Civil Disobedience: The Problem of Selective Obedience to Law

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Introduction

Civil disobedience is illegal activity undertaken to protest laws that are regarded as unjust.[1] It is characterized by open, *i.e.*, nonclandestine, violation of the law being protested or of other laws.[2] In either event its purpose, according to its advocates, is to effect change in the law by calling public attention to the claimed injustice and by creating the kind of tension or crisis in the community that is conducive to the desired change.[3] Most, though not all, of its proponents insist that acts of civil disobedience must be nonviolent and accompanied by a willingness to accept the legal penalty. An act of civil disobedience should be distinguished from one that tests the constitutionality of a law; the latter is predicated on a willingness to submit to the ultimate verdict of the legal system. Civil disobedience, on the other hand, is defiance of the law regardless of whether the act itself will be vindicated through legal process.[4]

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1. A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 49 (1968) [hereinafter cited as FORTAS].

2. For example, Fortas states that the term civil disobedience applies not only to the refusal to obey a law because of disapproval of *that* law, but also to the refusal to obey a law as a means of protesting some other law. The latter form of civil disobedience attempts to accomplish purposes unrelated to the law that is breached. A prominent example of this type of civil disobedience was Gandhi's general program of disobedience directed at the British in India. *See id.* at 51-52.

3. The second point is emphasized in King, Jr., *Letter from the Birmingham Jail*, in ON CIVIL DISOBEDIENCE 61 (R. Goldwin ed. 1968) [hereinafter cited as King]. King says that the purpose of nonviolent direct action (civil disobedience) is to create the kind of tension or crisis that will lead a community that has previously refused to negotiate to "confront the issue." *Id.* at 63-64. The purpose is to dramatize the issue so that the community cannot continue to ignore it. *Id.* at 64.

4. *See* Storing, *The Case Against Civil Disobedience*, in ON CIVIL DISOBEDIENCE 96-97 (R. Goldwin ed. 1968) [hereinafter cited as Storing]. *But see* FORTAS, *supra* note

The advocates of civil disobedience place a moral responsibility on each individual to disobey laws considered to be unjust.[5] In the past two decades, civil disobedience has been practiced by many, including civil rights protestors, antiwar groups, and student groups protesting both university and government policies.

The thesis of this essay is that civil disobedience is destructive of a regime regarded as fundamentally democratic;[6] however, it is also one of the tactical options, among other more extreme options, available in a revolution to overthrow a regime regarded as fundamentally undemocratic.

I. Civil Disobedience in Democratic Regimes

A. Which Laws Are "Unjust"

A serious deficiency in the theory seeking to justify civil disobedience is that it provides no principled basis for deciding which are the unjust laws. The definitions of just and unjust laws advanced by the advocates of civil disobedience are generally inadequate.[7] The attributes of justice are a subject on which many books—some of them great—have been written and on which philosophers and scholars disagree. The recent, much acclaimed work by Professor John Rawls, *A Theory of Justice*,[8] may be criticized for its failure to define the attributes of just and unjust laws. According to Rawls, an advocate of civil disobedience, not only is the idea of perfect justice "extremely rough," but "[t]he measure of departures from the ideal is left importantly to intuition."[9] When, in the chapter on "Duty and Obligation," Rawls takes up the question of what a just law or policy is, far from adducing substantive criteria for determining an answer, he involves the citizens in a public opinion guessing game about what laws or policies most people

1, at 52. Fortas considers testing the legality or constitutionality of a government decree to be a form of civil disobedience.

5. *See* King, *supra* note 3, at 66, who argues that just as each individual has a legal and moral responsibility to obey just laws, each one has conversely a moral responsibility to disobey unjust laws.

6. A democratic regime is one in which the majority rules either directly or through representatives and in which the majority recognizes certain basic rights of the minority. A regime lacking either or both of these characteristics would be undemocratic.

7. For example, Dr. King's definitions, because they are so general, provide very little guidance for specific situations. He states that just laws are consistent with the moral law, natural law, or the law of God and unjust laws are not. Laws that uplift human personality are just, and laws that degrade it are unjust. King, *supra* note 3, at 66.

8. J. RAWLS, A THEORY OF JUSTICE (1971).

9. *Id.* at 246.

would favor.[10] Rawls' criteria for determining what is a just law or policy seem to be devoid of serious guidance for citizens faced with concrete problems; Rawls' "method" involves speculation about what is in his view misguided future public opinion. If Rawls, in what is considered by some to be the most important twentieth century book about political philosophy and, specifically, about justice, can do no better than this, it is asking a very great deal that the ordinary citizen resolve the problem. Indeed, the history of political philosophy can be seen as a series of fundamental disagreements about the true nature of justice.

Human perception or understanding of what is just and unjust may change over time. In the 1950's and 1960's, many American blacks protested segregation statutes with civil disobedience; only a few years later, some blacks complained vehemently of the injustice of state laws and rules forbidding the same kinds of racial discrimination against which they had directed their earlier civil disobedience. Cornell University, on behalf of its black students, argued against the Department of Health, Education and Welfare and the New York State Board of Regents that it should be allowed to maintain what was in effect a segregated student housing facility;[11] some black groups across the country have advocated segregated facilities of various kinds.[12] Wheth-

10. "A law or policy is sufficiently just, or at least not unjust, if when we try to imagine how the ideal procedure [the conclusion of rational legislators who are 'constrained by a just constitution' and who are attempting 'to follow the principles of justice'] would work out, we conclude that most persons taking part in this procedure and carrying out its stipulations would favor that law or policy." *Id.* at 357.

But then Rawls whisks away whatever firm ground this statement provides by saying: "[W]e might be tempted to suppose that if many rational persons were to try to simulate the conditions of the ideal procedure and conducted their reasoning and discussion accordingly, a large majority anyway would be almost certainly right. This would be a mistake." *Id.* at 358.

See Schaefer, *The "Sense" and Non-sense of Justice: John Rawls' A Theory of Justice*, POL. SCI. REV. (Fall 1973), which argues that Rawls utterly fails to adduce substantive criteria for judging what are just and unjust laws or policies. Schaefer says that Rawls' reference to ideal procedure is "mere buck-passing," and that Rawls' encouragement to individuals to disobey the law "whenever their guesses about the 'ideal procedure' disagree with the government's" simply encourages anarchy. *Id.* at 31.

11. *Cornell Alumni News*, Nov. 1973, at 62-63; *id.*, Feb. 1974, at 56; *id.*, Mar. 1974, at 54; *id.*, Sept. 1976, at 57.

12. *See* G. ROCHE III, E. VAN DEN HAAG & A. REYNOLDS, THE BALANCING ACT 121-39 (1974). They note that black militants often demanded that whites—students, faculty, and administrators—be excluded from black studies programs and from black dormitories and that a number of schools, including Antioch and Cornell, complied with these demands. *Id.* at 121.

Moreover, a number of predominantly black groups, which both in court and elsewhere opposed racial discrimination in education, filed *amicus curiae* briefs favoring the use of racial and ethnic quotas in the law school admission process. *See, e.g.*, DEFU-

er the community should proscribe all forms of racial segregation turns out, at least for some, to be a very difficult problem indeed.

Some of the most complex questions about the justice of laws arise when one constitutional right appears to conflict with another. One such conflict in the United States concerns the freedom of the press versus the public's ability to prosecute crimes and the suspect's right to defend himself against a serious charge. The Supreme Court has decided that reporters have no blanket privilege to withhold information from grand juries or petit juries;[13] but does this mean that reporters and editors who believe that this decision is profoundly unjust and wrong should refuse by acts of civil disobedience to divulge certain kinds of information in court? Such actions would render the apprehension and prosecution of certain suspects (in some cases, dangerous and violent persons who have grievously violated the rights of others) difficult or impossible and would make it impossible for certain defendants to present the kind of defense they believe is necessary. After all, it is often the defense, not the prosecution, that needs subpoenaed information from the media. This is a complex problem, especially for those who endorse civil disobedience in principle. Determining which laws to obey is awesomely difficult for those who believe that in a democratic regime citizens may choose the laws they will obey and disobey.

Ironically, the very issues that often involve civil disobedience are probably those least susceptible of satisfactory resolution by individuals. For example, a decision to refuse cooperation with the draft laws in wartime is complex and momentous. From the perspective of the nation's welfare there is no reason to presume that the individual's judgment is likely to be more correct than that of the Congress or of the president. Apart from the question of the individual's competence to decide what is best for the nation, his inescapable concern for his own safety necessarily prejudices his view of the matter. It is doubtful, in short, that individuals are competent arbiters in matters affecting them directly. For John Locke, the point of establishing civil society was to move men away from a state of nature, its essential defect being that

NIS VERSUS ODEGAARD AND THE UNIVERSITY OF WASHINGTON (A. Ginger ed. 1974) (reprinting briefs filed by the United Negro College Fund, Inc. (*id.* at 1083), Southern Christian Leadership Conference (*id.*), National Urban League (*id.*), NAACP Legal Defense and Educational Fund, Inc. (*id.* at 1183), and National Conference of Black Lawyers (*id.* at 1205)). It may be argued that the views contained in these briefs are inconsistent with the opposition of these groups to racial and ethnic discrimination.

13. Branzburg v. Hayes, 408 U.S. 665 (1972)

men were judges in their own cases. Civil society was to establish peace by providing a common judge to settle disputes.[14]

B. The Historical Perspective

Obedience to law by citizens was an essential ingredient of American constitutional government as such government was seen by America's Founding Fathers. In *The Federalist, No. 15*, Alexander Hamilton analyzes the defects of the Articles of Confederation, the most serious of which is "the principle of legislation for states or governments, in their corporate or collective capacities, and as contradistinguished from the individuals of which they consist."[15] Because of this and other defects, the confederation of states had "reached almost the last stage of national humiliation."[16] In defending the new constitution whose laws would be binding on individuals, Hamilton concluded that the institution of government is required

> [b]ecause the passions of men will not conform to the dictates of reason and justice, without constraint. Has it been found that bodies of men act with more rectitude or greater disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence, when the infamy of a bad action is to be divided among a number, than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses, for which they would blush in a private capacity.[17]

Thus, Hamilton found that obedience by citizens to government authority, to law, was a crucial means of insuring that individuals conform to dictates of reason and justice.

Thomas Jefferson's first inaugural address, delivered on March 4, 1801, expresses clearly the citizen's duty to obey the law within the framework of a constitution that protects his rights while imposing obligations of obedience to the law. Jefferson states what he understands to be the essential principles of American government, among which are equal justice for all, "preservation of the general government in its whole constitutional vigor,"[18] care that the right of election by the people be maintained, and the freedoms of religion, press, and person.

14. J. LOCKE, THE SECOND TREATISE OF GOVERNMENT §§ 87-89 (1690) [hereinafter cited as LOCKE].

15. THE FEDERALIST No. 15, at 86 (H. Lodge ed. 1888) (A. Hamilton).

16. *Id.* at 84.

17. *Id.* at 89.

18. THE COMPLETE JEFFERSON 386 (S. Padover ed. 1943).

But the principle laid down by Jefferson of greatest interest here is that of "absolute acquiescence in the decisions of the majority—the vital principle of republics, from which there is no appeal but to force, the vital principle and immediate parent of despotism."[19] Jefferson's phrase "absolute acquiescence" is unqualified; it is noteworthy that he included such a call for obedience to law in what was one of the most important speeches of his political career.

Perhaps the most eloquent plea for Americans to obey the law was made by Abraham Lincoln in his address before the Young Men's Lyceum of Springfield, Illinois, on January 27, 1838. In that speech, Lincoln discussed the increasing tendency in the nation toward lawlessness and then suggested how the country might protect itself from this danger:

> Let every American, every lover of liberty, every well-wisher to his posterity swear by the blood of the Revolution never to violate in the least particular the laws of the country, and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and laws let every American pledge his life, his property, and his sacred honor—let every man remember that to violate the law is to trample on the blood of his father, and to tear the charter of his own and his children's liberty. Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling-books, and in almanacs; let it be preached from the pulpit, proclaimed in legislative halls, and enforced in courts of justice. And, in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions, sacrifice unceasingly upon its altars.[20]

Then Lincoln discussed the argument for civil disobedience, the argument that bad or unjust laws need not or should not be obeyed:

> When I so pressingly urge a strict observance of all the laws, let me not be understood as saying there are no bad laws, or that grievances may not arise for the redress of which no legal provisions have been made. I mean to say no such thing. But I do mean to say that although bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example they should be religiously observed. So also in unprovided cases. If such arise, let proper legal provisions be made for them with the least possible delay, but till then let them, if not too intolerable, be borne with.[21]

19. *Id.*
20. THE LIFE AND WRITINGS OF ABRAHAM LINCOLN 236-37 (P. Stern ed. 1940).
21. *Id.* at 237.

C. The Responsibility of the Minority

Locke, in his *Second Treatise of Civil Government*, points out that the decision to form a political community is and must be unanimous, but that it would be totally unrealistic to expect that all decisions subsequently made by that community would be unanimous. Because of the impossibility of continuing unanimity, the laws must be made by the majority.[22] Inherent in rule by majority is the opposition of a minority. Civil disobedience and its advocacy are a direct challenge to the basic democratic principle that the minority must accept the will of the majority once its recourse to legal procedures has been exhausted.[23] Virtually every citizen in a democracy at some time finds himself in the minority, believing that one or more of the majority's decisions—whether executive, legislative, or judicial—is unjust. He may find himself in deep and conscientious disagreement with decisions on war and peace, integration, busing, "reverse discrimination," abortion, or tax burdens. If every citizen exercised what advocates of civil disobedience call his responsibility, with or without a willingness to accept the penalty, and disregarded laws he believed to be unjust, or other laws, to demonstrate that belief, the result would be violence, chaos, or civil war—a total breakdown of the rule of law.[24]

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22. LOCKE, *supra* note 14, at § 96. Locke argues that the community is constituted by the consent of the individuals in it. Because it is necessary that the community as one body move in one direction or another, and because it must choose between conflicting policies, "it is necessary the Body should move that way whither the greater force carries it, which is the *consent of the majority*." *Id.* (emphasis in original).

23. *Id.* Locke argues that because no democratic society can exist without the power to punish the offenses and to preserve the property of those in that society, democratic society exists only when each of its members has given over to the community the natural powers he had in the state of nature. "*And thus all private judgement of every particular Member being excluded,* the Community comes to be umpire by settled standing Rules . . . and . . . decides all the differences that may happen between any members of that society, concerning any matter of right . . . ." *Id.* at § 87 (emphasis added). Thus, for Locke, civil disobedience in a democratic society is not only impractical but also destroys the basis of the regime.

24. "[W]herever and whenever a principled democrat accepts the political system of democracy, he must accept the binding authority of legislative decisions, reached after the free give-and-take of debate and discussion as binding upon him, whether he is a member of the majority or minority. Otherwise the consequence is incipient or overt anarchy or civil war, the usual preface to despotism . . . ." S. Hook, *How Democratic Is America? A Response to Howard Zinn*, in HOW DEMOCRATIC IS AMERICA? 67 (R. Goldwin ed. 1969) [hereinafter cited as Hook]. The recent violent difficulties, including riots, in Boston, Massachusetts and Louisville, Kentucky resulted in substantial part from the resistance of many whites to court-ordered busing for the purpose of achieving racial balance. TIME, Sept. 22, 1975, at 7-11.

The industrial strikes of the late 1800's and early 1900's, many of them illegal, and

Even from a less apocalyptic perspective, civil disobedience would soon become an effective means of retarding or halting the implementation of any or all public policies if it were practiced on a widespread basis; in fact, the more general its practice, the more destructive its effects. Thus, the proponents of civil disobedience are placed in the untenable position of advocating a form of action whose justification depends crucially on its rejection by the vast majority of citizens. Yet Dr. King and other advocates claim that civil disobedience is a *moral responsibility of each citizen.*

And what is sauce for the goose is sauce for the gander. Civil disobedience in this country is generally associated with causes that are loosely labelled liberal, progressive, or radical. But the argument for civil disobedience would justify the members of school boards who disagree with court orders of various kinds designed to integrate school facilities in refusing compliance and would justify the owners of hotels, motels, restaurants, and other facilities, determined by the courts and by Congress to serve the public, in refusing service to members of certain groups (as a matter of conscience, which in practice means opinion—or prejudice). The argument for civil disobedience can be made seriously only because its proponents steadfastly refuse to generalize the principles implicit in their arguments and actions. Indeed, if citizens opposing judicial integration orders in the past twenty years had engaged in civil disobedience on the scale on which it has been employed by the so-called liberal, progressive, or radical groups, much less progress would have been made in integrating our society, or a good bit more force and violence would have been necessary to accomplish the same degree of integration.[25]

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the often brutal and illegal responses by company managements are characterized in a prominent history of the United States as "uninterrupted industrial conflict that frequently broke out into violence and assumed the ominous character of warfare." 2 S. MORISON, H. COMMAGER & W. LEUCHTENBURG, THE GROWTH OF THE AMERICAN REPUBLIC 92 (6th ed. 1969). For a general discussion of industrial conflict in this period, see *id.* at 92-97. Although not political protest and thus not civil disobedience, these strikes illustrate the consequences of widespread refusal to obey the law by ordinarily law-abiding citizens who believed that law-abidingness should in this instance be subordinated to more important considerations.

25. Professor Sidney Hook summarizes this difficulty very well: "On this view, any group that defies any law that violates its conscience—with respect to marriage, taxation, vaccination, education—should be encouraged to do so." Hook, *supra* note 24, at 68.

Hook sets out limited conditions in which, in his view, civil disobedience may be justified: "Under carefully guarded provisions, a democrat may resort to civil disobedience of a properly enacted law in order to bear witness to the depths of his commitment

The argument can be made that civil disobedience is a self-limiting phenomenon because only a few will have the courage to face the accompanying legal penalties. But the penalties for most forms of civil disobedience are a short period in jail or perhaps a fine[26]—and these in some circles may bring respect to the person engaged in civil disobedience. One must question the amount of courage needed for these kinds of acts. Also, as will be discussed later, as acts of civil disobedience become more violent and coercive, the tendency to flee the penalty altogether beomes greater.

Whatever the number of its practitioners, civil disobedience tends to promote violence in a democratic regime. The possibility that prevailing conditions or perceptions of them may change leaves a significant potential for violence in a democratic regime. What will the nonviolent protester do if conditions, in his view, do not improve—or even deteriorate—despite (or perhaps because of) his nonviolent civil disobedience? What course of action directed toward improvement of the situation is left other than violence? As citizens become increasingly inured to and perhaps even bored or angered by the tactics of civil disobedience, acts of civil disobedience will lose their educational or shock value, citizens will no longer be moved to an examination of the justice of the protester's cause, and protesters will have to resort to increasingly coercive and violent methods simply to get attention.[27]

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in an effort *to reeducate* his fellow citizens. But in that case he must . . . voluntarily abandon his violation or noncompliance with law at the point where its consequences threaten to destroy the democratic process and open the floodgates either to the violent disorders of anarchy or to the dictatorship of a despot or a minority political party." *Id.* at 67.

26. *E.g.*, VA. CODE ANN. §§ 18.1-253.2, -254.01, -254.3 to .4 (Cum. Supp. 1975); CAL. PENAL CODE §§ 403, 467c, 408, 409, 647c (West 1970). These sections concern disorderly conduct in public places, obstructing free passage of others, participating in unlawful assembly, and remaining at place of riot or unlawful assembly after warning to disperse, respectively. Persons engaged in civil disobedience are frequently arrested for and convicted of these offenses, though they are often arrested for commission of other offenses.

27. The development of the tactics of the Students for a Democratic Society (SDS) from lawful dissent to illegal but non-violent protest and finally to violent protest, including acts of terror, is well chronicled in E. BACCIOCCO, JR., THE NEW LEFT IN AMERICA: REFORM TO REVOLUTION, 1956-1970, chs. 4-7 (1974) [hereinafter cited as BACCIOCCO] and in HOUSE COMM. ON INTERNAL SECURITY, ANATOMY OF A REVOLUTIONARY MOVEMENT: STUDENTS FOR A DEMOCRATIC SOCIETY, H.R. REP. NO. 1565, 91st Cong., 2d Sess. (1970). "From the militant's viewpoint, Columbia was a triumph because it regenerated SDS, radicalized SDS members and other participating students, and brought into the open a penchant for violence which until that time had for the most part been expressed verbally. Mark Rudd epitomized this inclination by remarking, 'I think everyone should have the right to go and talk to an interviewer, but if the Dow guy comes, fuck him and napalm him.' . . . In some cases the eagerness to use

Nothing in the argument for lawbreaking through civil disobedience necessarily precludes resort to violence if it is deemed necessary to accomplish a just result. If nonviolent lawbreaking is justifiable given certain perceptions or conditions, then violent lawbreaking is justified when those conditions are said not to be operative. Once one thinks that lawbreaking is justifiable in a democratic regime, once the lawbreaking barrier has been overcome, the decision for or against violence in that regime is simply a matter of prudential considerations, of tactics.

D. Acceptance of Legal Penalties

Whether those who engage in civil disobedience should be willing to accept the legal penalty for their lawbreaking has been a perplexing problem for the advocates of civil disobedience. Some, including Martin Luther King, Jr., advocate acceptance of legal penalties.[28] Other prominent writers on civil disobedience, however, sharply disagree. Both Professors Howard Zinn and Ronald Dworkin state that those who engage in civil disobedience are under no obligation to accept the legal penalty.[29] And in a sense, Zinn and Dworkin are quite right: as

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violent rhetoric reflected a willingness to engage in physical violence, as illustrated by the future SDS faction called the Weathermen in 1969 (Mark Rudd became a Weatherman)." BACCIOCCO, *supra*, at 205.

An examination of the biographies of a substantial number of radicals evinces the same development from illegal but nonviolent forms of protest to violence. For example, Stokely Carmichael was incarcerated 35 times for nonviolent offenses in the cause of civil rights. But then his rhetoric turned to calls for violent revolution. CURRENT BIOGRAPHY 66, 67 (1970). Carmichael was later convicted of incitement to riot. N.Y. Times, Dec. 7, 1972, at 52, col. 3.

28. Dr. King advocated voluntary acceptance of legal penalties on the ground that a person who accepts the legal penalty in order to arouse the conscience of the community about an alleged injustice "is in reality expressing the highest respect for law." King, *supra* note 3, at 67.

29. H. ZINN, DISOBEDIENCE AND DEMOCRACY 27-31 (1968). Zinn examines nine fallacies concerning law and order, the second of which is that "*the person who commits civil disobedience must accept his punishment as right.*" *Id.* at 27. He argues that quiet acceptance by citizens of government injustice perpetuates the idea that citizens must tolerate such injustices by the government. If the protest is morally justified, Zinn argues, then "it is morally justified to the very end, even past the point where a court has imposed a penalty." *Id.* at 30. If protest stops when a court imposes a penalty, then we are treating social protest like a football game in which good sportsmanship dictates that the verdict be more or less cheerfully accepted. Zinn argues that such an attitude demeans social protest. Finally, Zinn argues that a protest cannot be potent if it "stops dead in its tracks as soon as the very government it is criticizing decides against it." *Id.* at 30.

R. Dworkin, *Taking Rights Seriously*, NEW YORK REVIEW OF BOOKS, Dec. 7, 1970, at 23-31, advises persons who engage in civil disobedience to flee from the authorities, as Reverend Daniel Berrigan did recently until the F.B.I. caught up with him. Dworkin

Professor Herbert Storing has pointed out, the usual manifestation of respect for law by citizens is obedience; if citizens need not obey the law to show respect for it, why is it necessary for them to accept the law's penalty to show that respect?[30] Thus, Dr. King's argument that accepting the penalty is a logically necessary component of civil disobedience seems to be hard to sustain.

Aside from the conclusion that accepting the legal penalty seems not to be a logically necessary component of civil disobedience, it appears unlikely that willingness to accept the penalty will remain a meaningful ingredient of civil disobedience.

> But are we so sure that we can enforce this rule [that the lawbreaker must willingly accept his punishment], as the teaching of disobedience extends through the populace, especially the desperately poor, the degraded, and the bitter? Despite some outstanding successes in limited areas under special circumstances, I think it is now clear—as it should have been from the beginning—that the broad result of the propagation of civil disobedience is disobedience. The question then becomes whether the encouragement of disobedience endangers law and civil society, and the answer seems clear enough today, if it was ever in doubt, that it does.[31]

Obedience to law for most is not something that can be practiced on a selective basis according to conscience without having conscience ultimately subordinated to interest and desire. A fundamental reason for law, the control of individuals' unjust self-preferences, constitutes an important rationale for respecting and obeying the law.[32]

In fact, civil disobedience seems likely to become a formula for ever-increasing violence. As discussed earlier, acts of civil disobedience themselves have a tendency to become increasingly violent. As a result, the legal penalties for such acts will escalate in severity; persons facing serious legal sanctions that may deprive them of their liberty for extended periods of time are less likely to accept willingly the verdict of the law than those whose violations are regarded as relatively minor infractions. After all, it is one thing to pay a fine or spend a few days in jail,

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argues that if a man is convinced that he has a right to demonstrate, then he must be similarly convinced that the government would be wrong to stop him. And if this is so, then "it is silly to speak of a duty to obey the law as such, or of a duty to accept the punishment that the state has no right to give." *Id.* at 25. *See also* R. Dworkin, *On Not Prosecuting Civil Disobedience*, NEW YORK REVIEW OF BOOKS, June 6, 1968, at 14-21.

30. Storing, *supra* note 4, at 104.

31. *Id.* at 103-04.

32. ARISTOTLE, POLITICS § 1269a, lines 20-27, discusses obedience to law as depending on habit. He says that the law has no power to command obedience except that of habit, which can only be given by time, so that a readiness to change from old to new laws enfeebles the power of the law.

and quite another to face the prospect of long periods of incarceration. Thus, as the legal penalties for increasingly coercive or violent acts of civil disobedience escalate, a willingness on the part of the protestors to accept the legal penalties becomes less likely.

E. No Inherent Self-Limitation

There is a final difficulty with civil disobedience: Which laws and how many may be broken in civil disobedience? Once it is claimed, as most of the proponents of civil disobedience do, that the law broken need not be the one protested, then certain questions arise: Which laws may be broken? May more than one law be broken? Perhaps many? May a citizen refuse compliance with all laws—or at least the ones he claims he can break nonviolently—until the claimed injustices are rectified? Nowhere do the proponents of civil disobedience give a satisfactory answer to this problem; until they do, civil disobedience is a doctrine in search of limits.

As noted above, the advocates of civil disobedience regard it as a moral responsibility. But the fatal difficulty in the argument when applied to governments that operate by majority rule is that the effectiveness and continuance of the regime requires that individuals divest themselves of authority to judge which enacted laws are sufficiently just to warrant obedience. If the regime is worth maintaining and preserving, then civil disobedience is unjustifiable because it undermines the fundamental principles of the regime. Nothing in this essay denies that democratic regimes can and do enact unjust laws. The argument here is that when they do, the citizen who truly supports such a regime must use legal means to seek change in the law.

II. Civil Disobedience in Undemocratic Regimes

What, on the other hand, of a regime which is itself not democratic? The Reverend Daniel Berrigan has characterized the American regime as murderous and absolutely corrupt and proposed civil disobedience as a response. Professor Walter Berns writes of this characterization:

> The situation is hopeless, [Berrigan] says, and he proposes the "desperate" remedy of a ceremonial breaking of the law. As if Count von Stauffenberg, instead of placing that bomb at Hitler's feet, had set fire to a Third Reich draft card and said, "Take that, mein Fuehrer!"
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> . . . .
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> What sort of sentimental nonsense is this that tells a man to be *civil* . . . to a government he regards as absolutely corrupt?

> Jefferson and his colleagues at the beginning were not being civil in their disobedience to British authorities; they were killing British soldiers, and they knew what would happen to them if they lost the war. . . .[33]

It does not detract from Berns's argument to point out that there are a limited number of situations, such as that of British rule over Gandhi's India, in which civil disobedience may be one appropriate means, among others, for overthrowing a regime regarded as undemocratic; but here civil disobedience is a tool of revolution against an undemocratic regime. Thus, civil disobedience is one of the tactical options, among other more extreme options, available in revolution against a regime regarded as fundamentally undemocratic, but is, as argued above, destructive of a regime regarded as fundamentally democratic.[34]

Conclusion

There are those who argue that civil disobedience has been effective, at least in America, in speeding "desirable" social change. Yet there are many illegal, coercive, or violent methods that, it could be argued, would bring about desired changes but that we nonetheless condemn. The end does not in itself justify any means directed toward its attainment.

The search for justice through civil disobedience may well be a formula for tyranny, for according to Locke, men enter society in order to be governed by known, settled laws.[35] If the law-abiding majority increasingly has the impression that there is no such law or that it is not being enforced, it may choose rulers who will take law enforcement more seriously, to say nothing of building an Autobahn and making the trains run on time.

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33. Berns, *The "Essential Soul" of Daniel Berrigan*, NATIONAL REVIEW, Nov. 9, 1973, at 1231, 1240.

34. While it is outside the scope of this essay to argue the point at length, this author finds the evidence overwhelming that the United States is fundamentally democratic. The people exercise control over the formulation and content of public policy through their representatives, and basic civil rights and liberties, while always a subject of controversy, are firmly established. The American regime has shown a substantial capacity for remedying wrongs, whether these concern segregation, political corruption, the environment, or legal representation for the indigent. Many of the dilemmas facing the country today are difficult to resolve, not because the regime is undemocratic, but because important public interests must be subordinated to other even more important interests whenever a policy is made (as with environmental decisions) or because majority opinions or desires conflict with rights asserted by minorities (as with busing or "welfare rights"). Because the United States is fundamentally democratic, civil disobedience is not justified here.

35. LOCKE, *supra* note 14, at § 87.