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# DEMOCRACY AND THE PROBLEM OF CIVIL DISOBEDIENCE\*

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## I

If Sophocles were alive today to recast the dilemma of Antigone in contemporary, if less sanguine, terms, he might well seize on the problem of the citizen who refuses to answer questions put to him by a congressional investigating committee. Antigone, you will recall, was torn between two loyalties. Her religion commanded her to bury the body of her brother, while her state commanded that his body be left, unburied and unmourned, to be eaten by dogs and vultures on the open plain outside the city walls. As a loyal citizen, Antigone was required to yield her conscience to the state, to guide her conduct not by her rational moral knowledge but by the precepts of the law. As a person bound to her kin by the dictates of her religion, she was required to subordinate the instructions of Creon the king to those of her faith. She chose to obey her conscience and paid the penalty. Socrates, who—according to a traditional interpretation of the *Crito*<sup>1</sup>—would doubtless have counseled otherwise, was also executed by the state. Thoreau, who at a critical moment followed what has scornfully been termed “the primitive attitude of Antigone, rather than the

\* The substance of this paper was read at the annual meeting of the American Political Science Association in Washington, D. C., in September, 1953.

<sup>1</sup> John Dickinson, “A Working Theory of Sovereignty,” *Political Science Quarterly*, Vol. 43, pp. 32–63, at p. 50 (Mar., 1928). Taken by itself, the argument of the *Crito* (50–51) does, I think, support Dickinson’s interpretation. But there are strong grounds for holding a contrary view of what Socrates actually believed. It is clearly the teaching of the *Apology* (and other Socratic dialogues of Plato) that it is never right to do wrong, regardless of personal consequences. For this reason Socrates refused to obey the command of the Thirty to bring Leon the Salaminitian to Athens to be put to death by the oligarchy; and he refused to remain silent when, “as I conceive and imagine, the god orders me to fulfill the philosopher’s mission of searching into myself and other men” (*Apology*, 32, 28). Plainly, Socrates would disobey a law that required him to do an unjust thing. From this standpoint, the argument in the aforesaid passage of the *Crito* can be read as no more than a demonstration to Crito that none of his arguments is sufficient to persuade Socrates to flee prison. This leaves open the question whether Socrates might not have been persuaded by other reasons—e.g., by a refutation of his own implicit thesis that death was really preferable to him than exile, in view of all the circumstances. Such a refutation might have been convincing if there were a different set of circumstances surrounding such factors as his age, the suffering he might cause his friends in Athens, the treatment he might expect in the place or places of his exile, and above all the effect that escape would have had upon Socrates’ life-work, his philosophic mission, the thing which was more precious to him than life.

For another argument in support of the thesis that Socrates would have approved Antigone’s action, see R. N. Cross, *Socrates: The Man and His Mission* (Chicago, no date), pp. 168–72. Aspects of the general problem are discussed in Harry V. Jaffa, *Thomism and Aristotelianism* (Chicago, 1952), pp. 29–30, 199, and Jerome Hall, *Living Law of Democratic Society* (Indianapolis, 1949), pp. 21–22.

mature comprehension of Socrates,"<sup>2</sup> found that refusal to obey a law resulted not in loss of life but in temporary loss of physical freedom. This moderation of punishment from ancient Greece to mid-nineteenth century America, though not a steady historical trend, reveals a greater tolerance on the part of the state toward manifestations of civil disobedience, but the state's adamance still remains, and with it the essential dimensions of the problem.

Governments and people still contend over these old and fundamental problems of political obligation. Now as before, there are those who categorically assert that it is the duty of the citizen always to obey the law, while others insist that a citizen owes his primary obligation to his own conscience. Since it is my general conviction, with Aristotle, that "in all disputes upon government each party says something that is just,"<sup>3</sup> I propose to consider here those principles which, in a democratic state at least, appear to me to render valid *some* claims to the right of civil disobedience.<sup>4</sup>

Of such appeals to the right of civil disobedience I shall restrict myself in this paper to three: (1) the claim that the democratic state has no moral authority to make any demands on the individual because the political system (or the social order maintained by that system) is, in principle, unjust; (2) the claim that the system ideally conceived is just but that the particular state is a perverted form of democracy and is therefore unjust, and that consequently, as in the first instance, it lacks authority; (3) the claim that while the social order and the institutionalized form of democracy that seeks to maintain it are just, the particular law (or laws) is unjust in that it constitutes an attack on and a repudiation of that ideal, and that consequently disobedience to the law in question is, in the particular instance, calculated to achieve a greater good—the preservation of the system itself—than is likely to be achieved by compliance.

Since the resolution of a problem requires first that the problem be understood, it may be well to state at the outset what I conceive to be the underlying questions emerging from the present conflict over the principles of political obligation.

## II

When a citizen today is summoned by a congressional investigating committee to answer questions he regards as morally reprehensible—questions, for example, that call upon him to state his political beliefs or to be an informer—he finds himself in a grave dilemma. If he answers the questions, he obeys the law but violates his moral code, and may, in addition, expose himself to certain

<sup>2</sup> Dickinson, *op. cit.*, p. 50.

<sup>3</sup> Aristotle, *Politics*, trans. William Ellis, Everyman's ed. (London, 1912), 1281a.

<sup>4</sup> It seems hardly necessary to add that while the analysis of this problem is motivated by certain consequences which have ensued from the intense activities of congressional investigating committees in recent years, I am concerned not with the specific conduct of individuals who have appeared before such committees or with the behavior of the committee members themselves, but with the *principles* of political obligation that are relevant to such conduct.

non-legal consequences of his legal action—e.g., the loss of his job. If he refuses to answer on moral grounds, he satisfies his conscience but denies his obligation to the law, and thereby, if we are to believe certain conservative thinkers from Socrates' day to our own,<sup>5</sup> endangers as well the very foundations of the social order. His personal risks in such a course are even greater, entailing possible imprisonment, and his only consolation would be the knowledge that he had displayed the virtue of courage, or, with Thoreau, the thought that "under a government which imprisons any unjustly, the true place for a just man is also a prison."<sup>6</sup>

If, however, he resorts to a legal instrument—e.g., the self-incrimination clause of the Fifth Amendment to the Constitution—which will enable him both to satisfy his conscience and by invoking another law to stay out of jail, he invites a further dilemma. For if he invokes the Fifth Amendment knowing that it does not strictly apply to his case—e.g., if he seeks to protect someone else, although under the self-incrimination clause he is not entitled to do so—he does not tell the truth and may thereby dishonor his moral code. Nor can he enjoy the consolation of having been courageous, if he now seeks to escape the consequences of a refusal to answer based solely on moral grounds. On the other hand, if he is convinced that a lie is necessary to achieve a greater good, he may find it difficult to understand why one who acts rightly should be expected to invite wrongful punishment. To one who believes that a lie is always wrong, such conduct is inexcusable. But to men sensitive to the fact that moral dilemmas arise precisely because a particular situation offers no clearcut distinction between right and wrong, and that it is sometimes impossible to do that which is good without doing or suffering something that is bad, the performance of what under other circumstances might be evil is then right, not wrong. Moral rules are often in conflict, and a moral man may have to choose between telling the truth or lying to do good. If the greater good is right, the lie—otherwise bad but now necessary to the good—is also right. It is at least questionable whether an ambassador (or a spy) who lies, when necessary, for the good of his country, merits moral censure.

The gravity of the dilemma is compounded (a) by the failure of law, in general, to protect men from the non-legal consequences of legal action, and (b) by the deliberate use of the law, on occasion, to expose men to non-legal sanctions against actions heretofore beyond the pale of legal penalty.

Appeal to the Fifth Amendment may protect a man from certain legal penalties ensuing from his refusal to answer questions that might tend to incriminate him, but it provides no legal protection against the economic or social consequences of his refusal. Thus a man who invokes the Fifth Amendment may find himself without a job and with little likelihood of obtaining one,

<sup>5</sup> For a contemporary view, see the argument by Peter Viereck in *Conservatism Revisited* (New York, 1949), pp. 10–11; but note his argument for the reverse position, pp. 20–21.

<sup>6</sup> Henry David Thoreau, "Civil Disobedience," in *Walden and Other Writings*, ed. Brooks Atkinson, Modern Library ed. (New York, 1937), p. 646.

at least in his established field of endeavor. He may find himself and his family ostracized as well as impoverished. He may discover that his reputation and good name have been sacrificed on the altar of conscience. He may begin then to understand the element of truth in Machiavelli's cynical advice to one who would win popular approval and support—that it is often better to *seem* good than to *be* good. And he may learn, perhaps when it is too late, the awful significance of the words of Sophocles' Chorus:

Tomorrow and for all time to come,  
As in the past,  
This law is immutable:  
For mortals greatly to live is greatly to suffer.<sup>7</sup>

Since it is the rare man who is willing to suffer greatly, the dire non-legal consequences of permissible legal action impose pressures that make difficult a right resolution of the moral dilemma. The citizen may obey the law not because he conceives it right to obey but because he fears the consequences of disobedience. This introduces a new element into the problem, namely, the question of the moral obligation of the state to protect a citizen from social punishment when certain legal authorities or *private* powers disapprove his act, however unobjectionable it may be on strictly legal grounds. Does the state have an obligation to guarantee to a citizen not merely the constitutional right to refuse to answer questions with an incriminating bias, but also the legal right to protection from non-legal sanctions attendant upon such refusal?

It would be futile to deny that an affirmative answer to this last question leads into patent (and perhaps insuperable) difficulties, not the least of these being the dangers involved in unduly extending the sphere of state intervention. But the question of the state's obligation is not for this reason to be avoided. For if the Constitution is the final legal norm from which all subsidiary law derives its validity, then the protection of the Constitution must be made real and not simply formal. This can be achieved only when (a) the Constitution is applied not merely against *de jure* governments but against citizens and groups who comprise *de facto* or private governments that proclaim "laws" and impose sanctions, and (b) the laws of the state and the actions of governmental authorities conform both to the letter and to the spirit of the Constitution, i.e., they avoid so maltreating men as to expose them to non-legal sanctions where no legal punishments are or have been intended.

These principles, especially the former, may appear at first blush to embody a revolutionary proposal. Clearly, they require distinctions which are not likely to admit of mathematically precise application. On the one hand, there are certain social and economic consequences of lawful action which the state cannot prevent or eliminate even if it seeks to do so—e.g., the suspicion in the minds of some people that a man acquitted of a charge of rape or murder is nonetheless

<sup>7</sup> "Antigone," in Sophocles, *The Theban Plays*, trans. E. F. Watling, Penguin ed. (London, 1947), pp. 142-43.

guilty.<sup>8</sup> On the other hand, there are certain cases in which the state should not intervene even if it could do so—e.g., the dismissal from the police force of an officer who refuses, despite the direct and obvious nexus between the information sought and the responsibilities of his position, to testify even before a non-legal but properly constituted tribunal of his superior officers concerning his alleged collaboration with dope-peddlers. But between these two extremes there still remains a vast intermediate range of instances in which governments may properly undertake to protect men from non-legal sanctions which in effect invalidate a constitutional or legal right. In line with this principle—a principle long grasped by some of our more perceptive legal and political thinkers<sup>9</sup> and incorporated in considerable measure into American constitutional law by the decision of the Supreme Court in *United States v. Classic*<sup>10</sup> more than a decade ago—governments have in fact sponsored legislation which, like the Wagner Act, prevented an employer from dismissing an employee for joining a labor union, or which, like fair employment practices acts, seeks to curb certain discriminatory practices by private powers. And it is in line with this same principle that governments might well prevent a university from dismissing a member of its faculty if his sole offense is that he has invoked the protection of the Constitution in refusing to answer questions put to him by a legislative investigating committee. I do not mean to imply by this that a refusal to testify under protection of the Fifth Amendment is necessarily to be condoned. But it ought not to be automatically condemned; for a decision not to testify may involve profound and complex ethical as well as legal considerations to which automatic condemnation and consequent social punishment are blind, not to mention the fact that they violate the spirit of the constitutional amendment itself.

Similar considerations support the proposition that legal authorities are to be condemned when they circumvent, and indeed violate, the Constitution in employing indirect (non-legal) sanctions to coerce an individual in cases where the law itself does not give them that power. Consider, for example, the not infrequent behavior of a congressional investigating committee. If the primary purpose of—and warrant for—such a committee is to gather information as a

<sup>8</sup> But if in such an instance the state cannot prevent moral disapprobation, and even perhaps the imposition of social and economic sanctions, by those whose sentiments may have been outraged, it can at least assume the obligation not to leave the acquitted man impoverished if in establishing his innocence he has been compelled to exhaust his funds.

<sup>9</sup> See, for example, Morris R. Cohen, *Law and the Social Order* (New York, 1933), especially pp. 41–68, 102–11; Edgar Bodenheimer, "Power and Law: A Study of the Concept of Law," *Ethics*, Vol. 50, pp. 127–43, at pp. 133–35 (Jan., 1940); Alexander H. Pekelis, *Law and Social Action*, ed. Milton R. Konvitz (Ithaca, N. Y., 1950), pp. 91–127; and Robert L. Hale, *Freedom through Law* (New York, 1952). On the mutual dependence of legal and non-legal social controls, there is, of course, a vast literature—e.g., the writings of Ihering and Gierke, Edward A. Ross and Max Weber, Robert M. MacIver and Bertrand Russell. Some of the juristic thinkers are considered in Julius Stone, *The Province and Function of Law*, 2d printing (Sydney, Australia, 1950), Chs. 11 and 24.

<sup>10</sup> 313 U.S. 299 (1940). See further the cases and discussion in Robert K. Carr, *Federal Protection of Civil Rights* (Ithaca, N. Y., 1947), Ch. 4.

basis for recommending legislation, then a private or closed hearing would normally enable it to achieve this end without exposing the citizen to non-legal penalties. If the committee is not only indifferent to this last consideration but, through a second and open hearing that adds nothing but publicity to answers already vouchsafed or refused by the witness, deliberately contrives a situation that brings social and economic sanctions into play, it in effect converts such non-legal sanctions into indirect forms of legal action. This all too common effect of the sustained congressional investigations into the loyalty of university professors and others is a calculated perversion of power that raises serious questions concerning the justice of governmental behavior.

What is involved, consequently, is not only the obligation of the citizen to the state but also the responsibility of the state—certainly, at least, of a constitutional state—to the citizen.

The dilemma of the citizen, then, may derive not simply from a conflict between the commands of the state and the dictates of his conscience. It may emerge as well from the incompatibility of an enacted law or of the acts of governmental authorities or of private powers with the constitution of the state, understanding by the constitution not simply the written rules that comprise a revered document but the logic or underlying principle of the system which the Constitution (written and unwritten) is supposed to represent. In this circumstance the dilemma of the citizen takes another, and perhaps more aggravated, form than Antigone's moral problem; for the citizen here believes that he is being loyal to the Constitution in rejecting the obligation to obey the law (or the bidding of a legal authority). He is not pitting simply his conscience against the law but also the law against the Constitution. He is asserting that in defending the fundamental law he is being more loyal than those who would compel him to violate it. He invokes not (or not merely) the Fifth but the First Amendment, which, while thus far rejected by the courts in such cases, nevertheless appears to him the proper ground on which to take his stand.<sup>11</sup>

It is easy to say, and to say rightly, that there are legal mechanisms for the resolution of a conflict between an enacted law (or the bidding of a legal authority) and the Constitution, and that it is not the business of the citizen to displace such mechanisms by self-arrogation. But such mechanisms—e.g., the Supreme Court—do not always restrict social or economic or religious power groups from attaching severe penalties to action that is legally right. What is legally right may be deemed socially or economically or morally wrong. Consequently, the moral question for the citizen remains, all the more so since there is no legal

<sup>11</sup> It is not without interest that even a near-absolutist like Hobbes would in the immediate circumstances seem to sanction a man's refusal to obey. "No man," Hobbes declared, "is tied by any compacts whatsoever to accuse himself, or any other, by whose damage he is like to procure himself a bitter life . . . yet in a public trial he may, by torture, be forced to make answer. But such answers are no testimony of the fact, but helps for the searching out of truth; insomuch that whether the party tortured answer true or false, or whether he answer not at all, whatsoever he doth, he doth it by right." *De Cive*, II, 19.

machinery to prevent coercive action by non-legal power groups, by *private* governments.

### III

What, then, is the citizen to do? If he obeys the law, he may violate his conscience. If he obeys his conscience, he may violate the law. If he obeys his conscience and seeks to vindicate his alleged disobedience by invoking the protection of the Constitution, he exposes himself to social or economic sanctions that are sometimes more powerful than the legal penalties that might have been applied had he not claimed that protection. The state, where it is not itself the deliberate *provocateur*, is indifferent to his fate in this last circumstance. Should he then be indifferent to the state?

The answer of the state, at least, is clear. It is no. There can be no law to which obedience is optional, no command to which the state attaches an "if you please." Consequently, there can be no legal right to disobey the law. Nor will the state, customarily, recognize a moral claim to disobedience. It may be urged that conscientious objectors often escape the prescribed legal punishments by appealing to a higher law. But this is only half true. For they escape such consequences only because a court or a statute admits such a claim as a legal one. The state, so to speak, incorporates the higher law into the positive law; it proclaims that in such cases it is lawful for some men to follow a certain course of action denied to the populace at large.

The state, then, demands obedience to its laws; and while it employs (or can employ) a number of different arguments to vindicate this claim,<sup>12</sup> its primary justification is the ground that such obedience is essential to the maintenance of the social order. Order, it is said, is better than disorder; and if men are free to set aside the laws of the state whenever they find them in conflict with their private interests, particular religion, or individual sense of morality, anarchy will result. Disobedience to the laws, therefore, involves an attack on the state itself. It is an act of rebellion, an attempt to subvert the foundations of the entire system of order which it is the business of the state to secure. This is why Socrates rejected Crito's suggestion that he flee to escape execution. What reply could he make, Socrates asked Crito, if the Athenian government should come to him and say:

Tell us, Socrates, . . . what are you about? are you not going by an act of yours to overturn us—the laws, and the whole state, as far as in you lies? Do you imagine that a state can subsist and not be overthrown, in which the decisions of law have no power, but are set aside and trampled upon by individuals? . . . Tell us,—What complaint have you to make against us which justifies you in attempting to destroy us and the state? . . . And because we think right to destroy you, do you think that you have any right to destroy us in return, and your country as far as in you lies?<sup>13</sup>

<sup>12</sup> Cf. T. H. Green, *Lectures on the Principles of Political Obligation* (London, 1924 ed.); J. P. Plamenatz, *Consent, Freedom and Political Obligation* (London, 1938), Chs. 1-4; Max Weber, *The Theory of Social and Economic Organization*, trans. A. M. Henderson and Talcott Parsons (New York, 1947), pp. 324-73, 382-92; and Ernest Barker, *Principles of Social and Political Theory* (Oxford, 1951), Bk. V.

<sup>13</sup> *Crito* (trans. Benjamin Jowett), 50-51.

He could, Crito admitted, make no answer. Since by his failure to emigrate Socrates had agreed to abide by the laws, he could not now disavow that covenant. He could not through disobedience seek to overthrow the state.<sup>14</sup>

Clearly there is merit in this position. Order is a necessary condition to the achievement of larger values; and if order is to be maintained there must be power, and a general readiness on the part of men to abide by the commands of power. But the merit is a relative one. Order in itself is not a *sufficient* condition for the realization of those values, and a government which merely secures order without, or at the expense of, those larger values, lacks moral vindication. Under such circumstances, it might well be argued that anarchy or disorder is to be preferred—not for its own sake but for the opportunity it provides to recreate the requisite conditions for a better human existence. Thus, while order is good, it is not necessarily the highest good. We must still distinguish the just or the decent order; we must still recognize that order is but a means to some larger end.<sup>15</sup> Epictetus may command our sympathy when he observes: "Did heaven owe me perfect parents?—No; it owed me parents." But, as Aristotle reminded Plato, it is surely a shallow philosophy that ignores the vast difference between a family and a state. And if we are to adhere to the principle of democracy, then not order but a certain kind of order—one based on opinion, on consent—constitutes the necessary framework of justice.

This being so, it is hard to see what absolute moral claim democracy can make on those who withhold their fundamental consent. Anarchists, communists, fascists, and others who deny—not through revolutionary action but through civil disobedience—the authority of the social order which democracy seeks to maintain, appeal instead to some alternative principle of justice. If they obey the laws of democracy, they do so for reasons of expediency, not of principle. It is true that fascists like Lawrence Dennis who affirm fidelity to the notion that might makes right are by this standard logically committed to the acceptance of democracy where it prevails; for democracy by virtue of the fact that it prevails has might and is therefore "right."<sup>16</sup> But democracy is not responsible for the confused arguments of its opponents. Nor can it without denying its very essence stand on any principle other than that of generalized consent. Consequently, democracy must recognize that for men who reject its values and refuse their assent to its system of order the dictates of demo-

<sup>14</sup> The fact that Socrates was in prison at the very moment he was thus arguing against Crito's plea that he disobey the law, reinforces the contention in note 1 above that Socrates did not actually accept this position; that he was in fact prepared to yield only a qualified obedience to the laws.

<sup>15</sup> For this reason skeptics have put the argument for social order not in terms of right but in terms of convenience. The difficulty here, of course, is that it then becomes "right" to disobey whenever the social order ceases to be convenient.

<sup>16</sup> I do not mean to imply that Mr. Dennis accepts the logic of his own position. See my *Patterns of Anti-Democratic Thought* (New York, 1949), Ch. 3. For the absurdity of the "principle" that might makes right see the classic argument in Rousseau, *The Social Contract*, Book I, Ch. 3. Compare, however, Spinoza, *Tractatus Theologico-Politicus*, Ch. 16, and *Tractatus Politicus*, Chs. 2-4.

cratic government appear as the commands of an illegitimate power. And where that power can be defied, especially with some expectation of success, opponents of democracy will claim a moral right to do so. In this regard they claim no more, on purely formalistic grounds, with respect to democratic systems than democrats do with respect to oligarchical systems. Hence the problem for democracy is not that of validating its own claim to their obedience, but that of allowing them that degree of civil disobedience which will balance the need for its own institutional preservation with its ultimate values, especially the provision for maximum free play for the individual conscience. Democracy can, to be sure, offer an opposing value judgment; but it cannot—without invoking intuition or divine or natural sanction or the proposition that might makes right—*prove* that its value system is truly best. Consequently, while democracy must, in defense of its own values, reject the scheme of justice proposed by the anti-democrats, it must at the same time face the uncomfortable fact that on intrinsic grounds it lacks an absolute moral standard in terms of which it can justly disavow the right of civil disobedience to those who deny the validity of the social order.<sup>17</sup>

It may of course be argued that men who reject democracy should leave the state, that if they stay, as Socrates stayed, they assume the obligation to obey its laws.<sup>18</sup> And we have, in point of fact, instances in our time in which the right of egress has been exercised—e.g., T. S. Eliot, George Santayana, and Ezra Pound; even, perhaps, Alexander Berkman and Emma Goldman, who rejoiced when they arrived (albeit after an unintended and involuntary voyage) in Lenin's Russia. But apart from the practical objections that the state does not always grant the right of egress and that there may not be another state which embodies the "right" political system and social order—witness the tragic tale of Emma Goldman's disenchantment with Russia<sup>19</sup>—I fail to comprehend the moral character of this solution. I recognize that while on intrinsic grounds democracy affirms that each man's conscience is "right," it must set instrumental limits on this "right"; that, operationally speaking, the notion that each man is entitled to have any conscience he wants does not imply that he has a right to subordinate the laws to his conscience. Nevertheless, if democracy insists that all men are subject to the laws, it must also insist that all men are

<sup>17</sup> Some writers have sought in intuition or in natural law an "objective" criterion in terms of which they could show that democracy is intrinsically and not merely instrumentally best—e.g., Walter T. Stace, *The Destiny of Western Man* (New York, 1942) and Mortimer J. Adler and Walter Farrell, "The Theory of Democracy," *The Thomist*, Vols. 3-7 (July, 1941-Jan., 1944)—but all such efforts rest ultimately on certain assumptions which cannot be *proved*. See further my "Power, Law, and Freedom of Inquiry," in *Educational Freedom in an Age of Anxiety*, ed. H. Gordon Hullfish (New York, 1953), pp. 52-69, at pp. 59-65.

<sup>18</sup> For a recent (though qualified) restatement of this position, see Gray L. Dorsey, "The Necessity of Authority to Freedom," in *Freedom and Authority in Our Time*, ed. Lyman Bryson *et al.* (New York, 1953), pp. 317-33, at pp. 329-31.

<sup>19</sup> See her autobiography, *Living My Life*, 2 vols. (New York, 1931), Vol. 2, pp. 726-927.

protected by the laws, that all men have an equal right (say) to life and liberty. A majority under this principle has no absolute moral justification to limit this right except where it has secured the consent of the governed—not, of course, in the sense that consent is given to each particular law, but in the sense that generalized consent or consensus is accorded the system under which that majority has come to power. This being so, what moral principle justifies a democracy in going outside the area of consent to deny the right of civil disobedience to a recalcitrant individual or minority? What principle other than force gives a democratic people the right to exclude those who reject democracy from that portion of the earth possessed by the democrats? Clearly, the argument asserts only that the bulk of the people regard a particular system as just, and that those who do not accept this valuation shall nonetheless be required to submit.<sup>20</sup> But if consent is acknowledged to be the ultimate source of authority, the appeal to force leaves unanswered (where it does not negate) the question of justice—whether that system is good or, indeed, best. This is not to deny that even the *best* system may depend on a measure of force to maintain itself; it is only to affirm that the resort to force, even when successful, cannot of itself establish that a system is best.

I return, therefore, to the position that where consent is withheld from the entire system of order itself, democracy's claim to obedience with respect to such dissidents rests on power, not on a universal morality. Consequently, democracy cannot insist, without denying its own framework of justice—the principle of consent—that such individuals or groups obey the law. In such cases it can only resort to the rule of expediency referred to above—namely, that of disallowing only that expression of the individual conscience which is incompatible with democracy's own ultimate values and institutional preservation.<sup>21</sup>

<sup>20</sup> This was clearly perceived by Justice Holmes, who with typical frankness wrote to Frederick Pollock: "I do think that man at present is a predatory animal. I think that the sacredness of human life is a purely municipal ideal of no validity outside the jurisdiction. I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of worlds I see no remedy except force." *Holmes-Pollock Letters*, ed. Mark DeWolfe Howe, 2 vols. (Cambridge, 1942), Vol. 2, p. 36. And again, in letters to Harold J. Laski: "... all law means I will kill you if necessary to make you conform to my requirements." "... there is no superior arbiter—it is one of taste—but when men differ in taste as to the kind of world they want the only thing to do is to go to work killing." *Holmes-Laski Letters*, ed. Mark DeWolfe Howe, 2 vols. (Cambridge, 1953), Vol. 1, pp. 16, 116.

<sup>21</sup> I am not unaware of the objection that the state cannot regard as irrelevant the effects of such disobedience on others. There is an immense difference, it is said, between disobeying the law when it conflicts with my principles or preferences if such disobedience does not injure others, and disobeying the law at the cost of injury to others. This argument has great force, and in general I think it proper that men should obey even unjust laws when disobedience has the effect of worsening, rather than improving, the situation. But the argument seems to me also to beg two of the very questions at issue: whether the law (and more important the system itself) does in fact injure others, and whether the numerical calculus is a proper principle of justice. In disobeying the law under the circum-

## IV

Of those who accept democracy as the theoretically or practically best political order, yet contemplate disobedience to the law, two classes of citizens must, I think, be distinguished. One denies the intrinsic merit or rationality of the law itself; the other challenges as well the claim of the particular form of state enacting the law to be called a democracy.

For this latter group, democracy is good but the state is not democratic; hence with respect to the principle of political obligation their attitude toward the political order is not essentially different from that of those who accept the state as democratic but deny that democracy is good. They not only argue, with Aristotle,<sup>22</sup> that a government democratic in form may be oligarchical in fact; they insist further that a careful examination of the American political system discloses it to be formally insufficient as well. From their point of view, the American Senate (based on a quota system that does violence to the principle of popular representation), the Supreme Court (with its power of judicial review), the staggered system of elections (which not infrequently prevents a popular majority from becoming a legal or controlling majority), the involved apparatus that separates and checks powers so as to deadlock no less than to balance them, the amending clause (which puts the Constitution itself beyond the reach of normal majorities)—all these and more (e.g., suffrage restrictions, gerrymandering, and the like) are but devices to hinder and at times effectively to block the translation of public opinion into public policy. Even the sacred rules of the game may be changed by the group in power when those rules no longer operate to that group's advantage. This is amply evidenced by the history of the Supreme Court with respect, for example, to the Fourteenth Amendment.

Knowing these things (or feeling this way), a citizen confronted by what he conceives to be a morally reprehensible law (or an action under that law) has difficulty in accepting the argument that he should express his disapproval not through civil disobedience but through the regular legal and political channels available to him. In his view, it is simply not true that these legal and political channels *are* available to him, that is, available in the way that democracy ideally requires. Such a citizen might agree that all human contrivances are imperfect. He might admit, too, that it is great folly, if not fanaticism, to insist on the perfectibility of political institutions regardless of consequences. Nevertheless, if it is not simply to evoke his blind acquiescence, a democratic system must above all be democratic; it must embody to a major degree elements of that

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stances cited here, the dissident takes the position that it is the law (and the system of order as well) which inflicts the injury, and that by disobeying the law he is calling the attention of the people to the injustice of the state. Moreover, if justice involves injury to others, then it is "just" that such injury be inflicted upon them. (In this event, of course, the dissident might well contend that the injury is apparent rather than real.) In any case, the objection does little more than return us to the fundamental issue at stake: which of the conflicting value systems is truly best or just?

<sup>22</sup> *Politics*, 1292b.

just political order which it purportedly represents. If it falls so far short of this ideal as to foreclose any real possibility of correcting legislative evils by (say) normal majorities, if the political mechanism obstructs public opinion by institutionalizing various forms of minority control, it is in fact not a democracy at all. It is a perverted form of democratic government and, as such, it is bound to rely on unjust laws.<sup>23</sup>

To the extent that there is substance in this view—in the sense that the indictment of institutional arrangements is sound—men committed to democracy are under no moral obligation to obey “undemocratic” laws. Those who place a different weight on the shortcomings of the system may deplore their judgment in this regard, but if the shortcomings are serious and real they cannot in democracy’s name be asked to give absolute obedience to a less-than-democratic (and to this degree undemocratic) system. Like the good churchgoers of Concord who were taken ill when Thoreau asked them also to read the Bible, protagonists of the system might well be discomfited and silenced when confronted, for instance, by a Negro suffering political and educational discrimination in one of our states, or an interned Nisei, who to justify an act of civil disobedience asks but a single question: “Is this the content of democracy?”

## V

We come, finally, to those democrats who accept the system as essentially democratic and who are prepared, on the whole, to obey the laws. They understand that government by consent means consent not to each particular law but to the entire system of order itself, and ultimately to the idea of justice which that system represents. For the sake of the greater good secured by that system through its government and its laws, they accept specific enactments which they otherwise disapprove. They obey not necessarily because they think that the law is right, but because they think it right to obey the law.<sup>24</sup>

For this reason they reject the individualistic ethics of a Protagoras, who would justify disobedience to the law provided you can get away with it, or of a Harold Laski or of a Thoreau, who would demand of each law that it provide “moral adequacy,”<sup>25</sup> or of other legal and political theorists who would measure

<sup>23</sup> There is substantial though not complete truth in Aristotle’s dictum that “a well-formed government will have good laws, a bad one, bad ones.” *Ibid.*, 1282b.

<sup>24</sup> See R. M. MacIver, *The Modern State* (London, 1926), p. 154. This is not to argue that reason is the only, or the decisive, factor in leading men to obey laws which they regard as unjust. Habit, indolence, deference, fear, and the like, are in most cases the crucial determinants of obedience. See James Bryce, *Studies in History and Jurisprudence* (New York, 1901), pp. 467 ff., and R. M. MacIver, *The Web of Government* (New York, 1947), pp. 73–81.

<sup>25</sup> “My problem,” Laski wrote to Holmes, “is to take away from the state the superior morality with which we have invested its activities and give them [*sic*] back to the individual conscience.” *Holmes-Laski Letters* (cited in note 20), Vol. 1, p. 23. See further his *Authority in the Modern State* (New Haven, 1919), Ch. 1, especially pp. 43, 46, 55; *A Grammar of Politics*, 4th ed. (London, 1938), Part I; and *Studies in Law and Politics* (New Haven, 1932), Ch. 11. So also Thoreau: “Must the citizen ever for a moment, or in the

the obligation of a citizen to the law in terms of the degree to which it serves some other end. If a man's loyalty is to the system, then obedience cannot be determined solely by immediate approbation. He cannot attempt to evaluate the law simply in terms of its expressed content;<sup>26</sup> nor can he separate laws from their cumulative total effect on the assumption that disobedience to a particular law leaves unaffected the system of law. Very few laws are accepted unanimously, and if the considerable number of citizens who dislike a law are literally free to disobey it, the state and the social order can hardly be expected to survive. A plea for total disobedience, or for the right of total disobedience, logically entails not a state at all but anarchy.

Does it follow that the citizen who admits his obligation to obey the laws must obey *all* laws *always*? Is one who rejects the extreme individualism of a Laski compelled to accept the extreme absolutism of a Hegel,<sup>27</sup> or the near-absolutism of a Hobbes<sup>28</sup> or of a John Dickinson, who join with Socrates of the *Crito* in entering an affirmative answer? If a law is disobeyed, they tell us, the social order will collapse. In their view, each law is an integral part of a coherent, corporate body of law, which in turn sustains society. Consequently, disobedience to a law is a challenge to sovereignty itself. As Dickinson put it: "It is not a question of a bare conflict between the individual and the sovereign; the conflict must be regarded as rather between the individual and all that the sovereign stands for." In disobeying the sovereign we bring "dominantly into the foreground the large issue of the desirability of preserving public authority and civil society itself." In disobeying the sovereign we strike at just this essential method of civil society.<sup>29</sup>

This is a plausible argument. It avoids the individualistic fallacy by emphasizing the need for order and the role of law in maintaining that order. But it is not without fallacies of its own. What holds society together, for example, is not simply law (and perhaps not even law) but the customs and moral codes, the sentiments, of the people. The classic formulation of T. H. Green

least degree, resign his conscience to the legislator? Why has every man a conscience, then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, as much as for the right. The only obligation which I have a right to assume is to do at any time what I think right." Thoreau, "Civil Disobedience" (cited in note 6), pp. 636-37.

<sup>26</sup> This is convincingly demonstrated in Felix S. Cohen, *Ethical Systems and Legal Ideals* (New York, 1933), pp. 62-65.

<sup>27</sup> There is, however, a certain ambiguity in Hegel's absolutism, stemming from his apparent insistence that Antigone in refusing to obey the law of the state was both right and wrong. Cf. Georg W. F. Hegel, *The Phenomenology of Mind*, trans. J. B. Baillie, 2 vols. (New York, 1910), Vol. 2, pp. 453 ff., and Georg W. F. Hegel, *Philosophy of Right*, trans. T. M. Knox (Oxford, 1942), pp. 3-10, 100, 114-15, 165-73, and the relevant translator's notes on pp. 299, 301, and 351. Hegel's subordination of the state (the highest reality within the realm of right) to philosophical truth (the highest reality within the whole system) is emphasized in Herbert Marcuse, *Reason and Revolution* (New York, 1941), p. 178.

<sup>28</sup> For Hobbes' denial that political obligation requires an absolute obedience to all laws, see for example *De Cive*, VI, 13; VIII, 1; and XV, 18.

<sup>29</sup> "A Working Theory of Sovereignty" (cited in note 1), pp. 50-51.

still applies: it is not the state that produces cohesive will; it is will that creates and sustains the state.<sup>30</sup> Political loyalties and political obligations do not exclude other loyalties and other obligations, and it is the meaning of democracy that it does not seek to command a monopoly of man's allegiances. Democracy seeks to root its fundamental unity not in the power of the state but in the sense of common interest that sustains but does not obliterate the vital differences among men.<sup>31</sup> So long as these differences are admitted, with respect not simply to things that do not matter much but to things that touch the very heart of the existing order as well,<sup>32</sup> the democratic state can find its essential solidarity not in the structure of law but in the minds of men.

Nor does the absolutist position rest on solid ground when it assumes that all laws form a coherent unity, so that disobedience to a particular law necessarily involves the destruction of the entire system of law. Evasion of the law is a normal concomitant of all legal systems, and it is doubtful that the existence of jails constitutes sufficient proof of the breakdown of the system. We are all familiar with the propensity of people not in jails to disobey laws that inconvenience them—e.g., traffic regulations, income tax laws, and prohibitions on gambling and on the traffic in liquor and women. Police and other political officials do not enforce all laws equally and at times they conspire with people who seek to disobey them. Governments too evade or disobey the law—witness the oft-cited examples of Southern states that have largely ignored the Fourteenth and Fifteenth Amendments to the American Constitution; of the many Congresses that have failed to apply the constitutional provision (Sec. 2, Amend. XIV) requiring that the representation of such states in the House of Representatives be reduced; and of the refusal of the Congress in 1920 to carry out the required reapportionment of the House of Representatives. Despite these and other acts of disobedience, the system of law has not, I think, disappeared. Clearly, *some* laws are not essential to the maintenance of the social order.

If, therefore, the state is not equivalent to the whole of the social order, and if all laws are not integrated into a single coherent unity, disobedience to a particular law need not imply an attempt to overthrow the political system or the social order itself. To Dickinson's charge that the conflict is between the individual and all that the sovereign stands for, we must reply: the conflict is also between the sovereign and all that the individual stands for. It may even, in fact, be between the actual sovereign and all that the ideal sovereign stands for. In

<sup>30</sup> See also Elijah Jordan, *Theory of Legislation; An Essay on the Dynamics of Public Mind* (Chicago, 1952).

<sup>31</sup> Cf. MacIver, *The Modern State*, p. 482; Dorothy Fosdick, *What is Liberty?* (New York, 1939), p. 128; and the writer's *Patterns of Anti-Democratic Thought*, pp. 204-6, 247-48.

<sup>32</sup> As Mr. Justice Jackson so aptly put it in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). See also the interesting argument of Charles R. Nixon, "Freedom vs. Unity: A Problem in the Theory of Civil Liberty," *Political Science Quarterly*, Vol. 68, pp. 70-88 (March, 1953).

these two points, I believe, we can find a sufficient justification for *some* acts of civil disobedience.

Consider, first, what is involved when the state demands that an individual obey not his conscience but the law. In a general sense, it appears to ask only that he recognize the necessity of compromise if men are to live together. But when the issue is joined so that men question the justice of the terms on which they are asked to live together, the state requires far more: it demands nothing less than that he submit to a civil theology.<sup>33</sup> For if action contrary to conscience is immoral, the state by insisting that the individual follow not his conscience but a command of the state contrary to his conscience thereby insists that he act immorally. Since the state will not admit that its command is immoral, it must—if it is to vindicate its claim to obedience—argue that the judgment of the individual conscience is wrong, and that by acting instead according to the state's judgment of what is right the individual will realize his true morality, his true freedom. There are many who still take seriously this teaching of Rousseau, Hegel, and Bosanquet. Nevertheless, the notion that the state embodies our real will, our true morality, our true freedom, as against our actual will, which is said to represent a false morality, is incompatible with the democratic principle. For democracy, if I understand it correctly, stands above all else for a method whereby men can resolve peacefully which of competing moralities shall temporarily prevail. It cannot—if it is to remain a democracy—maintain that it has discovered the true morality which shall henceforth bind all men. Yet when the government of a democratic state demands of a citizen that he surrender his conscience to the state—as it demanded of Jehovah's Witnesses that they (or their children) salute the flag—it in effect demands that he submit to the true morality. From this point of view, imprisonment for civil disobedience becomes, paradoxically, a prolonged appeal to the prisoner's conscience, detention being but a means of permitting his conscience time in which to adjust,<sup>34</sup> after the state has by putting him in prison already denied the validity of his conscience.

<sup>33</sup> This, indeed, is what Lincoln frankly urged in his address in 1838 on "The Perpetuation of Our Political Institutions": "Let every American, every lover of liberty, every well wisher to his prosperity, 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. . . . let every man remember that to violate the law, is to trample on the blood of his father, and to tear the character 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." *Abraham Lincoln: His Speeches and Writings*, ed. Roy P. Basler (Cleveland, 1946), pp. 80–81.

<sup>34</sup> In employing here a modified phrase from Professor Stone, *The Province and Function of Law* (cited in note 9), p. 228, I do not mean to associate him with the doctrine in the text.

To escape this dilemma democracy must deny the theological sanction. It cannot assume what Eric Voegelin suggests the Oxford political philosophers have assumed: namely, that by the mystery of incarnation the principles of right political order have become historical flesh more perfectly in their country than anywhere else at any time.<sup>35</sup> It must recognize that the political order is not perfect and that the laws are not always just. It must affirm no more than that a law is law not because it is absolutely good or right but because a legal majority has decreed it. Democracy would, of course, insist that it is right for the majority to have this power, and that men should respect this right of the majority as a necessary condition of democracy. But if it is true that the majority may act wrongly—i.e., affront on intrinsic or instrumental grounds the notion of justice held by a dissenting individual or minority—such insistence leads to the paradoxical principle that while the system and the laws that institutionalize that system are just, particular laws emanating from the system may be wrong and therefore unjust. A just system may produce unjust laws.

Now the Aristotelian question—whether a good man can always be a good citizen—has traditionally formed the basis for the problem of political obligation. But if there is validity to the conception of citizenship that I have argued here, the mark of the good citizen—at least in a democracy—is not loyalty to the laws but loyalty to the system, to the principle of democracy itself. The good citizen is obligated not to the sovereign but to all that the sovereign stands for.<sup>36</sup> Consequently, law can command his allegiance not because it is law but because it serves something that is good, because it respects the system of democracy and the purposes for which the democratic state exists.<sup>37</sup> If he obeys simply because it is law, he worships means, not ends; and this is surely a perversion of purpose.

When, therefore, a government holding office and trust under that system so acts—whether directly through its laws or indirectly through non-legal sanctions and the cultivation of a climate of opinion characterized by suspicion and fear—as to deny or to threaten the integrity of the system itself, it creates a situation in which men loyal to democracy may be compelled to defend it against the laws.

It has been urged, not perhaps without reason, that such defense should look

<sup>35</sup> Eric Voegelin, "The Oxford Political Philosophers," *The Philosophical Quarterly*, Vol. 3, pp. 97-114, at p. 100 (April, 1953).

<sup>36</sup> This is not, perhaps, inconsistent with Aristotle who, while he defines a citizen as "one who obeys the magistrate" (*Politics*, 1277a), also affirms that the one care common to all the citizens—that which *describes* a citizen—is "the safety of the community" (*ibid.*, 1276b).

<sup>37</sup> Despite certain phrases in which Professor Barker seems to argue that obedience to the law is the highest political obligation (*op. cit.*, p. 194), I take his general position to be in accord with the proposition affirmed here: that it is the state, not the law, which merits that obedience. Clearly, he concurs with the further judgment that since the state is less than society, obedience to law must be subordinate to obedience to right, the highest moral obligation. *Ibid.*, pp. 193, 221 ff.

first to the democratic processes of persuasion and election.<sup>38</sup> But where it is precisely these processes that the laws attack, where the incursions of government are upon freedom of opinion and the elements of democratic procedure, this may well prove a vain hope. Men are not without warrant in saying today what men have all too often had to say before: the times are "out of joint." Once again, this is a moment when the ordinary rules of decency are to some men in power apparently unknown, when some men cloaked in the sanctity of the law seek to exorcise the spirit of free inquiry.<sup>39</sup> Under such circumstances, it may well be that obedience to democracy can best, and perhaps only, be served by disobedience to the laws. It may well be that men of moral sensitivity and courage will have to say, with Thoreau: "They are the lovers of law and order who observe the law when the government breaks it."<sup>40</sup>

## VI

Whether laws prescribing affirmations of loyalty, or sustaining legislative inquiries into one's past or present beliefs and associations, or proscribing the expression of revolutionary ideas, are of this variety, each man must judge for himself. If he dislikes such laws but does not regard them to be a crucial violation of or threat to democracy, he will obey them. If, however, he views such measures as destructive of the very principles that constitute the system to which he has given his allegiance and which he is pledged to uphold, he may see no moral alternative to disobedience.<sup>41</sup> In the judgment of others, his conscience may be wrong; but if he is to retain his dignity as a man he must act upon it. He may fail by such action to impress the value of his idea on others, but in no other way can he hope to correct the tragic lesson of history which "shows that good causes are more often defeated by negligence in the pursuit of the right than by positive forces of evil."<sup>42</sup>

So long as a man comes to this decision honestly, in accord with moral prin-

<sup>38</sup> So Lincoln in the address cited earlier (note 33, above, Basler, p. 81: ". . . bad laws, if they exist, should be replaced as soon as possible, still while they continue in force, for the sake of example, they should be religiously observed."

<sup>39</sup> It is well to recall the insight of Spinoza: "All men are born ignorant, and before they can learn the right way of life and acquire the habit of virtue, the greater part of their life . . . has passed away." Spinoza, *Tractatus Theologico-Politicus*, trans. R. H. M. Elwes, Ch. 16.

<sup>40</sup> "Slavery in Massachusetts," in *op. cit.*, p. 669. Compare the principles and grounds of justifiable disobedience in Franz L. Neumann, "On the Limits of Justifiable Disobedience," in *Conflict of Loyalties*, ed. R. M. MacIver (New York, 1952), pp. 49-56.

<sup>41</sup> Apart, of course, from the submission that looks to God. So Hobbes argued (*De Cive*, XVIII, 13): "Must we resist princes, when we cannot obey them? Truly, no; for this is contrary to our civil covenant. What must we do then? Go to Christ by martyrdom. . . ." And so the author of the *Vindiciae contra tyrannos* (trans. as Hubert Languet, *A Defence of Liberty against Tyrants*, ed. Harold J. Laski [London, 1924], p. 210), who, in the silence of the magistrates and the failure of men to run away, insisted that "there are no other weapons to be used, but bended knees and humble hearts."

<sup>42</sup> M. R. Cohen, *The Meaning of Human History* (La Salle, Ill., 1947), p. 296.

ciples to which he is firmly committed, and so long as his act of disobedience is calculated—taking the whole situation into view—to achieve a greater good than is likely to be achieved by his acquiescence, I cannot believe that he can be said to have denied his fundamental obligation either as a good man or as a good citizen.<sup>43</sup>

<sup>43</sup> To rely on conscience, integrity, and the capacity of man to judge rationally the probable consequences of his act of disobedience is insufficient, perhaps, to meet the objection of those who demand proof both of moral inescapability and of intellectual adequacy. But in the absence of an ethical absolutism and of a determinate aristocracy that embodies this alleged moral and intellectual superiority—and clearly democracy cannot in principle admit either alternative—I see no way to escape this trust.