

Instinct or rules: making moral decisions in the Cummings scandal

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How should individuals conduct themselves during a public health emergency, and more specifically how much reliance should we have on "instinct" and "rules"? Dominic Cummings, the Prime Minister's chief adviser, has been accused of breaking the social distancing rules. The allegations revolve around travelling from London to Durham to isolate himself and his family, as well as taking additional trips whilst in that isolation. The specific law he is alleged to have breached is [regulation 6](#) of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020. Regulation 6(1) provides that "During the emergency period, no person may leave or be outside of the place where they are living without reasonable excuse." In the course of defending his adviser, the Prime Minister [argued](#) that "he followed the instincts of every father" in seeking to protect his family. In response, Independent journalist Tom Peck [stated](#) that; "There is no guidance in place anymore, none at all. Just do what Dominic Cummings did and 'follow your instincts' and you'll end up in the right place".

There are many pertinent questions which I do not address here. Did Cummings break the law is a technical question which is best answered in the courts following a proper police investigation of all the facts, although some parts of the story as presented seem [barely credible](#). The question of his resignation isn't really a legal question but a political one, which ought to take into account his role, trust in government, personal integrity and solidarity with the rest of society. There has already been a clear answer to the question on the effect of this scandal on the willingness of the public to follow the rules - although one behavioural psychologist (and member of SAGE) has unequivocally stated that this has [trashed](#) the message to the public.

Instead the purpose of this post is to investigate the nature of "instinct" as a criterion for our moral response to the pandemic, and to contrast this with the idea of a rule-based society.

[Hobbes](#) famously argued that without rules and order, without a sovereign in charge, life would be nasty, brutish and short. He wanted a single ruler who imposed his will upon the populace, rather than a thousand separate rulers all vying for supremacy. Even worse would be the idea that individuals should make their own independent moral choices:




*the poison of seditious doctrines, whereof one is that every private man is judge of good and evil actions
...From this false doctrine, men are disposed to debate with themselves and dispute the commands of the
Commonwealth, and afterwards to obey or disobey them as in their private judgments they shall think fit;
whereby the Commonwealth is distracted and weakened*

(Leviathan at page 198)

For Locke, in his [Two Treatises of Government](#), the idea was that people agreed to come together to form a society (a commonwealth) and to subject themselves to the rules of that commonwealth, provided that those rules had been properly arrived at and promulgated with authority. Locke marked off some personal liberties (and private property) from encroachment from the commonwealth, but agreed that laws made by that commonwealth are binding upon everyone within it. Whilst there may have been some 'choice' in the decision to originally join the commonwealth, there was no choice over whether or not to obey its properly made rules.

Kant considered who should be the arbiter of our moral choices - who gets to decide what is right and wrong? It isn't always the case that we have complete personal autonomy over moral questions - we must sometimes subordinate our individual moral judgement to the moral judgement of the collective. His argument, according to [Reiss](#), was that "The principle of universality demands that our social and political relations should be governed and our public conflicts settled in a universal manner. This requires the existence of law." The universal matter means that we are dealt with in the same way, subject to the same restrictions. It requires rules which are applicable to everyone. It does not allow the anarchy of individual choices on matters where there is a settled community rule.

Stephen Reicher is a professor of social psychology rather than a philosopher, but from his entirely different discipline he made exactly the same point as Kant when he [said](#)



the prime minister seemed to endorse the idea that, when the going gets tough, it is fine to rely on your own judgments - and fine to follow your individual "instincts". In effect, Johnson's defence of Cummings turned an issue of communal responsibility into an issue of individual preference.

The Church of England vicar who questioned the Secretary of State for Health at the Government press conference on Tuesday 26 May made the same point when he [said](#) "if we are all being told we can use our instincts as to whether we can abide by the law, that's an increasingly serious thing for the future."

Developing Kant's line of reasoning further, Jeremy Waldron in [The Dignity of Legislation](#) argued that we are not fully autonomous human beings when it comes to making moral choices, but that we should make our decisions subject to the decisions we have collectively reached in society, or as he put it "the heteronomous obligations of positive law". We all have the capacity for moral reasoning and decision making, but in some cases we collectively agree that it is not for individuals to make their own choices about what is right and wrong, but for us all collectively to agree on what is right and wrong, what is permissible and impermissible.

A system of laws is that heteronomous statement of what is permissible and impermissible. We have a system in place to elect MPs, who then pass laws, which are properly debated, enacted, promulgated and then enforced. Parliament has debated and then enacted both the [Coronavirus Act 2020](#) and the [Public Health \(Control of Disease\) Act 1984](#). Using the authority of the 1984 Act, the Secretary of State for Health then made the [Health Protection \(Coronavirus, Restrictions\) \(England\) Regulations 2020](#). Those Regulations were then laid before, and approved by resolution of each House of Parliament within 28 days, in accordance with the procedural requirements. These rules were specifically crafted to deal with the coronavirus pandemic, and which took into account the need to protect the public as well as the need for personal liberties. I have previously argued that laws still apply, even during emergencies. The very fact that these Regulations were made for these exceptional circumstances shows that we have collectively taken the decision to regulate the pandemic through law.


It is these rules which reflect what we, collectively as a society, have decided is legally permissible and impermissible. Furthermore, part of being a member of that society is that we respect those rules, even though we may disagree individually with some aspects of them. For example, as an individual, I may think that it is perfectly acceptable for me to smoke in a public place, but even though I think my view is reasonable, I accept that society has taken a different view by enacting a law banning smoking in a public place. In a similar vein, even though I personally may think it ridiculous that children have to go to school aged 5, I accept that the properly formulated and democratic rule is that we all must send our children to school at that age. The point is that even though I may disagree with a rule, I accept the validity of it having been made and validated by the rest of society - I have given away some of my personal autonomy in favour of the group's view of what is right and wrong.

From the constitutional and rule of law perspective, it is abundantly clear that rules must guide our actions. [Lon Fuller's](#) first example of a legal system gone wrong is when Rex, the mythical king, dispenses with a system of laws and decides instead to make individual judgements in individual cases. For Fuller, the idea that the Prime Minister, or his adviser are the only arbiters of what is lawful is anathema to the morality of law. Fuller says that "The first desideratum of a system for subjecting human conduct to the governance of rules is an obvious one: there must be rules". Implicit in [Tom Bingham's](#) requirement that we are all subject to law, is the pre-requisite that there is a system of laws in place which purports to regulate our conduct.

This is why the recourse to "instinct" in the Cummings defense is out of place. As Kant pointed out, if we were all to follow our individual instincts, then there would be chaos. Or as [Jo Wolff](#) more prosaically noted "Cummings' gift to future teachers searching for an example of a breach of the golden rule of almost every religious and philosophical tradition: 'what if everyone did that?'". Even if we are not the vile tyrants and bullies envisaged by Hobbes, it is still possible for reasonable people to disagree on moral and political questions. But a system of law means that we mesh and aggregate our moral values into one which is collectively accepted by all of society.

Nowhere is this clearer than in a public health crisis. If we all follow the lockdown rules, then we have a good chance of reducing infection rates. But if we all are free to follow our instinct, to do what we personally think is right, then we have absolute chaos and the complete absence of an effective public health policy. As Irish Times journalist Fintan O'Toole [said](#) "We endure these things individually because we understand ourselves to be also enduring them collectively". Being in it together means we are all subject to the same rules. It means that we don't do the things that we personally think would be right (visit friends, attend funerals, hug family) because we have subordinated our own personal judgement to the judgement of the collective as represented by the Government and the Regulations. It is our instinct to visit our dying relative, but we sacrifice that instinct to our notion of the greater good, the heteronomous consensus that we stay at home, protect the NHS and save lives.

Writing on the Peloponnesian war and the plague that ravaged Athens, the Greek historian Thucydides, (according to [Robert Zaretsky](#)) wrote that:



Those yet alive, shattered by the enormity of the event, "became utterly careless of everything, whether sacred or profane." With the eclipse of the "fear of gods or law of men," anarchy became the rule.

In a time of crisis, we do not have the personal luxury of obeying our instincts. Instead all of us, from the highest to the lowest, must obey the law.

