

Is Obedience Always Support? Government Lawyers in Evil Regimes

Author : Rebecca Roiphe

Date : August 5, 2022

David Luban, [Complicity and Lesser Evils: A Tale of Two Lawyers](#), 34 *Geo. J. of Legal Ethics* 613 (2021).

Part of what makes David Luban so masterful is his ability to pose a critical question. After reading the first few sentences of his article, *Complicity and Lesser Evils: A Tale of Two Lawyers*, I immediately wanted the answer. Should lawyers participate in a corrupt or evil regime? Should they try to use their power to mitigate the damage or should they run in the opposite direction, knowing that obedience is support so no matter what they do they will end up responsible for the evil result? The answer to this question matters not only to give government lawyers guidance in the unlikely event that an evil regime takes over, but also to deepen understanding of the role of government lawyers in normal(ish) times.

Another thing that makes Luban so talented as a lawyer, academic, and philosopher is his ability to tell a story. Rather than answering the question he poses with philosophical rumination alone, he recounts the story of two lawyers who worked in the Third Reich. Some questions are hard to answer with logic and reason, citations to cases, or philosophical principle. This is one of them. The result of the story is that, when Luban does return to moral philosophy, its practical import is so clear, its human side so vivid that one hardly notices that it is, in fact, philosophy.

Before he gets to the stories of the two lawyers in the Nazi regime, Luban explains Hannah Arendt's answer to his question. She is unequivocal: Professionals and functionaries were not useful in reducing the damage of the Third Reich because whatever bad consequences they might have mitigated were outweighed by the way in which their service in normalized the evil regime. There is no way for insiders to insulate themselves from the taint of an evil regime. There is no such thing as mitigation because any assistance lends a veneer of legitimacy to the regime, which is far more valuable than the additional evil acts that might have been accomplished had the lawyer stayed on the sidelines. In other words, Hitler's success rested on the participation of professionals. Had the lawyers and civil servants stayed at home, he never could have accumulated the power and legitimacy necessary to perpetrate the atrocities of his regime. As lawyers went about their daily work, Luban elaborates, they gave Germans the sense that nothing too terrible or unusual was going on. Any individual's sense of shock was muted by the observation that others were acting normally. And so, by hiding concern and outrage, professionals facilitated the regime.

Luban turns to the biography of two lawyers to test her thesis. Bernard Lösener, the first of the two, started his career as a regional bureaucrat when he was called to serve as a lawyer to the Ministry of the Interior for the Third Reich as a "Jewish expert." In 1935, he was called to draft the infamous Nuremberg laws. Four drafts ended up in circulation. Lösener fought hard against Hitler's more radical advisors for the least severe version and he ultimately got his way. While Lösener viewed even his own draft as an outrage, he felt he had won a major victory and took credit for averting a more dire result. By excluding some individuals with mixed heritage from the definition of "Jew," Lösener claimed to have saved over 100,000 lives. When the atrocities of the Nazi regime became too much for him, Lösener requested a transfer from his post at the Ministry. He was ultimately imprisoned for offering shelter to a couple accused of plotting to assassinate Hitler and likely would have been executed if the war had not ended.

Was he a hero or a villain? Luban explains that Lösener fought to keep mixed marriage Jews from confinement in the ghetto and later prevented some of them from being deported to death camps. But in addition to the Nuremberg laws, he drafted laws that would have ordered the sterilization of individuals with Jewish heritage. Like all of his legal work, he justified this as an effort to avert a worse fate. His friends begged him to keep his post so he could stave off more damage and as he put it, he did so, "even as disgust threatened to choke me."

Luban's second lawyer is Count Helmuth James Von Moltke. Moltke practiced international business law and much of his private practice involved helping Jews escape Germany in the 1930s. From a famous Prussian military family, Moltke saw himself as part of the opposition. He almost emigrated out of concern that as a lawyer, he was supporting the corrupt Nazi regime, but instead, he joined the government as a civilian adviser on international law. His unit, Abwehr, formed a pocket of resistance—as Luban describes it, an early analog of the deep state. Moltke plotted with an inner circle to plan for a post-Hitler Germany. All the while, Moltke was aware of the regime's atrocities and like Löesner, he was wracked with guilt over his complicity. Anything short of resistance warranted a share of the culpability. Moltke had the moral conviction that he was obligated to mitigate the evil and to reduce the scope of the criminality. He drafted memo after memo urging the regime to comply with international law. He traveled to urge military leaders not to shoot hostages or prisoners. Moltke was, in the end, executed for his subversive actions.

Moltke had what Luban calls *spielraum*, discretion to influence events and sway those in power. He asserted his point of view, stood up to authority, insisted on what he saw as lawful and right. Unlike Lösiner, his work was not used to commit atrocities. He may have been complicit for remaining in government or not doing more to resist, but he did not aid the Nazi cause as Lösiner did.

Luban draws on moral philosophy to compare and evaluate the lives and careers of these two men. But in the end, he returns to the question with which he began and concludes that Arendt got it wrong. Staying in an evil regime can be the right thing to do. Particularly, when you can significantly reduce the harm, you retain your moral resolve, and finally when circumstances allow you the power and discretion to do so—*spielraum*, as Luban puts it—you can make a difference.

Before he presents Hannah Arendt's view and tells the story of the two lawyers, Luban offers a parable that sounds familiar. A lawyer has been asked to draft a controversial law on immigration for an unprincipled leader. We later learn that he is describing Lösiner but he intentionally makes it sound as if it could be a principled conservative lawyer in former President Trump's administration. Luban is not speaking in the abstract but rather bringing lessons learned from Nazi Germany to bear on the present. He makes it clear, of course, that he is not drawing an equivalence between Trump and Adolf Hitler. Instead, he makes a modest claim that lawyers and civil servants in these two regimes faced a similar dilemma. Many of them struggled with the question of whether to stay and mitigate the damage or refuse to participate.

While Luban's comparison is illuminating, it has its limits, as he acknowledges. Luban anticipates and answers the objection: If Arendt is wrong and professionals could make a meaningful difference even in Nazi Germany, then the same must be true in a less evil regime, like Trump's. As he promised, the narratives of the two German lawyers prove not only useful but enlightening despite the many dissimilarities. Returning to the difference between Nazi Germany and the Trump administration, however, might add to our understanding. It seems that the nature and degree of illegality and the relative evil of the regime within which the professional is asked to serve must also play a role in the analysis. Perhaps Arendt reached her conclusion, with which Luban ultimately disagrees, because Nazi Germany was such an extreme example.

Luban limits the scope of his observations, explaining that they only pertain to lawyers in abnormal times, but it seems to me there are lessons to be learned for government lawyers in normal times as well. Even decent leaders can do bad things. Illegal and destructive policies are not the sole province of dictators and demagogues. I take a broader moral from Luban's story, which is that there is always some room around the edges for lawyers to exercise influence: through counseling, protest, mitigation, or even stepping down in the face of unjust power. However, the desire to stay in the room—to be relevant and powerful—should never supplant lawyers' professional judgment and obligation the rule of law. Because it is easier to make excuses and invent rationalizations when the stakes are lower, losing sight of this may be an even greater danger in normal(ish) times than it is when evil takes over.

Cite as: Rebecca Roiphe, *Is Obedience Always Support? Government Lawyers in Evil Regimes*, JOTWELL (August 5,

Legal Profession

The Journal of Things We Like (Lots)
<https://legalpro.jotwell.com>

2022) (reviewing David Luban, *Complicity and Lesser Evils: A Tale of Two Lawyers*, 34 **Geo. J. of Legal Ethics** 613 (2021)), <https://legalpro.jotwell.com/is-obedience-always-support-government-lawyers-in-evil-regimes/>.