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Lovers of God’s Law: The Politics of Higher Law and the Ethics of Civil Disobedience

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Abstract

When Sister Cynthia Brinkman took the stand at her 2004 trial for trespass, with apocalyptic imagery and a theatrical sensibility she spoke of her love of God’s law and the binding force of relationships of solidarity that compelled her to “cross the line” onto the US Army base at Ft. Benning. Brinkman and her fellow agitators justified their actions through appeals to a higher law. I argue that implicit in these appeals are two heuristically separable accounts of the higher law, natural law and messianic. These two modes of theo-political reasoning are implicit in activists’ trial statements and I make them explicit through critical juxtaposition with Vincent Lloyd’s account of black natural law and Ted Smith’s messianic political theology. I demonstrate that such an exercise not only imparts a better description of moral action but through immanent critique can generate a normative evaluation of perennial issues confronting civil disobedients.

Keywords

Civil disobedience; higher law; natural law; messianism; nonviolent social movements

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When Sister Cynthia Brinkman SSND took the stand at her trial in January 2004 she carried a fabric globe. With apocalyptic imagery, Brinkman told Federal Judge G. Mallon Faircloth that she was “haunted by the blood that washes over this, our planet-home” and she was especially troubled by the “river of blood” that flowed from the United States into Central and South America.¹ Giving this image theatrical visualization, the soft-spoken sister lifted and turned the globe to reveal a red strip of fabric flowing from North to South America. Brinkman was on trial for “crossing the line” in protest onto Ft. Benning – the US Army base which houses the institutional heir of the infamous School of the Americas: the Western Hemisphere Institute for Security Cooperation (WHINSEC). Explaining her reasons Brinkman stated:

As a citizen of this country and a lover of God, God’s creation and God’s law, I say a resounding NO! Not in my name will my government further the interests of the corporate elite in this hemisphere by exploiting human beings as cheap labor and silencing their demands for justice with disappearances, torture and death – carried out by military trained at WHINSEC/SOA and paid for by tax dollars of US citizens.

Brinkman, along with 27 others, was convicted of trespassing and, because she was a repeat offender, was sentenced to six months in a federal prison.

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Brinkman’s explicit appeal to God’s law conjures a tangle of moral, political, and theological associations, associations that indicate forms of reasoning that can be easily missed in the constrained deliberative space of a courtroom. This is especially true if we are looking for activists to justify their actions by drawing on purportedly secular arguments or appeals to public reason.² Though appealing to the dictates of conscience, neither should these activists be understood as calling upon merely subjective judgments to justify their disobedience. Rather, these civil disobedients perform what I call a politics of the higher law: Brinkman and her colleagues violate laws that regulate assembly and speech and appeal to a “higher law” to justify these transgressions. Through these appeals activists attempt to rectify injustice by placing their bodies in the breach between the higher law and the laws on the books.

Drawing from original research on the effort to close the School of the Americas/WHINSEC – one of the longest-running nonviolent movements currently active in the United States – the following essay makes explicit the implicit forms of reasoning that Brinkman and her fellow activists deploy.³ I analyze the trial statements of School of the Americas Watch (SOA Watch) activists who have committed civil disobedience, known by movement insiders as

¹ Lamb, *Voices of Courage*, 22.

² Many ethicists and legal theorists have made just this sort of assumption by starting with John Rawls’s definition of civil disobedience. Rawls, *A Theory of Justice*, 364. See, for example, Quill, *Civil Disobedience*, 14; Brownlee, *Conscience and Conviction*, 6; Laudani, *Disobedience in Western Political Thought*, 112.

³ This essay draws from three years of research using ethnographic and archival data. I engaged in participant–observation at the annual gathering of SOA Watch for two years, participated in a delegation to the US–Mexico border, conducted 24 unstructured interviews, and read and coded published and unpublished reports on movement activities. In method, I follow Luke Bretherton’s appropriation of Michael Burawoy’s “extended case study method.” See Bretherton, “Coming to Judgement”; Burawoy, *Ethnography Unbound*.

“Prisoners of Conscience.”⁴ While these appeals are inescapably theological, and thus difficult for the courts to process, they are not uniform. I argue that implicit in these appeals are two heuristically separable accounts of the higher law, natural law, and messianic. These two modes of theo-political reasoning are implicit in activists’ trial statements and I make them explicit through critical juxtaposition with Vincent Lloyd’s account of black natural law and Ted Smith’s messianic political theology. With the historical retrievals of Lloyd and Smith, I draw the implicit theorizations of higher law in SOA Watch activists’ testimonies into the larger horizon of political theology both demonstrating the normative strength and identifying persistent temptations for each model (code fetishism and antinomianism respectively). I demonstrate that such an exercise not only imparts a better description of moral action but through immanent critique can generate a normative evaluation of perennial issues confronting civil disobedients.

What this essay does not do is evaluate the moral, political, and theological claims of the activists from some outside position of objective justice. While developing a normative critique of the injustice of US-Latin American militarism as an extension of soft imperial power is a worthy and needed task, it remains beyond the scope of this essay.⁵ Instead,

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I begin by assuming the basic persuasiveness of activists’ social and political critique and focus on the formal issues entailed in their appeals to higher law. As I demonstrate, going to the activists’ claims as a starting point reveals two theological traditions of moral reasoning in operation. Thus, my primary aim in this essay is to make explicit these implicit modes of theological reasoning that animate activists’ discernment about civil disobedience. While my primary aim is descriptive my secondary aim is evaluative – retrieving from that description the shape of practical reasoning that can constrain and enable such actions.

School of the Americas Watch and the politics of the higher law

The movement to close the School of the Americas/WHINSEC⁶ began in the wake of the 16 November 1989 assassinations of six Jesuit professor-priests, their housekeeper and her daughter at the Universidad Centroamericana (UCA) in San Salvador. Upon learning that the perpetrators of the UCA massacre had been trained at the US Army’s School of the Americas at Ft. Benning in Columbus, Georgia, activists began gathering annually to call for the facility’s closure and for a fundamental change in US foreign policy and military training programs. The

⁴ These statements have been collected into booklets that are circulated by SOA Watch. While they are edited and so do not reflect the exact transcription of court proceedings, they faithfully report the ways that these civil disobedients represent their reasons for activism. Collected from three years of actions (in 1997, 1999, and 2003) these booklets contain trial statements, essays, and prison journals from nearly eighty activists. The booklets have been compiled and edited by SOA Watch volunteers and published first by the Maryknoll Social Communications Department and later by the SOA Watch national office.

⁵ For an excellent anthropological analysis and critique of the US-Latin American military system as it is constructed and extended through the program of military training at the SOA/WHINSEC see Gill, *The School of the Americas*.

⁶ Founded as the Latin American Ground School in 1946 in the Panama Canal Zone, the school was reorganized and renamed in 1949 as the US Caribbean School, and then again renamed the School of the Americas (SOA) in 1963. The school was moved to Ft. Benning in Columbus, Georgia in 1984. In 2001, in no small part due to SOA Watch pressure, the school was reorganized and renamed as the Western Hemisphere Institute for Security Cooperation (WHINSEC).

central act of the annual gathering that continued meeting at the gates of Ft. Benning until 2016 was to call the names of those killed by SOA/WHINSEC graduates in a liturgy that claimed them as *¡presente!* or present. The cultivation of these “dangerous memories”⁷ of the dead allowed the movement to bridge the Latin American Solidarity Movement of the 1980s, the anti-globalization and anti-war movements that emerged in the early 2000s, and the immigrant rights movements of today.

What began as a few priests, vowed religious, solidarity activists, and refugees in 1990 blossomed into an annual gathering of tens of thousands, paired with lobbying, direct actions, and delegations to Latin America throughout the year, all organized by the social movement organization School of the Americas Watch (SOA Watch). Over the years, the specific appeals of SOA Watch adapted to the changing US foreign policy in Latin America. Early calls for an end to military aid to El Salvador became resistance to Plan Colombia and later Plan Merida.⁸ Consistently, however, activists called for an end to military training at Ft. Benning, military training that they argued was implicated in systematic violence against civilians across Latin America.

While the policy aims of the movement changed over time, nonviolent civil disobedience was always its beating heart. SOA Watch reported in early 2016:

328 acts of civil disobedience that drew sentences
300 different people sentenced for CD [Civil Disobedience]
Over 101.5 years of prison time sentenced
53.5 years of probation and home confinement time sentenced
\$223,150 of fines issued
6,900+ community service hours sentenced.⁹

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SOA Watch Prisoners of Conscience have processed and publicized their civil disobedience in a number of ways. Because part of the point of an act of civil disobedience is communicative,¹⁰ Prisoners of Conscience used whatever platforms were available to amplify their messages. These included online, alternative media and mainstream newspaper editorials and op-eds;¹¹ documentaries about SOA/WHINSEC and activism to close it;¹² as well as books critiquing US foreign policy, justifying activists’ decisions, or sharing memories of their time in jail.¹³ One of the sources that has documented, more than any other, the reasons that SOA Watch activists give for “crossing the line” is a series of movement-published booklets that reproduce Prisoner of Conscience court testimonies. These Prisoner of Conscience testimonies serve as the basis for the case study I offer here.

⁷ Metz, *Faith in History and Society*.

⁸ For a fuller treatment of the role of SOA/WHINSEC in the US-Latin American military regime and the development of the movement to close the facility see Gill, *The School of the Americas*.

⁹ “Prisoners of Conscience.”

¹⁰ Brownlee, *Conscience and Conviction*, 42–6.

¹¹ For one example of an activist using a personal blog as a platform of amplification see Clemens. There are a number of mainstream media treatments, but see, for example, the human interest story regarding Cynthia Brinkman by Ron Harris, “Nun, 67, Waits for Word to Begin Prison Sentence.”

¹² Richter, *School of Americas, School of Assassins; Uassouf, Somos Una America: Shut Down the SOA*.

¹³ Nelson-Pallmeyer, *School of Assassins*; Hanrahan, *Conscience & Consequence*; Beisswenger, *Locked Up*.

Prisoners of Conscience consistently narrate their reasons for activism by starting with their personal experiences witnessing violence in Latin America. In each of these statements, Prisoners of Conscience justified their civil disobedience by calling up obligations to remain faithful to the people represented in these stories. So, for Cynthia Brinkman, previewed at the outset of this essay, it was her encounter with refugees in Honduras fleeing political violence while on a mission with the School Sisters of Notre Dame that compelled her to take action against SOA/WHINSEC. In another case, retired Lutheran pastor and Prisoner of Conscience Brooks Anderson, was asked quite directly to work to close the SOA. He recounted:

We were [in El Salvador] for 10 days in this village. Each day we would eat our meals at—call it a restaurant. It was kind of a cooperative cooking facility. And the pastor from our church and I were standing outside. He had a little more Spanish than I, which between us was almost none. And a young lad about 12 years old came up to us, and he wanted to tell us something. And we were getting it a little bit mostly through sign language. You want to write to a school in America? No. And then we would try it again. “You want children from a school in America to write to your school?” “No, no.” We were standing by an iron gate that swings. And on one side it says “open.” He swings it the other way, and points to the word “closed.” “You want us to go home and write about closing the School of the Americas?” “Yes, yes, yes.” And that was the message we got from that village.¹⁴

Through broken Spanish, Anderson received a call to write and work for the closure of the School of the Americas. Stories like Brinkman’s and Anderson’s were repeated throughout the trial statements. For some, it was their own encounter with United States sponsored violence that led to their actions. For others, it was relationships with Latin Americans developed through human rights delegations, missionary assignments, or work with immigrants in the United States that compelled them. These experiences are one component of what social movement theorists call activists’ “biographical availability” to social change work.¹⁵ Their personal experiences, motivated by their moral and religious

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commitments, entangled them in relationships of solidarity in working against US supported violence in Latin America.

But it would be a mistake to view these stories as mere rhetoric or even indications of biographical availability. Rather, these appeals to stories of particular relations of obligation *provide the content* to the other ubiquitous appeal: to higher law.¹⁶ One might be tempted to conceptualize these two appeals as morally distinct principles of obligation: one indicating particular relations of solidarity, another indicating a universal imperative. As I will demonstrate, however, higher law is not separable from particular, proximate relations of solidarity. The hope for relationships of solidarity that transcend and transform the asymmetries of power within a hemispheric military system gives specificity to a sometimes apophatic invocation of the higher law.

¹⁴ Knapke, *Voices for the Voiceless*, 11.

¹⁵ McAdam, “Recruitment to High-Risk Activism,” 70; Nepstad, *Convictions of the Soul*.

¹⁶ Credit is due to Ann Mische who helpfully alerted me to the relationship between the obligations of solidarity and the higher law.

It would be a mistake to describe the higher law as one thing. Rather, it is a constellation of concepts, historical artifacts, and legal agreements; and activists' invocation of the higher law reflect this range of associations as they use different kinds of appeals to do different things. Yet, like the appeal to particular relationships of solidarity and obligation, appeals to the higher law do real moral work. They indicate obligations that transcend and thereby relativize the presumptive authority of standing legal conventions and justify transgressive actions taken to redress systemic injustice.

I find that there are two models of the ethics of civil disobedience implicit in the appeals to higher law by SOA Watch activists. Each deploys an explicitly theological mode of moral reasoning to justify civil disobedience. Risking the danger of oversimplification, I would classify these appeals in two different, though not exclusive types: natural law and messianic. The risk of these ascriptions is simply in their excess of meaning. Natural law and messianism both represent contested, internally plural traditions of political theological reasoning. My aim is not to give a final or succinct account of either here. Rather, as will become clear, my intention is to use these families of political theology to illuminate the forms of moral, political, and theological reasoning that SOA Watch activists engage in to make sense of their activism.

Natural law accounts of higher law

Therapist and Prisoner of Conscience Margaret Knapke argued in her trial statement that “some laws contradict others.”¹⁷ She went on to say:

And so I think that a conscientious citizen has to very carefully discern which laws have priority—moral if not legal priority....I really don't think that I or my friends here have broken the law in any meaningful sense of the word by taking political discourse onto the base.

Knapke argued that she and her collaborators had not broken the law by taking their protest onto Ft. Benning. Why? She continued,

In fact, I think that we are all being essentially obedient to a law that is very dear to me and with which I'm sure you are very familiar, the Nuremberg Principles. And as you know, the seventh principle claims that citizens are required to not cooperate with government policies which produce crimes against humanity, crimes against peace, and war crimes.

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Rather than disobedient, Knapke argued she was obedient to the prohibition against cooperation in crimes against humanity enshrined in the Nuremberg Principles. She concluded by indicating how those principles entangled her in obligations of solidarity:

And so I really believe I would be grievously disobedient if I failed to speak for the people of Latin America, particularly, those under fire in Columbia and Chiapas and other regions in southern Mexico, as directly and clearly and strongly as I have

¹⁷ *Voices for the Voiceless*, 27.

by taking our message directly onto the base where it most needs to be heard.

Key to Knapke's justification of her actions was a hierarchical account of law. There are civil laws, like those limiting speech and assembly on military bases; there are constitutional precepts, like that contained in the First Amendment of the US Constitution permitting freedom of speech; and there are international conventions, like the Nuremberg principles which require non-cooperation in crimes against humanity. Higher laws are those laws that transcend local variation and circumstance.¹⁸ While civil laws are binding, they are only binding insofar as they conform to the higher constitutional and international legal codes. For Knapke and many of her colleagues, these higher laws generate a more universal obligation of fidelity: universal commitments to human rights supersede local mores regarding trespass and speech.

Knapke's recourse to the Nuremberg principles is one that has often been used by peace activists to justify civil disobedience, though with little judicial success.¹⁹ The seventh Nuremberg principle reads: "Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law."²⁰ The main objection that judges raise to this defense is to the claim of complicity. As legal scholar Richard Falk argued, while the "zone of legal responsibility" certainly extends beyond principal state leaders, secondary figures are judged on the basis of whether they voluntarily cooperated in the commission of a crime.²¹ The extent of that voluntary cooperation is the principal legal issue.

Judge Hugh Lawson raised just this question following Knapke's invocation of the Nuremberg principles asking: "In what way have you been called to cooperate with the policy of the United States Government at the School of the Americas?" Knapke responded by arguing that the higher law of the Nuremberg principles compelled not just the cessation of material support for US military and foreign policy (paying taxes), but also a spate of legal repertoires of redress. Admitting the importance of "legal means" like lobbying and letters to the editor, she also identified their limits. In Knapke's account, faithfulness to the people of Latin America required her to raise her concerns "with the loudest possible volume." In other words, the relationships of solidarity that Knapke and other Prisoners of Conscience named throughout their testimony generated obligations of noncooperation, even to the point of civil disobedience. Here obligations to solidarity collaborate with obligations of non-cooperation in the Nuremberg principles, both dissolving the "legal priority" of laws prohibiting trespass onto the base and requiring Knapke's action of civil disobedience.

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Knapke's recourse to the Nuremberg principles is one among many appeals to legally encoded sources of higher law.²² Many Prisoners of Conscience, like Daniel Sage, appealed to the US Constitution and its guarantee of "freedom of speech, the right to peaceably assemble and

¹⁸ As Cicero classically remarked of the natural law: "there will not be one law at Rome, and another at Athens." *On the Commonwealth*, 71.

¹⁹ Lambek, "Necessity and International Law," 491.

²⁰ "Report of the International Law Commission Covering its Second Session."

²¹ Falk, "Son My," 35; Falk, "The Nuremberg Defense in the Pentagon Papers Case."

²² See also Peg Morton's appeal to Nuremberg in Lamb, *Voices of Courage*, 31.

to petition the government for redress of grievances.”²³ Others indicted the SOA for its role in undermining the “rule of law” in Latin American countries:

By offering its full support to those who routinely engage in terrorist activities and those who have shown through their actions that they hold all law in contempt, the School of the Americas has engaged in conspiracy to commit crimes against humanity and has contributed to undermining the rule of law throughout this hemisphere.²⁴

Rhetorically, these indictments serve to undermine the authority of the court and its presumptive legal authority. Activists, acting as lay lawyers, invoke the legal language of the court in order to call it to a higher account of justice.²⁵

Knapke’s appeal to a higher law is typical of a mode of reasoning that recurs across Prisoner of Conscience statements that has strong affinities with the long, internally plural tradition of natural law. These accounts are rooted in the priority of human rights, the violation of which obligates a duty of response. The hierarchical structure of law allows recourse to justifications that are encoded elsewhere (international or constitutional law) and enable the violation of lower laws. What is significant about the hierarchy is not merely plenary authority, but more importantly that the plenary authority is rooted in a universal account of human dignity that trumps any parochial legal code.²⁶ As such, the higher law prescribes a generic, universal duty to protect the human dignity of others and provides a legal structure to enact that obligation. We will return to this form of theo-political reasoning shortly, but first we need to turn to an alternative model at work in the justifications made by SOA Watch Prisoners of Conscience.

Messianic accounts of higher law

While appeals to forms of natural law reasoning in the trial statements are frequent, another common appeal is to higher law in a messianic register that invokes God’s law or divine obedience. To call these appeals messianic is not to claim that they explicitly refer to a Messiah. Rather, it is to say that their theo-political logic relies on the rupture of the current (legal) order by appeal to some “law” that stands beyond it. Messianic appeals to the higher law attempt to cooperate with and thus participate in this divine rupture. Recall, for example, Cynthia Brinkman’s statement recounted above. Brinkman

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appeals to her love of God’s law as the impetus for her actions. In a similar way, David

²³ *SOA Watch, Speaking Truth to Power*, 5. Some Prisoners of Conscience like Alice Gerard have argued, “I do not believe that I have violated any laws. I believe my actions were protected by the U.S. Constitution’s guarantee of free speech and free assembly and that these rights do not end with a fence at the end of the road.” Lamb, *Voices of Courage*, 27.

²⁴ Christopher Jones quoted in *SOA Watch, Speaking Truth to Power*.

²⁵ Jesuit William Bichsel pointed out to the judge that, “over you on the bench are the words ‘Lex Et Justicia.’ We come into this court of law where law is to be applied judiciously, not blindly, but applied with interpretation. But out of law, justice should flow, that each child, woman, man receives his or her due. And that’s a point of law in order that, as Scripture says, justice might roll down like a river.” (*SOA Watch*, 18)

²⁶ This argument was key to the development of the Nuremberg Principles as more than mere victor’s justice. See Citron, “The Nuremberg Trials and American Jurisprudence.”

Corcoran, a hospital chaplain, stated in his 2004 trial: “I believe we are gathered here in God’s name. God is our witness to the truth and validity of what we say. In fact, God is the only just Judge, the supreme Judge of all our actions.”²⁷ For Brinkman and Corcoran, God’s law, variously construed, provides a context and justification for their action. While there is specific content to this law, it is not codified. None of these activists claim that God commanded them to cross the line. What they do claim, however, is a sense of vocation expressed in transgressive action.

Prisoner of Conscience Betsy Lamb expressed this vocation by naming her friendship with the women organizers in southwest Colombia, women she had met while on a Witness for Peace delegation to the region. After reading a letter of support from four Colombian popular organizations addressed to the court, Lamb concluded:

As a friend of these people and as a follower of Jesus, I feel a deep obligation to call the United States government to repentance for this School....I tried legislative advocacy, without success. I cried during the solemn procession on November 23, as the names of so many martyred Latin Americans were read aloud, not just the names of bishops and priests and church workers, but also of some of the hundreds of thousands of lesser-known people equally loved by God. I had to do something more. Putting my own comforts on the line is the least I could do, and it is the way I have felt called to work toward this end.

Will my risking up to six months in prison change things? I do not know. I can only say, in the words of the prophet Jeremiah,

You duped me, O Lord, and I let myself be duped;
You were too strong for me, and you triumphed.
I say to myself, I will not mention God,
I will speak in God’s name no more.
But then it becomes like fire burning in my heart,
imprisoned in my bones;
I grow weary holding it in, I cannot endure it (Jeremiah 20:7a, 9–10, NAB).

Like Jeremiah, I could not endure not speaking out. More. After much prayerful discernment I felt I must do whatever I could to close the SOA, now known as WHISC or WHINSEC. I could not do otherwise.²⁸

I have quoted Lamb at length because her statement synthesizes some of the patterns that recur across Prisoner of Conscience statements. First, Lamb rooted the motivation for her actions in relationships of friendship and solidarity with particular people in Latin America. Second, she acknowledged that these relationships were formed because of her faithfulness as a follower of Jesus. Third, together, faithfulness to friends and to Jesus generated a “deep obligation to call the United States government to repentance,” a call manifest first in legislative advocacy. Fourth, recognizing the limits of legislative advocacy (its lack of “success” or effectiveness), Lamb engaged in “prayerful discernment” about how else to effectively speak out. Fifth, Lamb’s

²⁷ Lamb, *Voices of Courage*, 23.

²⁸ *Ibid.*, 29.

discernment generated a call and decision to speak out, even at the cost of her own comfort, through civil disobedience. The higher law of solidarity and faithfulness to following Jesus enabled,

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even required, transgressive action. In the end, she concluded, “I could not do otherwise.”

Whereas natural law type appeals to the plenary authority of a higher law express a sense of a codified moral, if not legal, obligation to responsible intervention, messianic appeals take a different form. These appeals are not about following a code so much as they are about discerning God’s calling in a particular place, time, and station. Statements like, “I could not endure not speaking out,” do not have the structure of obedience to a universalizable law. Rather, they are the fruit of deliberative discernment about a vocation to participate in God’s work in the world. They respond to God’s command as discerned by the Prisoner of Conscience. Lamb’s messianic appeal to a higher law takes a distinct shape from Knapke’s, even while consistencies remain. Both appeal to the principle of solidarity. Both maintain a critical relation to positive law as such. Yet, Lamb’s account is rooted first in the priority of particular relationships. These relationships call forth a particular response. What to do is a matter of prayerful discernment.

Making the models explicit: Lloyd and Smith

While the appeals to the higher law made by SOA Watch Prisoners of Conscience are irreducibly plural, there are patterns across them. Two commonalities that are consistent are appeals to solidarity and a critical relation to positive law. The way solidarity and the law are articulated and actualized are different and, I have suggested, can be heuristically organized into two families of moral reasoning: natural law and messianic.

Vincent Lloyd and the black natural law

Given the centrality of the *ipresente!* litany to SOA Watch’s political performance it is no surprise that exemplars play a significant role in the moral and political deliberations of the movement. SOA Watch Prisoners of Conscience made repeated appeal to the authority of Martin Luther King Jr. as they justified their stance on law. King’s most famous argument in support of civil disobedience was made in his 1963 letter smuggled from his jail cell in Birmingham, addressed to the eight white religious leaders who called for moderation in the face of racial injustice.²⁹ To make the case for the moral rightness of his and his co-agitators’ violation of the injunction on protest, King amassed a rhetorical barrage of moral sources. Key to this justification was an invocation of natural law.

Thinking of King as operating within the natural law tradition is uncommon, in spite of the invocation of natural law in his most famous written document. Vincent Lloyd has recently argued that this is due, in part, to the loss of what he calls the “black natural law tradition.” Lloyd’s recent retrieval of the black natural law tradition is prescient for my argument because it is King (not Cicero or Thomas Aquinas) who most directly influences the use of natural law

²⁹ King, “The Negro is Your Brother.”

reasoning by SOA Watch Prisoners of Conscience. Lloyd has argued that the black natural law tradition itself has a long legacy, but has been lost, as evidenced by the failed invocations by Clarence Thomas and Ben Carson. Going to older figures – Frederick Douglass, Anna Julia Cooper, W.E.B. DuBois, and Martin

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Luther King Jr. – Lloyd finds a rich tradition of moral inquiry and political praxis that “when engaged collectively, catalyzes social movements and offers a critique of the wisdom of the world.”³⁰ Lloyd argues that this tradition of natural law is distinct from Thomas Aquinas’s natural law theory even as it shares some family resemblances. The black natural law tradition is distinctive in its emphasis upon the mediating and epistemic role of emotions in discerning natural law and the ultimate unrepresentability of both God and human (and by extension God’s law). This unrepresentability generates two key practices: ideological critique of the wisdom of the world and strategic political organizing which performatively resists unjust legal formulations.

Lloyd rightly notes that King’s appeals to eternal law, moral law, and the law of God are ubiquitous throughout his preaching, teaching, writing, and organizing career. King consistently invoked the higher law, and did so in a variety of ways. For King, like Knapke, there was a “hierarchy of law” that situates local ordinances within national constitutions which in turn are circumscribed by God’s law.³¹ Furthermore, natural law for King was rooted principally in the human dignity of all persons. Injustice violates the image of God in humanity. Injustice must be resisted, therefore, through civil disobedience and strategic political organizing. Through the practices of strategic political organizing, King thought, people could participate in God’s will, God’s law. Through such organizing, movements could enact God’s law thereby resisting the flawed wisdom of the world.

The principal worry regarding this mode of moral and legal reflection is that it operates with a temptation toward what Charles Taylor calls “code fetishism” in which all goods are reduced to legal formulations.³² It is right to call this a temptation because natural law is best understood as a capacity or power, not as a list of legal strictures, however robust.³³ King was aware of this temptation. He pushed for legal changes but acknowledged the need to change hearts and minds. In the context of the SOA Watch, the danger is to conceive of legal codes, such as the Nuremberg principles, as totalizing. The Nuremberg principles, as important as they are, do not cover the types of complicity that Knapke indicated. This does not mean that they are not valid principles that should be employed in specific instances. However, the obligation to intervene is one that must be discerned, not commanded. Furthermore, the universalizing thrust of Knapke’s moral vision frays when applied without consideration of the differences of subject position. I take this point up more fully in the final section.

Lloyd’s analysis of King breathes fresh life into both accounts of natural law and of the political theology of King. Furthermore, it illuminates the distinctively theological reasoning at work in SOA Watch activists’ justification of their civil disobedience. What Lloyd neglects,

³⁰ Lloyd, *Black Natural Law*, viii.

³¹ *Ibid.*, 94, 98.

³² Taylor, *A Secular Age*, 704–7.

³³ See, for example, Jean Porter’s definition of natural law as “fundamentally a capacity or power to distinguish between good and evil.” Porter, *Nature as Reason*, 13.

however, is the eschatological dimension of King's work. King is oriented not only to natural law, but also to beloved community, a vision of justice that God inaugurates in the world. To be fair, Lloyd acknowledges this dimension of King's theology, but he suggests that King's vision of the beloved community was simply apophatic, devoid of specific content.³⁴ Moreover, apart from King, Lloyd worries about the ways apocalyptic

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reasoning undermines strategic deliberation.³⁵ Yet, messianism need not indicate a morally content-less end to practical reasoning.

Ted Smith and the messianic relation to higher law

Responding to categorical rejections of the higher law Ted Smith has recently argued that what is needed is neither the invocation of some higher law to support our political leanings nor the rejection of such politics outright – a rejection of ideology that, Smith argues, has become ideological in itself. Smith rather proposes that we should “cultivate the capacity of reasoning together about the form of a higher law”.³⁶ The major character in Smith's account is John Brown, neither freedom fighter nor fanatic, but figural specter who reveals the limits of law and its violence. Significantly, however, Martin Luther King Jr. also plays a minor role in Smith's argument. King, for Smith, is an exemplar of extremism: he is an extremist for love and justice.³⁷

Such extremism does not signal the end of practical reasoning, as Lloyd worries, however. Smith argues that there is a moral and political reasoning implicit in such appeals. Working in dialogue with Walter Benjamin, Smith argues for a higher law (1) in an indicative, rather than imperative, mood that (2) negates the pretensions of any attempt at fulfillment (3) freeing response to creative deliberative improvisation that (4) occurs within the providence of divine action but is not identical to it. For Smith, a messianic higher law does not require that we take action in order to fulfill it. To the contrary, it acknowledges a law whose fulfillment in Jesus Christ invites a free response. Admitting that appeals to a higher law can lead to dangerous extremism, Smith argues that this messianic account of the higher law indicates not the end of practical reason, but its necessity.

The messianic shape of the appeal to higher law for Brinkman, Cochran, and Lamb will raise alarm for some. Some critics will worry that appeals to higher law enable an antinomian cessation of the norms that typically constrain our daily lives and endorse a (sometimes violent) enactment of a particular moral or religious vision.³⁸ Messianic appeals to higher law are sometimes made with the urgency of necessity that seems to suspend moral reasoning.³⁹ Or, alternatively as Lloyd has argued, messianic appeals sometimes devolve into a pessimism that looks more like “solipsistic retreat” than sustained political engagement.⁴⁰ Because the law has already been fulfilled, there is no need, no necessity, for action. Our actions do not enact the law;

³⁴ Lloyd, *Black Natural Law*, 117.

³⁵ *Ibid.*, 146.

³⁶ Smith, *Weird John Brown*, 109.

³⁷ *Ibid.*, 108.

³⁸ Almond, Appleby, and Sivan, *Strong Religion*, 240.

³⁹ Appleby, “Rethinking Fundamentalism in a Secular Age,” 233.

⁴⁰ Lloyd, *Black Natural Law*, 146.

therefore, we need not act at all.

Though this temptation remains, the costly civil disobedience of SOA Watch Prisoners of Conscience who make messianic appeals to a higher law shows that neither violent enactment or apathetic retreat are necessary responses. For these activists, divine obedience is a response that improvises with the law. Messianic appeals to a higher law serve to relativize though not outright reject lower laws by expressing obligations of responsibility that transcend current legal orders and thereby frees law for use through a diverse set of legal repertoires. As such, civil disobedience is but one kind of relation to the law that is

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available to these activists; they also employ practices of lobbying and direct diplomacy. Yet, it is the messianic politics of the higher law that allows the coordination of these diverse forms of political action.

Models of higher law as modes of moral reasoning

My argument is that implicit in Prisoners' of Conscience appeal to a higher law are two modes of moral reasoning about law *qua* law and its plenary authority. Bringing those modes of moral reasoning into critical juxtaposition with the historical retrievals of Lloyd and Smith, we can make those modes of reasoning explicit. It is important to note, contrary to historical trends in twentieth-century Christian ethics, that there is not a presumptive exclusiveness to natural law and messianic accounts.⁴¹ SOA Watch Prisoners of Conscience often deploy both modes simultaneously. It is also important to note that both Lloyd and Smith tend to work in an apophatic key that can make appropriation of them for confident claims of SOA Watch activists seem a bit strident. However, a good typology helps to clarify differences even when concrete cases remain ambiguous. By juxtaposing Lloyd and Smith's constructive ethics with the actual practice of SOA Watch activists we can begin to evaluate their actions.

The differences between natural law and messianic accounts of the higher law are most readily visible in their dangers. The danger of natural accounts of the higher law is code fetishism: the desire to instantiate visions of the good in ever more sophisticated legal codifications. We can see this danger beginning to emerge in Knapke's totalizing account of obligation to resist the nefarious consequences of US policies that support civilian repression and the toleration of low-intensity warfare in Latin America. The danger of messianic accounts of the higher law is antinomianism: the cessation of normal moral constraints and obligations. This danger can manifest in the expressive witness of activists like Lamb who, in their desires to faithfully witness to an alternative to the current US-Latin American military system can easily neglect the work of piecemeal change. Both of these dangers are aberrations from the best accounts of the two models, but they do highlight the abiding distinctions between them.

While there are important distinctions between natural law and messianic appeals to the higher law, two aspects unite them. First, they are united in the way they construe the content of the higher law. It is relationships of solidarity, and the hope that they might be grounded in something other than asymmetries of hegemonic power that is the content of the higher law. These appeals to a higher law, though irreducibly plural, are not vacuous. They gesture toward

⁴¹ Barth, "No!"; Arner, *Theological Voluntarism and the Natural Law*.

hopes for sustained relationships of responsible solidarity. While both models share this content, they apply it in distinctive ways. The natural develops particular stories of suffering into universal obligations of solidarity. Witnessing the violation of the inherent dignity and human rights of another obligates responsible intervention on her behalf. The messianic, meanwhile remains in the register of particularity. Rather than generating universal obligations for intervention, particular relationships of solidarity generate particular responses: vocations to singular action.

Second, the two models are united in their requirement of moral discernment or *phronesis*. Neither model offers the clarity of certainty; both demand the practice of prudential

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judgment in order to come to a decision about the obligations that derive from the higher law. How each model executes this practical deliberation is distinct. For the natural law model, the question of deliberation is how I am obligated to fulfill the command that is generated by the violated dignity of the other. As Knapke argues, discernment is in regards to which law has plenary authority and thus commands my obedience. For the messianic, the question of deliberation is how I am called to respond to a law already fulfilled.

Obligations of (dis)obedience under the higher law

My argument has been that there are complex, theological forms of moral and political reasoning embedded in activists' justification of their actions that can be illuminated through critical juxtaposition with theories of the higher law. By making explicit those forms of reasoning we can better describe morally, politically, and theologically the actions of SOA Watch Prisoners of Conscience. This is a good in and of itself. Such a theologically informed description of civil disobedience evades the capture of prominent theories of civil disobedience within a reductively legal frame.⁴² But better description can serve a further aim, namely, the normative evaluation of these actions. The normative evaluations I offer here do not provide an objective standpoint of judgment. Rather, by making explicit the traditions of moral reasoning that these activists are working within we gain the capacity to practice a form of immanent critique, holding them to account on their own terms. What range of judgments, then, do these political theological frameworks of reasoning generate on the questions of obligation that are a regular part of the practice of civil disobedience?

Negative obligations: the force of law

First, regarding the question of the obligatory force of positive law, natural law, and messianic models affirm something external to the law that justifies obedience to it. Whether our account of justice is derived from an account of human flourishing or an eschatological vision of the beloved community, justice stands in a priority relation with the law as such. While each model shares this commonality, they diverge regarding the point at which positive law no longer obliges, a divergence which can be identified by attending to the more limited question of

⁴² See Laudani, *Disobedience in Western Political Thought*. For a critique of the anti-legal turn in theories of civil disobedience see Scheurman, "Recent Theories of Civil Disobedience."

whether civil disobedients should submit to punishment.

Natural law accounts of higher law are somewhat ambivalent on the question of submission to punishment. First, it should be noted that natural law accounts of higher law emphasize law's hierarchical structure as Lloyd pointed out and, therefore, often appeal to higher precedent to justify the apparent violation of a lower law. Moreover, natural law accounts assume the presumptive obligatory force of law, but that presumption is upheld only insofar as the law conforms to justice. King, in his letter from the Birmingham jail, cited Augustine (and Thomas) to say "an unjust law is no law at all."⁴³ On

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the surface, this can seem like a strong justification for simply ignoring unjust laws and the punishments that accompany them. This is what I take to be Knapke and other Prisoners of Conscience argument when they suggest that they did not violate the law "in any meaningful sense."⁴⁴ This argument, however, has two problems. First, for Knapke (and for King) the law that they violated, in the most technical legal sense, was not explicitly identified with the injustice against which they protested. Rather, they committed what legal theorists call "indirect" civil disobedience.⁴⁵ Thus, Augustine's famous maxim seems not to apply. More important on Lloyd's account of natural law than what law is violated is how such actions effectively critique the wisdom of the world and motivate movement activity. To argue the Prisoners of Conscience violated no law is to miss the point of legal violation in the first place. This relates to a second point, namely, that this argument underplays the ways the prominent voices in the tradition (whether Augustine, Thomas, or King) have argued that submission to unjust penalty can serve redemptive purposes. Thomas, for example, in his question treating the binding quality of unjust laws cites 1 Peter 2:19 in the *sed contra*: "For it is to your credit if, being aware of God, you endure pain while suffering unjustly." King picked up this redemptive account of suffering in his own political practice.⁴⁶ For this model of the higher law, suffering punishment for refusing to obey an unjust law redounds to the credit of the civil disobedient. While Knapke and others reject the moral authority of unjust laws, in the end they submit to punishment. Their argument that they violated no law fails, though their practice of submitting to punishment coheres with the judgments of the natural law tradition explicated by Lloyd.

Messianic accounts of the higher law have a more tenuous relationship with law as such. When it comes to accepting punishment, however, they offer the clearest description of what SOAWatch actors actually have done. Giorgio Agamben's commentary on Paul's letter to the Romans – a commentary that plays a prominent role in Smith's account – articulates a messianic posture to the law. It is not one of antinomian rejection (though that temptation remains). Rather, according to Agamben, Paul called for those under the law to be "as if not."⁴⁷ Agamben argued:

⁴³ Thomas also cited Augustine in an article asking "Whether human law binds a man [*sic*] in conscience?" *Summa Theologica*, 1–2.96.4. Augustine made the claim that "an unjust law is no law at all" in an extended dialogue with Evodius in his *On Free Choice of the Will*, 1.5.

⁴⁴ In addition to Knapke see Alice Gerard's statements.

⁴⁵ Lambek, "Necessity and International Law," 474.

⁴⁶ Note by contrast Dolores Williams' critique of redemptive suffering and James Cones recent appropriation of the same. Williams, "Black Women's Surrogacy Experience and the Christian Notion of Redemption," 199–203; Cone, *The Cross and the Lynching Tree*.

⁴⁷ See 1 Corinthians 7:29–31.

Rather, in the as not, the juridical-factual condition is taken up again and is transposed, while remaining juridically unchanged, to a zone that is neither factual nor juridical, but is subtracted from the law and remains as a place of pure praxis. Of simple “use” (“use it rather!”).⁴⁸

Agamben proposed a theology of law’s *use* that does not negate the juridical consequences of the law. Instead, even the punishment that the law intends to be a discouragement of disobedience is transposed. A messianic politics of the higher law would support the Prisoners of Conscience conclusion that: yes, she is guilty of violating positive law, but no, the punishment does not mean what the court intends for it to mean. Smith critiques Agamben for his aestheticization of the law at just this point, especially insofar as

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Agamben severs the relationship between law and justice.⁴⁹ SOAWatch Prisoners of Conscience do not commit the error of aestheticization by leaving claims of justice squarely at the center of their justifications, even as they follow Agamben’s transposition of the law. Thus, like the natural account but for different reasons, the repression of dissent only redounds to the credit of the dissenters.⁵⁰ On this account, submission to punishment is morally praiseworthy, not principally because it evinces fidelity to the rule of law, but because submission to punishment is transposed into an *askesis* of solidarity.

Positive obligations: justice through civil disobedience

Having examined the obligatory force of positive law, the second question that comes to the fore is at what point the commission of civil disobedience is itself called for. Neither of the models I have examined goes so far as to say that civil disobedience is obligatory. Rather, each model entails the civil disobedient in a process of prudential judgment. Where they differ is first, on the motivating obligations that drive the civil disobedient to act – universal human rights for the natural law and particular vocations to relationship for the messianic – and, second, on the relationship to the law as such.

For natural law accounts of the higher law, particularly black natural law as Lloyd identified it, the principle obligation is to the image of God manifest in the other: “finding the image of God in a neighbor and revering it...is clearly prescribed by God’s law.”⁵¹ When that image is constrained, marred, or deformed, we have a responsibility to organize for its redress. Thus, the commission of civil disobedience is recommended as part of a social movement strategy. Knapke, above, indicated a sketch of SOAWatch activities: legislative advocacy, public protest, and civil disobedience. In addition to these, SOA Watch has engaged in direct diplomacy by traveling to Latin American countries and calling on heads of state and military leaders to stop sending their officers to US training facilities like the SOA/WHINSEC. Civil

⁴⁸ Agamben, *The Time That Remains*, 28.

⁴⁹ Smith, *Weird John Brown*, 115–16.

⁵⁰ The danger of this line of reasoning is, of course, that it valorizes suffering. This is an important caution, but it seems to me simply descriptively true that in cases of nonviolent direct action that employ civil disobedience that punishment bestows a moral authority to the activist that receives it. See footnote 46 above.

⁵¹ Lloyd, *Black Natural Law*, 108.

disobedience is one part of a larger strategy. The danger for civil disobedience practiced in the mode of natural law is when it becomes obligatory for participants regardless of station. Returning to the questions of complicity raised in Knapke's discourse with Judge Lawson, I wonder how sweeping Knapke's account of responsibility might be. Do the Nuremberg principles require that everyone at the gates of Ft. Benning commit civil disobedience? What about parents? Historically victimized populations? People with criminal records? Undocumented immigrants? Each of these considerations has come up in the deliberations of the movement. Parents as well as those employed in helping professions have had to discern how to balance competing obligations. When asked whether he would commit civil disobedience, a black participant in a nonviolent direct action workshop simply stated: "I'm not trying to go to jail. We've got enough black folks in prison."⁵² Moreover, others critiqued the arrogance of some Prisoners of Conscience who according to one observer "wear [their] jail time like a fucking badge."⁵³ These are, I think, clear examples of the code fetishism that tempts this mode of reasoning.

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Messianic accounts of the higher law offer an account of obligation, or better the free response to a law already fulfilled, that also challenges SOA Watch practice. Not a generic obligation to justice, nor merely a commitment to the human dignity of the other, the messianic account locates response in relationships of solidarity with the living and the dead. As the SOA Watch annually declares that the dead are *i presente!* this claim frees and motivates participants to engage in piecemeal repair. Importantly, the claim of *i presente!* does not itself raise the dead. Rather it affirms the Christian creedal belief in and hope for the resurrection of the body and says that because these sisters and brothers are present in Christ, activists can act in love with and on behalf of them. The claim of *i presente!* does not obligate civil disobedience, but for many of the Prisoners of Conscience it represents an important moment of moral clarity, one that translates into a sense of vocation, a call to intervene (recall here Lamb's citation of the prophet Jeremiah). Vocation requires discernment, particularly discernment in community. This discernment is guided by the call to faithful solidarity with the living and the dead for effective political intervention.

The models of the ethics of civil disobedience that I have offered here do not, finally, speculatively resolve longstanding questions regarding the standing of positive law nor the responsibility to pursue justice through civil disobedience. What they do provide are modes of moral reasoning that guide prudential judgment about the moral rightness and goodness in particular situations. Rather than an anti-legal rejection of law, these appeals to a higher law respond to bonds of solidarity that transcend the boundaries between North and South, living and dead, by critiquing the legalized violence of the US-Latin American military system and calling for laws that better conform to justice.

⁵² Unpublished fieldnotes, November 20, 2015.

⁵³ Parker, "A Black Man's Look at Faith Activists."

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