

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.