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Disciplinary Brief

DYNAMICS OF DISORDER IN LEGAL CHANGE

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Nigel Biggar's Theology Brief on Created Order opens up a rich vein of inquiries for a sociologist of legal change. Biggar writes of an objective and rational moral order ordained by God. He juxtaposes this normative order with varieties of human orders—social, legal and political. This impels conventional social science and sociolegal scholarship not only to step outside itself and to take stock against a standard of values inherent in a created moral order, but also to bring social science theory into engagement with theological understandings of order.

I specialize in legal orders such as the laws and institutions that govern taxation or human rights or finance or crime or the climate or the environment—indeed, almost any sphere of human life and behavior. In this essay, I explore implications of Nigel's Biggar's evocative account of moral and social orders for scholars who study legal change, and in my case, the dynamics of transnational legal orders (TLOs). Almost every aspect of 21st century social orders are shaped by law, and domestic legal orders are almost always embedded to some degree or other in transnational orders that span national frontiers and weave together persons, institutions and states across regions and the world. These orders are constantly undergoing change, as they rise or fall, remain adaptive and vibrant, or become fragile and marginal.

I make two arguments in this Brief. First, a certain kind of disorder is integral to the viability of legal orders, and by extension, other social orders. Second, that the created moral order, as depicted by Biggar, will have a disturbing effect on current legal orders, effectively shaking them up in ways that induce social disorder insofar as they are impelled to conform to a higher good. I will illustrate the interplay of chaos, disorder and order in one of my research domains—the laws that govern business failures. I conclude with observations on empirical research as a companion to ethical reflections and with puzzles that remain for me if I seek to bring my social science research into meaningful conformity with Biggar's theological ethics. In so doing I seek to extrapolate from Biggar's characterization of the created moral order as "not a silent, barren thing, but [it] contains—both limiting and including—plurality, vitality, and freedom. God's order is not dead; it is dynamic."

The Dynamism of Disorder

In research on legal change, we observe order and disorder in a dynamic tension. Studies of transnational legal orders point to facilitating circumstances and precipitating events that press individuals, or industries, or states, or international organizations to create or reform an order. Sometimes change comes from outside an order: contexts change; alternative orders present competitive challenges; economic or social or political shocks trigger responses. Sometimes changes come from within an order: its internal organization may become rigid or brittle or irrelevant, or it no longer solves the problems for which it was initially designed. In the worlds of transnational legal orders, globalization and its discontents, the outbreaks of pandemics, the collapse of supply chains, the horrors of starvation and civil war, are among but a few of the disorders and disturbances that we observe when sets of facilitating circumstances suddenly explode and trigger calls for new or reformed orders. The Russian invasion of Ukraine, and China's erosion of the post WWII international legal order, are prime cases in point.

We can go a step further and argue that *a vibrant social or legal order requires constant disturbance as a dynamic of adaptation.* [1] Some degree of disorder becomes an essential condition, perhaps a force, for legal change. It might be styled as a moving equilibrium. Sometimes it may be purposefully induced by reformers, rights activists, campaigners, and on the international stage, by states or international governmental or civil society organizations, who identify a besetting problem and raise their voices in calls for change, very often, almost always, through some kind of law. Sometimes it is precipitated by the cruelty or narcissism or hubris of rulers who seek to domesticate or dismantle orders that limit their arbitrary power—consider Xi Jinping of China, or Viktor Orban of Hungary—or demand redress for harms committed against their own or adjacent populations.

Business Failures and International Economic Law

In market economies, many businesses fail. When they can no longer pay their bills, business enterprises can leave a trail of woes—unpaid workers, tax payments in arrears, pension funds hollowed out, suppliers out of pocket for goods they delivered, bankers who lent money that is not repaid, investors with moneys depreciated or lost. Assets of equipment or land or buildings or goodwill are not worth enough to pay off creditors in full or make investors whole.

From Liquidation to Rehabilitation

Until the later twentieth century, business failure met with two responses. [2] One was simply to leave the mess of the economic collapse to the informal processes of a market. The result was too often akin to chaos, an economic war of all against all, where the creditors, those owed money, scrambled to be the first to grab assets and the powerful and elbowed out the weak. Another was to regularize, make orderly through law, the liquidation of a firm. A failing firm could be sold and taken over by a successful firm. Or, a business could be broken up, all its assets sold, and the moneys from the sales used to pay off, usually at a

steep discount, those other businesses or the state or workers that were owed money. The orderly approach is the realm of corporate bankruptcy or insolvency law and institutions.

By the late 1960s and early 1970s a rising level of dissatisfaction in the U.S., and then the United Kingdom, pointed to the economic inefficiencies and unfairness of liquidation as a governing principle, and liquidation law and practice in everyday life. In 1976 the US Congress enacted a Corporate Bankruptcy Code, followed a decade later, by the English Insolvency Act, 1986 (Carruthers and Halliday 1998). While both pieces of legislation diverged in certain respects, both also represented a fundamental shift in legal change. The new laws advocated an ideal of rehabilitation and reorganization. Business managers or professionals could invoke the new laws to give the firm some breathing space, to hold creditors at bay, to restructure finances with a new business plan, to obtain new financing, to reorganize the firm. All these steps, it was thought, would save jobs, preserve more value for creditors, and rescue businesses. Properly restructured, a firm could re-enter the market better equipped to compete within it.

From Disorder to Order in International Law

The influential shifts from a liquidation to reorganization philosophy of business failure in the US and England pointed to an alternative order, but it took massive disorder to precipitate widespread legal change. The 1990s debt crises in Russia and Mexico, and then the Asian Financial Crisis, fundamentally challenged the completeness and efficacy of the prevailing corporate bankruptcy systems in most countries, shocks that revealed and magnified the disorderliness of dealing with companies in distress. In 1987 and 1988 several of the “Asian Tiger” economies collapsed. The International Monetary Fund and World Bank, together with the US and other major economies, coupled a massive infusion of funds to stabilize financial collapse in South Korea and Indonesia, among others, with drastic and often draconian “conditionalities” for change in their financial institutions. To forestall future financial crises, the World Bank and IMF pressed countries to construct robust corporate bankruptcy systems in which reorganization or rehabilitation was a governing principle.

From the late 1980s, the G-22 and at least four international organizations—the IMF, World Bank, OECD and the UN--worked with major professional associations of lawyers, accountants, and insolvency practitioners, to formulate a new legal order. Ultimately, the UN Commission on International Trade Law (UNCITRAL) took the lead as a quasi, non-binding global legislature, first creating a Legislative Guide for Insolvency, and following it up with a series of other model and soft laws (Block-Lieb and Halliday 2017). The World Bank and IMF added pressure for countries to reform their laws, often in the course of Article IV reviews and as a condition of lending. Over the past twenty years these laws have been adopted in part or whole by scores of countries, and has influenced legal harmonization efforts in the European Union. In effect, the magnitude of disorder displayed by the Asian Tigers, and later the 2008 Global Financial Crisis, triggered legal change on a global scale. These propelled creation of a global legal order that has gradually taken hold in the early 21st century.

Created Moral Order and Legal Change

Already, within political rhetoric (cf. Mrs. Thatcher's campaign in the UK to "clean up markets"), and amongst scholars, a notion of the morality of markets emerged since the 1990s on the law and institutions of corporate bankruptcy regimes (Carruthers and Halliday 1996) and thereafter more widely in economic sociology. But this concern with morality had no seeming connection with the created moral order as Biggar portrays it.

Creative Moral Order Disturbances for Legal Change

If a morality of markets can be observed within the social science enterprise itself, Biggar would subsume this morality, and all the social behaviors it orders, into a transcendent moral hierarchy that situates created order at its apex. This is a recipe for social disorder. In effect, when the created order comes into contact with a legal or social order, the friction of the two, perhaps always, will produce disorder in extant legal orders. If a current legal order is held accountable to the norms of the created order, it will be subject to "prophetic criticism." The assumptions, veneers and practices of a given legal order will be exposed, revealing its moral inadequacies and ethical shortcomings. The sociolegal scholar attuned to the ideals of God's moral order will point to mismatches between those ideals and the law on the books and law in action. That scholar will consistently ask: does the law produce the practices consistent with the created order? This stance of accountability therefore introduces moral disturbance to legal orders and thus acts as a motor of legal change. But what standards does Biggar propose?

Towards Goods and Flourishing

For Biggar, a benevolent created order produces a range of "goods," material and immaterial, that produces human flourishing. In Biggar's terms, any legal order, including corporate insolvency systems, will be measured against *ultimate* ethical values, including justice, moral integrity, and charity. He also identifies what we might call *processual* values. To remain responsive to material needs and immaterial values a legal order will display "plurality, vitality and freedom."

Some of the processual values can be observed in corporate insolvency systems when laws, regulations and institutions stimulate the economic creativity of market players—inventors, business startups, suppliers, investors. Indeed, disturbance of an extant sclerotic bankruptcy system can be produced precisely to compel current actors to break out of their conventional ways of doing business and to open up new spaces for innovation. Assets that are declining in value can be brought into a new financial reorganization with new moneys and new management to renew a firm's viability. Lawmakers and market actors, therefore, in Biggar's vision, are called to stewardship of human and financial resources as they work alongside each other to construct ethical and effective market institutions through law.

While it is fairly straightforward to identify material benefits of an economic legal order, the immaterial and ultimate values present more of a challenge. One approach might be to hold the ethics of players in failing

businesses and bankruptcy systems to the virtues that Biggar identifies, such as humility, critical self-reflection, and openness to correction. Others, such as prudence and charity can also come into play. However, the ultimate values of the created order identified by Biggar, such as justice, require explicit reasoning that derives and specifies the abstract value into applications for specific rules and laws, regulations and institutions. While clearly beyond Biggar's remit in this Theology Brief, a *Christian* theological ethics of corporate bankruptcy orders will need to weigh such values as forgiveness with fairness, economic power with economic vulnerability, reward for effort with reward for innovation.

Clearly, the example of corporate bankruptcy orders is a microcosm of a larger challenge. For any social order the Christian social scientist will require the aid and partnership of a theologian and ethicist to bring the biblical and theological, doctrine and abstract ideals, that are sharply pointed enough to disturb current legal and social orders and propel them to deliver the goods and ends of flourishing which the created moral order impels.

Empirics

If master ethical criteria for a good legal order are the production of human flourishing and adherence to higher order theological ideals of justice, charity and freedom, then the question immediately arises—how do we know what kinds of laws produce these goods? It is a verity of sociolegal research that good intentions don't always produce good laws, and good laws don't always result in good outcomes. A gap invariability opens up between laws-on-the-books and law-in-action.

Biggar implicitly issues a vocational calling, even a research agenda, for the Christian sociologist and empirical legal scholar. In my scholarship on transnational legal orders, I am therefore called to ask—what empirical evidence is that a given legal concept or law or regulation will deliver goods that produce flourishing? [3] What kind of lawmakers and lawmaking processes will ensure that evidence, not ignorance, will drive policy and lawmaking (Halliday 2018)? It appears to me that the ethicist and social scientist must be working together, as complementary disciplines. One elaborates the ideals of a Godly moral order. Legal and social science scholars on law will deploy these yardsticks to discover if laws and legal regulations, market and legal institutions, measure up to those ideals. Such an interdependency of endeavor elevates the work of a social scientist beyond empirical research and theory-building into another realm a Christian scholarly calling.

Put another way, Biggar points to a two-directional move for the Christian scholar on legal orders. In one direction, s/he compares and contrasts TLO ideals with created order ideals. In the other direction, s/he discovers whether the ideals in practice produce goods and human flourishing. This benefits the social science enterprise itself. Contingent social theory will identify what prevents or facilitates the implementation of the ideals articulated in a Christian moral order. Not least, as Biggar writes elsewhere, strong empirical foundations are necessary for theological ethics to be well grounded.

Double Disorder in Legal Change

As social scientists we can distinguish between two form of disorder in legal change.

Disjunctive disorder most visibly takes the form of exogenous shocks external to an institution or state. A massive oil spill, an economic crisis, atrocities, a pandemic, can highlight the inadequacies of current orders and precipitate a movement towards a whole new episode of legal change, even the construction of a new legal order in a domain of finance or commerce or human rights or the environment, among others. These shocks may border on chaos in their unpredictability and irrationality.

By contrast, there is a form of *constitutive disorder* which is integral to the dynamics of everyday adaptation and almost imperceptible change. Here the inner workings of a legal or social order, their faults and failures, propel responses which more or less, sooner or later, can shift the order in a more effective direction, however "effective" is defined. Here the outer contexts of an order, the slow changes in economic, social and political circumstances, also propel a legal order to change, to adapt the current order in ways that deliver the goods, moral and material, for which the order was constructed (cf. □□(Mahoney and Thelen 2010)□.

Lingering Questions

Biggar compounds the already evident forms of disjunctive and constitutive disorder in legal and social institutions by inducing another kind of disturbance—the critique, counterpoint and inspiration of a Christian moral order that offers a distinctive vision of a good social or legal order. In so doing, the ideals of the created moral order contribute constructively to a dismantling or reconstruction of present orders.

In the spirit of dialogue, however, can what we know about social and legal orders speak back to understandings of moral orders? I have already raised the challenge of specifying high level doctrinal and theological ethics sufficiently to provide some precision for application to social and legal orders. Other questions remain.

First, how much disorder is there within created moral orders? Within the scriptures, and across schools of thought in the Christian tradition, we observe differing conceptions of which ideals should be given primacy, both as derivations from scripture and doctrinal principles, and in applications to different places and times in biblical and Christian history. How is the Christian social scientist to discern what kinds of disorder should be induced in current institutions and what principles of order should replace them? Dialogue across the theological/disciplinary divide seems imperative.

Second, it seems that social orders not infrequently in the history of the church have induced revisions in the application of ideals to social institutions. Consider the democratic revolutions that overturn medieval presumptions about political order. Or, the rise of women's movements since the 19th Century and their implications for the dignity of women, not least their roles in church leadership. Or, the effect of a sexual

revolution on some branches of churches' moral orders on homosexuality. Does disruption of legal and social orders have a dynamic effect on disordering and then reordering understandings of the created moral order, insofar as we see through a glass darkly?

Third, should our understandings of created order reflect something of the uncertainties, approximations, and limitations evident in the construction and adaptation of legal and social orders? Must some of the contingency, even humility, that requires partial corrections and adjustments in social orders be also acknowledged in the expressions of created order insofar as they are crafted by fallen thinkers, themselves shaped by social and historical contexts with their brokenness and flaws?

Fourth, do the extent that legal and social orders always display gaps between their designers and outcomes, is there an element of moral contingency that any given set of standards and rules derived from higher-order ideals might be altered if their application in practice proves to be counter-productive, even subversive?

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End Notes

[1] This is a feature of the recursivity of law (Terence C. Halliday, 2009. "Recursivity of Global Normmaking: A Sociolegal Agenda." *Annual Review of Law and Social Science* 5:263-90).

[2] For an overview of U.S. bankruptcy law since the founding of U.S., see Skeel (2001).

[3] See the explicit call for empirical research as a complement to theological ethics in Nigel Biggar,

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