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Democracy and Civil Disobedience

MENACHEM MARC KELLNER

IT IS OFTEN ALLEGED that citizens of a democratic country may never violate democratically derived laws. A good democrat may disagree with the laws of his country but will never carry that disagreement to open disobedience. It is maintained that since all proposed legislation is aired in public before its enactment, and since it is voted into law by representatives of the people (in all contemporary democracies, at any rate), a special obligation devolves upon the democratic citizen to accept this legislation as binding. The general duty every citizen is assumed to have to obey the laws of his state is thus said to be stronger in a democracy, and it is asserted that it is never (or almost never) right to break a democratically enacted law.

On the basis of arguments such as these it is claimed that a good democrat may never engage in civil disobedience.

The problem of civil disobedience has received much attention in recent years. No generally accepted definition of 'civil disobedience' has been found. Nonetheless, it is safe to say that civil disobedience involves the public violation of the law of a government recognized as legitimate by the disobedient. It is further safe to assert that any *justified* act of civil disobedience (assuming that such there be) is likely to be peaceful and characterized by acceptance of the penalty on the part of the disobedient.

Three arguments which use the notion of democracy against civil disobedience can be distinguished. The first appeals to some principle such as majority rule. The second asserts that since the citizen

* I would like to thank Professors Steven Schwarzschild, Robert Barrett, Carl Wellman and James Childress for their kindness in reading this essay and for their many helpful comments.

in a democracy participates in the framing of legislation he may not, after legislation is passed, disobey it. The last declares that since lawful channels exist for protest and attempts at legal change, civil disobedience can never be justified. Let us examine them, one by one.

Very often, arguments against civil disobedience in democracy are based upon appeals to principles of majority rule. Thus, it is asserted that the most important goal of democracy is that the people exercise the power of government. The most practical way of ensuring this is to allow for free elections in which the majority rules. To violate the law is to supplant majority rule with minority rule and to make democracy impossible. Civil disobedience is

unjustifiable not simply because it breaks the law, but because in breaking the law deliberately it violates the procedural rules than an operating democracy presupposes. These rules, which set limits on the manner in which participants may seek to influence community decision making, are the foundation of a just government.¹

Addressing himself specifically to the issue of majority rule Rex Martin argues that

part of being a good citizen in democracy requires the citizen to adhere to the principle of democratic authority, that all decisions are made by elected representatives, and ultimately by majority vote, in accordance with established procedural rules, and that all persons are bound by such decision.²

There are a number of things which can be said in response to this argument. In what sense is a civil disobedient who violates the law openly, peacefully, and with acceptance of punishment violating the principle of majority rule? In a most important sense he is respecting the will of the majority by complying with it in allowing himself to be punished for an act for which, in many cases, he thinks he ought not be punished.

Even if civil disobedience does tend to subvert the principle of majority rule,

it does not follow that such protests will *never* be justifiable. It is surely conceivable that some acts of civil disobedience, particularly direct disobedience, may be aimed at laws and policies so cruel and unjust (although enacted demo-

¹ Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (New York: Columbia University Press, 1971), 167. Cohen cites this argument but does not advance it.

² Rex Martin, "Civil Disobedience in Democracy," *Ethics*, LXX.2, 123-139, 129.

cratically) that the good done by the disobedience outweighs the evil done (if it is done) in disrupting the democracy.³

The cogency of this latter claim rests upon the fact that, even for a democrat, the principle of majority rule is not an ultimate moral principle.

It is important to distinguish, as is often not done, between 'democracy' and 'the principle of majority rule'. The two are not one and the same. "Majority rule," in Carl Cohen's words, "is an instrument of democracy, and not its substance."⁴ Cohen adduces a number of considerations to substantiate this claim. First, the fact that a community is a democracy may preclude its adopting certain decision making rules, but does not force it to adopt any particular one. Second, many decisions in democracies are made in accord with plurality rule, not majority rule. Third, many of the institutions associated with democracies operate to prevent the majority from being absolutely decisive. "In the United States," for example, "such institutions as the judicial review of legislative action, the Electoral College, and the representation of each state by two senators regardless of its population, are invoked deliberately to protect minorities from exploitation by a majority."⁵ Finally, where it is possible, it is consistent with democracy to arrive at decisions on the basis of consensus, as opposed to majority rule. All of these considerations point up the instrumental character of majority rule in democracy. It is quite possible, therefore, that in a case in which democracy as an end is endangered, the good democrat may be forced to violate the principle of majority rule in order to defend democracy.

A second argument against civil disobedience in democracy is based on the claim that when one participates in the governing process (as in a democracy) one has a special obligation to obey laws derived in accord with that process. When a man is in the majority he expects those who oppose him to honor their commitment to democracy and obey the law. Now that he is in the minority he must behave as he always expected others to behave when in that situation. In participating in the law-framing process

³ Cohen, *Civil Disobedience*, 172.

⁴ Carl Cohen, *Democracy* (Athens, Georgia: University of Georgia Press, 1971), 69.

⁵ Cohen, *Democracy*, 69.

one makes an implicit agreement to abide by the eventual decision; were such not the case one's participation would be a total farce. Thus, the democratic citizen has an especially strong obligation to obey democratically derived laws.

John Petrov Plamenatz, in the postscript to the second edition of his *Consent, Freedom, and Political Obligation*, phrases the argument in the following way:

When there is an established process of election to an office, then, *provided the election is free*, anyone who takes part in the process consents to the authority of whoever is elected to the office. This, I think, is not to ascribe a new meaning to the word *consent* but is only to define a very ordinary and important political use of it. The citizen who votes in an election is presumed to understand the significance of what he is doing, and if the election is free, he has voluntarily taken part in a process which confers authority on someone who otherwise would not have it. He may bitterly regret the election of the successful candidate, and may not even have expected it, but if the election was free and he freely took part in it, he consented to the authority of the man elected.⁶

In general the reply which ought to be made to this sort of argument is that democracies do not always work as they were intended to work. Whole segments of the population of a democracy may be effectively, if illegally (and not always illegally), disenfranchised and excluded from the decision making processes. They have thus not participated in the governing process.

But even people who are not overtly excluded from participation in the framing of legislation may, on occasion, justifiably feel that their participation is meaningless. The revelations of the "Pentagon Papers" show that many lawmakers, let alone common citizens, were tricked or bamboozled into support of policies they would have rejected had the whole truth been available to them. Thus the Gulf of Tonkin Resolution, the entire legislative justification for the Indochina War, was apparently based on a fraud. In such circumstances many citizens of a democratic state might feel, with no little justification, that they had no part in the framing of laws and policies which vitally affect them.

Kent Greenawalt analyzes the participation argument in his essay, "A Contextual Approach to Disobedience." Plamenatz' contention, he writes,

⁶ John Petrov Plamenatz, *Consent, Freedom, and Political Obligation* (London: Oxford University Press, 1968), 170-171.

is relatively persuasive if one imagines a small meeting at which everyone understands that a majority vote will decide a specific question and at which it is implicitly understood that the act of voting implies consent to the result . . . This analysis is less convincing when applied to the role of a citizen in a complex society. In the first place, in most liberal democracies the avowed revolutionary is permitted to vote . . . It is hard to see how his vote represents consent to the authority of the winner of the election. But even in the case of a citizen generally satisfied with the political system, voting in a public election is very different than participating in and voting at a meeting. He votes for someone who will then decide on a broad range of particular issues, many unforeseen at the time of election. His choices even in regard to individuals are severely limited by a preliminary political process. He has no real chance to present his own views directly to the body voting on the laws. In short, though it may be correct to say that in some sense the person who accepts the system has consented to the authority of the person elected, it is much more difficult to argue that with regard to the small meeting that he has impliedly promised to accept the result of every deliberation of the body in which the person elected sits.⁷

Last, it is asserted that since ample provision is made for the relief of minority grievances before and after laws are enacted, and because legal channels for protest and change are open after a law is adopted, it is never right to violate a law in a democracy. Starting with the undeniable assumption that a democrat ought, in general, to obey democratic laws, it is argued that the fact that one can change obnoxious laws within the legal system makes civil disobedience impossible to justify.

In a number of articles Sidney Hook has made a similar claim.⁸ He holds that it is anti-democratic to violate the laws of a democracy:

The mark of a genuine conscientious objector in democracy is to respect the democratic process . . . having failed to influence national policy by rational means *within* the law, in the political processes open to him in a free society, he cannot justifiably try to defeat that policy by resorting to obstructive techniques outside the law and still remain a democrat.⁹

But Hook is not an absolutist; he admits that "it may be morally necessary to disobey an unjust law; even if this leads to revolution;

⁷ Kent Greenawalt, "A Contextual Approach to Disobedience," in *Political and Legal Obligation*, ed. Pennock and Chapman (*Nomos*, XII), 332-369, 344.

⁸ The articles by Hook are: (a) "Neither Blind Obedience Nor Uncivil Disobedience," *New York Times Magazine*, June 6, 1966, 52ff; (b) "Law, Justice and Obedience," *Law and Philosophy*, ed. S. Hook (New York: New York University Press, 1964) 56-60; (c) "Social Protest and Civil Disobedience," *The Humanist* (1967) 157-59, 192, 193.

⁹ Hook, "Neither Blind Obedience Nor Uncivil Disobedience," 124.

but one ought not call himself a democrat while doing this."¹⁰ Of this argument Carl Cohen writes:

Its plausibility arises from the conviction that where there are two ways of achieving the same objective, one lawful and the other not, the unlawful procedure (other things being equal) could not be justifiable . . .¹¹

This is true enough as far as it goes, but all too often other things are not equal. Evil and oppressive laws do get enacted in the best of democracies (such as the Alien and Sedition Act, the Fugitive Slave Law, early anti-labor legislation, and many more recent and therefore more controversial items); it may be impossible or too time consuming to achieve redress in the approved manner; corruption, official lack of interest, and a large list of other factors might nullify the alleged benefits of legal channels for change. It is often just because attempts for change within the law have been thwarted or blocked that the civil disobedient is prompted to his action.

These three arguments have great initial plausibility, and, despite the important difficulties just analyzed, some residual persuasiveness. They are all three, however, based on a serious misconception about the nature of democracy, about what it is and ought to be. They fudge over a crucial distinction and only achieve plausibility in that way.

II

The word 'democracy' is used in many ways. There is little doubt, however, that a minimal definition can be given that would be generally satisfactory. Such a definition would involve the notion of government by consent of the governed (or, phrased differently, "popular sovereignty"), thus preserving the original meaning of 'democracy' as rule of the people. In this sense, 'democracy' may be defined as "government by persons who are freely chosen by and responsible to the governed."¹² Thus, Plato characterizes democracy as "the form of government in which the magistrates are commonly elected by lot."¹³

¹⁰ Hook, "Law, Justice and Obedience," 59.

¹¹ Cohen, *Civil Disobedience*, 163.

¹² John Petrov Plamenatz, "Democracy in a World of Tensions," in *Democracy in a World of Tensions*, ed. Richard McKeon (Chicago: Chicago University Press, 1951), 302-327, 302.

¹³ *Republic*, 557.

The notion of democracy has grown much richer since antiquity when it was first discussed by Plato and Aristotle. The word has also come to signify a set of ideals such as dignity, liberty, and equality. This latter conception may be called "ideal democracy" to distinguish it from the first sense of the term which I will call "mass democracy."

There is yet a third way in which 'democracy' may be used. This is in the sense of government which seeks to actualize ideal democracy and see itself as a yet imperfect attempt in that direction. This I will label "imperfect democracy."

Such democracies are imperfect attempts at actualizing ideal democracy. To that end they adopt certain means. Among the more notable are free elections (governed by the principle of majority rule) and the various guarantees of liberty associated with a bill of rights. This is important. The ideals which an imperfect democracy is trying to realize determine the means it uses in that attempt; in other words, these ideals, to a large extent, determine the *structure* of imperfect democracies. It is by reference to these ideals that we can explain why such democracies are characterized by free elections, by a commitment to government by consent, and by all the protections of individual liberty and integrity which are often taken to be the external distinguishing characteristics of democracies.

Why ought major political and social decisions to be decided by elections? One important answer to this question is that this mode of decision making is the one most consistent with a thorough-going commitment to human equality: everyone has an equal voice in the making of decisions. Government by consent of the individual is consistent with and demanded by a true and honest respect for the dignity and integrity of the individual. To rule a person without his consent is to use him as a pawn and is to deny his right to make and act upon his moral decisions. A commitment to liberty without guarantees for that liberty would be a weak and inconsequential commitment.

An imperfect democracy, then, is a government which seeks to actualize ideal democracy and which uses means in pursuit of that goal which are consistent with the goal itself.

Thus, the purpose of imperfect democracy is the actualization of ideal democracy. The democrat is committed to imperfect democracy because it tries to realize ideal democracy.

It seems clear that in any case where the means adopted for the realization of some goal hinder its attainment instead of furthering it, the rational man will be more strongly committed to the goal than to the means.

It is also sadly clear that it is possible for a state that is an imperfect democracy to behave in ways which are undemocratic or antidemocratic (with reference to ideal democracy). In other words, a government which is an imperfect democracy may enact laws which make the realization of ideal democracy less, rather than more, likely or which make a mockery of democratic ideals altogether. In such a situation what ought a democrat to do? Ought he be more committed to his democratic government or to his ideals? To the extent that imperfect democracy exists to render actual ideal democracy it is clear that the democrat ought to be more committed to the ideal. Assuming the truth of this claim, it would seem to be difficult to argue cogently that a democrat has an obligation to obey undemocratic or antidemocratic laws (with reference to ideal democracy) just because they were enacted by an imperfect democracy.

Now what I take to be the weakest aspect of Sidney Hook's claim becomes clear. He says one ought not call oneself a democrat if one disobeys an unjust law even if it is morally necessary to disobey it. But the person who disobeys unjust laws which are radically inconsistent with democratic ideals is just the person who *is* displaying a commitment to democracy, not the citizen who mindlessly obeys every antidemocratic or undemocratic law (with reference to ideal democracy) enacted by his government! Hook, of course, could reject this argument were he willing to assert that the notion of democracy is exhausted by that of majority rule. But the difficulties associated with holding this position have already been shown and will be further demonstrated below.

In this light we can better understand what is wrong with the arguments against civil disobedience in democracy which were discussed immediately above. They all rely on the truth of the claim that the democratic citizen, because of the nature of his government and his relationship with it, has a very special and strong obligation to obey its laws. While this is true, it is also true that the democratic citizen is committed to democracy because of the ideal it is trying to actualize. In what follows I will argue that if democracy is a form of government morally worthy of being sought, this cannot

be because it is simply government by the people (*i.e.*, mass democracy). I will argue that democracy ought to be sought because of the ideals it seeks to realize, and that the democrat's commitment to democracy rests on those ideals, and not on a form of government. If this is true, the democrat is not being inconsistent or undemocratic, therefore, when in a restricted and careful fashion, he violates some democratically derived law in order to protect some advance toward ideal democracy which has been made or to protest some serious deviation from the path toward the actualization of that ideal.

The arguments based on democracy cited above all take the workings of a mass democratic government to be an end in itself. These arguments are based on the claim that 'democracy' is best defined in terms of procedures rather than ideals. They operate as if the functioning of such a government is the basis for whatever moral and practical superiority democracy can claim. These arguments are also based on the assumption that the democrat's allegiance to democratic government is based on the fact of popular sovereignty. These arguments, then, are based on confusions in the meaning of 'democracy'.

By showing that 'imperfect democracy' as defined here well captures what is ordinarily meant by 'democracy', I will demonstrate an important weakness in the three arguments against civil disobedience in democracy analyzed above. More important, I will be well on the way to supporting the contention that in certain cases a sincere democrat would not only be consistent in violating a democratically derived law but would have to violate it in order to be consistent.

III

Democracy is often considered to be a form of government superior to all other forms of government. Very few regimes in existence today are willing to admit that they are not democratic. This fact is dramatically underscored by the essays contained in a book entitled *Democracy in a World of Tensions*. It contains replies to a questionnaire circulated by UNESCO among scholars around the world on the definition and value of democracy. More than one hundred and twenty-five people contributed to the volume, and "for

all the difference of interpretation, none of the replies to the questionnaire defends antidemocratic doctrines."¹⁴

If we assume that democracy is nothing more than mass democracy, *i.e.*, "government by persons who are freely chosen by and responsible to the governed," then wherein does its alleged superiority lie? Are such governments either morally or practically superior to other governments? If they are not, there is no basis to the claim that democracy is superior to other forms of government. Let us deal with the question of practical superiority first.

Is there any reason to assume that a mass democracy promotes more of the goods that governments are supposed to promote than other governments, or that it does a better job of it? This is a strictly empirical question and there does not seem to be any evidence to the effect that mass democracies do a better job in this regard than other forms of government. In the Appendix to the last chapter of his *Consent, Freedom, and Political Obligation*, John Petrov Plamenatz lends support to a contention that mass democracy is not demonstrably superior to other forms of government on practical grounds:

In the first place, it is very doubtful whether men are really good judges of their own interests . . . If they are in a position to choose their own governors, there is no particular reason for assuming that their choice is likely to be a good one . . .¹⁵

Mass democracies seem no more conducive to the flourishing of the arts than do the most despotic autocracies. As Plamenatz points out,

It is far from absurd to suppose that the best literature of the second half of the nineteenth century was produced in Russia, whose autocratic government was held in contempt by every friend of democracy in Western Europe.¹⁶

Indeed, certain autocracies were very zealous in providing goods of all sorts to their subjects. Thus,

The French monarchs maintained the finest system of roads in Europe, they rebuilt large sections of Paris. The Prussian kings abolished feudalism, they built up a very efficient system of education and the most competent of European civil services.¹⁷

¹⁴ McKeon, *Democracy in a World of Tensions*, viii.

¹⁵ Plamenatz, *Consent, Freedom, and Political Obligation*, 158-159.

¹⁶ Plamenatz, *Consent*, 159-160.

¹⁷ Plamenatz, *Consent*, 161.

In summary Plamenatz writes,

The very superficial discussion of the last few paragraphs is intended to illustrate the empirical nature of the problem and to suggest that no cursory survey of the functioning of past and present governments will provide us with a solution. At a first glance, the available evidence does not appear to favor popular any more than non-popular governments.¹⁸

Mass democracy is thus not demonstrably superior to other forms of government on practical grounds. Is it more desirable on moral grounds? Only if popular sovereignty is taken as the highest moral good. For there is no reason to suppose that government elected by and responsible to the people will be any more just than an out and out autocracy. Moreover, to accept popular sovereignty as the highest moral good is to justify every injustice ever imposed on a minority by a majority.

The superiority of imperfect democracy, on the other hand, is not difficult to explain. It is clearly moral. Imperfect democracy is the as yet imperfect actualization of ideal democracy. Such governments may not be practically superior to others, but to the extent that they are consistent and pursue their aims, they are surely more desirable on moral grounds than other available forms of government. Imperfect democracies not only seek to provide all the goods that other governments seek to provide, they are also committed to protecting individuals in the free practice of their rights and to the maximization of justice to the greatest degree possible.

This point about the moral superiority of democracy as it is defined in this essay is not so simply settled. I argue that democracy is superior to other forms of government because of the goals it seeks to attain. Advocates of defining democracy in terms of its procedures might argue that democracy as they conceive it is also morally superior to other forms of government because of the ideals (such as equality) which these procedures seek to embody. They might further argue that a government which seeks to actualize democratic ideals might be led to use autocratic measures in the belief that they are the most effective or only possible means of realizing those ideals.

The proceduralist who argues in this way, however, does not basically differ from me. Moreover, he cannot consistently turn

¹⁸ Plamenatz, *Consent*, 162.

around and condemn out of hand acts of civil disobedience where the disobedient is protesting some application of democratic procedure grossly inconsistent with the ideals those procedures are supposed to embody or represent. He can only do this if the procedures are self-justifying. To argue in this vein, however, is to leave oneself open to the claim that democracy so defined is not morally superior to other forms of government.

With reference to the second point, a government which employs autocratic methods in an attempt to realize ideal democracy is not an imperfect democracy. As I noted above, the political procedures commonly associated with democracy are so associated because of their consistency with democratic ideals. It is because of this that the democrat treats them with the greatest respect, which is why civil disobedience is, for a democrat, almost always a counsel of last resort. To ignore democratic procedure, then, in alleged pursuit of democratic ideals gives the lie to that pursuit; it is impossible to attain an end with means inconsistent with that end. It is further a sign of disrespect for democratic ideals—not a means for realizing them—to ignore or circumvent the procedures most consistent with those ideals.

Another argument can be given in support of the contention that there is more to 'democracy' than 'mass democracy'. If 'democracy' is no more than 'mass democracy' what advantage does it have over other forms of government? Why, in other words, ought one opt for democracy as opposed, say, to some sort of enlightened and benevolent despotism? As has already been noted, mass democracies do not necessarily do a better job than other governments at promoting the goods which governments are supposed to promote. None of the grounds usually adduced in favor of opting for democracy will suffice in the case of mass democracy. None of the supposed benefits of democracy (freedom, equality, etc.) are necessarily present in mass democracies.

It might be objected that it is more likely that a despotism, no matter how enlightened and benevolent, will turn into a tyranny than will a functioning mass democracy. This again is a claim which can only be properly evaluated in the light of comprehensive historical evidence. But the experiences of Germany, Italy, and Poland in the inter-war period, and of Pakistan and Greece in the last decade, seem to point to the fact that mass democracies can and often do in fact degenerate into tyrannies.

IV

To recapitulate briefly, I have distinguished three distinct uses of the term 'democracy'. 'Ideal Democracy' signifies a set of ideals such as human dignity, liberty, and equality. 'Mass Democracy' is defined by Plamenatz as "government by persons who are freely chosen by and responsible to the governed." 'Imperfect Democracy' is a form of government which seeks to actualize ideal democracy, using means consistent with democratic ideals, and sees itself as a yet imperfect attempt in that direction. In the preceding pages I have suggested that the three arguments against civil disobedience in democracy cited at the beginning of the essay gain whatever credibility they possess from a confusion between mass democracy and imperfect democracy and that the latter better captures what we ordinarily mean by 'democracy' than does the former.

If we are to understand and evaluate actually existing democratic governments in terms of the definition of 'imperfect democracy' then a major and fundamental purpose of democratic governments is the actualization of ideal democracy. This is true by definition. I further take it to be true that in any case in which a person adopts some means or set of means to attain some goal or set of goals he will be more strongly committed to the goals than to the means. This would seem to be so especially in a case in which the means adopted actually hinder the attainment of the goal, instead of furthering it.

Assuming these claims to be true, it follows inescapably that the consistent democrat may on occasion be in a position in which his very commitment to democracy forces him to violate the laws of a democratic government. If a law passed by a democratic government is so antidemocratic (by the criteria of ideal democracy) that obedience to it must clearly and gravely hinder, rather than advance the attainment of democracy, it is the duty of the democrat to disobey it. There are antidemocratic tendencies in all democracies. One very effective way of thwarting them, and of promoting democracy, is to refuse to go along with them, even on those occasions when they seem to bear the imprimatur of democracy itself.