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Book Review Submission

A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL by CANDICE

DELMAS (New York: Oxford University Press, 2018, 295 pp., hb £19.99)

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A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL by CANDICE DELMAS
(New York: Oxford University Press, 2018, 295 pp., hb £19.99)

Civil disobedience has been a stale topic for legal theorists in recent decades. John Rawls' classical formulation, with its requirements for publicity, nonviolence and the acceptance of legal punishment on behalf of the dissenter, is old rope in countless academic tugs-of-war between traditionalist and more expansionist approaches, without much distance being made on any side.¹ Nowadays, a more interesting approach has been to examine disobedience writ large. In the context of anti-fracking activism in the UK, the *gilets jaunes* protests in France and Occupy movements internationally, the politics of disobedience are as relevant now as they were during Rawls' time, in the era of the US civil rights movement and anti-Vietnam war protests. The theoretical groundwork for framing these modern protests, however, needs to catch up with their transnational and antagonistic potential. Candice Delmas' theory for justifying 'principled resistance,' which may include secrecy, evasiveness and even violence, is therefore a welcome contribution that reinvigorates the topic, drags it into the 21st century, and indeed threatens to turn it on its head entirely.

Fundamentally, Delmas asks why we obey the law in the first place. She identifies several grounds of political obligation that generate moral duties of obedience to law and authority. She samples four recurring arguments for the 'duty to obey,' which feature throughout Western political theory: namely, these are duties to justice, duties to fairness, the 'Samaritan duty' to those in need, and the duty to preserve dignity within our political association (p. 5).

Each ground for obligation, she argues, can generate duties to obey the law: but, should those moral grounds be threatened by an unfair or unjust law, they conversely generate duties of disobedience and resistance to that law. The ground of fairness, for example, leads us to obey laws of a fairly, democratically-elected legislature; the same principle, however, might require passive disobedience should a law prove unfair in its treatment of minorities. The moral duty to obey is therefore defeasible. The US civil rights movement has historically been considered the epitome of this reasoning, with relation to peaceful civil disobedience.

But further, Delmas argues, the fundamental requirement of fairness creates duties to actively disobey and resist such laws, even to pursue 'uncivil disobedience,' and to break ancillary laws to do so. Where for example ICE agents seek unjustly to gather undocumented migrants and subject them to appalling conditions, citizens are duty-bound to assess what action they must take, which may include direct unlawful action and 'principled disobedience' such as providing sanctuary or deceiving enforcement agents. The very grounds for obedience are used to justify disobedience in pursuit of the same fundamental moral imperatives. Delmas thus creates a coherent theory for political obligations to resist unjust laws and social structures.

The elegance of her argument is that it takes received understandings of political obligation, and detaches them from an uncritical presumption towards duties of obedience, which has been the legacy of Rawls' model for decades. The

¹ J. Rawls, *A Theory of Justice* (1999, rev. ed.) 320

four fundamental grounds for obligation she explores in the main body of her book (and she accepts that there may be others to consider) are reasons for action *per se*, not merely reasons for obedience or dissent. Her four main chapters (Chapters 3-6) detail each moral ground, its role in civil disobedience, and its role in principled resistance, giving historical examples ranging from the Attica prison uprising through to Edward Snowden's data leaks and whistleblowing, to illustrate her reasoning.

Delmas avoids unnecessary semantic pedantry and cuts directly to the substance of what moral obligations must entail. These broad moral concepts are inescapably debatable in definition and scope – Delmas does not waste any time trying to pin down 'justice' (p. 75). However, by looking instead to received understandings of what might evidently be called *injustices*, such as official misconduct or deliberate disrespect for the equality of citizens, Delmas drives a persuasive and relatable argument through what might otherwise be treacherously broad, hazy territory.

Delmas preempts several potential criticisms, including concerns that principled disobedience is undemocratic, threatens social order, and endangers the civility that 'binds society together' (p. 50). These are not uncommon criticisms against even peaceful civil disobedience, but are particularly acute where uncivil and even violent action may be initiated by aggrieved individuals and groups. Recent commentary on the *gilets jaunes* protests suggests this 'social fabric' argument is as pertinent in Europe now as it was in 1960's America. However, again, she adroitly turns these concerns on their heads. Unjust and unfair laws threaten a healthy democracy, possibly more than subsequent acts of resistance can. Principled disobedience may well contribute to strengthening the rule of law and civic society, under a just and fair democratic regime. Indeed, purely peaceful disobedience may be ineffective at communicating dissent, pursuing change, effecting democratic dialogue, or preventing immediate harms resulting from egregious state policy. Uncouple the fundamental moral reason for action from a dogmatic duty to obey, and one can apply it just as well to duties to disobey.

In another deviation from traditional, tired debates on disobedience, Delmas expressly sidesteps thorny questions as to what renders a state a legitimate or illegitimate authority (p. 10). Her focus is on fidelity not to just institutions or governments, or even to law, but solely to the four moral reasons for action. Notwithstanding this sidestep, it is possible to draw some powerful contrasts between her thesis and established theories of legitimacy, such as Raz's service conception of authority.² Briefly stated, Raz conceives of authority as being legitimate to the extent that it is based on pre-existing reasons for action (which could include justice, fairness and the rest), and that the authority in question is best placed to facilitate those reasons for action. Where this is the case, a law becomes a 'content-independent,' pre-emptive reason for action, even if misguided or itself morally questionable. The law then displaces the 'background' moral reasons for action that would otherwise for Delmas demand resistance, according to individual conscience.³

² J. Raz, *The Morality of Freedom* (1986), 38-69

³ *id.*

Delmas does not depend upon a conception of legitimacy in order to be persuasive: for her, the obligation to the fundamental moral reason is paramount, and legitimate authority begins and ends with it. It would however be a fascinating exercise to contrast this theory with Delmas' more pronounced breakaway from the presumption of obedience. In part, this contrast matters because it informs how real-life social movements can conceive of their justifications. The 'legitimation discourse' of protesters, and state responses, depends upon coherent claims being made as to what renders authority morally intelligible.⁴ If Delmas has short-circuited this cycle of legitimation claims and counterclaims, creating a solid argument for disobedience to specific policies notwithstanding whether the state is 'mostly just,' it is a remarkable achievement and a powerful encouragement for social movements internationally.

There are further, more practical considerations she addresses regarding systemic injustices and our 'Samaritan duties.' These duties, she argues, require us to assist those in need, but not merely those we literally walk past: it includes those of whose plight we are aware, wherever they may be (p. 148). This stretches the received understanding of the duty to include non-proximate or structurally-generated instances of harm, rather than those with which one makes direct contact.⁵ Could wide-ranging duties to combat all such injustices prove onerous, if not impossible, for citizens to fulfill? Where structural injustices abound, or reach overseas, or are founded on a colonial history, what level of resistance is expected from ordinary people to address these imbalances? Examples readily spring to mind of climate change injustice and its differential effect on poorer populations.⁶ In an increasingly globalised and interdependent economy, with greater knowledge than ever of the consequences of our connectivity, it can seem a significant task for individual citizens to be able to coherently address innumerable, overlapping social injustices.

Delmas concedes that the difficulties attached to duties of resistance may indeed be burdensome, but insists that this does not extinguish the duties themselves. Rather, they require fortitude, collective action and perseverance in the face of systemic injustice (p. 161). The law also generates onerous obligations, but we expect obedience notwithstanding those burdens due to the importance of the underlying moral reasons for action: why not apply the same logic to acts of resistance? These too are, after all, 'defeasible' duties (p. 9) in a wider moral enquiry, she argues: a duty to fight injustice may well be defeated by other pressing moral and practical concerns, and may not create a constant and overbearing obligation to 'take on the system' in its entirety, alone. Conversely, it is only by encouraging transnational social movements that democratic dialogue can be empowered. In the face of 'democratic deficits' perceived in globalized neoliberal governance, environmentalist and social justice movements identify these broader duties and aim to gather solidarity

⁴ N. Sultany, *Law and Revolution: Legitimacy and Constitutionalism After the Arab Spring* (2017)

⁵ J.A. Simmons 'The Duty to Obey and Our Natural Moral Duties' in C. H. Wellman and A. J. Simmons (eds.), *Is There a Duty to Obey the Law?* (2005)

⁶ E.A. Posner and D. Weisbach, *Climate Change Justice* (2007)

transnationally.⁷ It is not extraordinary to state that these duties do exist and do matter. Delmas reflects the claims and narratives of these movements in her theory, and prizes open simplistic, state-centric conceptions of protest to embrace these modern challenges.

There is the perennial question throughout of how to decide what is 'right.' Nobody is Ronald Dworkin's metaphorical Hercules.⁸ The individual, as adjudicator of their moral duty, is bound to make mistakes: potentially grievous ones, in the event of violent action taking place. Delmas suggests that this difficulty does not repudiate the duty itself, no less than the onerous nature of law-abidance does not itself morally justify illegality. That the individual may err is unavoidable when engaging in moral enquiry. It is better, she argues, that the enquiry be informed and sincere, if imperfect, rather than abandoned altogether in favour of what would otherwise be morally arbitrary obedience.

Linked to this is the question of methods, and degree, of retaliatory resistance. The 'constraints' that Delmas suggests for resisters' actions should include respecting the interests of other individuals, including life and physical integrity; respecting pluralism and non-denomination, and the equal standing of all citizens regardless race, faith, and so on; and a respect for the system of fundamental rights within the constitutional order (p. 48). This begs the question, what violence (if any) might be tolerable given these constraints? Delmas claims that 'incivility does not necessarily violate people's basic interests' (p. 50). Beyond this is scope for violence necessary and proportionate to addressing the injustice identified. Any violence should not be inconsistent with the foundational moral reasons for action. This might exclude violence to the person in most circumstances, but may include sabotage of property or police equipment in others. Delmas would not be the first writer to argue that use of violence may be a rational and morally justifiable tactic, when used proportionately for the public good.⁹ There might arguably be a parallel to Dworkin after all, in that the action taken must cohere with the 'integrity' of the wider political public morality, notwithstanding a more local inconsistency with the broken law in question. The question of what violence can 'fit' into a Western democracy, that aspires towards purely peaceful dialogue, is more than merely of theoretical interest given, for example, Parisian riots of 2018.

That actions should be proportionate to the injustice addressed, with the least harm being employed to attain the required result, is an injunction which is nevertheless bound to raise consequentialist concerns. Notably, Arendt wrote of the unpredictability of long-term outcomes.¹⁰ Violence, or leaking confidential information, could easily have unforeseeable adverse effects on the safety and wellbeing of citizens, either immediately or further in the future. This is certainly a feature of the commentary on whistleblowing activists, such as Assange or Snowden. Delmas re-opens these debates within a fresh, contemporary setting while reminding us that, though we may not foresee the future harms caused by

⁷ D. Markovits, 'Democratic Disobedience' (2005) 114 *Yale Law Journal* 1897

⁸ R. Dworkin, *Law's Empire* (1986)

⁹ J. Schwazmantel, 'Democracy and Violence: A Theoretical Overview' (2010) 17 (2) *Democratization* 217, at 224

¹⁰ H. Arendt, *On Violence* (1970)

uncivil resistance, neither can we predict the long-term harms of deferring to unfair and unjust policies.

The thesis also opens up possibilities to explore beyond the individual dissenter's obligations, to address what the state must do to accommodate principled disobedience. Moral justification rarely translates directly into legal justification. Delmas freely admits that this may be beyond the scope of her work, and subject to enormous variation across regional and social contexts: she tentatively suggests a willingness on the part of the police, prosecutors and judges to drop prosecutions against acts of justifiable resistance, or perhaps the implementation of defences based on the grounds of the obligation in question – 'dignitary defences', for example (p. 70). The sincere moral convictions of defendants do seem, officially or otherwise, to be considered by judges at sentencing. The recent case of the 'Stansted 15' activists in the UK, who unlawfully obstructed deportation flights leaving the airport in 2017, demonstrates the public interest in these concerns within contemporary protest. Disobedience is necessarily a crossover point between social justice claims and criminal justice demands. Delmas leaves open the ongoing debate on how much the state can justify punishing, or penalizing, these dissenters: and whether protesters who can demonstrate moral grounds for disobedience should willingly accept any such sanction.¹¹

The book presents a robust but simple moral reasoning for uncoupling our political obligations from a presumed duty to obey – and one strongly relevant to our times. The text is peppered with potent examples where uncivil disobedience has contributed to the pursuit of justice, from countless social movement groups in the 20th century through to contemporary Black Lives Matter protests. We are reminded, in a Postscript relating her theory to 'the Age of Trump,' of the powerful relevance and urgency to her claims, beyond philosophical armchair experimentation (p. 229). She asks us to identify the injustices around us, and apply her theory to the question of what now must be done in the face of horrendous inequalities around us: not just relating to the Trump administration, but elsewhere across the US, the EU, and beyond. It is a fitting epilogue to an innovative theory, grounding it in a very real, modern and daunting setting, and asking us what actions we must take to counter immediate injustice.

¹¹ K. Brownlee, *Two Tales of Civil Disobedience: A Reply to David Lefkowitz*