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. It is characterized by open, i.e., nonclandestine, violation of the law being protested or of other laws. 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. 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.

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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. 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; 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. 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*, 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." When, in the chapter on "Duty and Obligation," Rawls takes up the question of what a just law or policy is, far from adding 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.

2. 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.

3. 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.

4. 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.


6. *Id.* at 246.
would favor. 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; some black groups across the country have advocated segregated facilities of various kinds. 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 Rawlswhisks 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.


12. See G. Roches III, E. Vanden 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 predomina ntly 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; 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.

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.

16. Id. at 84.
17. Id. at 89.
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.
21. Id. at 237.