

CIVIL DISOBEDIENCE IN A BUSINESS CONTEXT: EXAMINING THE SOCIAL OBLIGATION TO OBEY INANE LAWS

by

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Folklore recounts a rather amusing exchange between Henry David Thoreau and Ralph Waldo Emerson. The latter spoke first: “Why, Henry, why are you in jail?” To which the younger Thoreau replied: “My dear Waldo, the question is why are you not!” The conversation reportedly took place as Thoreau spent a night in a Massachusetts jail for failure to pay his poll tax. Thoreau conscientiously refused to pay a tax that would support both slavery and a war with Mexico that he deemed unjust. The night in jail would prompt Thoreau’s classic essay on “civil disobedience,”¹ broadly defined as the deliberate violation of law for reasons of conscience and moral principle.²

Perhaps the earliest literary expression of civil disobedience comes from Sophocles’ *Antigone*, penned in the fifth century B.C.³ As the play opens, Creon, King of Thebes, has declared Antigone’s brother, Polyneices, guilty of treason and ordered that his body lay unburied for the “birds and scavenging dogs” to do with as they will.⁴ Motivated by an urgent sense of familial duty and abhorred by the injustice of Creon’s decree,⁵ Antigone deliberately defies the king, spreading dust on her brother’s body while offering burial rites.⁶ A trial ensues in which Antigone expresses her contempt for any manmade law that defies the divine.⁷ Her appeal to divine law fails, and Creon condemns her to death.⁸

Though the acts of Thoreau and Antigone were illegal, they typically are viewed in positive lights. Slavery posed an abomination, and anyone brave enough to resist, did so justly. Though Antigone defied the King’s decree, her motives were pure, and Sophocles portrayed the fiery sister as the protagonist, not the villain. Other acts of civil disobedience, including Harriet Tubman’s Underground Railroad, Martin Luther King, Jr.’s illegal marches and sit-ins, and Mahatma Gandhi’s organized incitements to disobey a host of British laws, are unabashedly held up as exemplars to follow. Popular culture views Tubman, King, and Gandhi, not as criminals, but as heroes.⁹

The present article examines whether civil disobedience has any role to play in business contexts. In particular, it asks whether businesspeople may choose amongst business regulations, cooperating with the social spirit of regulations that they deem just, complying with the letter of morally neutral regulations, while simultaneously evading regulations that they deem immoral.¹⁰ In other words, must a businessperson fulfill all legal obligations equally, without reference to the particular regulatory law in question, or can the businessperson pick and choose when to cooperate and when to evade?

The analysis proceeds in three parts. Part I briefly reviews the philosophical literature. This literature distinguishes illegal acts committed as part of a political strategy to change the law from illegal acts done as an expression of private conscience. Justifications for civil disobedience in a variety of contexts are examined. Part II then turns to the role of civil disobedience in business settings, discussing four illustrative cases. The first case addresses the ethics of hiring undocumented workers. The second and third examine the duty to obey two misconceived workplace-safety laws. The final illustrative case draws on the stylized facts of the “snail-darter” controversy to fashion a hypothetical situation where a corporate executive faces an arguably inane application of an environmental regulation. Part III concludes with reflections and analysis that suggest that in some settings civil disobedience of business regulations can be both expected and justified. The analysis closes by examining the limitations to this proposition.

Taken collectively, this article offers insights into the social obligation of a businessperson to obey law. As such, it seeks to contribute to the corporate social responsibility literature. In business settings it may be tempting to simply assume that legal obligation exists without critical reflection. Yet, the decision to obey business regulations is very much a matter of choice. If one accepts that law is generally a society-imposed form of morality, then the choice to comply or to evade becomes a matter of conscience which the topic of civil disobedience can more fully inform. The analysis begins with a brief literature review.

I. PHILOSOPHICAL JUSTIFICATIONS OF CIVIL DISOBEDIENCE

Broadly speaking, civil disobedience can be defined as an intentional breach of law for reasons of conscience and moral principle.¹¹ Sometimes the illegal act is done openly with hope of changing the law.

For instance, both Gandhi and King used civil disobedience to publicly express a sense of political injustice in hopes of prompting the ruling majority to reconsider and ultimately change laws and governmental policies.¹² At other times, however, the disobedient has no hope of changing the law, and indeed steps may be taken to conceal the illegal act. Antigone held no illusion that Creon would change his decree; she simply refused to let her brother lay unburied, and she buried him secretly, under cloak of night.¹³ In addition, although most forms of civil disobedience are non-violent, this is not always the case. For example, the Boston Tea Party coupled civil disobedience with violent destruction of private property.¹⁴

In examining the justifications for civil disobedience, the philosophical literature typically distinguishes political acts intended to generate legal change from acts of private conscience. Among the latter group, open illegality typically constitutes “conscientious objection;” secretive illegality becomes “conscientious evasion;” and civil disobedience combined with violence may sometimes constitute “justified civil resistance.” The present discussion begins with the political, open, and non-violent form of civil disobedience aimed at legal change.

A. Civil Disobedience as a Strategy to Change the Law

In his famous treatise articulating a constitutional basis for justice, John Rawls identifies several moral prerequisites for using civil disobedience as a part of an organized strategy to change the law.¹⁵ To be justified, the strategic use of civil disobedience must be “political,” “open,” and “non-violent.”¹⁶ Rawls compares politically motivated civil disobedience to a “public speech” between the disobedient and the majority.¹⁷ The speech must be political, in the sense that it appeals to the logic and values of the political system, rather than to idiosyncratic values or religious predilections of the protesters.¹⁸ In addition, the disobedients must commit their illegalities openly, drawing attention to their acts and illustrating their willingness to accept their punishment.¹⁹ Finally, by keeping the disobedience non-violent, the dissenters build their ethos and help to persuade the majority that their speech is conscientious and sincere.²⁰

Both Gandhi and King met each of the Rawlsian prerequisites for political civil disobedience. Each appealed to the logic and values of the political system, rather than to religious or personal values. Gandhi had faith in British authorities to hold fast to the rule of law embedded in centuries-old tradition of the common law dating to the Magna Carta.²¹ King asked American society to rethink its constitutional commitment to equality embraced in the Bill of Rights and other legal texts.²² In addition, both Gandhi and King conducted their illegalities openly and willingly accepted their penalties.²³ And of course, both embraced principles of non-violence.²⁴

Although Gandhi and King provide excellent examples of political civil disobedience, they are far from alone. Contemporary protests regarding the War in Iraq often include acts of civil disobedience.²⁵ Similarly, abortion protesters continue to skirt legal boundaries and occasionally cross the line in their attempts to dissuade others from accessing reproductive service facilities.²⁶ Environmental groups will occasionally make the news, charged with trespass for disrupting fishing, mining, and forestry activities.²⁷ Recently, more than 400 people were prosecuted for civil disobedience activities in protest of the American military presence in Puerto Rico.²⁸ In each case, the acts were political, open, non-violent and done as part of a larger strategy to change governmental policy.

B. Conscientious Objection, Conscientious Evasion, and Justified Civil Resistance

Although the above discussion of civil disobedience as a means of changing the law captures many interesting examples, it also excludes others. In particular, the discussion excludes religiously motivated acts of conscience such as the refusal of a Jehovah Witness to salute the flag or to recite the pledge. It also excludes secretive acts, such as Tubman’s Underground Railroad, and violent acts such as the Boston Tea Party. Yet, in each of these cases, the actor or actors were engaged in illegal activity for reasons of conscience and moral principle and thereby within the rubric of civil disobedience.²⁹

Consider, first, the acts of the Jehovah Witnesses. In the 1930s, public schools across the country insisted that students salute and pledge allegiance to the flag at the beginning of each school day.³⁰ Many Jehovah Witnesses refused to comply, believing that the practice violated the commandment: “Thou shall have no other gods before me.”³¹ In several cases, the conscientious student was expelled.³² Such actors are typically referred to as “conscientious objectors.” Other acts of conscientious objection include the refusal of Quakers and other pacifists to register for the draft and the use of peyote by Native Americans as

part of religious ritual.³³ In each case, religious principles connect the illegal activity to an act of conscience, and thereby identify it as an act of civil disobedience.

Consider, next, to the role of secrecy. Turning to the Underground Railroad, one notes that Tubman was engaged in deliberate attempts to conceal her crimes.³⁴ Rawls classifies Tubman's form of civil disobedience as "conscientious evasion."³⁵ The term refers to an illegal act done for reasons of conscience and moral principle, but coupled with secrecy. Secret illegalities are to be expected in societies that are largely unjust. According to scripture, Hebrew midwives disobeyed Egyptian Pharaoh Ramses' legal decree to kill all boys at childbirth.³⁶ Moses survived only because of an act of civil disobedience done in secrecy.³⁷ Similarly, Antigone buried her brother at night, and Schindler confused and defrauded Nazi officials so as to conceal his desire to save his Jewish workers. If one has no hope of convincing the authorities to change their rules, secrecy in the name of substantive justice can potentially be justified.

Finally, the Boston Tea Party illustrates civil disobedience coupled with violence against property. Most philosophers agree that properly constrained, violence can be justified in the face of injustice.³⁸ With proper constraint, several of the more famous incidents of violent dissent, including Vietnam-era Catonsville-Nine protestors who destroyed draft files with napalm can be brought within the fold of justifiable civil resistance.³⁹

In short, the civil disobedience practiced by Gandhi and King was political, open, and non-violent. Yet, upon closer examination, one finds that none of these criteria are essential to justify illegal activities on moral grounds. Conscientious objection, as practiced by the Jehovah Witness, eliminates the need for political motive. Conscientious evasion, akin to Harriet Tubman, eliminates the need for openness. Justified civil resistance, as in the destruction of Vietnam-era draft records, may at times permit a principled resort to violence.

C. Summary

Reflecting on the long list of disobedients, one finds an equally long list of cultural heroes. From the decks of the cargo ships in Boston Harbor to the Civil Rights marches in Birmingham, Alabama one finds a proud heritage of civil disobedience. Americans have always held a healthy skepticism toward government, and although philosophers may quibble over the justifications for civil disobedience, as a cultural phenomenon, and the practice remains widely embraced. Americans render unto Caesar that which is Caesar's, but retain the right to exercise independent judgment in the face of unjustified law.

II. CIVIL DISOBEDIENCE IN A BUSINESS CONTEXT

The discussion now turns to the question as to whether civil disobedience can be justified in business contexts. Often this means a corporate setting. As an artificial entity, a corporation itself does not have "conscience;" it makes its moral judgments through its association with individuals who play the various roles of shareholder, board member, executive, and employee. At times these people may elect to conscientiously evade laws that they perceive to be unjust or possibly inane. The question becomes whether such behavior is appropriate, and if so, subject to what preconditions. The discussion proceeds with reference to four illustrative cases, beginning with the illegal hiring of undocumented workers.

A. *Conscientious Evasion and the Hiring of Undocumented Workers*

In a Democratic Primary Debate in November, 2007, then candidate Barack Obama quipped: "[A]n employer has more of a chance of getting hit by lightning than being prosecuted for hiring an undocumented worker."⁴⁰ If this is true, it is not due to a lack of law. The Immigration and Control Act of 1986 states that employers may only hire people who may legally work in the United States (citizens and authorized visitors), and requires employers to verify the identity and employment eligibility of anyone hired.⁴¹ Knowingly hiring an unauthorized worker carries fines,⁴² and a pattern of such hiring can carry a six month prison term for the employer.⁴³ Notwithstanding this law, the U.S. Department of Homeland Security estimates that there were nearly eleven million unauthorized immigrants in the United States in January, 2006.⁴⁴

The question, of course, is how an unauthorized worker finds employment. Part of the answer can be found in the ready availability of forged-identity documents on the black market.⁴⁵ Due to the forgeries, sometimes an employer hires an illegal worker unknowingly. But the answer also derives from the

economic incentives created by the lack of government enforcement activities.⁴⁶ Notwithstanding the widespread employment of illegal workers in various sectors of the American economy, over the past two decades there have been relatively few fines imposed on employers, and when fines are imposed, they are relatively light.⁴⁷ In short, immigration regulations seem woefully underenforced and many employers find that it is cost effective to break the rules. As one commentator noted, “Government officials freely admit that government does not and cannot fully enforce immigration laws generally and that the presence of illegal immigrants in U.S. society is a fact of life.”⁴⁸

Although forged documents and economic incentives, no doubt, play a large role, some employers may also view the hiring of an illegal worker as an act of conscientious evasion — that is, the intentional, albeit secretive, violation of law for reasons of moral principle. Indeed, some fair-minded employers may legitimately question the wisdom of immigration laws. These employers may note that undocumented workers often take jobs for which it is difficult to find legal workers at reasonable rates and that many illegal workers have been in the United States for many years and have families to support. In addition, by neglecting to enforce its own employment regulations, the federal government maybe be signaling to conscientious employers that a violation of these regulations carries relatively little moral stigma.⁴⁹ Once the stigma associated with the violation is reduced, some employers may feel ethically free to evade the regulation and risk the fine. If the employer hires the undocumented worker partly on the basis of moral principle, rather than as a mere economic expediency, then the act could be considered conscientious evasion, which in turn, is a form of justifiable civil disobedience.

So are the hundreds of thousands of employers who knowingly hire illegal workers each year properly viewed as modern-day examples of Harriet Tubman, willingly providing work for the ready, willing, and able? Or perhaps these employers are mere law breakers, hopelessly corrupt and deserving of moral condemnation. Reflecting on the moral content of the regulations, one finds a bit of ambivalence. On the one hand, employment provides the driving force behind illegal immigration, and illegal workers unfairly “cut in line” in front of others who are waiting to enter legally. In addition, every job taken by an illegal might have been taken by a U.S. worker. On the other hand, illegal aliens are human beings, often with families to support. Many illegal workers have been in the United States for many years. Their labor is unabashedly good for the economy, doing many jobs for which it is difficult to find American workers at reasonable wages, and paying tens of billions of dollars each year in state and federal taxes.⁵⁰ Given the ambivalence in the law coupled with the lack of legal enforcement, apparently many employers choose to conscientiously break the rules, risk the fine, and hire the illegal worker.

B. Conscientious Evasion of Misconceived Safety Regulations: Sprinklers & Helmets

The moral justification of regulations regarding the employment of illegal workers can be viewed somewhat ambivalently, and reasonable people can differ on the moral wisdom of the governmental policies. Other business regulations, by contrast, have no moral justification whatsoever.⁵¹ Consider, for example, two misconceived safety regulations. The first requires the installation of a costly sprinkler system in a metal-works factory that has concrete floors and metal framing and poses virtually no fire hazard.⁵² The second regulation, though not economically costly, seems misconceived and potentially dangerous. The regulation requires factory workers to wear a helmet that protects them from blows to the head, while simultaneously restricting their hearing. The market offers unambiguously safer headgear, but it has not been approved by governmental regulators.⁵³

The moral obligation to comply with misconceived safety regulations derives solely from the obligation to abide by laws in general.⁵⁴ This obligation, of course, should never be dismissed lightly. But if strict legal compliance, for example with the helmet law, poses significant dangers to workers, and assuming that there are no alternatives,⁵⁵ then conscientious evasion may be morally defensible, and possibly even morally required. The moral compulsion derives from the fact that an employer’s obligation to protect the health and safety of workers is of a different nature and kind than an obligation to obey a regulation just because the regulation exists. Comparing the conflicting obligations, the duty to protect workers carries a relatively higher degree of moral saliency as it directly involves issues of life and limb. The duty to obey law, by contrast, appears more abstract and attenuated.⁵⁶ Facing a choice, it would seem difficult to defend imposing safety risks on one’s employees simply to uphold the law, when the law itself is both misconceived and dangerous. Hence, one might expect the responsible businessperson to violate the helmet law as an act of conscientious evasion, even if it were not cost effective to do so.

The sprinkler example, by contrast, seems a bit more problematic. Here, the injustice involves economic inefficiencies, not health and safety concerns. Whereas the helmet law could be described as unjust, with strict compliance posing a direct threat to human safety, the sprinkler law would be better described as “inane,” that is, silly, ineffective, and ridiculous, but not directly harmful. After all, no one is physically endangered by installing a worthless sprinkler system. Strict compliance with the sprinkler regulation appears economically wasteful, but not directly harmful.

The question becomes, can it be socially responsible to engage in civil disobedience of business regulations that are merely inane and inefficient rather than directly harmful, and if so, when? Closely examining the distinction between the harm caused by a dangerous law, such as the helmet regulation, and the harm caused by an inefficient law, like the sprinkler regulation, the difference appears to be more a matter of degree than of kind. In a world of scarcity, economic waste becomes unconscionable, as wasted resources could be used to ease human suffering. This suggests that if strict compliance with an inane regulation proves sufficiently wasteful, then civil disobedience, including steps to conceal one’s offense, may be justified. The justification derives from the fact that the harm caused by strict compliance with inane laws (measured by the opportunity costs generated by the regulation) can be just as severe as the affirmative harm caused by strict compliance with unjust and dangerous laws. In this light, one might expect the businessperson to evade inefficient and inane laws when it is cost effective to do so. In addition, it would be difficult to label the act as unethical.

C. Business Regulations Inanely Applied: The Snail-Darter Controversy

In the minds of many, the stylized facts presented by the snail-darter case of the mid-1970s epitomized an inane regulation, or at least a regulation inanely applied.⁵⁷ The threatened extinction of a 2½ inch perch, called a snail darter, coupled with a strict interpretation of the Endangered Species Act enabled a group of private citizens to enjoin the construction of a five million dollar dam and to frustrate a one hundred and fifty million dollar recreational development project in eastern Tennessee.⁵⁸ The extreme nature of the facts caught the public’s attention and the snail darter became a rhetorical weapon in the politics over deregulation.⁵⁹ The snail-darter case became the poster-child of inane regulations, or at least, regulations inanely applied. More than a dozen years later, conservative commentators such as Rush Limbaugh continued to refer to the snail-darter case in attempts to delegitimize governmental regulations generally.⁶⁰

Although entertainers such as Limbaugh would no doubt exaggerate the facts in the snail-darter case to arouse his listeners and to score political points, the truth remains that not all business regulations are created equally. Inane laws exist, and business actors must decide how to cope with those laws. Perhaps the preliminary question is to ask whether saving the snail darter was indeed worth the cost. It would seem that reasonable people might differ. One might also ask whether there are grounds for compromise. Perhaps there would be a way to comply with the law, save the snail darter, while still completing the development project. In the snail-darter case, the TVA lost its appeal to the U.S. Supreme Court, but ultimately prevailed upon Congress to legislate an exemption.⁶¹ Ultimately the snail darter was moved to an alternative habitat, and the dam was erected, but not before the controversy stalled construction for almost a decade.⁶²

III. REFLECTIONS AND ANALYSIS

Superimposing the above business cases onto the types of civil disobedience discussed in the first part of this article, it would seem rare to find a business engaging in civil disobedience of the first type; that is, openly engaging in politically-motivated and non-violent illegal acts as part of a strategy to change the law. After all, businesses are primarily constituted to make a profit. Sometimes, however, particularly if the business actor conceals the offense, legal violations can prove profitable. This suggests that civil disobedience of the third type, conscientious evasion, may be relatively more common. In other words, the business model for civil disobedience probably derives more from Tubman, than from Gandhi or King.

The following three sections offer reflections and analysis of the business decision to violate law. The first poses a hierarchy of business regulations and suggests that businesspeople are likely to evade inane laws if those laws are not effectively enforced, and that at times, this decision may be justified. The second section uses this notion of a legal hierarchy to reexamine the cases examined above. The final

section discusses limitations to the exercise of civil disobedience in business contexts generally. The analysis begins with an ethical assessment of the strategic choice to break the law.

A. Examining the Strategic Choice to Violate the Law

Sometimes a businessperson surveys the legal environment and discovers that with the proper precautions, it becomes cost effective to breach a particular law and to risk paying the penalty. Assessing the strategic choice to violate the law, commentators divide into two camps – those who condemn the strategy as unethical and those that are largely sympathetic to it. Articulating the critical view, Cynthia Williams argues that most, if not all, business regulations must be obeyed even if they are not effectively enforced.⁶³ She fears that an alternative view that permits a businessperson to choose among regulations, obeying some while disobeying others, erodes social cohesion and misconceives the social obligations that businesses owe to society.⁶⁴

By contrast, some economists and writers influenced by economic reasoning tend to be more sympathetic to the idea that legal obedience, at least with regard to some regulations, is a matter of choice. For instance, the law and economics literature has developed the notion of an “efficient breach” of contract.⁶⁵ According to this idea, there is nothing wrong with intentionally breaching a contract so long as one compensates the aggrieved party.⁶⁶ Some commentators extend this notion to business regulations generally.⁶⁷ For example, Frank Easterbrook and Daniel Fischel argue that businesspeople “do not have an ethical duty to obey economic regulatory laws just because the laws exist, [and businesspeople] should violate economic regulatory laws when it is profitable to do so.”⁶⁸

Comparing the views of Williams with those of Easterbrook and Fischel, it appears fairly easy to find a compromise. Although Williams generally insists on strict legal compliance, she also allows for civil disobedience in some contexts.⁶⁹ She notes that unjust laws should not be obeyed.⁷⁰ And although Easterbrook and Fischel give great deference to the virtues of economic freedom, they recognize that some laws must be obeyed even if it is cost effective to breach.⁷¹ Hence, both polar views accept that there is a hierarchy of laws: some laws demand obedience; some provide choice, while others require breach. The question becomes, where one draws the line.

B. Applying the Hierarchy of Law to the Illustrative Cases

Applying the notion of a hierarchy of law to the business cases discussed previously, one finds a distinctive rank order. At the bottom of the hierarchy and deserving the least respect, one finds the misconceived helmet regulation. Strict compliance with this regulation appears to be demonstrably dangerous; hence, the rule must be disobeyed whether it is enforced or not. This remains true regardless of organizational structure as shareholders have no moral authority to order managers to comply with unjust laws.⁷² The only choice involves whether the violation occurs openly, akin to Gandhi asking the regulators to revisit the rule, or secretly like Tubman. Ultimately, the form of civil disobedience chosen may depend on the pragmatic consequences of the alternatives.

Second on the hierarchy, one finds laws regarding the hiring of undocumented workers. These laws appear to be highly ambivalent — moral arguments can be advanced both for and against violating these regulations. Whether the businessperson chooses to violate these laws may depend on his or her political views and prejudices regarding illegal immigration. As long as the businessperson chooses to hire (or to not hire) the illegal worker on the basis of moral principle, then that decision would seem hard to condemn. Of course, if civil disobedience becomes the choice, then the violation needs to occur secretly so as to protect the worker.

Third on the hierarchy, the sprinkler case involves an inane law, rather than a law that is either demonstrably (helmet law) or arguably (undocumented worker law) unjust. When a law is inane, rather than unjust, there is no direct moral compulsion to violate it. However, if the inane law is also underenforced, then the potential for conscientious evasion appears. In such a scenario, the responsible businessperson must compare the prima facie obligation to obey law with the economic waste and corresponding harm caused by compliance. Reasonable people can differ. With regard to the sprinkler law, there is little doubt that Easterbrook and Fischel would advocate breach. For them, even sensible regulations are only obeyed if they are effectively enforced; and if the law is also inane, then the decision to breach becomes fairly automatic. Williams, by contrast, would probably counsel obedience, so as to preserve the rule of law generally. Ultimately, the business decision probably depends on just how costly

the sprinkler system is, the likely fine, and the likelihood of fire. As a practical matter, when law is perceived to be both inane and underenforced, there is little likelihood of compliance.⁷³ Ethically speaking, there would be little or no reason to condemn such a choice.

Finally, the business decision to cooperate with the preservation of the snail-darter may depend on how one interprets environmental laws generally, and the Endangered Species Act (ESA) in particular.⁷⁴ Environmental laws generally seek to balance the need for a productive economy with the need for a pristine environment; while the ESA seems to offer less balance, tilting in favor of protecting the individual species.⁷⁵ While the ESA does not appear inane, one might argue that the snail-darter case involves an inane application of an otherwise just law. Williams would likely respect the ESA and demand strict compliance, while Easterbrook and Fischel might be more sympathetic to a firm who did a cost-benefit analysis and decided to press on with development project, notwithstanding the threat to the endangered fish.

C. *Some Caveats*

The above analysis suggests that it is often acceptable to disobey unjust, misconceived, and inane business regulations. Well-intentioned businesspeople need to be careful, however, to not abuse the strategic choice to violate the law.⁷⁶ When it seems profitable to conceal one's regulatory violations, it may be tempting for the business actor to rationalize illegal acts as motivated by conscience, when the true motive may be profit.⁷⁷ In addition, many of the matters concerning economic efficiency and the appropriateness of economic regulations implicate politics and speculative beliefs. Care must be taken to make sure that a self-serving bias does not overly color one's view of the facts or of the law.⁷⁸

A few caveats and precautions could help well intentioned businesspeople to avoid abusing the strategic choice to break the law. First, the injustice to be remedied must be significant, not a mere annoyance or triviality, and the illegal act in defiance must be as minimal as feasible. Care should be exercised so as to not make illegal acts habitual; in fact, the alternative habit of legal compliance should be inculcated. Second, all other avenues to justice must first be tried and found to fail. If the business actor could work with government regulators to reach an accommodation or competing interests, they should do so.⁷⁹ And third, the disobedient must exercise self-restraint, using illegal activities only as a last alternative. Given the tendency to be self serving, the decision maker should err on the side of caution and comply with the law unless the basis for disobedience appears exceptionally clear. When these criteria are met, however, civil disobedience becomes both a right and potentially a duty of a responsible business.

IV. CONCLUSION

The notion that a conscientious and well-intended businessperson can select amongst laws, choosing to obey some and to violate others may at first blush sound rather preposterous. After all, businesspeople must obey the law—even a libertarian like Milton Friedman insists on that as a moral minimum.⁸⁰ Upon closer inspection, however, the notion that not all laws deserve equal treatment seems to fare better. As Rawls reminds us, "laws do not all stand on par."⁸¹ If a particular law has no moral underpinnings and compliance causes affirmative harm, then the businessperson can be expected to fully weigh the option of breach. Businesspeople do not abandon their conscience simply because they are in a business setting. If the choice to intentionally violate a business regulation is truly a matter of moral principle rather than convenience, then like all forms of civil disobedience, it is to be applauded, not condemned.

Footnotes

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¹ See generally HENRY DAVID THOREAU, *On the Duty of Civil Disobedience*, in WALDEN AND CIVIL DISOBEDIENCE 241 (2003) (originally published in 1849 and titled *Resistance to Civil Government*).

² Philosopher John Rawls notes that it has become “customary” to define civil disobedience as “any noncompliance with law for conscientious reasons.” JOHN RAWLS, *A THEORY OF JUSTICE* 368 (1971). Rawls attributes this customary understanding to Thoreau’s classic nineteenth-century essay. *Id.* The present analysis employs this meaning as well. *See infra* notes 15-39 and accompanying text (distinguishing the various forms of civil disobedience, including political civil disobedience, conscientious objection, conscientious evasion, and justified civil resistance).

³ *See generally* Sophocles, *Antigone*, in *THE OEDIPUS CYCLE* 183 (Dudley Fitts & Robert Fitzgerald trans., 1949).

⁴ *Id.* at 193.

⁵ Explaining Antigone’s choice, Theodore Ziolkowski notes that “few of the unwritten laws of Greek antiquity match in urgency the sacred command to bury the dead.” THEODORE ZIOLKOWSKI, *THE MIRROR OF JUSTICE* 146 (1997).

⁶ Sophocles, *supra* note 3, at 197-98.

⁷ *See* RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 111-12 (1988) (using the debate between Creon and Antigone to illustrate the distinctions between legal positivism and natural law).

⁸ *See generally* Robert P. Lawry, *Ethics in the Shadow of Law: The Political Obligation of a Citizen*, 52 *CASE W. RES. 655*, 681-98 (2002) (examining Antigone’s choice to defy law); Susan W. Tiefenbrun, *On Civil Disobedience, Jurisprudence, Feminism and Law in the Antigones of Sophocles and Anouilh*, 11 *CARDOZO STUD. L. & LIT.* 35 (1999) (comparing and contrasting Sophocles’ version of Antigone with one crafted in 1944 by French playwright, Jean Anouilh).

⁹ *See generally* William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 *NEW ENG. L. REV.* 3, at 19-26 (reciting with implicit approval a lengthy list of historical instances of civil disobedience).

¹⁰ *See generally* Daniel T. Ostas, *Cooperate, Comply, or Evade? A Corporate Executive’s Social Responsibilities with Regard to Law*, 41 *AM. BUS. L.J.* 559 (2004) (distinguishing between legal compliance and legal cooperation).

¹¹ *See supra* note 2 and accompanying text (tracing this definition to Thoreau); *see also*, Quigley, *supra* note 9, at 15 (2003) (defining civil disobedience as “the intentional violation of a law for reasons of principle, conscience or social change”). *See generally* Matthew R. Hall, *Guilty But Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 *CARDOZO L. REV.* 2083, 2083-96 (2007) (discussing several definitional nuances associated with the term civil disobedience and providing useful citation to the literature).

¹² *See* Lawry, *supra* note 8, at 709 (noting that “law breaking by Gandhi and King was concerned with and executed as part of a mass movement”).

¹³ *See id.* (noting that Antigone’s acts were personal, not political, and secretive).

¹⁴ During December of 1773, 150 men led by Samuel Adams illegally boarded British ships, broke open hundreds of barrels of tea, and threw the contents into Boston Harbor, committing both criminal trespass and destruction of property. *See* Quigley, *supra* note 9, at 20 n.65 (describing the events of the Boston Tea Party).

¹⁵ RAWLS, *supra* note 2, at 363-91.

¹⁶ *Id.* at 365-67.

¹⁷ *Id.* at 366.

¹⁸ *Id.* at 365.

¹⁹ *Id.* at 366.

²⁰ *Id.* at 367.

²¹ *See* *THE ESSENTIAL GANDHI* 84-111 (Louis Fischer ed., 1962) (discussing a form of argument initially designed to resist discriminatory practices in South Africa).

²² *See* Lawry, *supra* note 8, at 713 (noting that in King’s famous *Letter from a Birmingham Jail*, King appealed to notions of procedural due process and violation of voting rights).

²³ *See* Martin Luther King, Jr., *Letter from a Birmingham Jail*, in *LAW AND MORALITY: READINGS IN LEGAL PHILOSOPHY* 453, 459 (David Dyzenhaus & Arthur Ripstein eds., 1996) (stating that one who “willingly accepts the penalty by staying in jail to arouse the conscience of the community over an injustice, is in reality expressing the very highest respect for the law”); Lawry, *supra* note 8, at 708 (discussing Gandhi’s willingness to accept punishment).

²⁴ *See* Lawry, *supra* note 8, at 708 (noting the influence of Gandhi views of non-violence on King).

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- ²⁵ See Quigley, *supra* note 9, at 3 n.1 (documenting recent acts of civil disobedience connected with governmental policies in Iraq).
- ²⁶ See, e.g., *United States v. Turner*, 44 F.3d 900 (10th Cir. 1995) (upholding the conviction of an abortion protestor).
- ²⁷ See Cesar Cuauhtemoc Garcia Hernandez, *Radical Environmentalism: The New Civil Disobedience?*, 6 SEATTLE J. SOC. JUST. 289 (2007).
- ²⁸ See *United States v. Maxwell*, 245 F.3d 21 (1st Cir. 2001).
- ²⁹ Rawls uses the term civil disobedience to describe only politically motivated actions. See RAWLS, *supra* note 2, at 368 (noting that this relatively restrictive use is not customary). He prefers to call acts of private conscience, such as Thoreau's refusal to pay a tax, "conscientious refusal." *Id.* Rawls labels secretive acts of justified legal defiance, such as Tubman's Underground Railroad, as "conscientious evasion." *Id.* at 369 (attributing the term conscientious evasion to Burton DeBren without elaboration).
- ³⁰ See JEFFREY TOOBIN, *THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT* 102 (2007).
- ³¹ *Id.*
- ³² *Id.*
- ³³ See generally STEPHEN L. CARTER, *THE CULTURE OF DISBELIEF: HOW AMERICAN LAW AND POLITICS TRIVIALIZE RELIGIOUS DEVOTION* 124-35 (discussing the accommodation of religious freedoms of Quakers, Native Americans, and others under the Free Exercise Clause).
- ³⁴ See generally LINDA RABBen, *FIERCE LEGION OF FRIENDS: A HISTORY OF HUMAN RIGHTS CAMPAIGNS AND CAMPAIGNERS* 40-58 (2002) (placing the acts of Tubman within a broader context of abolitionism generally).
- ³⁵ See RAWLS, *supra* note 2, at 369.
- ³⁶ See Exodus 1:17.
- ³⁷ See Quigley, *supra* note 9, at 19 n.3 (listing several examples of civil disobedience drawn from the Bible).
- ³⁸ See, e.g., HOWARD ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 39-53 (2002) (noting that non-violence is preferable, but drawing a distinction between non-violence and civil disobedience). Zinn quotes Gandhi as saying: "I do believe that where there is only a choice between cowardice and violence I would advise violence." *Id.* at 42.
- ³⁹ See generally DANIEL BERRIGAN, *THE TRIAL OF THE CATONSVILLE NINE* (1970) (recounting the highly publicized Vietnam-era trial involving breaking and entering into a government office building and destruction of property for reasons of conscience).
- ⁴⁰ Barack Obama, *Democratic Debate 2007*. Nov. 15, 2007 Las Vegas, NV., available at <http://transcripts.cnn.com/TRANSCRIPTS/0711/15/se.02.html>. (last visited May 11, 2009).
- ⁴¹ See Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324 et. seq. (2000). "It is unlawful for a person or other entity to hire ... an alien knowing the alien is an unauthorized alien." *Id.* at § 1324(a)(1)(A).
- ⁴² Guilt is established by a preponderance of the evidence before an administrative law judge. *Id.* at § 1324(a)(1)(C). The judge enters a cease and desist order and a civil penalty of "not less than \$250 and not more than \$2000 for each unauthorized alien." *Id.* at § 1324(e)(4)(A)(i). With repeat offenses, the fines escalate to between \$2000 and \$5000 per alien for second time-offenders and between \$3000 and \$10,000 per alien for third-time offenders. *Id.* at § 1324(e)(4)(A)(ii-iii).
- ⁴³ See *id.* at § 1324(f)(1).
- ⁴⁴ See Michael Hoffman et al., *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2005*, POPULATION ESTIMATES 1 (August, 2006).
- ⁴⁵ See Newsletter, U.S. Immigration and Customs Enforcement: Worksite Enforcement, April 30, 2009 (noting that aliens often turn to document fraud, Social Security fraud or identity theft in order to get jobs) [hereinafter Newsletter].
- ⁴⁶ See Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1735-36 (2006) (using immigration regulations as a prime example of a system of "underenforced" laws).
- ⁴⁷ See Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate Conscience*, 42 VAL. L. REV. 1129, 1153 (2008) (documenting a decline in enforcement from 1992-2002) (citation omitted). It seems that 2002 marked a low point for enforcement, with only 25 criminal arrests nationwide. See Newsletter, *supra* note 45. By 2008, the total criminal arrests regarding illegal workers had increased to 1103, but only 135 of these implicated employers. *Id.* (tracing enforcement rates from 2002 through

2008). Although information on the exact numbers of investigations, indictments, and convictions seems somewhat conflicted, by all accounts, the law is not well enforced.

⁴⁸ Natapoff, *supra* note 50, at 1736 (citation omitted).

⁴⁹ Alexandra Natapoff suggests that the signal may be purposeful. She notes that “notwithstanding the massive, expensive, and dangerous enforcement efforts to close the border, U.S. policy makers recognize that full enforcement of restrictive entry laws would harm the economy.” Natapoff, *supra* note 46, at 1736 (parenthetical omitted, citation omitted).

⁵⁰ *See id.* at 1735 (citing two recent studies).

⁵¹ Rawls notes that even in a reasonably just society, the government “cannot frame a procedure which guarantees that only just and effective legislation is enacted.” John Rawls, *The Justification for Civil Disobedience*, in *THE DUTY TO OBEY LAW: SELECTED PHILOSOPHICAL READINGS* 49, 53 (William A. Edmundson ed., 1999).

⁵² This example was recounted to the author by the president of a corporation reportedly facing this requirement. The conversation took place at an executive education program in Stillwater, Oklahoma.

⁵³ This example is based on conversation between the author and a safety engineer for a major oil refinery who reportedly faced such a regulation. The story was recounted during an executive education program in Tulsa, Oklahoma.

⁵⁴ For a collection of philosophical works addressing the social obligation to obey law, see *THE DUTY TO OBEY LAW: SELECTED PHILOSOPHICAL READINGS* (William A. Edmundson ed., 1999).

⁵⁵ *See RAWLS, supra* note 2, at 371-75 (noting that in reasonably just societies all other avenues to justice must be tried and found to fail prior to resorting to civil disobedience).

⁵⁶ The prima facie duty to obey law has been defended with reference to the social contract theories of Hobbes and Locke, to the utility theory of Bentham and Mill, and to a natural duty to support just institutions associated with Rawls. *See* M.B.E. Smith, *Is There a Prima Facie Duty to Obey Law?*, in *THE DUTY TO OBEY LAW: SELECTED PHILOSOPHICAL READINGS* 75, 77-93 (William A. Edmundson ed., 1999) (providing a critique of each approach). Careful delineation of these various approaches is beyond the scope of this article. Suffice to say; under each approach the prima facie duty to obey law is somewhat abstract and attenuated as compared to the affirmative duty to avoid physical harm to one’s employees. In addition, under each approach, space is carved out for the exercise of civil disobedience.

⁵⁷ *Hill v. TVA*, 419 F. Supp. 753 (E.D. Tenn. 1976), rev’d, 549 F.2d 1064 (6th Cir. 1977), aff’d, 437 U.S. 153 (1978). *See* Zygmunt J. B. Plater, *Tiny Fish, Big Battle: 30 Years after TVA and the Snail Darter Clashed, The Case Still Echoes in Case Law, Politics and Popular Culture*, 44 *TENN. B.J.* 14 (2008). In an online poll of environmental law professors asked to rank the ten most influential environmental law cases, the snail darter ranked first, receiving more than twice as many votes as the second place finisher. *See id.* at 14 n.2.

⁵⁸ *See* Plater, *supra* note 57, at 14 n.3 (recounting the facts and outlining the applicable law). Professor Plater notes that he spent six years as chief litigator for the plaintiffs in the snail-darter case. *Id.* at 14.

⁵⁹ *See id.* at 19-20 (discussing the evolution of the political controversy).

⁶⁰ Plater quotes from a Dec. 7, 1993 broadcast of the *Rush Limbaugh Show*: “America today is a new homosocialism.... What these people are is against private property rights. They are trying to attack capitalism and corporate America ... trying to say that we must preserve ... the snail darter whatever it is.” *Id.* at 14 n.2.

⁶¹ *Id.* at 19.

⁶² Plater notes that after litigating the case for the plaintiffs, he continued on with the case through the legislative process. *Id.* at 14. His account of the controversy is quite compelling.

⁶³ Cynthia Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 *N.C.L. REV.* 1265 (1998). Williams writes: “If we cannot expect corporations to comply with the minimum standards of responsible behavior set forth in positive law when the violations prove profitable ... then more refined notions of corporate responsibility seem relatively pointless.” *Id.* at 1276.

⁶⁴ *Id.* at 1285-95 (criticizing the notion that penalties should be viewed as price to be paid if one chooses to breach).

⁶⁵ *See generally* Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 *COLUM. L. REV.* 544 (1997) (providing the first articulation of the doctrine); RICHARD A. POSNER,

ECONOMIC ANALYSIS OF LAW 118-20 (4th ed. 1992) (explaining the doctrine with reference to economic theory).

⁶⁶ See Gil Lahav, *A Principle of Justified Promise Breaking and Its Application to Contract Law*, 57 N.Y.U. AM. SURV. AM. L. 163, 166-71 (2000) (justifying the intentional breach of a contract with reference to both deontological and utilitarian ethics). But see Craig S. Warkol, *Resolving the Paradox Between Legal Theory and Legal Fact: The Judicial Rejection of the Theory of Efficient Breach*, 20 CARDOZO L. REV. 321, 345-47 (1998) (referring to an intentional breach of contract as “efficient theft” and denouncing the doctrine of efficient breach as morally indefensible).

⁶⁷ See, e.g., Robert Cooter, *Prices and Sanctions*, 84 COLUM. L. REV. 1523 (1984) (arguing that fines associated with the regulation of productive activities, such as pollution emissions from a factory, should be viewed as prices to be voluntarily paid by the firm if chooses to break the law and pay the fine).

⁶⁸ Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982).

⁶⁹ See Williams, *supra* note 63, at 1278 n.43 (noting that a right to disobey unjust laws resides at “irreducible core of autonomy which authority can never invade”).

⁷⁰ Williams contends that a businessperson may not violated law unless there is a sufficient moral reason to do so, and that enhancing profits is not a sufficient moral reason. *Id.* (“profit-maximizing does not suffice as a sufficient ‘other obligation’ that may permissibly outweigh the prima facie obligation to obey the law”) (quotation marks in original).

⁷¹ Easterbrook and Fischel write: “Managers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm We put to one side laws concerning violence other acts thought to be *malum in se*.” Easterbrook & Fischel, *supra* note 68, at 1168 n.36 (citation omitted).

⁷² The social obligation to obey or to disobey law does not change with organizational structure. See Ostas, *supra* note 10, at 591 (noting that notwithstanding agency issues, a corporate executive’s legal and ethical duties are exactly the same as the legal and ethical duties owed by sole proprietors).

⁷³ See generally TOM TYLER WHY PEOPLE OBEY LAW 3-4 (1990) (distinguishing between “instrumental” and “normative” motives for obeying law); Daniel T. Ostas, *When Fraud Pays: Executive Self-Dealing and the Failure of Self-Restraint*, 44 AM. BUS. L.J. 571, 573-80 (2007) (suggesting that legal obedience comes from two sources: perceived economic incentives and moral self restraint).

⁷⁴ See generally TERRY HALBERT & ELAINE INGULLI, LAW & ETHICS IN THE BUSINESS ENVIRONMENT 201-09 (5th ed. 2006) (providing a series of readings expressing competing views that inform environmental law and policy).

⁷⁵ The Endangered Species Act works as an absolute — if a species is on the list, threatening activity must halt so as to address the issue. See Plater, *supra* note 57, at 17-18 (discussing the legal requirements for an injunction).

⁷⁶ See RAWLS, *supra* note 2, at 371-75 (discussing the limits of civil disobedience generally).

⁷⁷ The tendency to interpret ambiguous information in a self-serving fashion is one of a number of biases identified by cognitive psychology. See Robert A. Prentice, *The Case of the Irrational Auditor: A Behavioral Insight into Securities Fraud Litigation*, 95 NW. U. L. REV. 113, 143-80 (2000) (discussing self serving bias among a list of more than a dozen biases and heuristics that channel thought).

⁷⁸ *Id.*

⁷⁹ See generally HOWARD R. BOWEN, SOCIAL RESPONSIBILITIES OF THE BUSINESSMAN 28 (1953) (arguing that a businessperson has an affirmative duty to cooperate with government officials in the formation and implementation of business regulations); LEE E. PRESTON & JAMES E. POST, PRIVATE MANAGEMENT AND PUBLIC POLICY 100 (1975) (same).

⁸⁰ Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32 (articulating a view that a corporate executive has a duty to maximize shareholder returns subject to legal constraints).

⁸¹ RAWLS, *supra* note 2, at 352.