

Is it Mutiny?

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Abstract

Should an employee refuse a duty such as issuing a marriage license to a gay couple if performing that duty is offensive to the employee's morals? If so, should the employer accommodate the employee? On what basis are these questions resolved? How are they related to our core enlightenment beliefs? This paper examines a conflict in the concept of human dignity descended from the views of John Locke and Immanuel Kant, shows how the conflict can be resolved and shows that by resolving this conflict we can solve the moral problem regarding moral objection to public policy. However, the solution is not accommodation for the protesting employee.

Is it Mutiny?

I will use the term “disobeying orders” as shorthand for a variety of actions and inactions including failing to follow an instruction, failing to comply with a written rule, failing to perform one's usual duties under usual or unusual circumstances, or anything that might be called insubordination. If there are other cases that one might think count as intentionally evading public employment duties, I intend to use the term more inclusively rather than less. Yet, there is a continuum to consider. At one end there sabotage or other deliberate efforts to undermine public policy, whether long settled or recently made. At the other end there might be genuine confusion over the discretionary authority of the public employee. In the middle there may be a range of disobedience that is aimed not at overtly undermining the policy, but at resisting personal involvement in implementing in the policy. This paper is primarily about the middle and the subversive end of the continuum. Likewise, this paper concerns such behavior when the resistance is thought to arise from moral reasons, not other reasons, such as, when the employee just does not feel like doing the work or anticipates a pecuniary benefit from resistance.

This paper arises out the case of public employees who refuse to perform the public duty of issuing a marriage license to a gay couple after courts have determined that there is a constitutional right to such licenses (Perry, 2008). However, this is hardly a unique situation. Recently, during the time that this topic was debated on a listserv, there was news of a justice of the peace who refused a marriage license to an interracial couple (Associated Press, 2009).

These two cases involve marriage licenses and they involve public employees who oppose the nominal popular public policy,¹ however, there is no special reason why disobedience must reflect such conditions. In another recent incident, a dean of a public policy school circulated a memo to his school objecting to a decision either already made or substantially supported by the president of his university and as a result, he asserts, he was forced to resign as dean (Hahn, 2010). This incident does not reflect the failure to perform a public duty with respect to one officially endorsed as public policy, at least not in the same sense as the two discussed before; yet it, too, may fall within the broad category of disobeying orders. While the cited marriage licenses cases would typically be called “conservative” in American culture, it was not so long ago that the typical case would more likely be “liberal”(Hershey, 1973). This paper is not about conservatives mucking up liberal policy or vice versa, it concerns the moral status of refusals, whether explicit or otherwise, to perform public duties.

Let us assume that in the ordinary case there is a presumption that an individual is morally responsible for his actions. This moral responsibility cannot be transferred. This presumption is found explicitly in Article 8 of the Charter of the International Military Tribunal at Nuremberg, “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires” (Charter of the International Military Tribunal, Article 8). I have heard, outside the context of academic discussion, an assertion to the effect that this Nuremberg principle is not relevant to the ordinary case as it refers to particularly ghastly behavior. However, let us put that view to rest. A principle is meaningful if it can help

direct the action the user should follow. If the only application is that now that one has taken an action we particularly do not like we will retroactively assert a “principle” that never applies in the ordinary case, then the “principle” is not a principle, it is an excuse for revenge. Here, I assert that Article 8 communicates a principle. The simple straight forward version of this principle is that the individual can never fully transfer the responsibility for his action to anyone else including his employer-superior or the government.

What kind of principle is it? Modern moral philosophy offers us many options for setting principles, but not very many of them will get us to this particular principle. For example, it is hard to see how utilitarianism will get us there. There is no particular reason why utilitarianism requires each individual to calculate the utility of all possible actions. Why not shift most of that burden to the government? There is utility in that burden shift, so taking on the responsibility oneself would have disutility and, thus, be contrary to utilitarianism.

We can work through the others, but to simplify matters, I will assert that there is only one approach to modern moral philosophy that will get us to the Nuremberg principle and this is the deontological reasoning of Kant, specifically the second version of the categorical imperative, “So act as to treat humanity, whether in thine own person or in that of any other, in every case as an end withal, never as means only” (Immanuel Kant, 1785 (May 2004)), which is roughly equivalent to the Biblical “Golden Rule.” Under this general rule, the Nuremberg rule clearly follows. Each person is always an end-in-himself and, therefore, cannot be released from moral standing under any circumstances. Elsewhere, Kant argues, “[For] a human being

can never be manipulated merely as a means to the purposes of someone else and can never be confused with the objects of the Law of things....He must first be found deserving of punishment before any consideration is given to the utility of his punishment for himself or for his fellow citizens" (Kant & Ladd, 1965, p. 100). Thus, purely utilitarian justification for punishment or rehabilitation is impermissible. Instead, retributively punishing a prisoner is just because it is the natural consequence of the prisoner's own choice and, therefore, treats the prisoner as an ends, not merely a means (Kant & Ladd, 1965, pp. 99-107). This is the reasoning behind the Nuremberg principle, one remains responsible *without exception*. As we discuss public decisions, it can be debated whether Immanuel Kant, himself, would have held the view that public employees should ever resist public decisions (Hill, 1997; Nicholson, 1976); however, it is not unreasonable to suspect that he would condition obedience to the sovereign on the view that sovereign's orders are not blatantly immoral. Setting aside whatever Kant may have thought on the matter, the critical issue is the implication of the second version of the categorical imperative: no individual can ever be less than morally autonomous.

Our next question is: do we accept the reasoning? Deontology may not be as reputable today as it was in the late 1700s. Perhaps the moral agent can transfer his moral responsibility because, after all, deontology is just bunk? Before going there, let us go to a related point; if we reject the principle, then Article 8 of the Charter of the International Military Tribunal at Nuremberg may not be based on a moral principle, it may be a dressed up excuse for revenge. One could argue that it does not have to be based on a moral principle; it is based on established law. But, what established law? The charter for the tribunal cites indictments that,

themselves cite various pacts and treaties including the Treaty of Versailles (1919), The Hossbach Memorandum (1937), The Munich Pact (1938), The Kellogg-Briand Pact (1928), The Treaty of Nonaggression (1939), and various elements of the 1899, 1907, and 1929 conventions on conduct of war (Convention (I) for the Pacific Settlement of International Disputes (Hague I) 1899; Convention Between the United States of America and Other Powers Relating to Prisoners of War, 1929) (Laws and Customs of War on Land (Hague II), 1899; Opening of Hostilities (Hague III), 1907; Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), 1907). The apparent legal grounds, to the degree that there is any, for Article 8 is “The Laws and Customs of War on Land” (1899), particularly Article 46, “Family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated.” and Article 50 ““No general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible.” It is also possible that the “Convention Between the United States of America and Other Powers Relating to Prisoners of War” (1929) is a partial basis. What is apparent about “The Laws and Customs of War on Land” is that the treaty binds countries, *not individuals*. While it grants individuals rights (to be treated as prisoners of war, to be tried as spies, etc.) it specifies nothing about creating crimes of war. Countries are prohibited from these acts. While I do not propose to fully deconstruct the concept of war crimes, there is plenty of evidence that Article 8, in particular, of the charge to the Nuremberg Tribunal must be based on a moral principle to be binding (Overy, 2003;

Wyzanski, 1946)(Levinson, 1973; Paulson, 1975; Wasserstrom, 1971).² If there is no moral principle at hand, Article 8 is very likely just rationalization for revenge.

This paper does not examine the justification for deontological reasoning, which justification is far more than a paper. Instead, the reader is left with a choice: Those who are unwilling to accept any form of deontological reasoning may set the rest of this paper aside. They are, however, obliged to accept the view that post-WWII prosecution of war criminals through the Nuremberg Tribunals was nothing other than revenge, not moral or legal justice. Or, they must provide some other justification for the Nuremberg principle. That justification might very well be broad enough to justify the remainder of this paper. I proceed on the assumption that the principle is sound.

According to Herman Finer, “[The] servants of the public are not to decide their own course; they are to be responsible to the elected representatives of the public, and these are to determine the course of action of the public servants to the most minute degree that is technically feasible” (Finer, 1941, p. 336). Finer’s assertion is part of a mechanical view of democracy in which sovereignty belongs to the people at large and is delegated to their elected officials. All matters involving the use of sovereignty rest with those who possess sovereignty, that is, the people, or their explicitly selected delegates. For anyone not so delegated to use sovereignty is illegitimate. Thus, mechanically, those employed by the delegates of the people are not, themselves, delegates of the people and are only permitted to carry out the will of the people, not to determine the will of the people. Finer, authorizes no second order delegation,

at least not to those who are not first order delegates. Finer's view is, of course, in stark contrast with the Nuremberg principle. And, in fact, it is anti-Kantian. That is, if employees of the government are mechanical devices of the government and are not permitted to participate in deciding the objectives of government, they *are* means only and *not* ends-in-themselves.

Finer's view derives from Lockean natural rights and social contract theory. Sovereignty rests with the people as opposed to the nominal sovereign, the king. The king derives his delegated power from the people, and it is not absolute. Locke's point is to deny the immediately prior theories of the king's power, either as the absolute Leviathan as discussed by Thomas Hobbes (1651 (2002)) or the absolute power resultant from the late medieval concept of the divine right of kings. Locke argues that there is such a thing as natural rights, which rights are those that any rational person retains when agreeing to a social contract. He enumerates natural rights to life, liberty and possessions, which *cannot* be arbitrarily subjected to the will of another (Locke, 1690 (1764) (2005), Sections 87 and 135). A rational person retains these rights, that is cannot forfeit them, because to do so is against reason. The idea of natural rights that one cannot forfeit because it would be against reason is mysterious to most people, but can be clarified by use of modern vernacular: You would have to be crazy (against reason) to *voluntarily* subject yourself to the will of an *arbitrary authority* who can take away your life, liberty or possessions. This is the Lockean meaning of natural rights.

In post-Lockean thought, it is simply improper for the self-aggrandizing agent of the king (the executive) to exercise the delegated sovereignty of the people, because that agent is an

arbitrary authority. Thus, Finer is concerned that “[g]overnments and officials have been guilty of nonfeasance..., malfeasance... [and] *overfeasance*... [emphasis in the original]” (Finer, 1941, p. 337); that is, these government employees are at risk of exercising *arbitrary authority*. The only legitimate source of governmental decision making is the legislature (Gawthrop & Waldo, 1984).

The Lockean view and the Kantian views are actually similar. On both views, we are to recognize human dignity. For Locke, human dignity is found in natural rights which cannot be arbitrarily subjected to another. As Finer interprets this view, the “other,” to whom one’s rights cannot be arbitrarily subjected, is juxtaposed to oneself. It is this element that distinguishes the two views. On the Kantian view, there is no juxtaposition; there is no “other.” All individuals have dignity. For Locke, dignity, in the form of natural rights, is defensive against the arbitrary authority of the state. Finer finds the employee of the state, having no delegated sovereignty from the people, to represent the arbitrary authority, which the public employee cannot exercise.³

Does he go too far, however, in claiming that the public employee can exercise no discretion? On the Kantian view, the public employee is not merely or primarily an agent of the state, he is first and foremost an end-in-himself. To conclude otherwise is to deny the meaning of morality and of human dignity. As an end-in-himself, the public employee must have a moral choice. It is a denial of himself, that is, treating him other than an end-in-himself, to fully subject himself to the will of another, whether individually or collectively (as the state). The individual *must*

choose. But, going back to Locke's point, to avoid arbitrary power, when that choice is made by a public employee, it must somehow be constrained. This is the core conflict between the Lockean and Kantian views in this respect, and it becomes the core conflict between Finer and Carl Friedrich (Friedrich, 1940).

The constraint of choice, then, is the essence of the matter. What are the constraints on the public employee's choice? At first, one might ask this question in terms of breadth of constraint: How little choice can a public employee have and remain an end-in-himself? How much provides him arbitrary power? However, this is the wrong way to go about addressing this matter. The reason for this is straight forward enough: to be autonomous, the public employee can accept no involuntary constraint of his choice.

What is relevant is the *voluntary* nature of the constraint. Thus, a public employee can be both constrained and autonomous, that is, have his choices limited and yet remain an end-in-himself, when he voluntarily takes on the limits. This volunteering is not as simple as accepting the public job, although that is part of it. However, the power relationship between employers and employees is too asymmetric, for that to be the whole of it. The employee must be informed of lost choices and continuously consent to that lost choice before the constraint is consistent with treating the employee as an end-in-himself. From the employee's point of view, this situation is similar to that of the individual in the state of nature. That is, to repeat the vernacular paraphrase of John Locke, the employee would have to be crazy to subject himself to arbitrary absolute authority over his actions. In particular, the employee should

retain two sorts of free choices: (1) the ability to refuse actions that are contrary to the employee's moral sensibilities, whatever those might be, and (2) the ability to resign, although perhaps subject to a penalty or waiting period.

The second retained choice, the ability to resign, is fairly straight forward in most cases. In a few cases, such as the military, the penalty may be quite harsh. But, in the standard case, the matter is not that difficult to understand.⁴

The first retained choice is the matter that requires additional thought. It forms not only the bases of disobeying orders, the subject of this paper, but also the basis of administrative discretion. The moral administrator cannot, in good conscience, carry out program policy that is contrary to meaningful and effective practice or that is aimed at policy goals that the administrator finds repugnant. This assertion does not mean that every single program action and every minute component of policy has to be perfect. The realistic administrator knows that imperfect actual programs aimed at desirable outcomes are better than perfect programs locked up in dreams. Nevertheless, the administrator who is prevented from using his judgment where such judgment is called for, not merely refused discretion here or there, but as a matter of policy or at the frequent irrational whim of a higher ranked administrator, is being used as a means, not treated as an end. Administrative discretion, then, is part of the ability to refuse improper direction for administrative or political superiors.

Another part of this ability is the ability to refuse clearly wrong, that is, morally impermissible, directions. Thus, if a superior directs a subordinate to commit an action that the subordinate

believes to be morally prohibited, then the subordinate is permitted to refuse.⁵ Under normal moral practices the subordinate would be required to refuse, under his own moral expectations, even when the general view of society would support the view of the superior. The condition of the clerk who sincerely objects to gay marriage on what he believes to be moral grounds is the same as, for example, a morally motivated permit clerk in Birmingham when Martin Luther King applies for the parade permit and the superior says to refuse the permit. In both cases the same principle applies, the order should be refused. Improper orders *may* and *must* be refused.

Remedy-The Employer

What is the remedy? The critical component of the answer is that both the employee and the employer are each (or all) ends-in-themselves. The employee's ability to refuse the order does not overcome the employer's ability to have the thing done, if in the employer's morals, it is not wrong, or perhaps even the failure to do the thing is wrong. Nor does it oblige the employer to endorse the employee's view if it is onerous or the employer finds the employee's choice to be morally reprehensible.

Here, then, are four possibilities, where the employee objects. The employee's objection is:

1. Of no consequence to the employer.
2. Onerous to the employer.
3. Morally reprehensible in the view of the employer.

4. Some other inconvenience to the employer.

If the employee's objection is of no consequence to the employer, then the employer is obliged to accommodate the employee. This obligation derives from a general principle of moral toleration. In Kantian (or Biblical) terms, the employer would expect the reciprocal toleration under similar circumstances.

If the employee's objection is an onerous to the employer, say it results in the need to hire another employee or to contract out work that this now idle employee is capable of doing, then employer is not obliged to accommodate the employer; but if the burden is merely economic the employer may be obliged to negotiate with the employee in good faith with accommodation as a possible outcome. The employee should be allowed to propose ways that the burden may be eliminated or reduced to a trivial amount. "Trivial" is in the employer's perception, not the employee's. There may be no amount that is trivial.

There are times when the employer may see the employee's objection as onerous in other ways, for example, the point of the employee's job may be to perform the duty that the employee now refuses, or the employee may be expected to perform a role in the chain of management that becomes broken when the employee resists a particular duty. If an employee speaks out in public against the employer's decision or pending decision, he may thereby invalidate his ability to represent the employer with respect to that decision as negotiations or implementation continues. If representation of the employer is a critical role, the employer may not find it reasonable to accommodate the employee.⁶

The difficult case arises when the employer is concerned about the employee's view on moral grounds. Employers are ends-in-themselves (individually, and collectively), and are permitted moral judgments.⁷ If the employee's view is morally offensive to the employer, then the employer has no obligation to accommodate the employee. Consider an employee who morally objects to wearing clothing, after conversion to a new eco-religion that treats all non-weather protective clothing as anti-Gaia. The employee points out that the employer would actually save money by accommodating him, since the employer could set the air conditioner at a higher temperature. This would more than offset the cost of replacing the clear glass in his office door with smoked glass. The employee agrees to wear clothing in the presence of others, understanding that his eco-religion needs time to achieve social acceptance. The employer can still refuse. The employer, as an end-in-himself, is permitted to prohibit this behavior at the place of employment as offensive to the employer's moral sensibilities.⁸ As the act is morally repugnant, the employer is not only permitted to refuse to accommodate the employee, he is, in fact, morally obliged to refuse to accommodate the employee.⁹ There is no principled moral reason why permitting the employee to go about naked behind the closed door in his office would be any different than permitting gambling or incidental activity managing a prostitution business in Nevada. If the employer objects to these, he can and must refuse to permit them and refuse any accommodation.

The same reasoning can apply where the employee resists fulfilling a duty as required by the U. S. Constitution. For example, part of the first clause of the Fourteenth Amendment says, "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." To the

degree that the Fourteenth Amendment serves not merely as a legal guide, but also as a statement of moral principle, a public employee's unwillingness to fulfill a duty under this clause would be morally repugnant, not merely an inconvenience, and the public employer would not be obliged to accommodate the employee.

All of the Constitution provides legal guidance to American government, but not all of it provides moral guidance. For example, Article 1 Section 8 enumerates eighteen powers of Congress, including the power "To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures." While this is legal guidance, no one would interpret it as moral guidance. It is conceivable that an employee of a coinage agency may sincerely believe the Biblical text, "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth" (Exodus 20:4), but could be assigned tasks that do not specifically relate to the making of images. While this may seem farfetched, it shows that the fact that the duty arises out of authority in the Constitution does not necessarily make a possible moral objection to it morally offensive to the public employer.

It is more common for Americans to interpret the first ten amendments, known commonly as the Bill of Rights, as moral guidance, particularly the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It is on the strength of

this view that the Fourteenth Amendment can be interpreted as having moral significance as a substantial function of the apply to state governments as well.¹⁰

An interesting case is where the employer finds some other inconvenience. Perhaps the employer has made for the same, or other, employees religious and disability related accommodations and sees this as an instance of “here we go again.” Perhaps the employer just does not like this particular employee. Perhaps, as the limiting case, the employer is perfectly willing to agree that the action is not in agreement with accepted morals, but he wants it done anyway. Perhaps there is some other inconvenience. The tentative view offered here is that none of these conditions permit the employer to refuse to accommodate the employee.

Remedy-The Employee

How is the employee to respond to the employer’s willingness or unwillingness to offer an accommodation? Let us begin by acknowledging that accommodation does not necessarily or normally imply canceling the plan to take the objected action. Occasionally, the accommodation may incidentally end the objected action by, for example, shifting an event away from a day of religious observance. These instances, where no moral offense remains, are not of interest. The question that is of interest is, how is the employee to respond when the employer persists in pursuing the action the employee finds morally offensive, whether or not the employee is expected to participate?

If the employer fails to accommodate, the employee is then required to personally commit an immoral act. Setting aside sabotage and other forms of undermining the employer's agenda,

the employee is faced with an untenable situation. His choice is limited to appeal or resignation (Dobel, 1999; Thompson, 1985). Assuming that appeal is exhausted, as it at some point must be, the remaining option is resignation. The employee cannot commit the act he has deemed immoral without becoming personally responsible for it.

If the employer accommodates, should the employee be satisfied? Let us say that an employee of the health facilities licensing bureau considers it to be murder to perform euthanasia.¹¹ A certain state legalizes euthanasia. The employee receives an application for a license for the End of Life Care Facility, which numerous recent news articles say intends to open a euthanasia oriented facility for those in certain severely distressed health conditions. The employee believes this facility must not receive a license. The employer accommodates by giving the application to another employee to handle. Is this the end of it? The accommodationists seem to think it is.

The view offered here is that there are some instances where accommodation may be satisfactory to the employer, but should not be satisfactory to the employee. It may be that this outcome is the only possibility for the employee where accommodation is offered but the offense remains. The employee, having reached a moral judgment, is aware that he is working for an organization that is intent on committing immoral acts. Is he permitted to continue working for that organization simply because he is not personally involved in the immoral acts? This conclusion would seem odd. In the hypothetical example, by trading duties with the other

employee, the morally offended employee abets the licensing of the morally offensive facility. It would not seem that abetting an immoral act is substantially better than committing one.

Suppose a contract attorney works for a relatively large law firm. The firm deals with a lot of unsavory people in its criminal litigation division. The employee is not surprised at this. After several years, the attorney finds the same unsavory characters receiving services in the tax law division. He becomes curious. After a little quiet investigation, he discovers that he happens to be preparing a complex contract that appears to be legitimate, but actually provides a device to cover money laundering for a substantial illicit drug business. He looks around the firm and finds that it actually does quite a lot of perfectly legitimate business. Would it be adequate for our hypothetical attorney to get himself reassigned to legitimate work while continuing to work at the same firm?

Of course, the attorney has both his safety and the law to guide him. From a practical point of view, once he exhibits suspicion, he is not safe and so he needs to get away from the criminal environment. This part of the reasoning is hardly moral; it simply reflects the risky circumstances. From the legal point of view, he is not going to be clean just because he stopped committing a crime halfway through. He needs to get all the way out of the situation by reporting his suspicions to appropriate authorities. From a decision making point of view, our hypothetical attorney has it easy, many reasons point in the same direction. Yet, there seems to be something left out when just looking at these utilitarian guides. Regardless of other considerations, the attorney is not free of the taint of improper action until he takes

action to stop the illegitimate legal services. If he cannot actively stop the services, he needs to separate himself from the organization that provides them.

This hypothetical case provides some insight to the problem faced by the employee who is granted accommodation. While the accommodation appears to solve the employer's moral problem, it does not solve the employee's problem. The employee is still employed with an organization that is intent on (from the employee's perspective) immoral action and, therefore, the employee is abetting that immoral action. The public employee, granted accommodation, does not finish with the improper act with such grant of accommodation. Indeed, the immoral practice of the organization may have just begun.

The problem grows quite difficult. One can argue against continuing to work for the immoral employer on the view that one's moral view will dominate social action and that the employer will simply be unable to hire employees who will commit the offending immoral act. The immoral act is suppressed by society at large as each individual potential employee refuses to commit the offense. If, however, the employer is ready to offer accommodation, this argument seems to rely on a premise - there are no people who will commit this immoral act - that is unlikely to be true.

One can argue in favor of continuing to work for the employer on the view that protest from within, perhaps even resistance or sabotage are more effective than external resistance. The best way to undermine the employer's immoral policy is to remain employed. While working for the immoral employer, the employee may delay, interfere with and ultimately reverse the

immoral policy. Once leaving employment, the employee no longer has the same access for these purposes.

Another argument in favor of continuing to work for the employer is at a broader level of social resistance. If everyone who opposes this sort of policy resigns from this sort of organization, an entire cultural institution is ceded to an opposing and immoral element of the society. The employee has an obligation to stay employed in order to retain a foothold in this institution and resist other, even more offensive policies of the future.

All three of these latter arguments share the characteristic that they are utilitarian, or at least consequentialist, in nature. Is this characteristic a cause for concern? Are we inconsistent to argue responsibility on deontological grounds then shift at this late stage to teleological arguments? At minimum one should be cautious. Kant notoriously argues that when one chooses to reason teleologically, one takes actual consequences, not merely one's intended consequences, upon oneself, no matter what they may be. The result of this argument, for Kant, is that in the choice between lying, which Kant has argued is absolutely impermissible, and revealing, under compulsion, the location of a refugee from a murder, the respondent must reveal the location (Immanuel Kant, 1785, 1889). While Kant's reasoning seems extreme to most people, it may not be extreme to conclude that when one continues to work for an immoral organization, one necessarily abets that organization and, therefore, shares in the responsibility for that organization's acts.

Free Speech and Civil Disobedience

The employer should take note of the sort of reason that might allow the employee to accept accommodation. If the only justification for continuing to work for an employer, who the employee sincerely believes is committed to immoral policy, is to undermine or reverse that policy, then the employer may have a good reason to refuse accommodation. The employer's reasoning can be stated in the form of a dilemma: Either the employee is not sincere or the employee will continue to work only for the purpose of undermining the employer's agenda. In either case, the employer should refuse the accommodation.

One might argue that the refusal to accommodate has the effect of suppressing the free speech rights of the employee. An employer, including a public employer, is not obliged to permit free speech that has the effect of contravening employment duties. Imagine an actor who is hired for a role in *Midsummer's Night Dream*, but who has always wanted the leading role in *Hamlet*. If, halfway through the play he should suddenly start into the soliloquy, "To be or not to be...", he is not exercising his free speech rights, he is failing to perform his employment duties. Likewise, an employee who objects to a job duty does not exercise free speech by failing to perform the duty. The employee may, with certain limitations,¹² exercise free speech when not at work. Where not offensive, the employee might even express displeasure while at work, although this must be handled with the utmost care.¹³ However, failing to perform the duty is not free speech.

Perhaps a better description of such refusal is that it is civil disobedience. There is an extensive literature of civil disobedience, almost all of which focuses on citizen refusal to comply with the

law. As an employee is, simultaneously, a citizen, we might think that refusal to perform a morally offensive act amounts to civil disobedience, of the form sometimes called resistance. In fact, this would appear to be a perfectly reasonable interpretation. Insofar as the public employee is acting in his role as a citizen, the expectations associated with civil disobedience likely apply. Typically, those expectations include willing acceptance of any relevant penalty. Willing acceptance of penalty is part of what renders civil disobedience distinct from ordinary crime (Bedau, 1961; Cohen, 1969, 1972; Kaplan, 1982; Lyons, 1998; Macfarlane, 1968; Spitz, 1954; Walzer, 1967). If, however, we interpret a refusal to perform duties as civil disobedience, it should be clear that this act is impermissible in the role of an employee and the employer has no obligation to accommodate it. Civil disobedience is inherently about forcing a change in policy against some level of decision maker resolve; so employees who have a duty to implement that very policy are violating the very nature of an employment relationship in participating in such civil disobedience.

Refusing a Marriage License to a Gay Couple

What are the implications of this argument for the case of the clerk who would refuse a marriage license to a gay couple?

First, if the clerk sincerely believes that it is immoral for the gay couple to marry, then he is not only permitted to refuse the license. He is required to. To avoid violating the law or administrative rule, his choice is to refuse the assignment that would bring him actively into the situation.

Second, if the society, through the institution of its courts, has endorsed gay marriage as constitutional right in the sense implied in the Fourteenth Amendment - extending equal protection of the laws to all persons within the state's jurisdiction - then the refusal is morally repugnant. The society, as employer is not obliged to accommodate the employee and, in fact, is obliged to refuse to accommodate the employee.

Third, the sincere clerk is obliged to resign.

The difficulty arises when the clerk wants to refuse the duty but retain the employment. As we have seen, there is no moral defense for this position. Even setting aside the employer's moral objection, the sincere clerk should find continued employment with the perceived immoral employer intolerable. Other than the possible intention to undermine the policy, already discussed and dismissed above, other reasons the employee might have for wanting to retain employment with the immoral employer are lack of sincerity and weakness of will. Perhaps the employee has no sincere moral objection to marriage between moral couples. Instead he may feel peer pressure or he may be bigoted against gays. In such a case, it might be perfectly acceptable to work for a licensing office that issues marriage licenses to gays, as long as he personally does not have to do it. While this is certainly an ordinary human motivation, it does not provide a reason for accommodation.

Alternately, the employee might be quite sincere. Perhaps he believes that there are gays who are not so bad, but, in general, they are promiscuous evil people. Or perhaps he believes that the meaning of the Biblical story of Sodom and Gomorrah is that society must reject even the

possibility of gayness. His belief is sincere enough. But, it's a job. These are tough times. What is he supposed to do, let his children go hungry? This is a standard case of weakness of will. Again, it is perfectly ordinary human behavior, but it does not provide a reason for accommodation. This employee shows, through his weakness of will, that his morality is already compromised. The employer has no special reason to help the employee draw a fine line between performing evil and abetting evil. The employee must choose sincerity and resign or review the truth of his claim to moral objection.

Beyond the equal protection of the law based moral repugnance, which is reason enough for the employer to refuse to accommodate the employee, the employee himself should choose resignation. No other action is consistent with his moral objection.

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Endnotes

¹By “nominal popular policy,” I mean that at least at the time of the refusal the official position of the determinative body, such as the highest court or the state legislature, has taken a decision in favor of the policy to which the employee objects. By using “nominal,” I mean to withhold judgment regarding what the actual population thinks.

²I do not mean to settle the issue of “legal positivism,” roughly that the law is only that which is overtly expressed. One does not have to be a legal positivist to suspect the Charter of *ex post facto* law when it initiated a practice of personally penalizing acts that were at no previous time personally penalized outside the theatre of war.

³It seems unnecessary to justify the relevance of Locke to modern American political or moral reasoning. However, it is not so clear that the typical reader will consider Kant as substantially relevant. Kant’s influence is known more among philosophers and those taking a particular interest in the matter, than among people generally. However, among moral philosophers, Kant is recognized as the definitive source for matters concerning deontological reasoning (rule based morality) subsequent to Thomas Aquinas and up through modern times. Regardless of whether his name is widely known, his influence is suffuse.

⁴ Whether an employee can accept any penalty for resigning or effectively doing the same thing by refusing all future instructions is worth discussion, but is not part of this paper.

⁵ This direction need not be explicit. The usual duties may change because of some change in social context, such as religious conservatives have found when faced with duties that involve issuing marriage licenses to couples they consider improper. At issue is not whether there is an explicit “order,” it is whether the employee would perform the function for any other qualified individual presenting himself for the service.

⁶ The need to retain the ability to represent the employer by avoiding speaking against the employer in public should not be confused with a general loss of free speech rights by all employees. Some employment roles implicitly include whatever such employees do in public; such an employee should, therefore, take care not to publicly undermine the employer's decisions including those still to be taken.

⁷ Frequently, public policy decisions, especially those that are associated with interpretation of the Constitution, are thought to have a moral component.

⁸ As it is unnecessary at this time, I do not examine whether the employer can prohibit such behavior beyond the place of employment.

⁹ It does not matter that this particular moral prohibition is essentially nothing more than a cultural taboo.

¹⁰ It is not the intent here to parse the entire Constitution with respect to the parts that provide moral guidance.

¹¹ It is not the point to evaluate whether euthanasia is permissible.

¹² As suggested in note 4, some employment roles implicitly include whatever such employees do in public; such an employee should, therefore, take care not to publicly undermine the employer's decisions including those still to be taken.

¹³ I do not intend to endorse expressing displeasure at work; I acknowledge that this discussion does not clearly rule it out.