

LAW AND CONSCIENCE - FURTHER COMMENTS

By
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Lloyd Reinhardt claims that to leave the issue of legitimacy out of a discussion of conscientious disobedience makes the discussion incomplete; his reason being that otherwise we are concerning ourselves only with the power, not the authority, of the state. I agree; indeed I think I implied, that if one views the state as a powerful agency whose might lacks any legitimacy, then there is no special moral problem for the doubting subject raised by a conflict between the dictates of his conscience and the law of a state so regarded. If one believes the state in question is a legitimate one whose laws generally merit obedience, and which has acted in good faith in enacting the law which turns out to be the subject of conscientious concern, then two questions do arise: a question of moral conflict for the subject (between the dictate of conscience and the general duty to obey the law), and a question for the state, in its legislative or its judicial aspects, of whether to treat conscientious non-compliance in some special way. My answer to that latter question is that there is no good reason for treating conscientious non-compliers more leniently than other non-compliers and, despite other differences between us, it is pleasing to see that Reinhardt comes to the same general conclusion.

In sensing that I had taken the problem to be most acute when the law in question required somebody to do what he considered morally impermissible, or forbade him from doing what he regarded as morally obligatory, Reinhardt is correct. He is also correct in thinking that I regarded the cases where the law required somebody to do merely what he believed he should not be required to do (although he does not believe the required conduct itself immoral) or forbade him from doing what he believed he should be perfectly free to do (although the prescribed conduct, while perhaps being desired by the agent, is not considered obligatory by him) as far less significant. These are the conflicts which derive solely from the agent's liberalism.

The conflict I overlooked, and I am grateful to Reinhardt for pointing it out, is the intermediate one which arises between the law which forbids an agent from doing what he considers it right and important - although nonetheless not obligatory - that he should do. This is Reinhardt's case of the manuscript smuggling or secret meeting attending dissident. It is not sufficient to say that the law forbids him from doing what he believes he should be free to do, and it misrepresents the position to say that the law forbids him from executing what he takes to be a moral obligation. One can conceive something to be a morally important or urgent task without considering it a duty, and when such a task is rendered illegal, the conflict generated is surely comparable, as Reinhardt contends, to one between law and perceived duty.

In saying that a person's ultimate moral duty is to do what (after reflection) he believes is his duty, I do not take or imply the further (and unsound) step that the only genuine or real requirement is that we should do what we think our duty (or at least right). Just as there is a general requirement that we should seek to align our beliefs with objective fact, so there is a general requirement that we should seek to align our morality with morality's objective demands. To the extent that we fail, we are open to criticism. I agree entirely, and would not wish to have been thought to deny, that the moral wrongness of a man's conduct is in no way mitigated by the fact that he believed it was his duty; no more than the falsehood of a man's belief is qualified by the discovery that it logically followed from other things which he believed on the basis of what seemed to him to be good evidence. The sense in which a man's ultimate moral duty is to do what he believes to be his duty is the same as the sense in which a man's ultimate intellectual obligation is to hold true what he believes is most strongly confirmed on the best evidence available to him. In both cases he may end up doing or believing something quite wrong, and in both cases this will be because what, subjectively, obliged him to act or believe as he did was an inadequate or inaccurate reflection of the way things really were.

Reinhardt's final disagreement is with my claim that there is no logical limit to what we can regard as morally required of us. He correctly

diagnoses the source of that claim as lying in my formalism with respect to the characterization of an ethical judgement. Since disputes about formalism raise wider issues than are relevant here, and since we both agree that the more modest contention that the range of what people may consider themselves morally obliged to do is extraordinarily wide is all that is necessary for my argument, I shall not pursue these issues here.

I shall not attempt to comment on all of the points raised by Roger Wilkins, and in particular the interesting asymmetry of risks which he notes; that the Kantian is in danger of having to treat some madmen as conscientious objectors, while the Necessitarian (backed by a Humean theory of ultimate moral belief, which I too am disposed to endorse) is in danger of having to treat some, at least, conscientious objectors as on a par with madmen.

I agree with Wilkins that on any utilitarian theory of punishment, which is any theory of punishment that seeks to justify its infliction on the ground of the probability of its producing a future good, there are problems posed by the conscientious objector. At best his punishment may deter these would-be disobedients whose potential violations would have been other than morally motivated or subjectively sanctified.

If one takes a retributive view of punishment, however, as I am inclined to do on independent grounds to do with justice, then it seems to me that no special problems arise regarding the punishment of conscientious disobedients. Although still unfashionable amongst social scientists and those whose professional dealings touch on the world of the criminal, the retributivist theory of punishment has enjoyed a significant comeback amongst moral philosophers. It holds that punishment should be, fundamentally, backward looking. Its primary object is to harm the guilty for the wrong that they have done. To punish to deter others is to treat the guilty person as a means and not as a Kantian end; to punish to reform or to deter the guilty from future transgressions implies firstly the injustice of punishing different people with similar histories differently for qualitatively similar acts in similar circumstances, solely on the ground of differences in the hypothetical probabilities of recurrence, and secondly

the absurdity that not just the conscientious, but the intractable, should go unpunished.

For the retributivist legal punishment must be for committing an illegal act, and no cognizance should be taken of the likelihood of a repetition or the influence of this punishment on others. In this sense all punishment really ought to be "useless cruelty".