Are Judges Morally Obligated to Obey the Law

by Jeffrey Brand-Ballard

[This is excerpted from Dr. Brand-Ballard's forthcoming book, Limits of Legality]

Introduction

As a conscientious moral agent, a judge in a court of law often finds herself in a difficult position. She is confident that the law requires a certain result in the case before her, but she is at least as confident that this legally required result is unjust or otherwise morally objectionable. Consider some examples of cases in which a reasonable judge might consider herself to be in this position:

The law of landlord and tenant can require a judge to evict an impoverished, elderly widow from her apartment for missing rent payments...

A student in a poor school district sues his state for providing a much lower caliber of education than students receive in wealthier districts. Binding legal precedent requires the judge to dismiss the student's lawsuit.

Binding precedents construing the Fourth Amendment require judges to exclude evidence obtained without a search warrant. As a result, a child molester is acquitted, and, predictably, strikes again.

"Three strikes and you're out" statutes have required judges to sentence convicts to life in prison without parole for committing third felonies that are non-violent, such as stealing golf clubs or videotapes.

Federal sentencing laws specify mandatory minima that have forced judges to give twenty-year prison terms to the wives and girlfriends of men who deal drugs out of the home, without evidence that the women were much involved in the business.

One could define these moral dilemmas out of existence by insisting that any result required by positive law is, by definition, morally acceptable. This would involve biting the bullet and agreeing that slavery and genocide are moral wherever positive law requires them. Alternatively, one could deny that positive law, properly understood, ever requires slavery, genocide, or other immoral results. Readers who take either of these positions will have no interest in this paper.

For the rest of us, court cases such as these raise the question whether judges are morally obligated to apply the law. We might hope to gain insight into this question by consulting the hundreds of philosophical discussions of the duty to obey the law. Many contemporary philosophers have defended philosophical anarchism - the position that we have no moral duty to obey the law, just because it is the law. Although there are prominent defenders of the duty to obey, anarchism is now a mainstream position, and arguably the dominant one.

Disappointingly, almost all of these discussions concentrate on private parties deciding whether to obey. They largely neglect to ask about public officials, including judges. Steven Smith notes that "[a]lthough everyone assumes that courts normally have a duty to follow duly-enacted statutes, it is curious that hardly anyone bothers to articulate the basis of that duty." ["Why Must Courts Obey the Law?" Georgetown Law Journal, 77:113-164, 113.] Even the most radical anarchists never deny that presiding judges have a duty to apply and enforce the law in their decisions. Nor have the defenders of a general duty to obey often bothered to extend their conclusions to judges, although perhaps they have assumed that the extension is obvious. This neglect of
the judiciary must frustrate anyone who wants to know how judges should decide cases in which law and morality appear to conflict.

In this paper, I evaluate critically several arguments in favor of a judicial duty to apply the law, and present what I think is a better argument for that duty. My argument has some unexpected implications. It implies that, when the judicial duty to apply the law competes with other moral reasons, it does not prevail as consistently as one might expect. A viable argument for giving the duty some weight also supports an argument against giving it as much weight as many have wanted to give it. I conclude that judges' moral reasons to disregard the law can be decisive more often than most writers have assumed.

**The Duty to Obey the Law**

First, I shall explain what philosophers mean by "a duty to obey the law." They don't mean a legal duty. That one has a legal duty to fulfill one's overall legal duties is tautological. A private party can have legal grounds for disobeying a particular law, as when one faces a state law that conflicts with federal law. However, that's just to say that his overall legal duty is to violate the state law for the sake of the federal, under the Supremacy Clause of the U.S. Constitution.

The duty to obey the law is not a legal duty, but a moral duty. However, it is not a conclusive or all-things-considered moral duty, but one that can be overridden by other considerations. W.D. Ross called it a "prima facie duty," although I shall follow contemporary writers who call it a pro tanto duty. We have no all-things-considered moral duty to obey a horrendously unjust statute. Parents have no duty to injure their children, even if the law requires them to do so. Even if one has a pro tanto duty to obey the law, one's natural duty not to injure human beings would at least override, if not undermine it, in that situation.

How is the moral duty to obey the law relevant for judges? Of course, judges are also private citizens, so whatever duty to obey the law may exist, it has its ordinary relevance for them as they walk downtown and shop for groceries. That's not my concern. I'm interested in the relevance of the duty for judges, qua judges - judges in their professional capacities.

**Rules of Adjudication**

In modern legal systems, the professional duties of judges are specified in certain secondary legal rules, which H.L.A. Hart calls rules of adjudication. These duties include appearing in court, supervising courtroom proceedings, hearing evidence and argument, researching the law, deliberating about cases, writing opinions, et cetera. Unlike the rest of us, judges have a legal duty to perform these functions. The next question is: do they have a pro tanto moral duty to do their legal duty?

As mentioned, many philosophers have concluded that private parties have no pro tanto moral duty to obey the law. One might suppose that such a conclusion entails that judges have no pro tanto moral duty to obey adjudication rules. But most philosophers in this area seem to reject that inference. To determine whether they're correct, we must examine the conclusions defended by philosophical anarchists. Many are merely concerned to deny a completely general duty to obey the law - one that applies to everyone just in virtue of his physical presence within a jurisdiction. These anarchists don't deny that certain individuals, in certain capacities, have duties to obey the law. Perhaps that includes judges.

I shall now examine some arguments for a general duty to obey and consider whether they might support a judicial duty to obey adjudication rules. ...

**The Judicial Oath**
A classic argument for a duty to obey the law is the argument from actual consent. This argument is famously problematic as applied to natural-born citizens, most of whom never give actual consent to the state. However, the argument applies straightforwardly to judges. Judges in most legal systems swear a public oath to uphold the law. An oath either implies or constitutes a promise, and promises create duties. There are familiar defeating conditions, but these conditions are absent when judges take their oath of office. There is no duress or coercion, for example. Judges always have reasonable alternative occupations. Therefore, the oath gives judges a pro tanto moral duty to obey adjudication rules.

A promise can override or undermine reasons of prudence, preference, and partiality. Judges often have prudential reasons to disobey adjudication rules. For example, many judges would prefer playing golf to appearing in court, and they could make good money by practicing law on the side. However, adjudication rules forbid them to do either of these things, and their oath gives them a strong moral reason to obey the rules. This reason at least overrides (and probably undermines) judges' reasons of prudence, preference, and partiality. Therefore, judges have all-things-considered moral reasons not to skip trials or practice law on the side.

The fact that judges take an oath may explain why philosophers have not thought it necessary to defend judicial duties. It seems too easy!

**The Adherence Duty (the Duty to Apply the Law)**

My main concern, however, is not with the judge's duty to appear in court or to refrain from practicing law, or anything like that. I'm interested in his duty to apply the law correctly. I call this adhering to the law, to distinguish it from the generic concept of obeying the law. The opposite of adhering I shall call deviating from the law...

Codes of judicial conduct typically state that "judges shall be faithful to the law." These codes are incorporated by statute into adjudication rules, giving judges at least a pro tanto legal obligation to apply the law. Let me be clear what this means. I'm not saying that judges face legal sanctions for misapplying the law in their decisions. In fact, judges aren't fined or incarcerated, or even subjected to judicial discipline, for deviating from the law. Nor are they subject to civil damage awards. People are often surprised to learn that judges aren't disciplined for misapplying the law, but only for judicial misconduct, which is limited to things like criminal activity, sexual harassment, conflicts of interest, and intoxication on the job. Misconduct is not legally defined to include deviation from the law. So a judge's incentive to adhere to the law may be weaker than a private party's incentive to obey the law. Nevertheless, I suggest that adjudication rules give judges a legal duty to apply the law. Since H.L.A. Hart, legal theorists have recognized that the law can impose genuine legal duties without sanctions, just as it can grant legal powers without any sanctions being involved at all.

So adjudication rules give judges a legal duty to apply the law. If judges have a moral duty to obey adjudication rules, then they have a moral duty to apply the law. The stronger their moral duty to obey adjudication rules, the stronger their moral duty to apply the law...

If my only goal were to defend the claim that judges sometimes have a pro tanto moral duty to apply the law, then my task would be complete. However, I have yet to ask how this pro tanto duty interacts with a judge's other moral reasons, as opposed to her prudential reasons. It is widely recognized that a promise does not attenuate one's other moral duties, and that other moral reasons can undermine or override reasons generated by promises. I suggest that the same principle applies to oaths. Bruce has a natural duty not to inflict gratuitous pain on animals. He gets on the radio and swears a solemn oath before his fellow citizens that he
will kick his dog on Saturday. Most people would agree that taking this oath gives Bruce no reason whatsoever to kick his dog, and does not attenuate his reason to refrain from doing so. Bruce's natural duty undermines whatever reasons his oath might otherwise have given him.

A new question now arises: do judges' moral reasons to deviate from the law ever override or undermine their reasons to adhere?

**Optimal Versus Suboptimal Results**

In order to answer this question, I must distinguish between optimal-result cases and suboptimal-result cases. A suboptimal-result case is one in which the controlling legal authority requires the judge to rule in favor of a certain party, although she would otherwise have an all-things-considered moral reason to rule against that party, ceteris paribus. All other cases are optimal-result cases.

The philosopher's distinction between "justice" and "injustice." To evaluate my arguments, you need only be prepared to distinguish, for yourself, between optimal and suboptimal results. We need not agree regarding the proper classification of any particular result. The cases described at the beginning of this paper were intended as plausible examples of suboptimal-result cases. For illustrative purposes, I shall now add some details to one of these cases. Mary is an impoverished widow who is renting an apartment from Mike, a wealthy landowner who inherited the property and has never worked a day in his life. Mary has missed several rent payments, and Mike has filed an eviction petition before Judge Jack. I stipulate that Mary is morally innocent. She is too old and frail to work, and her pension does not cover her rent. Neither retributive nor corrective justice requires a judgment against Mary. She has done nothing to deserve eviction. Nor does Judge Jack violate anyone's moral rights if he rules for Mary. That decision violates Mike's legal rights, but Mike was not morally entitled to Mary's rent in the first place, absent the law. Nor will Mary's eviction maximize the combined utility of Mary and Mike, as Mary needs her apartment more than Mike needs her money. If the law did not require eviction, then Judge Jack would have an all-things-considered moral reason to deny Mike's petition. However, the regulating statute requires him to grant it, thereby evicting Mary. I'm using this as an example of a suboptimal-result case, but again, my point is not to persuade you that evicting Mary is definitely a suboptimal result. You can imagine some other case, if you prefer, one in which the law requires what you consider to be a suboptimal result.

Bearing in mind the distinction between optimal-result and suboptimal-result cases, I shall now reexamine the judge's duty to apply the law. If Judge Jack grants Mike's petition, then he commands the sheriff to force Mary from her apartment. No one, with the possible exception of Jack, has an all-things-considered moral reason to command anyone to do this to Mary. Indeed, everyone else has a strong pro tanto moral reason not to do so. If the law did not require it, then even Jack would have an all-things-considered reason not to do it.

I suggest that, just as Bruce's oath gives him no reason that competes with his natural duty to refrain from kicking his dog, likewise Judge Jack's oath to uphold the law gives him no reason that competes with his natural duty to deny the eviction petition...

**Systemic Effects**

The prospective arguments which seem the most promising to me are those that appeal to certain negative effects of patterns of judicial deviation from the law. I call these systemic effects. These are the effects that patterns of deviation have on the choices made by other legal actors, especially the choices made by judges in future cases. Arguments from systemic effects can support an adherence duty that applies in suboptimal-result cases because judicial deviation has systemic effects in both optimal-result and suboptimal-result cases.
Systemic effects fall into two categories: adaptation effects and mimetic effects. I start with adaptation effects. Suppose Judge Jack rules for Mary, despite the fact that the law requires him to rule for Mike. People may notice Jack's deviation. Journalists may report that Judge Jack has disregarded the law. Practicing lawyers and scholars may criticize him. Ultimately, news of this verdict might lead landlords to lower their estimates of the likelihood of winning lawsuits against delinquent tenants. This change could, in turn, lead landlords to raise rents, or to require better credit from prospective tenants.

A special form of adaptation occurs when judges attempt to imitate one another.14 Let us assume, first, that deviation encourages deviation. In unfortunate situations, deviation, even in suboptimal-result cases, encourages misguided judges to deviate in optimal-result cases, perhaps mistaking them for suboptimal-result cases. I call this mimetic failure. Mimetic failure constitutes an adherence reason that applies in both optimal-result and suboptimal-result cases.

However, there are countervailing reasons. Just as deviation encourages deviation, adherence encourages adherence. Adherence by judges in optimal-result cases can encourage misguided judges to adhere in what are actually suboptimal-result cases.

In light of the apparent parity between deviation and adherence, so far, how might one defend a presumption in favor of adherence? One might conjecture that the probability that a deviant decision will induce deviation in optimal-result cases is greater than the probability that an adherent decision will induce adherence in suboptimal-result cases. But I see no reason to accept this conjecture.

Instead, I suggest appealing to the fact that parties can plan for judicial adherence in suboptimal-result cases more effectively than they can plan for judicial deviation in optimal-result cases. Adherence in a suboptimal-result case is suboptimal, overall, but at least it does not frustrate the loser's reasonable expectations. Whereas, deviation in an optimal-result case is suboptimal, overall, and also frustrates the loser's expectations. Therefore, insofar as deviation encourages deviation in optimal-result cases, systematic reasons favor adherence over deviation, even in suboptimal-result cases. This argument does not depend on the dubious premise that the extent to which deviation encourages deviation in optimal-result cases is greater than the extent to which adherence encourages adherence in suboptimal-result cases.

The Objection from Magnitude

I believe that systemic effects provide the most important reasons for judges to adhere to the law in suboptimal-result cases. However, I must confront some objections to this thesis. One objection concerns the fact that a single deviant decision typically has no perceptible systemic effects. Only in extraordinary cases will there be a non-party who is adversely affected by a deviant decision, as such. The causal relations between a deviant decision and its systemic effects are diffuse, rather than concentrated.

If an action has no perceptible effects, then its effects can't constitute reasons for or against performing it. This fact is especially significant, for my purposes, because the immediate effects of an adherent decision are typically substantial, as compared to the systemic effects of a deviant decision. The judge who adheres to the law in a suboptimal-result case substantially disadvantages the losing party, and often other identifiable individuals. Of course, adherence also benefits the victorious party, but in suboptimal-result cases the winner almost always benefits less than the loser suffers. So the objection from the magnitude of systemic effects has great urgency for anyone who opposes a policy of consistent deviation in suboptimal-result cases, as do most writers on the subject.

...
One response to the objection from magnitude involves accepting the existence and moral significance of imperceptible harms. One can then assert that a deviant decision inflicts imperceptible harm on the legal system as a whole, despite its lack of perceptible effects on identified individuals... A second way to respond to the objection from magnitude is to treat each deviant decision as imposing a risk of substantial harm... Any deviant decision could, potentially, function as a trigger. However, very few deviant decisions directly cause subsequent deviation in optimal-result cases. Any given deviant decision runs only a miniscule triggering risk...

The important point is that these reasons are too weak to prevail in many suboptimal-result cases... judges in suboptimal-result cases pose a much more difficult puzzle because they have strong pro tanto moral reasons to deviate. We are trying to explain why they might nevertheless have an all-things-considered moral reason to adhere. Theories based on triggering risks or imperceptible harms provide reasons of the right kind, but these reasons are too weak to serve this purpose.

Consider, by analogy, the fact that administering a vaccination subjects the patient to a small risk of death. This risk gives the doctor a reason not to administer the vaccine, but this reason is weak. Of course, if the vaccine serves no medical purpose, then this weak reason becomes an all-things-considered reason not to administer it. But if the vaccine will reduce the risk of disease then the doctor has a pro tanto reason to administer it, which can override the opposing reason and generate an all-things-considered reason to do so...

Similarly, the negative effects of adherence, on the losing party and others, are often direct and substantial, in suboptimal-result cases. I suggest that the adherence reasons generated by systemic effects are rarely strong enough to override the judge's natural duty to deviate, in these cases, so they don't generate an all-things-considered reason to adhere.

**Participation**

So, I've still not identified a reason to adhere that is strong enough to override or undermine the reason to deviate in some suboptimal-result cases. What we need, I think, is a theory of participatory reasons or complicity.

Suppose Judge Jack deviates consistently in suboptimal-result cases. If other judges also deviate consistently in such cases, then they participate in a collective practice of consistent deviation in suboptimal-result cases. One could argue that Judge Jack intentionally participates in this collective enterprise. Is he therefore responsible for the effects of the enterprise, as a whole? He is, according to a moral principle defended recently by Christopher Kutz, called the Complicity Principle. The Complicity Principle holds that

"one is accountable for what others do when one intentionally participates in the wrong they do or harm they cause. One is accountable for the harm or wrong that one does together with others, independently of the actual difference one makes.” [Kurtz, p.122]

The Complicity Principle holds individuals accountable for driving a car that emits greenhouse gases in quantities too small to register, on the global scale. It also entails that a merchant acts immorally if he indifferently provides tools to criminals, even if the tools are widely available elsewhere. These actions make no difference to outcomes, but the Complicity Principle holds the agents accountable, nonetheless.

Similarly, the Complicity Principle links deviant decisions to the systemic effects of deviation patterns. If Judge Jack deviates in suboptimal-result cases, then he joins a collective enterprise with every other judge who deviates at least as often as he does. According to the Complicity Principle, he is accountable for more than the systemic effects of his individual contribution. He is accountable for the effects of the enterprise as a
whole. Its effects give him reasons. An enterprise of frequent deviation in suboptimal-result cases encourages misguided judges to deviate in some optimal-result cases. According to the Complicity Principle, Jack is responsible for the unjustified deviation caused by this enterprise, even though he never deviates, himself, in optimal-result cases, and he contributes only minimally to the enterprise that causes other judges to deviate, unjustifiably. The reasons generated by the effects of this enterprise may be strong enough to override the pro tanto reason to deviate generated by Jack's other natural duties, the ones that require him to reach morally optimal results.

Free Riding

My application of the Complicity Principle remains incomplete, however. Suppose the aggregate level of deviation in Jack's legal system is so low that there is no collective harm in which Jack participates. Is it wrong, nevertheless, for Jack to deviate more frequently than his fellow judges do, in suboptimal-result cases? ...

By deviating consistently in suboptimal-result cases, Judge Jack avoids directly inflicting unjustified disadvantages on legally disfavored parties. He keeps his "hands clean," as the expression goes. However, as we have just seen, if other judges were to follow Jack's policy, then he would become complicit in a harmful collective practice of consistent deviation in suboptimal-result cases. If, by contrast, the other judges adhere in suboptimal-result cases, then they thereby inflict unjustified disadvantages themselves. Therefore, it is only because other judges generally adhere, in suboptimal-result cases, that Jack has the option of deviation without the taint of complicity. He rides free on judges who deviate less frequently than he. Jack wipes his hands clean, but he wipes them on the hands of his fellow judges.

I suggest that, when pro tanto impermissible actions must be performed, there is a reason to distribute these actions evenly across agents who are disadvantaged by performing them, just as with any other unpleasant task that must be performed.

A judge who deviates less than consistently in suboptimal-result cases inflicts unjustified disadvantages when she adheres. But one who deviates consistently in suboptimal-result cases is either complicit in the harm of excessive collective deviation, if others also deviate excessively, or else she rides free on judges who deviate less frequently than she. If wrongdoing must be done, then it should be distributed as evenly as possible across moral agents.

Therefore, Jack has a strong reason not to follow a policy of consistent deviation in suboptimal-result cases, regardless of how other judges act. If they deviate consistently, then Jack has a strong reason not to do so, in order to avoid complicity. If they don't deviate consistently, then Jack still has a strong reason not to do so, in order to avoid free riding.

I can now explain the moral difference between the judicial oath and Bruce's oath to kick his dog. When Jack takes the oath, he becomes a participant in the collective judicial enterprise. As such, he is now someone whose deviant decisions participate in a decision pattern that has negative systemic effects, or else he rides free on other judges. To this extent, his oath constitutes a reason for him to adhere, but it does so only in virtue of making him a participant in the judicial enterprise. This is the condition that enables his oath to constitute a reason to adhere to the law.

By contrast, Bruce's oath does not transform him into a participant in any collective enterprise. If he breaks his oath by failing to kick his dog, his failure does not contribute to an enterprise with negative systemic effects. Therefore, Bruce's oath gives him no reason to kick his dog.