1924

When, If Ever, Is a Man Justified in Breaking the Law?

Samuel M. Wilson

Follow this and additional works at: https://uknowledge.uky.edu/klj
Part of the Criminal Law Commons, and the Jurisprudence Commons
Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Wilson, Samuel M. (1924) "When, If Ever, Is a Man Justified in Breaking the Law?" Kentucky Law Journal: Vol. 12 : Iss. 4 , Article 3.
Available at: https://uknowledge.uky.edu/klj/vol12/iss4/3

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.
WHEN, IF EVER, IS A MAN JUSTIFIED IN BREAKING THE LAW?

The word "law" is not a fixed but a flexible term and, in order to secure a clear comprehension of the question we are to discuss, it may be worth while to try to define and limit it.

According to Sir Henry Maine, the earliest notion of a "law" was not the enunciation of an abstract principle, but a decision or judgment in a particular case. When a matter had been settled the same way many times, a rule or principle of law was developed which was habitually followed in subsequent cases presenting similar facts.

Whatever the true history of the origin of legal concepts is, it may be laid down that law is a rule of action or of conduct, prescribed by some competent authority, either commanding or prohibiting the doing of certain things. The power imposing the law must have the ability to enforce it, and the persons subject to it must be bound to obey it. The things made mandatory are regarded as essential to, and the things forbidden as inconsistent with, the peace, order, and well-being of society.

There are, moreover, several kinds of law. For example:

1. The Moral Law;
2. Religious, or Ecclesiastical Law;
3. Municipal, or Secular Law;
4. Ethics, Conventional Law, or "Minor Morals."

This classification is not exhaustive, or, perhaps, strictly scientific, but it will suffice for present purposes.

The Moral Law, when once we are agreed as to what it is, either in general or as applied to a particular case, is inviolable. All being agreed that theft, murder, sexual vice, and the like are forbidden by the moral law, it must be conceded that it is not permissible, under any circumstances, to break that law. Particular infractions may be excused or condoned, but not justified.

Ecclesiastical or religious law is like municipal or secular law in this, that while it results, not from the enactment of individuals or groups empowered to act by the public authority of the state, but from the rules or regulations prescribed by
those placed in authority by the membership of the particular religious cult or ecclesiastical organization, with power to make and promulgate laws, and exists in a certain sense by the common consent of the members who expressly or tacitly agree to be bound thereby, yet it is made up of laws which are, in the main, intrinsically moral, though imposing other duties or restraints which seem to lack a strictly moral element. A ritual or liturgy may consist, in considerable measure, of forms and ceremonies that do not derive their sanction from any discoverable moral principle, are more or less artificial and arbitrary, but which, nevertheless, satisfy the religious instinct or yearning in its outward display of worship. Ecclesiastical law is also, to a certain extent, both written and unwritten, creetal or customary. A breach of any religious or ecclesiastical law which is of a moral nature admits of no justification. Other canonical laws, of a minor category, while not to be broken with impunity, yet do not carry the same measure of guilt or culpability. A law requiring the churchman to love his neighbor and to dispense charity can not rightly be broken; but a rule requiring one to attend Sunday School a certain number of times, or to read so many chapters of the Bible each year might be broken and yet not entail the like serious consequences. Offences under this head range all the way from indiscretions to cardinal sins.

Municipal or secular law is made up, in large part, of "moral law," but also, in large part, of other laws not necessarily possessing a moral ingredient. It is composed of mala prohibita as well as mala in se. Both branches of the secular law, nevertheless, may serve a moral purpose, as, for example, the preservation of the peace and good order, and the promotion of the general welfare of society. All municipal law is not of equal dignity. Its gradations extend from the sacred fundamental guaranties of a "magna charta" or of a bill of rights in a state constitution to the local ordinances, by-laws, or police regulations of a city. To deny to one accused of an infamous crime the right to a trial by jury would manifestly be a far more serious offence than to fail to sweep the snow off the sidewalk in front of one's house, or to ignore a traffic regulation.

The law of the land is composed, roughly speaking, of common or unwritten law and of statutory or written law. Neither of these great bodies of the law are absolutely fixed or
rigid, but are constantly, even though imperceptibly, changing and developing. Usually this comes about by express repeal or amendment by the law-making bodies; sometimes by the interpretation of the courts, reacting to new circumstances or responding to a more enlightened public opinion; but also by a gradual alteration in the sentiments or attitude of those who are themselves subject to the law. Through a transformation or growth of public opinion, a law may, to all intents and purposes, become obsolete or a “dead letter,” and hence come to be looked upon and treated as non-obligatory. This may be so despite the fact that it has never been expressly repealed or declared inoperative. Benefit of clergy, for example, survived in our law long after it had ceased to be recognized as a valid substitute for plenary punishment.

It has often been said that ours is “a government of laws, and not of men.” But it is perceived that the active force behind all laws is the power of public opinion, whether organized or unorganized, and the temper and efficacy of all laws is to an extraordinary degree determined by the character and resolution, or irresolution of the men whose duty it is to administer them. “Law,” as President Wilson once said, “is no more efficient than the State whose will it utters.” Again he said: “The public power may sleep, may be inattentive to breaches of law, may suffer itself to be bribed, may be outwitted or thwarted; laws are not always ‘enforced.’ Good laws are of no avail under a bad government; a weak, decadent state may speak the highest purposes in its statutes, and yet do the worst things in its actual administration.”

The laws embraced within the generic term of “municipal law,” to which citizens generally are subject, are far too numerous to be known or understood even by the best informed. It has been roughly estimated that each citizen of the United States is at all times bound to obey not fewer than 25,000 laws, and this, there is reason to think, is an under-estimate rather than an over-estimate. Manifestly, unless one is guided by some definite rule in the matter, it is difficult to see how he is to escape an occasional violation of the law, since he can hardly know or understand them all. Yet he is confronted always with the hard maxim that “Ignorance of the law excuses no man.” In this respect, municipal law is even more exacting than the codes
of religion. Where conscience or instinct fails, in order that one may be safe rather than sorry, the better course would seem to be, to seek expert advice or refrain from action altogether in the particular case presented for decision.

The word "ethics" is used here, not in the sense of morals but in the narrower sense of conventional or customary regulations or practices, commonly agreed upon and habitually observed by organized society. The ethics of one profession, for instance, differ markedly from the ethics of another profession. Etiquette varies from country to country. Thus, the professional code of the doctor differs from that of the lawyer; the ethics of the lawyer differ from those of the merchant; those of the teacher from those of the journalist; those of the clergyman from the ethics of all the others. Ethics, as the term is here used, includes the usages of polite society, and of the various classes and components of that society; it determines the proprieties of social and business intercourse; it embraces what are sometimes called the "minor morals," which contribute in so large a measure to the comfort, tranquility, and well-being of civilized man, yet are not absolutely imperative or necessarily moral in their nature. Their scrupulous observance may bring happiness, their disregard may entail misery, but the element of moral excellence, on the one hand, or of moral turpitude, on the other, may be entirely absent.

As to when, if ever, a man is justified in violating a known law, it may be said, as a general rule, that no one is ever justified in violating the law, all law, but, theoretically at least, every one has the absolute and undoubted right to be his own judge as to whether he shall obey a particular law. Law in general demands and is entitled to receive implicit and unquestioning obedience. But as to a particular law, the question may arise and, in fact, does constantly arise, as to whether it is right that one should obey it, or whether it is a greater wrong to some higher mandate to obey the law than to disobey and resist the law. This question is present whether one be an individualist or a communist, whether he acts on his own behalf solely, or on behalf of the community of which he happens to be a responsible member.

To begin with, in the case of municipal law, one is always justified in testing any given law by the constitution, the su-
premne touchstone of all civil law in a commonwealth. The citizen's right of private judgment in such cases is as dear to him, as sacred and inalienable as is the corresponding right of private judgment in matters of religion. It is true that he exercises the right at his peril, but nevertheless it is his to exercise, when and how he will. It can not be taken away short of despotic coercion or annihilation of the individual who dares assert it. One illustration of the principle which underlies this doctrine will be found in the Kentucky Constitution, which solemnly declares that "Absolute and arbitrary power over the lives, liberty, and property of freemen exists nowhere in a Republic, not even in the largest majority." Ky. Const. section 2.

But no such question should be raised except upon the fullest and maturest consideration. It is not the abstract right to violate that is disputed, but the wisdom or expediency of risking a deliberate violation in any particular case, upon the assumption that a law is unconstitutional and therefore null as well as obnoxious, which can only be determined upon the most careful, thorough, and conscientious consideration. And, insofar as possible, the orderly processes of law should be invoked to settle the question.

The same thing is true of ecclesiastical or religious law. And, furthermore, it is true of that law in its relation to municipal law. A law may be constitutional and valid, from the standpoint of the existing municipal law, and yet incompatible with the higher ecclesiastical or religious law, to which one has pledged and owes entire and uncompromising allegiance. Were this not so, there would have been few or no martyrs in the world's history. But here, again, an attitude of opposition or disobedience to the municipal law should not be taken lightly or on insufficient grounds, albeit it may be taken, be the consequences what they will.

All will remember the notable instances in the Book of Acts, where the principle is stated and nobly illustrated. In the one case, where Peter and John were summoned before the Jewish Sanhedrin, we are told (Acts 4: 18-20):

"And they called them and charged them not to speak at all nor teach in the name of Jesus. But Peter and John answered and said unto them, Whether it is right in the sight of God to hearken unto you rather than unto God, judge ye: for we cannot but speak the things which we saw and heard."
In the analogous case, a few days later, we are told (Acts 5: 27-29):

"And when they had brought them, they set them before the council. And the high priest asked them, saying, We strictly charged you not to teach in this name: and behold, ye have filled Jerusalem with your teaching, and intend to bring this man's blood upon us. But Peter and the apostles answered and said, We must obey God rather than men."

So, in the case of municipal law, all will recall the celebrated case of John Hampden, who refused to pay the ship's money. Concerning this historic instance, the great Edmund Burke, in his famous speech of April 19, 1774, on "American Taxation," said:

"Would twenty shillings have ruined Mr. Hampden's fortune? No! but the payment of half twenty shillings, on the principle it was demanded, would have made him a slave."

John Milton, another powerful protagonist of liberty, once said: "Men of most renowned virtue have sometimes by transgressing most truly kept the law."

A somewhat variant thought is thus expressed by Wendell Phillips, the great anti-slavery agitator: "The best use of good laws," said he, "is to teach men to trample bad laws under their feet."

Jefferson furnishes us with this suggestive comment:

"A strict observance of the written laws is doubtless one of the high duties of a good citizen, but it is not the highest. The laws of necessity, of self-preservation, of saving our country, when in danger, are of higher obligation. To lose our country by a scrupulous adherence to written law, would be to lose the law itself, with life, liberty, property, and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."

An invalid law is, of course, no law and may be treated accordingly. It is an unauthorized obstruction in the pathway of progress and, like an unlawful obstruction of the public highway, may be removed by the first citizen who happens along and whose freedom of movement is impeded or embarrassed by it. No official warrant is requisite to its overthrow. A valid law, on the other hand, presents a more difficult problem, if it is proposed to resist its enforcement. This contingency is provided for in the Code of Ethics of the Kentucky State Bar Association by the following rule:
"Except upon the ground that a moral principle is involved, an attorney ought never to counsel or approve the infraction or evasion of a valid law."

A distinction must often be taken between the letter of the law, and the spirit of the law. "The letter killeth, but the spirit giveth life." Many a man rigidly observes the letter, and flagrantly violates the spirit. It is not, by any means, every man who manages to keep within the law who is in reality the most law-abiding or who makes the best citizen.

"Lynch law," it is hardly necessary to add, does not come within the purview of this paper. Mob law, so miscalled, is the abrogation, the denial, of all law; and civilized man, living as he does under a government of laws, is seldom or never justified in taking the law into his own hands. The "unwritten law," in this sense, simply does not exist. On this point, Lord Brougham and Sir James Mackintosh, in the celebrated case of Rev. John Smith, which was before the British Parliament in the year 1824, and wherein it appeared that the accused had been tried and convicted by court-martial, notwithstanding the fact that the civil courts of law were open and there had been no suspension of their proper functions, united in declaring:

"When the laws can act, every other mode of punishing supposed crimes is itself an enormous crime."

This utterance is quoted, and with other similar sentiments, is emphatically approved by the Supreme Court of the United States in the memorable case of ex parte Milligan, 4 Wallace 2-142; S. C. 18 Law Ed. 281.

One step toward obviating the unrest and disturbance which perpetual controversy over legal enactments involves would be to avoid what Huxley calls "extreme regimentation." Excessive legislation tends either to destroy self-reliance or to madden to rebellion. "That people will be happiest," affirmed Jefferson, "whose laws are best, and are best administered." Not quantity, but quality, is the surest criterion of value.

The answer here given to the question propounded for discussion must always be considered both in its theoretical aspect and in its practical application. There is a vast difference between an abstract doctrine and a concrete exercise of that doctrine, howsoever sound and indisputable it may be. Granting the right to disobey, to violate, or to resist any given law, be-
cause it is conceived to be unconstitutional, illegal, pernicious, or otherwise contrary to a higher law which admits of no sacrifice, compromise, or surrender, it does not necessarily follow that it is always proper or advisable to scout or scorn the law. Time rectifies many errors. Furthermore, if one has protested against or has, for a time, for the sake of example, refused submission to an iniquitous law, or has used all reasonable and legitimate means to get rid of such a law, it may be the part of good citizenship to cease temporarily to struggle. Factionalism or disorder may breed discontent and disrespect for valid and wholesome laws, which, in the end, may be vastly more harmful than the vicious law ever could become, no matter how widely extended may be its operation. In deprecating the prevalence of an overweening fondness for litigation among the ancient Corinthians, who, in this respect, very closely resembled our own Norman-French ancestors, the Apostle Paul, (himself no mean statesman), earnestly insisted upon a broader spirit of forbearance and Christian charity, declaring (I Cor., 5:7):

"It is altogether a defect in you, that ye have lawsuits one with another. Why not rather take wrong? Why not rather be defrauded?"

Our conclusion, therefore, is that there may be circumstances under which one is fully justified in breaking a law, because an invalid law is no law, and a vicious law, even though technically valid, may have to be broken in order to draw public attention to its iniquity. Not only the tyranny of the majority, that is, of the actual majority, but the tyranny of an aggressive minority, usurping the status and prerogatives properly appertaining only to a real majority, may leave to the citizen with a high sense of duty no other honorable alternative. The law of conscience, in matters of religion, can never safely be made subject to human legislation, and this truth must always open a wide and indeterminate field for individual judgment and action. But, when all is said, this right, though sacred and indestructible, is one that should never be impulsively exercised or invoked for trivial or transitory reasons, and should only be asserted as a last resort.

To borrow from the sages once more, we do well to heed the words of Lord Chatham, one of the foremost champions of civil liberty, that "Where law ends, there tyranny begins." Emerson, in one of his profoundest essays, advised: "Let a man
keep the law,—any law,—and his way will be strewn with satisfaction.” Jefferson gives assurance that “While the laws shall be obeyed, all will be safe.” Burke’s emphatic testimony is: “There is but one law for all, namely, the law which governs all law, the law of our Creator, the law of humanity, justice, equity,—the law of nature and of nations.”

“Of law,” declared the erudite Richard Hooker, in the familiar ascription, “there can be no less acknowledged than that her seat is the bosom of God, her voice the harmony of the world. All things in heaven and earth do her homage—the very least as feeling her care, and the greatest are not exempt from her power.”

Samuel M. Wilson,
Lexington, Ky.