

# The Constitution and the Moral Order— Professor Bennett's Response to Comments

I am grateful to the commentators for their contributions. I shall not make a long response. Taking their points into account, I do not believe the paper requires major alteration. There are a few criticisms to which I shall briefly respond, and a few offers of advice about the extension of my thesis that deserve comment. At the end, I would like to offer an example of what I have in mind as the kind of citizen activity that constitutes *eunomia*, individual action which supports and strengthens important values of law and other values.

## I. Professor Rhinelander

Professor Rhinelander presents three criticisms or "reservations." First, he asserts that I take insufficient note of the many different questions involving the relationship of law and morality, and thereby obscure "some significant issues."<sup>1</sup> Second, he posits that I (and others upon whom I depend) do not consider whether the American constitutional system is worth preserving, and that this "most fundamental of all questions in the area of law and morals" should not be "hidden behind other questions."<sup>2</sup> Finally, he argues that my interpretation of Thoreau is mistaken and internally incoherent, because Thoreau believes in "a close causal and functional interaction between law and morality."<sup>3</sup>

Certainly, there are many questions that can be asked about the relationship of law and morality—questions Professor Rhinelander lists,<sup>4</sup> questions Professor Hart lists,<sup>5</sup> and questions others can list. Many of these are interesting, and many I have not considered. Nevertheless, one need not always deal with many questions in order to deal productively with one. The question I have considered is interesting;

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1. Rhinelander, *Law, Morality, and Thoreau*, 3 HASTINGS CONST. L.Q. 919 (1976) [hereinafter cited as Rhinelander].

2. *Id.* at 923.

3. *Id.* at 925.

4. *Id.* at 921-23.

5. H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

it is coherent; and it is not diminished in significance because there are other questions that might have been considered. The paper does not "obscure" other important questions: it simply does not deal with them and need not deal with them collectively. Philosophers often discourse as if the only thing worth one's philosophic time were the raising of questions and more questions—as if philosophy were *simply* the raising of questions. To be sure, raising questions can be a worthwhile and sensible activity. But we (and our students) should remember that answers—the best ones we can give—are also significant. This is particularly true when a question is important, and failure to consider it and attempt to answer it will leave us in the dark about things that are important to know. I submit that there are things, like my question, which we could know something about if we tried to learn. As philosophers, we are not forced inevitably to accept the characterization of philosophy suggested in the story of the man who, seeing a sign in a window saying, "Clothes Pressed Here" takes his clothes in and is told by the manager, "Oh no, we don't press clothes here. We only make signs."

The observation that I (along with Learned Hand and others) never consider "the most fundamental question," whether the American constitutional system is worth preserving, is false. This is what section four of my paper is all about.<sup>6</sup> On the merits, any reasonable United States citizen at all knowledgeable of history, before or after Watergate, should have no difficulty recognizing that the American constitutional system is worth preserving. The Constitution is, and appropriately so, the most imitated political document in the world. If there is any doubt about my position, let it be set aside: I *insist* that the American constitutional system is worth preserving. If this is "the most fundamental question," it is fortunate for us that it is easy to answer.

In regard to my understanding of Thoreau and the separation of domains, I must decline responsibility for Thoreau's mistakes. He made them, not I; I did not write *Civil Disobedience*.<sup>7</sup> Professor Rhinelander concludes that I have been victimized by a metaphor that leads me to postulate separate domains for law and morality.<sup>8</sup> Clearly, I accept no such separation in the paper; in its entirety, and

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6. Bennett, *The Constitution and the Moral Order*, 3 HASTINGS CONST. L.Q. 899, 914-18 (1976) [hereinafter cited as Bennett].

7. H. THOREAU, *Civil Disobedience*, in THE WORKS OF THOREAU 789 (H. Canby ed. 1937) [hereinafter cited as THOREAU].

8. Rhinelander, *supra* note 1, at 928.

especially in section four, it is an argument against any such separation. This, of course, is precisely one of the problems with the "myth of rights."<sup>9</sup>

Although Professor Rhinelander says Thoreau sees a "close causal and functional interaction between law and morality" in *Civil Disobedience*, Thoreau himself says the following: "Government is at best but an expedient . . . ."<sup>10</sup> "Law never made men a whit more just . . . ."<sup>11</sup> "[T]he State never intentionally confronts a man's sense, intellectual or moral, but only his body, his senses. It is not armed with superior wit or honesty, but with superior physical strength."<sup>12</sup> "It [government] can have no pure right over my person and property but what I concede to it."<sup>13</sup> "It [the American Government] is a sort of wooden gun to the people themselves."<sup>14</sup>

I submit again that this evidence suggests a separation of domains in Thoreau's (not my) view. The most reasonable inference from these statements, and from a careful reading of *Civil Disobedience*, is the allegation that morality is present in the individual and not in the government or the laws. Of course there are some interactions between law and morality of the sort Professor Rhinelander suggests, but that is hardly the issue; the issue is the implications of Thoreau's belief in an original, clear, and distinct separation between government and law on the one hand, and the individual and his morality on the other. For Thoreau, law as law is originally devoid of morality and needs to be instructed by the deliverances of individual conscience. Again, this is Thoreau's position; my entire argument is against it.

Professor Rhinelander suggests that by "expediency" Thoreau (and others) might not intend to exclude morality, and thereby claim a mixing of, or interaction between, the domains. Of course when Thoreau says "government is at best but an expedient," he could mean many things; for example, Thoreau could be a closet utilitarian, but the evidence suggests strongly that he is not. I submit that Thoreau's point was to set up a contrast, a contrast between government and law on the one hand, and the individual moral conscience on the other.

Finally, by my account of Thoreau it is not difficult to comprehend why Thoreau lived the way he did, separating himself from law and

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9. Bennett, *supra* note 6, at 914-15.

10. THOREAU, *supra* note 7, at 789.

11. *Id.* at 791.

12. *Id.* at 801.

13. *Id.* at 808.

14. *Id.* at 790.

government, a fact Professor Rhineland and I both regret. It is just this kind of separation in action that can occur as a consequence of opting for a belief in the ethical sufficiency of conscience and a separation of domains.

## II. Professor Pincoffs

Professor Pincoffs suggests that my concern to "rally 'round" certain values may underplay "the essential role of the ongoing criticism of accepted values."<sup>15</sup> This is a good caution; I would add only that for a citizen all kinds of "rallying 'round" must at the same time be occasions for what Madison called the exercise of "loving criticism." Creed and belief as well as practice require ongoing criticism as well as affirmation. It is only an apparent oxymoron that we need to embrace principles while we continue to raise questions about them. Affirmation need not exclude ongoing criticism; thoughtful affirmation presumes it. Certainly I do not recommend mindless praise and acceptance.

I agree with Professor Pincoffs as well about the difficulty of an argument from consensus<sup>16</sup>—an argument certainly implied in my paper—but I also agree with his conclusion that "it is the only consensus we have."<sup>17</sup> The consensus is indeed not as stable as one would like, and there will always be disagreement about how to put "consensus values" into practice. Politics, like much of life, is ineluctably and appropriately a business of accommodation. We need principles "at a middle distance" to affirm, and ongoing criticism of these principles so that we do not become enslaved by them. And finally we need to barter about them in a fair and free marketplace, the marketplace that politics should provide.

## III. Professor Delattre

Professor Delattre's suggestions for extension of my thesis are well-taken and illuminating. The argument about the problems of teaching values at a distance is quite apposite.<sup>18</sup> Professor Delattre appreciates what Professor Rhineland notes critically about Thoreau:

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15. Pincoffs, *Bennett on the Moral Order*, 3 HASTINGS CONST. L.Q. 933, 935 (1976).

16. *Id.* at 934-35.

17. *Id.* at 934.

18. Delattre, *On "The Constitution and the Moral Order,"* 3 HASTINGS CONST. L.Q. 937, 939 (1976).

the primary importance of practice, of how one lives in regard to the constant maintenance both of the moral order and of a healthy relationship of law and morality. In Professor Delattre's words, this leads to the recommendation for "intimacy with moral principles and ideals . . . in the experiences of daily life."<sup>19</sup> His examples and models are more than incidental.

Professor Delattre's article suggests a story to me with which I should like to conclude this response. It is an example of a citizen's appropriate understanding of how important values, expressed in and underlying the law, are to be supported. John, a good friend of mine, is a medical student who lives in Boston. One evening he discovered his wife's bicycle missing from their porch. His neighbor's children reported that they saw "a big boy," about thirteen years old, taking it down the street. John got into a friend's car, and the two men went to look for the bike. A few blocks away John spotted the boy riding the bike; when he got out of the car, the boy dropped the bike and ran. John chased him, finally caught up with him behind a fence, and told the boy that he was going to take him to the police station. The boy was afraid and quite anxious about being caught by John, who is physically imposing; he was also very frightened at the prospect of going to the police station. John and the boy were driven to the station by the friend, who reported their conversation:

John: You know that what you did was wrong and you have to take the responsibility for it.

Boy: I didn't mean to do it. Don't take me to the police station.

John: What would you do if your bike was stolen?

Boy: Lots of things of mine have been stolen, but no one ever does anything about it.

John: Well, we have to do something about it. We have lots of thefts in this neighborhood and it has to stop. We have to live together, respect each other's property.

Boy: Don't take me to the police station. They'll beat me up.

John: I won't let them beat you up. They won't do that. I'll go in with you and I'll be sure they don't. I'll stay with you the whole time.

Boy: I'm afraid.

John: Don't be afraid. I said I'd stay with you and I will.

Upon arriving at the station, John walked in with his arm around the boy and stayed with him while talking to the desk sergeant. A probation officer was assigned. John promised the boy that he would

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19. *Id.*

stay posted on what happened and would make sure the boy was not mistreated. He explained to the officer in charge that the boy was nervous and very worried about being hurt, and that he wanted to stay with him as long as he could that evening and be kept advised of developments in the case.

John's action is an example not of blind or mindless action, but of respect for law, and for the values that underlie law and must inform its rule. Here was vital and active recognition that such values are not self-executing, but require the attention and probity of citizens in daily, commonplace matters. Here, in short, was a little piece of *eunomia*, and as the conversation reveals, it contrasted sharply with what the boy himself had experienced up to that time. One cannot be a citizen alone.