

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

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

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 fine²⁶—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 becomes 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

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 law-breaking 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

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,

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!"

. . . .

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.

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.