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### Response

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## RESPONSE

DAVID LYONS\*

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### INTRODUCTION

How can one reply to the presentations and discussion of this conference? I think in the same spirit. The paper that took issue most substantially with some writing of mine was Aaron Garrett's, *Courage, Political Resistance, and Self-Deceit*.<sup>1</sup> What I have called political resistance has proved difficult for philosophers to theorize about. Aaron helps us to understand it much better. I am truly grateful for that and I am delighted to have provided the occasion for his paper. The same goes for the other contributions to this conference, which address issues more deeply than I have found it possible to do. But that is to be expected; we build on each other's work. It seems fitting for me to respond in kind. So I will offer some thoughts that are inspired by these discussions. They can be placed under three headings: utility, justice, and law.

#### I. UTILITY

I want to raise some questions about moral theorizing that I am not at all confident I can properly frame.<sup>2</sup> The questions came back to me when David Brink reminded us that John Stuart Mill would "appeal to the principle of utility when following [secondary principles] would be clearly suboptimal or when there is a conflict among secondary principles."<sup>3</sup> The first questions I have are: What kind of inquiry is that? Would Mill be asking which line of conduct conforms to act utilitarianism? Or would he be asking how to maximize welfare? I am not sure the two questions are equivalent.

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<sup>1</sup> Aaron Garrett, *Courage, Political Resistance, and Self-Deceit*, 90 B.U. L. REV. 1771 (2010).

<sup>2</sup> I have tried it before. See David Lyons, *The Moral Opacity of Utilitarianism*, in MORALITY, RULES, AND CONSEQUENCES: A CRITICAL READER 105 (Brad Hooker et al. eds., 2000).

<sup>3</sup> David Brink, *Mill's Ambivalence About Duty*, 90 B.U. L. REV. 1669, 1679 (2010), to be reprinted in J.S. MILL ON JUSTICE (L. Kahn ed., forthcoming 2010).

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First, let us assume that Mill's basic value is human welfare. Second, let us assume that welfare can be promoted not only by individual actions, but also by legal arrangements, political regimes, social practices, widely shared convictions, behavioral dispositions, and the like. This assumes that it makes sense to ascribe consequences to such things, on the understanding that any assignment of consequences depends on the circumstances, as it does for actions. Third, let us assume that Mill wants welfare promoted as much as possible by all available means and that he would want to configure those various means of promoting welfare so that together they maximize welfare.

My next question is this: Is it possible that such an arrangement for maximizing welfare could promote welfare to a greater degree than would be possible by promoting welfare directly, by conforming to a principle like act utilitarianism, which calls on us to maximize welfare by our individual actions? Some philosophers have seemed to think so. Peter Railton, for example, has claimed that "certain goods are . . . attainable . . . only if people have well-developed characters."<sup>4</sup> He claimed that "loving relationships, friendships, group loyalties, and spontaneous actions are among the most important contributors to whatever it is that makes life worthwhile."<sup>5</sup> I will assume that all of those items are welfare-promoting factors. He claims, in effect, that maximizing welfare by such means would cause one to violate act utilitarianism, which would promote welfare to a greater degree than one could do by following act utilitarianism.

The idea seems to be that some increments of welfare may not be accessible to act utilitarian conduct, and that welfare may be promoted to a greater degree if act utilitarianism is violated and those increments of welfare are realized. If that is right, the next question is whether the relevant behavioral dispositions can be brought about by welfare-maximizing conduct, that is, conduct that conforms to act utilitarianism. If that were possible, then it might be the case that the relevant increments of welfare are accessible to act utilitarian conduct after all, though indirectly. But if not, that seems like a reason to suppose that act utilitarianism is not the most faithful expression of utilitarian commitments like those I have associated with Mill. In that case, it would be misleading to regard conduct that conforms to act utilitarianism as welfare-maximizing, because welfare could be maximized only by violating the principle.

My next question is: If act utilitarianism is not the most faithful expression of the utilitarian commitments I have associated with Mill, is there a moral theory that is the most faithful expression of those utilitarian assumptions and, if so, what would it look like? (I have no idea.)

My last question along these lines is this: If it turns out after all that act utilitarianism is the most faithful expression of those utilitarian commitments, could we figure out how to follow the principle? The problem is this: We are

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<sup>4</sup> Peter Railton, *Alienation, Consequentialism, and the Demands of Morality*, 13 PHIL. & PUB. AFF. 134, 158 (1984).

<sup>5</sup> *Id.* at 139.

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faced with the need for a complex division of our own labor as well as the labor of others, such as how and when we should try to reform legal arrangements so that they better serve welfare, how and when we should try to reform political regimes so that they better serve welfare, how and when we should try to reform social practices so that they better serve welfare, how and when we should try to reform widely shared convictions so that they better serve welfare, how and when we should try to reform our own and others' character and personality traits so that they better serve welfare, and so on. I do not think we have any idea of how to make reasonable judgments of those kinds.

In practice, then, utilitarianism would seem to collapse into a set of practically independent principles, each one arguing for an assignment of our labor in a direction that is different from and incompatible with each of the other possible assignments. I do not see how an appeal to the principle of utility would help to settle such matters.

## II. JUSTICE

Now I have some questions about ideal theory. If we consider our least questionable judgments in the realm of social morality – what Rawls first referred to as “considered moral judgments”<sup>6</sup> and later as “provisional fixed points”<sup>7</sup> – we will find that our theorizing about justice is mainly based on judgments of injustice. We may be uncertain or disagree about the principles that are satisfied by well-ordered societies, but we are not uncertain, do not disagree, and have no reason to be uncertain or to disagree about our condemnation of slavery and the slave trade, lynching and Jim Crow, Chinese exclusion and the internment of Japanese Americans, redlining and facilitating white flight, and experimenting on prisoners and withholding treatment from others. That is a short list, which I am sure can be expanded upon.

I have no clear idea of what equitable relations might be like on a global scale, but here too we share many negative considered judgments. We might begin with some items on the list I just offered, because they cut across the boundary between domestic and global injustice. But we can go on. We must not decimate or coercively displace other peoples. We must not engage in aggressive, expansionist wars. We must not take colonies or impose protectorates. We must not undermine peaceful, democratic governments. We must not destroy local agriculture. That is a short list, which I am sure can be expanded.

Here are the questions: Should we expend as much effort as we do on “ideal theory” when most of our considered judgments concern injustice and might anchor non-ideal theory? Do we need a clearly defined ideal target before developing non-ideal theory? Or is confronting injustice just so complex and messy that no theory could give useful guidance?

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<sup>6</sup> John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 181 (1951).

<sup>7</sup> JOHN RAWLS, A THEORY OF JUSTICE 20, 319 (1971).

Of course, political theory has given us some guidance. It has by and large embraced the notion of a moral obligation to obey the law and left open the bare possibility of justifiable disobedience. That sort of theory has dominated philosophical discussions of civil disobedience for many years. We find such a theory in Rawls, whose approach seems a consequence of his preoccupation with ideal theory. One problem with Rawls's discussion of civil disobedience is that it is meant for a near-just society but is presented as if it applies here and now. It suggests that our leading political philosopher regards American society as near-just, despite his allusions to massive injustice and the impossibility of a generally applicable obligation to obey the law.

### III. LAW

My understanding is that law goes back as far as written history. My last question concerns the relation between law and the rule of law. I assume here that legal theory should reflect our knowledge of history and our most considered moral judgments.

Human societies typically include both "haves" and "have-nots." The haves typically enjoy wealth, status, and power. The have-nots lack wealth, status, and power. In most, if not all, societies that have had legal systems, some substantial segment has been subordinated, if not enslaved.

In fact, many societies with law have systematically enforced the subordination of a substantial segment of the population. That is a commonplace function of law: to establish places and keep people in them. In many societies, large segments of the population have been excluded from participating in the governance of the community. Whether or not they have been formally counted as citizens, they have been subjects.

Lon Fuller tells us something about such societies. One of Fuller's lessons is that substantive injustice undermines the rule of law.<sup>8</sup> I understand this as follows: When law sanctions subordination, it undermines the practical possibility of the subordinated holding their superiors to account, even by the superiors' own standards.

Thus law sanctioned apartheid, but apartheid inevitably undermined the rule of law. Those in public office ruled South Africa with unlawful brutality.

Law sanctioned chattel slavery, but slavery undermined the rule of law. Here is an illustration of that process. As the anti-slavery movement gained influence, slave states evidently thought it would be good public policy to enact some legal protections for slaves.<sup>9</sup> No one, however, could have reasonably expected those protections to work. For one thing, slaves could not testify against whites.<sup>10</sup> Furthermore, on those rare occasions when slave

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<sup>8</sup> See LON L. FULLER, *THE MORALITY OF LAW* 33-94 (rev. ed. 1969).

<sup>9</sup> See generally THOMAS D. MORRIS, *SOUTHERN SLAVERY AND THE LAW, 1619-1860* (1996) (providing a comprehensive account of the history and development of slave law in the South).

<sup>10</sup> See *id.* at 229-48.

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owners might have been held to answer for their crimes, the decision was in the hands of their slave-owning peers.<sup>11</sup> Prosecutions of slave-owners were uncommon, as might have been expected.<sup>12</sup>

We know how to describe all of those situations, with all of their complexity, in legal and political terms that ordinary people can understand. We know how to talk in plain terms about, for example, officials failing to follow the laws they are charged with administering.

The legal state of affairs can be more complex than I have so far suggested. Take the situation under Jim Crow. To some extent, law sanctioned subordination. The courts refused to acknowledge that segregation laws involved subordination, and this conferred the color of law upon the arrangement. But Jim Crow went beyond that.

The subordination of African Americans would not have been possible without officials accepting blatantly unlawful practices such as lynching. Many of those who approved of such practices said that they were needed to maintain the social order. I think they were right.

So unlawful activities that officials accepted partly constituted and maintained Jim Crow. The legal system coexisted with an absence of the rule of law. We know how to describe such situations, with all their complexity, in legal and political terms that ordinary people can understand.

I infer that the rule of law is not necessary for a system of law. I suggest that it is an unusual condition, not a normal feature of legal systems. So my final question is: Why should we be inclined to suggest otherwise?

#### POSTSCRIPT

One last word. I once suggested in a mini-memoir that the path I have taken could be traced from politics to philosophy to politics again.<sup>13</sup> The phases are not mutually exclusive. As an illustration, I thought I would mention some activities that fall on the political side. I usually avoid doing this sort of thing in an academic setting, but I think it might be appropriate here.

As some of my writing may suggest, most of my academic work for the past fifteen years has been more historical than philosophical. I have been trying to make more accessible some less discussed aspects of the last four centuries on this continent, especially as they concern the experience of those racial and ethnic segments of our population that have been subjected most systematically to subordination, and their resistance to it.

I want to mention two extra-curricular activities in which I am also engaged. For the past year, I have been working with some union organizers at Boston University, Boston University staff members, students, faculty, and alumni to

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<sup>11</sup> *See id.*

<sup>12</sup> *See id.* at 182.

<sup>13</sup> David Lyons, *From Politics to Philosophy*, in *LEGAL PHILOSOPHY: 5 QUESTIONS* 153, 153, 168 (Morten Ebbe Juul Nielsen ed., 2007).

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form a Coalition for Social Justice that is partly educational and partly a commitment to solidarity, in anticipation of issues that will inevitably arise.

Our first public activity was the organization of a lecture by Howard Zinn last November.<sup>14</sup> When I told Howard about the new Coalition he was enthusiastic and agreed at once to offer the lecture.

Howard has since died, and I have been working with members of the Political Science department, which was Howard's academic home at Boston University, to organize a celebration of Howard's life, which was held at Boston University on March 27, 2010.<sup>15</sup> I want to end by mentioning one bit of advice Howard offered when he had the opportunity to do so.

When asked how he could maintain his good cheer and optimism through these awful times, Howard would point out some things that the media obscures. People in many places around the United States are always working on a relatively small scale for progressive change. We cannot predict when those efforts will develop into movements that effect significant change on a large scale. The only way to effect such changes is to work for them, with the knowledge that others are doing the same and that our efforts will sometimes have important results. I commend that message to you.

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<sup>14</sup> Howard Zinn, *Holy Wars* (Nov. 11, 2009) (transcript available at [http://www.democracynow.org/blog/2010/1/8/howard\\_zinn\\_three\\_holy\\_wars](http://www.democracynow.org/blog/2010/1/8/howard_zinn_three_holy_wars)).

<sup>15</sup> Rich Barlow, *Grieving and Celebrating Howard Zinn*, BU TODAY, Mar. 26, 2010, <http://www.bu.edu/today/node/10706>.