban's problems is that his account is focussed too narrowly on the individual law or co-operative scheme.

If the moral obligation to obey laws is to be properly understood whole structures of laws — whole structures of co-operative schemes — need to be considered. For if this is done it becomes clear that in many instances the apparently bona fide non-participant is actually a participant in the overall structure of co-operative schemes, but is nevertheless unfairly trying to opt out of certain individual constituent schemes. He is in reality a free-rider. He wants to opt out of those individual constituent schemes that benefit others but not him, while he expects others to participate in individual constituent schemes that benefit him but not them. In such cases the free-rider is involved in an inconsistency, and hence unfairness, across individual co-operative schemes. The law is a good example of such a system of co-operative schemes. Many laws only benefit some individuals. However the issue is whether the whole system of laws on balance benefits everyone and to a reasonable extent. If so, then, failing to contribute in the case of a particular law may well be inconsistent and unfair to law-abiding citizens. Here breaking the law is simply a special case of unfair free-riding in a co-operative arrangement of the sort envisaged by Luban. As such, breaking the law will constitute a failure to discharge a moral obligation.

How do we determine in relation to a given instance of law-breaking whether it is a case of free-riding or of non-participation? In respect of law breaking we need to distinguish on the one hand, between individual law-breaking and law-breaking by collectives, and on the other between breakage of an individual law and rejection of the system of laws or of large fragments of a system. I have already suggested that in relation to fairness what is important is the whole system of laws. It is whether or not an individual or group participates in the *whole* system of laws that is important.

I suggest that in relation to systems of laws or large fragments of systems, there can be clear evidence that some group is essentially a



non-participant being forced to participate. That group consisting of black South Africans provides one clear example of this. This does not show that with respect to *all* groups desirous of non-participation there could be evidence. Presumably there are instances where there could not be evidence. But in any society where a group has a strong desire not to participate, and where there is some space to vent opposition to the system of laws (or some large fragment of the system) there is likely to be such evidence. What of the individual in relation to the system of laws?

Let us set aside those laws which express moral prohibitions, e.g. murder. I suggest that it is almost never the case that the set of the remaining laws of some legal system — or large fragments of the set of the remaining laws — are such that *one person only* (or even a handful of people) would rather not be a participant in those laws. Rather it is almost always the case that it is some *group* of individuals that would prefer not to participate. Typically such a group will consist of those individuals who are being burdened in various ways by the system of laws. But in that case in most situations where there is some space for groups to express their desire not to participate in the system of laws, the individual will be able to manifest his or her desire not to participate in that system of laws; he or she will be able to do so in consort with other individuals who have a similar desire.