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Where Law and Ethics are not Co-Extensive (Or, Civil Disobedience as a Civic Virtue)

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I

IN THE SPRING OF 2003, AT THE OUTSET OF THE U.S. INVASION OF Iraq, a student from Brigham Young University, Caleb Proulx, was arrested after he and others blockaded the entrance to the Wallace F. Bennett Federal Building in downtown Salt Lake City, to protest the war.

Explaining his actions, he said: “If I feel the government is doing something immoral, I’m willing to break the law in the tradition of nonviolent civil disobedience and I’m willing to accept the consequences. I would never break the law if it endangered anybody’s personal safety” (Blake).

Impressed by Proulx’s sense of civic duty, a member of the faculty of Utah Valley State College (UVSC) invited him to speak as a part of a series of pro-peace demonstrations. This event was announced via faculty-wide e-mail.

In response, another UVSC faculty retorted that it was inappropriate to bring a “criminal” to campus in an honorific speaking role.

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The tacit assumption behind this response, it seems, is that what is “socially given” determines what is moral or immoral behavior (that is, ethics=law). Since this particular student had been arrested, inviting him to campus in a honorary function was repugnant.

This response, predictably, provoked several counter-responses, all to the same effect: sometimes ethics is not coextensive with the law (that is, in some situations, ethics¹law), that, sometimes, civil disobedience (that is, the intentional breaking of the law) is ethically permissible, even obligatory. Mahatma Gandhi, Martin Luther King Jr., Nelson Mandela, and others were named as exemplars of the ethical breaking of the law.

My thesis is that this counter-response is the correct one. In most cases, ethics is probably coextensive with the law. This is a result of an ongoing, historical, multi-generational vetting process of laws that are unethical, such as excluding women from political processes, slavery, child-labor, and myriad other examples. In other situations, however, if the law is unjust for reasons grounded in ethical principles independent of the legal system itself, the breaking of the law cannot be condemned on moral grounds.

II

THE THOUGHT OF Karl Marx and Frederick Engels provides a hint as to why law is not by definition co-extensive with ethics.

For Marx and Engels, social institutions, or “superstructures” (custom, law, religion, etc.) derive from basic economic “substructures” (the productive relationships between people and social institutions). As Frederick Engels said at Marx’s graveside: “. . . mankind must first of all eat, drink, have shelter and clothing, before it can pursue politics, science, art religion, etc.; that therefore the production of the immediate material means of subsistence. . . form the foundation upon which the state institutions, the legal conceptions, art, and even the ideas of religion. . . have been evolved[,] instead of *vice versa*” (Marx and Engels 1989, pp. 467–68). Engels reiterates the same point eleven years later in *Anti-Dühring*: “. . .men, consciously or unconsciously, derive their ethical ideas...from the practical relations in which they carry on production and exchange” (Marx and Engels 1987, 87). Thus, law and other social practices are

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functions of productive relationships, which is to say, economics, unless other mitigating forces, such as a social reformation or outright revolution, intervene.

Sociologist Max Weber makes a similar point in this landmark treatise, *The Protestant Ethic and the Spirit of Capitalism*. The Protestant notion of a “calling,” Weber argues, furthers Capitalism insofar as one’s position in the economic system ought not to be called into question. If you have the rather unfortunate job of implementing an industrial process involving toxins which could be deleterious to your health, you might likely be paid a pittance. The Protestant work ethic, Weber observed, could be used to interpret such a situation as part of God’s overall “plan” immune from questioning or criticism. As such, religion supports and furthers a particular set of productive relationships—or, to put it another way, productive relationships determine the flavor of supernatural belief systems.

As for religion, the same goes for law. What is determined “legal” is a function of productive relationships. The cycle is a familiar one that is thoroughly understood (*vide* Greider): money from private interests goes to into the coffers of campaigns in the form of contributions. Once in office, victorious politicians, in loyalty to those who helped put them there, look after specific private—not public—interests. Legislation, not surprisingly, benefits individuals and corporations who contributed handsomely in the electoral process.

Example are numerous enough to fill up entire libraries, so only one well-known example will suffice here. In the first decade of the twentieth century, William Mulholland of the Los Angeles Department of Water and Power argued that the growing and thirsty city of Los Angeles desperately needed to divert Owens Valley water as part of a massive, expensive public project. Not coincidentally, the aqueduct was built through bone-dry San Fernando Valley, making previously worthless land suddenly very valuable. Landowners such as Harrison Gray Otis, Harry Chandler, Moses Sherman, and other owners of the San Fernando Mission Land Company, who “fortuitously” bought vast San Fernando tracts cheaply before the project was publicly announced, become phenomenally rich (see Reisner, especially pp. 74–101).

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The incestuous relationship of business and politics is the basis for the loud and clear calls for campaign finance reform, such as the McCain-Feingold legislation to amend the federal election campaign act of 1971 to provide bipartisan campaign reform (see Act of March 27, 2002, Public Law 107–155).

III

SOMETIMES, TO DIVORCE the unholy matrimony between unjust law and the abuse of political power, questionable law must be broken. Such breaking of unjust law we may appropriately call “civil disobedience.” Henry David Thoreau and Martin Luther King provide insight into the ethics of civil disobedience.

A pervasive theme of Thoreau’s writing is the primacy of the individual, and the importance of acting on *conscience*, even if it causes the individual to run up against the power of the state. If you believe certain laws sanction injustice, it is your moral *duty* to disobey them; you must follow a higher *moral law* than *civil law*. In the essay “Resistance to Civil Government” (more commonly known as “Civil Disobedience”), Thoreau says of the government: “if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law” (op. cit., p. 231). Just because something is legal does not mean that it is ethical.

Thoreau believed that the United States Government’s treatment of Native Americans, the practice of slavery, and the invasion of Mexico were all outrageously unethical. Thoreau writes: “[W]hen a sixth of the population of a nation which has undertaken to be the refuge of liberty are slaves, and a whole country is unjustly overrun and conquered by a foreign army, and subjected to military law, I think that it is not too soon for honest men to rebel and revolutionize (ibid., p. 227).

Revolution, however, need not be violent. The passivist can effectively counter legislated injustice by simply not cooperating. This is the reasoning behind Thoreau’s intentional failure to pay tax for several years. He did not believe, ethically, that he could support a government guilty of injustice. His stay in the Concord jail was the necessary consequence of civil virtue.

The idea of a moral responsibility to resist unjust laws through non-violent non-cooperation is a defining feature of Martin Luther King’s

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political philosophy. In a tribute to Thoreau titled "A Legacy of Creative Protest," King wrote:

During my early college days I read Thoreau's essay on civil disobedience for the first time. Fascinated by the idea of refusing to cooperate with an evil system, I was so deeply moved that I re-read the work several times. I became convinced then that non-cooperation with evil is as much a moral obligation as is cooperation with good. No other person has been more eloquent and passionate in getting this idea across than Henry David Thoreau. As a result of his writings and personal witness we are the heirs of a legacy of creative protest. It goes without saying that the teachings of Thoreau are alive today, indeed, they are more alive today than ever before. Whether expressed in a sit-in at lunch counters, a freedom ride into Mississippi, a peaceful protest in Albany, Georgia, a bus boycott in Montgomery, Alabama, it is an outgrowth of Thoreau's insistence that evil must be resisted and no moral man can patiently adjust to injustice (loc. cit.).

Through this strategy, it is *possible* to change the minds of the violent aggressor (indeed, trying to precipitate such change is actually, to use the language of Kant, a categorical imperative!). As King writes in *Stride Toward Freedom*, "To accept passively an unjust system is to cooperate with that system; thereby the oppressed become as evil as the oppressor" (op. cit., p. 212).

Circumstances transpiring near the end of 1955 in Montgomery, Alabama, gave King the golden opportunity to put into practice the theory of Thoreauvian civil disobedience. As we know, Rosa Parks, after a long day of work and tired of being on her feet, boarded a bus and sat in the first seat behind the section reserved for whites, along with three other African Americans. Soon the bus filled, and the bus driver ordered Rosa and the other blacks to forfeit their seats for

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embarking white passengers. The other blacks complied, but Rosa refused; obedience would mean Rosa would stand so a white male passenger could take her seat. She was arrested.

Under the leadership of King, Abernathy, and others, a committee of black citizens decided that a bus boycott was in order. A declaration was passed:

Don't ride the bus to work, to town, to school,
or any place Monday, December 5.

Another Negro woman has been arrested and
put in jail because she refused to give up her bus
seat.

Don't ride the buses to work, to town, to
school, or anywhere on Monday. If you work, take
a cab, or share a ride, or walk.

Come to a mass meeting, Monday at 7:00 P.M.,
at the Holt Street Baptist Church for further
instruction (ibid., p. 48).

Over 17,000 blacks stayed off the buses. The rest is history: the modern civil rights movement was born.

The Montgomery bus boycott illustrates King's conviction to Thoreau's idea of the supremacy of moral law over civil law. The hegemony of one political group over another is morally indefensible. Each individual is ethically obliged to resist such systems of injustice through non-violent non-cooperation (in this case, walking to work or school, or catching a ride).

The lesson is that inaction may amount to complicity in injustice. As Thoreau said in "Civil Disobedience," "The mass of men serve the state thus, not as men mainly, but as machines[;] they are as likely to serve the devil, without intending it, as God" (op. cit., p. 226). King saw his identity and his actions as embedded in a community. As he wrote in "Letter from Birmingham Jail," "Injustice anywhere is a threat to justice everywhere. We are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever affects one directly, affects all indirectly" (Schulke and McPhee, p. 226).

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IV

TO RETURN TO our starting point regarding law and ethics. In the political discourse and demonstrations leading up to the invasion—or “liberation” depending on your political orientation—of Iraq, the question becomes: does the fact that a protestor was arrested cast aspersions on the ethical validity of this individual’s political position?

Absolutely not. Evoking the foregoing remarks, one answer is simply that to oppose the war in Iraq, as Proulx did, runs contrary to the hegemonic status quo of the military-industrial complex and the political party in power. Moreover, it runs contrary to the dominant “neo-conservative” ideology—that democracy sometimes must be implemented, externally, by force, even if the reasons for going to war are based on deception, a “noble lie” reminiscent of Plato’s political philosophy (*Republic* 414c, p. 93)—that has been used to justify the action. In the case of the argument to initiate war with Iraq, the “noble lie” were claims of credible evidence of weapons of mass destruction poised to be unleashed upon unsuspecting innocents, now non-existent.

At the time of this writing, the war effort has been costing roughly between \$1–1.5 billion per week, which, as of early 2005, amounted to nearly \$200 billion (Weisman). According to Michael O’Hanlon, a defense analyst at the Brookings Institution, “We’re now officially about to hit a \$200 billion war, with a likelihood of hitting \$300 billion, a near-certainty it will reach 250 [billion] and a distinct possibility we’ll reach 400 [billion]” (ibid.). Are such gargantuan expenses a good use of taxpayer money, *a fortiori* by a political party whose purported platform is small government and the wise use of taxpayer earnings? The answer is not a resounding “yes, absolutely.”

Whatever the case may be, such expenditures of taxpayer monies are certainly lucrative to the U.S. militarily-industrial complex, and, one could venture to assume, the political super-structures which prop them up. Thus it is not surprising that the hollow rhetoric of jingoism would be employed by those with economic and political power to ends that benefit those private interests, even to public detriment.

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V

THE SPECIFIC ISSUE of the war in Iraq points to a larger issue about the problems of strictly equating ethics with law.

First, equating ethics with law is empirically impossible. Unless we satisfy ourselves with some form of extreme, naïve relativism, two cultures with logically contradictory normative standards—such as the maxim that it is never right to ritually compromise the bodily integrity of a human being with the maxim that it is sometimes ethically obligatory to ritually compromise the bodily integrity of a human being (as in female genital “circumcision” (Rosenberg))—then both standards can’t both be ethically right. If ethics and the law are coextensive, then we are left with an overt logical contradiction.

Second, as philosopher James Rachels argues, equating law with ethics rules out the possibility of moral progress; if what is legal is ethical, then the law needs no improvement, because, by definition, it is already ethically sound (Rachels, p. 18). History shows this to be flatly false, and, happily, ethical reasoning provides a corrective for unjust law.

In some kind of perfect, Leibnizian “best of all possible worlds,” ethics and law would be mutually co-extensive. But since this is not the kind of world we actually live in, civil disobedience might be a civic virtue.

Does this mean that in some circumstances *not* breaking unjust law may be itself unethical? That is an exceedingly interesting topic for another discussion entirely.

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