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The Civil Disobedience of Edward Snowden:

A Reply to William Scheuerman

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ABSTRACT: This paper responds to William Scheuerman's analysis of Edward Snowden as someone whose acts fit within John Rawls's account of *civil disobedience* understood as a public, non-violent, conscientious breach of law performed with overall fidelity to law and a willingness to accept punishment. This paper rejects the narrow Rawlsian notion in favour of a broader notion of *civil disobedience* understood as a constrained, conscientious and communicative breach of law that demonstrates opposition to law or policy and a desire for lasting change. The paper shows that, according to Rawls's unduly narrow conception, Edward Snowden is not a civil disobedient. But, according to the more plausible, broader conception, he is. The paper then identifies some advantages of the broader conception in contemporary analyses of new forms of disobedience including globalised disobedience and digital disobedience.

KEYWORDS: Civil disobedience, John Rawls, rule of law, Edward Snowden, William Scheuerman

Edward Snowden, the former CIA systems administrator who leaked information about classified NSA programs to the *Guardian* and *Washington Post*, qualifies as a civil disobedient, but not in the well-known, narrow, and implausible sense articulated by John Rawls.

Rawls defines *civil disobedience* as a 'public, nonviolent, conscientious yet political act contrary to the law usually done with the aim of bringing about a change in the law or policies of the government.'¹ More specifically, civil disobedience is:

...disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the

¹ Rawls, John (1971), *A Theory of Justice*. Harvard University Press, § 55.

public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's act.²

Despite William Scheuerman's claims to the contrary in this journal issue, Snowden fails to meet two of the core conditions for civil disobedience as Rawls specifies them.

First of all, Rawls's publicity condition includes giving fair notice (to the society and, consequently, to its authorities) that one is about to engage in civil disobedience.³ For Rawls, civil disobedience is neither covert nor secretive. It is akin to public speech. Giving fair notice of the intended disobedience is part of its open and public nature.

Snowden gave no notice to his society and its authorities that he would leak documents about NSA programs that gather information about millions of Americans and foreigners. Indeed, before his disclosures to the two newspapers became public, Snowden removed himself from Hawaii to Hong Kong.

Snowden's lack of fair-notice publicity need not trouble him or us since publicity is an overly stringent condition for *civil* disobedience. For one thing, civility, understood in terms of self-restrained, sincere, and well-meaning conduct, does not require that one announce in advance that one will engage in a constrained, communicative breach of law. For another thing, forewarning authorities that one intends to break the law gives law-enforcers a ready opportunity, if not to say a *pro tanto* duty, to intervene to prevent the disobedience.⁴ With any notice, authorities would have surely intervened in Snowden's case given the nature of the information he leaked. As a constraint on civil disobedience, therefore, advance publicity is likely to be self-defeating, particularly in serious cases where resort to civil disobedience may be necessary to bring an issue to the public's attention.

Snowden satisfies a more modest and more plausible condition for civil disobedience, which is dialogic effort. After the *Guardian* and *Washington Post* made their initial revelations, Snowden exposed his identity and sought to explain his

² Rawls (1971), § 55.

³ Rawls states that: '... civil disobedience is a public act. Not only is it addressed to public principles, it is done in public. It is engaged in openly *with fair notice*; it is not covert or secretive.' (my emphasis). (1971), § 55. Rawls says in a footnote that his definition follows that of Hugo Bedau, who explicitly builds in a condition of fair notice into his definition of *civil disobedience*.

⁴ Smart, Brian (1991), 'Defining Civil Disobedience' in *Civil Disobedience in Focus*. Hugo A. Bedau (ed.), London: Routledge.

reasons for informing the public about NSA programs, namely, that the public should be able to make an informed decision about these programs, the parameters of privacy, and how society will be governed. Snowden's behaviour aligns with Joseph Raz's requirement that a civilly disobedient act, even if it is unannounced and initially covert, be followed up afterward by an acknowledgement of the act and the reasons for which it is taken.⁵

Next, there is Rawls's fidelity to law condition, which is as demanding as his publicity condition is given its requirement that one be willing to accept the legal consequences for one's act.

In Snowden's case, some US officials claim that his acts were treasonous. If that were so, then, by nature, they would lack fidelity to the law of the United States regardless of whether Snowden were willing to pay the legal price, and Snowden would be in good company with Mahatma Gandhi as someone whose acts of civil disobedience sit outside the conceptual space offered by Rawls.

More importantly, though, Snowden signalled his unwillingness to accept the legal consequences for his conduct by fleeing to Hong Kong and then to Russia in an attempt ultimately to seek asylum in Latin America (or, indeed, in any one of the 21 countries to which he reportedly appealed).

Scheuerman argues that, despite Snowden's efforts to circumvent prosecution, he does display fidelity to law. Scheuerman stresses Snowden's implicit appeal to legal arguments in his discussion of the appropriate sanctions for disobedients as well as his awareness that, most likely, he would not receive a fair trial in the US. Scheuerman observes that 'A disobedient who accepts the legitimacy of criminal proceedings which are secret, irregular, arbitrary, or unduly brutal does not, in fact, necessarily uphold legality. On the contrary, by participating in them he risks becoming complicit in the regime's attack on the rule of law.'

There are two lines of reply that need to be made here. The first concerns Snowden and Rawls on fidelity. The second concerns Scheuerman's take on the rule of law.

Concerning Snowden, the fact that any trial would most likely be conducted in secret and would not be fair is irrelevant to the condition that a civil disobedient be willing to accept the legal consequences. Moreover, the fact that Snowden invokes

⁵ Raz, Joseph (1979), *The Authority of Law*. Oxford University Press, 265.

legal arguments in his account of his conduct does not necessarily mean that his breaches of law and his escape from US clutches were themselves consistent with fidelity to law in the Rawlsian sense.

Of course, to be fair to Snowden and to Rawls, Rawls's conception of *civil disobedience* is designed for a just or nearly just society, and not for the circumstances in which Snowden finds himself. What this means, though, is that we cannot easily extrapolate from Rawls's idealised context to our own. Although Rawls says reassuringly that, in societies that are not nearly just, there is no difficulty in resorting to civil disobedience (as well as to more radical forms of protest) 'as a tactic for transforming or overturning an unjust and corrupt system'⁶, nevertheless he leaves us without a conceptual footing with which to specify the nature of civil disobedience in societies like ours. Is fidelity to law required in societies whose basic structures include substantial injustice? Is fair-notice publicity a condition for civil disobedience in the United States today? We cannot say what civil disobedience is, for Rawls, in regimes that aren't nearly just, and we cannot transplant his conception of *civil disobedience* into our real-world circumstances.

Furthermore, regardless of problems of transplantation, Rawls's fidelity to law condition can be questioned since neither willingness nor unwillingness to accept the legal consequences need be a mark of a certain attitude toward the law. Willingness to accept the legal consequences for disobedience is not necessarily a mark of fidelity to law because a disobedient can have other reasons for accepting the legal consequences; for example, doing so may be strategically useful.⁷ Conversely, unwillingness to accept the legal consequences is not necessarily evidence of a lack of fidelity to law because the punishment for an offence may be the very thing that the disobedient opposes and which she seeks to highlight by breaching the law in question.⁸ She may 'submit' to the punishment, but she does not *accept* it. Or, since she believes it is an injustice and does not accept it, she may seek to circumvent it.

Once again, Snowden satisfies a more modest and more plausible condition for civil disobedience, which is non-evasiveness broadly construed. After he succeeded in passing documents to reporters, he exposed his identity. Through both

⁶ Rawls § 55.

⁷ I discuss this point at greater length in Brownlee, Kimberley (2013), 'Civil Disobedience' in *The Stanford Encyclopedia of Philosophy*, Edward Zalta (ed.).

⁸ Rawls seems to acknowledge as much when he says that one might contemplate disobeying a vague and harsh statute against treason in order to communicate opposition to it, but the punishment may be greater than one could reasonably be expected to bear (1971), § 55.

his disclosures and his self-exposure, he showed that he was willing to bear the *risk* of being punished as well as to endure the substantial losses of his citizenship rights and residence rights in the US.

In short, Snowden's conduct aligns with a broader, less tendentious, and more credible conception of *civil disobedience* that Rawls's. This broader conception sees civil disobedience as a constrained, conscientious and communicative breach of law that demonstrates one's opposition to a law or policy and one's desire for lasting change.⁹

Putting Snowden aside for the moment, let's turn to Scheuerman's claim that it is indispensable to understanding and defining *civil disobedience* that it display a principled commitment to legality, which can mean amongst other things not accepting the legitimacy of criminal proceedings that are secret, irregular, arbitrary, or unduly brutal. To participate in them could make a disobedient, like Snowden, complicit in the regime's attack on the rule of law.

Scheuerman relies on a content-laden notion of *rule of law* that '...provide[s] protections against arbitrary as well as unjust state action.' To my mind, this is closer to the rule of *justice* than the rule of *law*. My own take on the *rule of law* is less idealistic and less optimistic.

I agree with Scheuerman that the rule of law protects against (certain kinds of) arbitrariness, namely, the arbitrariness of the unpredictable, particularist variety that targets individual people without warning. As such, rule of law can protect against *some* unjust state actions, i.e. formal or procedure injustices that violate norms of generality, relative proportionality, and predictability. But since the legality of law does not depend on the morality of law, the rule of such law need not, though of course can, protect against substantive injustices, such as those to be visited upon whistle-blowers who are charged and convicted under the US Espionage Act.

It is unlikely that we will make progress by debating the meaning of the term 'rule of law'.¹⁰ Therefore, instead, I will note the advantages of an account of civil disobedience that does not build in either fidelity to the law of a given system or fidelity to a substantive, justice-laden notion of *rule of law*.

⁹ See Brownlee, Kimberley (2012), *Conscience and Conviction: The Case for Civil Disobedience*. Oxford University Press, ch. 1.

¹⁰ As Jeremy Waldron observes, *rule of law* may well be an essentially contested concept. See Waldron, Jeremy (2002), 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' in *Law and Philosophy*, 21, 137–164.

First, such an account does not anticipate the evaluation of the practice of civil disobedience. One legitimate complaint against Rawls is that he draws the conceptual boundary of *civil disobedience* so narrowly that it takes little argumentative muscle for the philosopher to show that the practice is morally justifiable.¹¹

Second, acts of civil disobedience are ultimately addressed to *people* as moral agents, be those people ordinary citizens, police officers, judges, jury members, legislators, executives, colleagues, employers, or members of other communities. The credible civil disobedient seeks to engage people in deliberative discussion about the moral merits of his cause so as to prompt democratic reflection that will lead to well-considered, lasting change. The arguments that the disobedient employs may include appeals to the best of legal reasoning and the most credible of political principles, but they ultimately must come back to the moral norms to which we are all subject as human beings. A civil disobedient would make a very poor case for her conduct if she were to point out either that civil disobedience can have a stabilising effect on society or that it sits within the boundary of fidelity to law.

I appreciate that an account that emphasises the moral ambitions of civil disobedients is idealistic. Indeed, I stand guilty as charged when Scheuerman notes that, from my work, ‘We get a hard-nosed empirics of legislative politics, but not a similarly hard-nosed empirics of political and social movements where conscientious lawbreaking plays a crucial role.’ This is fairly unproblematic since we can afford to idealise somewhat the individual people who hold a minority opinion, have comparatively little power to influence public policy, and resort to modest breaches of law to raise their cause. We do not have the same luxury to idealise governments and the Law in that way.

Third, an account of civil disobedience that is silent about fidelity to law is better built for societies like ours than a Rawlsian account is. By limiting his focus to disobedients’ who have a fidelity to law, Scheuerman, like Rawls, has little to say about disobedients who are ambivalent or hostile to their legal system or who are not members of the society whose laws they oppose. Consider the person who travels to another country and engages in an illegal demonstration in solidarity with local people. As someone who lacks the standing to have a fidelity to the law of that society she sits outside the conceptual and evaluative space of Scheuerman’s discussion. (Of

¹¹ Brownlee, Kimberley (2004), ‘Features of a Paradigm Case of Civil Disobedience’ in *Res Publica*, 10: 337-351.

course, she may be arrested and may be punished, but she is not a member of the community to whose sense of justice a Rawlsian disobedient would necessarily appeal.) The narrow, Rawlsian approach is less applicable than contemporary accounts are to the globalized world in which we live, as it can say nothing about the myriad of new forms of civil disobedience such as international, transnational, and cyber disobedience.

Returning once more to Edward Snowden, his acts are not only civilly disobedient, they are morally justified. He was properly sensitive to the responsibility that public officials have to exercise first-order moral reasoning about the programs they oversee. He was willing to put that moral responsibility ahead of formal expectations even though it was personally costly and meant breaking the law. It is true that he defended his acts in part on the political ground that the public has a right to be informed about policies that lack judicial and congressional oversight. But, behind that argument lies the moral argument that personal privacy is a fundamentally important interest which we should not allow our policies to erode without our informed consideration.