

MACCABAEAN LECTURE IN JURISPRUDENCE  
OBLIGATION AND OBEDIENCE TO LAW<sup>1</sup>

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A BETTER title for this Lecture would be 'The Morality of Disobedience to Law'. It will deal with a question of morality rather than of jurisprudence properly so-called. The question occurred to me on reading Lord Devlin's much discussed Lecture of 1959. He treated a question of jurisprudence, namely, the proper function of the legislator; as a counterpart to his thesis I want to consider a question of morality, namely the proper attitude of the subject.

Let me first say, for this is relevant to my argument, that after reading and re-reading Lord Devlin I find myself not fully convinced by his argument. If I understand him correctly, he maintained that acts may be criminally punished provided that they are sinful and 'beyond the limits of tolerance' and he asserted that the presence of disgust is 'a good indication that the bounds of toleration are being reached'. This needs closer analysis. There are some acts whose public performance people may find shocking and, I suppose, disgusting, like undressing in public. There are some things which, even if not publicly exhibited, can be disgusting even to think of, like excrement and vomit, and, lest you think I am forgetting the element of sinfulness, I must remind you that vomiting may be induced by drunkenness, and drunkenness is gluttony, and gluttony is one of the seven mortal sins. I agree that a man might justifiably object to the sight of these evacuations being forced on his eyes, but no one is compelled except by his own imagination to brood over the thought of them being performed in private. There are forms of sexual intercourse which may be practised in private between husband and wife, *extra legitimum matrimonii usum* and therefore sinful, and, to many, disgusting even to imagine. Here, again, we have private acts which are both sinful and disgusting. Are these acts to be forbidden by the criminal law? Can we think of any other acts which are sinful and may be so disgusting that the ordinary

<sup>1</sup> I gratefully acknowledge the helpful criticism I have received from Professor H. L. A. Hart of Oxford and Professor R. S. Summers of Oregon.

man feels that their 'mere presence is an offence' calling for criminal sanctions? I can think of possible instances which may satisfy the test but make me doubt whether the test itself is conclusively valid. Fornication is sinful; many white people are disgusted by the idea of sexual intercourse between white and black, and Hitler's followers found disgusting the idea of sexual intercourse between Aryan and Jew; the argument from disgust could be used to support racial laws on sexual conduct, and I am uneasy about arguments that lead to a conclusion for racial discrimination—I feel that they need to be put to strict proof.

Another point where I find difficulty is that those who say with Lord Devlin that 'society will not exist' unless it has a 'common morality' and enforces this morality by law seem to make at least two assumptions which need examination:

First, they assume that the empirical existence of a common opinion—which is what they seem to mean by 'morality'—constitutes an ethical justification for legal enforcement. I agree that, if such a common opinion exists, it has practical importance. A law in conformity with it is likely to be followed and a law in contradiction is likely to be disobeyed. So at least say the motorists. But common opinion may approve, and even command, what I consider to be morally, that is, ethically, wrong. For centuries practically everyone in Europe approved the laws for the burning of witches. Religion and public opinion in ancient Carthage approved the burning alive of infant children. Thuggee commanded murder as a religious duty.

In the second place, they assume that they can in fact discover, not only in a small closed traditional society but among fifty million people, a common stock of ideas of right and wrong on at least all fundamental points of conduct, and, further, they assume that this community of ideas will somehow be co-terminous with the jurisdiction of a legal system. But the moral values of the West Highlands do not always coincide with those of the West End, and recent experience has shown that when there does exist, as there may exist in a small traditional community, a strongly held common opinion on right and wrong, the law may remain indifferent. Last autumn British Railways proposed to introduce a Sunday car-ferry service to the Isle of Skye; a Commission of the Free Church of Scotland unanimously resolved that 'to develop tourism at the expense of loyalty to the Lord of the Sabbath' would be 'to force an unacceptable way of life upon a Godfearing and Sabbath-loving community'; a majority of the islanders signed a petition against

the Sunday ferry, but no heed was paid to them, and ten days ago the first ferry sailed. A number of islanders, led by a minister of the Church, obstructed the passage of cars coming off the ferry.<sup>1</sup> They chose in conscience to break the law of the State to prevent what they saw as a breach of the law of God.

It appears to me, then, that the fact that others are intolerant of, even disgusted by the thought of, my conduct does not necessarily prove that I am wrong, still less that, even if I am wrong, I deserve criminal punishment, but only that there may be conflict between what I believe to be right and what is approved by public opinion, or by the law, or by both; further, that there may be conflict between what is held obligatory by the opinion of a community and what is approved by the law.

Furthermore, 'morality', in the peculiar sense of public opinion, may change with time. Many people in more than one country have recently asserted a 'new morality' in sex, according to which any form of sexual intercourse, at least between consenting adults, not only should not be punished by law but is held to be not even sinful or wrong in itself.<sup>2</sup> So far as concerns the law, this 'new morality' is on most important points in accordance with the law of most European countries, but not with our law, which treats homosexual intercourse between males (not between females) as a crime, nor with the laws of most of the United States of America, where extra-marital

<sup>1</sup> The *Scotsman* on various dates during November 1964 and June 1965. . . . On the other hand, Mr. Tom Driberg, M.P., claims that the views of The Lord's Day Observance Society 'would be repudiated *with disgust*' (my italics) 'by the overwhelming majority of Christian people' (*Observer*, 21.2.65). Which is better entitled to speak for Christian people—The Free Church of Scotland or Mr. Driberg? . . . If, which I do not concede, law is to be based on 'morality' in the sense of public opinion, the basis might be made firmer by employing a system of local option and allowing each county, or parish, to vote for itself: alcohol or no alcohol; Sabbath observance or no Sabbath observance; homosexuality or no homosexuality.

<sup>2</sup> When I was preparing this Lecture I noticed the following newspaper paragraphs: *The Times*, 12.6.64 (Professor Kruithof of Belgium on 'a new code of morality'); *ibid.*, 1.9.64 (resolutions of an international congress of 500 jurists calling for 'fewer penalties on sexual behaviour'); *ibid.*, 8.10.64 ('Oxford supports Wolfenden'); *Observer*, 6.9.64 (Dr. Ullerstam of Sweden advocates 'the final divorce of sex and morality'); *ibid.*, 11.10.64 (for the Japanese man 'sex is a casual relaxation to be indulged like hunger'). Cf. C. H. and Winifred M. Whiteley, *The Permissive Morality*, 1964; these writers, taking it as a fact that among many young people in this country many of the traditional rules of conduct in sexual and other matters no longer command respect, urge, as I do, that the maintenance of moral standards is still possible and necessary.

heterosexual intercourse, even in private, is a crime by statute.<sup>1</sup> Now I want emphatically to make the point—and this will lead me to my main theme—that this ‘new morality’ does not, for all that may be said by its muddle-headed proponents or its muddle-headed opponents, destroy all morality. It still leaves scope for, it still requires the application of moral principles. There are seven mortal sins, of which *Luxuria*, lust, is only one.<sup>2</sup> If you drop one from the list, that still leaves six sins, with corresponding virtues. These mortal sins are all defined relatively, in terms of *inordinatus appetitus*, except *Accidies* and *Luxuria*, which latter is ‘*omnis delectatio venerea . . . extra legitimum matrimonii usum*’. For the ‘new morality’ I should like to propose that *Luxuria* might be redefined in terms of ‘*inordinata delectatio*’, excessive indulgence. On this definition a morality of sex could still be constructed. Even if sex between casual acquaintances became as easily acceptable as ordinary conversation, sex would still have varying degrees of seriousness, just as conversation ranges from the chat of fellow-passengers in a train to the intimate confidences of life-long friends. In sexual relationships, marital or extra-marital, heterosexual or homosexual, it is possible for the parties to exercise, and for the moralist to require, consideration for the other person, self-restraint, fairness, courage, moderation—*caritas erga proximum*, *prudencia*, *iustitia*, *fortitudo et temperantia*.

This brings me to my theme. Morality, by which I mean the guiding of conduct by ethical principles, is possible, and necessary, even if we no longer accept one of the traditional precepts of moral theology; morality is possible, and necessary, in conduct which is, in a particular country at a particular moment, contrary to public opinion and to the positive law; and my question is: How, and to what extent, is the morality of my conduct affected if I know that such conduct is or may be contrary to the current positive law? Does conduct which is not otherwise wrong become wrong if the law forbids it? Am I under any moral obligation to obey every rule laid down by the law, just because it is the law?<sup>3</sup>

<sup>1</sup> E. Cahn, *The Moral Decision*, 1959, p. 89; H. L. A. Hart, *Law, Liberty and Morality*, 1963, p. 26. These statutory prohibitions, I am told, are seldom enforced. If this be so, the United States authorities must agree with me that where the law is unjust and absurd it may be permissible to disobey it, and this even where by Christian standards disobedience is sinful.

<sup>2</sup> A. Tanqueray, *Synopsis Theologiae Moralis et Pastoralis*, 11th ed., tom. ii.

<sup>3</sup> Blackstone thought not. See *Comm.* i, Introd. § 2, pp. 57–58: ‘But in relation to those laws which enjoin only positive duties, and forbid only such

The question can be discussed on various hypotheses in various terms. I can discuss it only in the light of such principles as to me seem to command respect, and I know that I thus open myself to the criticism that my morality is subjective and unproved. I do, however, offer not as a private opinion but as a universal proposition that, if a man is at all conscious of himself as a moral being, an autonomous man able to choose between right and wrong, his first moral obligation, inasmuch as he is a rational being, is to think, as honestly and clearly as he can, what it is right for him to do. And I believe the starting-point is that, for any man except the solipsist, such consciousness of self involves consciousness of others as subjects (Del Vecchio's *alteritas*)<sup>1</sup> and thus an obligation to have regard to the personality of others, indeed, to have regard to the feelings of all sentient creatures. I suggest, too, that a man should not wait for the emergency to arise but should at all times, as he gains experience of life, be reflecting upon his conduct and finding, or forming, his own principles which will guide him in the emergency. As for my own principles, my own morality, it is non-theological (at least, I cannot bring myself to believe in commands issued by God *totidem verbis* from a thundercloud on a mountain-top); teleologically orientated in that I am inclined to judge actions by their consequences and to praise, pardon, or blame the doer according to his view of the consequences; utilitarian, in that I attach considerable importance to pleasure, or satisfaction, and to pain (physical or mental), although I hesitate to say that the pleasure-pain test is the only test, and I believe that in a particular situation several 'goods' and harms of different kinds may have somehow to be weighed against one another. I cannot prove the validity of these my principles, but I commend them by suggesting that, when a man is trying to think out what it is right for him to do, it is possible to make some calculation of the consequences of alternative lines of conduct in terms of them. With such principles it is possible, up to a point, to discuss rationally whether in a given situation it is better to obey or to disobey the law.

The topic of disobedience to unjust law has been under dis-

things as are not *mala in se*, but *mala prohibita* merely, . . . here I apprehend conscience is no farther concerned, than by directing a submission to the penalty, in case of our breach of those laws . . . these prohibitory laws do not make the transgression a moral offence, or sin: the only obligation in conscience is to submit to the penalty, if levied.'

<sup>1</sup> G. Del Vecchio, *Justice*, 1952, ch. vii.

cussion for more than two thousand years, but most commonly it has been treated without explicit distinction between the question of general obligation to obey the law (which has most often been seen as a question of the legitimacy of the ruler) and the question of the subject who accepts in general the authority of the system under which he lives but holds a particular rule of that system to be unjust.<sup>1</sup> Lest what I am about to say be misconstrued as a general declaration of rebellion, I ask you to remember that I am concerned with the latter question. My principles compel recognition of the general need for order and stability—this is a sort of ground-bass to all my arguments. I am going to discuss only some situations of doubt, marginal cases, where there seem to be good reasons for disobedience to a particular rule and where—save in one of my instances—the consequent danger to the stability of the system seems to be indirect, remote, and comparatively slight.

Let me attempt a systematic analysis. The positive law may:

(1) FORBID what I consider to be not wrong but innocent, beneficial, or even morally obligatory upon me, (a) in respect of myself, for instance, the satisfaction of an appetite, a health-giving hill walk which involves trespass on private property, an act of worship which I hold to be my religious duty, or (b) in respect of consequences to others, for instance, helping a runaway slave, performing an abortion for therapeutic reasons. My choice lies between (i) submission, (ii) secret disobedience—if this be possible, (iii) open disobedience, which has more or less the character of protest;

(2) ALLOW what I consider wrong, for instance, Sunday motoring, the sale of alcohol, female homosexuality, the manufacture of nuclear weapons. My choice lies between (i) acceptance of the law for the meantime, while I attempt (if I feel this my duty) to dissuade people from the wrongful conduct and to persuade the legislator to change the law, (ii) direct illegal opposition, for instance, sitting down in the roadway to stop the Sunday motorist, (iii) indirect illegal opposition, that is, the

<sup>1</sup> The problem of the unjust particular law has recently been discussed in the United States of America with reference to racial discrimination and 'civil disobedience'—see *Law and Philosophy: a Symposium*, ed. S. Hook, N.Y.U.P., 1964, and the following articles; R. Wasserstrom, 58 *Journal of Philosophy* (1961), p. 641; H. A. Bedau, *ibid.*, p. 653; S. M. Brown, *ibid.*, p. 669; J. R. Carnes, 71 *Ethics* 1960-1, p. 14. I note that for an American there may be a double problem: first, whether a particular act of legislation is constitutional, that is, is really legal; secondly, whether, even if it is constitutional, there may be a moral right or even moral obligation to disobey it.

commission of illegal acts by way of protest designed either to induce the legislator to change the law or to induce a change of conduct on the part of the people concerned, for instance, sitting down in the roadway to induce the Government to change its policy on nuclear weapons;

(3) **COMMAND** what I consider wrong, for instance, the payment of Ship Money, military service, compulsory vaccination. My choice lies between (i) submission, to avoid the scandal of disobedience, although I may try to persuade the legislator to change the law, (ii) passive resistance, (iii) active resistance.

In making my choice what considerations should I as a moral agent take into mind? From my standpoint it seems to me that, setting in one scale what I deem to be the evil of the law and the good that may be obtained by my disobedience, I must weigh against that the harm that may be caused by my disobedience.

First, of course, if I am caught disobeying, I may suffer punishment and disgrace. The direct harm to myself I may ignore, but I must not ignore either the harm and pain that may be caused to my dependants and my near ones, or the loss to the world if my conviction prevented me from producing a work of art or disqualified me from continuing a professional career.<sup>1</sup>

But I must consider also the harm which, even if I am not caught, may result from the act of disobedience itself. This may be:

(a) Directly to myself, as in suicide, self-mutilation, drug-taking, or directly to others, as in assault, theft, fraud;

(b) Indirectly to myself, by fostering in myself disrespect for the law and a habit of disobedience, or to others, by fostering in them similar disrespect and disobedience. Lord Devlin's Lecture reminds me that I should add the possible harm to others by reflex effect of shock, horror, or disgust, if I commit a bloody murder or a disgusting act in their presence, or, more remotely, if I talk or write about such acts, or, still more remotely, if people are allowed to imagine that somewhere I may be committing them.

On the argument of 'the bad example' I would comment (i) that it can apply only if my disobedience becomes known to other persons; (ii) that it may be more potent in some cases than

<sup>1</sup> In this sense one can talk of a 'duty to oneself', regarding oneself as a means to an end. But it is a dangerous notion. The selfish man may easily persuade himself that his 'duty to himself' overrides his plainest duties to other people.

in others—the motorist who sees me parking where I ought not is very likely to imitate me, not so the man who learns that I have committed a forbidden sexual act to which he himself has no natural inclination; (iii) that the extension by analogy is likely to be limited—the man who learns that I have committed with impunity a forbidden sexual act may indeed be encouraged to venture on a sexual act of a kind to which he feels a temptation, and the man who sees others around him ‘getting away with’ petty acts of dishonesty may be encouraged to commit such petty acts of dishonesty as opportunity places in his way, but how many ordinary reasonable men, as distinct from perversely generalizing philosophers, will argue straight from the fact that one kind of offence appears to be permissible to the conclusion that every offence of whatever kind and whatever gravity must be deemed to be permissible? These philosophers, indeed, if such there be, must be surprised that among all the Church of England clergymen who have broken the law governing the forms of public worship, and all the congregations who have assisted at their acts of disobedience, there have been so relatively few treasons, murders, rapes, and robberies.

On the argument from ‘fostering disrespect’ I would offer the conjecture that the solution which some people favour for some of our problems of conduct, namely, that the law should prohibit but the authorities should hardly ever enforce the law, seems even more apt to bring the law into disrespect.

Let us consider cases. My principle of respect for other persons makes it unnecessary to linger over the common criminal who by assault, theft, or fraud does direct harm to another or by breach of the peace or fraud on the revenue does obvious harm to the common good. Here the obligation to obey the law is almost overwhelmingly strong, although there may still be something to be said for the man who steals to feed his starving children.

Turning to the more difficult cases, the marginal cases, let us begin, since Lord Devlin gave him to us as the starting-point of our discourse, with the person inclined to a forbidden sexual act. Seldom, if ever, has the law forbidden such acts of purely ‘self-regarding’ character (Onan was punished for refusal to fulfil a family duty);<sup>1</sup> it might be justified in doing so if they were proved to be self-incapacitating, like drug-taking. Acts of bestiality often, not always, inflict pain on another creature.

<sup>1</sup> Gen. xxxviii. 8–10.



But most sexual acts are performed between two human beings. This complicates the problem. Let me try to put it in its simplest essential terms. *X* invites *Y* to a mutual sexual act. Both are adult. There is no use of force or drugs, not even an indirect 'softening-up' by drink, erotic talk, or the promise of reward. In parenthesis, what, to one who believes in respecting the free will of others, is the morality of obtaining consent by 'softening-up'? In non-sexual matters it seems to be in accordance with public opinion and with the law that, within certain limits set by the law of bribery, false pretences, and so on, I may persuade a man into a business deal by entertaining him to lunch and exciting his cupidity by talk of wealth. But in our statement of the problem let us exclude the complication of consent obtained by such inducements. Let us suppose that *X* can persuade *Y* by pure reasoning from premisses already accepted by *Y*, or that there is no need of persuasion because *Y* through inclination or indifference is already willing to accede to a mere invitation. Let us further suppose that the ensuing act is performed in private.<sup>1</sup> The act will, of course, to a Christian be sinful unless *X* and *Y* are man and woman, husband and wife, and the act is *intra legitimum matrimonii usum*. It may be of a kind forbidden by law. It may be of a kind disapproved by 'morality' in the sense of public opinion. What has morality, in the other sense, to say of it?

*X*, it seems to me, is certainly under an obligation to review the possible consequences in terms of harm that may result in the ways I have attempted to analyse. If the act is illegal, he must consider the possibility of detection, punishment, and disgrace and he must bear in mind that these consequences may fall not only on himself but also on *Y*; I doubt if he is justified in proceeding unless *Y* also has a reasonable apprehension of these consequences and is equally prepared to take the risk. If the act is one of normal but extra-matrimonial heterosexual copulation, the parties must also take into account the possibility of the resultant birth of a child who will suffer the stigma

<sup>1</sup> When I attach importance to the privacy of the act I may be accused of preaching the morality of Tartuffe:

Le scandale du monde est ce qui fait l'offense,  
Et ce n'est pas pécher que pécher en silence.

I am, however, making a distinction ignored by that subtle pleader. Secrecy makes no difference to the sinfulness of an act *per se*; but if we are judging the act *quoad effectus* secrecy can, and in this case I think does, make a difference. Cf. E. F. Carritt, *Morals and Politics*, 1935, p. 213.

of illegitimacy and, it may be, the further stigma of mixed racial origin. Possible consequences to other parties must be considered, for instance, if the act is adulterous, the distress to an innocent spouse or the impairment of matrimonial confidence by the practice of deceit. As for the more remote consequences attributed to a specifically illegal act, that *X* and *Y* may be encouraging disrespect for the law, I should venture in this context the opinion that persons who indulge themselves *contra legem* in matters of sex may indeed be encouraging themselves to further breaches of this particular prohibition but not to other sexual acts to which they have no natural propensity and still less to illegal acts of non-sexual character. If they boast about their act it is likely to be only among persons already sympathetic. (Propaganda and proselytizing raise another question—the relevant law may be found in the rules against obscenity and in the *Ladies' Directory* case.)<sup>1</sup> On the other hand, a reluctant abstention, through fear of punishment, from an act in which the agent can see no harm is also apt to breed resentment and disrespect for the law. Moreover, many of the possible harmful consequences of forbidden acts attach equally or in greater degree to forms of sexual indulgence which are not legally forbidden, and the argument based on 'setting a bad example' also seems to apply with equal force to these. The legal prohibition, then, introduces one factor, the possibility of punishment for oneself and one's partner, which must be taken into account, but this seems to me no more weighty than some of the other factors affecting the morality of sexual acts and I find it hard to believe that there must be some distinct and peculiar moral obligation to refrain from those particular forms of sexual acts which happen to be forbidden by the positive law.

Take now some cases where the law commands what I consider to be wrong. I might find an easy example in the German commanded by his Nazi leaders to assist in the massacre of Jews or of prisoners of war or of civilians in an occupied country. Even the most positivistic legalist might agree that the recipient of the command was under a moral obligation at least to consider whether he ought to disobey because the act commanded, although in accordance with the law of his own State, might be contrary to some higher rule of international law or religion or morality, and, if he considered the question in terms of my morality, he would have to weigh on the one hand the dubious harm to his fellow-countrymen if he set an example of

<sup>1</sup> *Shaw v. D. P. P.*, [1962] A.C. 220.

disobedience and on the other hand the dubious good which his obedience would do to them and the indubitable harm to the victims. Other examples are the conscientious objectors to military service (to whom our law allows a carefully qualified legal exemption) and those who refuse a requirement of vaccination or medical treatment. How are these cases to be decided by one who weighs the consequences? I can only suggest a few relevant points. The defection of the objector to military service hardly touches any other individual directly and the harm he does to the totality of his fellow-citizens divides itself into a small fraction of potential harm to each one. The man who refuses vaccination in time of epidemic makes himself a nearer and more lively source of danger to his neighbours and, if he refuses it on behalf of a child for whom he is responsible, he puts that child in danger of illness and death. The man who refuses medical attention for himself may endanger his own life (which may or may not be of value to others) and if he refuses it for a child or other helpless person he puts that person in danger. There is also the consideration that, if the refusal is publicly known, others may follow and so the harm will spread. What is added if the refusal is actually contrary to a rule of positive law? Perhaps this, that the existence of the rule at least gives notice to the objector of the probable harmful consequences and so requires him actively to consider what is his duty in the matter.

Take now some cases where it appears to the agent that his breach of the positive law would result in a clear and considerable good. Again let me begin with an easy example. Suppose I am staying in a remote country house where someone is taken seriously ill during the night, there is no telephone, and the quickest way of reaching the doctor is for me to bicycle to the doctor's house, but I have no rear lamp on my bicycle. Will you grant me without further argument that I have a moral right, indeed obligation, to break the law and bicycle as fast as I can to the doctor's house? Similar, although more complex, are the problems of therapeutic abortion. The positive law speaks with varying voice in different countries but it is clear that in many countries there must arise cases where a surgeon feels it his professional duty to operate with at least grave doubts about the legality of the operation. If he operates, he risks punishment, the ruin of his career, and the consequent diminution of his capacity to serve others; he may involve his colleagues and assistants in the same consequences; he is setting an example which others may extend, perhaps to the length of 'mercy killing'.

Moreover, even if he has his patient's consent, he is, if the foetus is viable, interfering destructively with a potential life. On the other hand, he has a duty to do all he can for the life, sanity, and health of his patient. This is a very difficult problem of conscience. There is weight in the consideration that the operation is or may be against the law, because of the harm which disobedience may cause to oneself and others; yet many would feel that there was more weight on the other side and that the duty to the patient must come first.

A case where the balance of conscience may be still more heavily weighted in favour of disobedience is that of the man who believes that it is his religious duty, required of him by the law of God, to do something which the law of the State forbids, for instance, to worship God in a particular way. Such has been, on occasion, the problem of the Roman Catholic and of the Scottish Covenanter. Now, I would not say that all laws restricting religious freedom were unjustified. I should myself favour a law restraining the Thug, whose religion commands him to murder an unwilling, unco-operating victim, just as I should support a law against homosexual or heterosexual activities involving rape, assault, or other interference with an unwilling victim. I should myself not go so far as Bishop Bilson who, denying the claim of Catholics to be allowed to conduct their own deviant worship in private, wrote (I note the resemblance of his language to that which it is nowadays fashionable to address to the private sexual deviant): 'No corner is so secret, no prison so close, but your impiety there suffered doth offend God, infect others, and confirm your own frowardness.'<sup>1</sup> But whether in such cases we approve of the law or not we can see that it must present a problem of conscience for the sincere religious believer.

Let me take a case which will make a transition to another group of problems. In some parts of Sicily there is much unemployment. The Constitution promised a 'right to work', but the administration of the law is dilatory, and public authorities may be inefficient, bankrupt, or corrupt. The reformer Danilo Dolci led out seven hundred men to repair a road by voluntary labour.<sup>2</sup> This involved some illegal trespass, for which Dolci was sentenced and imprisoned. Did Dolci do wrong by breaking the law when he took direct action for a good end? I must make

<sup>1</sup> *Christian Subjection*, 1585, cited by W. E. H. Lecky, *History of the Rise and Influence of the Spirit of Rationalism in Europe*, ed. 1910, vol. ii, p. 40.

<sup>2</sup> In 1956. See now J. McNeish, *Fire under the Ashes*, 1965.

the point that, if there is an obligation to obey the law not out of consideration of consequences but absolutely, simply because it is the law, it can make no difference that the law in a particular instance is inefficient or corrupt. Respect for law *per se* means respect for the law without regard to its goodness or badness, respect for bad law as well as for good law.<sup>1</sup>

Dolci's breach of law, even if merely incidental to his main purpose of getting a necessary road built, had a consequence which was perhaps not unwelcome, in that his trial gave publicity to the cause for which he was working. This element of desired publicity was present also in Dr. Bourne's case.<sup>2</sup> So we come to the cases where the breach of law is committed expressly and primarily to obtain publicity, where, in Gandhi's words, the lawbreaker 'invites' the penalty. Thus Gandhi deliberately, ceremoniously, and publicly broke a law which he considered unjust in itself and symbolical of the injustice of British rule in India. In countries where there is racial discrimination, public acts of protest have been made, in the United States by the 'sitters-in' and the 'freedom-riders',<sup>3</sup> in South Africa and Southern Rhodesia by the African Nationalists and their supporters. Sometimes the protesters are asserting a legal right against hostile public opinion; sometimes they are breaking the law. They may break the particular law to which they object, as did Gandhi, or they may break a law which is only indirectly connected with the theme of their protest, as when a century ago Thoreau refused to pay taxes because he disapproved of the purposes on which the Government would spend the money, or they may break a law which has no connexion with it at all, like our C.N.D. 'sitters-down', who obstruct the traffic not because they object to the traffic laws but to gain publicity and, they hope, attract sympathizers until they create a body of opinion which may influence the policy of the Government.

I would venture the remark that where the protesters are asserting a legal right against hostile public opinion there is actually more likelihood of immediate harm, in disorder and rioting, than there is where they are breaking a law in presence

<sup>1</sup> Similarly, if I am required to surrender my own judgement and fall in with 'common morality' (in the sense of public opinion), I must join in Bingo, bear-baiting, and baby-burning, when public opinion demands my participation.

<sup>2</sup> [1939] 1 K.B. 687.

<sup>3</sup> On whom see the articles cited *supra*, p. 342, n. 1.

of a sympathetic or indifferent public. Similarly, as I said earlier, some forms of sexual conduct within the law may be more harmful than some which are forbidden. And a public service may be as badly disrupted if the servants 'work to rule' as if they strike in breach of legal obligation.

We are, however, at the moment considering the protesters whose protest takes the form of breaking the law. Their activities often cause no more than inconvenience to others, but in some places protesters have resorted to acts of violence and sabotage. Moreover, even if the harm directly caused is slight, they may, in so far as the point of their activities is publicity, do harm indirectly by stimulating the young and thoughtless to irresponsible disobedience and consequent suffering. (The risk of imitation would seem to be increased the further the primary act of disobedience is detached, in time, place, or kind, from the specific object of the protest.) They usually assert in justification that there is no constitutional way in which they may hope effectively to achieve their beneficent purpose.<sup>1</sup> Even if this assertion is true, they still ought to be sure that their chosen way is the best among possible unconstitutional ways, and that the purpose is valuable enough to outweigh the incidental harm.

Finally the traitors.<sup>2</sup>

The wickedness of treason, objectively considered, depends on the fact that most men have only limited altruism, which extends not to all the rest of mankind but only to groups related to them by blood, propinquity, or association of thought and effort, and that these groups sometimes conflict, even violently, with one another. Most men believe that a man ought to have (as he normally does have) a stronger affection for the groups to which he most nearly belongs; they also believe, with less obvious reason, that if he belongs simultaneously to several groups, bound by ties of different kinds, his highest loyalty should be to the political group called the State. Hence, if the members of another group are, or may be in the future, trying to kill or subjugate the members of his State, it is held wrong of him to do anything which may further the victory of the other group, even if he is convinced that its victory would be for the greater

<sup>1</sup> So the African leaders tried at Pretoria (*The Times*, 13.6.64) and Bertrand Russell on behalf of the C.N.D. (*New Statesman*, 1961, p. 245); see also C. Driver, *The Disarmers*, 1964.

<sup>2</sup> On whom see Rebecca West, *The Meaning of Treason*, 2nd ed., 1952. I am not using the word 'treason' in the technical sense of English criminal law.

good of mankind, and the law of all States treats such conduct as one of the gravest of crimes.

The psychological causes of treasonable acts are various. Some men are forced into treason by blackmail, some are tempted into it by gain. Some appear to be natural criminals, for whom treason is just another way of making easy money, and some are psychological misfits who hope to obtain from the other side the recognition which their own fellows deny them. But there is also the conscientious traitor, who believes that the way of life favoured by the other group ought in right to prevail and believes this so strongly that he holds it his duty to help the other group even in ways forbidden by the law of his own State. Examples may be found among communists today or among English Catholics at the time of the Reformation. The traitor's acts may be of momentous consequence, as when he betrays to an enemy the defence secrets of his country, or comparatively trivial, as when he gives warning of the approach of the police to an illegal political or religious meeting, but they are in principle the same—he is putting his loyalty to the other group above his loyalty to his own State. How do we judge him? Do we morally condemn him if, after the most sincere and thorough examination of conscience of which he is capable, he has decided that this other loyalty must prevail? We may remember that Sir Walter Scott says that treason often 'arises from mistaken virtue and therefore, however highly criminal, cannot be considered disgraceful' and that this view 'has received even legislative approval, in the exclusion of treason and other political offences from international arrangements for extradition'.<sup>1</sup> The traitor must, however, in my view, consider and overcome arguments more weighty than those confronting the other potential lawbreakers whom we have studied. The man who betrays his country to an enemy is setting himself against not one particular rule but against the whole order of his political society. His act is not private or self-regarding; its consequences may and are meant by him to extend to all his fellow-citizens, at all points of their lives. He cannot reasonably estimate the harm he may do; the betrayer of King Log may end by setting up King Stork. Further, the traitor may be not only disregarding his general duty to make return to the community which has protected and nourished him; his treachery often involves the breaking of solemn express assurances which he has personally given, under the Official Secrets Act or when on naturalization

<sup>1</sup> C. S. Kenny, *Outlines of Criminal Law*, 12th ed., p. 8.

he took the oath of allegiance, and, morally, there is something to be said for keeping promises.

What conclusion shall we come to?

In the world of today we cannot close our eyes to the possibility of conflict of principles and conflict of allegiances. We cannot maintain the complacent positivist belief that only the law of the State is law properly so-called and our duty is simply to obey it because, even if it should be wrong in one or two points, these will soon be corrected by the march of progress. We know that the law can be used as an instrument of policy and as such it is exploring and experimenting and may often go wrong. We have heard of, we may have met, the victims of laws that are oppressive, brutal, and degrading. We believe that the State must be bound by international law and that Human Rights may stand above positive law. We know of religious and political creeds which claim priority of allegiance over the State. Thus, whatever be our own attitude to the State and its law, we cannot accept it as obviously and unquestionably self-sufficient and self-justifying. As an individual I must be prepared to face, if occasion arise, the question: How far ought I to obey the law and why?

If, having religious faith, I believe that I have clear knowledge of God's commands, I must obey these above all others, and, if I believe that the authority of earthly rulers comes in some measure from God, I must obey these rulers as far as their authority from God extends. These will be my compelling arguments for obeying the law of the State or, as the case may be, disobeying it and accepting martyrdom.

Lacking such belief, I, *moi qui vous parle*, can accept a moderate and tempered version of the argument of the *Crito*, that I ought to make some return to the State for its protection and nourishment. I am under an obligation, and a strong obligation, not to weaken the bonds of any society in which I freely live, and to refrain from public disobedience *propter vitandum scandalum vel turbationem*.<sup>1</sup> This argument, however, has little or no weight in application to private acts of individuals without significant external repercussion.

I can allow that in a case of doubt, where I do not see my duty clearly, where arguments pro and con seem equally

<sup>1</sup> St. Thomas, *S.T.*, Ia IIae, 96. 4. On St. Thomas and Suarez I have found helpful an article by R. Darrell Lumb, in *Australian Studies in Legal Philosophy*, 1963, Beiheft Nr. 39, 1963, to *Archiv für Rechts- u. Soz. Phil.*, p. 195.



balanced, there may be a *prima facie* case for obeying the law of the State, because it may be presumed that the gentlemen in Whitehall and the gentlemen at Westminster know best, 'quia reguntur altiori consilio et possunt habere rationes universales subditis occultas'.<sup>1</sup> The legislator may be more intelligent than I am; he certainly ought to be better informed. Yet a wide view of history shakes my confidence. The victory of the legions may establish a commander as *Princeps* whose *placita legis habent vigorem*, a cruel degenerate may inherit a throne of absolute power, a rigged election may set up a dictator, an honest democratic election may return a Government with a tiny Parliamentary majority and a minority of supporters among the electorate (the tyranny of the majority may be the tyranny of a fictitious majority). Even in a Parliament which has been democratically elected and is popularly supported, legislation may be hastily passed without time for study and discussion. Even if our present legislators are learned and wise and enjoy popular support, many of our laws were made when social conditions and the 'climate of opinion' (if we are to take account of that) were different, and there have been ages in which both the law and the 'climate of opinion' agreed in what now seems folly, superstition, and cruelty. Considering all these things, I feel that the presumption in favour of the law being wise and right is not at all times very strong.

It is said that, even if the case for obedience is not always very strong, it is at its strongest in a democratic society which allows me to criticize and to seek reform of the law; here, in Bentham's words, I may 'obey punctually and censure freely'. This consideration should certainly have weight in the cases where protest is the motive for disobedience, but it does not help the surgeon contemplating an operation which therapeutically is necessary and urgent but is against the law—is he bound to refrain from operating because he is free to write a letter to the Press saying that the law ought to be changed? And how much real hope have I, a private citizen, that I can induce our legislators even to debate a change in the law? However strongly I feel, I may lack the means of persuasion. Not every man has the pen of a Bentham or the propaganda resources of an organized pressure group. The voice of the individual has little power in the modern State.

What then am I, the individual, to do? Let me repeat the main points I have tried to make. By no means every command

<sup>1</sup> Suarez, *De Legibus*, I. 9. 11.

or prohibition of the law is going to raise for me a serious problem of obedience. When I feel doubt, I may admit *some* presumption that the law is more likely to be right than my own unaided opinion, and, even when I think the law is wrong, I acknowledge a strong, but not absolute, obligation to obey, or at least not openly to disobey, *propter vitandum scandalum vel turbationem*. But even in 'the best-regulated societies' (if you will allow the cliché) there may arise situations, such as I have tried to analyse, of serious doubt for the individual conscience. If a man in such a situation passively lets his action be determined by immediate external pressure or momentary impulse, I do not respect him as a moral agent. A moral man should use all his effort, not with contempt for others, but humbly, remembering that he may be mistaken and being on his guard against the undue influence of his personal desires, to find his own principles and decide for himself what is right. If he will not make the effort, then he had better stick to the rules made for him by others.<sup>1</sup>

I have tried to show how I think a man of humanistic, altruistic, and more or less utilitarian principles might address himself to some situations of doubt. But not all men hold such principles. What should I say of a man who, after sincere reflection, has convinced himself that his supreme rule of conduct must be always to seek his own advantage, or always to follow his impulse of the moment? It seems to me that such a man, if he wants to live in society, has gone wrong somewhere in his thinking, because men cannot live together without some measure of altruism and of consistency in the conduct of each. If such a man is sincere and acting according to his best lights, like the conscientious Thug, he may be at least morally forgivable, but he certainly has no ground for complaint if other men choose to restrain his activities.

To live as a moralizing anarchist (which I suppose is what I am) is easier if one's natural inclinations run on lines approved by law and opinion and if one is content with the *fallentis semita vitae*, cultivating one's garden and in one's little world making decisions which affect only oneself and a few close neighbours. It is harder if one's natural inclinations are unorthodox or one's

<sup>1</sup> Yet even the most unreflective person may on occasion be faced with an agonizing choice, for instance, the wife whose criminal husband seeks shelter: is she to surrender him to the law or to follow the dictates of natural affection (possibly reinforced by the opinion of her family and neighbours)?

decisions are far-reaching in effect. But the obligations are the same.<sup>1</sup>

<sup>1</sup> After I had written my Lecture it struck me that my eyes had been turned on problems presented by rules of 'public law'—criminal prohibitions, commands to pay taxes, to perform military service, and so on. Are the rules of 'private law'—the law of contract, reparation, property—likely to present similar problems? This would need discussion at length. On first consideration it occurs to me that in this sphere, where the rules *ad singulorum utilitatem pertinent*, there is a strong argument on grounds of *utilitas* that there should be a rule and that, even if it is not perfectly just, parties should abide by it *propter vitandam turbationem*; also that, in most cases, there is another person who is relying on my acting in accordance with the rule.