

GLOBALIZATION, DISOBEDIENCE, AND THE RULE OF LAW

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I

On November 30th, 1999 protestors in Seattle disrupted the opening ceremonies of the WTO meetings, held unlawful marches, obstructed justice, and smashed the windows of Starbucks and Nike franchises. The Montreal G-8 meeting of November 2000, the Summit of the Americas meeting in Quebec City in April 2001, and the G-8 meetings that same year in Genoa, were subject to similar protests. By September 2001, however, global attention shifted swiftly and almost completely. But there was fall-out for the anti-globalization movements; we saw it in Peter Beinart's instant diagnosis:

The anti-globalization movement is, in part, a movement motivated by hatred of the global inequities between rich and poor. And it is, in part, a movement motivated by hatred of the United States. Now, after what has happened this week, it must choose. (...) On Tuesday that ambiguity became impossible. This nation is now at war. And in such an environment, domestic political dissent is immoral without a prior statement of national solidarity, a choosing of sides.¹

We have also seen, to our peril, where such views about the preconditions for legitimate dissent can lead. But here I want to return to the first part of Beinart's claim. Is the anti-globalization movement (or what remains of it) mainly or only an expression of hatred of the crushing injustices that rich countries inflict on the poor, a response to the

¹ TRB FROM WASHINGTON Sidelines by Peter Beinart, *The New Republic Online* Post date 09.13.01 | Issue date 09.24.01 <<http://www.thenewrepublic.com/092401/trb092401.html>>

forceful projection outward of the kind of savagery with which the United States has, it seems, chosen to treat its domestic poor? Of course it is—in part. But I want to suggest that there is another dimension, or, if you like, interpretation, of the protests. On the view I propose here, they can be understood as a rebellion against a failure of political authority. In the use of disobedience to call attention to this failure, the anti-globalization movement engages in an extraordinary, and paradoxical-seeming, strategy: law breaking in defense of the rule of law. I will say little in defense of that strategy; my primary aim is to characterize it and to show that, whether or not it is wise, it is at least coherent. In doing so, I also want to broaden the way legal philosophers standardly think about the nature of civil disobedience.

II

At Seattle there were trade unionists protesting job losses, sweatshops, child labour, and the maquiladoras, environmentalists protesting the fate of endangered species and hormonized beef, indigenous people protesting global monoculture and appropriation of their traditional lands and knowledge, anti-capitalists protesting the extending tentacles of the market, and anarchists protesting all governmental and corporate power. What are we to make of this sprawling diversity of ambition? Apart from the observation that these groups are all vaguely—sometimes very vaguely—part of a leftist tradition in politics, it is not clear that they have much in common. It is not even clear that they are consistent: the critique of globalization from the North, for instance from relatively wealthy trade-unionists fearing job losses to international competition may be incompatible with the critique from the South, especially from the masses of landless peasants subjected to the rigors of IMF restructuring.

One response to this diversity would be to conclude that the movement is unlike anything before it: it is sound and fury signifying nothing, a *refus global* bearing no coherent message. Admittedly, the lack of an overall message does not entail that the movement is misguided or wrong. Suppose it is protesting a dozen unrelated things. If it is also *right* to protest each of these, then it is also right overall. The principle of dominance provides that if it is right about each, then it doesn't matter that there is no single, summary, issue about which it is also right; it is enough that it is right piece-by-piece. But something else might follow. If there is no overall issue, then there is no overall message. And if there is no overall message, then the *general* acts of protest and disobedience—marches, blockades, obstruction etc.—cannot communicate it; and if that is so then these protests lack the communicative character of paradigmatic cases of civil disobedience. Gandhi protested the British salt tax and salt monopoly by leading a march to the Arabian sea and making his own salt from sea-water. Where in the broad anti-globalization movement is there a similar nexus between protest and message?

One response we might give is to point out that there were piecemeal messages. When Brazilian farmers uprooted genetically modified corn and soy in Monsanto's plantations, the message was unmistakable. So maybe the movement had no aim to communicate, though its component parts did. Another answer is that it may be wrong to expect such a tight nexus, for not all justified civil disobedience breaks the very laws it protests. (I shall return to this point later.) But there is a more interesting possibility. Such coherence as the movement has may not be a matter of the resemblances among the particular aims that it pursues. It may lie instead in the context that gives rise to them. Three things form the background of its most important concerns. First, they emerge in

response to a perceived intensification of international economic and symbolic interaction.² Second, they accompany an increasing dissatisfaction, and sometimes despair, about the capacity of existing states to regulate this: in the North this is often expressed as the impotence of national governments, in the South as the domination of national governments by foreign forces. Third, they reflect a widespread view that the most influential international institutions, particularly the IMF, the WTO and the World Bank, are illegitimate, and that what came to be known as the “Washington Consensus” about policy was misguided and fundamentally unjust. These institutions and their operative norms were not seen as the tentative beginnings of an effective international order; they were seen as soldiers in the war of all against all.

Let me call those the “circumstances of globalization.” They provide the backdrop for most of the issues that engaged the protestors. They also suggest a way of thinking about civil disobedience that is different, not only in aims, but in structure, from what has gone before.

III

In trying to understand different forms of protest, our problems are not only historical; they are also interpretative and normative. What meaning should we assign these events, and how might that illuminate our assessment of them? We often understand the present through historical precedents, even when we are not entirely sure what the precedents are or what they mean. If we are curious about the nature and causes

² On the significance of communication, i.e. symbolic interaction, in globalization, see especially Anthony Giddens, *The Consequences of Modernity* (Stanford: Stanford University Press, 1990).

of protest we will need somehow to define the relevant class of events, and that requires a theory. Our understanding of civil disobedience is influenced by our paradigm cases, just as our understanding of revolution is influenced by whether we take as exemplars the American and French revolutions or the Glorious Revolution or the Velvet Revolution.³ Such considerations also matter when we turn to evaluation. Were the protests in Seattle or Quebec or Genoa—or any part of them—right or justifiable? This too may depend on our paradigms. Knowing whether something is right or wrong may well depend on knowing what it is, and that will often turn on its point, actual or imputed. Here, nothing is easier than to generalize rashly from the past.⁴ So let us ask: what is the relationship between the protests of Seattle, Prague, Washington, Chiapas, Seoul, Quebec City, or Genoa on the one hand, and what we might call the “classical” tradition of civil disobedience on the other—the tradition exemplified in, say, the civil rights marches and anti-war protests of the sixties and seventies and their antecedents from Thoreau to Gandhi?

The question is not whether these two series of events are the same or different. They are *both* the same *and* different, with strands of continuity are woven together with strands of change. The widespread feeling among commentators of a certain age, that the anti-globalization movement is *nothing like* the civil rights movement, fixes on the more evident differences, and in particular to the diversity of agents and aims that I have already mentioned. Earlier protests typically involved the citizens of *one* country

³ On the importance of paradigms and exemplars in concept formation in social science, see, W.B. Gallie, “Essentially Contested Concepts,” 56 *Proc. Aris. Soc.* (1955-56), pp. 167-98.

⁴ I think here of Rawls’s use of the wars of religion as the paradigm for modern conflicts around gender and sexuality. See my ‘Pluralism, Social Conflict, and Tolerance,’ in A. Soeteman, ed., *Pluralism and Law* (Dordrecht: Kluwer, 2001), pp. 85-105

speaking to *its government* about *one* issue. The anti-globalization movement, in contrast, involves a globalization of protest itself, with citizens of many countries speaking to governments and non-governmental actors about a wide range of issues. There is therefore a feeling, especially among those whose paradigms are drawn from earlier dissent, that the recent protests are a perversion of, or diversion from, justifiable civil disobedience. The supposed difference between the classical protests and the newer ones is not simply, as Canadian journalist Margaret Wentz put it, that “we were right, and they are wrong”—it is also that anti-globalization protests are not regarded as being the same kind of thing.

I think that there *is* a real discontinuity between the anti-globalization movement and the civil rights or anti-war protests, but that it does not lie here. Most commentators misidentify the source of their correct intuition that something new is afoot, for the anti-globalization movement is in fact significantly different from the paradigm of classical civil disobedience. On the classical view, civil disobedience may be understood and assessed as a response to a breach of the social contract. It is in that way *remedial* in character. It emerges in an effective state that has failed to keep faith with the trust its people have placed in it. Disobedience draws attention to the breach and demands that it be repaired. In contrast, the new disobedience protesting globalization is better understood as a response to a failure to conclude a social contract *in the first place*, and its context is not an existing and effective set of political institutions, but the complex anarchy that is global society. Because it aims not to repair the authorities’ breach of trust, but to establish authority afresh, we may think of it as *constructive* disobedience. For reasons that will become clear, the distinction between remedial and constructive

disobedience resembles the distinction between Locke's and Kant's views of the nature of political authority. And one reason the anti-globalization movement is so easily misunderstood—even by its members—is that we normally tend to see civil disobedience through the Lockean, remedial, lens. Shifting to the constructive paradigm may help us better understand and evaluate what the new protest movement is actually about. Or so I shall argue.

IV

All civil disobedience is law breaking, and is therefore always an affront to what I've called the 'self image of the state'.⁵ Every state tolerates what it regards as lawful protest, that is, protest within the limits permitted by law. (At Seattle, the AFL-CIO were granted permits for their protest marches.) But anyone who thinks that is the limit of permissible dissent necessarily thinks that all civil disobedience is wrong, for it is of its essence an unlawful act, even when the illegalities are the minor ones of trespass, obstruction, mischief, resisting arrest, and forms of symbolic non-compliance (for example, catapulting teddy-bears across a police barrier, as in Quebec City.) Civil disobedience, unlike lawful protest, is a category unknown to the law, and it becomes legally relevant, if at all, mainly in considering whether punishment should be mitigated. But at the same time civil disobedience is, as Rawls says, "disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof..."⁶ What brings it within the margins of fidelity to law are its ends and its means. First, unlike the usual sorts of non-compliance, civil disobedience is principled. Its goals are not power or self-interest, but

⁵ L. Green, *The Authority of the State* (Oxford: Clarendon Press, 1990), chap. 3.

better laws and practices; the changes it seeks stop short of an alteration of the whole political system or even the government. Its means also set it apart: civil disobedience is either non-violent, or minimally violent, and its primary appeal is not to superior force, but to the conscience of a functioning political community, to its shared sense of justice or decency.⁷ In Rawls's influential definition, civil disobedience is therefore "a public, nonviolent, conscientious yet political act contrary to law, usually done with the aim of bringing about a change in the law or policies of the government."⁸

Civil disobedience is thus the intermediate of three kinds of principled law breaking of which the near and far extremes are conscientious refusal and revolutionary action. Conscientious refusal acknowledges or at least tolerates the government's right to act as it does, but refuses cooperation on the ground that one is here entitled to keep one's own hands clean. Revolutionary action denies the government the right to govern, not merely in this manner or this area, but at all. It is directed not at a change of direction, but at a change of the system, and it is to be appraised directly by the theory of legitimacy.

Although distinguishable, these forms of non-compliance are in practice not always distinct. Thoreau's disobedience, for example, also incorporated a conscientious refusal to cooperate with his government's aggressive war against Mexico, its tolerance of slavery, and its oppression of the native peoples. "What I have to do is to see ... that I do not lend myself to the wrong I condemn," he wrote.⁹ And Gandhi, for all his commitment to non-violence, was also a committed revolutionary, wanting to end, and not merely adapt, British

⁶ J. Rawls, *Theory of Justice* (Cambridge MA: Harvard University Press, 1971), p. 366.

⁷ It is often said that it must appeal to the sense of *justice* of a community. Although I cannot argue the point here, I think that this is too narrow.

⁸ Rawls, *Theory of Justice*, p. 364.

⁹ Henry David Thoreau, "Civil Disobedience," in H.A. Bedau, ed. *Civil Disobedience in Focus* (London: Routledge, 1991).

colonialism.¹⁰ Still, there are reasons for isolating the strategy of civil disobedience, and for our purposes we can begin with Rawls's account:

The problem of civil disobedience... arises only within a more or less just democratic state for those citizens who recognize and accept the legitimacy of the constitution. The difficulty is one of conflict of duties. At what point does the duty to comply with laws enacted by a legislative majority (or with executive acts supported by such a majority) cease to be binding in view of the right to defend one's liberties and the duty to oppose injustice?¹¹

That epitomizes what I'll call "classical" civil disobedience. It is, I think, a view adapted to the protests of the sixties and seventies. It is not an analysis of the *idea* of civil disobedience; that has a much longer history extending, with modifications, back to the ancient world.¹² Nor is it a nuanced historical description; it is a highly theorized account. Not only, as I said above, did the protest movements of the last generation combine civil disobedience with conscientious refusal, it is not clear how committed they actually were to the legitimacy of the existing constitution. (David Lyons has persuasively argued, for example, that the most important figures were not.¹³) But it usefully highlights three salient features of many of the most important protests: they were forms of principled law-breaking that took place *within* a single society, with a *functioning* system of political authority, the injustice or illegitimacy of which was judged to be at least *tolerable*.

¹⁰ See Vinit Haksar, *Rights, Communities, and Civil Disobedience: Liberalism and Gandhi* (Oxford: Clarendon Press, 2001)

¹¹ Rawls, *Theory of Justice*, p. 363.

¹² David Daube, *Civil Disobedience in Antiquity* (Edinburgh: Edinburgh University Press, 1972).

¹³ David Lyons, "Moral Judgment, Historical Reality, and Civil Disobedience," *27 Philosophy and Public Affairs* (1998), p.48.

V

Consider now how the circumstances of globalization—international interdependence, the weakening of national political authority, and the absence of an effective international order—shape the sort of protests that form. To get at the points I have in mind, let me introduce a distinction between what I'll call *remedial* and *constructive* disobedience. I'll try to flesh that out in the company of two figures central to the liberal tradition.

As everyone knows, Locke and Kant were both contractarians; but they were contractarians of very different sorts. For Locke, the social contract is a remedy for the State of Nature, which is not a place, but a relationship. The state of nature obtains between any two people where there is “Want of a common Judge with Authority” to decide any differences that might arise between them.¹⁴ Of course, Locke is a theist who believes there is always an ultimate heavenly authority and law that binds everyone, even in the state of nature. His point is rather that there may be no earthly, positive, authority, and that this is the necessary and sufficient condition for the state of nature. Locke's state of nature is no Hobbesian war of all against all; it is, he says, a state of freedom and equality, subject to the duty to observe the law of nature, including the duty to preserve oneself and, at least where that does not conflict with one's own survival, also to preserve other people and the environment. In propitious circumstances, the state nature is therefore “a State of Peace, Good Will, Mutual Assistance, and Preservation.”¹⁵ But things are not always propitious, for although there is a universal law of nature our

¹⁴ Locke, *Second Treatise*, III, 19.

understanding of it and our capacity to comply with it and to enforce it are imperfect. We all have the human vices of ignorance and bias, a tendency to judge leniently in our own cases, harshly in others, and thus to fail to punish wrongdoers or to punish them out of proper proportion. To coerce others wrongly is to enter a State of War, which is simply the resort to “Force without Right.”¹⁶ It is to mitigate such “inconveniences of the state of nature” and to avoid the consequential injury to our lives, liberties, and property that we enter a state of civil government. There are two things I want to stress about Locke’s account. First, although these inconveniences provide our *reason* for leaving the state of nature, the *existence* of this reason does not in itself take us out of it. For Locke, subjection to positive authority on earth can come only through one’s own actual consent, whether express or tacit. Second, note that, although fully reasonable, leaving the State of nature is for Locke *optional*. The benefit that government brings is merely greater security for the familiar goods of life, not new and different goods (as it might be, for instance, in the civic republican tradition). So there is imprudence but, strictly speaking, no wrong in continuing in the state of nature; the only wrong lies in making war against another, that is, using force without right.

Kant’s view of the foundations of political authority is starkly different. The nature of humankind, he says, is one of ‘unsocial sociability’, and the tendency to make our own judgements, as we must, about right and wrong carries with it a tendency to violence. The natural state is *lawless* and insecure. In a crucial passage in the *Metaphysics of Morals*, Kant writes:

¹⁵ *Ibid.*

¹⁶ *Ibid.*

“[E]ven if we imagine men to be as benevolent and law-abiding as we please, the *a priori* rational idea of a non-lawful state will still tell us that before a public and legal state is established, individual men, peoples and states can never be secure against acts of violence from one another, since each will have his own right to do *what seems right and good to him*, independently of the opinion of others. Thus the first decision that the individual is obliged to make, if he does not wish to renounce all concepts of right, will be to adopt the principle that one must abandon the state of nature in which everyone follows his own desires, and unite with everyone else (with whom he cannot avoid having intercourse) in order to submit to external, public and lawful coercion. He must accordingly enter into a state wherein that which is to be recognized as belonging to each person is allotted to him *by law* and guaranteed to him by an adequate power (which is not his own, but external to him). In other words, he should at all costs enter into a state of civil society.”¹⁷

For Kant, the foundation of political authority is thus not will, but reason, and such authority is demanded whenever we find ourselves unable to avoid intercourse with others.

Continuing in the state of nature is not an option; leaving it is a moral necessity. In Rawls’s idiom, the natural, non-voluntary, duty of justice—not consent—is the foundation for the duty to obey the law.¹⁸

[A] fundamental natural duty is the duty of justice. This duty requires us to support and comply with just institutions that exist and apply to us. It also constrains us to further just arrangements not yet established, at least when this can be done without too much cost to ourselves.¹⁹

Rawls does not here specify the means by which we may “further just arrangements not yet established;” but Kant is forthright. In striking contrast to Locke, he authorizes the use of coercive force for this purpose, “*Anyone may thus use force to impel the others to abandon this state for a state of right.*”²⁰ People may be compelled to submit to an

¹⁷ Kant, *Metaphysics of Morals*, in H. P. Reiss, ed. *Kant’s Political Writings* (Cambridge: Cambridge University Press, 1979), p. 137.

¹⁸ I assess Rawls-type arguments in my, ‘Law and Obligations’ in J. Coleman and S. Shapiro, eds. *Oxford Handbook of Jurisprudence* (Oxford: Clarendon Press, 2001).

¹⁹ Rawls, *Theory of Justice*, p.115

²⁰ Kant, *Metaphysics of Morals*, pp.137-38.

effective scheme of governance, whether or not they consent to it, and if there is no effective government, people may use whatever means they can to help establish it.

Kant's contract, unlike Locke's, is purely "an ideal of reason"—not only did it not take place, it could not possibly have done so. It is but a vivid representation of the requirement that political order must be such that free and reasonable people *could* agree to it; it must be the possible object of a hypothetical agreement. "In all social contracts," Kant writes, "we find a union of many individuals for some common end which they all *share*. But a union as an end in itself which they all *ought to share* and which is thus an absolute and primary duty in all external relationships whatsoever among human beings (who cannot avoid mutually influencing one another), is found only in a society in so far as it constitutes a civil state, i.e. a commonwealth."²¹ For Kant, this society is the formal possibility condition of all other rights and duties. Outside such a commonwealth, there is no natural law of the Lockean sort; law depends for its intelligibility on a social contract, it cannot precede it.²²

So we have, in summary, two views about political authority, which we might abridge as follows:

First, for Locke government is an optional remedy for the "inconveniences of the state of nature"; for Kant it is an absolute moral necessity, the formal possibility condition for all other rights and duties.

Second, for Locke government is established only by actual consent, for nothing but one's own agreement can subject one to the will of another person. For Kant, the

²¹ Kant, *Theory and Practice*, in Reiss, p 73.

²² My reading is here influenced by Jeremy Waldron's "Kant's Positivism" in his *The Dignity of Legislation* (Cambridge: Cambridge University Press, 1999).

social contract is hypothetical only: whenever people interact in ways that give rise to the circumstances of justice, they must also subject themselves to lawful authority, and if they refuse to do so, they may be compelled. They may be dragged out of the state of nature, kicking and screaming if need be.

Third, for Locke governments hold a trust from the people, and enjoy a right to obedience only as long as they fulfil the conditions of that trust. When it is broken, the people are free to disobey and, if necessary, rebel. For Kant, it is wrong to think of government as a trust; the social contract being purely hypothetical, every existing government enjoys an absolute right to obedience provided only that weak formal conditions of right are fulfilled. The fact that the people, even a majority of the people, actually deplore its policies is irrelevant: “if it is at least *possible* that a people could agree to it, it is our duty to consider the law as just, even if the people is at present in such a position or attitude of mind that it would probably refuse its consent if it were consulted.”²³ So, Kant explains, if a proportionate war tax were imposed on all, the mere fact that they judge the war unnecessary does not relieve them of an obligation to obey “since it is at least *possible* that the war is inevitable and the tax indispensable.”²⁴ Individuals “are not entitled to judge this issue” in the way that they would be if, for instance, some but not all in an identically situated class were burdened, though they are always entitled “at least to make representations against it.” On the condition of possible agreement, obedience is required and dissent is limited to legitimate protest.

Disobedience to a supreme legislative power, and incitement to such resistance, “is the

²³ Kant, *Theory and Practice*, in Reiss, p.79.

²⁴ *Ibid.*

greatest and most punishable crime in a commonwealth, for it destroys its very foundations. This prohibition is *absolute*.”²⁵

VI

Those are two very different pictures of the nature and foundations of political authority. Locke’s is in most ways more familiar to us, and in some ways more palatable. I think it is also the one implicit in most liberal theories of civil disobedience. But it is Kant’s, I want to suggest, that provides the better model for the anti-globalization protests, in spite of his just-cited insistence on the wrongfulness of all disobedience.

The argument goes like this. With increased international interdependence, we find ourselves able to affect the vital interests of an increasing number of people. These are the very circumstances that call for mutual subjection to a lawful order. But in fact, the forces of globalization *weaken* existing national legal orders which are, as Saskia Sassen’s title has it, “losing control” over central tools of policy, especially in areas of fiscal, labour, health and environmental regulation.²⁶ In its most extreme cases, in the “free trade zones” near the borders of developing countries, territory is effectively denationalized and no longer really subject to the national authority at all. (There are now about as many people living in such zones around the world as there are people in all of Canada.)

There is also a second aspect. While national political authority is for these reasons unraveling, it is not being replaced with something else. There is no effective

²⁵ *Ibid.*

²⁶ S. Sassen, *Losing Control? Sovereignty in an Age of Globalization* (New York: Columbia University Press, 1996).

transnational legal order with the capacity to prevent each group from acting on its own conception of what is right. The inevitable result (especially with the recent spread of what Hume would have called political ‘enthusiasms’) are malignant demands based on unmoderated national self-interest, unregulated conflict, and violence. Protests over sweatshops, environmental degradation, the ‘race for the bottom’, energy-greed, tax policy competition etc. and are not, on this view, to be understood as complaints of a breach in the social contract. In these increasingly vital matters, there *is* no social contract: there is only anarchic competition and the attendant the risk of conflict.

How seriously should we to take the idea of anarchy here? In one sense, the expansion of free trade is inevitably anarchic. As Marx argues²⁷ capitalist production is has no way to bring the processes of production under deliberate control in order to serve human needs. This is perfectly consistent with the presence of a tangle of public and private international law and rule-making organs, including those that have attracted the brunt of anti-globalization protests: the World Bank, IMF and the WTO. But the protestors’ claim is that these do not replace self-interest with anything like the rule of law; to the extent that they are efficacious, they merely give effect to the self-interest of rich countries and, especially, of the United States. Three quarters of the members of the WTO are poor countries, but the international average tariffs on their main product, agricultural exports, is 40%—ten times the average 4% levied on the manufactured exports of rich countries. The point is not (only) that this is an obvious injustice; it is that this pattern, and many similar ones, strongly suggests that these institutions are not merely not succeeding at regulating naked self-interest; *they are not even trying*. Seen

²⁷ *Capital* Pt 2 Vol. III.

in that light, the anti-globalization movements seek to communicate two demands: first, they seek to strengthen national political systems, by calling attention to the damaging consequences of their weakness, and second (and more remotely) they seek to promote an international order capable of sustaining something like the rule of law. These goals, principled if utopian, clearly differ from the limited remedial ambitions of classical civil disobedience. Those were addressed to presumptively competent, functioning authorities, and sought to call them to their senses. Constructive civil disobedience stakes its claim at an earlier point, demanding that dysfunctional authorities be repaired, or that they be replaced or supplemented by functioning international authorities. We may think of the protestors as doing what Kant says anyone may do in the state of nature: trying to impel others to abandon a state governed only by might in favour of a system of right. This is what is new and important about anti-globalization, and what most distinguishes it from the protest movements of an earlier era.

VII

This interpretation may seem even more wild-eyed than the protestors themselves, and I need to say something in its defense against some apparent objections. But first, remember what it aspires to do: it seeks to fit a theory over diverse events and in doing so to explain the sense in which there is something new and significant in the anti-globalization movement. It seeks to characterize the movement's central normative thrust, to the extent that there is one, and to make it intelligible, without presuming to show that it is correct. Not all of the protests or protestors can be covered by it. (The anarchists, for example, plainly cannot.) Nor does it deny that there are continuities with

earlier traditions in civil disobedience; it seeks to identify the most important discontinuity.

But how can there be such a thing as constitutive disobedience purporting to function as nurse of national legal orders or as midwife to an international one? As we have seen, Kant explicitly says that all disobedience is wrong and that this duty is absolute. How then can law-breaking help *constitute* the rule of law? In each of the U.S., Canada, Mexico, South Korea, and Italy a political order *already* exists, and it is the laws of these orders that the protesters violate. Moreover, in addition to domestic law, there is international law and especially international trade law already in effect. Perhaps to take seriously the idea that international trade is anarchic is merely to misuse a metaphor. Everyone knows that markets, especially complex ones, rest on norms and laws, without which they would be impossible.

We might be tempted to reply to the first objection with a variation on Kant's own defense of the French Revolution—the King was not deposed, he abdicated to the Third Estate. But that is just sophistical.²⁸ So too would be the suggestion that there cannot conceivably be constructive disobedience, for one can only disobey when there are laws, and to the extent that there is anarchy then there are no laws to break. That is no better than the suggestion that disobeying an unconstitutional law is a contradiction in terms. Moreover, even when a law exists, the rule of law may not, and that is what matters here.

Fortunately, we have to hand more satisfactory resources for a reply. Begin by noticing the shape of Kant's argument against disobedience. He says in essence that there can be no rightful resistance on the part of the people, for right is possible only

²⁸ But see Lewis White Beck, "Kant and the Right of Revolution," 32 *Journal of the History of Ideas* (1971), pp.411-422.

under a framework of existing public laws. “The reason why it is the duty of the people to tolerate even what is apparently the most intolerable misuse of supreme power is that it is impossible ever to conceive of their resistance to the supreme legislation as being anything other than unlawful and liable to nullify the entire legal constitution.”²⁹ Kant’s proof is this: suppose the contrary. If it were lawful, it would have to be authorized by a supreme legislative power, but if the supreme legislator recognizes the right of the people then it is not, after all, the supreme—the people is. And against the supreme legislative will of the people the same objection then arises: lawful resistance to it would require a law, which law must not be broken. Hence, supreme legislative power cannot, without contradiction, fail to be absolute.

The form of that argument will be familiar to readers of Bentham or John Austin who use it, drawing ultimate inspiration from Hobbes, to prove that all legal authority must be absolute. And Kant’s argument fails for the same reason that theirs does, a reason familiar to readers of H.L.A. Hart: it confuses the thesis that law must be supreme with the thesis that it must be absolute. There is no contradiction in legally limited government, for a legal limitation may rest in the absence of a certain power as much as in the presence of a duty.³⁰ The rule of law does not in fact require an absolute duty of obedience. If disobedience is in some circumstances permitted, then what is permitted is, in those circumstances, disobedience, and not obedience to the permission to disobey.

Moreover, Kant’s duty binds only in the case of *effective* states: he concedes that successful revolutionaries acquire a genuine right to obedience, and that failed pretenders

²⁹ Kant, *Metaphysics of Morals*, p. 45.

³⁰ H.L.A. Hart, *The Concept of Law*, chap. IV. Terry Hopton notices the similarity between Kant and Austin on this point: “Kant’s Two Theories of Law,” 3 *History of Political Thought* (1982), pp. 52-75.

and governments-in-exile ultimately lose it. General efficacy is in fact a condition on the justifiability of any positive authority. It is true that efficacy is a question of degree, and that it is a dynamic matter. The suggestion is that the anti-globalization protests took aim at the *unraveling* of efficacy. Without supposing that the national legal orders they disobeyed were extinct, they might well have thought them headed for trouble. Bear in mind that we are trying here to secure the intelligibility, not necessarily the truth, of constructive civil disobedience, and surely it is intelligible that the anti-globalization movement could protest what it sees as a lurch towards the state of nature in which each acts on his own conception of the right. Remember, too, that much ordinary civil disobedience is *indirect*; it does not normally break the very rules whose injustice it criticizes. Nor should it: it would be wrong to commit treason in order to protest an unjust statute of treason.³¹ We can think of anti-globalization protests as generalizing that idea: they involve the breaking of local (national, municipal) rules in order to protest the diminishing efficacy of other local rules, or the absence of efficacious international ones.

It is, however, crucial to this argument that we may properly regard the emerging global order as on a par with a state of nature, as an “anarchical society”.³² Is that fair? Might we not equally say, with Hardt and Negri, that this is merely a new *form* of order, “a *decentred* and *deterritorialising* apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers.”³³ Is there not evidence for that view in, for example, the fact that Microsoft’s annual sales are greater than the GDP of Uruguay? Such facts seemed more pertinent before Sept 11th than they did after.

³¹ Rawls, *Theory of Justice*, p. 365.

³² I take the term from Hedley Bull, *The Anarchical Society: A Study of Order in World Politics* (New York: Columbia University Press, 1996).

³³ Michael Hardt and Antonio Negri, *Empire* (Cambridge, MA: Harvard University Press, 2000), p. xii.

Whatever Microsoft's economic power and influence, it cannot raise taxes or an army; it wholly lacks the modern state's capacity to compel and command resources, to affect the liberty and security of its citizens, to make or end war. Moreover, the value of Microsoft's capitalization depends on the actions of states than *can* do these things. As John Gray rightly says:

It is fashionable to see multinational corporations as constituting a kind of invisible government supplanting many of the functions of nations-states. In reality they are often weak and amorphous organizations. They display the loss of authority and the erosion of common values that afflicts practically all late modern social institutions. The global market is not spawning corporations which assume the past functions of sovereign states. Rather, it has weakened and hollowed out both institutions.³⁴

A second form of this objection, popular amongst international lawyers, strenuously resists the characterization of the global order as an anarchical society. It points out that there is *already* a legal order in place, and the undeniable existence of public and private international law shows that it is wrong to suppose that there is a state of nature that permits, let alone demands, an imposition of the social contract. There is no normative vacuum, so the contrast is unmotivated.

In fact, there are two questions here, and the lawyers' objection elides them. First, we may ask whether it makes sense to think of the existing international order as law and, second, we may ask whether it is the sort of law that is capable of ending the state of nature. It is crucial to see that these are different questions. Although I cannot defend the claim here, there is little reason to deny that international law is law.³⁵ Of course it is. But the relevant question for our purposes is the second one: is it the *sort* of law that has the capacity to end the state of nature? Here, we may be instructed by what

³⁴ John Gray, *False Dawn: The Delusions of Global Capitalism* (London: Granta, 1999), p. 63.

Locke said of the capacity to contract and conduct business in that state. “[T]is not every Compact that puts an end to the State of Nature between Men, but only this one of agreeing together mutually to enter into one Community, and make one Body Politic.”³⁶ Trade bargains, thinks Locke, are binding outside of political union, “for truth and keeping of Faith belongs to Men, as Men, and not as Members of society”.³⁷ That applies also to treaties, conventions, and many other forms of cooperative activity. But even if these are laws, none of them creates a body with the capacity to establish a binding scheme of right. As the “realist” school of international relations urges, they do not come close to seriously regulating raw bargaining power and self-interest; they just as often express and implement it. That being so, whatever their institutional status, as law, or near-law, or custom, they do not lift us out of the state of nature.

So, there is no obstacle to thinking that constructive disobedience is a coherent notion, and that the anti-globalization movement may instantiate it. And if the constructive paradigm is not only coherent but also plausible on the facts, then we do have a significantly new idea in the anti-globalization movement. Global interaction brings us, directly or indirectly, back into the state of nature, to the realm of force without right. It does so directly when it makes possible new and unavoidable interactions with other people, interactions that touch on our vital interests but which we have not yet managed to regulate by positive principles of justice. It does so indirectly when it undermines the institutions of governance that regulate our interactions with those with whom we already interact. In its most interesting and novel aspect, the anti-globalization

³⁵ The best account remains H.L.A. Hart, *The Concept of Law*, chap. X.

³⁶ Locke, *Second Treatise*, 14.

³⁷ *Ibid.*

protests can thus be understood as an attempt, not to eliminate power, but to discipline it, to distribute it, and bring it within rational control, at least as far as this is possible in human affairs. When it engages in civil disobedience, its acts bear the message that the risk of the state of nature is real and unacceptable.

VIII

Why does it matter whether we think of contemporary civil disobedience along classical remedial lines as enforcing a social contract or, in the way I've mooted here, as trying to establish a contract, in the constructive fashion? And how should we respond to the evident utopianism of the latter view?

Seeing the anti-globalization movement this way is relevant to gauging how it might be justified. It is sometimes held that civil disobedience must not only be principled, but that it must be guided by principles of a certain *kind*. According to Rawls, for instance, since civilly disobedient acts are addressed to *the community's* sense of justice, it is reasonable, at least *prima facie*, "to limit it to instances of substantial and clear injustice, and preferably to those which obstruct the path to removing injustices."³⁸ On this basis, he argues that civil disobedience should normally be limited to two kinds of concerns: serious infringements of what we might call equality of civil liberties, and blatant violations of equality of social and economic opportunity. In contrast, civil disobedience is said to be less appropriate in matters of broader social and economic justice, for example, the overall distribution of economic resources and power in society. Denying minorities the vote, or restricting their movement or property rights, such things are the proper sphere of civil disobedience. In contrast, Rawls says, "unless tax laws... are clearly designed to attack or

abridge a basic equal liberty, they should not normally be protested by civil disobedience. The appeal to the public's conception of justice is not sufficiently clear."³⁹ The categorial distinction between civil liberties and equality of opportunity on the one hand, and social and economic justice on the other, is meant to reflect the comparative clarity of injustice. We can often tell, Rawls claims, whether civil liberties have been violated, since these involve open and public standards, but what he calls "choice" among social and economic policies of other kinds also involve "theoretical and speculative" beliefs, judgment, social scientific evidence, "hunch", and here there is both more doubt and more room for self deception.⁴⁰

Ronald Dworkin makes a related argument: civil disobedience must focus on matters of principle, that is to say, individual rights,⁴¹ and not matters of policy in which the majority is entitled to get its way; at least once it is fully informed. He suggests that the contrast between the civil rights movement and the anti-nuclear movement constitutes a "reasonably sharp" distinction of the sort he has in mind. In the former,

It was only necessary to force enough people to look who would be ashamed to turn away. The questions of policy at the bottom of the nuclear controversy are, by contrast, signally complex. It is plainly not obvious, one way or another, whether deployment of missiles in Europe is more likely to deter or provoke aggression, for example, or even what kind of an argument would be a good argument on either view.⁴²

³⁸ Rawls, *Theory of Justice*, p. 372.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ Admittedly, Dworkin officially allows matters of principle to include both individual and group rights (*Taking Rights Seriously*) but I have been unable to find an instance of him actually relying on the latter in argument.

⁴² Ronald Dworkin, "Civil Disobedience and Nuclear Protest," in his *Matter of Principle* (Cambridge MA: Harvard University Press, 1986), p.112.

Disobedience, he thinks, is here ill-suited to stimulate national debate and must therefore function instead as a non-persuasive strategy of an elitist or paternalist kind, one that simply tries to make it more costly for an elected majority to get its democratic way.

No doubt many felt something similar about the anti-globalization protests. The issues in play did not seem closely tied to the sort of familiar liberal rights that Rawls and Dworkin think are the natural habitat of civil disobedience. If there is a principled basis, or bases, to anti-globalization, perhaps it rests on principles of the wrong sort? There are, however, two reasons for refusing to follow them on this point. First, category is a poor proxy for either the severity or clarity of injustice. Some serious violations of voting rights—at the very core of the classical theory—may be open and clear; but they may also result from the imposition of unfair burdens on a formally equal right to vote (for example, through registration or identification requirements). Assessing the merits of that case will require the same burdens of theoretical and empirical judgment that Rawls thinks clouds the violation of social or economic rights. Second, the distinction depends on a controversial view about rights that we are not bound to accept. Consider again Dworkin's complaint against the protestors at Greenham common. Contrary to what he suggests, their objection to positioning American missiles on English soil was not that it might not work, but that it *might*, and that it could only do so by making a credible but immoral threat: a threat intentionally to kill innocent civilians. But in that case nuclear protest really does involve a matter of principle and not just policy. So it is no good objection to the anti-globalization movement that its principles are of the wrong category, for these categories are entitled to much less significance than standard accounts of civil disobedience accord them. Even if the language of rights is not the mother tongue of the protestors, there is little doubt that

many of their goals can be recast in that way. After all, human rights are nothing but human interests so urgent that they warrant holding people under a duty to protect them. The anti-globalization movement is not about something other than that—even when, as in its defense of environmental interests, it embraces an expanded conception of what rights we have.⁴³

In the remedial view, civil disobedience is something that takes place within efficacious states, especially democracies or states on the way to democracy. In these circumstances, we may be able to give sense to the idea that the government is *mine*, that it acts in my name, and that to some degree its actions may be imputed to me. Even if there is no general duty to protest every injustice, there may be special duties connecting us to injustices done in our names.⁴⁴ That idea will play a less important role in the international context: it is less true, and often simply untrue, that the most powerful international organizations and corporations act in ways that can be imputed back to the protestors themselves. And so the anti-globalization movement must also carry forward a broadening of political sympathies, a generalization of Martin Luther King's famous response to the libel that as a pastor from Atlanta he was an 'outside agitator', in Birmingham, Alabama:

I am cognizant of the interrelatedness of all communities and states. I cannot sit idly by in Atlanta and not be concerned about what happens in Birmingham. Injustice anywhere is a threat to justice everywhere. We are

⁴³ It is sometimes denied that there can be rights to such collective goods. For an argument to the contrary, see my 'Two Views of Collective Rights, 4 *Canadian Journal of Law and Jurisprudence* (1991), pp.315-327.

⁴⁴ Thoreau: "It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even those most enormous wrong; but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support. If I devote myself to other pursuits and contemplations, I must first see, at least, that I do not pursue them sitting upon another man's shoulders. I must get off him first, that he may pursue his contemplations too." *Civil Disobedience*, p.34.

all caught in an inescapable network of mutuality, tied in a single garment of destiny.⁴⁵

In attempting to widen our sympathies, thinking globally has also brought about an intensified globalization of protest. Commentators rarely fail to mention the supposed irony that the anti-globalization movement is part of a global community of protest whose choice of venues and actions themselves embody an extraordinary degree of international coordination and communication. But there is of course no contradiction here, nor even much irony; for what the anti-globalization movements protest is not everything that might fit under the heading ‘globalization.’ Nor should we imagine that this is a wholly new phenomenon. Already in 1968 the protest marches in the U.S., France, Germany, and Czechoslovakia were watching and mirroring each other, though with less efficient means of communication.

Finally, let us think for a moment about the justificatory upshot of the model I’m proposing. There are two major forms of justification in politics: we sometimes argue that something is *the right thing* to do—that it is on its merits just, wise, and proper. But we also sometimes argue that it is something we *have a right* to do. Free speech, for example, protects us not only when we are in the right, but also when our words are wrong, foolish, or offensive. These two forms of justification have different purposes and different targets. To show that doing X is right is to show that the *agent* has reason to do it; to show that the agent has a right to do X is to show that *others* have a reason not to interfere with her action, *whether or not* she has adequate reason to do it.

⁴⁵ Martin Luther King, ‘Letter from Birmingham City Jail,’ in Bedau, ed. *Civil Disobedience in Focus*, p. 69.

In a democracy, peaceful protest is a matter of one's rights, and one does not need to establish the justice of one's cause to be morally justified in pursuing it. In contrast, law-breaking requires a substantive argument. One must show that one's cause is just and one's means effective and proportionate. Classical civil disobedience takes place within the social contract, in an actually existing regime of political authority that has the legitimate power to determine our positive rights and duties, including our rights of political participation. That is why, in that context, there is no right to civil disobedience, even though civil disobedience is sometimes the right thing to do.⁴⁶ If, however, it is correct to see the anti-globalizations movement in the way I have here described, as protests against the anarchical effects of globalization, then the other pattern of justification becomes available. Everyone has a right to leave the state of nature, and a right to take others with them—in Kant's view, by any effective means. So those who complain, for example of the secrecy of WTO, of the extortionate and detailed control of IMF rescue proposals, of the shift of effective political power away from national governments, may have a defense of protest that *does* rest on their rights. This is sometimes put in terms of the "democratic deficit" in the international order, but in some respects it can also be seen as a deficit in the rule of law. For the rule of law is not merely the rule of *rules*, it is the excellence of a particular mode of governance by rules of a particular scope and ambition. Law-breaking in defense of this mode of governance does not require the usual showing that the substantive policies of the protestors are correct. It is enough that they are morally entitled to participate in decisions from which they are now excluded, and to do so under clear, stable, open and effective laws that

⁴⁶ See Joseph Raz, *Authority of Law* (Oxford: Clarendon Press, 1979), chap. 14.

provide for such participation. They are protected by their moral right to effective governance, and by the derivative right to a fair share in it. To the extent that the anti-globalization movement is well described by this account, we may therefore say not merely that they are defending their rights, but that they have every right to do so.

IX

The idea that past generations of disobedients (or at any rate those who made the history books and whose successes coloured our theories) were right, but these ones at the barricades are wrong—that is a surprisingly resilient idea. It was familiar already to Thoreau:

All men recognize the right of revolution: that is, the right to refuse allegiance to, and to resist, the government, when its tyranny or its inefficiency are great and unendurable. But almost all say that such is not the case now. But such was the case, they think, in the Revolution of '75.⁴⁷

No doubt, as Thoreau seems to suggest, there is often an element of bad faith or cowardice in our attitudes to contemporary injustices. But it may also be that circumstances have changed, and that in a new world civil disobedience takes new forms, and for new reasons. If one thinks that the context of the anti-globalization movement is the familiar remedial one—of functional governments that need to be reminded of the terms of the social contract—then it must be hard to hear a coherent message. If, on the other hand, one sees it as a protest against the dual consequences of weakened national governments and a still-anarchic international order, then things may be otherwise.

What, finally, of utopianism? The anti-globalization movements *are* utopian, and we do well to recognize and understand that. But not all-utopian thinking is shoddy

⁴⁷ Thoreau, 'Civil Disobedience', p. 31.

thinking, and politics demands not only the economist's virtue of making the optimal choice among the alternatives that a society already faces, but also the visionary's virtue of reconceiving the alternatives themselves. The aspiration for a lawful international order is part of that. We would be right to hesitate about certain routes to it: world government, to say nothing of world empire, brings the risk of world despotism. So perhaps the better ideal is the one Kant himself preferred: a federation of independent and sovereign states under an effective law of nations. But that too is pretty remote from our actual world, and the processes of globalization may be pushing this second, more attractive, alternative even further out of reach. The anti-globalization movement warns us of that risk, sometimes choosing disobedience as a way of getting the message out. We may reject or refuse it. But we should not fail to hear it because we are wedded to a familiar, but constricted, view of what civil disobedience might be.
