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Finding a "Niche" for Civil Disobedience? Decriminalizing Disobedience in the Post–Civil Rights Era

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Between fifteen and twenty-five million Americans took to the streets in the summer of 2020 to march, mourn, occupy highways, clash with police, and be together in grief and rage. Municipal and state police forces responded with a national campaign of excessive force. Demonstrators were clubbed, tear gassed, sprayed with chemical agents, kettled and trampled, illegally detained, and mutilated by "less-than-lethal" munitions. Internal police reviews and municipal leaders blamed the violence on insufficient training but the scale and intensity of repression suggest a more profound democratic crisis surrounding the criminalization of dissent.

Seeing Like an Activist offers a compelling account of how we got here. Artfully weaving a genealogy of civil disobedience from social movement archives and intellectual history, Pineda demonstrates how attempts to legitimate civil disobedience in the language of liberal political thought unwittingly domesticate dissent. The book traces this moral advocacy's transfiguration into disciplinary control to unexamined narratives about the meaning of the civil rights era and American democracy found between the lines of works of normative political thought. Liberalism's "civil disobedience playbook"[1] draws its authority from a retelling of the civil rights era that absorbs the movement into a story about the progressive triumph of the institutions of American democracy. In framing the challenge of civil disobedience as a moral question of weighing the claims of conscience against the claims of law, political philosophers like John Rawls mystify the racial character of the American polity that civil rights activists embraced civil disobedience to confront. Reorienting the study of civil disobedience towards activist praxis as a

[1]Candice Delmas, "(In)civility," in *Cambridge Companion to Civil Disobedience*, ed. William Scheuerman (New York: Cambridge University Press, 2021), 209.

generative source of theoretical insight, Pineda shows that the questions occupying groups like SCLC, SNCC, and CORE were not those of justification and obligation. They asked instead how to "undermine the conditions that enabled white supremacy and constitutional democracy to coexist" and "unsettle the frames and imaginaries that enable citizens to see their society as a nearly just one" (17). Borrowing from James Scott, Pineda identifies the liberal sleight of hand displacing the white supremacist character of the American state with questions of justification as an exercise in seeing like a white state.

Pineda proposes to correct this myopia by reconceiving the problem space of civil disobedience. In the hands of Black activists of the early 1960s who imaginatively transposed the "American dilemma" beyond the national frame as one moment in a worldwide struggle against white supremacy, daring to break the law and suffer the consequences was "a means of decolonizing America's white democracy" (195). Their aim was a radical reconstruction of the meaning of democracy itself. Pineda issues a call not only to deparochialize the archive of political theory but to "think more deliberately about what political theory—whether produced by scholars or by activists—does in the world" (18). *Seeing Like an Activist* places these conflicting approaches to civil disobedience in counterpoint to dismantle taken-for-granted judgments about the purpose and boundaries of protest, freeing us to forge new standards of judgment in civic dialogue with the problems of our contemporary moment.

Yet crafting persuasive justifications of civil disobedience might remain amore urgent task today than Pineda suggests. Moral and political legitimation of extralegal popular contention should be seen as a pressing contribution to protecting protesters and dismantling the carceral state. Hannah Arendt stated the problem of legitimation better than Rawls when she asked what it could mean to find a political "niche" for civil disobedience in the American system of government.[2] Arendt's comment is sometimes misconstrued as a call for the constitutional codification of a legal right to disobey. But we do better to read her as calling for a more diffident relationship to law and legitimation, seeing them as threats to the democratic energies they presume but also an unavoidable terrain of democratic contests activists often seek to refashion. This niche is less a space of comfortable compatibility than tension and uncertainty where the boundaries demarcating civility from criminality are more difficult to theoretically circumscribe.

Arendt's talk of niche is an artifact of an approach to civil disobedience developed by American jurists and legal scholars in response to a string of early 1960s Supreme Court decisions commonly referred to as the sit-in cases.[3]

[2]Hannah Arendt, "Civil Disobedience," in *Crises of the Republic* (New York: Harcourt, Brace, 1972), 83.

[3]*Brown v. Louisiana* (1966); *Blow v. North Carolina* (1965); *Cox v. Louisiana* (1965); *Hamm v. City of Rock Hill* (1964); *Fox v. North Carolina* (1964); *Mitchell v. City of*

The hegemonic liberal approach Pineda locates in Rawls and his contemporaries lies downstream of this earlier episode of state actors debating how to see disobedience. The Court's decisions to vacate trespassing charges against civil rights activists on constitutional grounds provoked wide debate in the legal profession about whether the supremacy of federal law implied something like a "right" to civil disobedience under Jim Crow. As the legal conservative Alexander Bickel, one of Rawls's key sources on civil disobedience, puts this, because "appeal to higher law is built into the American constitutional system," violating segregation ordinances constitutes no crime. Principled acts of protest like the Freedom Rides "can in no sense of the term be thought of as civil disobedience."[4] These debates carved out a niche, albeit a claustrophobic one, for civil disobedience in the American legal system's distinction between higher and lower law. Jurists did not so much decriminalize disobedience as shift the boundaries of constitutionally protected conduct to draw a sharp line between direct, civil acts of disobedience and indirect, criminal ones. The disciplinary power of the discourse of disobedience that Pineda finds in works of political philosophy should be understood as a later chapter of this longer elite project of squaring order and dissent in constitutional terms.

Are there other ways we might find a defensible "niche" for civil disobedience that do not presume the ends of the New Deal state then or the carceral state now? For Arendt, the search for a niche begins by abandoning the language of higher law in pursuit of a practice-oriented conception of law.[5] Pineda, by contrast, follows the critique of higher law into the antilegal turn of recent theories of civil disobedience. Law and legal order are tools of white democracy that civil rights activists looked to dismantle in the service of a more inclusive and radical conception of self-rule. Shifting attention from law to democracy discloses a rich understanding of civil disobedience obscured by the liberal paradigm but also risks deflecting the ways the classic period of the civil rights struggle was one over the meaning of law itself. These were experiments not exclusively in decolonizing disobedience, as Pineda puts it, but also decriminalizing dissent as a valuable and even necessary democratic institution.

An unlikely example here is Martin Luther King, Jr. Obscured by the canonical weight of his "Letter from a Birmingham Jail" are a diversity of strategies of justification and postures he occupied towards the law. As he confessed to the Bar Association of New York City in 1964, "I have such mixed, almost

Charleston (1964); *Williams v North Carolina* (1964); *Bouie v. City of Columbia* (1964); *Barr v. City of Columbia* (1964); *Dresner v. City of Tallahassee* (1963); *Lombard v. Louisiana* (1963); *Wright v. Georgia* (1963); *Peterson v. City of Greenville* (1963); *Edwards v. South Carolina* (1963).

[4]Alexander M. Bickel, *Politics and the Warren Court* (New York: Harper & Row, 1965), 78.

[5]Arendt, "Civil Disobedience," 83.

schizophrenic, feelings about lawyers."[6] King experienced law, legal order, and the legal profession in the United States as vehicles of white power. Yet the path to democratic counter-power depended on making strategic use of these legal institutions and agents. King sought to craft a niche for civil disobedience that kept the tension between civility and criminality alive. He forgoes the language of high modern constitutionalism to approach civil disobedience in the common law language of necessity. "There is nothing wrong with a traffic law which says you have to stop for a red light. But when a fire is raging, the fire truck goes right through the red light, and normal traffic better get out of its way." King's fire was the compounding economic and military crises engulfing the poor who need not higher law but "brigades of ambulance drivers" willing "to ignore the red lights of the present system until the emergency is resolved."[7]

King anticipates the legal reasoning of contemporary climate activists who have turned to the common law language of necessity to refashion criminal proceedings as sites of combative political theater. Necessity defenses for civil disobedience have mixed results in US courts, although recent cases show a growing willingness of lower court judges to allow them. Claiming necessity is refusing criminalization, not because the act broke no law but because it challenges the state's ultimate authority to define the boundaries of crime itself. Here is a different niche for civil disobedience that does not claim to square order and justice in the terms of higher law. It unsettles "the frames and imaginaries that enable citizens to see their society as a nearly just one" (16), as Pineda puts it, by embodying a different, more participatory approach to law displaced by the hegemony of modern constitutionalism policing both the terms of dissent in theory and the bodies of dissidents in the streets.

One contemporary face of these struggles with and against the white state is the deluge of anti-protest laws unleashed across the country in the wake of recent Indigenous and Black insurgencies, along with seemingly ever-expanding police powers to enforce them. Confronting repression today must involve learning from past struggles in the ways Pineda invites us to but "thinking in the streets" (12) in this way need not preclude also thinking in the courtroom to forcefully articulate positive legal, even institutional, defenses of disobedience in the services of wider visions of democracy here and now.

[6]Martin Luther King Jr., "The Civil Rights Struggle in the United States Today," *Record of the Association of the Bar of the City of New York* 20, no. 5 (1965 Supplement): 6.
[7]Martin Luther King Jr., *The Trumpet of Conscience* (Boston: Beacon, 2010), 55.