

1982

Harm, Utility, and the Obligation to Obey the Law

Richard Dagger

University of Richmond, rdagger@richmond.edu

Follow this and additional works at: <http://scholarship.richmond.edu/polisci-faculty-publications>



Part of the [Ethics and Political Philosophy Commons](#)

Recommended Citation

Dagger, Richard. "Harm, Utility, and the Obligation to Obey the Law." *Archiv Für Rechts- Und Sozialphilosophie* 68, no. 1 (1982): 102-08.

This Article is brought to you for free and open access by the Political Science at UR Scholarship Repository. It has been accepted for inclusion in Political Science Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

Harm, Utility, and the Obligation to Obey the Law

BY RICHARD DAGGER (TEMPE/ARIZONA)

In a recent essay, "Political Obligation"¹, *R. M. Hare* sets out a utilitarian account of the obligation to obey the law which he believes to be immune to an objection often brought against such accounts. In what follows I shall briefly review this objection and Professor *Hare's* response to it; then I shall go on to argue that *Hare's* response, ingenious as it is, fails to defeat the objection. *Hare's* argument is instructive nonetheless, for its failure tells us something about wrongs and harm as well as utility and political obligation.

1.

In its simplest form, the objection to utilitarian accounts of the obligation to obey the law with which Professor *Hare* is concerned consists in pointing out that a conscientious utilitarian will break the law whenever he believes that he can achieve better results by breaking it than by following it. Thus it might be argued, to borrow an example from *Hare*, that a poor person ought to steal from a rich one because, due to diminishing marginal utility, this will produce a net gain in utility. And this means that the principle of utility is incompatible with an obligation to obey the law because the principle of utility counts for everything and the obligation to obey counts for nothing. On the utilitarian account, in short, there is no *obligation* to obey the law.

When it is put this way, the objection is easily met by utilitarians. As *Hare* and others have noted, the utilitarian's calculations are not complete until he considers all the consequences, including the side-effects, of law-breaking. Since these side-effects will usually involve some rather serious costs — *Hare* mentions "the cost of the police force, of locks and banks, the inconvenience and unpleasantness of having to watch one's property or go in fear of losing it and the growth of general mistrust" (p. 8) — it is quite unlikely that breaking the law will produce a net gain in utility.

As readers of David Lyons's *Forms and Limits of Utilitarianism* are aware, however, this objection can be put in a form more difficult for the utilitarian. For if the utilitarian's appeal to side-effects meets the objection, the objector has only to point to cases where the side-effects are either negligible or non-existent. Such a situation arises when, in *Hare's* words, "one person can, by breaking a law, secure for himself an advantage at the cost of no comparable disadvantage to others, because he knows they are all going to keep the law, and it takes quite a large number of breaches of it to produce any substantial disutility" (p. 9).

¹ In Ted Honderich, ed., *Social Ends and Political Means* (London, Henley and Boston: Routledge & Kegan Paul, 1976), pp. 1–12. All citations in parentheses refer to this essay.

This may happen, for instance, when a government responds to a fuel shortage by ordering its citizens to keep the temperatures in their homes at or below a certain level. In these circumstances a utilitarian has no need to worry about the side-effects of his law-breaking if he knows that his failure to comply will go undetected and that it will make no real difference to the success or failure of the conservation effort. The amount of fuel he consumes is an insignificant portion of the total, after all, so his non-compliance will bring hardship to no one; and if no one discovers his “free-riding”, he will not be setting a bad example which threatens to undermine the government’s conservation program. The utilitarian may conclude, therefore, that his enjoyment of a more comfortable temperature will actually maximize utility because it is neither offset nor outweighed by other considerations. Even when all things are considered, then, the utilitarian in this and similar situations will decide that he ought to break the law. This is to say, once again, that utility counts for everything, obligation for nothing. Thus utilitarianism fails to provide a satisfactory account of the obligation to obey the law.

2.

Professor *Hare*’s response to this objection is to set out his own “universal-prescriptive” version of utilitarianism. Whenever we must decide what we ought morally to do, *Hare* says, we must ask ourselves, “‘What universal principle of action can I accept for cases just like this, disregarding the fact that I occupy the place in the situation that I do (i.e., giving no preferential weight to my own interests just because they are mine?’)” (p. 3) This means that we must give “equal weight to the equal interests” of everyone likely to be affected by our actions, then devise and follow principles “which will in all most promote those interests” (p. 3). If we follow this method, according to *Hare*, we are led to a form of utilitarianism, for the principles we prescribe must themselves be justified by an appeal to their utility.

When the “universal-prescriptive” method is applied in the case of the utilitarian and the fuel shortage, furthermore, we find – or Professor *Hare* finds – that the utilitarian must adopt a principle which requires him to comply with the order to lower the temperature in his home. He must do so because his failure to comply, even if it went unnoticed, would harm others by frustrating a desire “which nearly all of us have, namely the desire not to be taken advantage of, even unknown to us” (p. 9). Since this desire is common, it appears that whatever the utilitarian will gain by breaking this law will be outweighed by the harm he does to others. What is true in this case will be true in others where the desire not to be taken advantage of is involved, of course, and this leads *Hare* to formulate the following general reason for obeying the law: “The fact that, if I break the law, I shall be taking advantage of those who keep it out of law-abidingness although they would like to do what it forbids, and thus harming them by frustrating their desire not to be taken advantage of” (p. 11).

3.

The problem with *Hare's* argument is that it rests on an unacceptably broad view of what constitutes a harm. As he explains in another essay, "a man's interests are harmed not only when his actual feeling-states are adversely affected, but also when desires which he has (for example, not to be cheated) are, even unknown to him, frustrated"². Now there is some truth to this, for it is certainly true that we may be harmed without being (or even becoming) aware of it. This could happen if a bank clerk were to divert funds from my account to his own, for instance. Given the way I handle my account, I might never notice that, a bit at a time, I had suffered a substantial loss. It is also true that we may be harmed when others frustrate our desires, such as the desire to be free from assault. But this is not to say, with *Hare*, that one is harmed *whenever* one's desires are frustrated.

To see why this conception of harm is too broad, we need only think of cases where *A* undeniably frustrates *B's* desires, but it would nevertheless seem odd, at best, to say that *B* has been harmed by *A's* action or inaction. Suppose that *A* is an employer and that *B* applies for a position, one he very much wants, with *A's* firm. If *A* awards the position to someone else, he has certainly frustrated *B's* desire to hold the position; but unless there are special circumstances, we can hardly say that *A* has *harmed B*. Or suppose that a pitcher in a baseball game strikes out a batter, thereby frustrating the batter's desire for a hit. Here again it would be out of place to say that the pitcher has *harmed* the batter. Or suppose, finally, that I insist that my daughter have soup, which she does not want, rather than cookies, which she does, for lunch. I admittedly frustrate her desire for cookies when I do this, but I do not believe that I *harm* her. Indeed, I should say that I would come closer to harming her were I to give in to her demand for cookies. The point, however, is that in none of these cases, nor in a good many others which we may easily imagine, does the frustration of desires constitute a harm. *Hare's* conception of harm is too broad, in sum, because *Hare* does not recognize that one may be frustrated without being harmed. Once the conscientious utilitarian notices this, he will reject *Hare's* general reason for obeying the law.

Perhaps this is unfair to Professor *Hare*. Perhaps what he means is not that the frustration of any desire whatsoever, but only the frustration of certain desires, counts as harm. This seems to be unobjectionable. If these certain desires include the desire not to be taken advantage of, furthermore, then *Hare's* general reason for obeying the law will stand. But can he demonstrate that this desire is indeed one of those whose frustration is harmful? Or, more generally, can *Hare* provide a rule for distinguishing those desires which may be harmlessly frustrated from those which may not?

There are, I think, two different ways in which *Hare* might try to draw this

² "The Argument from Received Opinion", in R. M. Hare, *Essays on Philosophical Method* (London and Basingstoke: Macmillan, 1971), p. 131.

distinction. The first relies upon what *Joel Feinberg* calls “the orthodox jurisprudential analysis of harm as invaded interest”³. Following this conception of harm, *Hare* might maintain that the frustration of desires is harmful whenever it invades – or, more broadly, is contrary to – the interest of the person whose desires are frustrated⁴. This in turn would enable *Hare* to dismiss some troubling examples of the harmless frustration of desire. He might say, for instance, that I may frustrate my daughter’s desire for cookies without harming her because I am acting in her interest, not invading or thwarting it, when I insist that she have soup for lunch.

But what about the desire not to be taken advantage of or cheated? Are our interests invaded when this particular desire is frustrated? To this there is no ready answer; we must proceed case by case. If I were to lose money in a land swindle, I should say that I was cheated, that my interests were invaded, and that I was harmed. In other cases, though, including the kind of case which is crucial to *Hare*’s argument, invasion of interest does not follow from the frustration of the desire not to be taken advantage of. This is demonstrated by further examination of the fuel shortage example, where we are assuming that the person who disobeys the conservation order escapes detection and deprives no one of the benefits of the program. If there is any invasion of interest in this case, it can only be because the person who disobeys is frustrating the desire of those who, while complying with the program, do not want others to take advantage of them. But does this really constitute an invasion of interest? It hardly seems so. Those who are taken advantage of are not suffering a loss of comfort or convenience or money or opportunity; and as long as they do not discover that someone is taking advantage of them, they will not even suffer the anguish or distress of knowing that one of their desires has been frustrated⁵. In these circumstances the conscientious utilitarian may well decide that his failure to comply with the conservation order will not only produce the best possible consequences, but that it will do so without harming – without invading the interests of – anyone at all. Thus the “orthodox jurisprudential analysis of harm” fails to support *Hare*’s claim that we are harmed whenever our desire not to be taken advantage of is frustrated.

³ “Harm and Self-Interest”, in Joel Feinberg, *Rights, Justice, and the Bounds of Liberty* (Princeton: Princeton University Press, 1980), p. 45. Feinberg goes on to say, “A person is harmed when someone invades (blocks or thwarts) one of his interests”.

⁴ *Hare* himself defines ‘harm’ in a way that is similar to, but perhaps broader than, the jurisprudential analysis in his “Wrongness and Harm”, in *Hare, Essays on the Moral Concepts* (Berkeley and Los Angeles: University of California Press, 1972), pp. 92–109. There (p. 97) he says, “To harm somebody is to act against his interests”.

⁵ For a similar argument aimed in a different direction – against the principle of fair play – see M. B. E. Smith, “Is There a Prima Facie Obligation to Obey the Law?” in J. Feinberg and H. Gross, eds., *Law in Philosophical Perspective* (Encino and Belmont, Ca.: Dickenson Publishing Co., 1977), p. 111. Smith’s argument is actually misdirected, for the principle of fair play does not tie the obligation to obey the law to the harm which disobedience must necessarily produce.

The second way in which Professor *Hare* might try to support a distinction between desires which may be frustrated without harm and those which may not is by appealing to a more explicitly ethical conception of harm. Some desires may be rightfully frustrated, on this view, and others may not. This is to say that one is harmed whenever one is injured – injured, that is, in the sense of treated unjustly. This would allow *Hare* to handle the examples used against him earlier, for he could say that as long as my daughter, the batter, and the job seeker are not treated unjustly when their desires are frustrated, they are not being harmed. This way of drawing the distinction would also allow him to say that the utilitarian in the fuel shortage example would be harming his countrymen if he were to set his thermostat higher than the law allows because he would be doing injury, or injustice, to them.

This second conception of harm, however, is no more successful than the first in providing *Hare* with the distinction he needs to save his utilitarian account of the obligation to obey the law. There are at least two reasons for this, the first being that the conception is simply unsatisfactory. It is not clear, that is, that one is actually harmed whenever he is treated unjustly. If the utilitarian in the fuel shortage example does set his thermostat at an illegally high level, he may frustrate the desires of many people who do not want others to take advantage of them; and if his failure to comply is discovered, he may well be accused of acting unjustly. Yet it seems, again, that he has actually *harmed* no one. If harm is mentioned at all in cases of this sort, it is not the “harm” of frustrating the desire not to be taken advantage of, or even the “harm” of treating others unjustly, but the harm that may occur when others follow the law-breaker’s example, thereby undermining the conservation effort.

But let us grant, for argument’s sake, that we are harmed whenever we are treated unjustly. If *Hare* were to adopt this conception of harm, he would still face a second problem – a problem that is fatal to a utilitarian account of political obligation. This is that any attempt to distinguish those desires which may rightfully or justly be frustrated from those which may not must ultimately rely on a notion of rightness or justice. Such a notion must either depend upon or be independent of the principle of utility. If it depends upon the principle of utility – if we say that an action is right *because* it produces the best consequences possible in the circumstances – then we are stuck with a utilitarian account of political obligation which remains open to the very objection which *Hare* is seeking to defeat. For what are the consequences of frustrating the desires of others when the others never know that their desires have been frustrated? Given this utilitarian conception of harm, we should have to say, once more, that the utilitarian in the fuel shortage example is acting rightly when he disobeys the order to conserve fuel. If something is harmful because it is unjust, and if injustice is doing what is contrary to the principle of utility, then the utilitarian does nothing harmful or unjust when he refuses to lower the setting of his thermostat.

The alternative is to follow a conception of rightness or justice which is independent of the principle of utility. But this would also be unsatisfactory,

from *Hare's* point of view, because such a conception is incompatible with utilitarianism. And as long as *Hare* cannot establish, on utilitarian grounds, that the frustration of the desire not to be taken advantage of is harmful, then we must conclude that his conception of harm is unacceptably broad and his account of the obligation to obey the law unsatisfactory.

4.

There is at least one point on which Professor *Hare* and I agree, and that is that those who break the law in situations such as the fuel shortage example wrong those who comply with it. Our reasons for holding this view, however, are quite different. *Hare* believes that those who break the law in these circumstances wrong those who abide by it because they harm them. I believe that the law-breakers wrong the law-abiders despite the fact that they do not harm them. My point, then, is simply that one may be wronged – taken advantage of, deceived, cheated, treated unjustly or unfairly – without being harmed⁶.

If his account of the obligation to obey the law is to be a utilitarian account, Professor *Hare* must obliterate this distinction. It is not enough to say that one ought not to take advantage of others; *Hare* must show that one ought not to do this *because* doing so would harm the others in some way. But he cannot do this, as we have seen, without stretching the notion of harm farther than it will go. *Hare's* account, consequently, is as open to the objection in question as any other utilitarian account of the obligation to obey the law. For a more satisfactory account, we shall have to draw upon a moral theory which not only distinguishes wrongs from harms, but also explains why one is wronged when he is taken advantage of, deceived, or treated unfairly. Such a theory will rest on rights and respect for persons, not utility.

Résumé/Zusammenfassung

Le préjudice, l'utilité et l'obligation d'obéir à la loi: Dans un essai récent, *R. M. Hare* donne un récit utilitaire de l'obligation d'obéir à la loi qu'il croit être à l'abri d'une objection qu'on fait souvent à de tels essais. Dans le récit présent cette objection et la réponse de *Hare* sont exposés brièvement. Ensuite l'auteur prétend que la réponse du Professeur *Hare* ne réussit pas à réfuter l'objection. Cela est dû à la conception que *Hare* tient de la notion préjudice, qui est irrecevablement large, parce qu'il ne distingue pas entre injustice et préjudice. Dans sa

⁶ Suppose that Jones, who is known widely as Smith's enemy, tells vicious lies about Smith in an attempt to ruin him. Suppose also that no one believes these lies and that Smith never learns of Jones's slanderous actions. Has Jones harmed Smith? Has he wronged him? I should answer "no" to the first question and "yes" to the second. I should also say that a moral theory which would lead us to conclude that Jones has not wronged Smith *unless* he has harmed him is, at best, morally impoverished.

conclusion l'auteur prétend qu'on trouve une explication convaincante de l'obligation d'obéir à la loi dans une théorie morale, qui dépend des droits et du respect pour les individus et non de l'utilité.

Schaden, Utilität und die Gehorsamspflicht gegenüber dem Recht: R. M. Hare liefert in einem neueren Aufsatz eine utilitaristische Rechtfertigung der Gehorsamspflicht gegenüber dem Recht, die seiner Meinung nach gegen den Einwand immun ist, der oftmals gegen Rechtfertigungen dieser Art vorgebracht wird. Im vorliegenden Aufsatz werden dieser Einwand und Professor Hares Antwort darauf kurz dargelegt; darauf aufbauend wird argumentiert, daß Hares Antwort diesen Einwand nicht widerlegt. Der Grund hierfür liegt in Hares Begriff von Schaden, der zu breit gefaßt ist, und er ist zu breit gefaßt, da er Schaden von Unrecht nicht unterscheidet. Um eine zufriedenstellende Theorie der Gehorsamspflicht gegenüber dem Recht zu erhalten, so schließt der Autor, müssen wir uns einer Moraltheorie zuwenden, die auf Rechten und Menschenwürde und nicht auf Utilität beruht.