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## ARTICLES

### LAW, JUSTICE AND DISOBEDIENCE

HOWARD ZINN\*

In the year 1978, I was teaching a class called "Law and Justice in America," and on the first day of class I handed out the course outlines. At the end of the hour one of the students came up to the desk. He was a little older than the others. He said: "I notice in your course outline you will be discussing the case of *U.S. vs. O'Brien*. When we come to that I would like to say something about it."

I was a bit surprised, but glad that a student would take such initiative. I said, "Sure. What's your name?"

He said: "O'Brien. David O'Brien."

It was, indeed, his case. It began the morning of March 31, 1966. American troops were pouring into Vietnam, and U.S. planes were bombing day and night. David O'Brien, with three friends, mounted the steps of the Courthouse in South Boston, where they lived—a mostly Irish, working-class neighborhood—held up their draft registration cards before a crowd which had assembled, and set the cards afire.

According to Chief Justice Earl Warren, who rendered the Supreme Court decision in the case: "Immediately after the burning, members of the crowd began attacking O'Brien" and he was ushered to safety by an FBI agent. According to O'Brien, as he told the story to my class, FBI agents pulled him into the courthouse, threw him into a closet and gave him a few blows as they arrested him.

Chief Justice Warren's decision said that "O'Brien stated to FBI agents that he had burned his registration certificate because of his beliefs, knowing that he was violating federal law."<sup>1</sup> His intention was clear. He wanted to express to the

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1. *United States v. O'Brien*, 391 U.S. 367, 369 (1968).

community his strong feelings about the war in Vietnam, trying to call attention, by a dramatic act, to the mass killing our government 'was engaged in there. The burning of his draft card would get special attention precisely because it was against the law, and so he would risk imprisonment to make his statement.

O'Brien claimed in court that his act, though in violation of the draft law, was protected by the free speech provision of the Constitution. But the Supreme Court decided that the government's need to regulate the draft overcame his right to free expression, and he went to prison.<sup>2</sup>

O'Brien had engaged in an act of civil disobedience—the deliberate violation of a law for a social purpose.<sup>3</sup> To violate a law for individual gain, for a private purpose, is an ordinary criminal act; it is not civil disobedience. Some acts fall in both categories, as in the case of a mother stealing bread to feed her children, or neighbors stopping the eviction of a family which hasn't been able to pay its rent. They seem limited to one family's need, but they carry a larger message to the society about its failures.

In either instance, the law is being disobeyed, which sets up powerful emotional currents in a population which has been taught obedience from childhood.

#### OBEDIENCE AND DISOBEDIENCE

"Obey the law." That is a powerful teaching, often powerful enough to overcome deep feelings of right and wrong, even to override the fundamental instinct for personal survival. Thus World War II veteran, Alvin Bridges, after saying "It was a useless war, as every war is," can also say in the same conversation, "I'm not an anti-war guy. I'd go tomorrow if there were a war."<sup>4</sup>

We clearly *learn* very early (we certainly don't get it in our genes) that we must obey "the law of the land." Tommy Trantino, a poet and artist, sitting on death row in Trenton State Prison, wrote in his book, *Lock the Lock*, a short piece called "The Lore of the Lamb":

i was in prison long ago and it was the first grade and i  
have to take a shit and . . . the law says you must first raise  
you hand and ask the teacher for permission so i obeyer  
of the lore of the lamb am therefore busy raising my hand

2. *Id.*

3. Some of the material in this chapter is drawn from my book *H. ZINN, DISOBEDIENCE AND DEMOCRACY* (1968).

4. S. TERKEL, *THE GOOD WAR* 387 (1984).

to the fuhrer who says yes thomas what is it? and i thomas say I have to take a i mean may i go to the bathroom please? didn't you go to the bathroom yesterday thomas she says and I say yes ma'am mrs parsley sir but i have to go again today but she says NO . . . and i say eh . . . I GOTTA TAKE A SHIT DAMMIT and again she says NO but I go anyway except that it was not out but in my pants that is to say right in my corduroy knickers goddamm . . .

i was about six years old at the time and yet i guess that even then i knew without cerebation that if one obeys and follows orders and adheres to all the rules and regulations of the lore of the lamb one is going to shit in one's pants and one's mother is going to have to clean up afterwards ya see?<sup>5</sup>

Surely not all rules and regulations are wrong. One must have complicated feelings about the obligation to obey the law. Obeying the law when it sends you to "stupid" wars (veteran Alvin Bridges' word) seems wrong. Obeying the law against murder seems absolutely right. Indeed, in order to *really* obey that law, one must refuse to obey the law sending you to war.

But the dominant orthodoxy leaves no room for making intelligent and humane distinctions about the obligations to obey the law. It is stern and absolute. It is the unbending rule of every government, whether Fascist, or Communist, or liberal capitalist. Gertrude Scholtz-Klink, chief of the Women's Bureau under Hitler, explained to an interviewer the Jewish policy of the Nazis: "We always obeyed the law. Isn't that what you do in America? Even if you don't agree with a law personally, you still obey it. Otherwise life would be chaos."<sup>6</sup>

"Life would be chaos." If we allow disobedience to law we will have anarchy. That idea is inculcated in every population in every country. The phrase which represents it is "law and order." It is a phrase which sends police and the military to break up demonstrations everywhere, whether in Moscow, or Chicago. It was behind the killing of four students at Kent State University in 1970 by National Guardsmen. It was the reason given by Chinese authorities in 1989 when they killed hundreds of demonstrating students in Beijing.

It is a phrase which has appeal for most citizens, who, unless they themselves have a powerful grievance against authority, are afraid of disorder. In the 1960s a student at

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5. T. TRANTINO, *LOCK THE LOCK*, 6-8 (1974).

6. C. KOONZ, *MOTHERS IN THE FATHERLAND* xxviii (1987).

Harvard Law School addressed parents and alumni with these words:

The streets of our country are in turmoil. The universities are filled with students rebelling and rioting. Communists are seeking to destroy our country. Russia is threatening us with her might. And the republic is in danger. Yes! danger from within and without. We need law and order! Without law and order our nation cannot survive.

There was prolonged applause. When the applause died down, the student quietly told his listeners: "These words were spoken in 1932 by Adolph Hitler."<sup>7</sup>

The episode is unsettling. Because in truth, peace, stability, and order are desirable. Chaos and violence are not.

But stability and order are not the only desirable conditions of social life. There is also *justice*, meaning the fair treatment of all human beings, the equal right of all people to freedom and prosperity. Absolute obedience to law may bring order, but it may not bring justice. And when it does not, those treated unjustly may protest, may rebel, may cause disorder, as the American revolutionaries did in the 18th century, as anti-slavery people did in the 19th century, as Chinese students did in this century, as working people going on strike have done in every country across the centuries.

Are we not more obligated to achieve justice than to obey the law? True, the law may serve justice, as when it forbids rape and murder, or requires a school to admit all students regardless of race or nationality. But when it sends young men to war, when it protects the rich and punishes the poor, then law and justice are opposed to one another. And in that case, where is our greater obligation, to law, or to justice?<sup>8</sup>

The answer is given in democratic theory at its best, the words of Jefferson and his colleagues in the Declaration of Independence. Law is only a means. Government is only a means. Justice and equality, specifically, "Life, Liberty, and the pursuit of Happiness"<sup>9</sup> — these are the ends. And, "whenever any Form of Government becomes destructive of these ends, it

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7. N. ZAROLIS & G. SULLIVAN, WHO SPOKE UP? AMERICAN PROTEST AGAINST THE WAR IN VIETNAM, 1963-1975, 241 (1984) (QUOTING EICHEL, JOST, LUSKIN, & NEUSTADT, THE HARVARD STRIKE (1970)).

8. Some of the material in this article is drawn from my essay *The Conspiracy of Law*, in THE RULE OF LAW (R.P. Wolff ed. 1971).

9. The Declaration of Independence para. 2 (U.S. 1776).

is the Right of the People to alter or to abolish it, and to institute new government. . . ."<sup>10</sup>

True, the disorder itself may become unjust, if it involves indiscriminate violence against people, as did the Cultural Revolution in China in the period 1966-76, which started out with the aim of equality, but eventually became vengeful and murderous. But that danger should not lead us back to the old injustices in order to have stability. It should only lead us to seek methods of achieving justice which, while disorderly and upsetting, avoid massive violence to human rights.

The answer to worries about disobedience to law leading to "anarchy" is best given by historical experience. Did the mass demonstrations of the black movement in the American South in the early Sixties lead to "anarchy?" True, they disrupted the order of racial segregation. They created scenes of disorder in hundreds of towns and cities in the country (although it might be argued that the police, responding to non-violent protest, were the chief creators of that disorder). But the result of all that tumult was not general lawlessness.<sup>11</sup> Rather, the result was a healthy reconstitution of the social order towards greater justice, and a healthy new understanding among Americans (not all, of course) about the need for racial equality.

The orthodox notion is that law and order are inseparable. However, absolute obedience to law not only violates justice, but leads to disorder. Hitler, calling for law and order, threw Europe into the hellish disorder of war. Every nation uses the power of law to keep its population obedient, to mobilize acquiescent armies, threatening punishment for those who refuse. Thus, the creation of order inside each nation by law, leads to the unspeakable disorder of war, to the bloody chaos of the battlefield, to international "anarchy." (I use quotation marks because the philosophy of anarchism does not envision or approve of widespread disorder, but rather foresees a voluntary harmony that would come in a just, egalitarian society.)

If law and order are only ways of making injustice legitimate, then the "order" on the surface of everyday life may conceal deep mental and emotional disorder among the victims of injustice. This is also true for the powerful beneficiaries of the system, in the way that slavery distorted the psyches of both

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10. *Id.*

11. See M. WALZER, OBLIGATIONS 17 (1970) (noting that "there is very little evidence which suggests that carefully limited, morally serious civil disobedience undermines the legal system or endangers physical security").

slaves and masters. In such a case, the order will only be temporary, and when it is broken, it may be accompanied by a bloodbath of disorder—as in the United States, when the tightly-controlled order of slavery ended in civil war, and 600,000 men died in a country of 35 million people.

### THE MODERN ERA OF LAW

We take much pride in that phrase of John Adams, second President of the United States, when he spoke of the “rule of law” replacing the “rule of men.” The test of justification for an act is not its legality but its morality. The idea is that in ancient societies, in feudal society, there were no clear rules, written in statute books, accompanied by constitutions, and so everyone was subject to the whims of powerful men, whether the feudal lord or the tribal chief, or the king.

But, the story goes, modern times, bringing big cities, international trade, widespread literacy, and parliamentary government, also brought the rule of law, no longer personal and arbitrary, but written down, impersonal, neutral, applying equally to all, and therefore democratic.

And so there is much reverence for certain symbols of the modern “rule of law”: the Magna Carta, which stated what are men’s rights against the king; the American Constitution, which is supposed to limit the powers of government and provide a Bill of Rights; the Napoleonic Code, which introduced uniformity into the French legal system. But we might get uneasy about the connection between law and democracy when we read the comment of two historians (Robert Palmer and Joel Colton, *A History of the Modern World*) on Napoleon: “Man on horseback though he was, he believed firmly in the rule of law.”

I don’t want to deny the benefits of the modern era: the advance of science, the improvements in health, the spread of literacy and art beyond tiny elites, the value of even an imperfect representative system over a monarchy. But those advantages lead us to overlook the fact that the modern era, replacing the arbitrary rule of men with the impartial rule of law, has not brought any fundamental change in the facts of unequal wealth and unequal power. What was done before—exploiting the poor, sending the young to war, putting troublesome people in dungeons—is still done, except that this no longer seems to be the arbitrary action of the feudal lord or the king; it now has the authority of neutral, impersonal law.

The law appears impersonal. It is on paper, and who can trace it back to what men? And because it has the look of neu-

trality, its injustices are made legitimate. It was not easy to hold onto the "divine right" of kings—everyone could see that the king was a man (or the queen a woman), or whether the emperor had clothes or was naked. A code of law is more easily deified than a flesh-and-blood ruler.

Under the rule of men, the oppressor was identifiable, and so peasant rebels hunted down the lords, slaves killed plantation owners, and revolutionaries assassinated monarchs. In the era of corporate bureaucracies, representative assemblies, and the rule of law, the enemy is elusive, unidentifiable. In John Steinbeck's depression-era novel, *The Grapes of Wrath*, a farmer having his land taken away from him confronts the tractor driver who is knocking down his house. He aims a gun at him, but is confused when the driver tells him that he takes his orders from a banker in Oklahoma City, who takes his orders from a banker in New York. The farmer cries out: "Who can we shoot?"<sup>12</sup>

The rule of law does not do away with the unequal distribution of wealth and power. It reinforces that inequality with the authority of law. It allocates wealth and poverty (through taxes and appropriations) but it does this in such complicated and indirect ways as to leave the observer bewildered; you can try to trace back from cause to cause and you will die of old age before you can figure it out.

What was obvious exploitation when the peasant gave half his produce to the lord is now the product of a complex market society enforced by a library of statutes. A mine owner in Appalachia was asked, some years ago, by a curious young man, why the coal companies paid so little taxes, and kept so much of the wealth from the coal fields, while local people starved. The owner replied: "I pay exactly what the law asks me to pay."

There is a huge interest in the United States in crime and corruption as ways of acquiring wealth. But the greatest wealth, the largest fortunes, are acquired legally, aided by the laws of contract and property, enforced in the courts by friendly judges, handled by shrewd corporation lawyers, figured out by well-paid accountants. Our history books, when they get to the 1920s, dwell on the Teapot Dome scandals of the Harding Administration, while ignoring the far greater reallocations of wealth that took place legally, through the tax laws proposed by Secretary of the Treasury Andrew Mellon (a

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12. J. STEINBECK, *THE GRAPES OF WRATH* 52 (Viking Compass ed. 1958).



very rich man, through oil and aluminum), and passed by Congress in the Coolidge Administration.

How can this be? Didn't the modern era bring us democracy? Who drew up the Constitution? Wasn't it all of us, getting together to draw up the rules by which we would live, a "social contract?" Doesn't the Preamble to the Constitution start with the words "We the People, in order to . . . etc. etc.?"

In fact, while the Constitution was certainly an improvement over the crown colonies controlled by the King of England, or the proprietary colonies, openly controlled by wealthy landowners, it was still a document drawn up by rich men, merchants and slaveowners, who wanted a bit of political democracy, but had no sympathy for economic democracy. It was designed to set up a "rule of law" which would efficiently prevent rebellion by dissatisfied elements in the population. As the Founding Fathers assembled in Philadelphia, they still had in mind farmers who had recently taken up arms in western Massachusetts against unjust treatment by the wealth-controlled legislature.<sup>13</sup>

It is certainly a deception of the citizenry to claim that the "rule of law" has replaced the "rule of men." True, we have all these laws. But it is still men (women are mostly still kept out of the process) who pass these laws, who sit on the bench and interpret them, who occupy the White House or the Governor's mansion, and have the job of enforcing them.

These men have enormous powers of discretion. The legislators can decide which laws to put on the books. The president and his Attorney-general can decide which laws to enforce. The judges can decide who has a right to sue in court, what instructions to give to juries, what rules of law to apply and what evidence should not be allowed in the courtroom.

As for lawyers, to whom ordinary people must turn for help in making their way through the court system, they are trained and selected in such a way as to insure their conservatism. The exceptions, when they appear, are noble and welcome, but too many lawyers are more concerned about being "good professionals" than achieving justice. As one student of the world of lawyers put it: "It is of the essence of the profes-

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13. The distinguished historian Charles Beard, in C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1913), broke through the romanticization of the Founding Fathers with his exploration of their economic interests and their political ideas. Other scholars have claimed to refute him, but I believe his fundamental thesis remains untouched: wealth and political power are inextricably related.

sionalization process to divorce law from politics, to elevate technique and craft over power, to search for 'neutral principles,' and to deny ideological purpose."<sup>14</sup>

"Equal Justice Under Law" is the slogan one sees on the marble pillars of the courthouse. And there is nothing in the words of the Constitution or the laws to indicate that anyone gets special treatment. They look as if they apply to everyone. But in the actual administration of the laws, are rich and poor treated equally? Blacks and whites? Foreign born and natives? Conservatives and radicals? Private citizens and government officials?

There is a mountain of evidence on this: a CIA official (Richard Helms) who commits perjury gets off with a fine<sup>15</sup> (Alger Hiss spent four years in jail for perjury);<sup>16a</sup> a President (Nixon) is pardoned in advance of prosecution for acts against the law.<sup>17</sup> Or note this news item:

The government, saying it could not go to trial without exposing CIA secrets, yesterday dropped its perjury case against an ITT [International Telephone and Telegraph] vice president accused of concealing the company's efforts to influence Chile's 1970 election.<sup>18</sup>

Still, the system of laws, in order to maintain its standing in the eyes of the citizenry, to keep up the appearance of fairness, to provide safety valves by which the discontented can let off steam and thus keep the system safe and stable, must have a bit of fairness.

And so, the law itself provides for change. When the pressure of discontent becomes great, laws are passed to satisfy some part of the grievance. Presidents, when pushed by social movements, may enforce good laws. Judges, observing a changing temper in the society, may come forth with humane decisions.

Thus, we have alternating currents of progress and paralysis. Periods of war alternate with periods of peace. There are times of witch-hunts for dissenters, and times of apologies for the witch-hunts. We have "conservative" presidents giving way

14. See J. AUERBACH'S *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976) for an excellent critique of the legal profession by a historian.

15. See *Helms Is Fined \$2000 and Given Two-Year Suspended Prison Term*, N.Y. Times, Nov. 8, 1977, at A1, col. 2.

16. See J. SMITH, *ALGER HISS: THE TRUE STORY* 432 (1976).

17. See G. FORD, *A TIME TO HEAL* 176-78 (1979).

18. UPI dispatch, March 8, 1979 (on file with the author).

to liberal presidents and back again. The Supreme Court makes decisions one week on behalf of civil liberties, and the next week curtails them. No one can get a clear fix on the system that way.

The modern system of the rule of law is something like roulette. Sometimes you win and sometimes you lose. No one can predict in any one instance whether the little ball will fall into the red or the black, and no one is really responsible. You win, you lose. But as in roulette, in the end you almost always lose. The results are fixed, not by corruption, but by the legitimate rules of the game. In roulette, the results are fixed by the structure of the wheel, the laws of mathematical probability, the rules of "the house." In society the results are fixed by the law of contract, the rules of the market, and the power of the authorities to change the rules or violate them at will.

What is the structure of society's roulette wheel that insures you will, in the end, lose? It is, first of all, the great disparities in wealth, which give a tremendous advantage to those who can buy and sell industries, buy and sell people's labor and services, buy and sell the means of communication, subsidize the educational system, buy and sell the political candidates themselves. Second, the structure of "checks and balances," in which bold new reforms can be buried in committee, vetoed by one legislative chamber, or by the President, interpreted to death by the Supreme Court, or unenforced if passed by Congress.

In this system, the occasional victories may ease some of the pain of economic injustice. They also reveal the usefulness of protest and pressure, and suggest even greater possibilities for the future. And they keep you in the game, giving you the feeling of fairness, preventing you from getting angry and upsetting the wheel. It is a system ingeniously devised for maintaining things as they are, while allowing only for limited reform.

#### OBLIGATION TO THE STATE

Despite all I have said about the gap between law and justice, and despite the fact that this gap is visible to many people in the society, the idea of obligation to law, obligation to government, remains powerful. When in 1979, President Jimmy Carter reinstated the draft of young men for military service, and television reporters interviewed those who went to register, asking them why they were complying with the law (per-

haps 10% were not), the most common answer was: "I owe it to my country."

The obligation that people feel to one another goes back to the very beginning of human history, as a natural, spontaneous act in human relations.<sup>19</sup> Obligation to government, however, is not natural. It must be taught to every generation. And who can teach this lesson of obligation with more authority than the great Plato? For a long time now, Plato has been one of the gods of modern culture, his reputation that of an awesome mind, a brilliant writer of dialogue, his work the greatest of the Great Books. You don't criticize Plato without a risk of being called anti-intellectual, of being drummed out of the circle of educated people.

Plato, shrewdly, puts his ideas about obligation in the mouth of Socrates.<sup>20</sup> Socrates left no writings that we know of, so he can be used to say whatever Plato wants. And Plato could have no better spokesman than a wise, gentle old man who was put to death by the government of Athens in 399 B.C. for speaking his mind. Any words coming from such a man will be especially persuasive.

But they are Plato's words, Plato's ideas: All we know of Socrates is what Plato tells us. Or, what we read in the recollections of another contemporary, Xenophon. Or, what we can believe about him from reading Aristophanes' spoof on his friend Socrates, in his play, *The Clouds*.

So we can't know for sure what Socrates really said to his friend Crito, who visited him in jail, after he had been condemned to death. But we do know that what Plato has him say, in the dialogue *Crito* (written many years after Socrates' execution) has been impressed on the minds of many, many generations, down to the present day, with deadly effect.

It really doesn't matter if most Americans have never read anything by Plato; his ideas have become part of the orthodoxy of the nation, absorbed into the national bloodstream, reproduced in ordinary conversations and on bumper stickers. ("Love it or leave it"—summing up Plato's idea of obligation.)

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19. The political theorist Michael Walzer writes about "the obligation to disobey." He talks about people having the "obligation to honor the engagements they have explicitly made, to defend the groups and uphold the ideas to which they have committed themselves, even against the state, so long as their disobedience of laws or legally authorized commands does not threaten the very existence of the larger society or endanger the lives of its citizens. Sometimes it is obedience to the state, when one has a duty to disobey, that must be justified." M. WALZER, *supra* note 11, at 16-17.

20. PLATO, *EUTHYPHRO, APOLOGY, CRITO* (F. Church trans. 1948).

Plato's message is presented appealingly by a man calmly facing death, whose courage disarms any possible skepticism. It is made even more appealing by the fact that it follows another dialogue, the *Apology*, in which (according to Plato), Socrates addresses the jury in an eloquent defense of free speech, saying those famous words: "[The] unexamined life is not worth living."<sup>21</sup>

Plato then unashamedly (lesson one in intellectual bullying: speak with utter confidence) presents us with some unexamined ideas. Having established Socrates' credentials as a martyr for independent thought, he proceeds in the *Crito* to put on Socrates' tongue an argument for blind obedience to government.

It is hardly a dialogue, though Plato is famous for dialogue, and the famous "Socratic method" is based on teaching through dialogue. Poor Crito, who visits Socrates in prison to persuade him to let his friends plan his escape, is virtually tongue-tied. He is reduced to saying, to every one of Socrates' little speeches: "Yes . . . of course . . . clearly . . . I agree . . . Yes . . . I think that you are right . . . True . . ."<sup>22</sup> And Socrates is going on and on, like the good trouper that he is, saying Plato's lines, making Plato's argument. We know the ideas are Plato's because in his famous, much bigger dialogue, the *Republic*, he makes an even more extended case for a totalitarian state.

To Crito's offer of escape, Socrates replies: No, I must obey the law . . . true, Athens has committed an injustice against me by ordering me to die for speaking my mind [Such a mild reaction! They have ordered him put to death and he is somewhat annoyed.] . . . but if I complained about this injustice, Athens could rightly say: "We brought you into the world, we raised you, we educated you, we gave you and every other citizen a share of all the good things we could."<sup>23</sup>

Socrates accepts this argument of the state. He tells Crito that by not leaving Athens he agreed to obey its laws. So he must go to his death. Yes, it is Plato's own bumper-sticker: "Love it or leave it."

Plato was the apostle of civil obedience. If he had lived another two thousand years or so he would have encountered the argument of Henry David Thoreau, the quiet hermit of Walden Pond, who wrote a famous essay on civil disobedience.

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21. *Id.* at 45.

22. *Id.* at 55-56.

23. *Id.* at 61.

Thoreau said that whatever good things we have were not given us by the state, but by the energies and talents of the people of the country. And he would be damned if he would pay taxes to support a war against Mexico based on such a paltry argument.

Plato, the Western world's star intellectual, makes a number of paltry arguments in this so-called dialogue. He has Socrates imagining the authorities addressing him: "What complaint have you against us and the state, that you are trying to destroy us? Are we not, first of all, your parents? Through us your father took your mother and brought you into the world."<sup>24</sup>

What complaint? Only that they are putting him to death! The state as parents? Now we understand those words: The Motherland, or the Fatherland, or the Founding Fathers, or Uncle Sam. What neat spades for planting the idea of obligation. So, it's not some little junta of military men and politicians who are sending you to die in some muddy field in Asia or Central America; it's your mother, your father, or your father's favorite brother. How can you say no?

"Through us your father took your mother and brought you into the world." What stately arrogance! To give the state credit for marriage and children, as if without government men and women would remain apart and celibate.

Socrates listens meekly to the words of the Law:

[Are] you too wise to see that your country is worthier, more to be revered, more sacred, and held in higher honor both by the gods and by all men of understanding, than your father and your mother and all your other ancestors; and that you ought to reverence it, and to submit to it, . . . and to obey in silence if it orders you to endure flogging or imprisonment, or if it sends you to battle to be wounded or to die?<sup>25</sup>

In the face of this heartfelt argument, Crito is virtually mute, a sad sack of a debater. You would think that Plato, just to maintain his reputation for good dialogue, would give Crito some better lines. But he took no chances.

Plato says (again, through Socrates bullying Crito): "In war, and in the court of justice, and everywhere, you must do whatever your state and your country tell you to do, or you must persuade them that their commands are unjust."<sup>26</sup>

24. *Id.* at 60.

25. *Id.* at 60-61.

26. *Id.* at 61.

Why not insist that the *state* persuade *us* to do its bidding? There is no equality in Plato's scheme: the citizen may use persuasion, no more; the state may use force.

And so it is that the admirable obligation human beings feel to one's neighbors, one's loved ones, even to a stranger needing water or shelter, becomes confused with blind obedience to that deadly artifact called government. And in that confusion, young men, going off to war in some part of the world they never heard of, for some cause that cannot be rationally explained, then say: "I owe it to my country."

It seems that the idea of *owing*, of obligation, is strongly felt by almost everyone. But what does one owe the government? Granted, the government may do useful things for its citizens: help farmers, administer old-age pensions and health benefits, regulate the use of drugs, apprehend criminals, etc. But, because the government administers these programs (for which the citizens pay taxes, and for which the government officials draw salaries), does this mean that you owe the government your *life*?

A confusion of the *country* for the *government*. That is what the Declaration of Independence tried to make clear, that the people of the country *set up* the government, to achieve the aims of equality and justice, and when a government no longer pursues those aims it loses its legitimacy, it has violated *its* obligation to the citizens, and deserves no more respect or obedience. It is very clever of the government to pose as the country, to get people to say: "I owe something to my country" and then proceed to obey the government, to which they owe nothing when it has taken away their human rights, when it threatens their lives, when it becomes their enemy.

We are intimidated by the word "patriotism," afraid to be called unpatriotic. Early in the 20th century, the Russian-American anarchist and feminist, Emma Goldman, lectured on Patriotism. She said:

. . . conceit, arrogance and egotism are the essentials of patriotism . . . Patriotism assumes that our globe is divided into little spots, each one surrounded by an iron gate. Those who had the fortune of being born on some particular spot, consider themselves better, nobler, grander, more intelligent than the living beings inhabiting any other spot. It is, therefore, the duty of everyone

living on that chosen spot to fight, kill, and die in the attempt to impose his superiority upon all the others."<sup>27</sup>

Even the symbols of patriotism—the flag, the national anthem—become objects of worship, and those who refuse to worship are treated as heretics. When, in 1989, the U.S. Supreme Court decided that a citizen has a right to express himself-herself by burning the American flag, there was an uproar in the White House and in Congress. President Bush, almost in tears, began speaking of a constitutional amendment to make flag-burning a crime. Congress, with its customary sheepishness, rushed to pass a law providing a year in prison for anyone hurting the flag.

The humorist Garrison Keillor responded to the President with some seriousness:

Flag-burning is a minor insult compared to George Bush's cynical use of the flag for political advantage. Any decent law to protect the flag ought to prohibit politicians from wrapping it around themselves! Flag-burning is an impulsive act by a powerless individual—but the cool pinstripe demagoguery of this powerful preppie is a real and present threat to freedom.<sup>28</sup>

If patriotism were defined, not as blind obedience to government, not as submissive worship to flags and anthems, but rather as love of one's country, one's fellow citizens (all over the world), as loyalty to the principles of justice and democracy, then patriotism would require us to disobey our government, when it violated those principles.

It is curious that Socrates (according to Plato) was willing to disobey the authorities by preaching as he chose, by telling the young what he saw as the truth, even if that meant going against the laws of Athens. Yet, when he was sentenced to death, and by a divided jury (the vote was 281 to 220), he meekly accepted the verdict, saying he owed Athens obedience to its laws, giving that puny 56% majority vote an absolute right to take his life.

#### ACCEPT YOUR PUNISHMENT!

Socrates' position has become one of the cardinal principles in the liberal philosophy of civil disobedience, and part of the dominant American orthodoxy in the United States, for conservatives and liberals both. It is usually stated this way:

27. E. GOLDMAN, *ANARCHISM AND OTHER ESSAYS* 128-29 (1969).

28. Keillor, *Toasting the Flag*, N.Y. Times, July 2, 1989, § 4, at 13.



it's your right to break the law when your conscience is offended; but then you must accept your punishment.<sup>29</sup>

Why? Why agree to be punished when you think you have acted rightly and the law, punishing you for that, has acted wrongly? Why is it all right to disobey the law in the first instance, but then, when you are sentenced to prison, start obeying it?<sup>30</sup>

Some people, to support the idea of accepting punishment, like to quote Martin Luther King, Jr., whose opinions

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29. Carl Cohen, for instance, in his book *CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW* (1971) makes a distinction between "direct disobedience" (disobeying a law which is in itself wrong, like a law drafting you into military service), in which case evading punishment is justified, and "indirect disobedience," where someone is violating something like a trespassing law which is not in itself bad, in which case "it is right for him to be punished." *Id.* at 52. That distinction makes no sense to me, because while the trespass law may be theoretically okay, if it is applied unjustly against a political protester, the punishment for disobeying it is also unjust.

The philosopher Sidney Hook, once a radical, later a supporter of American foreign policy in Vietnam and other military interventions, dealt with this question in his book *THE PARADOXES OF FREEDOM* (1962). He says a *democrat* (his emphasis) can defend an unlawful action "*only* [his emphasis] if he willingly accepts the punishment entailed by his defiance of the law." Otherwise, Hook says, "he has in principle embarked upon a policy of revolutionary overthrow." This seems silly to me. Sure, a person who evades prison *may* be a revolutionary, but he also may not. Angela Davis was a Communist, and presumably a revolutionary. Daniel Berrigan was bitterly opposed to the war, but hardly "embarked upon a policy of revolutionary overthrow." Both evaded prison.

30. The legal philosopher Ronald Dworkin, in his book *TAKING RIGHTS SERIOUSLY* (1978), argues that people should not be punished when committing civil disobedience when "the law is uncertain, in the sense that a plausible case can be made on both sides." *Id.* at 212. And, he claims, any moral issue can find a plausible basis in the Constitution, even if the Supreme Court has not yet come to that conclusion. He seems to be straining to find a *legal* basis for civil disobedience, as if the morality of the disobedient act is not enough. Granted, the Constitution has enough open-ended rights (the Ninth Amendment, for instance, has endless possibilities for asserting the rights of people) to cover just about anything. But to seek refuge in that gives too much support to the idea that you *must* have a legal cover for your moral act. Dworkin's undue respect for the law shows itself when he says (near the end of his chapter on "Civil Disobedience"): "If acts of dissent continue to occur after the Supreme Court has ruled that the laws are valid, or that the political question doctrine applies, then acquittal on the grounds I have described [an "uncertain" law] is no longer appropriate." *Id.* at 222. In other words, Dworkin is willing to accept punishment—he suggests "minimal or suspended sentences"—for insistent civil disobedience. Dworkin finds himself in the humble position of appealing for leniency to the authorities—to Congress, to the prosecutor, to the judge—because he is constantly addressing, not the citizenry, but the government (the prince).

deserve respect because he is one of the great apostles of civil disobedience in this century. He once wrote:

I submit that an individual who breaks a law that conscience tells him is unjust, and willingly accepts the penalty by staying in jail to arouse the conscience of the community over its injustices is in reality expressing the very highest respect for law.<sup>31</sup>

I believe this passage has too often been misinterpreted. It is part of King's famous "Letter from Birmingham City Jail," written in the spring of 1963, in the midst of tumultuous demonstrations in Birmingham against racial segregation. A group of white Alabama church leaders wrote to King asking that he stop the demonstrations: "When rights are consistently denied, a cause should be pressed in the courts and in negotiations among local leaders, and not in the streets."<sup>32</sup> King's reply was an impassioned defense of non-violent direct action, but it is obvious that he was trying his best to persuade these conservative church leaders of his moderation, and so was anxious to show that, while committing civil disobedience, he was "expressing the very highest respect for law."

But the "law" that King respected, we know unquestionably from his life, his work, his philosophy, was not man-made law, neither segregation laws, nor even laws approved by the Supreme Court, nor decisions of the courts, nor sentences meted out by judges. He meant respect for "the higher law," the law of morality, of justice.

To be "one who willingly accepts" punishment, is not the same as thinking it *right* to be punished for an act of conscience. If this were so, why would King agree to be released from jail by behind-the-scenes pressure, as he did in 1960 when a mysterious benefactor in a high position (someone close to President-elect Kennedy) pulled strings to get him out of prison? The meaning of "willingly accepts" is that you know you are risking jail, and are willing to take that risk, but it doesn't mean it is morally right for you to be punished.

In the quoted passage King talks about "staying in jail to arouse the conscience of the community over its injustice." He does not speak of staying in jail because he *owes* that to the government, and that (as Plato argues) he has a duty to obey whatever the government tells him to do. Not at all. The stay-

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31. King, *Letter from Birmingham City Jail*, reprinted in *CIVIL DISOBEDIENCE* 78-79 (H. Bedau ed. 1969).

32. *Quoted in NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY* 461 (S. Lynd ed. 1966).

ing in jail is not for philosophical or moral reasons, but for a practical purpose, to continue his struggle in a different way, "to arouse the conscience of the community over its injustice."

In King's situation, where a world-famous figure spends a limited time in jail, the cost to his freedom and his ability to organize is relatively small, but the gain from the publicity and attention, and aroused indignation is very great. So the practical use of "accepting" punishment is obvious.

But we can safely say, knowing King's life and thought, that if the circumstances were different, he might well have agreed (unlike Socrates) to escape from jail. What if he had been sentenced, not to six months in a Georgia prison, but to death? Would he have "accepted" this?

Would King have condemned those black slaves who were tried under the Fugitive Slave Act of 1850 and ordered to return to slavery, and refused to give themselves up, who ran away from their sentence? Would he have criticized Angela Davis, the black militant who, after she had participated in a daring rescue of a black prisoner from a courtroom, refused to stand trial and went underground?

We can imagine another test of King's attitude towards "accepting" punishment. During the Vietnam war, which King powerfully opposed ("The long night of war must be stopped," he said in 1965), the Catholic priest-poet Daniel Berrigan committed an act of civil disobedience. He and other men and women of the "Catonsville Nine" entered a draft board in Catonsville, Maryland, removed draft records, and set them afire in a public "ceremony."

Father Berrigan delivered a Meditation:

Our apologies, good friends, for the fracture of good order, the burning of paper instead of children . . . . We could not, so help us God, do otherwise . . . . We say: killing is disorder, life and gentleness and community and unselfishness is the only order we recognize. For the sake of that order we risk our liberty, our good name. The time is past when good men can remain silent, when obedience can segregate men from public risk, when the poor can die without defense.<sup>33</sup>

While he used the term "men," one of the Catonsville Nine was a woman, Mary Moylan. When they were all found guilty and sentenced to jail terms, and lost their appeals,

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33. Quoted in H. ZINN, *A PEOPLE'S HISTORY OF THE UNITED STATES* 479 (1980).

she and Daniel Berrigan refused to turn themselves in, remained "underground." Berrigan was found after four months, Mary Moylan was never apprehended. She wrote from underground: "I don't want to see people marching off to jail with smiles on their faces. I just don't want them going . . . . I don't want to waste the sisters and brothers we have by marching them off to jail . . . ." <sup>34</sup>

Berrigan and Moylan thought the war was wrong, thought their going to jail for opposing it was wrong. If, like King, they felt it would serve some practical use, they probably would have "accepted it." Going to jail can make a certain kind of statement to the public: "Yes, I feel so strongly about what is happening in the world that I am willing to risk jail to express my feelings."

Refusing to go to jail makes a different kind of statement: "The system that sentenced me is the same foul system that is carrying on this war. I will defy it to the end. It does not deserve my allegiance." As Daniel Berrigan said: yes, we will respect the order of "gentleness and community" but not the "order" of making war on children.

Daniel Berrigan and I had traveled together in early 1968 to Hanoi to pick up three American pilots released from prison by the North Vietnamese. We became good friends, and I was soon in close contact with the extraordinary Catholic resistance movement against the Vietnam war. It was in early 1970, his last appeal turned down, facing several years in prison, that he "disappeared," sending the F.B.I. into a frantic effort to find him. They had caught sight of him at a huge student rally in the Cornell University gymnasium, but before they could make their way through the crowd the lights went out, and when they came on he was gone, spirited away inside a huge puppet, to a nearby farm house.

A few days after his disappearance, I received a phone call at my home in Boston. It was from New York City, and I was being invited to speak at a Catholic church on the upper West Side Manhattan, on the issue of the war and the Berrigans. Philip Berrigan, Daniel's brother, also a priest, also one of the Catonsville Nine, also gone underground, had just been found by the FBI in the tiny apartment of the church's pastor.

The church was packed with perhaps five hundred people. FBI agents mingled with the crowd, alerted that Daniel Berrigan might show up suddenly, as he had at Cornell. (Someone later claimed one hundred FBI agents were there, but this is

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34. Quoted in *id.*, at 480.

hard to believe, even of the FBI.) I made a brief speech. Another friend of Dan Berrigan spoke. This was Eqbal Ahmad, a Pakistani intellectual and one of the anti-war movement's most eloquent speakers.

As the two of us sat on the platform, listening to more speeches, a note was passed to us, to meet two nuns at a Spanish-Chinese restaurant farther up Broadway, near Columbia University. At this restaurant, we were given directions to New Jersey, to the house where Dan Berrigan was hiding out.

The next morning we rented a car, drove to New Jersey, and met him. The house he was staying in was not secure (in fact, an FBI agent lived across the street!). We arranged a trip to Boston, a car, a driver, a destination. From that point on, for the next four months, he eluded and exasperated the FBI, staying underground, but surfacing from time to time, to deliver a sermon at a church in Philadelphia, to be interviewed on national television, to make public statements about the war, to make a film (*The Holy Outlaw*) about his actions against the war, both overt and underground.

During those four months I was helping take care of Berrigan, and also teaching my course at Boston University in political theory. I was discussing Socrates' reasons for not escaping punishment, and asking my students to listen to his reasons, and also to consider Daniel Berrigan's reasons for going Underground. They did not know, of course, that Berrigan was right there in Boston, living out his ideas.

I think it is a good guess, despite those often-quoted words of his on "accepting" punishment, that Martin Luther King, Jr. would have supported Berrigan's actions, as he would have supported Angela Davis' escape from punishment, as he would have applauded the refusal of black slaves before the Civil War to give themselves up to the punishment of the Fugitive Slave Law. The principle is clear. If it is right to disobey unjust laws, it is right to disobey unjust punishment for breaking those laws.

The idea behind "accept your punishment" (advanced often by "liberals" sympathetic with dissent) is that whatever your disagreement with some specific law or some particular policy, you should not spread disrespect for the law *in general*, because we need respect for the law in order to keep society intact.<sup>35</sup>

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35. John Rawls, in his book *A THEORY OF JUSTICE* (1971), has a section on civil disobedience (pp. 363-391) in which he worries about civil disobedience going so far as to bring about a general disrespect for law, but he does speak strongly (*see id.* at 390-91) about the obligation to resist under

This is like saying: since apples are good for children, we must insist that they not refuse the rotten ones, because that might lead them to reject all apples. Well, good apples are good for your health, and rotten apples are bad. Bad laws and bad policies endanger our lives, our freedoms. Why can't we trust human intelligence to make the proper distinctions—among laws as among apples?

The domino theory is in people's minds: let one domino fall and they will all go. It is a psychology of absolute control, in which the need for total security brings an end to freedom. Let anyone evade punishment, and the whole social structure will come down. Socrates scolds Crito: "Do you think that a state can exist and not be overthrown in which the decisions are of no force and are disregarded and undermined by private individuals?"

We might respond: can a decent society exist (*that is our concern, not the state*), if people humbly obey all laws, even those that violate human rights? And when unjust laws, unjust policies become the rule, should not the state (in Plato's words) "be overthrown?"

Jefferson and the Declaration were clear on this: "But when a long train of abuses & usurpations pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty to throw off such government . . . ." <sup>36</sup>

Most people quickly accept the idea of disobedience in a totalitarian society, or in a blatantly undemocratic situation as in the American south with its racial segregation. But they look differently on breaking the law in a liberal society, where parties compete for the voice of citizens, and laws are passed by bodies of elected representatives, and people have opportunities for free expression of their ideas. <sup>37</sup>

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certain circumstances. Rawls, however, confines his discussion to the situation in a "nearly just society," by which he seems to mean the United States. This exaggerates the justness in our system and therefore creates a basis for a more cautious and partial acceptance of civil disobedience. For an excellent comparison of the views on civil disobedience of Rawls, Dworkin, and myself, see Karapin, *The State, Democracy, and the Disobedient Citizen: A Review of Some Recent North American Contributions* (unpublished manuscript on file with the author) (written as part of the author's National Science Foundation Graduate Fellowship).

36. The Declaration of Independence para. 2 (U.S. 1776).

37. Liberals and conservatives often join on this issue. For instance, Irving Kristol, a leading American conservative, wrote during the Vietnam war:

Even were I opposed to the Administration's policy in Vietnam,

What this argument misses is that civil disobedience gives an *intensity* to expression, by its dramatic violation of law, which other means—voting, speaking, writing—do not possess. And if we are to avoid majority tyranny over oppressed minorities, we must give a dissident minority a way of expressing the fullness of its grievance.

What kind of person can we admire, can we ask young people of the next generation to emulate—the strict follower of law, or the dissident who struggles, sometimes within, sometimes outside, sometimes against the law, but always for justice? What life is best worth living, the life of the proper, obedient, dutiful follower of law and order, or the life of the independent thinker, the rebel?

Leo Tolstoy, in his story "The Death of Ivan Ilyich" tells of a proper, successful magistrate, who on his deathbed wonders why he suddenly feels that his life has been horrible and senseless. "Maybe I did not live as I ought to have done . . . . But how could that be, when I did everything properly?' . . . and he remembered all the legality, correctitude and propriety of his life."<sup>38</sup>

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which I am not, I would not regard this case as one in which civil disobedience is justified. The opportunities for dissent are obviously abundant.

Kristol, *Civil Disobedience Is Not Justified By Vietnam*, N.Y. Times Magazine, Nov. 26, 1967, at 129, reprinted in H. Bedau, *supra* note 31, at 209.

What Kristol misses is that citizens may have the opportunity to speak up, but speaking alone may not be effective enough, powerful enough, to get a nation out of a war.

38. L. TOLSTOY, *THE DEATH OF IVAN ILYCH* 148 (A. Maude trans. 1960).