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Foreword

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FOREWORD

JOHN H. YODER*

By the nature of the case, the concept of civil disobedience cannot be self-defining. It designates a response to a particular demand of a particular governmental authority, because the person who would ordinarily be willingly subject to that authority holds its dictates to be overruled by a higher power. Both the unacceptable claim and the higher power are incorrigibly particular, unique.

In principle the case for disobedience is classically simple; if there be a God worthy of the name, then that God's claims, when known, must by definition be imperative. The only honor that God's servants owe to anyone else is what is compatible with the prior divine will. Formally speaking, the only exception to this logic would be a situation where a given state would itself be divinely mandated. This was thought to obtain in ancient Mesopotamia and ancient Egypt. It could obtain in some readings of Constantine's divine mandate, yet only because the God in question was no longer JHWH of hosts, the Father of Jesus. In principle, no state today being God, when seen from the perspective of those who believe, the notion of a case where "we must obey God rather than men"¹ must not be impossible.

On the other hand, any state considers itself *in some sense* to be a moral absolute, a "sovereign;" it cannot by definition be prevented from making some claims which some of its subjects consider improper. Even those modern western states which limit themselves by means of written or implicit Bills of Rights do so sovereignly.

What remains open for definition in particular cases, then, is the grounds for identifying some particular demand of the state as unacceptable to some citizen. When that happens, the second question is whether, and if so how, the state will (or "can afford to") accede to such a refusal.

The simplest classical specimen is obligatory participation in a pagan cult, dramatized in the heroic legend of Daniel:

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1. *Acts* 5:29 (Jerusalem Bible).

Your question hardly requires an answer; if our God, the one we serve, is able to save us from the burning fiery furnace and from your power, O king, he will save us; and even if he does not, then you must know, O king, that we will not serve your god or worship the statute you have erected.²

But the cult example may overstate the issue, as if the only ground for disobedience were formal idolatry. Those same four friends had been just as stubborn two chapters earlier in defense of their Jewish dietary commitment. Yet one trait in the picture which we may carry over from the ancient examples is the awareness that the line which limits obedience is easier to draw for persons who have a strong realistic sense of cult meanings; we think of the meanings of blood or of the flag for Jehovah's Witnesses.

It is a different matter when in a relativistic and nominalistic culture one asks where the limits of compliance run. Where did it run during the slow rise of sensitivity about the moral unacceptability of slavery? Where did a citizen of Massachusetts in 1848 discern the beginning of culpable complicity? It may not be hard to feel that Henry David Thoreau was oversensitive, adolescent, in being so clear:

If the injustice is part of the necessary friction of the machine of government, let it go . . . ; but if it is of such a nature that it requires you to be the agent of injustice, then, I say, break the law. . . . Under a government which imprisons any unjustly, the true place for a just man is also a prison.³

Thoreau may have thought so himself; he seems not to have repeated the offense.⁴ Yet in the strange chemistry of cultural history the principle Thoreau enunciated, together with the label "civil disobedience" he chose for it, has come to be respected far beyond the case where he applied it.

2. *Daniel* 3:16 (Jerusalem Bible).

3. H. THOREAU, *Civil Disobedience*, in *WALDEN AND OTHER WRITINGS* 644, 646 (Mod. Library ed. 1950).

4. Thoreau oversimplified at first, as does Zinn, in characterizing the local poll tax, which he refused to pay, as support for the war against Mexico. Thoreau's initial vision was probably Emerson's romantic vision of the power of the heroic individual: "If a single man plant himself indomitably on his instincts, and there abide, the huge world will come round to him." R.W. EMERSON, *The American Scholar*, in *THE COMPLETE ESSAYS AND OTHER WRITINGS OF RALPH WALDO EMERSON* 63 (1940). A beautiful hope, but dubious social science.

Where might the limit to compliance arise in a society which is not (like Thoreau's Massachusetts) becoming more sensitive but rather gradually deteriorating into fascism? A.J. Muste cites the classic case: a teacher of philology (in itself an utterly innocent, liberal discipline) in Hitler's Germany,⁵ looking back with remorse after the fact, who still could not identify the threshold at which resistance to anti-jewish legal measures should have begun. Can there be a "notch" somewhere along a slippery slope?

There are at least two classical ways to define a point of imperative resistance. One was articulated by Martin Luther King, Jr. in his classic "Letter from Birmingham City Jail:"⁶

. . . [T]here are two types of laws: just and unjust. I would be the first to advocate obeying just laws. . . . [O]ne has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that "an unjust law is no law at all."⁷

If we set aside for the moment the question of *how one knows* that a given law is immoral, this argument can serve to restate the point of mandatory resistance we have been looking for. In actual experience the "higher law" which worked in King's favor was most often the federal administration, sometimes the federal courts, but that is not the claim he is making. He is writing to religious leaders and making a religious claim. But how is that "non-law," which ought not to be obeyed, identified as such?

Now, what is the difference between the two? How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is

5. Cited from the preface to *The Smoking Mountain*, a collection of short stories about occupied Germany, by A.J. MUSTE, OF HOLY DISOBEDIENCE, Pendle Hill Pamphlet No. 68, at 31 (Wallingford, Pa. 1952), reprinted in CIVIL DISOBEDIENCE: THEORY AND PRACTICE 142 (H. Bedau ed. 1969).

6. M.L. KING, *Letter From Birmingham City Jail*, in WHY WE CAN'T WAIT 84 (1963).

7. The phrase appears as a side comment at the end of Augustine's second speech in I/5 of *The Free Choice of the Will*. The phrase is not a clear thesis, being introduced by *videtur* ("it seems"). The passage gives no specification of what such a non-law might be; nor does it suggest disobedience (either permitted or mandatory) if a non-law were to be identified as such.

not rooted in eternal law and natural law. Any law that uplifts human personality is just.⁸

The concept is very clear, but few of our readers will take that definition as adequate to guide legislation or litigation.

The other classical conceptual weapon to limit obedience is the notion of an intrinsically evil deed. It occurs at numerous points in routine Catholic moral theology. In his article on "War" in the *Catholic Encyclopedia* (1912),⁹ Charles Macksey, then Professor of Ethics and Natural Rights at the Gregorian University, included within the criteria for means within the "just war" that there be *no act intrinsically immoral*.¹⁰ It is assumed that there exist (or may exist) such acts; that they can be identified, and that once identified they both should and can be refused.

William V. O'Brien, whose *Nuclear War, Deterrence, and Morality*¹¹ reviews both the Catholic heritage and its current challenges most expertly, recognizes the category of *malum in se* as setting a limit to what can be permitted. He is confident that it does not prohibit indirect or unintended killing of innocents. He hopes that, in order to avoid making just war thinking irrelevant for discriminating judgments in nuclear policy, it will not apply even to the massive bombing of civilians. Thus it is not a concept which O'Brien applies practically. That makes it all the more significant that he continues to acknowledge it as a potentially pertinent limit.¹²

The same is the case more broadly for the classical casuistic system of "double effect" moral reasoning.¹³ It is formally *de rigueur* in the tradition of natural law reasoning to posit that

8. M.L. KING, *supra* note 6, at 85. Thomas does say that whether a human law is just can be determined by measuring the derivation of both its content and its authority from the Eternal Law. It is wrong to obey "the laws of tyrants which promote idolatry or whatsoever is against divine law." The closest Thomas comes to King's phrase "that degrades human personality" is "a law which afflicts unjust grievance on its subjects." In this case disobedience is permitted, but (as distinguished from a law demanding idolatry) not mandatory, if the cost of disobedience would be "greater damage" or "scandal [i.e. moral harm to someone else]." T. AQUINAS, *SUMMA THEOLOGIAE* I. II. 96.4 (c. 1270).

9. Macksey, *War*, in 15 CATH. ENCY. 546 (1912).

10. *Id.* at 549.

11. W. O'BRIEN, *NUCLEAR WAR, DETERRENCE, AND MORALITY* (1952).

12. O'Brien affirms that such a concept does still exist for him, and suggests (in a personal letter) that an example would be genocide.

13. See *generally* DOING EVIL TO ACHIEVE GOOD (R.A. McCormick, S.J. & P. Ramsey eds. 1978). The symposium reviews with great refinement the distinction between direct and indirect effect, but alludes only glancingly to the notion of an intrinsically evil deed. None of the symposium participants

there is such a thing as an intrinsically immoral act, which must never be done even for an otherwise good cause. Yet today in the realm of practical moral reasoning, in the hands of moral theologians who claim that this "natural law" system is adequate, the intrinsic evil is alluded to only negatively, as not excluding whatever it is that the writer would like to allow or the decision-maker is being pressured to do in the present case. The concept *as currently used* by theologians would thus seem to be an almost empty set; a weak reed on which to support resistance to authority. Yet for those non-theologians who do in fact break laws, the set is sometimes not empty.

Most of the above survey of simple types of argument has centered on the burden of proof's being with the negative; why and when must one *not* obey? A.J. Muste reverses the burden of proof, in an evangelical way consonant with the doctrine of vocation taught by his Calvinist ancestors. The Christian (or any decent person) is (or should be) already doing what God has called him or her to do. It is not for the state to oblige any subject by force to leave that calling even if the thing the state wants her or him to do were not evil. Even if the government offers noncombatant alternative service to the pacifist, its right to call the citizen away from her or his primary calling must be contested.¹⁴ This may sound to some like anarchism or libertarianism; it is rather puritan.

Thus far I have been reviewing the *prima facie* argument for not obeying. It applies to Jehovah's Witnesses refusing transfusions, or to the early Christian martyrs; yet there is a quite different dimension in most of the important stories. Neither Gandhi nor King disobeyed *every* unjust law. Which law to break and why (and when) was determined in the light of shrewd strategic thinking, with a view to changing the unjust laws by unmasking their injustice in the eyes of the wider public, or of the people benefiting from their enforcement. Thus what at first looked like a firm deontological "So help me God I cannot do otherwise" is at the same time a carefully calculated pragmatic tool for achieving change which one could not attain by the ballot or the gun. The deontological appeal is the stated grounds for breaking the law; but the pragmatic intent is what builds a constituency. The deontological appeal is why the

denies the concept, although Schüller and McCormick tend to reduce it to a premodern way of expressing proportional reasoning.

14. A.J. MUSTE, *supra* note 5, at 136, wrote this during the Korean War, when pacifists were divided between those who considered alternative service acceptable and those who refused registration for selective service as itself a culpable complicity with militarism.

position is called "conscientious" and why governments concede exemptions, but standing alone it can be accused of purist irresponsibility. The pragmatic intent claims relevance but at the cost of debatable tactical calculations about effectiveness.

The trick is to keep both dimensions decisive without collapsing either into the other. Without the pragmatic promise the "Here I stand" rhetoric is overblown, discrediting its own transcendent claim. Without the transcendent claim the pragmatism boils down to mere obstructionism grasping for illegitimate leverage in the service of a minority interest. Thus each dimension must be evaluated in its own terms; the transcendent by the criteria of moral discourse and the pragmatic as social strategy. The debate is incorrigibly bifocal. We may think we differ about the social description when the clash is really between moral commitments, or vice versa.

This review of the ordinary resources for limiting obligation to government must suffice to have located the concept we are pursuing. If the state is not god its claims must be finite. The concept of "limit" is operational only if in some real case a greater value can in fact claim priority; then the moral thing to do is to disobey. If there is no place for this to occur, the state is god after all.¹⁵ Yet if it is done routinely it undermines the more normal vehicles of political discourse.

From this skeletal review, the questions with which we shall turn to the papers in this issue of the *NOTRE DAME JOURNAL OF LAW, ETHICS & PUBLIC POLICY* are evident. How can "the state," whose very nature is to claim "sovereignty," recognize space (or even "rights") where its writ does not run? How can the servant of God (however be defined a focus of transcendent moral obligation)¹⁶ both legitimate and limit the claims of

15. For purposes of the present discussion I have accepted the terms of the standard western liberal account according to which the "subject" or citizen is an individual, and "the state" univocally represents the collectivity. This picture is however factually wrong:

- 1) there are multiple powers and value systems in effect in any one place under the title "state." This issue is represented in our symposium by Cavanaugh-O'Keefe's Operation Rescue paper; the real enemy there is not the state but the way the medical profession works, called "the dominant powers."
- 2) There are "intermediate associations;" both involuntary ones like the clan, voluntary ones like the ACLU, and a scale of mixed forms in between, including churches. Without them individual disobedience would be rare and weak.
- 3) Most who disobey are not individuals standing alone as to either the reasons for their disobedience or its mode.

16. Here I ignore completely the quite different grounds for

the civil order without falling prey to arbitrariness? Do these two "how can . . .?" questions collide in such a way that only the force of dollars or numbers can adjudicate? Or is there some definable median range where both can be tolerably satisfied?

The "canonical" tradition of disobedience, as represented by Thoreau, Gandhi, and King, avowed the illegality of the action, accepting the jurisdiction of the police and the courts, accepting as well the legal penalty. Gandhi sometimes even refused the opportunity to have his case dismissed, insisting on being found guilty. Readiness to suffer was a lexical rule, used to sort out the serious grounds for disobedience from the frivolous or the self-seeking.

Our texts challenge this from both sides. Howard Zinn grants no more status to the judicial process which enforces an unjust law than to the law itself. The consistent lawbreaker, like Daniel Berrigan or Mary Moylan, will be morally justified in adding to the first offense the further one of evading the law. Zinn offers no pragmatic argument about how thus escalating the offense should be evaluated. He traces the wrongness of the argument "accept your punishment" all the way back to Plato's Socrates, even though Socrates was not condemned for civil disobedience.

On the other edge of the argument there are those who plead "justification" on the grounds that the law they have broken is illegal. Some appeal to Nuremberg (Lippman); Dr. Spock and William Sloan Coffin argued the illegitimacy of the draft on the ground that the Vietnam War was undeclared. If the "necessity" justification is accepted by the court (as in the original Montgomery bus boycott), the law is thereby changed. Cavanaugh-O'Keefe accuses of illogic the judges who assume the Gandhian understanding. Yet from the moral perspective it is not evident that pleading not guilty, in order to obtain change by moving administrators or legislators, is fundamentally different. These writers differ as to the pragmatics of change, not as to the morality of obedience.

What is left out of the above debate about accepting the penalty is its foundation in the thought of (e.g.) Gandhi. He did not believe (like Plato's Socrates) in the metaphysical dignity of the law even when it does evil. Nor did he share the

disobedience which would make sense in a thoroughly positivistic frame of reference. One might disobey whenever the penalty for disobedience, multiplied by the probability of being caught, would be less than the cost of obeying.

Catholic vision, well characterized in this symposium by Christiansen, of the benefit of the doubt belonging to the positive value of extant institutions. Gandhi rather saw the policeman or the judge as a person to be converted. Toward that end he affirmed the moral power of unjust suffering voluntarily accepted.

The focus of the breach of the law is for Gandhi not the moral heroism of the one disobeying, but rather the encounter at the bar of "Truth,"¹⁷ which it makes unavoidable for the perpetrator of injustice. By his readiness to bear the punishment Gandhi obliged the policeman or the judge to recognize himself as an accomplice of the unjust system, and thereby challenged him to join Gandhi in the opposition. By accepting prison he likewise provoked widespread popular sympathy. Being exonerated by a justification defense would not have had the same effect.¹⁸

This difference represents well the method challenge posed by the bifocal dialogue situation noted above. When Jesuit Berrigan, like Tolstoy, sees "the system" as so perverted that even judicial due process is not trustworthy, and Jesuit Christiansen hopes that "political friendliness" will be able to sublimate political apocalypticism into "civil initiatives," is that a difference in empirical description of the American scene or in moral theology? For Cavanaugh-O'Keefe, once the demons are out of the bottle civility will not help; there is only war, violent or nonviolent. One chooses the right methods and leaves results in God's hands. If God chooses to use bloody war (as was the case for the end of slavery) rather than successful nonviolent pragmatism, that is not for us to judge. The "right road" which the rescue movement has found is to save in the womb one life at a time and to avow no other goal. The success of popular solidarity in Manila in 1986, or the closing of clinics where he was arrested, is gratifying to him but it would be misleading to plan for such victories. Publicity is not

17. Gandhi characterized his life work as "experimenting with truth;" truth is a cosmic humanizing power; our mode of incarnating it enables it to act upon the oppressor. Christiansen's notion of "amity" is a somewhat thin version of this same accent on the interlocutor's dignity. It differs in the higher level of confidence that the system may work better if we help it, as in the case of "civil initiative."

18. To this we must add the fact that Gandhi, although a lawyer, agreed with Tolstoy (who got it from Jesus) in not trusting the courts to be fair. The justification defense trusts the courts to be more fair than the executive. Gandhi assumed that the courts were part of the unjust system they enforced. At that point he would understand Zinn's argument; yet he asked strategy questions which Zinn does not treat in this paper.

primary because it is not the public which one wants to convince. The courts will not accept the necessity defense; yet they might in the future.

There is a kind of realism in thus leaving to others to determine whether a change in abortion law would do any good, but this comes at the cost of having little guidance for legislators, or for citizens, who want their prosecutors to stop jailing bishops. Cavanaugh-O'Keefe is closer to the Amish than to the faculty of the Notre Dame Law School. This realism is wholesome, in deconstructing the confident pragmatism of many activists who promised too easily "we shall overcome" without recognizing that "some day" may be far away. It demonstrates the perduring vitality, in non-academic catholic moral life, of the notion of the intrinsically moral deed which needs no justification by proportional reasoning. But might it not undervalue the "Catholic" appreciation of civil amity, both that which has already been achieved in a society under law and that which we seek?

