

## INDIVIDUAL OBLIGATION AND THE LAW

### An Essay on "Do the Right Thing"

*Respect for law arises out of our respect for each other. Laws that foster and protect our humanity are worthy of our respect and win our loyalty and obedience. But even when law fails to win in the court of my conscience I respect it if it wins support from the consciences of other persons. For there are times when I wish them to obey a law my conscience supports even though their conscience may view it as unnecessarily burdensome. Hence, whether this law would be supported by other members of the profession and the community at large is relevant to whether it deserves Houston's obedience. The Social Work Profession is perhaps unique in that it advocates for those not well served by the law; and we rely on its members to protect our humanity and personality in the dark place of the law. This essay's brief survey of theoretical perspectives on the nature of law and individual obligation suggests that one ought not to take law at face value, but to examine the structure of its actual political, economic and social context.*

#### By Samuel A. Richmond

Samuel A. Richmond is Professor of Philosophy, Department of Philosophy, Cleveland State University, Cleveland OH. Dr. Richmond had been the Chair of the Department of Social Work.

In "Do the Right Thing" A. Houston reports on her experience as a graduate student in a prison placement working with women inmates in a special unit with their children under age two. Dams for the prevention of sexually transmitted disease among women engaging in same-gender sexual activity in the prison were contraband. Houston reports that the response of prison authorities to legalization was that dams were not needed because sexual activity was not supposed to be taking place.

Houston affirms her "conscious choice to look the other way concerning the contraband trafficking thus condoning and passively participating in the activity." She felt her actions justified because they were for the greater good and served as a model of doing the right thing. Her report raises fundamental questions regarding the nature of legal obligation and its relation to professional ethics and individual conscience. What appeared to her to be right appears to some to be wrong. Where law and individual conscience conflict, does one of them have greater authority? What follows are answers to this question selected from the array of theoretical opinion relevant to this question:

Discussion of this question often begin with the classical statement by Thomas Aquinas of the natural law theory of the relation between legal obligation and moral obligation. According to this view individual conscience is not obligated by law that is contrary to human good:

either in respect to the ends, as when an authority imposes on his subjects burdensome laws, conducive, not to the common good, but rather to his own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect to the form as when burdens are imposed unequally on the community, although with a view to the common good. Such are acts of violence rather than laws, because, as Augustine says, a law that is not just seems to be no law at all. Wherefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance....

For Aquinas, a necessary condition of legal obligation is consistency with moral obligation: law inconsistent with morality cannot obligate; it is no law at all.

A sharply contrasting view is put forth in the classic statement of the positivist theory of the law by the utilitarian, John Austin. For him legal obligation is not a form of moral obligation. It is based on the power of the superior party to coerce obedience. Austin did not assume that the commands of the sovereign were for the common good. Neither did he think they were less obligating when not for the common good. We may be legally obliged to perform acts that are outrageously immoral.

Neither Aquinas nor Austin held that one is morally obliged to obey an unjust law. Nor did they hold that one is morally obligated to disobey. The idea of disobedience motivated by moral obligation was introduced by Henry David Thoreau's refusal to pay his poll tax. According to him law based on power is corrupt. He claimed individuals are obligated morally to find a way to disobey when law commands and maintains slavery or unjust war. Socrates stands almost alone as one who believes he rightly chose to obey the law even in an instance in which it was clearly unjust. He himself was unjustly sentenced to death and he argued he ought to comply rather than escape, and so he drank the hemlock. But he did not generalize from this instance to argue that one might act unjustly toward another in order to obey a law.

Since World War II, schol-

arly theories of law include second order rules or principles for the recognition of valid legislation and denial of invalid legislation. No contemporary academic theory of justice would fail to provide for individual disobedience to laws contrary to individual moral opinion, though each might conceive of its proper exercise differently. All believe that one must have a critical view of law; one cannot assume that because something is required by law one ought to comply. Obedience to law just as much as disobedience requires an individual to judge whether what is required is worthy of one's compliance.

It is perhaps the one great lesson of the twentieth century that one ought not comply with laws that require one to treat others in ways that conflict with one's conscience. According to Gandhi and King we are morally obliged where necessary to join together in organized collective disobedience to remove unjust laws. A policy of continued compliance is not morally permissible on their view.

Continental traditions of philosophical reflection on the law tend to be more critical than Anglo-American. Karl Marx viewed law in a capitalist system as inevitably in the interest of the ruling class and contrary to the interests of the working class; according to Vladimir Lenin the State is armed men and prisons in the service of the capitalist class and at war against the working class. Sigmund Freud saw civilization as the source of internal conflicts that pit individuals against themselves.

Jean-Paul Sartre and

Michel Foucault hold that there is no politically neutral moral resolution to the conflicts of contemporary humanity, but that we are constantly faced with the problem of doing the right thing in an environment of power that corrupts our thought and discourse. Jacques Derrida in a critique of Walter Benjamin in "The Force of Law" contends that there is no justification of the violence of the law — none.

Historically, the force of law has been exercised in wars of national aggression, slavery, systematic oppression of women and persons of subpopulations differing in religion, caste, language, nationality, or other condition of birth. It is only in recent years that law has been an instrument for ending slavery, protecting rights, and extending freedom.

Robin West and Margaret Jane Radin, feminist critics of American law, have noted its history. Laws that govern women have paternalistic roots. Women's perspectives are not routinely represented in the law. There has been no systematic purge from law of this long-accumulated bias against women. The Equal Rights Amendment is designed to eliminate inequalities based on gender from the legal system. Women do not yet have constitutional protection from unjust legislation.

The brief survey of theoretical perspectives on the nature of law and individual obligation does not give much support to the view that there is a *prima facie* moral obligation to obey the law simply because it is the law. To the contrary, each school of thought alerts us to sources of criticism of the law which may

invalidate its claim to individual obedience. What are the sources and aim of the law? What function does it actually serve? Who does it actually serve? Are those governed by it among its authors?

Theoretical reflection on law suggests one ought not to take law at face value but to examine the structure of its actual political, economic, and social context. Does the law serve the common good? Does it burden people equitably and in proportion to their means regardless of differences of race, gender, religion, language, nationality, economic class, or social position, or other condition of birth? Is it within the authority of its author? Does it impose slavery or war on others? Does it serve the interests of one economic class at costs to interests of another? Does it divide human personality against itself or enhance its integrity? Does it rely on a pious lie, ideology, or power discourse whereby the conditions of its application are taken to be as they are supposed to be rather than as they are actually? Is the law itself a significant source of violence in the population? Law that commands obedience morally must meet high moral expectations.

When we ask these questions of the law denying dams to women in a jail in which sexual activity is taking place among inmates some of whom have tested HIV positive, many potential sources of invalidity appear. Few would allow that it is for the common good, since it risks increase in the incidence among inmates and in the general population. What ends does denying dams serve? Is such an end a

proper aim of legislation? Is denying dams a proper means given the risks?

Does denying women in prison dams distribute the burdens of pursuit of the aims of the laws equitably? Placing women in prison at greater risk for incurring sexually transmitted disease places a disproportional burden of risk upon them. Drug laws of recent years have placed the burden unequally on lower-income classes. Disproportionate mandated sentencing accounts for most of the increased imprisonment of low-income people.

In recent years the larger context of law in which prison laws function has become an instrument for shifting burdens from those of great means to those of small means. Income and wealth have been redistributed from the bottom up. The impoverishment of the low-income people has had disastrous effects. Higher rates of imprisonment is one. Higher prison rates are an especially burdensome imposition on the least advantaged of our society.

What the law is depends upon actual practices of the law and the view of those practices held by conscientious citizens. Where the informal or actual practice is consistently and predictably different from the text of the law, the practice of the law may be a better guide to what the law actually is. Legal interpretation includes reference to practice, it takes into account limits in effectiveness, and it relies on the judgment of reasonable persons to interpret its meaning and decide its validity. The expectations of reasonable persons administering

the law and governed by the law are in turn shaped as much by practice as text. Deference to individual conscience is built into law. The law is decided by judge and jury, and will they not assume the validity of their conscientious reflection in making decisions of law? Would we want them to act otherwise? Only those acts that survive the test of conscience rightly receive the sanctions of law.

Is looking the other way or more actively facilitating transfer of the means of disease prevention a form of fraud, deceit or misrepresentation that is inconsistent with the values of members of the profession of social workers or the larger community. What is the view of the faculties of schools of social work on whether denial of the dams is just? What is the view of the members of the National Association of Social Workers whose Code of Ethics is to guide us here? Prison systems involve us in contradictions that reach to our deepest values and sentiments. We rely on persons of good conscience to act with due consideration and discerning judgment that assigns high priority to the actual advancement of human life, human health, and human personality.

Covertly facilitating the transfers of dams does not seem to be an act that shows any disrespect for anyone. The prison system and the community at large are not as such persons. A fair number of persons within the prison system and the community at large seem to agree with Houston's assessment of the justness of the denial of dams to women in prison. She sought to

entrench the availability of this source of protection by directly participating in the prison's informal structure of support.

Note that it may be illegal to possess or transfer other forms of prison contraband such as drugs and guns outside of prison settings. Possession and transfer of dams is not inherently illegal; it is illegal only in prison. Note, too, that participating in the covert transfer of dams is not like vigilante justice in which violence is used against others who have been judged to act contrary to the wishes of the vigilantes.

Respect for law arises out of our respect for each other. Laws that foster and protect our humanity are worthy of our respect and win our loyalty and obedience. But even when law fails to win in the court of my conscience I respect it if it wins support from the consciences of other persons. For there are times when I wish them to obey a law my conscience supports even though their conscience may view it as unnecessarily burdensome. Hence, whether this law would be supported by other members of the profession and the community at large is relevant to whether it deserves Houston's obedience.

Discussions of civil disobedience often note that disobedience should be done publicly and with a willingness to accept the consequences — the punishments prescribed by the law for those who violate it. Where disobedience may appear to serve both one's conscience and one's personal interests, as in conscientious refusal to perform military service, one may be accept punishment, or an alternative risk of

one's own life in the service of others, in order to demonstrate good faith. And where the goal is freedom and equality for an oppressed people, a willingness to suffer some of the consequences of disobedience in order to eliminate unjust laws may be necessary to keep the focus of other citizens on change. But there is no inherent reason for those who disobey unjust laws to suffer punishment. Suffering such sanctions arises from the need to show respect to citizens with whom one disagrees but whom one hopes to persuade by earnest action. It was unjust that Martin Luther King was locked in the Birmingham jail because the law which placed him there was unjust law.

Would we want no one under a Hitlerist or Stalinist regime to disobey to protect another person without doing so publicly and with acceptance of punishment? Would we want those who did so punished later? Houston reports seeking to change the prison practice publicly but unsuccessfully. Covert disobedience incurs additional risks that moral agents must take into account. It alienates and isolates people from each other.

Conflicts between individuals and the law often have to do with the tension between the hypothetical conditionals that are supposed to be the case under the law and what is actually the case. Thus the argument that there need be no protection because there is not supposed to be any

sexual activity. Sometimes the human heart responds with compassion to what is actually the case and views as merely theoretical that which is supposed to be but is not. Moreover, it is difficult for the law to guide us under conditions that are contrary-to-law. Recognition and public discussion are often proscribed as well. Few wish to be perceived as urging violation of law for that itself may be proscribed. As a result the dictates of man-made law benefit from subordination to the dictates of the individual human heart. Would we have it otherwise? Would we have every decision so legalistic as to be premised only on how things are supposed to be without regard to how they actually are?



Social work students sometimes bring a fresh perspective to corrections settings. For example, a student in a sentencing setting lobbied for prisoners being told that no mail from home would be forwarded to them the first month of incarceration rather than believe no one had written.

The court changed its practice. Had the court not changed, would we want no social worker or student to tell any inmate the true reason they were not receiving any mail? We hope all will subject their actions to a close examination of their relationship to the ethical codes of our professions and individual conscience. A profession that depends on law for its recognition and license is bound to fidelity to what is sound in the law. Social work is perhaps unique in that it advocates for those not served well by the law. And we rely on the members of this profession to protect our humanity and personality in the dark place of the law. □

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