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**TOWARDS THE RECONCILIATION  
OF CIVIL DISOBEDIENCE AND DEMOCRACY**

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## Table of Contents

ACKNOWLEDGEMENTS .....	i
TABLE OF CONTENTS .....	iii
SUMMARY .....	vii
<b>CHAPTER I: INTRODUCTION .....</b>	<b>1</b>
I. CIVIL DISOBEDIENCE AND ITS DEBATES .....	1
II. THE RECONCILIATION OF CIVIL DISOBEDIENCE AND DEMOCRACY .....	4
III. PLAN OF THE THESIS .....	8
<b>CHAPTER II: THE DEFINITION OF CIVIL DISOBEDIENCE.....</b>	<b>12</b>
I. TYPICAL CASES OF CIVIL DISOBEDIENCE .....	13
A. <i>Thoreau's Struggle</i> .....	15
B. <i>Gandhi and His Movement</i> .....	17
C. <i>Luther King and the Civil Rights Movement</i> .....	20
D. <i>Civil Disobedience in the Contemporary World</i> .....	22
II. THE CHARACTERISTICS OF CIVIL DISOBEDIENCE .....	27
A. <i>Intentional Breach of Law</i> .....	28
B. <i>Predominantly Nonviolent</i> .....	33
C. <i>Publicity</i> .....	39
D. <i>Willingness to Accept Punishment</i> .....	43
III. CIVIL DISOBEDIENCE AND RELATED PHENOMENA.....	48
A. <i>Civil Disobedience and Common Crimes</i> .....	49
B. <i>Civil Disobedience and Legal Protest</i> .....	52
C. <i>Civil Disobedience and Conscientious Objection</i> .....	54
D. <i>Civil Disobedience and Rebellion</i> .....	56
E. <i>Civil Disobedience and Terrorism</i> .....	58
IV. CONCLUSION: THE DEFINITION OF CIVIL DISOBEDIENCE .....	61
V. SUMMARY .....	63
<b>CHAPTER III: THE JUSTIFICATION OF CIVIL DISOBEDIENCE IN DEMOCRACY .....</b>	<b>65</b>
I. DEMOCRATIC DEFICITS AND JUSTICE DEFICITS .....	65
A. <i>The Essence of Democracy</i> .....	66
B. <i>The Generation of Democratic and Justice Deficits</i> .....	70
II. THE NECESSITY OF CIVIL DISOBEDIENCE .....	77
A. <i>The Necessity of Civil Disobedience</i> .....	78
a. The Commitment to Democracy .....	78
b. The Argument of Lawful Means .....	82
c. The Problem of Violent Means and the Further Justification of Civil Disobedience .....	88
d. Two Kinds of Civil Disobedience .....	94
B. <i>Individual Conscience and the Justification of Civil Disobedience</i> .....	99

III. SOME OBJECTIONS CONSIDERED.....	106
A. <i>Rights of Participation and Consent</i> .....	106
B. <i>Slippery Slope Argument and Social Chaos</i> .....	111
C. <i>Gratitude and Fairness</i> .....	116
D. <i>The Majority Principle</i> .....	122
IV. SUMMARY .....	127
<b>CHAPTER IV: THE ROLE OF CIVIL DISOBEDIENCE IN DEMOCRACY .....</b>	<b>129</b>
I. THE POSITIVE FUNCTIONS OF CIVIL DISOBEDIENCE IN A DEMOCRACY.....	130
A. <i>The Democracy-enhancing Function of Civil Disobedience</i> .....	130
B. <i>The Democracy-stabilizing Function of Civil Disobedience</i> .....	135
a. <i>Civil Disobedience as a Safety Valve</i> .....	136
b. <i>Civil Disobedience Can Right Injustices</i> .....	138
C. <i>The Degeneration-preventing Function of Civil Disobedience</i> .....	141
a. <i>The Degeneration of Democracy</i> .....	142
b. <i>The Desanctifying Effect of Civil Disobedience</i> .....	145
D. <i>The Function of Cultivating Democratic Citizens</i> .....	148
a. <i>The Spirit of Participation</i> .....	149
b. <i>Dignity of Human Person</i> .....	151
c. <i>Therapeutic Effects on the Victims</i> .....	152
II. THE MECHANISM OF CIVIL DISOBEDIENCE .....	154
A. <i>Publicity through Dramatization</i> .....	155
a. <i>The Publicity Power of Civil Disobedience</i> .....	155
b. <i>Civil Disobedience and Judicial Review</i> .....	158
B. <i>Persuasion through Suffering</i> .....	161
a. <i>The Persuasive Power of Civil Disobedience</i> .....	161
b. <i>The Importance of the Audience</i> .....	165
C. <i>Coercion through Nonviolence</i> .....	169
a. <i>Coercion in Civil Disobedience</i> .....	169
b. <i>Debates about Coercion</i> .....	174
III. THE QUESTION OF SUCCESS.....	180
IV. SUMMARY .....	184
<b>CHAPTER V: CIVIL DISOBEDIENCE: RIGHT OR DUTY? .....</b>	<b>187</b>
I. COULD THERE BE A RIGHT OF CIVIL DISOBEDIENCE?.....	188
A. <i>The Proposition of Civil Disobedience as a Sub-right</i> .....	189
B. <i>The Proposition of Civil Disobedience as an Independent Right</i> .....	193
C. <i>The Nature of the Right of Civil Disobedience</i> .....	197
II. IS CIVIL DISOBEDIENCE A DUTY?.....	204
A. <i>Civil Disobedience as a Duty</i> .....	204
B. <i>The Nuremberg Trials</i> .....	208
C. <i>Should Civil Disobedience Be Established as a Legal Duty?</i> .....	211
III. WHO IS THE GOOD CITIZEN? .....	215

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A. <i>Three Kinds of Citizen</i> .....	216
B. <i>Who Is the Good Citizen?</i> .....	219
a. The Obedient Citizen.....	219
b. The Conditionally Obedient Citizen.....	222
c. The Rebellious Citizen .....	226
C. <i>Citizenship and Democracy</i> .....	227
IV. SUMMARY .....	230
<b>CHAPTER VI: THE RECONCILIATION OF CIVIL DISOBEDIENCE AND DEMOCRACY .....</b>	<b>231</b>
I. THE APPROPRIATE RESPONSE TO CIVIL DISOBEDIENCE.....	232
A. <i>Different Attitudes towards Civil Disobedience</i> .....	233
B. <i>The Responsibility of Leniency to Civil Disobedience</i> .....	237
a. The Dangers Posed by Civil Disobedience .....	238
b. The Commitment to Tolerance .....	241
c. The Problem of Punishment .....	244
II. CIVIL DISOBEDIENCE AND PUNISHMENT.....	246
A. <i>The Courts' Role in Protecting Civil Disobedience</i> .....	248
a. The Necessity Defense .....	248
b. The Good Motive Defense and the Mistake of Law Defense .....	255
c. The Establishment of the Civil Disobedience Defense .....	260
B. <i>Alternative Means of Protecting Civil Disobedience in Not-So-Liberal States</i> .....	268
a. Constitutional Protection of Civil Disobedience .....	268
b. Legislative Role in Protecting Civil Disobedience .....	270
C. <i>Other Means for Expressing Tolerance</i> .....	272
D. <i>Potential Criticisms Considered</i> .....	275
a. No Punishment, No Civil Disobedience? .....	276
b. The Efficiency of the Civil Disobedience .....	278
E. <i>The Protection of Civil Disobedience in Situations of Emergency</i> .....	281
III. SUMMARY .....	284
<b>CHAPTER VII: CONCLUSION.....</b>	<b>286</b>
I. MAIN FINDINGS AND SUGGESTIONS.....	286
II. FINAL THOUGHTS AND PROPOSED AREAS FOR FURTHER RESEARCH .....	289
<b>BIBLIOGRAPHY .....</b>	<b>292</b>



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## Summary

The thesis argues that civil disobedience is justifiable in the liberal democracy and there is a viable way to reconcile civil disobedience with democracy. Can civil disobedience be justified in the liberal democracy? What role does civil disobedience play in a democracy? How to reconcile civil disobedience and democracy? These are the questions which will be explored in the thesis. The thesis is divided into four main parts.

The first part includes the first two chapters. The main aim of this part is to introduce the background of the research and to define civil disobedience. Since civil disobedience has been used in a variety of different meanings, defining it clearly at the outset is necessary.

The second part is composed of the third and the fourth chapter. This part is devoted to the justification of civil disobedience, which argues that civil disobedience is justifiable in a democracy because it is beneficial to the development of democracy. The fourth chapter is a further explanation of the third chapter, which elaborates in what ways civil disobedience is beneficial to democracy.

The fifth chapter is the third part. This chapter proposes that the practitioners



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of civil disobedience are more demanded by democracy than those citizens who obey all laws unconditionally. Therefore, these disobedients deserve tolerance and respect of the democratic society.

In the last part, the sixth chapter, I argue that there is a viable way of reconciling civil disobedience with democracy. Based on a critical review of the past suggestions, I suggest establishing a special defense for civil disobedience in the criminal law system and some other ways to show our tolerance of civil disobedience.

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## Chapter I: Introduction

### I. Civil Disobedience and Its Debates

Civil disobedience, understood as breaching a law out of moral or political grounds, is not a modern invention; it is a classical idea whose roots can be traced at least to ancient Greece when Antigone courageously broke the law to bury his brother.<sup>1</sup> And Socrates, a great philosopher of ancient Greece, is also believed to be the first philosopher who thoroughly examined the question of whether to obey or disobey an unjust law. In *Crito*, he explained why laws should be followed and why disobedience to the law is rarely justified. In this dialogue, it becomes clear that, for Socrates, one should obey the laws of the city as one obeys his father and mother.<sup>2</sup>

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<sup>1</sup> Sophocles' play "*Antigone*" illustrates the conflict between obeying human and divine law. The play opens after Oedipus' two sons Eteocles and Polyneices have killed each other in a civil war for the throne of Thebes. Oedipus' brother in law Creon then assumes the throne. He dictates that Eteocles shall receive a state funeral and honors, while Polyneices shall be left in the streets to rot away. But Polyneices' sister, Antigone, believes that an improper burial for Polyneices would be an insult to the Gods. She vows that Polyneices' body will be buried, and Creon declares that anyone who interferes with his body shall be punished. This is the beginning of the conflict. The question is whether duties to the gods are more essential than obedience of the state and law. There is no compromise between the two. Both Creon and Antigone believe in the absolute truth of their obedience.

<sup>2</sup> Socrates compares the obedience of law to that of how a child should not cause harm to his parents. From birth you are told to obey laws. You were brought to life from your mother and father and thus you should respect and obey the rules that they do. But the city's laws were there before your mother and father, and are therefore equally if not more important than the laws of your mother and father. It is impious to bring violence to bear against your mother or father; it is much more so to use it against you country. One should obey one's parents, but more important is the city. Because the city was that which has taught your ancestors and your parents, it must be superior to them. (*Crito*, 50c-51c)

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Since Socrates' time, many philosophers have expressed views about civil disobedience. Their attitudes towards civil disobedience can roughly be divided into two schools. The first school adopts an affirmative attitude toward civil disobedience by recognizing its justifiability under some circumstances. Those who hold this view include Henry David Thoreau, Martin Luther King Jr., Mohandas ("Mahatma") Gandhi and Ronald Dworkin.<sup>3</sup> A second school, whose representatives include Morris I. Leibman and Lewis H. Van Dusen Jr., assumes a negative stance against civil disobedience, totally denying its justness or propriety in the society. The voice of the latter school is much weaker than the former's. The situation may be partly due to the fact that the view of the latter is the view which has been adopted by the state, so the scholars in the latter group feel that they have much less to say than the scholars in the former who have to strive for the recognition of their views.

But the debates about civil disobedience take place not only on the theoretical level; they also took place in practice. Many people, from ancient to modern, have used their bodies, even lives, to participate in these debates. The afore-mentioned Thoreau, King and Gandhi, and many other civil disobedients

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<sup>3</sup> The philosophers from the first school see eye to eye on the justifiability of civil disobedience, but their arguments are often based on very different grounds. Some mainly base their arguments on moral grounds, for example, King. Some others may mainly base their arguments on political grounds, for example, Rawls. For their main arguments, please see Martin Luther King, Jr., "Letter from a Birmingham City Jail", in *Why We Can't Wait* (New York: New American Library, 1964) at 76-95 and John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 335-343.

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who are less famous or even unknown to history are all good examples. They were arrested, jailed and even sentenced to capital punishment in extreme cases.<sup>4</sup> If punishment represents disapproval of the citizen by the state, then these civil disobedients were obviously regarded as unwelcomed persons by the authority. But history tells us that they are different from ordinary criminals who seek only their own interests. Their acts are typically intended to benefit the whole society. Even today, many still benefit from the noble actions of Gandhi and King. Without them and their noble actions of civil disobedience, today's world would be much darker.

It is understandable why an authoritarian regime might punish the civil disobedient because the goal of such a regime, as generally believed, is to protect the privileges of the few. Anyone who dares to challenge the interests of the dominant class might be punished without consideration of the reasonableness of the challenge. Punishment, under such a regime has no necessary relation to justice. But it is totally different in a democracy. A democracy purports to be a system committed to justice. Punishment, therefore, in a democracy should also be used to enhance justice. So any

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<sup>4</sup> Actually, the most horrible prospect for the civil disobedient is not the death penalty, but brutal massacre and assassination. The Amritsar massacre, which took place in British-colonized India in 1919, is a good example of this. On the 13th of April 1919, about 10,000 demonstrators unlawfully, but peacefully, protested at Amritsar. Although these civilians were unarmed and not violent, the then British General Edward Dyer ordered his soldiers to open fire. Nearly 400 were killed and more than a thousand were severely injured. Please see Tim Coates (ed.), *The Amritsar Massacre, 1919: General Dyer in the Punjab 1919* (London: Stationery Office Books, 2001).

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punishment meted out in a democracy should have a justification. In view of this important relationship between justice and punishment in a democracy, we should ask: Is civil disobedience justified in a democracy because of its promotion of justice? Must civil disobedients be punished in a democracy as they are punished in a totalitarian regime? If not, then what is the best way to moderate or eliminate the penalty for them?

On the one hand, the law denies the claim that civil disobedience is a right; on the other hand, civil disobedience is an important part of the political landscape, a common and familiar event.<sup>5</sup> This reality requires that we have a better understanding of civil disobedience and democracy. Thus, the aim of this thesis is to consider the justification for civil disobedience in a democracy and attempt to reconcile the two by softening the predicament of the civil disobedient.

## **II. The Reconciliation of Civil Disobedience and Democracy**

The main theoretical question in this thesis concerns the justification for civil disobedience in a democracy because understanding how civil disobedience

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<sup>5</sup> Chemi bin Noon, "Civil Disobedience, Rebellion, and Conscientious Objection", online: <<http://www.ict.org.il/articles/articleDet.cfm?articleid=438>>, last visited on January 9, 2010.

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might be justified theoretically enables us to see how to reconcile civil disobedience and democracy in practice. Many scholars have remarked that civil disobedience is inconsistent with democratic values. For instance, Joseph Raz argues that the need for civil disobedience is confined to illiberal societies because in liberal societies people enjoy extensive freedom and have many ways to influence the government. Thus, there is no need for them to resort to civil disobedience to express their views.<sup>6</sup> Other opponents of civil disobedience see it as a threat to democratic society and the forerunner of violence and anarchy.<sup>7</sup> However, I follow some liberals such as John Rawls in arguing that civil disobedience is still justified in contemporary democracies. But my justification for civil disobedience is not a simple repeat of previous liberal arguments. I will invoke the concepts of democratic deficits and justice deficits to show that contemporary democracy is imperfect. In an imperfect democracy, citizens are justified in resorting to civil disobedience in order to be loyal to democratic ideals. Additionally, in order to show the justification of civil disobedience, the role of civil disobedience in a democracy will also be

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<sup>6</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 266-275. In his account of a right to civil disobedience, Raz places great emphasis upon the kind of regime in which a disobedient acts. Raz argues that only in an illiberal regime do certain individuals have a right to civil disobedience. Given that the illiberal state violates its members' right to political participation, individuals whose rights are violated are entitled, other things being equal, to disregard the offending laws and exercise their moral right as if it were recognized by law... "[M]embers of the illiberal state do have a right to civil disobedience which is roughly that part of their moral right to political participation which is not recognized in law." By contrast, in a liberal state, Raz argues, a person's right to political activity is, by hypothesis, adequately protected by law. Therefore, in such a regime, the right to political participation cannot ground a right to civil disobedience.

<sup>7</sup> For example, see Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: The World Publishing Co., 1968), at 55.

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discussed because it can help us better understand the positive effects of civil disobedience on democracy.

Based on the justification of civil disobedience and its potential contributions to the evolution of democracy, I argue that the civil disobedients are good citizens that are needed by democracy. Compared to those citizens who obey any law enacted by the state, the civil disobedient only obeys the law conditionally. When he finds that a law is in conflict with the spirit of ideal democracy, he will seek to redress it, even in the form of disobedience. This spirit of vigilance serves as a reminder to the state that its power is not unrestricted and, therefore, might be able to prevent democracy from degenerating into authoritarianism.

The ultimate aim of my thesis, however, is to find a way to reconcile civil disobedience and democracy. There have been many debates about the justification of civil disobedience, but the literature on the practical reconciliation of civil disobedience and democracy is rare. Few scholarly efforts have concentrated on this issue. Briefly speaking, three sporadic suggestions can be found.

One suggestion is that the civil disobedient is entitled to avail of the necessity

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defense to exempt himself.<sup>8</sup> On this view, practitioners commit civil disobedience out of urgency and with the view to preventing a more severe harm; this is a typical act of necessity. Thus, the practitioners of civil disobedience can avail themselves of the necessity defense to get an exemption of the punishment. A second suggestion is that the most important difference between civil disobedience and crime lies in the motivation of the actor. Therefore, the court can utilize the good motive defense to acquit the civil disobedient.<sup>9</sup> A third suggestion is to use the mistake of law defense to acquit the civil disobedient. If a defendant really believes that a law is unconstitutional and consequently violates that law to obtain a chance to challenge the law, the mistake of law defense should be available to the defendant.<sup>10</sup> Indeed, these suggestions work in some cases of civil disobedience. For example, the necessity defense has been successfully adopted in several cases by the state courts of the United States.<sup>11</sup>

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<sup>8</sup> Luke Shulman-Ryan, “The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State’s Civilly Disobedient”, (2005) 27 *W. New Eng. L. Rev.* 299, at 299-364; And also see John Alan Cohan, “Civil Disobedience and the Necessity Defense”, (2007) 6 *Pierce L. Rev.* 111, at 111-175.

<sup>9</sup> Martin C. Loesch, “Motive Testimony and a Civil Disobedience Justification” (1991) 5 *Notre Dame J.L. Ethics & Pub. Policy* 1069.

<sup>10</sup> Graham Hughes, “Civil Disobedience and the Political Question Doctrine”(1968) 43 *N.Y.U.L.Rev.* at 1.

<sup>11</sup> See, for example, *California v. Jerome* (Cal. Mun. Ct. Oct. 1987) (defendants blocked main gate to nuclear weapons laboratory; arrested for traffic violation; Traffic Commissioner permitted necessity defense; prosecuting attorney moved to drop charges; motion granted); *California v. Block*, (Cal. Mun. Ct. Aug. 1979) (defendants demonstrated against nuclear power at nuclear power plant; charged with trespass and resisting arrest; judge permitted necessity defense).



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In my opinion, these defenses, however, are not without flaws. In the first place, they do not work in most cases of civil disobedience. In addition, they pose the danger of excessively politicizing the court and extend the existing defenses too much. I will suggest that the most feasible way to soften the predicament of civil disobedients is to mitigate the punishment by establishing a special defense for civil disobedience. When a claim of civil disobedience is raised in the court, the court should decide whether the conduct amounted to civil disobedience, and if the court finds that the prosecuted action fully satisfy the standards of civil disobedience, it can decide to reduce or abolish the punishment for the defendant. This suggestion has obvious advantages. First, it is applicable to all cases of civil disobedience; second, it can allow the benign character of civil disobedience to be considered in the court while at the same time retaining civil disobedience as a viable means of protest in democracy.

### **III. Plan of the Thesis**

As mentioned above, this thesis is about the reconciliation of civil disobedience and democracy. The aim of the whole thesis is to argue that civil disobedience should be tolerated by democracy and there is a viable way to reconcile civil disobedience and democracy by making some changes to the

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present constitutional and criminal systems. The thesis will be divided into seven chapters, with the Introduction and Conclusion respectively as the first and last chapter.

In the second chapter, I define civil disobedience. Civil disobedience has been used by philosophers in a variety of different meanings, it is necessary, therefore, to give a definition of civil disobedience at the outset.

The third and fourth chapters are devoted to the justification of civil disobedience in a democracy. In order to achieve the final aim of reconciling civil disobedience and democracy, the first step is to prove that there is possibility for them to be reconciled. However, it has long been argued that civil disobedience may be justified in an authoritarian regime, but it is never justified in a democracy where people are allowed to vote and to protest. Thus, the main aim of these two chapters is to establish that civil disobedience is in consistent with democracy and it will not be in vain to make endeavors to reconcile them. Along this line, the third chapter argues that civil disobedience is still needed in liberal democratic societies as in the authoritarian regimes because the existing liberal democracies are far from perfect. It would be helpful to retain civil disobedience as an effective way in liberal democracies to eliminate injustice and improve democracy. The fourth chapter is a natural extension and a further explanation of the third chapter. The third chapter

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argues that civil disobedience should be retained as a helpful way to develop democracy, but it does not explain what kind of help civil disobedience can do to a liberal democracy. Thus, the fourth chapter is written to fill that gap by elaborating on the contributions that civil disobedience could make to the development of democracy. I argue that civil disobedience not only can help to stabilize democracy, but also can help to nurture certain characters of citizenship that are required by any viable democracy.

The fifth chapter explains the virtues of the practitioners of civil disobedience. In a society, there are citizens who would obey any law at any time and there are citizens who obey laws conditionally. The practitioners of civil disobedience are among the second type. In general, they acknowledge the necessity and the justness of obeying law, but at the same time they retain their own judgments. When faced with great injustices, they will stage their protest in the form of civil disobedience. My argument in this chapter is that citizens who obey all laws at all times are more damaging to democracy than the practitioners of civil disobedience. Good citizens must, at times, be disobedient as well as obedient. Proving that the practitioners of civil disobedience are good and responsible citizens is essential to the reconciliation of civil disobedience and democracy because it allows us to encourage civil disobedience by protecting its practitioners.

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In the sixth chapter, I try to reconcile civil disobedience and democracy in practice. One stark contradiction of today in political and legal sphere is that, on the one hand, we hail civil disobedience as noble actions which are beneficial to democracy, but on the other hand, the state spares no effort to punish the practitioners of civil disobedience. Therefore, the most important thing to reconcile civil disobedience with democracy is to minimize the undue punishment of civil disobedience. I propose that this can be done on many levels: first, for those states with a competent judicial system, a special defense for civil disobedience may be enforced by the courts; secondly, for those states which are not so liberal, civil disobedience may be protected by the legislature and the constitution.

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## Chapter II:

### The Definition of Civil Disobedience

Many practitioners and philosophers have talked about of civil disobedience, but there have never been unanimity on what is the accurate meaning of civil disobedience. The disputes about the definition of civil disobedience are so extensive that there are scholars who even doubt that civil disobedience is capable of genuine definition.<sup>12</sup> Therefore, it is necessary to define civil disobedience before I proceed to discuss further questions.

Two tendencies must be avoided when defining civil disobedience. One tendency is to define civil disobedience too broadly; the other is to define it too narrowly. If defined too broadly, the definition of civil disobedience will include all kinds of protest; civil disobedience, therefore, will lose its status as an independent and distinguished phenomenon. But it is not good to define civil disobedience too narrowly either. If defined too narrowly, civil disobedience may retain its distinguished character, but such a definition will have little practical meaning because very few acts in reality can meet its standard. Therefore, in order to avoid these two tendencies, two rules will be strictly followed when I try to give a definition of civil disobedience. The first

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<sup>12</sup> George Anastaplo, *The American Moralists: On Law, Ethics, and Government* (Athens, OH: Ohio University Press, 1992) at 552.

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rule is that the definition of civil disobedience should be able to include all typical cases of civil disobedience; the second rule is that civil disobedience must be retained as an independent phenomenon with distinguished characters from other kinds of protests.

The task of defining civil disobedience will be completed in four steps. First, I will briefly describe the typical cases of civil disobedience in history because I try to make all of these typical cases to be covered by my version of definition. Second, I will elaborate the various characteristics of civil disobedience. It is by these characteristics that civil disobedience is differentiated from other kinds of protests. Third, I will analyze the differences between civil disobedience and other related phenomena with a view to further clarify the meaning of civil disobedience. Finally, I will summarize what I find and give a definition of civil disobedience.

## **I. Typical Cases of Civil Disobedience**

Civil Disobedience in the meaning of violating a law on the grounds of moral or political principle can be traced in western history as far back as to ancient Greece. At that time, the choice between breaking and obeying the law had been a question for both Socrates and Antigone despite their different social

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backgrounds. While Socrates finally chose to respect the law, even if the law was an unjust one, Antigone courageously chose the opposite. She believed that she should follow the law of divine, rather than the law made by man.<sup>13</sup> Some scholars believe Antigone's spirit of resistance is the very origin of civil disobedience.<sup>14</sup>

In my opinion, the historical development of civil disobedience might roughly be divided into three stages. As I explained, the origin of civil disobedience can be traced to ancient Greece, but the very term "civil disobedience" is popularly believed to be coined in the nineteenth century by David Thoreau in his famous essay "Civil Disobedience".<sup>15</sup> Thoreau used civil disobedience to boycott the war on Mexico and the American slavery system, but at that time civil disobedience did not attract much attention of the public. So the time from antiquity to Thoreau can be viewed as the birth stage of civil disobedience. Then, in the twentieth century, the practice of King and Gandhi finally made civil disobedience famous. Their practice also attracted the

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<sup>13</sup> About the stories of Socrates and Antigone, please see Plato's *Crito* and Sophocles' *Antigone*.

<sup>14</sup> Beth Doggett, "Antigone and Civil Disobedience", online: <[http://vccslitonline.cc.va.us/antigone/antigone\\_and\\_civil\\_disobedience.htm](http://vccslitonline.cc.va.us/antigone/antigone_and_civil_disobedience.htm)>, last visited on October 20, 2007.

<sup>15</sup> Thoreau's essay "Civil Disobedience" was originally delivered as a lecture before the Concord Lyceum on January 26, 1848, under the title, "On the Relation of the Individual to the State"; it was published with some revisions in 1849 in a journal called *Aesthetic Papers*, which had only one issue. In this journal, the title given to the essay was "Resistance to Civil Government". The essay first appeared as "On the Duty of Civil Disobedience" when it was republished in a volume of his writings titled *A Yankee in Canada*, four years after his death. Therefore, "Civil Disobedience," the name given to Thoreau's essay for its posthumous publication in 1866, may or may not have been Thoreau's title; the evidence leaves both possibilities open.

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attention of both scholars and politicians around the world. Many academic meetings were summoned and a great number of papers and books on civil disobedience were published. Both theoretically and practically, civil disobedience emerged as an important political concept during this period, which can be viewed as the developing stage of civil disobedience. Generally speaking, this period stretches from Thoreau's time to the civil rights movement in the United States. The third stage is the maturity period. In this stage, civil disobedience began to be practiced in more areas and many organizations which adopted civil disobedience as their main tactic were established. The typical cases in this stage include the anti-globalization and environmental movements.

Before I venture into a detailed discussion of the definitional requirements for civil disobedience, I will briefly describe the most important and well-known events which are believed to be typical cases of civil disobedience. In consideration that these events will be cited more than once in this dissertation, it is helpful to describe them in advance.

### **A. Thoreau's Struggle**

Henry David Thoreau (1817–1862) played a vital role in the development of



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civil disobedience. He is the man who made the theory famous, put it into practice, and gave the practice the name “civil disobedience”.

Thoreau’s theory of civil disobedience is not very complicated. There are two principles underlining it. The first is that the authority of the government depends on the consent of the governed. The second is that justice is superior to the laws enacted by the government, and the individual has the right to judge whether a given law reflects or flouts justice. In the latter case the individual has the right and duty to disobey the law and accept the consequences of the disobedience. He claims that the only obligation one has a right to assume is to do at any time what one thinks right. Otherwise, why has every man a conscience?<sup>16</sup>

In order to protest the injustice of slavery and Mexico War in which the American government was engaging, Thoreau refused to pay the poll tax. In 1846, he was arrested and thrown into jail for this. He could easily have afforded the tax, but he felt that it took at least one person to stand up for what they believed in. However, the next day a friend paid the tax for him, much to Thoreau's regret, and he was released. Thoreau’s protesting gesture and his theory of civil disobedience did not get much attention at the time, but many years later they influenced many, sparked political struggles, and changed

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<sup>16</sup> Henry David Thoreau, “Civil Disobedience”, in Hugo Adam Bedau (ed.), *Civil Disobedience in Focus* (London: Routledge, 1991), at 29.

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world politics forever.<sup>17</sup> When Bedau talked about Thoreau's contribution to the development of civil disobedience movement, he said this:

[Thoreau] seems to stand at a pivotal point in the history of the movement. In one way or another the concept of Civil Disobedience has been voiced and acted upon for at least 2,400 years, but never has it received such mass support, never has it been the object of so much public attention as during the century since Thoreau laid down in such clear intellectual terms the reasons why men should seek to govern their own actions by justice rather than legality.<sup>18</sup>

## **B. Gandhi and His Movement**

Mohandas ("Mahatma") Gandhi (1869–1948) is the man who broadened the scope of civil disobedience and helped civil disobedience to gain international

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<sup>17</sup> The list of the persons who are influenced by Thoreau is astonishing. It famously includes Tolstoy, Gandhi, and Martin Luther King. It also includes the anarchist Emma Goldman, the English educator Henry Salt, the German-Jewish philosopher and activist Martin Buber, the American peace activist Ammon Hennacy, the World Fellowship Center director Willard Uphaus, the African National Congress founder Trevor N. W. Bush, the Freedom Rider William Mahoney, and such notable contemporary tax resisters as Errol Hess and Randy Kehler. Please see Lawrence Rosenwald, "The Theory, Practice and Influence of Thoreau's Civil Disobedience", in William B. Cain (ed.), *A Historical Guide to Henry David Thoreau* (New York: Oxford University Press, 2000). The article is also available online: <<http://thoreau.eserver.org/theory.html>>, last visited on October 20, 2007.

<sup>18</sup> Hugo Adam Bedau(ed.), *Civil Disobedience: Theory and Practice* (New York: Pegasus Books, 1969), at 15.

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fame.<sup>19</sup> Gandhian civil disobedience originated in 1906, in South Africa, as part of his campaign for the defense of the civil rights of the disenfranchised Indian immigrants. There, he successfully compelled the government of the Union of South Africa to make important concessions to his demands, including recognition of Indian marriages and abolition of the poll tax for Indians.<sup>20</sup> In early 1915, Gandhi returned to India. As soon as he returned to his own country, he began to use the techniques he had developed in South Africa to protest against oppressive taxation and widespread discrimination, and above all to fight for the independence of India. Gandhi famously led Indians in the disobedience of the salt tax on the 400 kilometer Gandhi Salt March in 1930, and an open call for the British to quit India in 1942. Gandhi was imprisoned for many years on numerous occasions in both South Africa and India, but his movement attracted a huge number of followers from the Indian public. Thus, Gandhi was able to use the technique as an effective political tool and played a key role in bringing about the British decision to end colonial rule of his homeland. Gandhi's India independence movement was one of the few relatively unqualified successes in the history of civil disobedience. His success made civil disobedience known to the world.

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<sup>19</sup> Most scholars think Gandhi's practice is typical cases of civil disobedience, but there are still some other scholars who deny Gandhi's Satyagraha belongs to civil disobedience.

<sup>20</sup> "*Gandhi in South Africa*", online: <<http://www.encounter.co.za/article/112.html>>, last visited on October 25, 2007.

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Gandhi called his practice *Satyagraha*, a Gujarati<sup>21</sup> word meaning “firmness in adhering to truth”.<sup>22</sup> He considered truth as the sovereign principle: “Truth is God.”<sup>23</sup> To be binding, laws had to be truthful. All untruthful laws had to be resisted. However, Gandhi’s theory does not end here; he further proposed that despite untruthful laws must be resisted, the end does not justify the means. The means itself must be equally noble and pure. Thus, non-violence was always at the very center of Gandhi's thoughts and struggles. In his eyes, there is an obvious relationship between the doctrine of truth and non-violence, that is, non-violence is the fundamental means by which truth can be realized.

The seeker after Truth should be humbler than the dust. The world crushes the dust under its feet, but the seeker after Truth should so humble himself that even the dust could crush him. Only then, and not till then, will he have a glimpse of Truth.<sup>24</sup>

By stressing love and non-violence, Gandhi successfully deepened the meaning of civil disobedience. His place in civil disobedience and humanity is measured not in terms of the twentieth century, but in terms of history. His

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<sup>21</sup> One of the Indian regional languages, *Satya* means truth, *Graha* means firmness.

<sup>22</sup> Gandhi’s idea of civil disobedience was influenced by many thinkers. Thoreau is one of them, and perhaps the most important one. Please see George Hendrick, “The Influence of Thoreau’s ‘Civil Disobedience’ on Gandhi’s Satyagraha”, (1956) 29 *The New England Quarterly* 462, at 462-471.

<sup>23</sup> M. K. Gandhi, *An Autobiography: The Story of My Experiments with Truth* (London: Jonathan Cape, 1966), at xiii.

<sup>24</sup> *Ibid.*, at xiv.

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teachings inspired nonviolent movements all over the world, notably the Civil Rights Movement led by King in the United States and the Anti-Apartheid Movement in South Africa under the leadership of Nelson Mandela.

### **C. Martin Luther King and the Civil Rights Movement**

Martin Luther King Jr. (1929–1968) was another figure who contributed greatly to the development of the practice of civil disobedience. Like Gandhi, he helped make civil disobedience a respected practice worldwide.

King's "Letter from a Birmingham Jail" is considered the most widely read and discussed manifesto on civil disobedience after Thoreau's essay. Although aware of Thoreau's writings, King was more directly influenced by Gandhi and the Christian humanism.<sup>25</sup> In his essay, he maintained that there were two types of laws: just and unjust. He contended that those laws which square with the moral law or the law of God are just, whereas those laws which are out of harmony with the moral law are unjust. Just laws should be advocated; unjust laws should be disobeyed because they degrade human personality.<sup>26</sup> Like

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<sup>25</sup> John P. Diggins, "Civil Disobedience in American Political Thought", in Luther S. Luedtke(ed.), *Making America: The Society and Culture of the United States* (Washington: United States Information Agency, 1987) at 352.

<sup>26</sup> Martin Luther King, Jr, "Letter from a Birmingham Jail", in David Dyzenhaus and Arthur Ripstein(ed.), *Law and Morality: Readings in Legal Philosophy* (Toronto: University of Toronto Press, 1996), at 458.

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Thoreau and Gandhi, King insisted on the nonviolence nature of civil disobedience. And, like Thoreau and Gandhi, he emphasized the importance of accepting the penalty. “One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty.”<sup>27</sup> Moreover, King was not only a theorist but also a great practitioner of civil disobedience. He played a very active role in the African-American civil rights movement, similar to the role which Gandhi had played in the independence movement of India.

Generally, the African-American Civil Rights Movement refers to the reform movement in the United States in the 1950s and 1960s which was aimed at abolishing racial discrimination against African-Americans. Those days were an uneasy and unforgettable time for Americans. The Montgomery bus boycott, the lunch counter sit-ins, the Freedom Rides, the Mississippi Summer and the March on Washington all took place in that period. Though not all of the events that made up the Civil Rights Movement would qualify as civil disobedience, there can be no doubt that the movement as a whole showed the great power of civil disobedience in changing unjust social orders.<sup>28</sup> King was at the forefront of the Civil Rights Movement. Beginning with the Montgomery Boycott, and over the course of his life, King helped to bring together African-Americans and created a great movement and changed United States forever. His strategy of civil disobedience and his philosophy of

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<sup>27</sup> *Ibid.*, at 459.

<sup>28</sup> *Supra* note 9, at 1084.

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non-violent resistance also made himself one of the most influential Americans to ever live.

After nearly a decade of nonviolent protests and marches, Congress of the United States passed the Civil Rights Act of 1964 and the Voting Rights Act of 1965, guaranteeing basic civil rights for all Americans regardless of race; the civil rights movement triumphed and the strength of civil disobedience was also made clear once more.

#### **D. Civil Disobedience in the Contemporary World**

In the past, civil disobedience was connected with struggles for basic human rights. Now the situation of human rights has greatly improved in the western liberal democracies since King's time. But, civil disobedience has not disappeared with such improvements on human rights. On the contrary, it is even more prevalent and is adopted as a tactic by various protest groups worldwide. The anti-nuclear movement, the green movement, and the movement against globalization have all adopted civil disobedience with varying degrees of enthusiasm. Such movements help civil disobedience go beyond the national boundary and become an international phenomenon.

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The anti-nuclear movement is a loosely-linked international social movement opposed to the use of nuclear technologies, which originated in United States and soon spread to almost the whole world.<sup>29</sup> Soon after the successful test of the atomic bomb and its subsequent use on Japan in 1945, people began worrying about its destructive power. As concern mounted, citizens formed groups to protest. Inspired by King and the Montgomery bus boycott of 1956, some activists formed the Committee for Non-Violent Action in 1957 and many members of this organization were arrested for trespassing when they tried to enter the gates of the atomic test site.<sup>30</sup> In the same year, the Committee for a Sane Nuclear Policy was formed and began pressing for a halt to weapons testing. These two events heralded the beginning of the anti-nuclear movement in the United States. In the following decades, hundreds of thousands of people participated in this movement. The participants did not restrict their protests to legal demonstrations. Civil disobedience tactics such as sit-ins, trespassing and blockade of roads were also extensively used by them. The movement soon spread to Europe and the rest of the world in 1950s, and the decision of the NATO to deploy nuclear weapons in Europe, in particular, sparked a series of massive civil

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<sup>29</sup> For a detailed discussion of the movement, please see Jerome Price, *The Anti-Nuclear Movement* (Boston: Twayne Publishers, 1990) and Lawrence Wittner, *Resisting the Bomb: A History of the World Nuclear Disarmament Movement* (Stanford: Stanford University Press, 1993).

<sup>30</sup> “Anti-nuclear Protests”, online: <<http://www.san.beck.org/GPJ29-AntiNuclearProtests.html>>, last visited on April 30, 2009.



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disobedience protests in many European countries. For example, in the last week of October 1983, nearly one million people protested in several cities of West Germany by blocking roads and offices of the defense ministry, sit-ins and forming human chains, and so on. London saw a demonstration of nearly 300,000 people, an equal number protested in Brussels, more than 200,000 in Copenhagen, 500,000 in Rome and more than 550,000 in The Hague.<sup>31</sup> The movement lost its momentum at the end of last century, but it still continues today. One recent event took place in Germany in 2008 when over 15,000 people turned out to disrupt a delivery of nuclear waste across Germany.<sup>32</sup>

The anti-globalization movement is another major movement which uses civil disobedience.<sup>33</sup> The movement burst into mass consciousness with the “The Battle of Seattle” in November 1999. In the series of demonstrations that took place over the course of several days, the protestors participated in unauthorized marches, blocked delegates' entrance to WTO meetings and

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<sup>31</sup> Kepi, “Anti-nuclear Demonstrations or Peace Movement?”, (1984) 19 *Economic and Political Weekly* 198, at 198.

<sup>32</sup> “The Renaissance of the Anti-Nuclear Movement” , online: <<http://www.spiegel.de/international/germany/0,1518,589456,00.html>>, last visited on April 30, 2009.

<sup>33</sup> Most people who are labeled "anti-globalization" reject the term, preferring instead to describe themselves as the Global Justice Movement, the Anti-Corporate-Globalization Movement, the Alter-Globalization movement (popular in France), the "Counter-Globalization" movement, and a number of other terms. Actually, many of them regard the term “anti-globalization” as a tag meant to somewhat discredit the movement; in fact, many of the people involved in the anti-globalization movement do support closer ties between the various peoples and cultures of the world, and they are opposed only to capitalist globalization. This is why they tend to use more nuanced terms such as given above to describe their movement because these names are more accurate in expressing their goals of ensuring justice for those people who are underprivileged by the globalizing trend.

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forced the cancellation of the opening ceremonies and lasted the length of the meeting until December 3. After Seattle, mass civil disobedience actions continued to take place in many other cities such as Melbourne, Prague and Genoa wherever the world leaders met to discuss the implementation of neo-liberal policies. Besides the widely-known protests taking place at the international level, more protests were held by various groups at the local and national levels including strikes in South Korea, the mass mobilization of civil society in Argentina following the country's 2001 economic collapse, and Indonesian protests in the wake of the 1997 Asian Financial Crisis.<sup>34</sup> There are great differences among the different segments of the anti-globalization movement, and their goals are sometimes inconsistent,<sup>35</sup> but the tactic of the civil disobedience has been a common and visible characteristic of this ever-expanding movement.

In contemporary world, the tactic of civil disobedience is also widely used by

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<sup>34</sup> No doubt, those actions taking place at the international level are the most highly publicized events of the movement, but the protests taking place at the local and national levels are also important and an integral part of the movement. These local and national events are numerous and unknown to the other parts of the world, however, there are also some well-known cases such as strikes by unions in South Korea, fights against water privatization in Bolivia and South Africa, the mass mobilization of civil society in Argentina following the country's 2001 economic collapse, the struggle against development of hydroelectric dams in rural India, Indonesian protests in the wake of the 1997 Asian Financial Crisis, actions of the landless farmers movement (MST) in Brazil, African efforts to secure access to low-cost generic AIDS drugs, and demonstrations in Central America against the adoption of trade agreements with the United States.

<sup>35</sup> The movement has been criticized by many critics for lacking of coherent goals, inability to suggest alternative plans etc. Please see "The Anti-Globalization Movement Defined", online: <http://www.stwr.org/the-un-people-politics/the-anti-globalization-movement-defined.html>, last visited on April 23, 2009.

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the environment activists. Environmental and forest demonstrations, with acts of civil disobedience such as sit-ins, blockades, tree sits and forest occupations, have emerged in the last decade, prompted by the continuing mass clear cuts and destruction of the forest ecosystem and widespread environmental consequences.<sup>36</sup> Today, most famous environment organizations such as Greenpeace, the Rainforest Action Network, the Sea Shepherd Conservation Society, the Earth Liberation Front and Animal Liberation Front have all adopted civil disobedience as a way of publicizing their views and achieving their aims. Actually, the tactic of civil disobedience is so widely recognized and used in environmental movements that even the former vice-president of United States, Al Gore, called the people to practice environmental civil disobedience.<sup>37</sup>

The tactic of civil disobedience is also contemporarily used in many other movements, including movements against war and movements against racial discrimination. Moreover, more civil disobedience actions are practiced individually rather than by organizations. So civil disobedience is still widely practiced in the modern world, only the people involved and the causes have

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<sup>36</sup> Kayla Starr, "The Role of Civil Disobedience in Democracy", online: <<http://www.civilliberties.org/sum98role.html>>, last visited on April 20, 2009.

<sup>37</sup> "If you're a young person looking at the future of this planet and looking at what is being done right now, and not done, I believe we have reached the stage where it is time for civil disobedience to prevent the construction of new coal plants that do not have carbon capture and sequestration," Gore was reported to say. Please see Michelle Nichols, "Gore Urges Civil Disobedience to Stop Coal Plants", online: <<http://www.reuters.com/article/environmentNews/idUSTRE48N7AA20080924>>, last visited on April 20, 2009.

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changed.<sup>38</sup>

I draw attention to these important events of civil disobedience in history and in the contemporary world because those events not only are important for our discussion but also should guide our response to civil disobedience. Having discussed the typical cases of civil disobedience, I will now try to define civil disobedience by identifying its main characteristics.

## **II. The Characteristics of Civil Disobedience**

In the previous section, I discussed some famous cases of civil disobedience. In this section, I analyze the common characteristics of these civil disobedience cases. Civil disobedience is best understood as a set of diverse actions that tend to possess certain general attributes. Understanding these characteristics will be greatly helpful to the understanding of the definition. Thus, the following section is devoted to the enumeration of these characteristics. I suggest there are four characteristics of civil disobedience: intentional breach of law, predominantly nonviolence, publicity and willingness to accept punishment.

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<sup>38</sup> *Supra* note 9, at 1087.

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## A. Intentional Breach of Law

The first characteristic of civil disobedience is that it must involve an intentional breach of law. Though there have been and will continue to be serious disputes over exactly what the term “civil disobedience” means, on this point scholars almost unanimously agree.<sup>39</sup> Actually, it is reasonable to call this characteristic the most prominent characteristic of civil disobedience because almost all of the disputes about civil disobedience can be traced to this characteristic. As Weber said, if there is no breach of law, there will be no need to justify it.<sup>40</sup> In order to make it easier to understand, I will further divide this characteristic into three sub-characteristics.

Firstly, it means that there must be a breach of law. In other words, if no law is violated in a protest, then that protest is not qualified as civil disobedience. This requirement is necessary to distinguish civil disobedience from legitimate protest in the public square such as organized marches, parades or demonstrations. A classic case in point here is the famous Montgomery bus boycott led by King in 1955-56. King had called on his followers to boycott the buses by walking and organizing car pools. Such boycotts, at least initially,

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<sup>39</sup> Only a few academics tried to challenge this point. Please see Bruce Ledewitz, “Civil Disobedience, Injunctions, and the First Amendment”, (1990) 19 *Hofstra L. Rev.* 67, at 69-70.

<sup>40</sup> Paul J. Weber, “Toward a Theory of Civil Disobedience” (1967) 13 *Cath. Law.* 198, at 202.

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did not breach any law, so they should not be considered civil disobedience, contrary to the view of some scholars whose views will be considered shortly.<sup>41</sup> The same point also applies to Gandhi when he called Indian people to resist using any goods imported from England.<sup>42</sup> Refusing to buy something is not against the law, so such acts do not qualify as civil disobedience either.

Secondly, the breach of law must be intentional. “One feature of the disobedient's violation of law is especially notable. He not only breaks the law but does so knowingly and deliberately.”<sup>43</sup> This is very important. It means that disobedience itself is an essential, not an accidental, element in the disobedients’ act. In other words, accidental violations of law, even in the course of a protest, cannot be classified as civil disobedience. For example, a man in a legitimate demonstration broke a window out of negligence and was arrested by the police. Though such an act is a breach of law and also takes place in a protest, it is not an act of civil disobedience. Civil disobedience, after all, is not just done; it is deliberately and knowingly committed.

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<sup>41</sup> If boycotts have been declared as illegal by the authorities, but the civil disobedient still choose to perform, then the acts would qualify as civil disobedience.

<sup>42</sup> The boycott of British goods in December 1921 by Mahatma Gandhi, known as the *swadeshi* policy. Gandhi also urged people to boycott British educational institutions and law courts, to resign from government employment, and to forsake British titles and honors.

<sup>43</sup> Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* (New York, Columbia University Press, 1971), at 39-40.

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Finally, the breach of law is intended to be a protest. The purpose of civil disobedience is to call attention to an unjust law or policy and ultimately change it. Therefore, the civil disobedient does not commit civil disobedience merely for amusement or out of self-interest. They must seek to benefit society.<sup>44</sup> That is to say, when a civil disobedience action is staged, its purpose must be to protest or persuade. So in the previous example, if the man broke the window to steal a necklace he wanted for his wife, this would not be an act of civil disobedience. Civil disobedience is a noble action.

Although, as mentioned earlier, almost all scholars agree that intentional breach of law is an essential part of civil disobedience, minor disputes on this point persist. Two main disputes are involved here. The first is what the word “law” means. The second is whether the breach of law can be indirect.

Some scholars claim that breaking an unconstitutional law is not civil disobedience. For example, Leslie J. Macfarlane proposed that actions taken in furtherance of the constitution against unconstitutional practices could not be validly construed as acts of civil disobedience.<sup>45</sup> And Stuart M. Brown, Jr. also contended that “if the only statute that a freedom rider ever breaches are unconstitutional, then he commits no crime or act of civil disobedience. The

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<sup>44</sup> This is not to say that the civil disobedient cannot also act out of self-interest. It is merely to say that only self-interest is not enough; he must include something bigger than self-interest among his reasons for action.

<sup>45</sup> Leslie J. Macfarlane, “Justifying Political Disobedience” (1968) 79 *Ethics* 24, at 40.

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notion of disobeying implies a legally valid rule or command.”<sup>46</sup> In my opinion, this is a very unrealistic view because it excludes many typical cases of civil disobedience. For instance, the segregation and discriminating laws opposed by King and his followers were unconstitutional in reality, but this did not prevent them from being civil disobedients. To take a step back, if we accept the view that breaking an unconstitutional law is not civil disobedience, then the conclusion would be this: only constitutional law itself and those laws which are in line with it would qualify as targets of civil disobedience. To a large degree, this would mean that only constitution itself could be the target of civil disobedience since all other laws are under the constitution. No doubt, this is a very unrealistic view. If it were adopted, there would be hardly any cases of civil disobedience because many of the typical cases of civil disobedience, such as those described earlier in this chapter, would have to be excluded as cases of civil disobedience.

So what kind of law should qualify as a target of civil disobedience? And what does the word “law” means in this context? In my view, the law targeted by civil disobedience is one that is either constitutional or unconstitutional. As long as the authorities consider the law valid and are ready to enforce it by coercive means, the law would qualify as the target of civil disobedience. The reason is that before the unconstitutionality of such laws is officially

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<sup>46</sup> Stuart M. Brown, Jr., “Civil Disobedience”, (1961) 58 *The Journal of Philosophy* 669, at 675.



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recognized by the court or other government branches, they are still enforceable and a prospective practitioner of civil disobedience would have to face the danger of punishment, just as in those civil disobedience cases which target laws that are, in reality, unconstitutional.

The other dispute here is whether breaches of law in civil disobedience can be indirect. Must a civil disobedient breach the very law that is being protested? Or he can breach one law in order to protest another law? According to one view, breaching one law to protest another law is forbidden. Its most well-known representative is Judge Abe Fortas who said that civil disobedience “is never justified in our nation where the law being violated is not itself the focus or target of the protest”.<sup>47</sup> However, such a view is not accepted by most scholars. As John Rawls points out in *A Theory of Justice*, direct disobedience is impossible at times because one cannot protest a law on treason by committing treason or protest a law on rape by committing rape.<sup>48</sup> In my view, Rawls’s view is preferable, but a more important question is how far indirect civil disobedience can go. Is it possible to protest a segregation law by killing a white person? Is it right to protest an unfair university policy by stealing? Obviously, indirect civil disobedience should not be allowed to go so far. Otherwise, the social order would be damaged, if not completely destroyed.

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<sup>47</sup> “Speech on Conciliation with the Colonies”, in Edmund Burke, *Speeches and Letters on American Affairs* (New York: E.P. Dutton & Co., 1961), at 63.

<sup>48</sup> John Rawls, *A Theory of Justice*(Oxford: Oxford University Press, 1971) at 322.

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So where should the demarcation line be drawn? Undoubtedly, the answer is not an easy one. It differs from case to case. But the general rule is clear: The connection between the law breached and the law protested must not be so far as to appear ineffective and absurd. And here it is also important for the civil disobedient to let both the authorities and the public know that he is deliberately violating a law or an injunction in protest at a law that has no direct bearing upon the nature of the law or injunction violated. Ultimately, civil disobedience is a symbolic and instrumental act;<sup>49</sup> its fundamental aim is not to breach the law or paralyze the social order but to redress the law which is considered unjust. So communication between the civil disobedient and the authorities is vital, especially in the case of indirect civil disobedience.

## **B. Predominantly Nonviolent**

The second characteristic of civil disobedience is non-violence. This means that the civil disobedient must be committed to a peaceful protest. He does not try to achieve his aim by the use of violence or threatening use of violence.

Almost all academic commentators of today consider non-violence an

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<sup>49</sup> Asa Kasher, "Special Issue: Refusals to Serve: Political Dissent in the Israel Defense Forces: Comment: Refusals: Neglected Aspects", (2002) 36 *Isr. L. Rev.* 171, at 173.

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essential characteristic of civil disobedience.<sup>50</sup> But some scholars disagree. There are some commentators who claim that civil disobedience can be violent as well as non-violent. For example, Berel Lang in his “Civil Disobedience and Nonviolence: A Distinction with A Difference” claims that acts of civil disobedience need not be nonviolent. Any justification of civil disobedience also serves as justification for a subclass of actions involving violence.<sup>51</sup> John Morreall also contends that civil disobedience directed against certain immoral laws or policies can be violent and still be justifiable.<sup>52</sup> However, in my opinion, the argument that civil disobedience can be violent is either based on misunderstanding or is looking at completely different concepts. For example, what John Morreal tried to propose in his article is that violent disobedience is justifiable. It is true that violent disobedience, even violent revolution, may be justifiable under certain circumstances, but this does not mean that these violent disobediences qualify as civil disobedience. Civil disobedience does not include all kinds of justifiable disobedient actions, and there is no civil disobedient or theorist of civil disobedience who claims that only civil disobedience is justified and all other acts of disobedience are not. So whether an action is justifiable is one thing; whether it qualifies as civil disobedience is another.

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<sup>50</sup> Elliot M. Zashin, *Civil Disobedience and Democracy*(New York: The Free Press, 1972), at 116.

<sup>51</sup> Berel Lang, “Civil Disobedience and Nonviolence: A Distinction with a Difference” , (1970) 80 *Ethics*156, at 156.

<sup>52</sup> John Morreall, “The justifiability of violent civil disobedience”, (1976) 6 *Canadian Journal of Philosophy* 35, at 35-47.

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I will therefore follow most philosophers of civil disobedience and the original meaning of “civil” by defining civil disobedience as a non-violent action. This is more of a concept-mapping question than a contentious philosophical question because defining civil disobedience as non-violent does not imply that I deny the justifiability of other kinds of disobedience. But the resulting definition does have advantages by giving civil disobedience a distinguishable characteristic. It can help to distinguish civil disobedience from other kinds of protests, including revolution and overt terrorism, which, if ever justified, would require a distinct justification.<sup>53</sup>

Having defined civil disobedience as non-violent, I need to further clarify what I mean by non-violence because even those scholars who agree that non-violence is an essential characteristic of civil disobedience are also divided on its meaning. The first group of scholars, whose most known representative is Rawls, adopts an almost zero-tolerance attitude towards violence.<sup>54</sup> A second group is tolerant of some violence. They maintain that civil disobedience should be only predominantly non-violent.<sup>55</sup>

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<sup>53</sup> *Supra* note 40, at 202.

<sup>54</sup> According to Rawls, violent acts likely to injure are incompatible with civil disobedience as a mode of address. “Indeed”, says Rawls, “any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one’s act.” See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 366.

<sup>55</sup> Mark Edward DeForrest, “Civil Disobedience: Its Nature and Role in the American Legal Landscape”, (1997-1998) 33 *Gonz. L. Rev.* 653, at 658.

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In my view, the latter view is preferable. The former is generally rejected for two reasons. First, it overlooks the complicated social context in which civil disobedience takes place. Civil disobedience in nature is a non-violent, benevolent resistance. However, since it usually takes place during a time of great social strife and acts of peaceful resistance have historically been countered with violence from the side of those who try to preserve the status quo, it is difficult under such circumstances for the civil disobedients to keep their actions completely peaceful. Sometimes, even when all reasonable steps are taken to ensure the peaceful nature of an act of civil disobedience, sporadic violence will still happen. In Kevin Smith's words, the civil disobedient may find the reality of the street is such that his resolve and effort to do no harm evaporate.<sup>56</sup> Moreover, civil disobedience is often practiced on a mass level; there are thousands, even millions of participants protesting together. It would be unimaginably hard for the organizers to control such a large number of participants.

Second, it is very difficult, if not impossible, to find a precise dividing line between violence and non-violence. It is unclear, for example, whether self-inflicted "violence", minor "violence" to property (such as burning of draft cards), or minor "violence" against others (such as a vicious pinch) should be counted as "violence" so as to disqualify otherwise peaceful acts as

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<sup>56</sup> Kevin H. Smith, "Therapeutic Civil Disobedience: A Preliminary Exploration", (2000) 31 *U. Mem. L. Rev.* 99, at 123.

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acts of civil disobedience. If they are not considered violence, it is counter-intuitive because general knowledge tells us they are violence, just as the words I used to describe them suggest. However, if they are included in the conception of violence, such a strict definition of violence would disqualify many acts (including largely peaceful mass demonstrations) from being regarded as acts of civil disobedience. Moreover, non-violent acts or legal acts sometimes can cause more harm to others than violent acts.<sup>57</sup> For instance, a legal strike by ambulance workers may well have much more severe consequences than minor acts of burning one's own draft cards. Undoubtedly, this further blurs the difference between violence and non-violence. Since violence and non-violence are difficult to differentiate clearly, the pure non-violence attitude will become impractical, if not naïve.

Thus, in consideration of the complicated social context and the difficulty in distinguishing violence and non-violence, the “predominantly non-violent” approach is preferable. But, what does “predominantly non-violent” mean? On the one hand, “predominantly non-violent” means that the civil disobedient does not try to accomplish his aim either by initiating or by threatening violence. Even when confronted with violence, he should not respond with violence. Rather, he should be prepared to suffer.<sup>58</sup> In addition, it also means

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<sup>57</sup> Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press, 1979), at 267.

<sup>58</sup> Hugo A. Bedau, “On Civil Disobedience”, (1961) 58 *The Journal of Philosophy* 653,

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that disobedients must not only eschew violence at the outset of their actions but also assess their ability to remain peaceful during the protest.<sup>59</sup> Disobedients should act with the best interests of the community in mind.<sup>60</sup> Civil disobedience is peaceful in nature; actions that are intended to or threaten to physically harm other people are beyond the pale of civil disobedience.

On the other hand, civil disobedience actions need only to be predominantly non-violent.<sup>61</sup> The civil disobedient is not intended to use violence, but he may find the reality of the street is such that he is incapable of remaining completely non-violent. He may, for example, have to protect himself properly from the violence of the police. Also, he may have to resort to minor violence such as burning of his own draft card or sitting-in in order to dramatize the situation. This character should not deprive him of the status of civil disobedient. Likewise, violence caused by a small number of participants should not disqualify others from the status of civil disobedient and violence used by government members against the bystander or the civil disobedient should not cause the civil disobedient to lose the status. Therefore, in view of

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at 656.

<sup>59</sup> Rudolph H. Weingartner, "Justifying Civil Disobedience", in Robert M. Baird and Stuart E. Rosenbaum(eds.), *Morality and the Law* (Buffalo: Prometheus Press,1988), at 101, 111. Also see Morris Keeton, "The Morality of Civil Disobedience", (1965) *43 Tex. L. Rev.* 507, at 519.

<sup>60</sup> *Supra* note 9, at 1094.

<sup>61</sup> Bruce Ledewitz, "Civil Disobedience, Injunctions, and the First Amendment", (1990) *19 Hofstra L. Rev.* 67, at 70.

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the complicated reality of the street, the question of violence must be assessed in each context rather than being dismissed outright.<sup>62</sup>

### **C. Publicity**

The third characteristic of civil disobedience is publicity which requires the action of civil disobedience to be carried out in the open, in a non-secretive or overt manner.<sup>63</sup> There are two elements involved in this requirement.

In the first place, publicity means that people who violate law for reasons of civil disobedience must state or demonstrate the reason for their disobedience. Civil disobedience is an action intentionally committed for protest; it is vital, therefore, for the disobedient to let both the government and the public know what they are protesting against. They cannot achieve their aim of redressing the law or policy if no one knows what they are complaining about. That is to say, the goal of civil disobedience can be achieved only if civil disobedients successfully convey their intentions to the authorities and the public.

In the second place, publicity requires that the civil disobedient's violation of a

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<sup>62</sup> Christian Bay, "Civil Disobedience Theory", in Christian Bay & Charles C. Walker (ed.), *Civil Disobedience: Theory and Practice* (Montréal: Black Rose Books, 1975), at 13-30.

<sup>63</sup> *Supra* note 61, at 71-80.



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law must either be public or done in a manner in which the civil disobedient “leaves the signature” on the action. This requirement would exclude disobedience like the Underground Railroad,<sup>64</sup> which succeeded because of its covert operation, from the definition of civil disobedience.

Publicity is an important characteristic of civil disobedience, but it should not be defined too narrowly. For example, some writers go so far as insisting that publicity means the civil disobedient must give prior notice to the authorities before committing civil disobedience.<sup>65</sup> But, practically, it is unreasonable to construe publicity in such a strict meaning because it may put the civil disobedient into a fragile and powerless situation. The authorities, after being informed, may dispatch personnel to impede the performance of civil disobedience and prevent it from being made public, so advance notice should not be a requirement of all civil disobedience,<sup>66</sup> though it is not rare for the

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<sup>64</sup> Also known as the Underground Railway Movement of America. Created in the early nineteenth century, the Underground Railroad was an informal network of secret routes and safe houses used by nineteenth century Black slaves in the United States to escape to free states and other countries such as Canada and Mexico with the aid of abolitionists who were sympathetic to their cause. For more, see David W. Blight, *Passages to Freedom: The Underground Railroad in History and Memory* (Washington: Smithsonian Books, 2001) and Fergus M. Bordewich, *Bound for Canaan: The Underground Railroad and the War for the Soul of America*, (New York: Harper Collins, 2005).

<sup>65</sup> “Some writers even go further, construing publicity, along Gandhi’s lines, as the obligation to communicate future acts of civil disobedience to the competent authorities beforehand.” Please see Maria Jose Falcon Y Tella, *Civil Disobedience* (Herndon: Brill Academic Publishers, 2004), at 56. The book was translated into English by Peter Muckley from *La desobediencia civil*, (Madrid: Marcial Pons, 2000). Also see Matthew R. Hall, “Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law”, 28 *Cardozo L. Rev.* 2083, at 2093.

<sup>66</sup> Brian Smart, “Defining Civil Disobedience”, in Hugo Adam Bedau (ed.), *Civil Disobedience in Focus* (London: Routledge, 1991), at 206.

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authorities to be informed beforehand by the civil disobedient. I therefore suggest that it will suffice to meet the characteristic of publicity as long as the civil disobedient commits civil disobedience publicly or leaves his signature on the protest so that the authorities know who is disobeying the law and what he is protesting against.

It is also unnecessary that civil disobedience be carried out in the public square where the civil dialogue of any society takes place, as in a mass meeting or before the media, as some writers have suggested.<sup>67</sup> The requirement of publicity emphasizes that the intention of the protest and the identity of the protestor be known to the public and the authorities; it does not require civil disobedience to be committed necessarily with the presence of many people or in view of the media. A public declaration of intention and identity immediately after the act should be enough to satisfy the requirement of publicity. For example, some civil disobedients may secretly, rather than publicly, trespass on the nuclear test site and paint some protesting slogans on the buildings, but their actions would be still sufficient to meet the requirement of publicity as long as they announce their intentions after the action.

But, at the same time, another trend of denying publicity as a characteristic of

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<sup>67</sup> *Supra* note 40, at 202.

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civil disobedience must also be avoided. A few scholars adhere to the view that civil disobedience also can be done in complete secrecy. Two typical cases often mentioned by them are the Underground Railway Movement of America<sup>68</sup> in which many people secretly harbored or protected slaves from their owners in defiance of the Fugitive Slave Act and the soldiers' defiance action in Nazi Germany<sup>69</sup> when many German soldiers secretly defied their senior's orders to kill the Jewish people. The reason why these scholars wrongly believe that civil disobedience can be committed in complete secrecy is the same reason expounded in the last section, which leads some writers to wrongly believe that civil disobedience can be violent. They all confused civil disobedience with justified defiance of law. They all, therefore, mistakenly believe the theory of civil disobedience should cover every justified breach of law. But, actually, civil disobedience is only one type of justified breach of law. It does not cover every justified breach of law, nor has the necessity or obligation to do so. No doubt, the defiance actions of the soldiers in the Nazi Germany to protect Jews are just and should be encouraged, but this does not mean they must be considered as civil disobedience. In fact, this line of thought followed by them is very harmful to the study of civil disobedience, because it will blur the line between civil disobedience and typical crimes and

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<sup>68</sup> Michael Perry, *Morality, Politics, and Law* (New York: Oxford University Press, 1989), at 118.

<sup>69</sup> Eugene Schlossberger, "Civil Disobedience", (1989) 49 *Analysis* 148, at 153. George Anastaplo, *The American Moralists: On Law, Ethics, and Government* (Athens, OH: Ohio University Press, 1992) at 540-1. Susan Tiefenbrun, "Civil Disobedience and the U.S. Constitution", (2003) 32 *Sw. U. L. Rev.* 677, at 687.

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cause civil disobedience to lose the character as an independent and distinguished form of protest.

In summary, publicity is an essential character of civil disobedience, but it does not mean that civil disobedience must be committed with witnesses or audiences; it merely highlights that the intention of disobedience and the identity of the committer be known to the public and the relevant authorities.

#### **D. Willingness to Accept Punishment**

Another characteristic of civil disobedience is willingness to accept punishment, which requires that the protesters who engage in civil disobedience not only be peaceful and open, but also be willing to pay the penalty for their actions. That is to say, the civil disobedients should not seek to shirk accountability for their actions or hide what they have done. Rather, he should come forward and accept any punishment which the authorities impose on them<sup>70</sup>

This characteristic, i.e., willingness to accept punishment, is closely related to the non-violence characteristic of civil disobedience. Non-violence

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<sup>70</sup> *Supra* note 55, at 661.

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characteristic requires all proper measures to be taken in the part of the civil disobedient to avoid the occurrence of violence. The civil disobedient should not incite violence himself, and he should also refrain from resorting to violence when provoked by others in order to avoid stirring more violence. In order to keep the protest nonviolent, it is necessary for the civil disobedient to willingly submit himself to the relevant authorities because if he resists or even only tries to escape, violence may ensue. Therefore, in some sense, willingness to submit to punishment is the inner requirement or natural extension of the meaning of nonviolence.

Willingness to submit to punishment is also an expression of the civil disobedient that he is not putting his own interests over those of the others' and, rather, he is committed to the rule of law.<sup>71</sup> Civil disobedience, given its place at the boundary of fidelity to law, is said to fall between legal protest, on the one hand, and revolutionary action, militant protest and organized forcible resistance, on the other hand.<sup>72</sup> It is not, and must not become, an open invitation to anarchy.<sup>73</sup> The civil disobedient is different from anarchist because he still has faith in the rule of law. The civil disobedient is also

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<sup>71</sup> For example, Dworkin in his *Taking Rights Seriously* claims that when one breaks the law, he must submit to the punishment that state imposes, "in recognition of the fact that his duty to his fellow citizens was overwhelmed but not extinguished by his moral obligations", please see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), at 186.

<sup>72</sup> "Civil Disobedience", in Stanford Encyclopedia of Philosophy, online: <<http://plato.stanford.edu/entries/civil-disobedience/>>, last accessed on May 29, 2009.

<sup>73</sup> *Supra* note 40, at 202.

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different from violent revolutionists because he believes that the authorities may accept his plea finally and there is chance to change the injustice peacefully. He does not want, at least in the beginning, to break abruptly with the authorities in power. Very often, the target of civil disobedience is not the whole political system, but only one law or a small number of laws.<sup>74</sup> Therefore, it is reasonable for the civil disobedient to show his allegiance to the political system by submitting himself to the authorities willingly after breaking the law, especially in those cases of indirect civil disobedience in which a just law has been broken merely serving the aim of showing the injustice of another law.

But some scholars deny that the civil disobedient should willingly submit himself to the authorities. Howard Zinn holds that accepting punishment for civil disobedience would be contradictory. The contradiction would lie in the fact that the civil disobedients disrespect the law in the first place, with their law-breaking action, and then accept the legal punishment with the aim of showing their respect to the law itself. Why is it all right to disobey the law in the first instance, but then, when you are punished, start obeying it? The principle should be if it is right to disobey unjust laws, it is right to disobey

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<sup>74</sup> Just as Rawls said in his *A Theory of Justice*, civil disobedience only “expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one’s conduct.” See John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 322.

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unjust punishment for breaking those laws.<sup>75</sup> The same puzzle is underscored by Paul Power, who contends that willingness to accept punishment is unacceptable: “To accept jail penitently as an accession to the rules is to switch suddenly to a spirit of subservience, to demean the seriousness of the protest”.<sup>76</sup> This seems to be a serious challenge for those who endorse the principle that civil disobedience requires the willingness to accept punishment. However, the challenge is built on the misunderstandings of civil disobedience. First, Zinn misunderstands the aim of civil disobedience. Civil disobedience is not to overthrow the political system or build a new government. It is only a protest against some of its laws. Though the civil disobedient complains of these laws sometimes, he is still loyal to the larger political system. When he disobeys a particular law, he is protesting its injustice, but when he submits himself to the punishment, he is trying to express his allegiance to the whole political system. The fact that he accepts the punishment imposed by the law is only to show that he is still willing to cooperate with the authorities in resolving the problem. Therefore, there is no contradiction as suggested by Zinn.<sup>77</sup> Second, willingness to accept punishment does not necessarily mean

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<sup>75</sup> Howard Zinn, “Law, Justice and Disobedience”, (1991) 20 *Notre Dame Journal of Law, Ethics and Public Policy* 899, at 914-8.

<sup>76</sup> Paul F. Power, “On Civil Disobedience in Recent American Democratic Thought”, (1970) 64 *The American Political Science Review* 35, at 40.

<sup>77</sup> Moraro suggests that this misunderstanding of Zinn comes from his different answer to the question whether we have to obey a system which produces injustice. Zinn’s answer is negative, i.e. one should completely break off with such a system and defy to the end; while the answer of the typical civil disobedient is active, i.e. he believes that the injustice can be redressed with a limited disobedience while at the same time retaining cooperative with the system. Please see, Piero Moraro, “Violent Civil Disobedience and Willingness to Accept Punishment”, *Essays in Philosophy*, Vol. 8, No. 2, June 2007, online:

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that the civil disobedient must plead guilty or acknowledge the propriety of the government to punish him; it only means that he should not try to hide his identity and should submit himself to punishment peacefully if the authorities seek to punish him. And raising possible defenses is not inconsistent with the requirement of willingly submitting to punishment, the civil disobedient may choose to continue his fight with words in the court to show the rightness of his cause and the injustice of the law. In this light, it is not sound to conclude that willingly submitting to punishment is a sign of spiritual subservience or a demeaning of the seriousness of the protest as claimed by Power.

Another point which deserves attention is that willingness to accept punishment does not require the civil disobedient to go to jail automatically or voluntarily request to be punished. The reasons advanced so far for encouraging willingly submitting to punishment would be largely satisfied by a course of action that allows the authorities to impose punishment. It is wrong to argue that the civil disobedient must request to be punished.<sup>78</sup> Certainly, it is true that some civil disobedients may wish themselves to be arrested and jailed because they think this will be a very helpful way to expose the brutality

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<<http://www.humboldt.edu/~essays/mararo.html>>, last accessed on April 3, 2009.

<sup>78</sup> For example, William A. Herr uses this reason to deny Thoreau as a civil disobedient. Though he admits that Thoreau did not resist incarceration for his failure to pay taxes, but he also claims that Thoreau went to jail only because he could not figure out how to avoid punishment. And Thoreau also insisted that the state had no right to punish him. Based on these arguments, William denies that Thoreau was a civil disobedient. Arguably, William's claim is based on the misunderstanding of willingness to accept punishment which we mentioned here. Please see, William A. Herr, "Thoreau: A Civil Disobedient?", (1974) 85 *Ethics* 87, at 90.



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of the authorities and arouse the public, but this is another question which concerns the specific tactic of civil disobedience instead of the inner requirement of willingness to accept punishment.

In short, willingness to accept punishment is an essential characteristic of civil disobedience which requires the civil disobedient to refrain from resisting enforcement of laws and willingly submit to punishment. But it does not require the civil disobedient to plead guilty. It is a misunderstanding to interpret willingness to accept punishment as pleading guilty and admitting impropriety.<sup>79</sup> The civil disobedient, through willing acceptance of punishment, indicates that he is seeking redress of the injustice by cooperating with the authorities rather than breaking off with them completely.

### **III. Civil Disobedience and Related Phenomena**

Based on the characteristics of civil disobedience elaborated above, I will try in this section to differentiate civil disobedience from its related phenomena. This will not only contribute to the further clarification of the implications of civil disobedience, but will also help to justify my analysis of civil

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<sup>79</sup> For example, Lippman claims that “a central precept of civil disobedience is that disobedients should plead guilty and accept their punishment.” See Matthew Lippman, “Civil Resistance: The Dictates of Conscience and International Law versus the American Judiciary”, (1990) 6 *Fla. J. Int'l L.* 5, at 7.

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disobedience as an independent kind of protest.

### **A. Civil Disobedience and Common Crimes**

Both civil disobedience and common crimes involve violations of law, and very often deliberate violations of law. Therefore, they look very similar under some circumstances. Sometimes, it is not easy to draw a clear line between them because there are bound to be difficult cases at the boundary.<sup>80</sup> However, under most circumstances, there is no difficulty in differentiating them.

Their main difference lies in the motive. The common crimes are generally committed because of such familiar motives as personal gain, malice and hate etc.,<sup>81</sup> but civil disobedience is not undertaken out of selfishness (or at least not *merely* out of selfishness); rather it seeks to enhance the common good through changes in the policies or laws of the state. Perpetrators of civil disobedience believe that they are engaged in a noble cause and they also believe that the public will eventually come to agree with them. On the other hand, most criminals know what they are committing is not commendable and, therefore, they rarely have the extravagant hope that people will view them as

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<sup>80</sup> *Supra* note 45, at 30.

<sup>81</sup> Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992), at 153.

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good examples.

Further, acts of civil disobedience may be distinguished from typical cases of crime by their outer characteristics. First, civil disobedience is characterized by publicity, whereas typical cases of crime are characterized by secrecy.<sup>82</sup> The civil disobedient aspires both his actions and identity to be known by others, and the more people know, the better. Nevertheless, typical criminals try to break the law secretly. Generally, they want others know neither their acts nor their identities.

Second, civil disobedience is committed non-violently; while criminal acts can be violent. Non-violence is an inner requirement of civil disobedience; the use of violence may lead to the loss of the civil disobedience status. But, non-violence is not a necessary component of crime and the use of violence does not negate the status of crime either, though there are some crimes that are necessarily committed peacefully, such as fraud and theft.

Third, the civil disobedient is willing to submit himself to punishment; at least he does not try to hide or escape. However, typical criminals often do everything possible to avoid punishment.

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<sup>82</sup> *Supra* note 46, at 670.

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Fourth, civil disobedience is an intentional breach of law, i.e. it is committed with the purpose of protest. Accidental breach of law does not constitute civil disobedience. However, the situation of common crimes is much more complex. Most crimes are committed voluntarily, but there are also some crimes which can be committed involuntarily such as involuntary killing and negligence of duty.

After elaborating all of these differences, it should be pointed out that the civil disobedient is typically punished as a common criminal today, though some form of mitigation is often provided; almost all of the modern penal codes of the world, if not all, fail to specify a special treatment for civil disobedience. Certainly, the civil disobedient is not punished under the crime of civil disobedience because there is no such a crime. He is punished according to specific rules which he breaches. It has been argued by some scholars that this response is inappropriate and some of them have also suggested ways to revise the penal code in order to distinguish the civil disobedient and his acts from criminals and criminal acts.<sup>83</sup>

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<sup>83</sup> *Supra* note 9, at 1096.

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## **B. Civil Disobedience and Legal Protest**

In a democracy, citizens enjoy the rights of protest. The rights of protest can be expressed in demonstrations, strikes, parades, petitioning, public debates, and direct appeals to the media, and so on. Legal protest has a great deal in common with civil disobedience, in that both civil disobedience and legal protest are public responses to a certain situation created by law or policy which the protesters feel harmful either to them or to the society.<sup>84</sup> And they are both committed to justice and serve the law's need for growth and reform. But, legal protest and civil disobedience also have significant differences.

The key difference is that civil disobedience involves breaking the law, while legal protest does not. Civil disobedience is a protest beyond the legal system which requires laws to be broken. That is to say, violation of law is an essential part of civil disobedience, without which civil disobedience will cease to exist. But legal protest is a protest within the legal system which requires citizens to exercise their rights of protest in accordance with the law. In fact, this difference is a reflection of the protestors' different attitudes towards the existing legal system. The legal protestors still believe that injustices and departures against which they are protesting can be cured in the

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<sup>84</sup> *Supra* note 5.

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legal system itself by resorting to the legal channels provided by it, whereas the civil disobedient is more pessimistic who considers that the legal means are either unavailable to them or ineffective. It is believed that on the continuum of protest civil disobedience lies in the middle. One end of the continuum of protest is legal protest, and the other end is rebellion.<sup>85</sup> Legal protest is protected by law and is not considered as an infraction to the law, while civil disobedience represents only a limited respect for the law.

Further, the means of expression adopted by legal protests are generally considered more benevolent than those adopted by the civil disobedients. Legal protest is expressed in such ways permissible by law as parades, strikes, dialogues, fasting and boycotting. However, civil disobedience does not follow the legislated rules, often involving disturbing the government in various ways, such as sitting-in, refusing to pay tax, refusing to serve in military forces, and blocking the road. Civil disobedience, therefore, is generally believed to be more likely to create problems for society than legal protest. That is why some scholars suggest that civil disobedience should be used only as a last resort, after all legal means have been tried.<sup>86</sup>

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<sup>85</sup> John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 322.

<sup>86</sup> For example, Tiefenbrun pointed out that civil disobedience should be considered only as a last resort after negotiation, conciliation, the courts, and Congress have failed. Please see Susan Tiefenbrun, "Civil Disobedience and the U.S. Constitution" (2003) 32 *Sw. U. L. Rev.* 677. And also, Ernest van den Haag, *Political Violence and Civil Disobedience* (New York: Harper & Row, 1972) at 114-117. Haag claims that the civil disobedient "first must have made a good faith effort to work within the confines of the established, lawful procedures to change the law which motivated the act of civil disobedience." Anyway, we will discuss this point later.

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### C. Civil Disobedience and Conscientious Objection

Conscientious objection is noncompliance with a more or less direct legal injunction or administrative order, whose aim is to safeguard the conscience of a person.<sup>87</sup> One typical case is the conscientious objection to military service on the basis of religious or secular pacifism. Conscientious objection is very similar to civil disobedience in many aspects. For example, they both involve disobedience of law; they both have close links with the conscience and the moral standards of the protestors. Therefore, sometimes it is very easy to confuse them. But, actually they belong to different categories and deserve different treatment.

First, conscientious objection is a private act which does not try to fight for common good. As Rawls observes in *A Theory of Justice*, the conscientious objector does not seek to impose his conscience on the society and, accordingly, does not make efforts to ask the redressing of law. He hopes only that the society will take his special case into account and grant him a special exemption from the relevant law. On the contrary, the civil disobedient seeks

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<sup>87</sup> Actually conscientious objection which is alternatively called conscientious refusal by some scholars, like civil disobedience, is also a concept whose meaning is full of controversy. Here, we follow the footsteps of Rawls. His definition of conscientious refusal is the most popular one. About the different meanings of conscientious refusal, please see Avi Sagi and Ron Shapira, "Special Issue: Refusals to Serve: Political Dissent in the Israel Defense Forces: Comment: Civil Disobedience and Conscientious Objection", (2002) 36 *Isr. L. Rev.* 181, at 183-187.

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to redress or abolish the protested law and does so not only out of conscience but also out of sense of justice, compassion or similar motives.<sup>88</sup> What the civil disobedient is demanding is not only to preserve their own integrity and conscience, but also to fight for the social good. Therefore, compared to conscientious objectors, the civil disobedient focuses more on the big picture of society rather than on the small world of personal suffering.

Second, civil disobedience can be performed directly or indirectly, whereas conscientious objection must be practiced directly. The civil disobedient may choose to violate a just law to protest another law which he considers unjust. Nevertheless, the conscientious objector cannot do so because his conscience will not be preserved by violating another law.

Third, conscientious objection is always passive, but civil disobedience can assume an active role at times. Conscientious objection is always a passive response to the requirement of law or order, but it is different in the case of civil disobedience. Some cases of civil disobedience are passive responses to the requirement of law, but in other cases civil disobedience can become very aggressive by demanding and coercing the authorities to take steps to change the status quo. In the latter cases, the civil disobedient is in the status of a challenger rather than a passive respondent.

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<sup>88</sup> *Supra* note 85, at 323-325.



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Finally, civil disobedience and conscientious objection are also different in their outer characteristics. Civil disobedience must be performed publicly, non-violently and with a willingness to accept punishment, whereas conscientious objection has no such strict inner requirements. Conscientious objection may be performed secretly, with some violence and with an obvious intention to escape punishment. These differences in outer characteristics originate from the different aims of these two kinds of breach of law. Conscientious objection is largely a private action aimed at defending oneself from what is seen as immoral, while civil disobedience is a politically-motivated breach of law designed to contribute to the improvement of law and, therefore, it is important for others to know their action and the sincerity of the motive behind it.<sup>89</sup>

#### **D. Civil Disobedience and Rebellion**

Rebellion is an organized group act of law-breaking, which is politically motivated; its purpose is to change the regime or the existing constitutional arrangements.<sup>90</sup> Typical examples of rebellion include the Chinese bourgeois

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<sup>89</sup> Joseph Raz, "Bound by their Conscience", online: <<http://www.seruv.org.il/english/article.asp?msgid=98&type=article>>, last accessed on April 29, 2009.

<sup>90</sup> *Supra* note 5.

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democratic revolution led by Sun Yat-sen in 1911, French revolution in 1789, Russian revolution in 1918 and American War of Independence. Rebellion is an act far more violent and aggressive than civil disobedience.

In the first place, rebellion has no respect for the existing political system and authority. A rebellion usually occurs when there is an extreme disparity between the expectations of the rebelling group and the actual situation. When an extreme disparity occurs, the rebel group does not recognize the existing laws of the state any more and, instead, it seeks to overthrow the government or change the constitutional arrangements. In other words, it contemplates the wholesale destruction of the state, that is, the entire system by which law is made, interpreted, and administered.<sup>91</sup> Nevertheless, civil disobedience is not an effort to overthrow the government. It only seeks reform the political order from within.<sup>92</sup>

In the second place, the means of resistance used by rebel groups are far more violent and aggressive than those of civil disobedience; they are not necessarily limited to nonviolence. These means might take the form of terrorism, armed struggle, or political protest of various types. The act of rebellion is often accompanied by great loss, both in terms of lives and in

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<sup>91</sup> *Supra* note 56, at 112.

<sup>92</sup> Susan Tiefenbrun, "Civil Disobedience and the U.S. Constitution", (2003) 32 *Sw. U. L. Rev.* 677, at 688-9.

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terms of property. And its practitioners have no wish to receive punishment; rather they do their best to escape it. On the contrary, civil disobedience is much more restricted. It must be predominantly non-violent and take into account the interests of others.

Finally, rebellion indicates an organized opposition to the government and its laws. Therefore, rebellion is always committed by a mass which is organized to some degree, whilst civil disobedience can be committed both collectively and individually. Actually, most cases of civil disobedience are individual civil disobedience, not mass civil disobedience.

### **E. Civil Disobedience and Terrorism**

Terrorism is best defined as acts of violence committed against innocent persons or noncombatants with the intention of achieving political ends through fear and intimidation.<sup>93</sup> Like civil disobedience, terrorism is usually

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<sup>93</sup> The definition of terrorism has proved controversial. Various legal systems and government agencies use different definitions of terrorism. But it is generally agreed that there are three key criteria distinguishing terrorism from other forms of violence. First, terrorism must be politically motivated. Second, terrorist violence is directed at innocent persons or noncombatants. Third, terrorists intend to influence audience by the way of fear or intimidation. For example, Title 22 of the United States Code, Section 2656f(d), defines terrorism as politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents, usually intended to influence an audience. For a detailed discussion of the definition of terrorism, see Charles L. Ruby, 'The Definition of Terrorism', (2002) 2 *Analyses of Social Issues and Public Policy* 9, at 9-14.

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politically-motivated, that is, terrorist actions are intended to guide or influence governmental policy.<sup>94</sup> Moreover, both civil disobedience and terrorism seek to achieve their aims by the violation of valid laws. Therefore, it is difficult to differentiate them accurately in some borderline cases. But in most cases, there is no difficulty in differentiating them.

The first difference between civil disobedience and terrorism is their attitudes towards the existing political system. The civil disobedient believes that only part of the system goes wrong and its faults can be redressed within the existing system. However, terrorists do not necessarily hold such views. Typical terrorists believe that the existing system is better to be toppled than retained. That is to say, terrorists have much less respect for the existing system and the authorities. But it deserves to point out here that the political motivation behind the terrorism is very complex. Some terrorist groups are motivated by more or less just causes such as getting independence from foreign rule, fighting for more freedom, and so on. It is inappropriate to blindly deny all motivations of terrorism as unjustifiable merely because it shows less respect for the existing system.<sup>95</sup>

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<sup>94</sup> Thus, terrorism is different from violent acts such as robbery and homicide which are committed in the furtherance of personal or criminal goals.

<sup>95</sup> For example, it is controversial whether Palestinian suicide attacks in Israel are morally justifiable. It is suggested that in certain circumstances certain types of terrorism which is utilized for certain purposes may plausibly be claimed to be both morally and tactically justified. Kai Nielsen, "On the Moral Justifiability of Terrorism", (2003) 41 *Osgoode Hall Law Journal* 427, at 427-444.

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A second difference between civil disobedience and terrorism concerns their attitudes toward violence. As mentioned above, civil disobedience must be predominantly nonviolent and the civil disobedient has an obvious abhorrence to violence. But on this point terrorism is just the opposite, given its reliance on violence. Terrorists often try to achieve their aims by using violent means, such as assassination and bombing. Moreover, terrorism usually does not differentiate the innocent from the combatant; in order to achieve its aim terrorism is often connected with the deliberate killing of innocent people.<sup>96</sup> Even weapons of mass destruction, nuclear, chemical or biological, are open to consideration by the terrorist. But in the case of civil disobedience, intentional attacks on innocent people are strictly prohibited.

Thirdly, terrorism usually seeks to spread fear among a wider group than those directly harmed or killed.<sup>97</sup> While terrorists commit violent acts out of different motivations and goals, terrorist groups typically have a tactic in

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<sup>96</sup> This is obvious from the definitions of terrorism. Just cite a few here: "Terrorism is the deliberate killing of innocent people, at random, in order to spread fear through a whole population and force the hand of its political leaders." Michael Walzer, "Five Questions about Terrorism", (Winter 2002) *Dissent* 5, at 5. "Terrorism is the deliberate use of violence, or threat of its use, against innocent people, with the aim of intimidating them, or other people..." Igor Primoratz, "What is Terrorism?" (1990) 7 *J. Applied Phil.* 129, at 135. "Terrorism consists in aiming specifically at civilian targets not directly involved in the opposing side's war effort..." Danny Goldstick, "Defining 'Terrorism'" (1991) 4 *Nature, Soc'y, & Thought* 261, at 265.

<sup>97</sup> Kaplan (1981) said that terrorism is intended to create an extremely fearful state of Mind both for the direct victims and for a larger audience who have no relationship to the victims. Abraham Kaplan, "The psychodynamics of terrorism", in Y. Alexander & J. Gleason (eds.), *Behavioral and Quantitative Perspectives on Terrorism* (New York: Pergamon, 1981), at 35-50. Oots similarly emphasized that terrorism was intended to "create extreme fear and/or anxiety-inducing effects in a target audience larger than the immediate victims." Kent L. Oots, "Bargaining with Terrorists: Organizational Considerations", (1990) 13 *Studies in Conflict & Terrorism* 145, at 145.

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common: intimidation. Terrorism uses violence, or threat of violence, against one portion of a society to compel the greater body of that society or their leaders to make a change out of fear. The message of the terrorist is most strongly conveyed through violence and the threat of more violence. But civil disobedience does not work by intimidation. Its tactics are much softer. Persuasion, self-suffering and soft coercion are its main tactics.

#### **IV. Conclusion: the Definition of Civil Disobedience**

In the light of the analysis above, I define civil disobedience as follows: civil disobedience is a deliberate, public violation of law with the intent to protest, performed non-violently, with a willingness to accept punishment. This definition still needs some clarification.

First, this definition is not applicable to those extremely totalitarian regimes such as Nazi Germany. The society to which my definition is applicable needs not be a “nearly just society” as defined by Rawls,<sup>98</sup> but it must be a society in which the right of protest and freedom of speech have been legally recognized, for in a society which forbids any kind of protest, all acts and gestures which intend to protest, even only a few dissenting words, will tend to be classified

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<sup>98</sup> *Supra* note 85, at 319.

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as disobedience.<sup>99</sup> Moreover, in such a society, civil disobedience action has no way to be known by the public because the authorities are prepared to do everything possible, if necessary, to prevent it from being disseminated.

The reason why I do not follow Rawls to confine the social background to a “nearly just society” is because I think “nearly just society” is a confusing concept. Given the complexity of social reality, it is very difficult to determine whether a society is nearly just or not. For example, Rawls often cite cases from the slavery era in the United States, but not everyone agrees that nineteenth-century America was nearly just considering the fact that African-Americans were treated brutally and women also had no right to vote. Therefore, it is contentious whether such a society was “nearly just”.

Second, when I give this definition, I follow two rules as I have said in the beginning. The first rule is that I try to make most typical cases of civil disobedience fall within my definition. If civil disobedience is defined too strictly, many typical cases of civil disobedience would be excluded. Such a definition would be purely theoretical, with no significance to reality. The second rule is that I try to maintain the independent character of civil disobedience. I consider that civil disobedience should be an identifiable

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<sup>99</sup> In fact, lots of the confusions and misunderstandings in the definition of civil disobedience are caused by different social backgrounds in which civil disobedience happens. When social backgrounds are different, the definition of civil disobedience will tend to vary.

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action which can be distinguished by observable characteristics from other forms of law-breaking such as rebellion or conscientious objection.

Third, this definition restricts civil disobedience to disobedience of political authority, namely, the disobedience of laws or policies of the government. Civil disobedience I discuss here does not include the disobedience of private authority such as disobedience of company rules or religious norms.

## **V. Summary**

Civil disobedience is a kind of political protest which has a long tradition. Many philosophers have used civil disobedience in different ways; it is, therefore, necessary to define civil disobedience at the outset to avoid confusions in subsequent chapters. In this thesis, civil disobedience will be defined as a deliberate, public and predominantly nonviolent violation of law committed with the intent to protest and with a willingness to accept punishment. This definition satisfies the two rules noted above: it covers most typical cases of civil disobedience which occurred in the past and it retains civil disobedience as an independent and distinguished phenomenon.

Now that we have a better idea of what civil disobedience is, I turn to the



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justification of civil disobedience in the next chapter. The justification of civil disobedience is all the more important to the reconciliation of civil disobedience and democracy because it is only if civil disobedience can be justified in a democracy that there is reason to explore their reconciliation.

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## **Chapter III:**

### **The Justification of Civil Disobedience in Democracy**

Having defined civil disobedience in the previous chapter, I now turn to the justification of civil disobedience. Though there is general agreement that civil disobedience is justified in an authoritarian regime, its justification in a democratic state is highly controversial. I will argue that civil disobedience remains necessary in modern western democracy and the argument will be made in three steps. First, I will explain the phenomenon of democratic and justice deficits in the modern western democracy. Second, on the basis of the democratic and justice deficits theory, I will justify civil disobedience from the perspective of the ideal democracy. Finally, I will respond to potential criticisms of my justification of civil disobedience.

#### **I. Democratic Deficits and Justice Deficits**

Democracy is widely considered the best mechanism of governance, but it has never been fully realized. All existing democracies are imperfect. In my opinion, the defects of actual democracies can be explained from two perspectives: democratic deficits and justice deficits.

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## A. The Essence of Democracy

Democracy is often considered a form of government superior to all others. Very few regimes in existence today, if any, would be willing to admit that they are not democratic. But both in theory and in practice there is no universally accepted definition of democracy. Modern textbooks on the topic generally state that “the word democracy comes from the Greek and literally means rule by the people”.<sup>100</sup> The idea of the “rule by the people” means that people can elect their own government and influence or participate in its decisions: in other words, democracy means a government by persons who are freely chosen by and responsible to the governed. Thus, Plato characterizes democracy as “the form of government in which the magistrates are commonly elected by lot”.<sup>101</sup>

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<sup>100</sup> See, for example, Anthony H. Birch, *The Concepts and Theories of Modern Democracy* (London: Routledge, 1993), at 45. However, there is study which shows that the word democracy is much older than classical Greek commentators. Its roots at least can be traced to the late Bronze Age civilization (1500-1200 BC). The discovery of contemporary archaeologists also shows that the practice of self-governing assemblies was not a Greek invention. Actually, it was an innovation of the “East”, by peoples and lands that geographically correspond to contemporary Iraq and Iran. It was later transported eastwards, towards the Indian sub-continent. It also traveled westwards, first to city states like Byblos and Sidon, then to Athens. Please see, “Little Dreams”, online: <[http://www.johnkeane.net/research/research\\_history\\_outline.htm#\\_edn2](http://www.johnkeane.net/research/research_history_outline.htm#_edn2)>, last accessed on February 21, 2008.

<sup>101</sup> Plato, *Republic*, 5.57.

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Today, the notion of democracy has grown much richer and more complex since antiquity when it was discussed by Plato. In fact, it has become so complex that even political theorists struggle with its meaning. This situation is vividly reflected by the multiplicity of terms introduced into democratic dialogue. For example, liberals speak of “modern”, “liberal”, “representative”, “constitutional” or “parliamentary” democracy; social democrats speak of “social”, “economic” or “industrial” democracy.<sup>102</sup> There are both thinner and thicker conceptions of democracy. However, a minimal definition of democracy can be secured that is generally satisfactory.

First of all, democracy continues to be understood, as in antiquity, as a form of government. In this sense, democracy is viewed as a mix of procedures, processes and institutions which are devised to ascertain and reflect the will of the people.<sup>103</sup> Since the sovereign power is vested in the people, rather than the government, the legitimacy of the government comes from its position as a

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<sup>102</sup> Takis Fotopoulos, *The Multidimensional Crisis and Inclusive Democracy*, (2005), Chapter 11, the book is available online: <[http://www.inclusivedemocracy.org/journal/ss/ch11.htm#\\_ftn1#\\_ftn1](http://www.inclusivedemocracy.org/journal/ss/ch11.htm#_ftn1#_ftn1)>, last accessed on August 13, 2009.

<sup>103</sup> For example, all of the eight criteria given by Robert Dahl to judge a democracy are procedural elements. The eight criteria are: the right to vote; the right to be elected; the right of political leaders to compete for support and votes; elections that are free and fair; freedom of association; freedom of expression; alternative sources of information; and institutions that depend on votes and other expressions of preference. Please see Robert Dahl, *Polyarchy* (New Haven: Yale University Press, 1971), at 3.

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servant of the people.<sup>104</sup> The national assembly or parliament is ‘sovereign’ because it expresses the delegated power of the people and it is legitimately so because it is representative of the people’s will.<sup>105</sup> Therefore, the aim of the democratic system is to ensure that the sovereign will of the people to be reflected in the government decisions, policies and laws as accurately as possible. This is an understanding of democracy from the perspective of procedure.

However, it is not enough to understand democracy merely from the perspective of procedures and processes. Democracy not only means a form of government but also a set of values which are above “democracy”.<sup>106</sup> Otherwise, the minority will be very easily subjected to the tyranny of the majority. Some values such as equality, freedom of speech, and freedom of religion should be independent of the majority and the government. This is

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<sup>104</sup> I do not mean here some explicit doctrine of a social contract, but only claim that the sovereign power ultimately resides in the people.

<sup>105</sup> Paul Hirst, *“Representative Democracy and Its Limits”* (Cambridge: Polity Press, 1990), at 24.

<sup>106</sup> A worldwide investigation made by the Centre for the Study of Democracy (University of California, Irvine) in 2007 found that most cognitively capable citizens think of democracy in terms of the freedoms, liberties and rights that it conveys, rather than procedural and institutional conceptions of liberal democracy. This implies that democracy is understood by the popular not in terms of its procedures for elections and governance, but in terms of the freedom and liberty it provides. For the full report of the investigation, please see: Russell J. Dalton, Doh Chull Shin, and Willy Jou, “Popular Conceptions of the Meaning of Democracy: Democratic Understanding in Unlikely Places” (May 18, 2007). Center for the Study of Democracy Paper 07-03, online: <<http://repositories.cdlib.org/csd/07-03/>>, last accessed on March 20, 2008.

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most obvious in the emphasis that all actual democracies place on the values it promotes, such as equality, freedom of speech, freedom of religion, and so on. The American Constitution, for example, limits itself, forbidding the legislation of any law which would infringe freedom of expression and freedom of religion, even if a majority of the people or a majority of the legislature votes to establish that law.<sup>107</sup> Since democracy aims to be a regime of freedom, it should be conducted in the light of values which are independent of the majority and the government because democratic processes *per se* do not guarantee the fulfillment of these values.<sup>108</sup> Consequently, a good democracy should not only be responsive to the will of the majority, it should also ensure social justice and meet some substantive standards. In consideration of this goal, some scholars point out that “the rule of the people” is not a good definition of democracy; a more accurate one would be “the rule of the people restricting itself against the tyranny of the majority of the people”.<sup>109</sup>

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<sup>107</sup> Amendment 1 of the United States Constitution states: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

<sup>108</sup> Certainly, the converse is also true. A regime which only meets the substantive standards does not match the name of democracy either. A good example is Hong Kong and India under the colonial rule of British, which perhaps had more social justice than all authoritarian regimes at that time, but few would have considered the then governments of these two colonies are democratic.

<sup>109</sup> *Supra* note 5.

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So, in summary, although democracy “stands above all else for a method whereby men can resolve peacefully which of competing moralities shall temporarily prevail”,<sup>110</sup> it also should have some substantive stipulations. I will not propose, in this dissertation, what substantive standards should be met if a society can be considered democratic because the justification of civil disobedience does not require such an elaboration. It suffices, here, to remember that democracy has two essential elements: on the one hand, it is a system to give expression to the people’s will; on the other hand, it has certain substantive standards which cannot be transgressed. Every good democracy should be an appropriate combination of procedural and substantive elements.<sup>111</sup>

## **B. The Generation of Democratic and Justice Deficits**

The essential test for a democracy, then, is whether it reflects the will of the people accurately and, at the same time, meets the necessary substantive

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<sup>110</sup> David Spitz, “Democracy and the Problem of Civil Disobedience”, (1954) 48 *The American Political Science Review* 386, at 400.

<sup>111</sup> Some scholars may argue that these substantive standards are the requirements of the rule of law or constitutionalism rather than democracy. But since it is universally recognized today that democracy cannot go alone and must be combined to some degree with the rule of law and constitutionality, it is not important for democracy whether these substantive restrictions are from inner requirements or outer ones (constitutionality and the rule of law). What is important is that democracy is unavoidably restricted by some substantive standards.

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standards. Here, I will use this simplified test to differentiate different kinds of democracy.<sup>112</sup> The democracy which can perfectly satisfy both of these requirements may be called an “ideal democracy” or “perfect democracy”. According to this standard, unfortunately, no democracy in existence today can claim itself to be an ideal democracy, viz. it can claim that it has accurately reflected the will of the people and perfectly realized the substantive standards required by the ideal democracy. All existing democracies have flaws. Though the flaws they have may be different both in substance and degree, the common character they share with each other is that they all aspire to be ideal democracies. I will therefore call these existing democracies “imperfect democracies” or “actual democracies”. And call the gaps between imperfect democracy and ideal democracy as “deficits”. There are two kinds of deficits.

The first is a “democratic deficit”. An ideal democracy can reflect the sovereign will of the people very accurately so that there is no gap between the state will and the will of the people, viz. the state will and the people’s will in an ideal democracy are highly consistent with each other. But, in an imperfect democracy, the situation is different. Gaps often exist between the will of the

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<sup>112</sup> Measuring democracy in a formal way is a complex and controversial task, but it is still possible to measure it with a simplified standard. The ideal democracy may have much subtler standards than the two essential elements I discuss here, but this point does not affect the persuasive effect of my argument below.



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people and the state will as reflected in the laws and policies. When such a gap occurs, that is, when the state will departs from the will of the people, a deficit is produced. I call this kind of deficit a “democratic deficit”.<sup>113</sup> Democratic deficits reflect the departure of the state will from the sovereign will of the people.

A second kind of deficit also arises in imperfect democracies. As I discussed above, a democracy has substantive standards which must be met; however, an imperfect democracy may fail to meet these standards. Though democracy is the form of government “most likely to produce the decisions and results that treat all members of the community with equal concern,”<sup>114</sup> it is wrong to presume that a democracy will never behave unjustly.<sup>115</sup> In an imperfect democracy, it is still possible for the basic rights of minorities to be denied and for freedom of speech and association to be endangered. Therefore, when an imperfect democracy fails to meet the substantive standards required by ideal democracy, a gap arises between the ideal and imperfect democracy. I will call this gap of substantive elements “justice deficits”. The “justice deficits” is the

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<sup>113</sup> The term “Democratic Deficits” is often used as a synonym to democratic faults by the public media; however, this meaning is slightly different from the one I will use in the dissertation, as can be judged from its definition provided here.

<sup>114</sup> Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000), at 186.

<sup>115</sup> Every state has been guilty at some time or another of acting towards some of its subjects unjustly. Even a democracy is not always entitled to a presumption of having acted in good faith. See J. R. Lucas, *The Principles of Politics* (New York: Clarendon Press, 1966), at 329.

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gap between the substantive standards which a democracy should support and the actual realization of those standards.

Having defined democratic and justice deficits, now I explain how these two deficits are generated in an imperfect democracy. But, here, I will not go into depth. For my present purpose, it is enough to consider the issue briefly.

There are at least two causes of democratic and justice deficits. The first is that the actual democratic procedures are open to manipulation and abuse by powerful members and groups of the society. Most people in an imperfect democracy do not have enough resources or time to be fully involved in the decision-making process; therefore, the right to make decisions is generally committed to legislators and public officials who are periodically elected by the people. Since they are difficult to remove once installed,<sup>116</sup> there is the risk of centralizing power in the hands of those best placed to assert that they are the true judges of what is the people will.<sup>117</sup> However, we must not forget that the people are sovereign in a very different sense from the Parliament.<sup>118</sup>

Some critics of the actual, i.e. the imperfect, democracy even view the current

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<sup>116</sup> Ian Shapiro (ed.), *The Rule of Law* (New York: New York University Press, 1994), at 40-1.

<sup>117</sup> Simon Evans, "Why is the Constitution Binding? Authority, Obligation and the Role of the People", (2004) 25 *Adelaide Law Review* 103, at 128.

<sup>118</sup> Leslie Zines, "The Sovereignty of the People", in M. Coper and G. Williams (eds.) *Power, Parliament and the People* (Sydney: Federation Press, 1997), at 94-8.

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form of representative democracy today as a mechanism devised to exclude the vast population from politics:<sup>119</sup> “Once more, the people are not admitted to the public realm, once more the business of government becomes the privilege of the few”.<sup>120</sup> There is indeed some truth in these observations. Besides being subject to manipulation by those in power, democratic procedures are also open to manipulation by those societal members with great wealth, more knowledge, more experience, and so on. The tenth of population that is richest has between about 52% and about 70% or 72% of the society's total personal wealth in Sweden, Britain, and the United States respectively. The poorest tenth has barely any worth speaking of, far less than 1%.<sup>121</sup> As for income, the best-paid tenth has between about five times (Scandinavia) and about twelve times (U.S.) as much as the worst-paid tenth. The subsequent consequence is that the top tenth of population has at least 30 times the economic power of the bottom tenth. Moreover, economic power correlates with fundamental rights because most determinants of political power can be

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<sup>119</sup> John Dunn pointed out that the modern state was constructed purposefully above all for the express purpose of denying that any given population, any people, had either the capacity or the right to act together for themselves, either independently of, or against their sovereign. The central point of the concept was to deny the very possibility that any *demos* could be a genuine political agent, could act at all, let alone act with sufficiently continuous identity and practical coherence for it to be able to rule itself. The idea of the modern state was invented precisely to repudiate the possible coherence of democratic claims to rule, or even take genuinely political action. Please see John Dunn, *Democracy: the Unfinished Journey* (Oxford: Oxford University Press, 1992), at 247-8.

<sup>120</sup> Hannah Arendt, *On Revolution* (London: Penguin, 1990), at 237-8.

<sup>121</sup> Ted Honderich, “Hierarchical Democracy and the Necessity of Mass Civil Disobedience”, online: <<http://www.ucl.ac.uk/~uctyho/ted5.htm>>, last accessed on February 17, 2008. The article also can be found in Ron Bontekoe and Marietta Stepaniants (eds.), *Justice and Democracy*, (Honolulu: University of Hawaii Press, 1997).

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bought.<sup>122</sup> Therefore, when democratic processes are captured and manipulated by special interests, democratic and justice deficits could be generated.<sup>123</sup>

The second reason for the generation of democratic and justice deficits is intrinsic to democracy. This is best explained perhaps by an analogy between the formation of the sovereign will and an individual will.<sup>124</sup> We all know an individual sometimes makes wrong or improper decisions. This may be because the information on which he depends to make decisions is insufficient or inaccurate, because of his failure to notice some aspects of the event or foresee his decision's severe consequences at the time of making decision, because he has not understood the event correctly at that time, or because some elements grow more important after the decision. Whatever the reason, the outcome is that now he cannot agree with the decisions he has made before. He wants the decision to be reconsidered and invalidated if possible. This also applies to the sovereign will because it is based on the individual will. But the difference is that it is relatively easy for an individual to change his decision,

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<sup>122</sup> *Ibid.*

<sup>123</sup> UN Secretary-General Kofi Annan once said in his address to the General Assembly on September 21, 2004 that in too many places "Hatred, corruption, violence and exclusion go without redress. The vulnerable lack effective recourse and the powerful manipulate laws to retain power and accumulate wealth." online: <<http://www.washingtonpost.com/ac2/wp-dyn/A38192-2004Sep21?language=printer>>, last accessed on March 1, 2008.

<sup>124</sup> Daniel Markovits, "Democratic Disobedience", (2005) 114 *The Yale Law Journal* 1897, at 1923.

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nevertheless, it is far more difficult to change the collective decision because of the barriers like institutional inertia.<sup>125</sup> The democratic sovereign “contains more internal barriers to reconsideration than even the most pathologically mulish individual will”, “once a democratic sovereign has made a collective choice, this decision necessarily becomes difficult to reverse.”<sup>126</sup> For example, Malaysia after its independence adopted many laws and policies ranging from business licenses and government contracts to education opportunities and wealth ownership to enhance the welfare of Malay-Malaysians at the expense of other races’ equal chances (mostly Chinese and Indians).<sup>127</sup> At that time, these policies might have been seen as understandable because the ethnic Malays were poorer and less-educated than other races. However, the problem is, after many years’ implementation of unequal policies, some of the background conditions that justified these policies have arguably disappeared; Malays have become dominant in both politics and business, but the policies persist.<sup>128</sup> Under such circumstances, deficits will arise unavoidably. In fact, the historical experience shows that challenge to the status quo could be difficult, lengthy and even deadly dangerous for those involved in it. So, not

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<sup>125</sup> It deserves to notice that institutional inertia is not a bad thing all the time, sometimes it can help to stabilize laws and policies.

<sup>126</sup> *Supra* note 124, at 1926.

<sup>127</sup> In 1957, 45% of the Malaysian population was Chinese; 12% was Indian. In 2004, the number is 25% and 7% respectively.

<sup>128</sup> For instance, among the five major banks of Malay, only one is multi-racial, the rest are controlled by Malays. For the unfair policies adopted by Malay and their consequences, please see “Racial Discrimination in Malaysia”, online: <<http://www.worldpress.org/2298.cfm>>, last accessed on March 1, 2008.

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all people are courageous enough to challenge the status quo. As a consequence, the existence of democratic and justice deficits is inevitable.

In conclusion, in imperfect democracies, public decisions do not always reflect the real will of the people and often depart from the substantive standards required by ideal democracy. The reality of democracies is that they are imperfect, and thus suffer from democratic and justice deficits. I will therefore argue in the next section that these deficits open the door to an important role for civil disobedience.

## **II. The Necessity of Civil Disobedience**

Having explained the generation of democratic and justice deficits, I will now contend that our commitment to democracy is to ideal, not imperfect, democracy. When imperfect democracy is in conflict with the standards of ideal democracy, our loyalty goes to the ideal democracy. Both imperfect democracy and its citizens have obligation to enhance the realization of ideal democracy. Citizens should first use legal means to do so, but when legal means are unfairly blocked, civil disobedience may become necessary.

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## **A. The Necessity of Civil Disobedience**

### **a. The Commitment to Democracy**

It is generally considered that democracy is a form of government which is better than any other form of government. Thus, people have a general obligation to support democracy and the laws enacted by a democratic system.<sup>129</sup> However, as I have discussed above, democracy is not a single entity or a settled concept. It can be further classified into imperfect and ideal democracy. Then, the following question is which kind of democracy is the democracy we should be committed to. In other words, ought we to be more committed to the actual democracy or the ideal democracy? The answer to this question is both important and obvious.

It is important because the answer will directly determine whether there is room for civil disobedience in a democracy. If people's commitment is to imperfect democracy, then the commitment will require them to obey all of the laws enacted by it, whereas if their commitment is to ideal democracy,

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<sup>129</sup> This obligation is often phrased as the prima facie obligation/duty to obey the law. Please see Chaim Gans, *Philosophical Anarchism and Political Disobedience* (New York: Cambridge University Press, 1992), at 42-94.

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then their commitment to imperfect democracy will be a limited one, subject to the higher demands of ideal democracy. Partially disobeying the laws enacted by the imperfect democracy may be necessary in some circumstances.

It is obvious because it is clear that people should be more committed to ideal democracy than to imperfect democracy. I have suggested above that most actual democracies are imperfect, suffering from democratic and justice deficits. They sometimes enact laws that are not democratic, even anti-democratic as compared to ideal democracy. Actually, imperfect democracy is a temporary step toward realizing ideal democracy. The mission of the imperfect democracy is to attain the ideal democracy, notwithstanding no one yet knows for sure what an ideal democracy is. But we do know that the meaning of democracy includes “freedom”, “equality”, and so on; it cannot be reduced to actually existing interpretations, and its content is up for grabs.<sup>130</sup> The fact that the statute book of all democratic states is forever changing — laws are added, removed, modified and replaced — is often a reflection of the effort of imperfect democracy to try to progress toward the ideal democracy. In fact, from a long-term perspective, imperfect democracy can be viewed as an unfinished project which is fallible and revisable, whose purpose is to improve the existing procedures in order to make them more responsive to the people’s will and to interpret the system of rights better with

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<sup>130</sup> Lasse Thomassen, *Deconstructing Habermas* (New York: Routledge, 2008), at 110.



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the view to making it more just and legitimate; in other words, its purpose is to strive to realize ideal democracy. Therefore, when the imperfect democracy conflicts with the ideal democracy, it is clear that we should be more committed to our ideals.

Actually, being totally committed to the imperfect democracy is problematic because it would justify every injustice imposed on minorities and other vulnerable groups. Therefore, it is better to view imperfect democracy as a limited justice and we are only conditionally committed to it.

A question which may arise here is why we should be committed to imperfect democracy at all since our final commitment is to the ideal democracy. The answer is that it is our commitment to ideal democracy that requires us to do so. First of all, the law of the imperfect democracy is possible to be in conflict with the ideal democracy, but, very often, it is in line with the ideal. Therefore, we have an obligation to support it just as we have an obligation to support the ideal democracy. Next, imperfect democracy is, with high probability, the best means to actualize ideal democracy. So, we are committed to it is because of its aim of realizing ideal democracy and because it may be the most effective way available to us to achieve that aim.<sup>131</sup> This is why we treat the imperfect

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<sup>131</sup> In some sense, democracy is a system with constitutive imperfectness, because its development is a progress from the good to the better. It is almost sure that we will never achieve the best.

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democracy with respect. But our respect to it is only conditional. When its laws and practices are in line with the ideal democracy, we are obligated to obey them, but when its laws and practices are unnecessary departures from the ideal democracy (the democratic and justice deficits), our obligation to it also ends. In order to defend the ideal democracy cherished by us, we are entitled to adopt appropriate means including both lawful means and civil disobedience, to address the deficits.

But if there are many lawful means available in the imperfect democracy to address the deficit, why is civil disobedience needed? After all, today's democracy, though not perfect, has made great progress from those authoritarian regimes in the past; it allows people to petition, to persuade, to protest, to organize themselves to fight for almost everything they want to achieve. So why is civil disobedience necessary?<sup>132</sup> In the next section, I

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<sup>132</sup> It seems that this position is most strongly held by officials. It is rewarding to recall what Lincoln said in his famous address "The Perpetuation of Our Political Institutions" in 1838: "Let every American, every lover of liberty, every well wisher to his posterity, swear by the blood of the Revolution, never to violate in the least particular, the laws of the country; and never to tolerate their violation by others. As the patriots of seventy-six did to the support of the Declaration of Independence, so to the support of the Constitution and Laws, let every American pledge his life, his property, and his sacred honor;—let every man remember that to violate the law, is to trample on the blood of his father, and to tear the 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

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consider this question.

### **b. The Argument of Lawful Means**

I have proved above that the imperfect democracy is fallible and our commitment is to ideal democracy rather than to imperfect democracy. Therefore, when imperfect democracy conflicts with ideal democracy, it is our duty, if our commitment to ideal democracy is sincere, to find ways to address the democratic and justice deficit. But we cannot conclude from here that civil disobedience is justified because lawful means are available in a democracy to the dissenters and legal means are generally presumed as preferable to illegal ones. So, in order to prove that civil disobedience is necessary, we must prove further that legal means are not enough to meet our ends. Three reasons can be given.

First of all, lawful means are distributed unfairly among the society. It is noticed by Brian Martin that in today's democracy the lawful means are distributed unfairly and disproportionately among the social members.<sup>133</sup> The

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unceasingly upon its altars." Abraham Lincoln, "The Perpetuation of Our Political Institutions", online: <http://teachingamericanhistory.org/library/index.asp?document=157> >, last accessed on March 23, 2008.

<sup>133</sup> Brian Martin, "Protest in a Liberal Democracy", (1994) 20 *Philosophy and Social*

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rich and the powerful obviously have more channels to influence the laws and policies of the government. Many alleged lawful means such as hiring lobbyists and engaging in a “capital strike”<sup>134</sup> are clearly unavailable to the poor. What makes this situation even worse is the fact that the lawful means mainly used by the poor such as strikes and demonstrations are carefully scrutinized and often stigmatized, while those actions taken by powerful groups often go unexamined. Jackie Esmonde also observed that in existing democratic capitalist society, equality is only realized in its procedural meaning, not its substantive meaning, so people’s participating rights and freedoms are always limited. In such a situation in which people have disproportionate access to state power and law is manipulated to maintain unequal social relations, disobedience may be the only avenue for those without political power to press for change.<sup>135</sup> In fact, it has been a very old technique for dominant groups in society to defend their own interests by promoting a narrow conception of “acceptable protest”, for example, by defining the lawful means in a limited way or by requiring protests to be only to the government instead of directly to the rich and powerful guys.<sup>136</sup> To

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*Action 13*, at 14-6.

<sup>134</sup> Capital strike means using capital as a way to influence the policy of the government such as redirecting investments out of a particular area or the withholding of new investment in an area. A capital strike most often occurs where governments pursue policies that investors consider “unfriendly” or “inflexible”.

<sup>135</sup> Jackie Esmonde, “Bail, Global Justice, and the Limits of Dissent”(2003) 41 *Osgoode Hall L. J.* 323, at 329.

<sup>136</sup> *Supra* note 133, at 13-24.

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some degree, even the term “protest” itself is a reflection of bias because it is generally applied to actions of groups that are painted as outside the mainstream; the actions of the mainstream are rarely called protest.<sup>137</sup> Therefore, the first trouble with legal channels is that they are very limited and biased in favor of privileged groups. Totally restricting protests to lawful means may be unfair for unprivileged members of society.

The second difficulty with this argument is that lawful means sometimes are blocked in practice. As observed by Thoreau, the legal channels of change may be only open in theory, but closed or unfairly obstructed in practice.<sup>138</sup> Sometimes, they are too time-consuming. Voting and petitioning often achieve little in some societies and sometimes legal channels take too long. Man “was born to live, not to lobby”.<sup>139</sup> Circumstances may arise, moreover, where sole reliance on appeal to legal means such as the courts may mean that serious injury or risk of injury is suffered from the unjust law or policy until a legal decision has been given and operated on.<sup>140</sup> When this happens, when the incursions of government are precisely upon the availability of legal channels

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<sup>137</sup> For example, when trade unions go on strike that is recognized as a form of political protest, but when corporations redirect investments out of a particular area, when the medical profession resists the state regulation, they are not taken to be a protest. Please see Brian Martin, “Protest in a Liberal Democracy”, (1994) 20 *Philosophy and Social Action* 13, at 14-16.

<sup>138</sup> Martin Luther King, Jr., “Letter from a Birmingham City Jail”, in *Why We Can't Wait* (New York: New American Library, 1964) at 76-95.

<sup>139</sup> *Supra* note 16, at 29.

<sup>140</sup> *Supra* note 45, at 40.

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and freedoms, the legal channels may well prove a vain hope.<sup>141</sup>

Thirdly, lawful means are not a panacea for all problems. Every system, whether social or political, suffers from the problem of rigidity and inertia.<sup>142</sup>

Once decisions and rules are made, they are not easy to change. Under some circumstances, the political inertia might be so strong that lawful means are not able to break it. As Gandhi observed, the mere appeal to reason has very limited effect on those who have settled convictions. Their eyes are not opened by mere argument, but by suffering.<sup>143</sup> Compared to legal channels, breaking the law can be a forceful means of expression and can have effective value in bringing reform to unjust laws which cannot be repealed by lawful means.<sup>144</sup>

Because of the significant sacrifice and suffering of disobedients, a regime that is generally insensitive to lawful appeals may become sensitized and may ultimately assent to the civil disobedients' point of view.<sup>145</sup>

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<sup>141</sup> *Supra* note 110, at 402.

<sup>142</sup> Lewis A. Coser, *Continuities in the Study of Social Conflict* (New York: Free Press, 1967), at 29.

<sup>143</sup> Gandhi had noticed in his time that mere appeal to reason has no effect on those who have settled convictions. "The eyes of their understanding are opened not by argument but by the suffering of the Satyagrahi." Please see Mahatma Gandhi, *Non-Violent Resistance* (New York, Schocken Books, 1961), at 191.

<sup>144</sup> *Supra* note 92, at 698. Jacobs also notices the special capability of civil disobedience compared to lawful means by saying that civil disobedience is a unique mode of communication, it can grab the majority attention in a way that lawful means may not, "signifying not only a distinct substantive message, but also signaling the protester's depth of commitment". Leslie Gielow Jacobs, "Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance", (1998) 59 *Ohio St. L.J.* 185, at 241.

<sup>145</sup> Vinit Haksar, *Rights, Communities and Disobedience: Liberalism and Gandhi* (New

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In addition, the historical experience also tells us that lawful means sometimes need to be combined with the extra-legal means, especially in the face of a drastic social change. For example, it is difficult to imagine that the social status of African-Americans could be changed simply by the enactment of laws and court decisions in the 1950s and 1960s. After all, the implementation of laws and court decisions depends, at least in part, on public action which not only will refrain from opposing but will also take action to insist on their application; otherwise, decisions may become dead letters in dusty volumes of law.<sup>146</sup> The social attitude toward African-Americans, in particular, was mainly changed by their enduring struggles and deep sufferings, not by court decisions and laws. Civil disobedience played a critical role in educating the American people and winning dignity for African-Americans.

Last but not least, it should not be forgotten that most of the so-called normal channels, which are recommended as prior to or preferable to civil disobedience, have themselves been established through “illegal means”. For example, civil disobedience played a major role in the ending of slavery, extension of the franchise, curtailing ruthless aspects of the exploitation of the labor and extending rights to women and minorities. As observed by some

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Delhi: Oxford University Press, 2001), at 109-37.

<sup>146</sup> Wilson Carey McWilliams, “Civil Disobedience and Contemporary Constitutionalism: The American Case”, (1969) 1 *Comparative Politics* 211, at 216.

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scholars, “the rights and privileges we take for granted today, many of which are enshrined in the constitution, are themselves the product of struggles aimed both at particular laws and the status quo itself”.<sup>147</sup> Moreover, the experience of Nazism, by which Nazis came into power through legal means and promoted the inhumanity in a legal form, also teaches us not to rest the democratic order on legality alone. Constitutionalism and democracy are not safe unless individuals are secure in their right to defend it through acts of civil disobedience.<sup>148</sup> This is the reason why Rawls views civil disobedience as the final device to maintain a just constitution;<sup>149</sup> when legal means are proved ineffective, civil disobedience will be needed to rescue democracy. Probably, some extra-legal activity always has had to be, and always will have to be, accepted by the society<sup>150</sup> because democracy can go so far on the wrong track that no legal means can cure.<sup>151</sup>

In conclusion, since legal means are sometimes blocked or ineffective, their

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<sup>147</sup> Judy Fudge and Harry Glasbeek, “Civil Disobedience, Civil Liberties, and Civil Resistance: Law’s Role and Limits”, (2003) 41 *Osgoode Hall L.J.* 165, at 171.

<sup>148</sup> Harvey Wheeler, “The Constitutionality of Civil Disobedience”, (2002-2003) 35 *UWLA L. Rev.* 440, at 445.

<sup>149</sup> *Supra* note 85, at 335-343.

<sup>150</sup> “The historians offer evidence that some extra-legal activity always has had to be, and always will have to be, accepted by the legal system.” Please see Judy Fudge and Harry Glasbeek, “Civil Disobedience, Civil Liberties, and Civil Resistance: Law’s Role and Limits”, (2003) 41 *Osgoode Hall L.J.* 165, at 172.

<sup>151</sup> For a detailed discussion of the contributions made by illegal means to the development of democracy, please see April Carter, *Direct Action and Liberal Democracy* (London: Routledge, 1973).



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existence is no obstacle to a justification of civil disobedience. Insofar as a democracy provides no effective means of remedying an otherwise remediable form of harm, departure or exploration, the democracy is defective. It would be understandable for the public to resort to appropriate illegal means including civil disobedience to develop democracy.

### **c. The Problem of Violent Means and the Further Justification of Civil Disobedience**

It has been argued above that imperfect democracy may produce democratic and justice deficits. When the existing lawful means are not enough to redress such deficits, illegal means are necessary. Another question arises here: since civil disobedience is justifiable in a democracy, what of terrorism, rebellion or any other kind of violent means? Are they also justifiable? If so, when? If not, why not? Though I have touched on the problem of violence in the first chapter while discussing the characteristics of civil disobedience, I now explain in more depth why violent means are not justified in a normal democracy.

We know from the first chapter that civil disobedience is predominantly non-violent, but this does not mean zero violence. In fact, in mass civil

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disobedience, the existence of scattered violence is almost unavoidable given the fact that it is almost impossible for an organizer to control the whole process. No matter what line is drawn between civil disobedience and violent actions, there will always be borderline cases. But, thanks to the peaceful nature of civil disobedience, we can still demarcate civil disobedience and violent actions relatively clearly. Violence in violent actions is purposefully used by the practitioners as a means, even the main means, to achieve their aim, whereas in civil disobedience violence is not a means purposefully used by the civil disobedients, but something which they do not want to see. The occurrence of violence in the course of civil disobedience is unintentional. Civil disobedients, as the supporters of non-violence, believe they have been wronged or the government has departed from their dream, but they do not think that violence is the right way to redress such wrongs or departures.

Having defined the difference between civil disobedience and unjustified violent opposition, I will claim that while civil disobedience can be generally justified in a democracy (if it is really a democracy),<sup>152</sup> violent means never can be. There are mainly two reasons to reject the use of violent means in a democracy. The first reason is that violent means are not in the spirit of democracy. One of the implications of democracy is that differences and

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<sup>152</sup> Or in Rawls words, in a nearly just society, please see John Rawls, *A Theory of Justice*(Oxford: Oxford University Press, 1971) at 319. But the question for Rawls is that it is difficult to conclude whether a society is nearly justly or not.

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disputes should be resolved in a peaceful manner.<sup>153</sup> A key characteristic of democracy is that right is, or at least should be, might, while in authoritarian regimes might is right. However, violence as a way of resolving conflicts will make fruitful conversions impossible and render truth unheard because one cannot normally establish the justifiability of a cause unless and until those who oppose it have an opportunity to put forward their views in public. It may be argued that violence is a more effective way to enable imperfect democracy to realize its ideals. It is true that in the beginning violence sometimes plays an important role in overthrowing despotic regimes and establishing democracy, but after a democratic society has been established it is absurd to insist still that democracy can be developed further by violence because repeated violence can extinguish the spirit of democracy. According to Menachem Marc Kellner, “to ignore democratic procedure, then, in alleged pursuit of democratic ideals gives the lie to that pursuit; it is impossible to attain an end with means inconsistent with that end”.<sup>154</sup>

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<sup>153</sup> Though agreement does exist in a democracy that disputes should be resolved in a peaceful manner, but when it is faced with a danger from outside, even from a similar democratic society, it seems that the democratic state are never more hesitant than the authoritarian regimes, if not more aggressive than the authoritarian regime, to use violent means including war as a way to protect its own interests. In other words, on the international level, democratic state are as combative as the authoritarian one. Please see, Daniel Ross, *Violent Democracy* (Cambridge: Cambridge University Press, 2005). In this book, Daniel Ross shows how violence is an integral part of the democratic system from its origins and into its globalized future. He draws on the examples of global terrorism and security, the wars in Iraq and Afghanistan, the relation of colonial powers to indigenous populations.

<sup>154</sup> Menachem Marc Kellner, “Democracy and Civil Disobedience”, (1975) 37 *The Journal of Politics* 899, at 910.

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The second reason for rejecting violent means is that the use of violence will damage the actual democracy itself. In the pursuit of ideal democracy, it is important to preserve the democratic achievements we have already obtained thus far. Violence will stir more violence, which will endanger democratic achievements rather than help to realize ideal democracy. Compared to supporters of violence who are willing, if not glad, to see the collapse of the existing form of society, civil disobedients are peaceful reformers; their acts have far less impingement on the good social order and the rule of law.<sup>155</sup> Civil disobedients occasionally make mistakes and abuse their liberty in a manner inconsistent with promoting democracy, but because of their generally peaceful nature, we can be assured that they are not dangerous figures to the existing democratic achievements. Of course, on the other hand, it is not right to suppose that violent means cannot be justified at any time. In fact, even rebellion can be justified under extreme circumstances. When democracy is in great and urgent danger of being destroyed completely or has been destroyed completely, violence proportionate to the danger may be justified. This is precisely what happened in Nazi Germany and Italy. The stipulation of the right of resistance in the *Basic Law for the Federal Republic of Germany* is the very reflection upon this experience.<sup>156</sup> But this does not deny the fact that

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<sup>155</sup> Matthew Lippman, "Civil Resistance: The Dictates of Conscience and International Law versus the American Judiciary", (1990) 6 *Fla. J. Int'l L.* 5, at 16.

<sup>156</sup> *Basic Law for the Federal Republic of Germany*, Article 20(4): "All Germans shall

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violent means are not justified in a normal democratic society.

The aim of allowing the practice of civil disobedience is the advancement of democracy, but the practice may fail to serve that end and may even be harmful to that end. Even worse, some people may practice civil disobedience only out of selfish interests, hiding a sinister end under the cover of a noble mission. So the challenge is to ascertain who is sincere and who is hypocritical, and which practice is helpful to the advancement of democracy and which is not. However, the answer which can be given is pessimistic. For most cases, we have no way of knowing at that moment or even many years after the practice, whether these practices are helpful or not because of our inability to predict social developments. Generally, an evaluation of these practices will have to await the judgment of history. It is only with hindsight that we can decide which practice of civil disobedience served the aim of advancing democracy and which did not.<sup>157</sup> Hence the decision a democracy must make is not that of judging which value is right, but allowing as much disobedience as can balance the need for self-preservation with the need for maximum liberty for the people. So a democracy should not judge which aim is right and which is wrong (since it has no such ability), but which kind of means should be allowed and which should not; that is to say, it should regulate the means of

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have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”

<sup>157</sup> *Supra* note 5.

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protest rather than the content of protest. As long as the means used by the protestor are acceptable, the content and the aim they are seeking will not be so important. Therefore, what really matters in most protest cases is not the content of the protest but the means.<sup>158</sup> Insofar as a protest is practiced in the law, even the aim it seeks is definitely wrong according to today's value system (such as petitioning the government to drive out all foreigners instantly and unconditionally, certainly extreme cases excluded), the protest should also be tolerated.<sup>159</sup> Civil disobedience ought to be tolerated in a democracy because it is a peaceful form of expression. If properly used, it can enhance the progress of democracy. Even maliciously misused, it cannot do much harm to the democracy as to put the democratic achievements into danger. Nevertheless, violent actions are too dangerous to our democratic achievements; therefore, they must be discarded except in the most extreme conditions discussed earlier.

Therefore, the peaceful nature of civil disobedience, not the values it tries to protect, plays an important role in the justification of civil disobedience because most of the time we cannot know immediately whether the reforms

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<sup>158</sup> The extreme cases must be excluded from the argument. Some actions, such as instigating the extinguishing of the minorities and hatred among races, must not be tolerated in any way, even when they are practiced in a very peaceful way. Because these values, we have known for sure, are completely and seriously wrong.

<sup>159</sup> Certainly, extreme cases such as petitioning the government to kill all of the minorities in the state must be excluded here since we have known for sure that genocide is not right. This is one of the few truths we have known in social area.

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proposed by the civil disobedient represent the future of ideal democracy or merely an effort to return to an authoritarian past. The justification of civil disobedience comes from both its ends and its peaceful means. We can thus also see the problem with some suggestions which mix civil disobedience with violent actions by suggesting a kind of justified violent civil disobedience.<sup>160</sup> Violent actions may be disobedient, but they cannot be civil and cannot be justified in a normal democracy.

#### **d. Two Kinds of Civil Disobedience**

I mentioned at the beginning of this chapter that two kinds of deficits might arise in a democracy, viz. democratic deficits and justice deficits. A democratic deficit is a gap between the state will and the will of the people. It reflects the fact that the sovereign will of the people is not reflected accurately in the laws and policies of the state. A justice deficit is the departure of the state will from the justice standard of the ideal democracy. Civil disobedience can be justified by both democratic deficits and justice deficits.

First, people may have reason to think that some decisions adopted by the state

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<sup>160</sup> Please see John Morreall, "The Justifiability of Violent Civil Disobedience", in Hugo Adam Bedau (ed.), *Civil Disobedience in Focus* (London: Routledge, 1991), at 130-43.

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do not reflect the true will of the people; in other words, a democratic deficit exists. This may happen because the state neglects some considerations when making the decision or because the state decision is a decision of the past generation which was insufficiently democratic. Whatever the reason, citizens might ask that such state decisions be reconsidered when they believe a democratic deficit exists. If they fail to get the decision reconsidered through legal means such as judicial review and petitioning, they may be justified in resorting to civil disobedience. Their aim is not to abolish the decision or impose their views on others, but merely to request that the decision or some aspects of the decision be reconsidered.

Second, people may consider some policies or laws of the state unjust, that is, they might believe that justice deficits exist. Under such circumstances, after failing to realize their aims through legal means, they might resort to civil disobedience as well. But, their aim is totally different from the first kind of civil disobedience mentioned in the previous paragraph. They not only ask for a reconsideration of the decision, but also request their views to be implemented. In other words, they want their views of justice to be imposed on the whole society because they think their views are better and more in the spirit of the ideal democracy.

I now consider a controversy which has long existed in the study of civil



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disobedience. Some scholars argue that civil disobedience should not be coercive and should be only used as a way of persuasion, publicity or as a plea for reconsideration,<sup>161</sup> while others argue that since civil disobedience is a way to redress injustices, it can be coercive and, even takes the form of moderate violence.<sup>162</sup> The former is often called “persuasive civil disobedience”, “civil disobedience as a plea for reconsideration”, “democratic disobedience”, etc.; the latter is called “liberal disobedience” or “coercive disobedience”.<sup>163</sup> However, from the standpoint of democratic and justice deficits, the dispute is very easy to understand. Actually, it is not a genuine dispute because civil disobedience is not a question of this or that; it is both. In

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<sup>161</sup> Please see Paul F. Power, “Civil Disobedience as Functional Opposition”, (1972) 34 *The Journal of Politics* 37, at 37-55. Haksar talks a kind of persuasive civil disobedience, see Vinit Haksar, *Civil Disobedience, Threats and Offers: Gandhi and Rawls* (Oxford: Oxford University Press, 1986), at 4-29. Peter Singer also refers to “disobedience as a plea for reconsideration”, see Peter Singer, *Democracy and Disobedience* (Oxford: Clarendon Press, 1973), at 84-92. Daniel Markovits’s article “Democratic Disobedience” is the first article which systematically shows that a different kind of disobedience exists besides liberal disobedience, see Daniel Markovits, “Democratic Disobedience”, (2005) 114 *The Yale Law Journal* 1897, at 1897-1952.

<sup>162</sup> Thoreau and Dworkin hold such view. Please see Henry David Thoreau, “Civil Disobedience”, in Hugo Adam Bedau (ed.), *Civil Disobedience in Focus*(London: Routledge, 1991) and Ronald Dworkin, “Civil Disobedience”, in David Dyzenhaus and Arthur Ripstein (ed.), *Law and Morality: Readings in Legal Philosophy*” (Toronto: University of Toronto Press, 1996), at 434-68. Rawls also holds that civil disobedience is a redress for injustice, but it seems that he can tolerate only very limited coercion. Please see John Rawls, *A Theory of Justice*(Oxford: Oxford University Press, 1971) at 326-31.

<sup>163</sup> The existence of two kinds of civil disobedience is also reflected in the summary of dictionaries. “Civil disobedience sometimes serves primarily to inform and to educate the public about an issue. But other times, it acts by confronting the majority with the higher costs of retaining a given law or policy in the face of continued, concerted opposition.” Please see “Civil Disobedience”, *Stanford Encyclopedia of Philosophy*, online: <<http://plato.stanford.edu/entries/civil-disobedience/>>, last accessed on April 2, 2008.

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other words, civil disobedience can either be a plea for reconsideration or be a request for justice, the former is justified by democratic deficits and the latter by justice deficits. So, in order to correspond to the democratic deficits and justice deficits which justify these two kinds of civil disobedience respectively, I will call them democratic disobedience<sup>164</sup> and justice disobedience correspondingly.

Now, I have pointed out the different justifications behind these two kinds of civil disobedience. If I stop here, it seems that the different justifications have no special importance in theory since these two kinds of civil disobedience have been suggested for a long time, but I will explain further that the different justifications have implications for practice because different justifications set different limits to these two kinds of civil disobedience.

As we have seen, the aim of democratic disobedience is a request for reconsideration; therefore, once the decision has been fully reconsidered according to the highest standard of democratic process, democratic disobedience should stop because its justification has expired. Even if the final outcome is retaining of the old decision, the democratic disobedient must accept it readily. Moreover, the justification behind it also determines the

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<sup>164</sup> The phrase was first used by Markovits in his article “Democratic Disobedience” which is a basic study of this kind of civil disobedience. Please see Daniel Markovits, “Democratic Disobedience”, (2005) 114 *The Yale Law Journal* 1897, at 1897-1952.

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actions which can be adopted by democratic disobedience. It has been pointed out above that its justification comes from the democratic deficit, from the insistence that the will of the people is not reflected accurately; therefore, the means it adopts also should not unfairly influence the reconsideration it seeks. That means the democratic disobedient should not use coercive means to seek to impose their views on the rest of the society. Thus, such protesters sometimes have no concrete views of their own; what they do is only to protest and plea, pleading the decision to be reconsidered. Markovits thinks this rightly explains the criticism of the anti-globalization movement for its lack of a positive policy agenda. Insofar as the movement is an example of democratic disobedience, the lack of its own policy is perhaps a salutary thing for the movement.<sup>165</sup> However, the situation is totally different for justice disobedience. Justice disobedience is justified by justice deficits, that is, the lack of justice in imperfect democracy as compared to the standard required by ideal democracy. Therefore, what the justice disobedience demands is justice, not mere reconsideration of the decision. The justice disobedient will not stop committing civil disobedience until their views prevail. As in the American Civil Rights Movement, what African-Americans demanded was equal treatment. Even when their demands were rejected by the vast majority of Americans, they still thought this was unfair and persevered. According to their justice justification, they had no responsibility to stop protest, after the

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<sup>165</sup> *Supra* note 124, at 1940.

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decision was reconsidered. At the same time, the justice disobedient is also more justified in using coercion to compel a government to abandon the policies, laws or practices which he thinks is in conflict with the spirit of ideal democracy since the content of these laws and policies of the state lack legitimacy in his eyes.

## **B. Individual Conscience and the Justification of Civil Disobedience**

Having given my own justification of civil disobedience based on democracy, I will now consider other justifications of civil disobedience. Through history, many justifications for civil disobedience have been given by scholars and practitioners. Among them, the conscientious justification is the most famous. It not only originated almost at the same time as the very concept of civil disobedience, but has had many supporters all along. Though there are disputes among them, the supporters of the theory generally hold that civil disobedience can be justified by individual conscience. While law is important, it does not transcend the fundamental liberty of the people to follow their hearts.<sup>166</sup>

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<sup>166</sup> “Civil Disobedience” in *Dictionary of the History of Ideas*, online; <<http://etext.virginia.edu/cgi-local/DHI/ot2www-dhi?specfile=/texts/english/dhi/dhi.o2w&act=text&offset=3231685&query=civil+disobedience&tag=CIVIL+DISOBEDIENCE>>, last accessed on December 20, 2007.

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To Thoreau, the first responsibility of people is to follow their hearts and to do what they believe is right, not to obey the law legislated by the majority. Though a person has no obligation to devote his life to eliminating evils from the world, he is absolutely obligated not to conspire to commit evils. Therefore, when a government becomes unjust, people should refuse to cooperate with such a government and distance themselves from it. In his view, both slavery and aggressive war on Mexico were unjust and against the conscience of people, so the American government at that time deserved people's disobedience.<sup>167</sup>

Gandhi, heavily influenced by Thoreau, also claims that people's conscience is the highest law of the world and far superior to the man-made law. Consequently, when conflict happens, people should obey the former rather than the latter.<sup>168</sup> Furthermore, Gandhi elevated civil disobedience to a new level. To him, civil disobedience was not only the inherent right of a citizen, but also a sacred duty. As required by people's integrity and conscience, it is a sacred duty not to participate in evil, so when the state has become lawless or corrupt, it is people's sacred duty to assume an attitude of non-cooperation and practice civil disobedience because "a citizen that barter with such a state

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<sup>167</sup> *Supra* note 16, at 29.

<sup>168</sup> Arnand Hingorani (ed.), *Gandhi for 21st Century Vol. 4: The Science of Satyagraha* (Mumbai: Bharatiya Vidya Bhavan, 1998) at 59.

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shares its corruption or lawlessness”.<sup>169</sup>

Some modern scholars also support the conscience justification of civil disobedience. They claim, directly or indirectly, that conscience is a moral imperative which human beings must obey. One cannot be moral by acting contrary to one’s beliefs. One must act according to what one believes to be right.<sup>170</sup> “If society is going to exist in dependence upon man’s moral nature, on his ability to choose the right course from the wrong - on his conscience - then society is also going to have to recognize man’s right and duty to follow his conscience even if this leads to civil disobedience.”<sup>171</sup>

Admittedly, the conscience theory once played a very important role in the development of civil disobedience. It had been an efficient way to arouse people to fight with injustice.<sup>172</sup> But, in my view, the conscience theory is not

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<sup>169</sup> Mahatma Gandhi, *Young India 1919-1922* (Madras: The Huxley Press, 1924), at 944. But Gandhi does not agree with the view that civil disobedience is unlimited. He believes that individuals should turn to civil disobedience only when the injustice is so great that our conscience and self-respect do not permit us to tolerate it. Just as he claimed “there are many unjust laws that a good citizen obeys so long as they do not hurt his self-respect or the moral being.” Please see R. Duncan (ed.), *Selected Writings of Mahatma Gandhi*, London: Fontana, 1971), at 75.

<sup>170</sup> H J. McCloskey, “Conscientious Disobedience of the Law: Its Necessity, Justification, and Problems to Which It Gives Rise”, (1980) 40 *Philosophy and Phenomenological Research* 536, at 542.

<sup>171</sup> Harrop Freeman, “The Case for the Disobedient”, (1966) 17 *Hastings Law Journal* 425, at 437.

<sup>172</sup> For example, in the antislavery movement of America, many activists were actually motivated by their religious beliefs rather than by political motivations. They believe God’s law is higher than the civil law, so when the law of God is violated by the civil law,

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a sufficient justification for civil disobedience because of its several defects.

The first defect the conscience theory suffers is that it attempts to answer two questions with one answer. The main disputing point about the justification of civil disobedience is whether one is justified to commit civil disobedience, whereas the point which the conscience theory often dwells on is whether one is right to do what one considers right.

Undoubtedly, the answer to the latter question is in the affirmative. Especially in the sphere of pure morality, people do have the moral right to follow their consciences, and democracy also affirms man's conscience. But the notion that each man is entitled to behave according to his conscience in morality cannot be translated directly into the notion that he has a right to subordinate the laws to his conscience.<sup>173</sup> That is to say, the most we can say is that one has a right to pursue his own conscience; we cannot go on to say that pursuing one's conscience in the form of law-breaking is always a right thing. Since it is considered by almost everyone that it is necessary to live peacefully in a society, it is necessary for everyone to curb their actions to some degree

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as in the case of slavery, the duty of the Christian is to be disobedient. All people, said Luther King, the famous leader of the American Civil Rights Movement, have an important moral obligation to disobey unjust laws in order to obey a higher, natural, or divine law whose authority preempts man-made laws. Please see *supra* note 138, at 76-95.

<sup>173</sup> *Supra* note 110, at 394.

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against the dictates of their own conscience. “We have therefore a moral duty not to insist on what we would consider, in the absence of other people’s opposition, to be the morally right action - we need to distinguish what I after argument and deliberation honestly believe to be the morally right course, from what, in view of the often unreasonable obstruction of other people, I finally decide to go along with.”<sup>174</sup> Therefore, even if the conscience theory can successfully prove that man has a right to conscience, we cannot conclude from it that man is justified to placing his conscience over the law of the society in the form of civil disobedience because considerations other than the protection of conscience have to be taken into account.

A second criticism which can be leveled against the conscientious justification for civil disobedience is that it opens the door to absolutism and anarchy. The supporters of the theory claim that human integrity and conscience are the justification for civil disobedience. However, personal integrity and adherence to conscience are no guarantees of justification, although justification is impossible without them. “Madness does not become truer just because you believe in it. Truth does not arise from belief or passion.”<sup>175</sup> It has been

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<sup>174</sup> J. R. Lucas, *The Principles of Politics* (Oxford: Clarendon Press, 1966), at 136.

<sup>175</sup> Per Hergren, *Path of Resistance: the Practice of Civil Disobedience*, revised edition 2004, Chapter VII: Consensus, E Book online: <[http://ickevald.net/perhergren/english/Path\\_of\\_Resistance\\_Per\\_Hergren\\_2004.htm](http://ickevald.net/perhergren/english/Path_of_Resistance_Per_Hergren_2004.htm)>, last accessed on April 2, 2008. But it deserves to notice that motive does play a role in crime. It can influence both the nature of the crime and the quantity of the punishment. For example, stealing because of hate and stealing for saving a starving beggar’s life may



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proved by history, again and again, that the worst political excesses are often committed by men who have dedicated themselves to some cause which they hold to completely and sincerely.<sup>176</sup> Consider the sincere, thoughtful Inquisitor, the sincere, conscientious Nazi, and the sincere, committed Khmer Rouge, to mention only a few. Therefore, the supporters of the theory tend to be imbued with the spirit of absolutism, as the words of Thoreau demonstrate: “the only obligation which I have a right to assume is to do at any time what I think right”; “there will never be a really free and enlightened State, until the State comes to recognize the individual as a higher and independent power.....”<sup>177</sup> At the same time, by placing individual conscience over the law of the state, the theory also opens the door to anarchy. Certainly, law is fallible; “it may be pure ideology, mere heteronymous force, or the expression of the interests of the ruling class, but it is also true that individual conscience can be perverted by ideology or by psychological imbalances.”<sup>178</sup> Therefore, in terms of infallibility, conscience should not be considered as superior to law.

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have the same objective action, but the punishment for them deserves difference. From this point of view, it is inappropriate to claim absolutely that the status of mind will not influence the severity of the crime. For example, it is claimed by Dr. Brown that “the obvious fact that the freedom riders regard racial segregation as iniquitous does not make their breach of the segregation laws any less a crime and does not itself justify a conspiracy to breach them.” Please see Stuart M. Brown, Jr., “Civil Disobedience”, (1961) 58 *The Journal of Philosophy* 669, at 673.

<sup>176</sup> *Supra* note 45, at 36.

<sup>177</sup> *Supra* note 16, at 29.

<sup>178</sup> Maria Jose Falcon Y Tella, *Civil Disobedience* (Herndon: Brill Academic Publishers, 2004), at 181-82. The book was translated into English by Peter Muckley from *La desobediencia civil*, (Madrid: Marcial Pons, 2000).

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Another defect of the conscience theory is that it assumes a stance of anti-democracy. The theory views civil disobedience as a conflict merely between the individual conscience and the law of the state. This is a very narrow-sighted view because it fails to see the fact that most perpetrators of civil disobedience do not merely intend to solve their own personal moral problems, but act for the common good and for the wellbeing of the society and, as a consequence, it also fails to see the great role of civil disobedience in the development of democracy. Relying on individual conscience to realize justice is an idea which has long been discarded. Actually, the very reason that law and democracy came into being is because of the unreliability of the human conscience. Democracy is the protector of conscience, but at the same time it also set limits on individual conscience. Therefore, placing individual conscience over law represents an effort to go back to the dark past of rule of man. It constitutes a denial to democracy and the rule of law. By assuming an anti-democracy stance, the civil disobedients under the conscience theory also lose the right to be tolerated in a democracy since they view democracy as a foe rather than as a friend.

Thus, the conscientious justification of civil disobedience, despite its fame, is not a sufficient justification of civil disobedience. Conversely, it has the character of anti-democracy and consequently, its prevalence is a danger

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instead of an opportunity to society.

### **III. Some Objections Considered**

As a subsidiary to my justification above, in this section, I will respond to some arguments against civil disobedience. I will, in turn, introduce these arguments and then provide a brief response. My conclusion is that these counter-arguments are not sufficient to reject civil disobedience.

#### **A. Rights of Participation and Consent**

The most popular attempt in the history of endeavors to reject civil disobedience is probably the one which relies on the rights of participation. The right of participation, that is, the right of having a share in the making of the laws, is considered by some scholars as the right of rights.<sup>179</sup> It is maintained that since all citizens in a democracy enjoy the right of participation, and since all proposed legislation is aired in public before its enactment, and since it is voted into law by representatives of the people, a special obligation devolves upon the democratic citizen to accept this

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<sup>179</sup> Jeremy Waldron, *Law and Disagreement* (Oxford: Clarendon Press, 1999), at 232-54.

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legislation as binding: “The dissenter incurs the obligation when he participates in the decision-procedure together with other members who are opposed to the dissenter’s views, but are prepared to accept and obey whatever decision” the procedure produces.<sup>180</sup> By participating in the process, one has consented to obey the final outcome even if it is against his will. Thus, it is claimed that where people can exercise their participating rights they have no need again to resort to civil disobedience.<sup>181</sup>

I am inclined to agree with most of these arguments because otherwise the democratic process would be superfluous. What would be the sense of having a vote if no one ever accepted the result of the vote? Voting would be pointless. However, this does not mean that the right of participation in elections undermines civil disobedience. There are several reasons to think otherwise.

In the first place, not all citizens in an imperfect democracy can enjoy a fair right of participation. The supporters of the rights of participation theory generally base their analysis on the presumption that the election is held in a free and fair manner, but they neglect the fact that elections in the real world are rarely, or never, as fair and free as they have imagined. In practice, democracy (as I have discussed previously) is imperfect, suffering from

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<sup>180</sup> Peter Singer, *Democracy and Disobedience* (Oxford: Clarendon Press, 1973), at 46.

<sup>181</sup> *Supra* note 57, at 266-275.

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democratic and justice deficits. Whole segments of the population of a democracy may be, illegally or legally, disenfranchised and excluded from the decision-making processes.<sup>182</sup> Even people who are not overtly disenfranchised may, on occasion, justifiably feel that their participation is meaningless.<sup>183</sup> Law is prone to be manipulated by the rich and the powerful. Despite of the existence of alleged free elections, minorities might find it exceptionally difficult to change the discriminating measures against them. Moreover, it should be noted that the right of participation can cut two ways. On the one hand, it can be used to deny civil disobedience; on the other hand, it can also be used to justify civil disobedience. If the denial of civil disobedience is conditioned on the existence of free and fair elections, then, when such elections do not exist and the rights of participation are unfairly blocked, civil disobedience would be justifiable.<sup>184</sup> Thus, the mere existence of elections is not a sufficient reason to reject civil disobedience at all times.

Another problem for the right of participation argument is that participation in the procedure does not necessarily mean that the participant consents to the

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<sup>182</sup> For example, women who constitute half of the population had the long experience of being disenfranchised. The minorities in many countries also had such experiences; among them African-Americans perhaps are the most famous. For a timeline of when women were allowed to vote, please see “International Woman Suffrage Timeline”, online: <[http://womenshistory.about.com/od/suffrage/a/intl\\_timeline.htm](http://womenshistory.about.com/od/suffrage/a/intl_timeline.htm)>, last accessed on April 3, 2008.

<sup>183</sup> *Supra* note 154, at 903.

<sup>184</sup> *Supra* note 148, at 444.

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procedure. It is held that in voting, one's voluntary behavior means that one consents to the decision-making procedure. But people sometimes vote without accepting the legitimacy of the procedure. They participate in the procedure simply because it is compulsory,<sup>185</sup> expedient,<sup>186</sup> or because they can see nothing better to do. Even the supporters of the argument from consent agree that the consent here is only a quasi-consent, tacit consent or historical consent<sup>187</sup>. Though it is held that one can choose to emigrate to another country if one disagrees with the procedure, emigration is not always possible. How can we seriously say, as pointed out by David Hume, that a poor peasant or artisan has a free choice to leave his country, when he knows no foreign language or manners, and lives from day to day by the small wages which he acquires?<sup>188</sup> Therefore, the claim that participating in the procedure means that one consents to the procedure is not right. One may choose to obey the final decision just because one thinks it is a necessary condition for people to live a peaceful life together, not because he agrees with the procedure or with the outcome it produces.

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<sup>185</sup> In Australia and Singapore, for example, one can be fined for failing to vote.

<sup>186</sup> For example, though Lenin thought that the capitalist democratic procedure is hypocritical, he also insisted that it can be used as a way to overthrow the capitalist state. Participating in the procedure, here, definitely does not mean consent to the procedure.

<sup>187</sup> Richard Hooker, *Of the Laws of Ecclesiastical Polity* (Cambridge: Cambridge University Press, 1989), at 87-9.

<sup>188</sup> David Hume, "Of the Original Contract", in Henry D. Aiken (ed.), *Hume's Moral and Political Philosophy* (New York: Hafner Press, 1948), at 363.

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Last but not least, even if consent exists it still does not mean that one has to abide by the final outcome. Consent is considered the most typical, undisputable source of obligations. Many have assumed that success in demonstrating that the law's subjects have consented to obey it would serve to justify the duty to obey firmly and decisively.<sup>189</sup> But this is not true at all times because occasionally other elements have to be taken into account. In other words, from the point of view of democratic theory those who participate in a procedure must accept its results; however, from the broader standpoint of political morality in general, this is only one factor to be taken into account in deciding how to act. For example, some German soldiers may have had participated in the formulation of Nazi's policies such as annihilation of Jews during the Second World War, but this does not mean that they must loyally follow such policies. If some of them had chosen to save rather than kill the Jews, this breach of German policies would have been an act worthy of praise, not condemnation. As in personal relations, breaking instead of adhering to former promises sometimes is more praiseworthy. Giving up a promise to kill someone in revenge generally is an act in the right direction. Therefore, even we agree that participating in a procedure means that one has consented to the procedure still does not mean that one is under an absolute obligation to obey its outcome. It only means that other things being equal one

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<sup>189</sup> Chaim Gans, *Philosophical Anarchism and Political Disobedience* (New York: Cambridge University Press, 1992), at 49.

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is obligated to obey the outcome. But when other things are not equal, it should be balanced against other elements. That is to say, the obligation incurred by participating in the procedure is a significant consideration which should never be ignored. However, it may sometimes be overridden.<sup>190</sup>

In conclusion, the existence of rights of participation does not dissolve the need for civil disobedience. It might require stronger reasons for engaging in civil disobedience, but there is still space for civil disobedience to be justified under some circumstances.

## **B. Slippery Slope Argument and Social Chaos**

Another counter-argument to civil disobedience is a slippery slope argument. It claims that if civil disobedience is allowed, if men are free to set aside the laws of the state whenever they find them in conflict with their own interests or dreams, social chaos and anarchy would result. 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 including the laws and the whole state? Do you

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<sup>190</sup> *Supra* note 180, at 58.



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imagine that a state in which the decisions of law have no power and are set aside and trampled upon by individuals can subsist and not be overthrown?” Crito admitted that he could offer no answer.<sup>191</sup>

Alexander Hamilton, one of the founding fathers of the United States, was also suspicious of the acts of resistance and disobedience. In his opinion, if such actions were allowed, the multitude unguided by sufficient stock of reason and knowledge would naturally develop habits of “contempt and disregard of all authority” would be “apt more or less to run into anarchy”.<sup>192</sup> George Washington, another founding father of the United States, thus prayed that God “would incline the hearts of the citizens to cultivate a spirit of subordination and obedience to government.”<sup>193</sup> Justice Fortas echoed the views of American founding fathers when he said, just “as we expect the government to be bound by all laws, so each individual is bound by all of the laws under the Constitution. He cannot pick and choose. He cannot substitute his own judgment or passion, however noble, for the rules of law.” Otherwise, anarchy would result.<sup>194</sup>

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<sup>191</sup> Crito, 50b-54d.

<sup>192</sup> Alexander Hamilton, “Letter to John Jay” (Nov. 27, 1775), in Harold C. Syrett (ed.), *The Papers of Alexander Hamilton* (New York: Columbia University Press, 1962), at 176-77.

<sup>193</sup> George Washington, “Circular Letter to the States” (June 8, 1783), in Jack P. Greene (ed.), *Colonies to Nation, 1763-1789: A Documentary History of the American Revolution* (New York: Norton, 1975), at 436-43.

<sup>194</sup> Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: The World Publishing Co., 1968), at 55.

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The slippery slope argument has its merits. It is worth noting, however, that this form of argument is easy to abuse and should be approached with caution because it can be used to oppose almost anything. If you do not like something but have no good arguments against it, you can always make up a prediction about what it might lead to; and no matter how implausible your prediction is, no one can prove definitely that you are wrong.<sup>195</sup> Therefore, it is not a question of what would happen if everyone acted as you propose to act but what sort of people and how many of them are likely to imitate you in engaging civil disobedience. If there is no real likelihood that others would imitate the dissenters or if the imitators are so few as to cause no serious danger of social chaos, then the slippery slope argument is not justified. One cannot deny civil disobedience solely because it would be imitated by others without consideration of the real danger it poses to the society because such a stand would rule out all unwelcomed action, no matter how small its danger to society.

It follows that the slippery slope argument poses very little threat to the justification of civil disobedience. That is to say, civil disobedience is not likely to cause anarchy and social chaos in a democratic society. First, the

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<sup>195</sup> James Rachels and Stuart Rachels, *The Elements of Moral Philosophy* (New York: McGraw-Hill, 2007), at 11.

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slippery slope argument is based on the false assumption that there are so many unjust laws in a democratic society that most of the people, at least a large part of the population, would resort to civil disobedience if civil disobedience were allowed. However, this is not true. Unjust law constitutes only a small part of the legal system of a democracy and most such laws can be redressed through legal means. Therefore, the threat of social chaos as imagined by the supporters of slippery slope argument is unlikely to be realized. Moreover, civil disobedience requires more courage than resorting to legal channels. Sometimes, the civil disobedient has to face arrest, suspicion, stigmatization, even loss of life from both the state and the public who are opposed to the civil disobedient's position. To understand this, simply consider what happened to Thoreau, King, and Gandhi, who were all imprisoned for their actions. Most people, consequently, would be hesitant to engage in civil disobedience even if they find some laws repugnant. It is more likely that they would appeal to legal channels when they feel compelled to do something to change the repugnant law. So as long as there is no serious problem in a society, the number of citizens resorting to civil disobedience would be very limited and unlikely to cause the collapse of society. According to Dworkin, while it is surely true that society cannot endure if it tolerates all disobedience; "it does not follow, nor is there evidence, that it will collapse if it tolerates some".<sup>196</sup>

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<sup>196</sup> Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press,

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Another flaw of the slippery slope argument is that it falsely assumes that order in a democratic society is totally dependent on state law. In fact, what holds society together is not simply law but also the customs, moral codes, and the sentiments of the people. And a breach of law is not something rare and unusual.<sup>197</sup> We all break laws such as traffic regulations, income tax laws, litter laws, prohibitions on gambling occasionally, even very often for some people, but social order is not destroyed. There is no reason to think that when people break the law in such cases, social order would be maintained as usual, whereas when it is the civil disobedient who breaks the law, the social chaos would result. Conversely, if properly guided, civil disobedience can enhance the social cohesion by serving as a safety valve. So it is unlikely that social chaos would result just because some laws are broken by the civil disobedient.

Finally, even if civil disobedience were widespread and some social chaos were to result, this should not necessarily to be seen as a bad thing because order is not always better than disorder. Disorder sometimes comes with opportunities. The greater the number of participants in civil disobedience, the more likely it is that substantial disappointment exists in the society. The disorder may well be consistent with broader democratic values. To be sure,

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1978), at 206.

<sup>197</sup> *Supra* note 170, at 540.

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disorder brings with it an uncertain risk. But is there not an equally serious risk if stability is valued ahead of everything?<sup>198</sup>

In an otherwise well-functioning democracy, disobedience of a particular law should not be viewed as a real threat to social order. Anarchy and social chaos will not result simply because some instances of civil disobedience are tolerated. If some social disorder is generated by civil disobedience, it may well be as much an opportunity for strengthening democratic values as a threat to those values.

### **C. Gratitude and Fairness**

The third argument against civil disobedience is the gratitude and fairness argument. The gratitude argument and the fairness argument are different, but closely related. The argument from gratitude proceeds as follows. In general, by accepting benefits from others we incur debts of gratitude. Socrates, under sentence of death, is urged by his friends on the grounds of the injustice of the sentence to escape and flee to another country. In his reply, recounted by Plato in *Crito*, he refuses to do so on the ground that by doing so he would be showing ingratitude to the state that had brought him into existence, had

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<sup>198</sup> *Supra* note 76, at 47.

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regulated his education, had provided for his training in the accomplishments of music and gymnastics; ingratitude to the state that had been as a parent to him, whose benefits he has accepted, and to whom he owed all that had been of value to him in his life.<sup>199</sup> That is to say, since we have accepted the benefits of the state such as the protection of the police, the armed forces, and the public health service, and the benefits of the money system and public schools, we are said to have a debt of gratitude to the state and an obligation to obey its laws. Not to do so would be ungrateful.

Like most theories that have been defended by great philosophers in the past, the gratitude theory contains a grain of truth. It reminds the public that rights and responsibilities are inseparable. One should not enjoy rights while at the same time try to evade responsibilities dishonestly. But the truth of the theory is a very limited one. It has been met with three main responses.

Firstly, citizens of the state arguably receive benefits involuntarily, and therefore the citizens do not need to show gratitude to the state by obeying its laws and policies.<sup>200</sup> Consider this example. Suppose that a young woman receives flowers from an admirer on many occasions, despite her continued efforts to discourage him. Here, the young woman has no responsibility to feel

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<sup>199</sup> JG Riddall, *Jurisprudence* (London: Butterworths, 1999), Second Edition, at 326-7.

<sup>200</sup> Teresa M. Bruce, "Neither Liberty Nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law", (1996) 5 *Cornell Journal of Law and Public Policy* 431, at 481-82.

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gratitude to the admirer because what the admirer did for her is not something she desires. On the contrary, his acts may have brought her many inconveniences. A citizen in the modern state also often has no choice in receiving the benefits of the state provided by the government. And as noted earlier, it is unreasonable to suppose that he can simply or easily choose to emigrate.

Secondly, for a beneficiary to owe gratitude to his or her benefactor, the benefactor's act must be carried out with the intention of benefiting its receiver.<sup>201</sup> In other words, a benefactor must operate from altruistic motives in order to deserve the beneficiary's gratitude, but the state is not necessarily altruistic. Those who maintain public facilities in the name of the state may do so for self-serving reasons. Sometimes it is out of a realization that the provision of public benefits is critical to the state's subsistence. And it is also possible that the public benefits are used only as a means to deceive citizens in order to rule them. Under such circumstances, no responsibility of gratitude arises, at least for some citizens, if not for all.

Thirdly, even if we admit that there is some sort of gratitude required on the part of citizens, this does not mean that the gratitude must be expressed in the form of obedience. If a citizen feels some gratitude to the state, generally he

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<sup>201</sup> *Supra* note 189, at 43.

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should behave in the best interests of the state and defend it when it is in danger of being destroyed. But unconditional obedience to its laws may not be the best way of protecting the state because it will allow dissatisfaction to grow. Proper disobedience of its laws may be helpful to the improvement of the state and its system of law.<sup>202</sup> Thus, obedience to the law does not necessarily represent the only appropriate way to express gratitude to the state, just as a son does not necessarily to show his gratitude to his parents by obeying every instruction they give him.<sup>203</sup>

The fairness argument is related to the argument from gratitude, but with some distinctions. The argument is also based on the benefits which citizens receive from the state, but it claims that each individual citizen's duty of obedience is owed ultimately, not to the state, but to other citizens: "When a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these restrictions when required have a right to a similar submission from those who have benefited by their

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<sup>202</sup> For example, Walker argues that every citizen who has received benefits from the state owes the state an obligation of gratitude not to act contrary to the state's interests, and this means, among other things, complying with the law of the state. Please see A.D.M. Walker, "Political Obligation and the Argument from Gratitude," (1988) 17 *Philosophy and Public Affairs* 191, at 192-207. But a self-contradiction which Walker fails to notice here is that unconditional complying with the law may not be in the best interests of the state.

<sup>203</sup> M. B. E. Smith puts this very well when he says that "the mere fact that a person has conferred benefits on me, even the most momentous benefits conferred from genuinely benevolent motives, does not establish his right to dictate all my behavior". Please see M. B. E. Smith, "Is There a Prima Facie Obligation to Obey the Law?", (1973) 82 *The Yale Law Journal* 950, at 952.



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submission.”<sup>204</sup> This means that as a citizen who reaps the benefits of his membership within society, he is obligated to share in the burdens of society such as obedience to law due to the concept of fairness. Otherwise, he is unfairly taking advantage of the work of others and is, therefore, morally wrong in doing so.<sup>205</sup> If the government tolerates those who break the law, it allows them to unfairly secure the benefits of everyone else’s deference to law.

This argument is a serious one. It cannot be answered simply by saying that the disobedients would allow everyone else the privilege of disobeying a law he disapproved of.<sup>206</sup> According to Chaim Gans, the principle of fairness can indeed be a source of obligation in some circumstances.<sup>207</sup> There are, however, flaws in the argument which make it far from an absolute principle. First of all, it suffers from the same flaw as the gratitude argument. In a modern state, a citizen receives the benefits involuntarily who has no choice of making

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<sup>204</sup> This is Hart’s formulation, please see H. L. A. Hart, “Are There Any Natural Rights?”, (1955) 64 *Philosophical Review* 175, at 185. The fairness argument was further developed by John Rawls. He calls it “the duty of fair play” in his article “Legal Obligation and the Duty of Fair Play” (in Sidney Hook (ed.) *Law and Philosophy* (New York: New York University Press, 1964), at 3-18.) and “the principle of fairness” in his book *A Theory of Justice* (Oxford: Oxford University Press, 1971, at 342-49).

<sup>205</sup> Actually, this is what the American Supreme Court ruled in *Luria v. United States* (*Luria v. United States*, 231 U.S. 9 (1913)).

<sup>206</sup> Ronald Dworkin, “Civil Disobedience”, in David Dyzenhaus and Arthur Ripstein (ed.), *Law and Morality: Readings in Legal Philosophy* (Toronto: University of Toronto Press, 1996), at 436.

<sup>207</sup> Chaim Gans suggests that the principle of fairness can be a source of responsibility in two situations. First, it applies when people desire the existence of a given situation from the point of view of their personal interests and goals; second, it applies when the existence of a given situation is required by people’s moral views. In these two situations, fairness requires people share in the burdens necessary for the maintenance of the situation even if it can be maintained without their participation. Please see Chaim Gans, *Philosophical Anarchism and Political Disobedience* (New York: Cambridge University Press, 1992), at 63-4.

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otherwise decisions. The benefits provided by the state are similar to a compulsory loan which is forced on the citizen. The second flaw in the argument is that there are many cases where violating the law does not take advantage of anyone.<sup>208</sup> In other words, the element of exploitation is not involved necessarily in every instance of law-breaking; such breaches of law, therefore, do not constitute unfairness to other citizens. Conversely, the actions of the civil disobedient sometimes represent an additional self-sacrifice in defending the legal system. The third flaw in the argument is that the benefits of government and the rule of law are never equally distributed among the citizens of a modern democracy. To achieve fairness, different individuals must be allowed to have different burdens in obeying the law rather than asking them to obey the law indiscriminately. For those disadvantaged groups such as the African-Americans before the civil rights movement, even if, as a matter of fairness, they should have shared the burdens of the society, their share would have been much smaller than that of the whites who benefited significantly from the system, according to Rawls<sup>209</sup> So long as there is economic deprivation, social discrimination, and unequal access to powerful offices, society is not a “mutually advantageous” cooperative venture. If there were an obligation of obedience derived from the principle of fairness, therefore, it would apply at most to the more favored members of the

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<sup>208</sup> *Supra* note 81, at 170.

<sup>209</sup> *Supra* note 85, at 301-312.

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society.<sup>210</sup>

In conclusion, while both of these arguments, the gratitude argument and the fairness argument, have some weight, neither provides a conclusive reason, either in theory or in practice, for holding that disobedience cannot be justified in a democratic political systems. In other words, both of them can indeed be sources of obligation under some circumstances, but they are unable to justify obedience to law on every occasion.

#### **D. The Majority Principle**

Very often, arguments against civil disobedience in democracy are based on appeals to principles of majority rule. In traditional democratic theory there is unanimous agreement that the majority's decision shall be binding on everyone, and thus the decision to either perpetuate or dissolve a government rests on popular consent. Civil disobedience, in contrast, implies that a small minority of citizens, even an individual, have a right to break laws made by the majority. Therefore, it would amount to condoning the coercion of the majority by the minority to allow civil disobedience. Addressing himself specially to the issue of majority rule Rex Martin stresses that "part of being a

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<sup>210</sup> *Ibid.*

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good citizen in democracy requires the citizen to adhere to the principle of democratic authority, that all decisions are made by elected representatives, and ultimately by majority vote, in accordance with established procedural rules, and that all persons are bound by such decision.”<sup>211</sup> Thus, like any coercion of one person by another, civil disobedience needs justification, the more persons coerced into yielding their wills to those of others, the more in need of justification such coercion is.

It is true that civil disobedience does need justification since we suppose that the law should be obeyed in general. However, the above claim which uses the majority principle to reject civil disobedience is not acceptable because, in my opinion, it is based on false premises or presumptions. The first false premise it depends on is that it supposes that the majority principle is an absolute rule or the ultimate goal of democracy which should not be contradicted at any time in any case. But, in fact, the majority principle has only a subordinate place as a procedural device in a democracy, despite the fact that it is generally considered as the best available way of ensuring equality for all.<sup>212</sup> Many

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<sup>211</sup> Rex Martin, “Civil Disobedience in Democracy”, *Ethics*, LXX.2, at 123-139.

<sup>212</sup> It is claimed that the majority principle can insure that all have an equal opportunity to influence decisions, which gives no advantage to any one person. Please see JG Riddal, *Jurisprudence* (London: Butterworths, 1999), second edition, at 328-9. However, this is true only in a limited sense. By a limited sense I mean that it is true when it is viewed from the individual perspective: one person one vote and no one’s vote is counted more than another’s, which gives no advantage to any individual. But when the majority principle is viewed in a bigger background, it may become horrible because it gives advantage to some interest groups which occupy the position of majority. In other words, though the majority rule does not give advantage to any individual, it may give advantage to some special groups.

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great philosophers have viewed their skepticism with the majority principle, rightly from Alexis de. Tocqueville's "the tyranny of majority"<sup>213</sup> to Thoreau's<sup>214</sup> and Rawls'<sup>215</sup> recent comments about it. The majority rule is widely adopted by the democracy, but it is also one of those things against which a mature democracy must guard. For example, in America, many constitutional constraints have been devised to restrain its use and impact. Judicial review by the court and the enumeration of the inalienable rights of the people in the Constitution are the most obvious examples. The former does not adhere to the principle of majority rule and the latter states clearly that there are some rights which even the majority has no right to deny. That is why Daniel Webster said that by adopting a constitution, "the people agreed to set bounds to their own power," because it would be the death-blow of constitutional democracy to admit the right of the numerical majority to alter or abolish constitutions at their pleasure.<sup>216</sup> Therefore, the rule of majority is not an absolute principle which enjoys sacred status and must not be breached

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<sup>213</sup> The phrase "tyranny of the majority" was coined by Alexis de Tocqueville in his *Democracy in America* and was further popularized by John Stuart Mill in his *On Liberty*. See Alexis de. Tocqueville, *Democracy in America* (New York: Doubleday Anchor Books, 1969) and John Stuart Mill, *On Liberty*, (New York: Cosimo Classics, 2009).

<sup>214</sup> For example, Thoreau in his essay "Civil Disobedience" claims that the majority rules, "not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest." Obviously, for Thoreau, this very fundamental element of democracy, where power belongs to the majority, is just another brutish fight where the strongest wins.

<sup>215</sup> Rawls views the majority principle only with an instrumental value. The justification for it rests squarely on the political ends that the constitution is designed to achieve. Please see John Rawls, *A Theory of Justice*(Oxford: Oxford University Press, 1971) at 313.

<sup>216</sup> See *The Rhode Island Question: Arguments of Messrs. Whipple and Webster in the Case of Martin Luther Plaintiff in Error, Versus Luther M. Borden and Others* 1, 40 (Charles Burnett ed., 1848). Here cited from Susan Tiefenbrun, "Civil Disobedience and the U.S. Constitution", (2003) 32 *Sw. U. L. Rev.* 677, at 685.

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at any time; rather, it is the very inner requirement of democracy to set it aside in some cases. Consequently, it is not right to deny the justification of civil disobedience merely because of its possible conflict with the majority principle. Especially when democracy as an end is endangered, the good democrat may be forced to violate the principle of majority in the form of civil disobedience in order to defend democracy.

The second premise on which the argument is based is that civil disobedience is in conflict with the majority rule. But we must ask: in what sense is a civil disobedient who violates the law openly, peacefully, and with acceptance of punishment violating the principle of majority rule? The answer is that the civil disobedient displays his fidelity to law and strictly minimizes his deviation from it and he willingly allows himself to be punished for an act for which he thinks he ought not to be punished; all this is meant to show respect for the will of the majority. The 'coercion' employed by the civil disobedient is soft and persuasive and the success of civil disobedience still depends on whether the disobedience action can attract enough followers to support the cause. Therefore, civil disobedience is not necessarily subversive of the majority principle and, on the contrary, it often works through it. As Carl Cohen persuasively argues:

The disobedient forces society to hear his objections; but he pays a very

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high price for that, and he is very unlikely to get his own way, nor is he likely to disrupt in any way the process by which laws are adopted. His push is no more disruptive than that of an influential publisher who uses the news columns of his paper to editorialize vigorously on behalf of one candidate in an election, or the push of a legislator who, in the effort to combat what he believes to be oppressive legislation. Therefore, the claim that every case of civil disobedience violates the fundamental procedural principles of democracy, or subverts the rule of the majority, simply cannot be substantiated.<sup>217</sup>

In summary, the majority principle is not an absolute rule in a democracy, but even if it were absolute, civil disobedience would not likely to be subversive of it. The broad acceptance of majority rule does not preclude civil disobedience. By this, I am not saying that minorities should have right to make decisions for the majority, I only mean that majority is not necessarily wiser than the minority. An evil does not become right only because that evil is approved by the majority; in such a case the evil is even greater.<sup>218</sup> Some form of the majority principle is necessary. In agreeing to a democratic constitution one accepts at the same time the principle of majority rule. As long as the laws enacted by the majority are bearable, and its injustice does not

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<sup>217</sup> *Supra* note 43, at 170-71.

<sup>218</sup> T Branislav Stevanović, "Theoretical and Valuable Foundations of the Right to Civil Disobedience", (2005) 4 *Philosophy, Sociology and Psychology* 1, at 4.

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exceed certain limits, we are obligated to obey them in order to show respect to the will of the majority and make a constitutional regime workable; but when the enactments of majority exceed certain bounds of injustice, the citizen may consider civil disobedience even though it is against the will of majority.<sup>219</sup>

#### **IV. Summary**

Being imperfect, democracy is an unfinished project that needs refining from time to time. Civil disobedience is an effective way to develop democracy, to help democracy to realize its ideals, especially in those situations where lawful avenues are blocked or ineffective. In this sense, civil disobedience is justified in a democracy.

After pointing this out, the challenge now is to explain specifically how civil disobedience can help the development of democracy; we must substantiate the argument by explaining why civil disobedience is effective and in what way. Therefore, the aim of the next chapter is to explain the advantages and mechanism of civil disobedience in helping the development of democracy, especially when compared with lawful means.

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<sup>219</sup> John Rawls, "The Justification of Civil Disobedience", in Hugo A. Bedau (ed.), *Civil Disobedience: Theory and Practice* (New York: Pegasus Books, 1969), at 240-55.





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## **Chapter IV:**

### **The Role of Civil Disobedience in Democracy**

In the previous chapter, I justified civil disobedience on the basis that it is consistent with and justified by democratic values, but I said very little about how precisely civil disobedience could help to improve democracy. In this chapter, I fill that gap by explaining how it could do so. In other words, this chapter serves as an extension of the previous chapter by substantiating its argument that civil disobedience contributes to the development of democracy.

The chapter is divided into three sections. The first section is devoted to the elaboration of the positive functions of civil disobedience in a democracy; the second focuses on the mechanism of civil disobedience, explaining why civil disobedience is so powerful in fulfilling its missions; the third further emphasizes the significance of civil disobedience by refuting an argument made by some scholars that civil disobedience should be judged by its social consequences.

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## **I. The Positive Functions of Civil Disobedience in a Democracy**

Civil disobedience is of great benefit to democracy. It not only enhances the development of democracy, but it also helps to stabilize democracy and prevent it from degenerating into tyranny. In addition, it also plays an important role in cultivating democratic citizens.

### **A. The Democracy-enhancing Function of Civil Disobedience**

Civil disobedience enhances democracy in two ways. First, it plays an important role in the establishment of democracy. Second, it is a powerful instrument in promoting the further development of democracy, from imperfect to ideal, from lower levels to higher levels.

As we know, many democratic systems today were established after long political struggles, which often included some form of civil disobedience. From the independence of the United States of America to the establishment of India, from the anti-Apartheid Movement in South Africa to the collapse of authoritarian regimes in Eastern Europe, civil disobedience has contributed significantly to their foundation. Moreover, in some of these cases, such as in

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India, South Africa, civil disobedience played a decisive role in the transition to democracy. Civil disobedience and mass protest, rather than revolutionary violence or top-down political reforms were often the main instruments for establishing democracy in these countries. In other countries, such as the United States, civil disobedience was not the major cause of the establishment of democracy, though it nevertheless played an important role. For example, the actions of the Boston Tea Party (in which citizens of the colony of Massachusetts trespassed on a British ship and threw its cargo overboard into the sea, rather than be forced to pay taxes without representation to Britain) was one of the many acts of civil disobedience leading to the War for Independence that established the United States of America as a sovereign state.<sup>220</sup>

The significant role of civil disobedience in the establishment of democracy is persuasively explained in a recent study led by Adrian Karatnycky and Peter Ackerman. The study titled “How Freedom is Won: From Civic Resistance to Durable Democracy”<sup>221</sup> covers transitions that have occurred from 1971 to

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220 *Supra* note 36.

221 “How Freedom Is Won: From Civic Resistance to Durable Democracy” is a study based on research conducted by Freedom House. Data and findings were reviewed and evaluated by a panel of independent academic authorities. The project was also supported by the International Center on Nonviolent Conflict. A brief edition of the report was published in *The International Journal of Not-for-Profit Law*, Volume 7, Issue 3 (June, 2005). The full report is available online at <<http://www.freedomhouse.org/template.cfm?page=383&report=29>>, last accessed on August 18, 2008.

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2004. Altogether, the transitions of 67 countries are included.<sup>222</sup> One of the principal findings of the study is that “people power” movements, including civil disobedience, matter and nonviolent civic forces are a major source for decisive change in most transitions. “The force of civic resistance was a key factor in driving 50 of 67 transitions, or over 70 percent of countries where transitions began as dictatorial systems fell and/or new states arose from the disintegration of multinational states.”<sup>223</sup> It is clear that civil disobedience and other nonviolent protests, rather than revolution and violence, were the main tactics for bringing about political change in these countries. Moreover, the study also found that democracies that were established through nonviolent tactics are more stable and sustainable than those founded on violence. Recourse to violent conflict in resisting oppression is significantly less likely to produce sustainable democracy.<sup>224</sup> Therefore, it is safe to conclude from the study that civil disobedience and other similar tactics are instrumental in the establishment of democratic states. It is also reasonable to suggest that nonviolent disobedience, if available, is a preferable way of fighting for democracy than violent resistance.

But civil disobedience is more than just a case of asserting democratic values

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222 Western Europe, Japan, small countries with populations of less than one million and countries where major political transitions occurred in the last two years before the report (2003 and 2004) such as Kyrgyzstan, Ukraine, Georgia are excluded from the study.

223 Please see Report: “How Freedom Is Won: From Civic Resistance to Durable Democracy”, in *The International Journal of Not-for-Profit Law*, Volume 7, Issue 3 (June, 2005), at 6-7.

224 *Ibid.*, at 8-9.

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against autocratic or authoritarian, and hence illegitimate, regimes. It is an integral part of a well-functioning democracy, which can help to improve the quality of democracy and promote its development.<sup>225</sup> As argued in the previous chapter, democracy is not a settled or static concept. Rather it is an evolving and aspirational one. No democracy is perfect. After basic democracy is achieved in a state, it still needs to be refined continuously to realize its ideals. Government may not be a dependable source for accomplishing this task. As Thoreau complained in the 19<sup>th</sup> century, government was rarely important in the development of American democracy: “It was not the government that created the conditions for liberty, educated the people, settled the frontier, and made possible the beauties of nature. Nor should Americans be so naïve as to believe that politics provide the means by which society could be reformed.”<sup>226</sup> Civil disobedience and other kinds of protest, not government, play the major role in the development of democracy.<sup>227</sup> And when normal means of protest are not available, the role of civil disobedience becomes crucial. It is questionable whether American democracy could have emerged had there been no such famous civil disobedience movements as the anti-war movement, the women’s suffrage movement, the abolition of slavery movement, the civil rights movement, and the labor rights movement, and so

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225 *Supra* note 135, at 325. I will argue that not only is civil disobedience consistent with democracy and the rule of Law, but it can actually further these principles and thus make an important contribution to positive social change.

226 *Supra* note 25, at 350.

227 “English society was the creation of amateur initiatives; its most valuable institutions were the result either of private patronage ... or of people making common cause and clubbing together.” See R. Scruton, *England: an Elegy*, (London: Pimlico, 2001), at 57-8.

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on.<sup>228</sup> Civil disobedients were generally punished and even subjected to severe criminal punishments. Yet, in the long term, civil disobedients invariably were vindicated by having their views adopted by larger society. Acts of nonviolent civil disobedience have proven to be central to the achievement of social and political reform, in other words, to the improvement of democracy.<sup>229</sup>

However, some may argue here that since these days democracy in western society has become more mature and more advanced and that the serious injustices have been eradicated; the “golden age” of civil disobedience has passed, only to be replaced by other means of legal protests. Unfortunately, this is only an illusion rather than an accurate reflection of the current situation. In fact, western countries where mass civil disobedience was largely a memory of the 1960s and 1970s have witnessed a recent resurgence in the practice. In the United Kingdom alone, mass civil disobediences between 2002 and 2008 involving several hundred thousand people have taken place in protest of both the government's anti-hunting legislation<sup>230</sup> and the recent invasion and occupation of Iraq and Afghanistan. Needless to say, in those

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228 For a detailed discussion of the role of civil disobedience in promoting US democracy, please see Howard Zinn, “The Role of Civil Disobedience in Promoting US Democracy”, online: <<http://www.afsc.org/pwork/0299/029904.htm>>, last accessed on August 18, 2008. And also see Kayla Starr, “The Role of Civil Disobedience in Democracy”, online: <<http://www.civilliberties.org/sum98role.html>>, last accessed on August 18, 2008.

229 *Supra* note 155, at 14.

230 The movement was mainly led by such rural organizations as the Countryside Alliance and the Avon Vale Hunt.

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countries that are still in pursuit of a decent democracy, civil disobedience has a greater role to play. Consider, for example, mass protests in the Philippines in 1986; Chile and Poland in 1988; Hungary, East Germany, and Czechoslovakia in 1989; the Baltic States in 1991; South Africa in 1994; Serbia and Peru in 2000; Georgia in 2003; and Ukraine in 2004. These are all the latest cases of civil disobedience in a series of successful transition to democracy. Therefore, it is too hasty to conclude that a golden age of civil disobedience has passed. Actually, as long as the democracy is imperfect, democratic and justice deficits will arise and civil disobedience will endure as a way of eliminating those deficits. Especially at a time when there is declining faith in representative democracy in liberal states owing to many unpopular policies it creates,<sup>231</sup> it is quite possible that civil disobedience will experience resurgence in the near future.

## **B. The Democracy-stabilizing Function of Civil Disobedience**

Another important function of civil disobedience is that it helps to stabilize

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231 Bhikhu Parekh once described the alienation of the policy of the representative democracy and the people as such, "Representatives were to be elected by the people, but once elected they were to remain free to manage public affairs as they saw fit. This highly effective way of insulating the government against the full impact of universal franchise lies at the heart of liberal democracy. Strictly speaking liberal democracy is not representative democracy but representative government." Bhikhu Parekh, "The Cultural Particularity of Liberal Democracy" in David Held (ed.), *Prospects for Democracy* (Cambridge: Polity Press, 1993), at 172.



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democracy. First, civil disobedience can function as a safety valve for discontent which prevents democracy-destroying violence from happening. Second, civil disobedience can be used as a tool to eliminate or eradicate injustice from society which is beneficial to the stabilization of democracy.

#### **a. Civil Disobedience as a Safety Valve**

Civil disobedience is not a threat to democracy and the constitutional order, but provides a mechanism for stabilizing it.<sup>232</sup> In fact, an important function of civil disobedience is to serve as a safety valve for discontent, with the effect of preventing anger from accumulating and escalating into violence. As Haksar argues in his book *Civil Disobedience, Threats and Offers: Gandhi and Rawls*, “civil disobedience, when properly conducted, can be a stabilizing device and can work as a safety-valve” because minorities or the disadvantaged may feel compelled to resort to violent measures if civil disobedience were not allowed, even as a last resort.<sup>233</sup> Indeed, it is easy to imagine that a social movement, if suppressed, could migrate from a purely nonviolent form of civil disobedience to a more drastic form, and if further suppressed, to revolution.<sup>234</sup> For example, if the movement led by Gandhi had

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232 For this point, please see *supra* note 146, at 221.

233 Vinit Haksar, *Civil Disobedience, Threats and Offers: Gandhi and Rawls* (Oxford: Oxford University press, 1986), at 2.

234 According to Martin, something of the same sort happened in American political

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been brutally suppressed by English colonists, the Indians might have resorted to violent revolution to gain the independence of India. Similarly, if the civil rights movement in the United States had been met with systemic and lethal violence, the African-Americans might have to win their freedom through civil war rather than nonviolent civil disobedience. Therefore, civil disobedience, though illegal, could in some cases prevent violent actions from taking place and serve to stabilize democracy.

The possibility of violent escalation is all the more important given that those who resort to civil disobedience are often those who feel discriminated against and prejudiced by existing political system. Lawful means, they often feel and insist, are not available or not sufficient for them to advance their cause. As a result, they often believe that there is no fair and effective way for them to participate in the deliberative process of democracy. Thus, if the government continues to insist that they must resort to lawful means and refuses to tolerate their acts of civil disobedience, greater hostile attitude toward society would likely result. Seen in this light, tolerating civil disobedience may be a way to give a voice to those whose voices cannot otherwise be heard within the existing democratic system<sup>235</sup> and, to retain or even regain their confidence in

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experience and consciousness at the time of the Revolution; a political attitude was first replaced by a revolutionary attitude of civil disobedience, and then, somewhere 1774 and 1776, another gray zone was passed over into revolution proper with the Declaration of Independence. Please see Rex Martin, "Civil Disobedience", (1970) 80 *Ethics* 123, at 134.

235 In the view of Habermas, those who engage in civil disobedience are often those

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and loyalty to democracy. The hope is that as long as they still have some confidence, no matter how little, in the existing democracy, it is less likely that those who are discontent with particular policies would adopt a hostile attitude that supports violence as the way of changing the existing system.

The contribution of civil disobedience to the stabilization of democracy can also be explained by the theory of elastic systems. According to this theory, elastic systems are more stable and dynamic than rigid systems. “More elastic systems, which allow open and direct expression of conflict within them and which adjust to the shifting balance of power that these conflicts both indicate and bring about, are less likely to be menaced by basic and explosive alignments within their midst.”<sup>236</sup> Civil disobedience, by venting high systemic pressures, may enable systems to become more elastic and stable.

## **b. Civil Disobedience Can Right Injustices**

While democracy is considered by many to be the most just form of government, it remains imperfect. One of its most important deficiencies is

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who are excluded from the deliberation process of democracy. Civil disobedience, therefore, can be viewed as an alternative way to let them to take part in the process of deliberation. See Lasse Thomassen, *Deconstructing Habermas* (New York: Routledge, 2008), at 109.

<sup>236</sup> *Supra* note 142, at 29.

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that it does not always guarantee justice, no matter how young or how mature it is.<sup>237</sup> Indeed, many great injustices, such as colonization, the slave trade, and the use of nuclear bombs against civilians, were all committed by the so-called civilized and democratic countries. To a large degree, democracy is a system based on the majority rule. But, unfortunately, the majority is not always right. “If 49 per cent of the population can be wrong, so can 51 percent.”<sup>238</sup> The existence of injustices, especially serious injustices, is a terrible threat to the stability and sustainability of democracy because injustices seriously endanger the social cohesion on which democracy greatly depends. Therefore, another way in which civil disobedience can contribute to the stability of democracy is by helping to right injustices that could endanger it.

Certainly, the effect of civil disobedience on the stability of democracy may not be discernable immediately after its practice. Sometimes, it even makes the democracy appear more fragile. For example, the civil rights movement led by King was criticized fiercely as a threat to the social stability in his time, and King himself was hated and harassed by both the American government and white segregationists, and even the mainstream media. In fact, the indecency and barbarism aimed at him were so strong at that time that they

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237 Or, as Churchill famously quipped “the worst form of government, except for all those other forms that have been tried from time to time.”

238 Peter Singer, *Practical Ethics* (Cambridge: Cambridge University Press, 1993), Second Edition, at 299-300.

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finally led to his murder. But when we look back at those turbulent years, it is not difficult to agree that King contributed much to American democracy. Democracy in the United States has become more stable rather than more fragile after King. As previously discussed, had there been no King and no civil rights movement, it is difficult to imagine that the United States would now enjoy its status as a relatively successful democratic country. Thus, the conclusion is that while civil disobedience might cause short-term disruptions to the society, in the longer term it often makes the democracy more confident, more stable and more durable.

Some might argue here that civil disobedience is not the only way to right injustice; every democracy has some checks, balances and normal avenues to ensure justice. The answer to this argument, as I discussed in the previous chapter, is that normal avenues are not always enough. Indeed, it is impossible for a democratic system to anticipate all of the injustices it generates and to develop lawful means that perfectly redress all of them. Neither the court nor the practices of voting, lobbying, or lawfully demonstrating can perfectly accomplish the task of eradicating injustices. When normal avenues are obstructed or ineffective, the only sensible way left for those people who want to stop injustice is to commit civil disobedience<sup>239</sup> to arouse the public and to

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239 “Because of this, the only sensible way to get things accomplished is to wake the public up to faults of certain laws. The best way to do this, perhaps, is to civilly disobey, since getting anything accomplished in Congress is impractical and civil disobedience can

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compel the government to confront questions which, otherwise, it is unwilling to. For example, the great movements for civil rights, workers' rights, women's rights, animal rights, environmental protection all represent a democracy society being forced to look into its soul to find better ways to redress the injustices it generates.<sup>240</sup> Seen from this light, civil disobedience is not simply a safety valve, but also a useful and ethical means of serving humanity, justice and the common good.<sup>241</sup>

### **C. The Degeneration-preventing Function of Civil Disobedience**

Democracy can move closer to its ideals, but it can sometimes also regress, degenerating into tyranny. Civil disobedience, with its vigilance against state power and emphasis on the spirit of protest and sacrifice, may function as a roadblock to rescue the democracy from degeneration.

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occur immediately." Please see Kristi Roberts, "Civil Disobedience", online: <<http://members.aol.com/wutsamada2/ethics/essays/roberts.htm>>, last accessed on August 20, 2008.

240 Bhupal Lamichhaney, "Democracy, Injustice, and Nonviolent Civil Disobedience", online: <<http://www.scoop.co.nz/stories/HL0605/S00371.htm>>, last accessed on August 20, 2008.

241 *Supra* note 12, at 541.

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### **a. The Degeneration of Democracy**

Democracies do not always remain democracies. They may descend into tyranny.<sup>242</sup> The experiences of Germany, Italy, and Poland in the inter-war period and of Pakistan and Greece in the last decade are all good examples of degeneration. Two factors make democracy especially vulnerable to the danger of degeneration.

First of all, the limited breadth of the existing democracy makes it fragile to the danger of degeneration. Democracy, today, is generally considered the best way to organize government and tackle problems, but it has not been effectively applied to every area of political life. In most democratic countries, there are many vital issues that do not attract political scrutiny. As pointed out by some scholars, the most vital decisions of today relating to international politics and financial policies have escaped the democratic processes and rule of law, and depend on the judgment of particular individuals.<sup>243</sup> Absent effective democratic restraints, these powers are easily abused by politicians. For example, a war which is avoidable may be waged irresponsibly or merely because of the personal ambition of politicians and an economic recession or

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242 Steven D. Laib, "The Degeneration of Democracy", online: <<http://www.intellectualconservative.com/2007/11/01/the-degeneration-of-democracy/>>, last accessed on August 12, 2008.

243 *Supra* note 146, at 214.

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financial crisis may be triggered by the corruptive policies of selfish officials irrespective of what the people want. These abuses might then become a catalyst for social instability, lawlessness and tyranny. In addition, another way for democracy to degenerate into military dictatorship or tyranny is through the use of “emergency powers”. One argument in favor of emergency powers is that liberal democracies must temporarily become dictatorships to protect their long-term viability as democracies.<sup>244</sup> While this appears to have been the case in Britain and United States during the world wars, it is also true that the power has often been used by dictators to uphold their own tyranny and suppress dissent. Actually, this has occurred in numerous countries in recent decades. A good example is Indonesia where Suharto maintained his own dictatorship for several decades in the name of avoiding Communism. And unfortunately, even those countries with long traditions of liberal democracy such as Germany and Chile also could not escape.

Additionally, the weakness of human nature also makes democracy vulnerable to the danger of degeneration. Fear, lust, jealousy and hatred are all normal feelings of men, but they also expose men to submission, craze and the danger of being controlled. Highly proficient political leaders always know how to achieve their own aims as full as possible by maneuvering these feelings of

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<sup>244</sup> For example, see Clinton Lawrence Rossiter, *Constitutional Dictatorship: Crisis Government in the Modern Democracies* (Princeton: Princeton University Press, 1948).



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men. In extreme cases, military dictatorship and tyranny are also possible. It is easy to forget that this was what happened in Germany and Italy during 1930's, with Germany smarting from its defeat in 1918 and Italy seeking to recreate the Old Roman Empire. It may be argued here that such things will not happen again because, with the advent of satellite broadcasting and the internet, it is increasingly difficult for governments and politicians to distort facts, to conceal news and manipulate the feelings of their populations. However, the "war on terror" suggests that the attitude is too opportunistic. To say nothing of the "significant intelligence failures" claimed by President Bush,<sup>245</sup> the often one-side perspective of the mainstream media in reporting terrorism is disappointing. These reports typically abandon themselves to the vivid depiction of the barbarism and cruelty of the terrorists, but devote little to the underlying causes of terrorism, as well as the discrimination, marginalization, helplessness, despair and exceptional sufferings experienced by some who resort to political violence. Frankly, I cannot discern any progress in this attitude when compared with the mainstream attitude to communism decades ago.<sup>246</sup>

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245 It is believed that the CIA had distorted evidence on Iraq's alleged mass destruction weapons in order to tell the White House what it wanted to hear and help make the case for war. Moreover, some doubts that President Bush had knew that there was little evidence which could prove the ownership of mass destruction weapons by Iraq before the war, but he still decided to use it as an excuse to win support for the war. Please see Patrick Martin, "Behind the Resignation of CIA Director George Tenet: the Bush Administration Begins to Break Up", online: <<http://www.wsws.org/articles/2004/jun2004/tene-j07.shtml>>, last accessed on September 1, 2008.

246 Certainly, I am not a supporter of terrorism. Nor I think terrorism is the right way to solve problems. I am only claiming that at least we should let the people see the two sides

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## **b. The Desanctifying Effect of Civil Disobedience**

Any form of government could fail. So when the degeneration of a democratic government has become obvious, what should people do? There are different answers to the question. According to one interpretation of legalism, a law is a law which should be obeyed under any circumstances, no matter right or wrong. Any action taken by the government, no matter how barbaric or dehumanizing, is considered as legitimate because there is no standard by which the government can be judged.<sup>247</sup> Therefore, under this theory, there is no limit to the power of the state, except for those limits that the state chooses to place upon itself.<sup>248</sup> The consequences of this kind of legalism are frightening because it places citizens in a dangerous and vulnerable position. When a government becomes totalitarian and blocks the legal protests, its citizens would have no choice but to surrender to the authority and accept the degeneration of democracy.

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of the story. Terrorists are not born, but are created by their social experiences which are often full of tears and throws. I deeply believe that, for most terrorists, they choose this way only after too many exceptional sufferings. To a large degree, they are also victims just as those innocent people who died unfortunately in their terrorist attacks. But, unfortunately, most people and most media only see terrorists' eyes full of hatred, but never ask themselves where the hatred is from. It is my deep belief that the way to eradicate terrorism is to ask ourselves more about where the hatred is from and do our best to eliminate its origin rather than annihilate the terrorists simply.

<sup>247</sup> For example, this is the view taken by the legalists of ancient China in Warring Times, Fa Jia, whose most famous representatives are Shang Yang and Han Feizi.

<sup>248</sup> Mortimer J. Adler, *Six Great Ideas* (New York: Macmillan Publishing Company, 1981), at 200-201.

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On the contrary, the theory of civil disobedience is in a far better position to defend democracy. It takes a limited view of government. For civil disobedients, the state, its law and its functionaries have only a contestable claim to legitimacy.<sup>249</sup> The government, while powerful, is not infallible and its actions should still be subject to evaluation based on their compliance with an objective standard of justice and its consistency with democratic ideals. Therefore, when there is a practical danger of degeneration, citizens may resort to civil disobedience to defend democratic values. This character of civil disobedience may be effective in rescuing democracy from degeneration because it sends a clear message to the government that the people will refuse to go along with it if it departs too far from the democratic way. Moreover, occasional exhibitions of civil disobedience by respectable citizens and in obviously good causes can help to nurture within society a respect for the spirit of resistance, thereby encouraging their government to be more humane and cautious in what it demands of its people.<sup>250</sup>

Indeed, civil disobedience, along with other kinds of resistance, is a powerful weapon for defending democracy. The founding fathers of the United States were aware of this when they included the right of resistance in the Declaration of Independence: “Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever

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249 *Supra* note 147, at 172.

250 *Supra* note 12, at 543.

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any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it...”<sup>251</sup> “What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance”,<sup>252</sup> the primary drafter of the Declaration, Thomas Jefferson, asked rhetorically.<sup>253</sup> Locke too was well aware of the importance of civil disobedience. He argued that when government escapes from institutional constraints, substantive limitations of the government power will rest with the citizenry, with that “right of resistance” which is the ultimate restraint of the political order. Indeed, Locke insisted that the people must be enabled to act before any usurpation occurs, for once established, it may become impossible to remove.<sup>254</sup>

In conclusion, by desanctifying the government and its power, civil disobedience may play a unique role in rescuing democracy from degeneration. That is also the very reason why it is considered as the final device for maintaining the stability of a just constitution.<sup>255</sup>

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251 “The Unanimous Declaration of the Thirteen United States of America”, July 4, 1776. The full text is available online at <<http://www.ushistory.org/declaration/document/index.htm>>, last accessed on September 1, 2008.

252 “Letter from Thomas Jefferson to William Smith” (Nov. 13, 1787), reprinted in Julian P. Boyd (ed.), *The Papers of Thomas Jefferson* (Princeton: Princeton University Press, 1955), at 356.

253 Harris G. Mirkin argues that though Jefferson also supports the idea of revolution, he views civil disobedience as a better choice because acts of resistance “forced the society to deal with problems before they assumed proportions that would justify real revolution.” Harris G. Mirkin, “Rebellion, Revolution, and the Constitution: Thomas Jefferson’s Theory of Civil Disobedience”, (1972) 13 *American Studies* 61, at 64.

254 John Locke, *Second Treatise on Civil Government*, Sect. 159, 160, 220, 240, 242.

255 *Supra* note 85, at 337.

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#### **D. The Function of Cultivating Democratic Citizens**

There are many disputes about what kind of citizen is needed for a democracy to function well, and, most likely, this is not a question which can be settled in the foreseeable future. In spite of this, it is widely agreed that democracy, in order to be vital and effective, requires a highly educated electorate with some special characteristics. For example, the citizens should have a good spirit of participation; they should have a good sense of equality and good self-esteem, neither thinking themselves superior to others nor bowing to others very easily; and, crucially, they should have capabilities to form their own opinions and own courage to defend them. These characteristics desired by democracy are not innate; they need to be cultivated and learned. The conventional ways of protest and civil society are good places for citizens to receive democratic education, but civil disobedience can also provide such training to citizens.<sup>256</sup>

Not only can civil disobedience greatly enhance respect for human dignity and the spirit of participation among the people, it also has an active therapeutic

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256 For example, it is claimed by some scholars that civil disobedience does not serve to educate the public about democratic mechanics, nor does it train leaders or socialize dissidents into the pattern of conventional oppositions. Please see, Paul F. Power, "Civil Disobedience as Function Opposition", *The Journal of Politics*, Vol. 34, No. 1, (Feb., 1972), p. 46. However, such criticism is based on the misunderstanding of civil disobedience. Civil disobedience, in fact, also provides training to citizens which especially can make citizens aware of the shortcomings of the mechanism of democracy. More than often, civil disobedience is practiced after the failure of conventional protest. Civil disobedience, therefore, is based on a higher understanding of democracy, both its advantages and disadvantages. Today, more and more organizations which are committed to civil disobedience are established which also provide a lot of education to participants about how democracy functions.

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effect on the marginalized. Therefore, an indirect contribution of civil disobedience to democracy is that it can instill in its citizens the most important qualities needed for participation in democratic life.

### **a. The Spirit of Participation**

Since democracy means the existence of a government “of the people, by the people and for the people”,<sup>257</sup> citizen participation is vital. So for democracy to function well there must be a spirit of participation among the people. If the participation rate is too low, not only will the function of democracy be damaged but its legitimacy will be threatened.<sup>258</sup> Civil disobedience, like legal protest, is able to encourage citizens to take part in the democratic processes.

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257 The Gettysburg Address delivered on November 19, 1863 by American President Abraham Lincoln, the address is available online at <<http://www.gettytsbg.com/gettytsburgaddress.shtml>>, last accessed on August 21, 2008.

258 Some scholars have argued that for democracy to function well, a sizable, semi-passive citizenry is vital. High levels of participation in the social area will threaten intellectual freedom, economic opportunity, and personal development. Moreover, extensive politicization will destroy the balance between consensus and cleavage that has been established by moderate levels of participation and support for flexible, responsible elites. Please see Lester W. Milbrath, *Political Participation* (Chicago: Rand McNally, 1965), at 142-54. However, in my opinion, it is obvious that it is not in the interest of democracy if the participating rate is too low. Letting decisions to be made by a few elites without extensive participation, actually, is not in line with the true meaning of democracy. And letting decisions to be made by a few elites is also a dangerous idea because it not only contributes to the alienation of men from one another and from their social and political systems, but also discourages their attempts to gain access to social decision-making.

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In the first place, civil disobedience can mobilize and galvanize opinions. By presenting the dispute in a dramatic way, it can help people to see controversial issues which are otherwise unnoticed by them. And by intensifying the conflicts, it is able to attract otherwise politically-indifferent people to be involved in the democratic process. For those who have been unsuccessful in traditional forms of protest, civil disobedience gives them new hope for success and, hence, encourages them to remain engaged in the public issues. As history shows, as in the 1960s in the United States, civil disobedience was often able to widely kindle or rekindle citizens' spirit of and passion for participation. Moreover, civil disobedience is also a way to organize and unite people with similar views behind a cause. Organizations committed to public issues may be formed in the civil disobedience movement and these organizations will generally continue to exist and function as part of an active democratic force after the civil disobedience ends. Some organizations which arose from civil disobedience movements such as Greenpeace, the Environment Left and American Civil Liberties Union have become major participants in contemporary democracies, particularly in the United States.

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## **b. Dignity of Human Person**

Civil disobedience also enhances self-respect and the dignity of the person which are valuable to the functioning of democracy. Democracy is based on the assumption that as independent beings with the capacity to make up their own minds, individuals are the best judges of their own interests. As such, they should neither be arrogant, nor easily subdued by injustice. In other words, it is vital to protect the conscience and dignity of the person.

The practice of civil disobedience proclaims a powerful message about the dignity of human beings. It sends a clear message that the law, while important, does not transcend the fundamental liberty of human conscience at all times.<sup>259</sup>

By practicing civil disobedience, those who cannot abide by the decrees of the majority because of their own integrity and conscience can find a mechanism to voice their discontent, and hence to disassociate themselves from the wrongs done by the government. As Bernard Boxill pointed out in “Self-respect and Protest”, individuals have reason to protest not only to stop injustice but also to show self-respect and to know themselves as self-respecting; if they fail to express openly outrage at injustice, however assiduously they works against it, they will, in the long run, lose

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<sup>259</sup> *Supra* note 55, at 667.



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self-respect.<sup>260</sup> On this view, the main goal of civil disobedience is not to awaken people's innate aggression or sheer animosity toward authority "itself"; its purpose is not to turn back citizens to a "state natural" but to develop moral virtue, civil courage and human dignity in them: "one could not be free without the feeling of human dignity: one would rather be to deliver himself to the imbecile comfort of subjection and the other poisoned fruits of voluntary slavery".<sup>261</sup>

### **c. Therapeutic Effects on the Victims**

Civil disobedience also has special therapeutic effects on victims of discriminatory laws. Civil disobedience is often directed toward a law which denies certain rights to a disadvantaged group. The assumption behind the discrimination is that the disadvantaged are inferior in some fashion or possess some stereotypic and negative attributes. The existence of such laws and their underlying assumptions may result in low self-esteem and a sense of group inferiority among the law's targets. They may feel powerlessness, despair and alienation from the society.<sup>262</sup> As King said when he referred to the slavery

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260 Bernard R. Boxill, "Self-Respect and Protest", (1976) 6 *Philosophy and Public Affairs* 58, at 59.

261 *Supra* note 218, at 8.

262 *Supra* note 56, at 129. For a discussion of the psychological and emotional effects of discrimination and oppression, please see Ali Khan, "Lessons from Malcolm X: Freedom by Any Means Necessary", (1994) 38 *Howard Law Journal* 79, at 79 ff.

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system, it gave the segregator a false sense of superiority and the segregated a false sense of inferiority.<sup>263</sup> Civil disobedience, on the contrary, can function as a beneficial activity to liberate the victims from the false sense of inferiority and other negative feelings. First of all, at the group level, the practice of civil disobedience can bind them together as a whole. As a united group, they become powerful and are able to take steps to make others take them seriously. Gradually, they may gain a sense of group identity and group solidarity and recover from the negative sense of powerlessness and alienation. At the individual level, civil disobedience is also a cleansing force. During the practice of civil disobedience, the victims, instead of simply existing within and at the whim of an oppressive system imposed by others, become proactive by taking steps designed to change their own circumstances, rather than passively being at the mercies of others.<sup>264</sup> Such active practices help to free the victim from his inferiority complex, from his despair and inaction, and make him courageous and fearless. Seen in this light, it is safe to conclude that civil disobedience may be a good cure to that sense of inferiority which comes with the discriminating laws. Moreover, as long as the sense of inferiority is dispelled, the discriminating laws will be unlikely to persist either because, as claimed by Wilson Carey McWilliams, the essence of tyranny lies in the effort to perpetuate a sense of individual isolation and weakness that creates a felt

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263 *Supra* note 138, at 76-95.

264 *Supra* note 56, at 131.

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need for and a willingness to endure the rule of the strong.<sup>265</sup>

This fact can be vividly explained by the experiences of African-Americans. James Lawson pointed out, African-Americans, because of their miserable experiences and inferior social status, for many years, have hated themselves rather than turning their hatred, vindictiveness and ill will against white men. Because of that, they have developed an inverted violence, a depreciated and rejected selfhood.<sup>266</sup> But during the civil rights movement these same people could hold up their heads with justifiable pride, working collectively to solve racial problems. A nonviolent movement can do something to the hearts and minds of those committed to it: “It gives them new self-respect; it calls up resources of strength and courage they did not know they had.”<sup>267</sup> After the movement, African-Americans had a new sense of courage and self-confidence.

## II. The Mechanism of Civil Disobedience

We learned from the previous section that civil disobedience plays an important role in democracy. But what is the mechanism that civil

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<sup>265</sup> *Supra* note 146, at 221.

<sup>266</sup> James M. Lawson, Jr., “Non-Violent Way,” (1960) 13 *The Southern Patriot* 1, at 1.

<sup>267</sup> Martin Luther King, Jr., “Pilgrimage to Nonviolence,” (1960) 77 *The Christian Century* 439, at 439-41.

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disobedience depends on? What characteristics make civil disobedience so powerful in helping democracy? As I argue in this section, there are mainly three weapons which make civil disobedience powerful: publicity through dramatization, persuasion through suffering, and coercion through nonviolence.

### **A. Publicity through Dramatization**

The first weapon which makes civil disobedience so powerful is its character of dramatization.

#### **a. The Publicity Power of Civil Disobedience**

Civil disobedience is a powerful attention-getting device, which is far more effective than normal protests in publicizing contested issues.<sup>268</sup> Its effectiveness comes, first, from the fact that “it is a form of political

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268 For example, Susan Tiefenbrun points out that breaking the law can be a forceful means of expression. Please see Susan Tiefenbrun, “Civil Disobedience and the U.S. Constitution”, (2003) 32 *Sw. U. L. Rev.* 677, at 698. Leslie Gielow Jacobs also holds the view that civil disobedience is a unique mode of communication because it can grab the majority attention in a way that lawful means may not. Leslie Gielow Jacobs, “Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance”, (1998) 59 *Ohio St. L.J.* 185, at 243.

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participation available to citizens without the money, media support, lobbying resources, voting strength, political skills, or political access necessary to influence decision-makers through more traditional means.”<sup>269</sup> That means civil disobedience is a cheap tactic which nearly everyone can resort to. Therefore, it can help make otherwise unheard voices of the poor and the disadvantaged heard by the whole society.

But the most important reason behind the publicity power of civil disobedience is its character of dramatization and provocation. Civil disobedience is not only a public protest but also a public show and a public violation of legal rule. In the first place, due to the fact that civil disobedience does not need to be pre-approved, its practitioners can fully use their judgments to devise their performance in order to generate surprise and publicity. The more dramatic, the more attention it can get. Additionally, civil disobedience is a provocative act calculated to gain attention and provoke discussion. The act of breaching the law can ensure it will not be ignored easily by the government. The character of dramatization and provocation together can make civil disobedience a powerful means of publicity. As pointed out by scholars, one of the primary operational objectives of governments is the maintenance of civil order. Failure to secure this goal is

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269. Gordon Neal Diem, “Civil Disobedience”, in *St. James Encyclopedia of Pop Culture*, online: <[http://findarticles.com/p/articles/mi\\_g1epc/is\\_/ai\\_2419100256](http://findarticles.com/p/articles/mi_g1epc/is_/ai_2419100256)>, last accessed on September 1, 2008.

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likely to provoke retaliation and complaint from constituents. “An excluded group can thus gain attention to its grievances from even unsympathetic elites and governments by interrupting the smooth functioning of the system.”<sup>270</sup>

The leaders of civil disobedience movements are usually aware of the dramatic character of civil disobedience and its usefulness in promoting their goals. For example, Gandhi used the technique almost perfectly in his protest against the salt tax law. “In 1930, Gandhi launched the Satyagraha campaign by walking to the sea with 78 disciples to break the salt tax laws. ‘Day by day the tension mounted,’ reports one writer, ‘as all India followed the elderly Mahatma plodding through the countryside on his crusade.’ Then the dramatic moment came: as hundreds of congressmen and government officials watched, Gandhi made salt from the sea, breaking the law and setting the rest of India into a ‘semi-comic frenzy of producing uneatable salt.’”<sup>271</sup> Through a simple act of dramatization and provocation, Gandhi achieved his aim of protesting and exposing the injustices of the salt tax laws.

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270 Don Von Eschen, Jerome Kirk, and Maurice Pinard, “The Conditions of Direct Action in a Democratic Society”, (1969) 22 *The Western Political Quarterly* 309, at 309-25.

271 Jerry M. Tinker, “The Political Power of Non-violent Resistance: The Gandhian Technique”, (1971) 24 *The Western Political Quarterly* 775, at 784.

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## **b. Civil Disobedience and Judicial Review**

Having discussed the publicity power of civil disobedience, in the following paragraphs, I will explain how this publicity power works in a democratic society. It may be best explained, perhaps, by drawing an analogy to another practice of democracy: judicial review.

Although civil disobedience and judicial review arise in very different settings, they have striking similarities. Like civil disobedience, judicial review is criticized as being anti-majoritarian or anti-democratic.<sup>272</sup> It involves a group of people who seemingly enjoy no democratic legitimacy, but who nevertheless try to thwart the laws of democratic government. Indeed, the tension between judicial review and democracy is even greater than that between civil disobedience and democracy. Judicial review directly invalidates democratic laws, whereas civil disobedience merely defies them.<sup>273</sup> As early as the eighteenth century, the founding fathers of the United States took note of the similarities between judicial review and disobedience when they said that judicial review is a peaceful revolution by which groups that could otherwise achieve their goals only by violent revolution could protect

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272 As H.L.A. Hart says, English political and legal thinkers find this extraordinary judicial phenomenon to be particularly hard to justify in a democracy. Please see H.L.A. Hart, "American Jurisprudence through English Eyes", in *Essays in Jurisprudence and Philosophy* (New York: Oxford University Press, 1983), at 125.

273 *Supra* note 124, at 1929.

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themselves against arbitrary government.<sup>274</sup> Owing to these similarities, civil disobedience may well contribute to democracy in a similar manner as judicial review.

Judicial review contributes to democracy in many ways, but one of its important functions is to ensure, as John Hart Ely claims, that the political process is open to all viewpoints; that is, judicial review protects persons against being cut off, in one way or another, from democracy.<sup>275</sup> It is true that citizens can exert their voting rights periodically in a democracy, but not every group can influence the issues discussed in an election. For example, issues that most concern minority groups may get lost amid the general bundle of arguments and policies offered by the opposing parties and, as a consequence, those laws and policies that most concern them may not be considered.

When normal democratic means fail to address their concerns, another mechanism which citizens can depend on is judicial review. By triggering judicial review, citizens can get a valuable chance to have their concerns reengaged. Under the threat of its laws being struck down, the legislature, or even the wider society, may be induced or compelled, to reconsider these

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274 More about the topic, please see Harris G. Mirkin, "Judicial Review, Jury Review, & the Right of Revolution against Despotism", (1973) 6 *Polity* 36, at 36-70.

275 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980), at 74.



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laws.<sup>276</sup> Judicial review is an effective mechanism for bringing otherwise ignored issues onto the agenda. Civil disobedience also works along these lines.

Civil disobedience, through its power of publicity, is also able to trigger a democratic reengagement with issues that the status quo has kept off the political agenda. As Rawls observes, by engaging in civil disobedience a minority can lead the majority to consider whether they want to have their acts taken in this way, or whether, in view of the common sense of justice, they wish to acknowledge the claims of the minority.<sup>277</sup> In other words, civil disobedience can help those causes that have been marginalized by political parties and are unlikely to become part of the policy-making or legislative agenda. Realizing the problem is the first step in addressing it. By dramatizing the problems of the society, civil disobedience contributes significantly to the development of democracy. For example, when the United States was formed, almost no one thought that women needed to be enfranchised; indeed, most Americans at the time of the Revolution and for decades after thought that women were well represented by men. It is only after the rise of the suffrage movement that Americans began to realize that women were not satisfied with

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276 It is observed that judicial review contributes to democracy not by irreversibly striking down the undemocratic laws and replace them with judicially divined alternatives, but rather by intervening in the political process in ways that induce the legislature to reconsider statutes that are out of date, out of phase, or ill adapted to the legal topography. Please see Guido Calabresi, *A Common Law for the Age of Statues* (Cambridge: Harvard University Press, 1982), at 18.

277 *Supra* note 219, at 240-55.

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the status quo.<sup>278</sup> Another good example is the contemporary globalization movement which has introduced many new issues onto the meeting agendas of world leaders. Though global movements are fiercely criticized for their lack of a unified argument, a series of massive disobediences across the world in Seattle, Bolivia, Washington, Prague, Quebec City, Genoa and Argentina have successfully placed such topics as poverty, global inequality, job insecurity, and third world debt into the political agenda of world leaders.

## **B. Persuasion through Suffering**

A second weapon which makes civil disobedience so powerful is the persuasive power produced by its character of self-suffering.

### **a. The Persuasive Power of Civil Disobedience**

Civil disobedience is considered not only as an attention-getting device, but also as a persuasive technique for galvanizing support for the goals of civil disobedients. So where does this persuasive power come from?

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278 Reva B. Siegel, “The Jurisgenerative Role of Social Movements in United States Constitutional Law”, online: <<http://islandia.law.yale.edu/sela/SELA%202004/SiegelPaperEnglishSELA2004.pdf>>, last accessed on September 2, 2008.

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The answer given by many philosophers and practitioners of civil disobedience is suffering. The voluntary suffering of the civil disobedients is a great catalyst to win them sympathy, belief and support. Thus P. T. Sorokin can write about “love begetting love”, while King can insist that unmerited suffering is always redemptive.<sup>279</sup> But the most ardent supporter of the belief that suffering can melt the hearts of the people was Gandhi. He was convinced that the success of the civil disobedients lies in their willingness to suffer and to be arrested and imprisoned, rather than in their endeavors to avoid imprisonment. According to his view, even if there is but a single unarmed policeman, civil disobedients should surrender to him instead of running away. The triumph of the civil disobedients “consists in thousands being led to the prisons like lambs to the slaughter house...If the lambs of the world had been willingly led, they would have long ago saved themselves from the butcher’s knife. Our triumph consists in being imprisoned for no wrong whatever. The greater our innocence, the greater our strength and the swifter our victory.”<sup>280</sup> Success is the certain result of suffering of the extremist character, voluntarily undergone.<sup>281</sup>

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279 James F. Childress, “Nonviolent Resistance and Direct Action: A Bibliographical Essay”, (1972) 52 *The Journal of Religion* 376, at 392.

280 Mahatma Gandhi, *Non-Violent Resistance* (New York, Schocken Books, 1961), at 172.

281 *Ibid.*, at 275.

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According to Gandhi, enormous self-sacrifice is involved in the practice of civil disobedience. The practitioners must keep their actions nonviolent and must voluntarily submit to whatever punishment the authorities decide to impose. At certain times, especially in a regime which is not so democratic, the punishment undergone by the civil disobedients is unusually harsh. Not only criminal punishments may be imposed, but practitioners might lose their jobs, be isolated by social companions, and suffer defamation. That is why King said that civil disobedience is not for cowards; it is the way of the strong.<sup>282</sup> A stigmatic adherence to internal violence and suffering may seem unrewarding at times, in particular when the opponent is determined to suppress the movement with iron and blood, but it does play an important role of communication between civil disobedients and opponents, as well as the general community. It sends a clear message to the society that the civil disobedients have no wish to redress their wrongs or realize their political goals by violence. It also helps civil disobedients to convince the majority of fellow citizens that their acts are indeed conscientious and sincere. Therefore, the commitment to nonviolence and the willingness to suffer are very helpful in persuading both the opponent and the general public to sympathize with the

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282 Martin Luther King, *Stride toward Freedom* (New York: Harper & Brothers, 1958), at 102ff. In discussing nonviolence, King points out six principles that should be present in a campaign: (1) it is not for cowards, it is the way of the strong; (2) it does not seek to defeat or humiliate the opponent, but to win his friendship and understanding [this seems to be a little inconsistent with some of his other statements]; (3) it attacks the evil itself rather than the evildoer; (4) it embodies a willingness to accept suffering without striking back; (5) it avoids internal violence as well as external; love rather than hate is involved; and (6) it is based on the belief that the universe is on the side of justice.

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cause of the civil disobedients. In addition, this is also the very reason why civil disobedience is more powerful than normal protests in persuading the audience, including political opponents. According to Haksar, because of the significant sacrifice and suffering on the part of disobedients, a regime that is generally insensitive to lawful appeals may become sensitized and may ultimately accede to the civil disobedients' point of view.<sup>283</sup> In Gandhi's words, "the eyes of their understanding (those people who have settled convictions) are opened not by argument but by the suffering of the Satyagrahi."<sup>284</sup>

The power of civil disobedience was well illustrated by the civil rights protests in the American South, which undoubtedly succeeded, at least partly, by convincing the white majority of the evil of the American "apartheid." In that movement, the nonviolence character of the movement greatly helped the protestors win the sympathy of the observing public and reduced fears of whites that blacks intend to retaliate violently for past suppressions.<sup>285</sup> At the very least, it did a great deal of good in winning "neutral" or "moderate" whites to sympathize with the blacks.<sup>286</sup>

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283 *Supra* note 145, at 109-137.

284 *Supra* note 280, at 191.

285 Jacob R. Fishman and Fredric Solomon, "Youth and Social Action: Perspectives on the Student Sit-in Movement," (1963) 33 *American Journal of Orthopsychiatry* 872, at 879.

286 For example, *The New York Times* reported the Sit-in Movement on February 28, 1960 like this: "First, a white youth attacked another white youth who was sitting beside a Negro girl at McClellan's counter after getting no reaction when he called the fraternizing white a nigger-lover. Second, a white man attacked a Negro student after having received

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## **b. The Importance of the Audience**

The persuasion of civil disobedience is aimed at both opponents and on-lookers, but opponents, at least those with strongly settled minds, are sometimes difficult to persuade. Indeed, studies show that though the suffering of civil disobedients plays a great role in winning the hearts of the moderate opponent, the pacifist approach of civil disobedience practically has no positive effect in inducing the most hardened opponent to adopt a cooperative attitude, and perhaps even has a negative effect.<sup>287</sup> Because of the nonviolence and self-suffering character, it is highly probable that the most hardened opponent may develop a false impression that civil disobedients are cowardly, powerless, troublesome rather than courageous, self-confident and honest. This may further enhance their contempt of the civil disobedients. Therefore, under some circumstances, whether the civil disobedients can achieve their goals is dependent on whether they can persuade most of their

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no reaction when he repeatedly blew cigar smoke into the student's face. Third, a group of white boys attacked two Negro demonstrators after receiving no response during remarks. A third demonstrator was pushed down the stairs in the accompanying confusion." Frazier thinks the wide dissemination of this kind of information could have done a great deal of good in winning "neutral" or "moderate" whites to sympathize with the Negroes. See Thomas R. Frazier, "An Analysis of Nonviolent Coercion as Used by the Sit-in Movement", (1968) 29 *Phylon* 27, at 39.

287 For example, after studying what happened in the Civil Rights Movements of America, Zashin points out that civil disobedience had very limited effect in changing the hearts of the dominant whites in the South. Please see Elliot M. Zashin, *Civil Disobedience and Democracy*(New York: The Free Press, 1972), at 195-223. In a simulated game, some scholars also prove that the pacifist approach practically has no effect in inducing the dominant group to be cooperative. Gerald H. Shure, Robert J. Meeker and Earle A. Hansford, "The Effectiveness of Pacifist Strategies in Bargaining Games", (1965) 9 *Journal of Conflict Resolution* 106, at 106-7.

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audience and win their support rather than on whether they can persuade their opponents to change their minds.

The scope of a conflict can often determine who will be the winner. It has been noted that in a conflict the general tendency of the weaker is to broaden it and to expand the battle lines in order to involve more parties, whereas the tendency of the stronger is to privatize it, to contain it and to limit attempts to involve the larger audiences.<sup>288</sup> The reason is that the stronger can win the conflict without the intervention of the third party, while often the only chance for the weaker to win is to change its status as weak by inviting more supporters to join in the conflict. Compared to their opponents (often the regime and its most loyal supporters), civil disobedients are generally weaker. Therefore, it is often in the interests of civil disobedients to expand their conflict with the opponent by inviting the intervention or support of third parties. Indeed this is the main reason why the civil disobedients try to publicize their protest, whereas the regime seems more interested in avoiding publicity. Thus, it is essential for civil disobedients to persuade the non-involved audience to support their goals. In Kuper's words, civil disobedience "wins, if it wins, not so much by touching the conscience of the

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288 In almost every conflict, one protagonist struggles to privatize it—to contain it and limit attempts to involve the larger public—while the other attempts to socialize it. Please see E. E. Schattschneider, *The Sovereign People* (New York: Holt, Rinehart, and Winston, 1960), Chapter I. Here cited from Jerry M. Tinker, "The Political Power of Non-violent Resistance: The Gandhian Technique", (1971) 24 *The Western Political Quarterly* 775, at 777.

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masters as by exciting the sympathy of disinterested onlookers”<sup>289</sup>

As we have seen, one of the most important ways for civil disobedients to persuade is to suffer. The suffering, on the one hand, can legitimize their own claims, showing their integrity and honesty; on the other hand, can show the injustice, cruelty and tyranny of the regime.<sup>290</sup> Moved by the sufferings of civil disobedients or angered by the cruelty of the government, otherwise latent supporters of the civil disobedients may decide to act on their behalf. When a large number of on-lookers get involved, civil disobedients may be elevated to the position of the stronger, while the regime becomes weaker. As described by Michael Lipinsky, “the essence of political protest consists of activating third parties to participate in controversy in ways favorable to protest goals”.<sup>291</sup> If civil disobedients successfully mobilize the larger, on-looking populace to stand with them, it becomes easier for them to achieve their goals.<sup>292</sup>

This technique of persuading the audience to one’s side becomes all the more important considering the fact that there are always lots of politically inactive

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289 Leo Kuper, *Passive Resistance in South Africa* (New Haven: Yale University Press, 1957), at 75.

290 *Supra* note 271, at 777.

291 Michael Lipsky, *Protest in City Politics: Rent Strikes, Housing and the Power of the Poor* (Chicago: Rand McNally & Co., 1970).

292 Some may find that most civil disobedience movements in history had close relations with certain religion. Actually, this is an efficient way to win the support of the fellow citizens. The connection with religion can make civil disobedience more credible and make it easier to attract a larger number of followers.



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citizens in a democracy. In almost every democracy a large segment of the adult population is indifferent to or only superficially involved in political affairs.<sup>293</sup> They have no interest in the political campaigns, are unconcerned about the outcomes, and are uninformed about the candidates and issues. Moreover, there are many others who are so uninvolved that they have no wish to vote most of the time.<sup>294</sup> But, when these inactive citizens are mobilized to participate in the political process, sometimes they are strong enough to change the status quo. This is why it is essential for the challenger of the status quo, certainly including the civil disobedients, to activate these citizens.

A third party can show its support to the civil disobedients in many different ways, not necessarily in the form of participating in their civil disobedience. For example, they may choose to show their support by voting against those candidates who are hostile to the civil disobedients, retreating from their cooperation with the regime, taking part in all kinds of legal protests, writing letters to the government and the legislator, and so on. As long as they are activated to show their support, the political battle lines will be changed.

Lastly, the third party need not be limited to the citizens of the civil

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<sup>293</sup> For example, see “Voter Participation in Canada: Is Canadian Democracy in Crisis?”, Centre for Research and Information on Canada, online:< <http://www.ccu-cuc.canada>>, last accessed on January 26, 2010.

<sup>294</sup> *Supra* note 50, at 301-3.

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disobedients' state. The whole international society could be involved and become a third party, which is even more so in the age of the "global village". The anti-apartheid movement of South Africa is a good example. For a very long time, the movement led by Mandela failed to find enough support in South Africa to abolish the discriminating system; it was abolished only after international society was stunned by the injustices and began to act actively against the regime.

### **C. Coercion through Nonviolence**

A third weapon which makes civil disobedience so powerful is its character of nonviolent coercion.

#### **a. Coercion in Civil Disobedience**

Civil disobedience is not performed only in words, but in actions. Despite the insistence of a few scholars that civil disobedience is always persuasive and never coercive,<sup>295</sup> it does contain some elements of coercion or pressure. The

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295 For example, it is claimed by Joel Feinberg that the only pressure involved in civil disobedience is "moral pressure"—dramatically sincere appeal to the public's sense of justice rather than coercion. Please see Joel Feinberg "Civil Disobedience in the Modern World", in his *Freedom and Fulfillment: Philosophical Essays* (Princeton: Princeton

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coercion and pressure involved in civil disobedience mainly include the following.<sup>296</sup>

First, civil disobedience is a provocative act against the government. By engaging in law-breaking disobedience the dissenters pose a question to the government to which the government must respond immediately. The government in the case of civil disobedience has only two choices, either recognizing, explicitly or implicitly, the cause of the disobedients by refraining from punishing them, or rejecting their appeals by punishing them. No middle ground, such as playing the technique of delay or keeping silence, is left for the government. In other words, the government is placed on the defensive in the case of civil disobedience, having to defend its actions or inactions in public.<sup>297</sup> In short, civil disobedience is a question posed to the government demanding a decision for or against it and the government has to answer immediately.

Second, by persuading non-cooperation with the government, acts of civil disobedience exert pressure on the function, even subsistence, of the

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University Press, 1992), at 152. Rawls also holds the view that civil disobedience should always be persuasive rather than coercive. Please see John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971) at 335-343.

296 In his article "The Pedagogy of Democracy: Coercive Public Protest in India", Bayley analyzes in detail the coercion imposed on the government by the nonviolence movement. Please see David H. Bayley, "The Pedagogy of Democracy: Coercive Public Protest in India", (1962) 56 *The American Political Science Review* 663, at 663-72.

297 Roger I. Abrams et al., "Arbitral Therapy", (1994) 46 *Rutgers Law Review* 1751, at 1760.

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government. As has been noted, the smooth function of the government is dependent on the voluntary cooperation of great numbers of people even when the government seems to rely on repression. But civil disobedience tries to persuade the public to withdraw their cooperation with the government on some laws in order to protest their undemocratic nature. Once large numbers of people are convinced to withhold their cooperation, the ability of the government to fulfill its functions may be adversely affected. It may become helpless in enforcing its rules and regulations, and, moreover, may lose its justification for existence and its claim to legitimacy. Therefore, civil disobedience exerts considerable pressure on the government by threatening to erode its support.<sup>298</sup>

Third, in addition to indirectly eroding the basic support of the government, civil disobedience also constitutes a direct burden to the government. For example, civil disobedients may temporarily block the entrance to or trespass on government buildings. In the case of mass civil disobedience, too many arrests may make the prisons and the courts of the state congested, even totally disabling them. Therefore, civil disobedience sometimes consumes many

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298 The threatening nature of civil disobedience to a government was most cogently summarized by Lord Irwin, the Viceroy, in a speech to the legislative council in 1930: "In my judgment and in that of my Government the campaign (led by Gandhi) is a deliberate attempt to coerce established authority by mass action... Mass action, even if it is intended by its promoters to be non-violent, is nothing but the application of force under another form, and, when it has as its avowed object the making of Government impossible, a Government is bound either to resist or abdicate." Here cited from Jerry M. Tinker, "The Political Power of Non-violent Resistance: The Gandhian Technique", (1971) 24 *The Western Political Quarterly* 775, at 785.

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resources of the government that otherwise could be allocated to other areas. If too many resources, whether in the form of personnel or economic resources, were redirected to cope with civil disobedience, the normal functions of the government would be undermined. Mass civil disobedience can not only make the government inefficient but can also inhibit the performance of its functions as occurred in the United States during the anti-Vietnam War movement.

Coercion or pressure is a very efficient way to induce change because the responses of the governments to the suffering of people often depend on the pressure that is put on them.<sup>299</sup> Just as an individual is reluctant to admit his mistakes, the government is often unwilling to acknowledge its wrongdoings and reverse its policies unless external pressure is imposed. Pressure can induce the government to change its policies by making it realize that not compromising or not making concessions may be too costly in relation to the benefits of maintaining the status quo.

Civil disobedience is normally a persuasive action. It tries to persuade rather than coerce the government to listen to the appeals of the disobedients. In Rawls's words, it is an action appealing to the sense of justice; in Gandhi's

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299 William Mervin Gumede, "Democracy and the Importance of Criticism, Dissent and Public Dialogue", paper presented at the Harold Wolpe Lecture Series, University of KwaZulu-Natal, Durban, 18 April 2005. The paper is available online at <[http://www.wolpetrust.org.za/dialogue2005/DN042005gumede\\_paper.htm](http://www.wolpetrust.org.za/dialogue2005/DN042005gumede_paper.htm)>, last accessed on September 18, 2008.

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words, it is an action aimed to change the hearts of the opponents. But the hearts of the opponents are not always readily changed, especially for those opponents with dogmatic convictions. Their hearts may be insulated from any kind of rational or emotive appeal. Under such extreme circumstances, the only alternative way in a democracy to open their hearts is to persuade them through pressure, making them understand that maintaining the status quo is a much higher cost than compromising with the protestors. According to Elliot Zashin, civil disobedience, sometimes, is a question of convincing the opponents that the costs of concessions are smaller than the costs of enduring the protest campaign.<sup>300</sup>

History also proves that civil disobedience often succeeds most fully when it imposes direct economic and political pressure on the opponents. In civil disobedience, persuasive appeals are important, but it is often backed by such nonviolent direct actions such as sit-ins, boycotts, mass marches, strikes, trespasses, and upsetting of government works. Therefore, civil disobedience is not merely a persuasive or spiritual power as claimed by some scholars; it is also a political and economic power that exerts considerable pressure. It remains predominantly nonviolent, but nonviolence also can be used as a powerful way to press for change.<sup>301</sup>

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300 *Supra* note 50, at 198.

301 For a full discussion of nonviolence as a powerful tool for change, please see Gene Sharp, *The Power of Nonviolent Action*, 3vols. (Boston: Porter Sargent, 1974, 1975,

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## b. Debates about Coercion

Coercion is very efficient in bringing changes to the society, but not all scholars see eye to eye on this issue. Some worry that to the extent that it uses coercive techniques civil disobedience risks itself becoming a form of repression in which protestors attempt improperly to impose their personal political preferences on others. This is a concern of Rawls, who insists that civil disobedience should be a form of speech, an expression of conviction and an appeal to the sense of justice of the majority rather than a form of coercion.<sup>302</sup> And that is also the very reason that makes Gandhi appear paradoxical. On the one hand, he believes (generally) that civil disobedience should not involve coercing opponents,<sup>303</sup> while on the other hand he endorses many techniques of compulsion such as obstruction and non-cooperation with the government.<sup>304</sup> But there are other scholars who would like to see coercion to play a greater role in civil disobedience. For them, those worries that civil disobedience will become repressive are understandable, but they believe that such worries have been exaggerated

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1985); and Peter Ackerman and Christopher Kruegler, *Strategic Nonviolent Conflict* (New York: Praeger, 1993).

302 *Supra* note 85, at 335-343.

303 It deserves to notice that Gandhi did not hold a negative attitude to coercion at all times, though at most of the time. At least in his more radical moments, he thinks coercion is acceptable in order to bend the unjust government to the will of the people.

304 Robert E. Klitgaard, "Gandhi's Non-violence as a Tactic", (1971) 8 *Journal of Peace Research* 143, at 149. Also see Joan V. Bondurant, *Conquest of Violence* (Princeton: Princeton University Press, 1958), at 9.

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because the coercion used by civil disobedience is not in any sense evil.<sup>305</sup> I prefer the second view, but my reason is slightly different. The main reason why I am open to coercion as a legitimate part of civil disobedience is not because it is not evil, but because it is compatible with democracy.

In fact, coercion is prevalent in democracy; democracy does not reject coercive techniques without differentiation. All forms of political protest, legal and illegal, are designed to be coercive, in the sense of being designed to pressure the authorities to act in a particular way. For example, “pressure” groups use pressure as the main way to achieve their political goals. Even techniques such as boycotting and lobbying which are generally considered as very soft often create tremendous pressure.<sup>306</sup> Therefore, democracy does not totally reject coercion as a way of solving problems. A protest can be coercive and democratic at the same time.

Richard Chappell suggests that in liberal democratic societies civil disobedience may never be acceptable because if you are really morally right, then you ought to be able to persuade your fellow citizens of this, and have the needed reforms implemented through legitimate democratic processes.<sup>307</sup> One

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305 *Supra* note 145, at 142.

306 Even the mere existence of the nation state is conceived in and maintained by force. Otherwise, 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?

307 Richard Chappell, “The Ethics of Activism”, <<http://www.philosophyetc.net/2006/08/ethics-of-activism.html>>, last accessed on



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of the assumptions of this argument is that legitimate democratic processes are persuasive, not coercive, while civil disobedience is coercive, and therefore unacceptable. But the analysis in the previous paragraph suggests a shortcoming in this argument that it fails to acknowledge that both legitimate democratic protests and civil disobedience resort to coercion. Certainly, the coercion of civil disobedience may be more aggressive and even more likely to give rise to violence,<sup>308</sup> but this does not mean that civil disobedience always brings more disruption and more chaos to society than lawful protests. Lawful protests are equally likely to degenerate into violence and cause social turmoil, as can be seen from what happened in Indonesia in 1998 when a lawful protest demanding more economic help from the government degenerated into brutal and violent attacks on Chinese-Indonesians and their properties. The danger of degeneration into social chaos is a tactical question that must be assessed in each context rather than being dismissed outright; it is not right to reject civil disobedience merely because it adopts coercion as a possible way to achieve its political goals.

The ultimate standard, in my opinion, to judge whether coercion of civil disobedience is acceptable is to ask whether the coercive techniques are used in a democratic way, i.e. whether they are used in a manner consistent with

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September 3, 2008. For a complete rebuttal of this article, please see Brian Berkey, "Democracy and Civil Disobedience", <<http://www.lawsocietyblog.com/archives/288>>, last accessed on September 3, 2008.

308 *Supra* note 45, at 46-47.

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democratic values. If they are used in this way they are acceptable; otherwise, they should be banned. My argument is that they are normally both democratic and acceptable.

First, civil disobedience is committed to nonviolence which does not involve physical injury, violence or the threat of violence. Violent action is against the spirit of democracy, but nonviolent coercion is not necessarily so. While the presence of violent coercion always invalidates an agreement as a principle, an agreement can still be considered to be democratic and valid with the presence of even considerable nonviolent pressure. As discussed earlier, the production of almost any law, any decision, in a democracy is accompanied by pressures from different groups and persons. For example, the process which gave rise to the American Constitution, as well as almost all democratic constitutions of the world, was full of pressure with, in the American case, different states and many representatives threatening to leave the meeting if their requests were not satisfied from the very beginning. But this does not deny the democratic nature and validity of the constitution. According to Thomas Frazier, the difference between violent coercion, in which deliberate injury is inflicted, and nonviolent coercion, in which injury indirectly results, is a difference of such great degree that it is almost a difference of kind.<sup>309</sup> Or as suggested by Haksar, though violent coercion is not acceptable in democracy, nonviolent

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309 Thomas R. Frazier, "An Analysis of Nonviolent Coercion as Used by the Sit-in Movement", (1968) 29 *Phylon* 27, at 30.

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coercion is not inconsistent with the spirit of democracy unless it involves an unfairness or a wrong to others, especially the coerced group, by taking advantage of the vulnerable position of others and becoming a dirty trick.<sup>310</sup> The coercion of civil disobedience may inflict an unpleasantness on the authorities or the dominant group by trying to deprive them some of their privileges, but it is democratic as long as it is practiced strictly according to requirements of civil disobedience.

Second, the will of the government is not unfairly restricted in the case of civil disobedience. The government still has a choice to support the laws it enacts. One of the important reasons that coercive civil disobedience is not acceptable, as claimed by Harry Prosch, is that it leaves the government with no choice but war, in the sense of having to use violence to defend its principles.<sup>311</sup> Unfortunately, the argument is based on the misunderstanding of the nonviolence character of civil disobedience; it fails to attach enough importance to the strong commitment of civil disobedience to nonviolence. Most civil disobedients are true peace-lovers; they are prepared to submit themselves peacefully to any arrests and punishments if the state determines to support its laws. Therefore, it is not difficult for the government to support its laws if it determines to do so. Another criticism of civil disobedients is that

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310 *Supra* note 233, at 44-58.

311 Harry Prosch, "Limits to the Moral Claim in Civil Disobedience", (1965) 75 *Ethics* 103, at 104-105.

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they are demanding so forcefully for the state to reconsider its laws that the government is forced to give an answer, either by agreeing with them in some form or using its coercive powers to uphold the law. But, in my opinion, this is not a sufficient reason to reject civil disobedience because it does not restrict the will of the government in any way. A court has to dispense a judgment on an appeal, but this does not mean that the will of the court has been restricted so as to eliminate choice. The only restriction of civil disobedience on government is that it might be compelled to give priorities to the discussion of some topics. But this is not in conflict with the spirit of democracy.

Third, civil disobedience works ultimately through democratic processes. Its aim is not to overthrow the democratic system; it tries only to modify some of its laws. Whether the law protested will finally be altered still depends on whether civil disobedients can gain enough support from the society. If they fail to persuade enough people to sympathize with their cause, their aims will not be realized. Thus, the civil disobedients, as noted by some scholars, always try to represent their values and aspirations as public values and aspirations because this is the most feasible way to gain support for their claims.<sup>312</sup> The civil disobedients defiance of the law is done only to expose the law's undemocratic nature and to trigger democratic mechanisms to change it; they do not normally intend to change the law other than through already existent

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312 *Supra* note 278.

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democratic institutions.

Thus, the coercion used in civil disobedience is not necessarily anti-democratic. As long as it is practiced strictly according to its core principles, it is democratic and acceptable.

### **III. The Question of Success**

Having explained the role of civil disobedience in a democracy, I will now consider an argument about its utility. It has been proposed by some scholars that civil disobedience can be justified only if there is a high probability of producing positive changes through the disobedience because only this can justify exposing one's society to the risk of harm. This point is made very clear by Leslie J. Macfarlane in his paper "Justifying Political Disobedience": Civil disobedience, like any other political activity, must be judged on the basis of "whether it is likely to improve the situation complained of, stop it from getting worse, or stop it from getting worse than it otherwise would. If there are no real grounds for believing it will do any of these things, then it is doubtful whether the proposed acts of disobedience are justifiable, even though there may be no doubts as to the case for committing the act except in

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terms of its consequences”.<sup>313</sup> On this view, whether civil disobedience should be undertaken depends on its utility in achieving positive social changes. If it is highly likely to produce social changes, then it should be; otherwise, it should be prevented, even if its aims are just.

This is a utilitarian view according to which civil disobedience must be assessed solely by reference to its utility or disutility in producing social changes. The overall consequences are what really matter. On this view, unsuccessful civil disobedience, i.e. civil disobedience which fails to or is unlikely to produce positive changes, is unjustified disobedience. This view, no doubt, has an element of truth. It helps to remind the civil disobedient that he needs to establish a relationship between act and consequence such that the latter provides adequate grounds for the former. The consequences of the disobedience are not known, of course, until after the act has been committed,<sup>314</sup> but the civil disobedient must keep in mind that the probable consequences play an essential part in the determination of whether to engage

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<sup>313</sup> Leslie J. Macfarlane, “Justifying Political Disobedience” (1968) 79 *Ethics* 24, at 51. Or in McCloskey’s words, civil disobedience is justified if and only if one or some of practical purposes are to be achieved by it. Please see H J. McCloskey, “Conscientious Disobedience of the Law: Its Necessity, Justification, and Problems to Which It Gives Rise”, (1980) 40 *Philosophy and Phenomenological Research* 536, at 549.

<sup>314</sup> It is very difficult to know exactly in advance what will be the consequences of a particular civil disobedience action. This is partly due to the fallibility of the human mind in foreseeing things, partly due to the unforeseen intervention of formerly inexistent forces. Requiring that every organizer of the civil disobedience action knows exactly what will happen next is requiring something impossible. In fact, even the utilitarian does not hold this view. But he does emphasize that the civil disobedient should make an honest attempt to foresee the consequences. If the civil disobedient believe that his action will not likely produce the expected changes, he should give up the plan even he is justified in staging the protest.

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in disobedience; after all, he is not taking action for action's sake but pursuing some practical aims. But against Macfarlane's view, I wish to suggest that even when the civil disobedience does not have or is unlikely to have its intended social or political consequences; it might still be justified because of its other potential effects.

In fact, civil disobedience has other instrumental value other than inducing the changes of laws and policies. For example, even when it fails to bring about any change, it still can give the participants a stake in the system and a sense of power and belonging.<sup>315</sup> For Johan Galtung, when there is a conflict in society, there are two needs that must be dealt with. These are the instrumental needs of resolving the conflict and the expressive needs of the participants. "An act may be said to be instrumental to the extent that it has the function of contributing to conflict resolution, and it may be said to be expressive to the extent that it serves the function of tension release from the latent intensity".<sup>316</sup>

Either way, it contributes to an easing of the conflict. So even when it fails to contribute to a final resolution of the conflict by bringing about social changes,

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<sup>315</sup> The sense of belonging can be gained from the mere action of participation irrespective of its outcome. Participation and the sense of belonging are critical for the stability of a democracy. The mere participation in civil disobedience actions may have the effect of transforming an individual from a mere recipient of government decisions to a player, however modest the role may be, in the formulation and evaluation of these decisions. William Mervin Gumede, "Democracy and the Importance of Criticism, Dissent and Public Dialogue", paper presented at the Harold Wolpe Lecture Series, University of KwaZulu-Natal, Durban, 18 April 2005. The paper is available online at <[http://www.wolpetrust.org.za/dialogue2005/DN042005gumede\\_paper.htm](http://www.wolpetrust.org.za/dialogue2005/DN042005gumede_paper.htm)>, last accessed on September 18, 2008.

<sup>316</sup> Johan Galtung, "Pacifism from a Sociological Point of View," (1959) 3 *Conflict Resolution* 67, at 67-84.

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civil disobedience might still moderate the conflict by satisfying the participants' need for expression. Seen in this light, it is unreasonable to consider all civil disobedience that fails to bring about social change as unjustified. Inducing social change is not the only value of civil disobedience; even its failure might have worthwhile consequences for its practitioners.<sup>317</sup>

From another perspective as well, the standard proposed by Macfarlane (i.e. using the practical success to judge the justifiability of civil disobedience) is questionable. The usefulness of this standard as a practical guide is seriously damaged by the difficulty in determining whether positive social changes intended by the civil disobedience action have been realized. In most circumstances, the bad law or policy targeted by the civil disobedience cannot be repealed by a single disobedient act. Very often, its repeal is the outcome of a series of struggles over a long period. It is difficult to say which action in this series is useless and unjustified.<sup>318</sup> Therefore, it is far from practical to

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<sup>317</sup> It is claimed by Maria Jose Falcon Y Tella that "civil disobedience, it is important to underline, works as a means to achieve certain goals, not as an end in itself". And Tella further explains that civil disobedience is not in itself the proposal to act illegally; it is always carried out with further ends in view such as religious freedom, colonial independence, political freedom, racial equality, sexual equality and peace. To some degree, Tella is right in suggesting that civil disobedience cannot be practiced for civil disobedience's sake, but it will be wrong to deny that civil disobedience has other values even when it fails to achieve its intended practical goals. Please see Maria Jose Falcon Y Tella, *Civil Disobedience* (Herndon: Brill Academic Publishers, 2004).

<sup>318</sup> For example, even the seemingly most useless civil disobedience action may have the effect of changing minds of some people and, thus, increase the participants of next protest. These are not discernible immediately, but they are very important for the final struggle which brings social changes because they accumulate power for the final success. However, according to this utilitarian criterion, such actions of civil disobedience may be considered unjustifiable.



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use practical success as the sole standard to judge the justifiability of civil disobedience.

In short, civil disobedience is an action that has value even apart from its legal and political consequences. It is unreasonable to reduce it to a mere instrument of legal reform which deserves to be practiced only when it is capable of achieving its aims. Likewise, it is neither right nor practical to use its political utility as the sole standard for judging its justifiability.

#### **IV. Summary**

Throughout the history of democracy, civil disobedience has played a significant role in many social reforms that we take for granted today. It is unimaginable what many societies would look like today if there had been no civil disobedience. Civil disobedience serves the growth of democracy in many ways. First, it enhances the development of democracy by helping imperfect democracy to attain a higher level; secondly, civil disobedience helps to stabilize democracy by functioning as a safety-valve and righting injustices in the society; thirdly, civil disobedience helps to prevent democracy from degenerating into authoritarian regimes by desanctifying the state and its laws; and fourthly, civil disobedience is helpful in developing particular

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characteristics of citizenship which are essential to the smooth functioning of democracy..

Lawful channels and protests are also helpful to the development of democracy, but compared to them, civil disobedience is more effective and powerful. Even in those situations in which lawful channels do not work, civil disobedience still can function well to remind the state and its citizens that reforms are needed. The effectiveness of civil disobedience comes from its special mechanisms. First of all, civil disobedience is a very powerful publicity instrument because of its tactics of dramatization; second, civil disobedience is very effective in persuading the public to sympathize with its cause because of the sufferings and self-sacrifices involved; and finally, civil disobedience is not only about publicity and persuasion, it also exerts pressure and coercion on the opponents, although in a democratic way. Intertwined with each other, these three tactics of civil disobedience often help to achieve reforms that seem almost impossible through legal means. But civil disobedience is not only an instrument which can be used to achieve legal reforms. It has other instrumental uses, such as self-expression; and so civil disobedience may be justified regardless of its success or failure in achieving practical legal reforms.<sup>319</sup>

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<sup>319</sup> If its only moral justification is its capacity to serve as an effective means of moral persuasion then it can be said to have little, if any, value. The moral rationale of non-violent civil disobedience requires another principle able to justify it as an action,

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Having examined the justifiability of civil disobedience and explained the positive role of civil disobedience in a democracy, I proceed to discuss the legal status of civil disobedience in the next chapter: since civil disobedience is justifiable and plays an important role in the development of democracy, should there be a right of civil disobedience? Should there be a duty of civil disobedience? In other words, should a right of civil disobedience, or more radically, a duty of civil disobedience be recognized in the legal system to further promote civil disobedience?

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regardless of its success or failure in moral persuasion. Please see *supra* note 311, at 106.

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## Chapter V:

### Civil Disobedience: Right or Duty?

Since civil disobedience is justified and plays an important role in democracy, I will take a closer look at civil disobedience in this chapter by discussing its legal nature. There have been many scholarly disputes about the nature of civil disobedience. Some claim that civil disobedience should be a right, while some others claim that it cannot be a right in any legal sense. At the same time, there are others who contend that civil disobedience is not only a right but also a duty. So what is the nature of civil disobedience? Is it a right? Is it a duty? Or both a right and a duty at the same time? These are the main questions I will consider in this chapter.

The chapter is divided into three sections. The first section focuses on whether there is a legal right of civil disobedience. My conclusion is that civil disobedience can be a legal right in only a very limited sense, that is, in the sense of being entitled to a mitigation of punishment. The second section concerns the duty of civil disobedience. I argue that civil disobedience becomes a duty in some unusual circumstances. The third section is devoted to the definition of a good citizen, discussing what kind of citizen is most suitable for democracy. I argue that those citizens, who are courageous enough

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to fulfill their responsibility of civil disobedience when necessary, in view of their potential contributions to democracy, should be considered good citizens. Other citizens, by avoiding their responsibility for democracy and yielding to the despotic threat in some cases, are not culpable, but become meritless.

### **I. Could there be a Right of Civil Disobedience?**

Is it appropriate to speak of a legal right of civil disobedience? Some may hastily conclude here that since the justifiability of civil disobedience has been established in previous chapters, there must be a right of civil disobedience. But being justified is different from being a right. One particular kind of action is justified does not mean that there must be a right for the people to practice it. For example, it is a justifiable action for Tom to help his friend who is in urgent need of money, but it would be improper to assert that Tom has a right to help his friend irrespective of the will of his friend. Similarly, the fact that civil disobedience is justifiable is one thing, but it is quite another thing that it should be considered a legal right. Thus, determining whether civil disobedience should be a legal right is a new task for us, which is relatively independent of the question of justification.

There are many opinions about the legal nature of civil disobedience. The

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prevailing opinion is to deny the possibility of the existence of a right of civil disobedience. The right of civil disobedience is considered a logical contradiction because it is impossible for law to stipulate a right of no law. However, I take the opposing stance by affirming the possible existence, at least in a limited sense, of a right of civil disobedience.

#### **A. The Proposition of Civil Disobedience as a Sub-right**

As mentioned in Chapter III, some scholars suggest that resorting to civil disobedience should be made a right when alternative means are unavailable, but at the same time most of these scholars see no need to establish a special kind of right, viz. the right of civil disobedience. The constitution, as they say, has provided enough protection for the practice of civil disobedience. There is no need, therefore, to establish an independent right of civil disobedience since the practice of civil disobedience has already been protected by the constitutional rights such as the freedom of speech and the right of participation.<sup>320</sup> Civil disobedience, in their opinion, should be protected as a sub-right of these constitutional rights rather than as an independent right.

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<sup>320</sup> These scholars may use different kinds of right to justify civil disobedience, but it is their firm belief that civil disobedience has been protected by the constitution already. Just as forcefully claimed by Harvey Wheeler, civil disobedience has never been easy or safe, but in The United States it is constitutional because it is at the heart of constitutionalism. For more detail, please see Harvey Wheeler, "The Constitutionality of Civil Disobedience", (2002-2003) *35 UWLA L. Rev.* 440, at 440-59.

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Freedom of speech is the most frequently used constitutional right to support civil disobedience. Under the speech/conduct dichotomy in US constitutional law, says Peter Meijes Tiersma, civil disobedience should be classified as expressive conduct in the United States because it is intended to communicate a message and is able to be reasonably understood by audiences.<sup>321</sup> Haksar also contends that the action of civil disobedience should be understood as a practice of free speech because it is a form of address to the authorities.<sup>322</sup> And, moreover, it is suggested by these scholars that civil disobedience is a unique speech which is highly powerful. Susan Tiefenbrun emphasizes that breaking the law can be a forceful means of expression and is very effective in bringing reform to bad laws which are immune to lawful protests.<sup>323</sup> This view is also shared by Charles R. DiSalvo. Civil disobedience, for DiSalvo, is a unique mode of communication which can move people when argumentation and exhortation fail, not only signifying a distinct substantive message but also signaling the protester's depth of commitment.<sup>324</sup>

For some other scholars, civil disobedience is part of the right of participation.

The right of participation, in the eyes of these philosophers, is the right of

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<sup>321</sup> Peter Meijes Tiersma, "Nonverbal Communication and the Freedom of Speech", (1993) 3 *Wisconsin Law Review* 1525, at 1525-89.

<sup>322</sup> *Supra* note 145, at 109-126.

<sup>323</sup> *Supra* note 92, at 677-701.

<sup>324</sup> Charles R. DiSalvo, "Abortion and Consensus: The Futility of Speech, the Power of Disobedience", (1991) 48 *Wash. & Lee L. Rev.* 219, at 226.

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rights or the father of all rights, enjoying a very special position in the spectrum of constitutional rights.<sup>325</sup> Due to the extreme importance of the right of participation in the family of rights, extensive ways should be provided to the governed in order that they have enough chances to take part in the making of laws and policies. Civil disobedience is an important way of participating, and it is especially so when the normal avenues are obstructed. Thus, civil disobedience is constitutional, as part of the right to participation, and both democracy and constitutionalism is not safe unless individuals are secure in their right to defend it through acts of civil disobedience.<sup>326</sup>

In order to weigh the reasonableness of the claim that civil disobedience is a constitutional action and protected by the freedom of speech or the right of participation, we must determine how far the protection of free speech and right of participation really goes. However, the conclusion I reach after a careful examination is disappointing: according to the current interpretation of constitutional rights, at least in the United States, neither freedom of speech nor the right of participation is able to provide a full protection to the practice of civil disobedience. While in a small number of instances, these basic

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<sup>325</sup> *Supra* note 179, at 232.

<sup>326</sup> *Supra* note 148, at 444. It is curious to note that the right of participation is also used by some scholars to deny civil disobedience. For example, Raz contends that in liberal democracies people can exercise their participating rights; they have no need, therefore, to resort to civil disobedience. Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979) at 266-275.



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constitutional rights could justify some actions of civil disobedience,<sup>327</sup> they are hardly broad enough, by any interpretation, to provide justification for most acts of civil disobedience. For example, while disobedient acts which are clearly symbolic and expressive are protected by the freedom of speech; many acts of civil disobedience are not so simple as to be merely expressive. They involve great pressures, even physical coercion, of the government. These acts of civil disobedience are not purely symbolic. In the words of Robert T. Hall, an act cannot be classified as symbolic speech merely because the agent says that it is an attempt to communicate with his opponents.<sup>328</sup> Therefore, freedom of speech may protect someone who merely bends the grass on the lawn of a government building and is charged with criminal trespass, but it can hardly justify disobedient acts that involve enormous pressure and coercion. The same is true to the right of participation which can protect a small number of civil disobedience actions, especially when lawful means of participation are totally denied or ineffective,<sup>329</sup> but it cannot provide relief when normal

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<sup>327</sup> It may be argued here that if an act is protected by the right of free speech, then it is not a civil disobedience action because no illegality is involved in the action. But, as I have pointed in the second chapter when I tried to define civil disobedience, I will take the illegal element of civil disobedience as a prima facie one. As long as the disobedient and the prosecutor honestly consider the action as illegal when it is committed, it still suffices to be an action of civil disobedience even afterwards it is cleared of crime by the court.

<sup>328</sup> Robert T. Hall, "Legal Toleration of Civil Disobedience", (1971) 81 *Ethics* 128, at 131-2.

<sup>329</sup> For example, in the Civil Rights Movement of America, many African-Americans who committed civil disobedience were pardoned on the excuse of necessity since they had been denied the right to vote which is an important, if not the most important, means for one to participate in the government.

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means are open to the civil disobedient.

In short, according to the current interpretation of constitutional rights, at least in the United States, civil disobedience is not fully covered by either freedom of speech or the right of participation. The fact that some acts of civil disobedience are justified by these rights does not mean that there is now a sub-right of civil disobedience under these constitutional rights. It would also be mistaken to claim that civil disobedience is legal just because some forms of it could be justified by these rights. That is to say, there is no such a sub-right of civil disobedience at present either under the freedom of speech or under the right of participation.

### **B. The Proposition of Civil Disobedience as an Independent Right**

Since civil disobedience is neither protected by the right of participation nor by the freedom of speech, should there be an independent right of civil disobedience in the sphere of legal rights?

“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

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you please.’ Consequently, there can be no legal right to disobey the law.”<sup>330</sup>

Actually, this view is held not only by the state, but also by the majority of scholars who have touched on the topic of civil disobedience, though most of them agree that civil disobedience may be politically or morally justified. Stuart M. Brown suggests that no legal system can allow that the breach of a valid law is no breach.<sup>331</sup> Frank M. Johnson contends that the law cannot as a matter of law officially recognize a right of civil disobedience.<sup>332</sup> Joseph Raz gives a detailed explanation for this attitude in *The Authority of the Law*, saying that civil disobedience cannot be recognized by the law because, if it were recognized by the law, there would no longer be any need for civil disobedience.<sup>333</sup>

However, the aforementioned view is not accepted by all. Some scholars insist that there is indeed, or there should be, an officially recognized right of civil disobedience. Branislav Stevaonić suggests that any assumed list of human

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<sup>330</sup> *Supra* note 110, at 392.

<sup>331</sup> *Supra* note 46, at 677.

<sup>332</sup> Frank M. Johnson, “Civil Disobedience and the Law”, (1969) 4 *Tul. L. Rev.* 1, at 6-7.

<sup>333</sup> Joseph Raz, *The Authority of the Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979). Knat also elaborates a slightly different explanation for this attitude when he talks about the right of revolution. He contends that there cannot be a right of revolution because sovereignty is indivisible. A constitution cannot contain in itself an article which would allow for someone in the state to resist the sovereignty, because if there was such an article, the sovereignty will be inferior to the person who has right to resist it. The person rather than the sovereignty will become the chief magistrate, i.e. the final arbitrator of the law. Therefore, there is a contradiction in legalizing the right of revolution. Please see Lewis W. Beck, “Kant and the Right of Revolution”, (1971) 32 *Journal of the History of Ideas* 411, at 413.

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rights would not be complete without the right of civil disobedience because it is permitted by all contractual and other theories which insist on the sovereignty of the people.<sup>334</sup> Moreover, some philosophers point out that the right of civil disobedience has been actually recognized by legal texts in many occasions already, which stretch from the Declaration of the Rights of Man and of Citizens of 1789 to the Universal Declaration of Human Rights and the Basic Law for the Federal Republic of Germany.<sup>335</sup>

Which view is more reasonable, then, the view opposing or endorsing a right of civil disobedience? I will defer my answer to the end of this section. For now, another question needs to be considered first: if we suppose those scholars who support a right of civil disobedience are correct (i.e., there is indeed a right of civil disobedience), what are the implications of the right? In response to this question, a typical explanation is given by Haksar in his article, “The Right to Civil Disobedience,” in which he contends that

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<sup>334</sup> *Supra* note 218, at 1-2.

<sup>335</sup> Article two of the Declaration of the Rights of Man and the Citizen (August 1789): “The aim of every political association is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property, security, and resistance to oppression.” Preamble to the Universal Declaration of Human Rights: “Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.” Article 20(4) of the Basic Law for the Federal Republic of Germany: “All Germans shall have the right to resist any person seeking to abolish this constitutional order, if no other remedy is available.”

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[the] view that people have a right to civil disobedience implies, firstly, that even if they are punished, they have a claim not to be prevented from breaking the law. Secondly, they have a claim not to be punished or to have a reduced punishment.<sup>336</sup>

Obviously, according to Haksar, there are two levels of meaning to the right of civil disobedience. First, the right means that the civil disobedient has a freedom to practice civil disobedience and the government has a responsibility to refrain from interfering with the practice or attempts to practice. Instead of preventing the action of civil disobedience from practicing, the government should allow the civil disobedient to complete his practice according to his plan and to attain his aim of addressing to the public.

Second, the right implies that the civil disobedient is entitled to no punishment or reduced punishment. If the actions of the civil disobedient are justified or reasonably wrong, according to Haksar, the disobedient is entitled to such treatment. Though not all civil disobedient will go free, no matter how wrong they are, when the social case for punishment is weak, the civil disobedient

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<sup>336</sup> Vinit Haksar, "The Right to Civil Disobedience", (2003) 41 *Osgoode Hall L.J.* 407, at 414. On this point, David may have a different view with Haksar. David contends in his article "On a Moral Right to Civil Disobedience" that "the only claim constitutive of the right to public disobedience is a claim not to be punished for engaging in such an act." But the civil disobedient has no claim against the state that it should refrain from interfering with their attempts to exercise the right to civil disobedience. Please see David Lefkowitz, "On a Moral Right to Civil Disobedience", (2007) 117 *Ethics* 202, at 217. But, in my opinion, Haksar's view is more popular and more acceptable in consideration of our discussion in the last chapter about the toleration of civil disobedience.

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should be exempted from punishment altogether.<sup>337</sup>

Now that we have a better idea of the implications of the right of civil disobedience, now I turn to the question whether there could be a right of civil disobedience.

### **C. The Nature of the Right of Civil Disobedience**

In order to find an answer to the question whether civil disobedience should be a legal right, we must answer another question in advance: what is legal right? Here, I will rely on the conception of a right given by Joseph Raz and Tony Honore: for a right to exist the potential holder must have an interest weighty enough to provide a sufficient reason for holding some other person to have a duty towards him, and, at the same time, two further related items, recognition and remedy, are needed to prevent the structure of a right from collapse.<sup>338</sup> That is to say, for a right to exist three standards ought to be met: first, there is an interest weighty enough to be protected; second, there is recognition of the right; and third, a remedy is available.

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<sup>337</sup> Vinit Haksar, "The Right to Civil Disobedience", (2003) 41 *Osgoode Hall L.J.* 407, at 424.

<sup>338</sup> Joseph Raz, "Legal Rights", (1984) 4 *Oxford Journal of Legal Studies* 1, at 5. Tony Honore, "The Right to Rebel", (1988) 8 *Oxford Journal of Legal Studies* 34, at 34-5.

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The first standard concerns what constitutes a sufficient reason for a right to exist, i.e. for an interest to be protected in the form of right. According to Honore and Raz, only those interests which are weighty enough can be considered sufficient. However, confusions will unavoidably arise here on what “sufficient” and “interest weighty enough” mean.<sup>339</sup> The existence of borderline cases which could reasonably be classified as sufficient or insufficient is inevitable. Almost no taxonomy in the social sciences can avoid borderline cases. But, fortunately, there are also many cases which are clear-cut. Civil disobedience is such a clear-cut case which involves a sufficiently weighty interest. What, then, is the interest behind civil disobedience that makes it suffice to be a right? The answer is its role in protecting human rights and safeguarding democracy. As we have seen, civil disobedience plays an important role in both of these respects. Without civil disobedience, the danger of a society sliding into autocracy or anarchy or tolerating substantial injustice increases.

Some may argue here that civil disobedience itself is also dangerous, with potential to destroy the democratic order that it seeks to protect. This challenge has already been answered in Chapter III. But it is beneficial to point out here that the right of civil disobedience, if it exists, will not be an

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<sup>339</sup> Tony further clarifies Raz’s conception by saying that Raz talks of “sufficient” as a matter of policy or of moral justification, but this cannot dispel people’s confusion on what “sufficient” means. Tony Honore, “The Right to Rebel”, (1988) 8 *Oxford Journal of Legal Studies* 34, at 34-5.

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absolute one, but a limited one which must be weighed against other interests and rights. Thus, there is no need to worry unduly about its negative consequences. Some might argue further that if the right of civil disobedience has to be balanced against other interests and rights, then it is not a complete right, only a quasi-right. My answer is that each right has to be balanced against other interests, which, nevertheless, does not affect its nature as a right.<sup>340</sup>

The second standard is that the right must be recognized in a proper way. This does not necessarily mean that a right must be officially or formally recognized by written laws. There is informal recognition as with customary law. But even in the case of customary law, the intervention of the state is essential. Only when it is supported and enforced by the state can customary law be called a law. According to Honore, when the state affirms a right, it either creates a new right which is from the beginning formal or turns an existing informal right into a formal one.<sup>341</sup> Therefore, if civil disobedience is to be a right, it has to be recognized, by the state, formally or informally. Opponents of the right hold that no state can recognize such a right because it is a right to no law. It is simply a more sophisticated way of saying that a man is entitled to take the law into his own hands. This in turn means government

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<sup>340</sup> For example, the right to free speech, please see Vinit Haksar, "The Right to Civil Disobedience", (2003) 41 *Osgoode Hall L.J.* 407, at 424.

<sup>341</sup> Tony Honore, "The Right to Rebel", (1988) 8 *Oxford Journal of Legal Studies* 34, at 35.



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by force, not by law. It means might makes right. Such a doctrine is morally unsound and practically untenable.<sup>342</sup> To be sure, no legal system can afford to acknowledge that the breach of a valid law is no breach. If the right of civil disobedience means a right to no law or a right to break the law any time the disobedient wants to, then there is no state which can afford to recognize such a right. But it does not necessarily mean that advocates of the right are wrong. In fact, no advocates claim that the right of civil disobedience is a right that entitles the disobedients to break any law any time they want. They define the right only in a very limited sense and the right has to be balanced against other interests and rights. And civil disobedience itself also has strict disciplines such as nonviolence and willingness to accept punishment. A right of civil disobedience in this sense is less threatening to the state and hence easier for its legal system to recognize. Indeed, most liberal states have shown some kind of tolerance to civil disobedients in the form of the mitigation of their punishments, especially when compared to the totalitarian regimes in which the civil disobedient is punished harshly. Therefore, whether the right to civil disobedience can be recognized depends on the implications of the right. If the right to civil disobedience is defined as a right to no law as claimed by its detractors, then no state can recognize such a right; but if it is defined only in a limited sense such as in the sense of a mitigation of their punishments, then there is no insurmountable barrier for a democratic government to recognize

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<sup>342</sup> *Supra* note 332, at 7-8.

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such a right.

It might be objected that it is illogical to recognize a right of civil disobedience because, if civil disobedience is legalized, there would no longer be any need for civil disobedience. A right to civil disobedience, therefore, is legally impossible.<sup>343</sup> In other words, if a right to civil disobedience is legalized, civil disobedience would disappear because one of its necessary characteristics is breach of law. I will dwell on this point in detail in the next chapter when I discuss the reconciliation of civil disobedience and democracy. So it suffices to briefly point out here that the viability of this argument depends on the implications of the right of civil disobedience. If the right of civil disobedience means the complete legitimating and immunization of civil disobedience, then the notion of civil disobedience would collapse. But, if the right only means that some kind of mitigation to be extended to civil disobedience after trial, then I do not see any inconsistency here because the right means only that the court should take the good characteristics of civil disobedience into account when passing judgment, rather than means the total and blind elimination of the illegality character of civil disobedience. When the punishment for a civil

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<sup>343</sup> Joseph Raz, *The Authority of the Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979). In which, Raz contends that applied to responsible civil disobedience, mutuality does not mean that legal immunity ought to be extended to it. This would be to legitimize and normalize civil protest into a formal, remedial institution that the democratic system already provides in other ways. Routinization would also destroy the logic and spontaneity of disobedience. Here cited from Paul F. Power, "On Civil Disobedience in Recent American Democratic Thought", (1970) 64 *The American Political Science Review* 35, at 46.

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disobedient is exempted or mitigated, it is based on the understanding that he breaches the positive law, but the breach is partially justified on the ground of civil disobedience. A right in this sense is not a right to comprehensively legitimate civil disobedience; it merely claims that the peculiar characteristics of civil disobedience should be taken into account when punishment is given out. This question will be discussed in detail in the following chapter.

The third standard concerns the remedy for violations of the right. As opined by Chief Justice Marshall in *Marbury v. Madison*, there is no right without relief.<sup>344</sup> When violations of a right happen, there must be a remedy for those violations; otherwise the right should not be considered an actual right because it is “naked and unprotected”. An unprotected right is no more a right than is an unprotected fortress a fortress.<sup>345</sup> So, is there an effective remedy for the right of civil disobedience in the legal system? There cannot be any legal remedy for the right of civil disobedience if it is understood as a right to no law because law itself has been destroyed by it. But if the right is interpreted as some kind of mitigation of punishment for the civil disobedient, then the remedy is available. The necessity defense, the good motive defense and the prosecutor’s discretion are all able to be used to mitigate punishments for the civil disobedients in certain cases, though they are not without defects. The best choice, in my opinion, is to establish a special defense, i.e. the civil

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<sup>344</sup> *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803).

<sup>345</sup> *Supra* note 341, at 35.

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disobedience defense, in the criminal law system to provide relief for the civil disobedient. This is the main topic I will discuss in the next chapter.

Having analyzed the three standards for a right to exist, now it is time for me to give a final answer to the question whether there can be a right of civil disobedience. But my conclusion may be very disappointing to those who seek a definite and clear-cut answer because the answer is “it depends”. The conclusion is whether there can be a right of civil disobedience depends on the implications of the right. The right of civil disobedience is able to be defended in a very limited sense, i.e. in the sense of some kind of punishment mitigation. But it is never defensible in the sense of a right to no law. In other words, if the right of civil disobedience means the complete legitimating and immunization of civil disobedience, such a right could never be institutionalized. But at the same time there is no insurmountable obstacle to institutionalize a right of civil disobedience with a limited sense.<sup>346</sup> Obviously, this is a right in a very weak sense. Perhaps, then, the most acceptable answer would be to consider civil disobedience as neither legal nor completely illegal. As suggested by Maria Tella, it would be useful to think of degrees of legality or illegality. In this sense, an act of civil disobedience is of the nature of a

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<sup>346</sup> And another fact which makes the right even weaker is that it is not a right which can be resorted to directly and immediately. Civil disobedience can be practiced only after the normal means are obstructed or proved ineffective. Otherwise, it will be difficult for the disobedient to seek legal toleration. This determines the right of civil disobedience is only a secondary rather than a primary right.

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paralegal action, which means an intermediate position between the completely lawful and the clearly unlawful, partaking of the characteristics of both legality and illegality.<sup>347</sup>

## **II. Is Civil Disobedience A Duty?**

Rights and duties are normally two opposing poles in a legal relationship. The former indicates a position of power, the latter, a burden or obligation. Normally, if an act is a right, then it cannot be a duty at the same time, and vice versa. But, as I will show, this principle does not apply to the case of civil disobedience, because it can be considered as both a right and a duty under special circumstances.

### **A. Civil Disobedience as a Duty**

For some scholars, civil disobedience is not only a right but also a duty. It seems that most scholars who champion civil disobedience also support the idea that civil disobedience should be made obligatory at least in some circumstances. We can easily find such comments from the writings of

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<sup>347</sup> *Supra* note 178, at 362.

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Thoreau, King, Gandhi, Dworkin and many other scholars.

Thoreau believes that each of us must accept personal responsibility for injustice. One should not become complicit with evil governmental policies, therefore, when one is required by the government to do injustice, civil disobedience becomes an obligation:

If the injustice is part of the necessary friction of the machine of government, let it go, let it go; perchance it will wear smooth — certainly the machine will wear out. If the injustice has a spring, or a pulley, or a rope, or a crank, exclusively for itself, then perhaps you may consider whether the remedy will not be worse than the evil; but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.<sup>348</sup>

Thoreau does not think that it is a man's duty, as a matter of course, to devote himself to the eradication of any or even the most enormous wrong in society because he may have other concerns to attend to. But Thoreau does believe that it is a man's duty to "wash his hands of the wrong", that is to say, not give

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<sup>348</sup> *Supra* note 16, at 29.

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the wrongdoing any practical support.<sup>349</sup> It is on this belief that Thoreau refused to pay his tax, that is, in case the money would be used to support the unjust cause of enforcing slavery law or waging wars on Mexico.

Compared to Thoreau, Gandhi and King are more ardent in supporting the idea of civil disobedience as a duty. They discard the idea that the duty of civil disobedience should be limited to rare circumstances, when one is required to be the agent of injustice; rather they contend that civil disobedience should be made obligatory in a more extensive sense. According to Gandhi, civil disobedience should become a sacred duty when the State becomes lawless and corrupt.<sup>350</sup> For him, civil disobedience is a necessary adjunct to any democratic political system. It is not only an inherent right of citizens, but also becomes a “sacred duty” when the State degenerates into corruption or lawlessness. On this point, King’s point of view is very similar to that of Gandhi. King claims that all people have a moral and a legal obligation to obey just laws, but they have an equally important moral obligation to disobey unjust laws in order to obey a higher, natural, or divine law whose authority preempts man-made laws.<sup>351</sup> “He who passively accepts evil is as much

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<sup>349</sup> *Ibid.* Thoreau sometimes is misunderstood here. Actually, what Thoreau claims here is that civil disobedience becomes a duty only when one is required to act as an agent of injustice, rather than when injustice happens in society. If one is not required to be agents of injustice, then he is not obligated to practice civil disobedience, even enormous injustice exists in the society because, as Thoreau rightly claims, one may have other more important things to attend to.

<sup>350</sup> Mahatma Gandhi, “The Right of Civil Disobedience”, in *Non-Violent Resistance* (New York: Schocken Books, 1951), at 174.

<sup>351</sup> “One has not only a legal but a moral responsibility to obey just laws. Conversely, one

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involved in it as he who helps to penetrate it. He who accepts evil without protesting against it is really cooperating with it.”<sup>352</sup> It is obvious, in King’s opinion, that both the general public and those who practically participate in the evil are obligated to protest the unjust law, which is a much stronger view than that of Thoreau. Why do both Thoreau and Gandhi hold such a strong view of civil disobedience as a duty? One possible explanation is that this may be related to the roles of Gandhi and King in their time, who were not only philosophers but also leaders of major movements, and who therefore needed to persuade as many people as possible to join them and support their causes.

For modern scholars, the duty of civil disobedience comes from the citizen as an independent and rational man. Each individual in a democracy has a right and a duty to evaluate the laws and policies of the government. While formulating his own judgment, the individual may and should seek the counsel of others, but to be intellectually honest, as a rational man, the final decision must be up to him. Accordingly, he must be responsible for his own decision: “After his personal decision that an ‘evil’ exists, the individual is morally obligated to resist not only the evil, but the instrumentality responsible for it.”<sup>353</sup> And so, according to Rawls, we are ultimately individually accountable

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has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that ‘an unjust law is no law at all.’” Please see *supra* note 138, at 76-95.

<sup>352</sup> Martin Luther King, *Stride toward Freedom* (New York: Harper & Brothers, 1958), at 102ff.

<sup>353</sup> J. L. LeGrande, “Nonviolent Civil Disobedience and Police Enforcement Policy”, (1967) 58 *The Journal of Criminal Law, Criminology, and Police Science* 393, at 396.



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for our actions and therefore “we cannot divest ourselves of our responsibility and transfer the burden of blame to others.”<sup>354</sup>

## **B. The Nuremberg Trials**

The scholars’ argument that one has a duty to disobey unjust man-made laws reflects the legal reasoning of the Nuremberg Tribunals which were established to conduct trials of Nazis after the World War II. The judgments of the Tribunals established the principle that an individual has a legal duty to disobey unjust state orders, to be disobedient; otherwise he will be legally and personally responsible for carrying out unjust laws, even if he claims to have merely obeyed superior orders.<sup>355</sup>

The Nuremberg convicted twenty-two high-level German governmental officials of Crimes against Peace, War Crimes and Crimes against Humanity.<sup>356</sup> Many of the defendants in these trials, criminally charged with their acts of atrocity during the war, offered the defense that they owed an allegiance to the legally constituted Nazi government and in the performance of their acts they were executing direct orders of this government and thus

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<sup>354</sup> *Supra* note 85, at 389. Dworkin, as Rawls, believes that individuals have natural duties towards justice that override any communal obligation in contravention to justice.

<sup>355</sup> *Supra* note 194, at 111.

<sup>356</sup> From December 9, 1946 to April 13, 1949, twelve subsequent trials before the Nuremberg Military Tribunals also took place under the authorization of the U.S.

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could not be held individually accountable for the crimes. However, this defense was adjudged unacceptable by the tribunals, which indicated that the fact the defendants were only following orders of a legally constituted government did not serve as a sufficient defense; the defendants were obligated to exercise their individual conscience and question the morality or immorality of their actions.<sup>357</sup> Though the Tribunal did not extend international criminal liability to low-level officials and combatants or to civilians, it did stress that individuals have international duties which transcend the national obligations imposed by domestic governments. Those people who violate such international duties, whether private citizens or governmental officials, are subject to prosecution and punishment under international law.<sup>358</sup> The International Law Commission, acting on the request of the United Nations General Assembly, produced in 1950 the report, *Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal*,<sup>359</sup> in which Principle IV is about the defense of superior orders. Defense of superior orders, the principle states clearly, is not a defense for international crimes, although it might influence a sentencing authority to lessen the penalty. “The fact that a person acted pursuant to order of his Government or of a superior does not relieve

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<sup>357</sup> *Supra* note 353, at 397.

<sup>358</sup> *Supra* note 155, at 33.

<sup>359</sup> *Yearbook of the International Law Commission*, 1950, vol. II. The Principles are also available online at: <<http://www.icrc.org/ihl.nsf/FULL/390>>, last accessed on March 8, 2009.

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him from responsibility under international law provided a moral choice was in fact possible to him.”

The Nuremberg Trials not only served as a model for the International Military Tribunal for the Far East, which tried Japanese officials for crimes against peace and against humanity in its time, they also had a great influence on the development of international criminal law. The principles established in the Trials have been expressed in many international conventions and in the legislation of many states. For example, the Genocide Convention of 1948 clearly stipulates that “persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.<sup>360</sup> That is to say, the defense of obeying superior orders, even under a democratic form of government, will not suffice to exempt the defendant from the crime of genocide. Similar principles can also be found in the Universal Declaration of Human Rights, the Geneva Convention on the Laws and Customs of War, and the Convention on the Abolition of the Statute of Limitations on War Crimes and Crimes against Humanity. In addition, the present-day courts at The Hague, for trying crimes committed during the Balkan wars of the early 1990s, and at Arusha, for trying the people responsible for the genocide in Rwanda,

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<sup>360</sup> Article IV, *Convention on the Prevention and Punishment of the Crime of Genocide*. Adopted by Resolution 260 (III) A of the U.N. General Assembly on 9 December 1948 and entered into force on 12 January 1951.

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are also obviously influenced by the reasoning of the Nuremberg Tribunals.<sup>361</sup>

### **C. Should Civil Disobedience Be Established as a Legal Duty?**

We learn from the Nuremberg Trials and subsequent jurisprudence that obeying superior orders is not a sufficient guarantee to escape liability. In other words, the Nuremberg Trials advanced a new legal norm according to which one should not obey a particular law or order, even if it has been legally and democratically accepted into the statute book.<sup>362</sup> Those who obey illegitimate orders will probably be considered criminals and penalized. In this way, as remarked by Maria Tella, the Nuremberg Judges transformed the right to civil disobedience into a duty, the non-fulfillment of which was punished accordingly.<sup>363</sup>

The principle that emerges from the Nuremberg Trials is consistent with the

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<sup>361</sup> For a detailed a discussion of the influence of the Nuremberg Trials, please see Norbert Ehrenfreund, *The Nuremberg legacy: how the Nazi war crimes trials changed the course of history* (New York : Palgrave Macmillan, 2007).

<sup>362</sup> Certainly, long before the Nuremberg Trials, the defense of superior orders has been discussed and used in the court. The first recorded use of the test was the trial of Peter von Hagenbach in 1484, where he stated that the various atrocities that he had allegedly committed were not his responsibility, for he was being ordered by his superior, the Holy Roman Emperor of the time, Charles the Bold. Please see Kingsley Chiedu Moghalu, *Global Justice: The Politics of War Crime Trials*, (Greenwood Publishers, 2006). The next recorded usage of the doctrine was the German Military Trials that took place after World War I of which the matter of Lieutenant Karl Neumann was one of the most famous. In that matter, the court accepted the defense and acquitted him. Please see Anon., "German War Trials: Judgment in Case of Commander Karl Neumann", (1922) 16 *The American Journal of International Law* 704, at 704-708.

<sup>363</sup> *Supra* note 178, at 159-60.

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thoughts of many liberal thinkers such as Thoreau, Gandhi, King, and Dworkin who argued that civil disobedience should be considered a duty. But others strongly oppose this view. For example, Agassi claims that the Nuremberg solution is not tenable: if, in principle, every citizen can determine for himself whether the law ought to be obeyed, there is no place for law; no legal system is possible with that legal limitation, and no society can exist without a more or less acceptable legal system.<sup>364</sup> As far as civil disobedience is concerned, this worry is not warranted; as argued earlier, civil disobedience is a strictly self-limiting and peaceful action which is unlikely to lead to the destruction of the legal order. However, there is another problem which should concern us if civil disobedience is established as a normal legal duty. The problem is that the individual will be forced into a dilemma: on the one hand, he is obligated to obey the law, otherwise he would be punished; on the other hand, he has to ask himself continuously whether a particular law should be obeyed because if he obeys a law which is subsequently considered illegitimate, he might later be liable to punishment.<sup>365</sup> This is an enormous burden for the ordinary citizen who might not be able to judge the legitimacy

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<sup>364</sup> Schatz and Ariel (ed.), *The Lexicon of Citizenship, Society and State*, (Dvir., 1989), at 59. [Hebrew]. Here cited from Chemi bin Noon, "Civil Disobedience, Rebellion, and Conscientious Objection", online: <<http://www.ict.org.il/apage/5349.php>>, last accessed on April 20, 2009.

<sup>365</sup> Put it more theoretically, this reflects the conflict of two distinct legal world-views: the practical law of the moment, applied by courts as a matter of expedience and practicality; and the romantic law of principle which embodied the eternal truth of natural law and justice. Please see Matthew Lippman, "Civil Resistance: The Dictates of Conscience and International Law versus the American Judiciary", (1990) 6 *Fla. J. Int'l L.* 5, at 36.

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of every law, especially given the abundance of borderline cases. Therefore, even if a duty of civil disobedience can be established, it ought not to be an extensive duty; rather it should be extremely narrow in scope. There are two reasons for this.

First, the duty of civil disobedience is not justified in borderline cases. Borderline cases are those cases in which it is difficult for the ordinary people to determine whether the law or superior order involved is legitimate. To recognize a duty of civil disobedience in these cases would be perplexing and make any concept of legal order impossible. But the situation is totally different in manifestly illegitimate cases. By “manifestly illegitimate cases” I mean cases in which the illegitimate nature or the fallacy of the superior order is so obvious that every citizen with an ordinary sense would be able to see it, for instance, the genocide in the Nazi Germany and present-day genocide in Sudan. In these cases, anyone who collaborates with the evil order should be subject to punishment. In short, the duty of civil disobedience does not arise every time the legitimacy of a law or superior order is in question, but it does arise when the law in question is so manifestly illegitimate as to contradict the fundamental values of democracy. That is to say, the duty of civil disobedience is not justifiable on an extensive base, but only in a limited sense, i.e. when the illegitimate nature of the superior order is manifest enough.

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Second, the duty of civil disobedience does not apply to all people. Ordinary people have a very limited role to play in the determination and execution of the law. It would be unfair to ask them to be responsible for what they do not participate in and have no ability to control. Such persons, according to Michael Walzer, may be morally obligated to help the victims, but it would be absurd to claim that they are similarly obligated as those decision-makers and active collaborators because the ordinary people had never incurred any duty to do so.<sup>366</sup> Moreover, even if the duty is made applicable to ordinary people, that is to say, ordinary people would be punished as the decision-makers for obeying the law, such a rule would not work well because the punishment which may be imposed after the fact is much less dangerous than the immediate punishment which would be imposed if they join the disobedient. Therefore, it is proper for the duty of civil disobedience to apply only to decision-makers and active collaborators for these people are either the origin of the evil or its direct agents.

From the above analysis, we can see that civil disobedience does become a duty in exceptional cases, as was the case in the Nuremberg Trials. But, we should acknowledge that this is not a typical approach: the usual approach is to conceive disobedience as a right and not as a duty. Perhaps, this is the main reason why, despite liberal thinkers' claim that it is man's right and it is man's

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<sup>366</sup> Michael Walzer, "The Obligation to Disobey", (1967) 77 *Ethics* 163, at 166.

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duty to fight the evil regimes and laws, the duty theory that men can be obligated to disobey has not played as much a part as the right theory in the development of democracy.

### **III. Who Is the Good Citizen?**

After settling the question of right and duty, now I will turn to see whether civil disobedience is a vice or virtue. Instead of discussing the question directly, we will see the issue from a different perspective, i.e. the perspective of the good citizen. Both vice and virtue have no meaning if isolated from human beings. Therefore, I will answer the vice and virtue question by answering the question of who is the good citizen.

The “good citizen” is a very broad concept that can be defined in different ways. For example, it may be expressed by contributing to one’s country’s treasury more than one’s due according to the tax laws or by serving in the army for longer than the term specified by laws. Therefore, before I begin to discuss who the good citizen is, I must limit my study to a certain understanding. Here, the point I will focus on is to see which conceptions of citizenship would best advance democracy. That is to say, which kind of citizen is the one who benefits democracy most: the one who obey laws always or the one who is prepared to practice civil disobedience in some



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situations?

In pursuit of this aim, I find a tripartite classification of citizens is very helpful. Therefore, I will divide citizens into three groups, i.e. the obedient citizen, the conditionally obedient citizen and the rebellious citizen. After defining them, I will turn to discuss which group serves the democracy best. My final conclusion is that those citizens who are prepared to resort to civil disobedience when necessary behave in the best interests of democracy because democracy does not demand that citizens be servants but requires that they be autonomous individuals capable of formulating their own ideas and evaluating the laws and policies of the state.

### **A. Three Kinds of Citizen**

In terms of citizens' attitudes towards law abidance and legal authority, three kinds of different citizens can be distinguished: the obedient citizen; the conditionally obedient citizen and the rebellious citizen.

1. The Obedient Citizen. The obedient citizen takes a more procedural view of law, and would obey every law as long as it is legislated by a qualified authority. The most important tenet for this kind of citizen is that law is law

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which must be obeyed by everyone in the society and the lawbreaker must be punished as pre-stipulated irrespective of whom he is and for what reason he breaches the law. Certainly, these citizens may grumble at the injustice or undemocratic nature or inappropriateness of the law, and sometimes they might even stage a legal protest against the law, but the imperfection of the law does not affect their willingness to obey it because it is their belief that even imperfect laws must be obeyed before they are changed in a legal way. Civil disobedience and other illegal means of changing the law are never an option for them. A typical representative of this kind of citizen is Socrates who would rather to be executed unjustly than to run away from the prison because, for him, obedience to the commands of the city (and to other authorities) is precisely what it means to be just. The just person is the one who obeys.<sup>367</sup>

2. The Conditionally Obedient Citizen. Conditionally obedient citizens take a more substantive view of law; they think that the law must not only be enacted through democratic procedures but must also conform to the basic principles of democracy in a substantive sense. In principle, they acknowledge the need for legal authority, either as a means of facilitating the reasonable coordination of man or as a useful tool to protect and enhance democracy, thus they are

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<sup>367</sup> Curtis Johnson, "Socrates on Obedience and Justice", (1990) 43 *The Western Political Quarterly* 719, at 721. Socrates' argument proceeds from the statement of a perfectly general moral principle to its application in his particular case: One ought never to do wrong even in response to the evil committed by another; but it is always wrong to disobey the state; hence, one ought never to disobey the state. And since avoiding the sentence of death handed down by the Athenian jury would be an action in disobedience to the state, it follows he ought not to escape. (*Crito* 50e, 52e)

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prepared to abide by the law legislated by the legal authorities; however, they differ from the obedient citizen in that they would not confine their fighting to the legal means to change the law if they find the law repugnant and inconsistent with the fundamental principles of democracy.<sup>368</sup> They think that law can be wrong or undemocratic, so it needs to be scrutinized by individuals. Moreover, legal means may be unavailable or ineffective to redress unjust laws, so civil disobedience is vital. In short, the conditionally obedient citizen is the one who would normally give priority to obeying the law, but nevertheless, when the need arises, would break it (through civil disobedience) in the name of democracy. Thoreau, probably one of the few most famous representatives of this kind of citizen, said, “I seek...an excuse for conforming to the laws of the land...I am but too ready to conform to them”.<sup>369</sup>

3. The Rebellious Citizen. The rebellious citizen holds a generally hostile attitude towards law and legal authority. For the conditionally obedient citizen, the existing political system is roughly acceptable though its laws may occasionally go wrong, so the conditionally obedient citizen is not willing to revolt against the government, but rather seeks the redress of some its laws or policies. But the rebellious citizen completely denies the legitimacy of the

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<sup>368</sup> This does not mean that the conditionally obedient citizen will resort to disobedience of the law whenever they find the law repugnant. Sometimes, even they believe the law is unjust, they may still choose to obey the law, in deference to the overriding needs of the common good of the community or just showing respect for the outcome of a democratic process.

<sup>369</sup> *Supra* note 146, at 223.

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existing regime; therefore his aim is to change the whole system rather than some of its laws. Correspondingly, rebellious citizens do not try to restrict their fighting to peaceful disobedience as conditionally obedient citizens do; armed struggle, even terrorist actions, are all options for them.

## **B. Who Is the Good Citizen?**

After mapping three kinds of citizen, it is time for us to answer the question that is of central importance: who is the good citizen? That is to say, what kind of citizen do we need to support an effective democratic society? The answer to this question would also be an answer to the question whether civil disobedience is a virtue.

### **a. The Obedient Citizen**

One theory holds that the obedient citizen should be regarded as the good citizen. The theory is based on the assumption that to solve social problems and maintain democracy, citizens must have good character; they must be honest, responsible and, foremost, law-abiding members of the community.<sup>370</sup>

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<sup>370</sup> Joel Westheimer and Joseph Kahne, "What Kind of Citizen? The Politics of Educating

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There is much truth in this view. After all, society is composed of numerous men and women; if most of them are unused to deferring to the law, it would be hard to maintain order and justice. But what is neglected in the theory is that it fails to acknowledge that a satisfactory society cannot be achieved solely on the basis of exact and narrow adherence to the law.<sup>371</sup> There are important shared goods in the society that can be realized only if there is a significant body of citizens who have a sense of common concerns, and who are prepared to stand up against the existing authority if necessary. Adherence to law rather than disobedience of law is sometimes more dangerous. As I emphasized in Chapter II, historically, the most terrible things, war, genocide and slavery, have resulted not from disobedience, but from obedience. Seen in this light, a theory that merely insists a strict obedience of law fails to take into account the dangers of life: the not uncommon tyranny of the majority, the tendency of power to corrupt, the chauvinism of nations and of groups within nations.<sup>372</sup>

A further failure of the theory is that it fails to see the demands of democracy

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for Democracy”, (2004) 41 *American Educational Research Journal* 237, at 240.

<sup>371</sup> Iseult Honohan, “Active citizenship in Contemporary Democracy”, in Clodagh Harris (ed.) *The Report of the Democracy Commission: Engaging Citizens, the Case for Democratic Renewal in Ireland. Dublin: TASC and Democratic Dialogue*. The report is also available online at: <<http://www.tascnet.ie/upload/Iseult%20Honohan%20paper.pdf>>, last accessed on April 2, 2009.

<sup>372</sup> Donald V. Morano, “Civil Disobedience and Legal Responsibility”, (1971) 5 *J. Value Inquiry* 185, at 187.

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on citizenships. The spirit of obedience to law is vital to the smooth function of democracy, but it is not about democratic citizenship because tyrants of a totalitarian regime would be as delighted as leaders in a democracy if their citizens were imbued with the spirit of subservience. Tyrants, aware of their fragile position, seek to sanctify their laws and make it impossible for citizens to think and behave in an autonomous way. This is the essence of tyranny. But it is different in a democracy in which citizens are expected to have their own views about policies and laws. They are not expected to follow the law simply because it is law or because politicians or the authorities tell them to do so; the ideal situation is that they follow the law out of a genuine commitment, that is to say, after a careful consideration of its merits and demerits. Therefore, mere emphasis on loyalty or obedience works against the kind of critical reflection and action which is essential to the democratic society.<sup>373</sup>

The powerlessness of the obedient citizen will become especially apparent when he or she is faced with a regime which is very corrupt or has a high tendency of slipping into totalitarianism. Under extreme conditions, no legal means is able to halt the degeneration of the regime. Thus, it is completely necessary for citizens to hold the right of resistance under such circumstances as an ultimate restraint on the political order.<sup>374</sup> That is to say, there is a

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<sup>373</sup> *Supra* note 370, at 244.

<sup>374</sup> A wall of vigilant unyieldingness on the part of the representatives of the people and the people itself, collectively, may well be entirely sufficient to prevent a decline into the

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different way to be a good citizen besides obeying the law unconditionally.

### **b. The Conditionally Obedient Citizen**

I have argued above that the obedient citizen is not the kind of good citizen demanded by democracy. The good citizen should be the kind of citizen who has the spirit of obedience in the normal times, but who is also prepared to resort to all necessary means, including illegal ones, to protect democracy when democracy or its fundamental values are endangered. This kind of citizen is the conditionally obedient citizen. The conditionally obedient citizen not only has the calmness and determination to make a democratic order possible but also has the vigilance to protect the order.<sup>375</sup> According to T.R.S. Allan, it is not the quiet submission to political power, born of habit or tradition or self-interest, which characterizes the good citizen in a democracy, but a cautious, more measured compliance, with civil disobedience as a possible last resort.<sup>376</sup> However, this point of view is not shared by everyone and there are many arguments against it.

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oppression of despotism. Please see Wolfgang Schwarz, "The Right of Resistance", (1964) 74 *Ethics* 126, at 127.

<sup>375</sup> It is not the written laws, but the vigilance and determination of these freedom loving people with spirit of resistance and sacrifice who are the best and most effective safeguards against the loss of liberty, against dictatorship. These, indeed, are words of wisdom. See Guenter Lewy, "Resistance to Tyranny: Treason, Right or Duty?", (1960) 13 *The Western Political Quarterly* 581, at 595.

<sup>376</sup> T. R.S. Allan, "Citizenship and Obligation: Civil Disobedience and Civil Dissent", (1996) 55 *Cambridge L. J.* 89, at 109.

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The first counter-argument is that social consequences are difficult to predict and an individual's judgment is so subjective and biased that opposing one's judgment to that of society as reflected in its laws is too dangerous. Even if the original intention of the civil disobedient is to help the democracy, his action might ultimately be counter-productive. Thus, it is difficult to say that the conditionally obedient citizen is the good citizen as his disobedience may do more harm than good to the society. There are three responses to this argument. First, it is true that an individual's judgment is unreliable, but the same is true of laws, which are not one hundred percent reliable either. It is not justified, therefore, to ask the people to follow laws always.<sup>377</sup> Second, there are some laws that are obviously illegitimate, such as those that are in breach of basic human rights and principles of democracy. When this happens, it is completely unjust to ask the citizen to follow the laws, especially after all legal means have been exhausted. Third, from a historical point of view, democracy gains much from civil disobedience. Although some specific acts of civil disobedience might unfortunately do more harm than good, civil disobedience on the whole contributes significantly to the development of democracy. Thus, the occasional misjudgment of the conditionally obedient citizen will not

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<sup>377</sup> Truly, the fallibility of individual human judgment is highly relevant in determining the proper occasions for disobedience, but it will be unjustifiable to rule out disobedience in all circumstances just because of the possible fallibility of judgment. See Kent Greenawalt, "A Contextual Approach to Disobedience", (1970) *70 Columbia Law Review* 48, at 58.



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undermine his status as good citizen.

Another fear related to the first argument is that this kind of citizen's judgment about when to obey and disobey the law will lead to terrible consequences such as social chaos. I have already answered this question in chapter III when I tried to justify civil disobedience by refuting the arguments against civil disobedience. There, I argued that there is little danger that civil disobedience will lead to social chaos because of its highly self-restricting nature, for example, its strong commitment to nonviolence and willingness to submit to punishment. But here I should add another argument from the standpoint of human nature. As we know that to be a civil disobedient means great self-sacrifice; one who disobeys the law has to experience all the danger and unpleasantness that comes with being a fighter against the state. Sometimes, he has to serve the cause at the risk of losing his job, freedom, even life. Therefore, normally there are not many people among the society who are brave enough to be civil disobedients because of the harm-evading instinct of human beings. In the words of the American Declaration of Independence of 1776, "mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." This is precisely why Richard Swedberg contends that "there are many people who show courage on the battle field, but this is much less common in life outside

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the military.”<sup>378</sup> The human nature is such that only a few can be truly good citizens, i.e. citizens who are courageous enough to resort to civil disobedience when necessity arises. Most people choose to join the brave only after they see that the success is forthcoming or the dangers have been greatly lessened. Thus, social chaos is unlikely to be caused by the disobedience of these few individuals under normal circumstances. Seen in another light, this is precisely what makes the conditionally obedient citizen a good citizen. Compared with ordinary citizens, they are more determined, courageous and are more willing to fight for the good of the whole society, irrespective of their own risk. Obviously, there is a much easier path for them to choose, that is to say, to lie back and obey any law, whatever the law happens to say, whatever politicians have made into law on the basis of selfishness, but they do not choose this easier path by joining the obedient citizen. Rather, they choose a more risky path by voluntarily taking a heavy responsibility to check the law of the country and to guard the democracy which they cherish so much. In other words, they are determined to serve their country not only with their minds, but also with their bodies.<sup>379</sup>

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<sup>378</sup> Richard Swedberg, “Civil courage: The case of Knut Wicksell”, (1999) 28 *Theory and Society* 501, at 501. According to Richard Swedberg, a standard definition of civil courage is “to dare to act because of one’s conviction, even at the risk of paying a high price for this conviction”.

<sup>379</sup> *Supra* note 146, at 221.

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### **c. The Rebellious Citizen**

In response to my argument that the conditionally obedient citizen is a good citizen, some might object that rebellious citizens also can satisfy the standard because they are also determined, courageous and would like to risk themselves for their cause. It is true that the rebellious citizen also can contribute to the social good, if we admit rebellion can ever be justified. But we have to notice at the same time that rebel is suitable only for those extremely totalitarian regimes in consideration of the potentially great and damaging power of a rebellion. Often, what a rebel brings is not the seed of peace and love, but the seed of a new cycle of chaos and hatred. The rebellious citizen's contempt for authority and the sweepingly destructive power of the rebel are too dangerous for most societies. In any case, rebellion is not a real choice for any kind of liberal democracy. No rebel can be justified in the context of a democracy, if it is a genuine, not pseudo, democracy. Therefore, rebellious citizens may be viewed as "good" and courageous under very rare circumstances, for example, when rebellion was really needed in a cruel regime such as the Khmer Rouge of Cambodia, but it would be totally wrong to acclaim them as good citizens for all societies because they lack the equally valuable spirit of cooperation and obedience which is dearly needed by any kind of society. At the very least, the rebellious citizen is not the good citizen

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required by a democracy.

After analyzing three kinds of citizen, we can now discern who the good citizen is. Actually, the answer to this question has been hinted at by some philosophers when they say that a vigilant yet patient people are the best safeguard of democracy.<sup>380</sup> To be more precise, the good citizen is not the one who offers blind allegiance to the state or who consigns infallibility to his elected and appointed officials. Rather, the good citizen is a watchdog who is legally responsible and prepared to violate laws on the books in order to be true to the ideal democracy.<sup>381</sup>

### **C. Citizenship and Democracy**

There is a very popular view which holds that to be a citizen under a democratic system is very easy because he enjoys extensive rights while at the same time has only minimal responsibilities. As observed by political scientist John Muller, “democracy is really quite easy; any dimwit can do it.... People do not need to be good or noble, but merely to calculate their best interests,

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<sup>380</sup> Guenter Lewy, “Resistance to Tyranny: Treason, Right or Duty?”, (1960) 13 *The Western Political Quarterly* 581, at 595. And also see Wolfgang Schwarz, “The Right of Resistance”, (1964) 74 *Ethics* 126, at 127.

<sup>381</sup> *Supra* note 372, at 189. Here, Donald uses the conscientious citizen instead of the good citizen.

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and if so moved, to express them.”<sup>382</sup> Is democracy really so easy that it makes nobility and goodness unnecessary?

It is totally understandable that in a democracy people always pay more attention to their own rights and interests than to the duties and so-called public interests because that is the way in which democracy is supposed to work. It is widely believed that if diverse people in a society are all encouraged to protect their own interests and to pursue their own happiness and prosperity, then the ensuing interactions and compromises with each other will be able to prevent a tyrannical dominance by any faction or even coalition of factions. The popularity of this view is reasonable because the pursuit of self-interests makes democracy possible and operational, but it will be absurd to assume that in a democracy nobility is unnecessary. Actually, to be a citizen in democracy is neither easy nor simple. The smooth function of democracy needs citizens to take far more responsibilities than they would under totalitarian regimes. In the totalitarian regimes, the responsibilities of a citizen required by the state are simply to passively follow the law since the authoritarian government has determined everything for him, even what he should think. But the situation is totally different in a democracy, the smooth function of which needs the extensive participation of the citizen and requires

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<sup>382</sup> Here cited from Ralph Ketcham, “Citizenship and Good Democratic Government”, online: <<http://usinfo.state.gov/journals/itdhr/1205/ijde/ketcham.htm>>, last accessed on April 18, 2009.

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that the citizen be able to exercise his own judgments. It hopes that if a citizen in a democracy follows a law, he is acting on his own judgment not merely because he is told to do so.<sup>383</sup> The spirit of participation and the ability to make independent judgments are essential to the functioning of democracy; without the participation of the citizen or without the citizen who has the ability to evaluate the policies of the government, democracy would lose its base. The concept of democracy presupposes the concept of obligation. It is built on the assumption that many of its citizens would fulfill their responsibilities of participation and exercise their ability to distinguish between laws that are worth supporting and those that are corrupt and oppressive and which ought, therefore, to be overthrown.

Therefore, in a democracy, the good citizen is one who has a spirit of participation and an ability to make independent judgments rather than one who is accustomed to obeying everything decreed by the government, for it is those active and independent citizens who make democracy possible. Although the unconditionally obedient citizen generally is not punishable, he or she becomes meritless compared to the participative citizen. This may serve as additional proof that the spirit of the conditionally obedient citizen is more

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<sup>383</sup> He may, of course, rely on the judgment of others more or less, but he must be able to find reasons for trusting that judgment and to assess their opinion in light of contrary indications. Or as said by Allan, a citizen's obedience to the law should be an expression of his considered and deliberate judgment that conformity to law is justified. *T.R.S. Allan, Law, Liberty, and Justice—The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1993), at 125.

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compatible with democracy than that of the obedient citizen.

#### **IV. Summary**

Civil disobedience can be a right in a limited sense, i.e. in the sense of being entitled to some kind of punishment mitigation. It can also be a duty at the same time, though only in very rare circumstances. The ideal citizen needed by democracy is not a citizen who is ready to obey any order of the state, but a citizen who holds a critical view of the state, i.e. a citizen who would like to obey the law under normal circumstances but at the same time who is not afraid of resorting to civil disobedience to defend democracy if necessary.

Since civil disobedience can be a right, and even a duty, and since civil disobedients might be hailed as ideal citizens of democracy, an important question that follows is how to reconcile civil disobedience and democracy. The most important goal in reconciling civil disobedience and democracy is to find a way to soften the predicament of civil disobedients. It is improper to punish civil disobedients on the one hand and, on the other hand, call them heroes. If they are regarded genuinely good citizens who are an integral part of democratic society, that society in turn must show them due respect. So, in the following chapter, I will explore possible ways of doing so.

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## **Chapter VI:**

### **The Reconciliation of Civil Disobedience and Democracy**

I explained in previous chapters that civil disobedience plays a substantive role in the development of democracy and the civil disobedient, not the unconditionally obedient citizen, is the good citizen. But the fact is that civil disobedience has never been warmly welcomed by any form of government. Even in today's liberal democracies, it still faces fierce resistance from the state; sometimes it is directly denounced as profoundly misguided and as a threat to safety and democracy. Consistent with the attitude of the state, the existing criminal system also punishes the civil disobedient harshly and the court generally refuses to take the special circumstances of civil disobedience into account. The state fears that if civil disobedience, a form of purposeful breach of law, is given special consideration, the whole criminal law system will collapse. However, in this chapter I will argue against this view by insisting that the democratic state is obligated to tolerate civil disobedience and there is a viable way to make changes to the criminal system to accommodate civil disobedience. My argument will be presented in two steps: First, I emphasize that democracy has a special responsibility to tolerate civil disobedience. Though the authoritarian regime has every reason to be afraid of civil disobedience, democracy does not. Civil disobedience poses little danger



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to the subsistence of democratic system even though it could topple a totalitarian regime. Second, I analyze how to adapt the criminal law system to accommodate civil disobedience, that is to say, to alleviate punishment for civil disobedience. A variety of suggestions have been proposed by scholars on this point, for example, both the mistake of law defense and the good motive defense have been proposed as defenses for civil disobedience, but neither of them has been widely recognized. My argument begins with the analysis of the advantages and disadvantages of these suggestions. After analyzing them, I propose a solution: the establishment of a partial defense as the most appropriate way to soften the punishment for civil disobedience. I also suggest that in those not so liberal states without a competent judicial system, the protection of civil disobedience under constitution and other legislations may be considered.

## **I. The Appropriate Response to Civil Disobedience**

Though the contributions of civil disobedience to the social development are generally recognized, there is no unanimity, both among the professionals and the laymen, on how properly to treat the perpetrators of civil disobedience. It has been claimed by most scholars that they have to be punished since they are law breakers. The voice which calls for the exemption of punishment for them

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is weak. But here, I will join the latter group by arguing that a democratic society, to distinguish itself from an authoritarian regime, has a special responsibility to tolerate civil disobedience. This special responsibility comes at least from three aspects: first, civil disobedience poses less danger to a democratic society than to an authoritarian regime, in other words, civil disobedience is more affordable to the democratic system; second, democracy is a system which is committed to leniency and development, while the dictatorship is just the opposite; third, democracy is a system which is committed to justice, so it is highly problematic to punish the civil disobedient.

### **A. Different Attitudes towards Civil Disobedience**

Civil disobedience as a strategy of resistance is treated with both respect and revulsion.<sup>384</sup> Scholarly opinions fall between two limits. One is identifiable with conservatism, which holds that civil disobedience is incipient rebellion

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<sup>384</sup> It deserves to notice that images of civil disobedience from past times are more easily to be respected and appreciated. For example, few would suggest that African-Americans were wrong to protest segregation in the South by sitting at whites-only lunch counters and refusing to leave, or by refusing to move to the back of the bus even though these actions obviously broke the then-valid law. Similarly, images from other countries are also more easily to be respected. For example, the protestors in Tiananmen Square in 1989 are highly regarded in western society, but, at the same time, not so popular in China. One explanation for this is because civil disobedience actions happening now and here may bring chaos or other harms to the society and, thus, become annoying to the people. However, when civil disobedience under evaluation is from other countries or the past, the people are more probable to be detached far enough not to let their considerations of private interests interfere with their judgments.

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and must be punished according to law. The other is on the outer frontier of institutional libertarianism and claims that civil disobedience as “non-violent revolution” should be given legal immunity.<sup>385</sup>

How should the government deal with those who practice civil disobedience? Many people think that the answer is obvious: they must be punished if they have disobeyed the law. As Charles E. Wyzanski, Chief Judge of the United States District Court in Boston, said: “Disobedience is a long step from dissent. Civil disobedience involves a deliberate and punishable breach of legal duty.”<sup>386</sup> There is no immunity conferred by the Constitution and laws of the United States to those individuals who insist on a right of civil disobedience. The philosophy that a person may determine for himself whether a law should be obeyed or resisted is foreign to the rule-of-law theory.<sup>387</sup> It is also held by this view that even personally the civil disobedience deserves sympathy, but officially they must be punished, as claimed by US President John F. Kennedy in the 1960s. At the time of the black demonstrations in Birmingham, Kennedy gave many signs that, as an individual, he was in sympathy with the goals of the demonstrators, but he also made it clear that, as Chief Executive, he could give neither permission nor approval to such actions.<sup>388</sup>

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<sup>385</sup> *Supra* note 76, at 42.

<sup>386</sup> Here cited from Lewis H. Van Dusen Jr., “Civil Disobedience: Destroyer of Democracy”, (1969) 55 *American Bar Association Journal* 123, at 123-6.

<sup>387</sup> *Forman v. City of Montgomery*, 245 F. Supp. 17, 24-25 (M.D. Ala. 1965).

<sup>388</sup> *Supra* note 332, at 3.

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Some are even less sympathetic, insisting that civil disobedience be treated as terrorism.<sup>389</sup> What makes these people hold such a strict view on civil disobedience? Probably, the most common argument is the slippery argument which I have discussed in Chapter III. The argument is made from the danger of instability and anarchy, which states: if every Tom, Dick, and Harry takes it into his hand to disobey the law whenever he thinks necessary, anarchy may result.<sup>390</sup> This point of view was stated very clear by Victor Hanson in his recent article “Socratic Question: What Is the Rule of Law?” According to this article, if civil disobedience is immunized,

the entire edifice of a once unimpeachable legal system will collapse.

We (America) would then become no different from those nations whose citizens are now fleeing to our own shores to escape the wages of lawlessness. That worry is why Socrates, 2,400 years ago, taught us that the deliberate violation of the rule of law would have been worse for ancient Athens even than losing its greatest philosopher.<sup>391</sup>

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<sup>389</sup> For example, please see “Criminalizing Civil Disobedience” which talks about civil disobedience of green movement and “eco-terrorism”, online: <[http://www.sourcewatch.org/index.php?title=Criminalizing\\_civil\\_disobedience](http://www.sourcewatch.org/index.php?title=Criminalizing_civil_disobedience)>, last accessed on January 9, 2009. Also see Steve Watson, “Endemic: The Move to Label All Civil Disobedience ‘Terrorism’”, online: <[http://www.infowars.net/articles/december2006/011206terror\\_legislation.htm](http://www.infowars.net/articles/december2006/011206terror_legislation.htm)>, last accessed on January, 2009.

<sup>390</sup> *Supra* note 170, at 550.

<sup>391</sup> Victor Davis Hanson, “Socratic question: What is the rule of law?”, online: <<http://www.victorhanson.com/articles/hanson061906.html>>, last accessed on December 23, 2008.

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Certainly, there are also other arguments which are used by conservatives to support their strict view on civil disobedience, but here I will not elaborate and analyze them; I will withhold my comments on them until later.

In sharp contrast to the above standpoint is the view held by some liberals whose outstanding representatives are Thoreau, Dworkin, Rawls and Habermas. Though their conclusions are based on different arguments, they agree that civil disobedience deserves some kind of toleration. Dworkin argues that there are good reasons for not prosecuting those who commit civil disobedience. One obvious reason is that they act out of better motives than those who break the law out of greed or a desire to subvert government. Another reason is that our society suffers a loss if it punishes a group that includes some of its most loyal and law-respecting citizens. Jailing such men solidifies their alienation from society, and alienates many like them who are deterred by the threat.<sup>392</sup> Rawls is of the same view that civil disobedience should be tolerated to some degree; he argues that “courts should take into account the civilly disobedient nature of the protestor’s act, and the fact that it is justifiable (or may seem so) by the principles underlining the constitution, and on these grounds reduce and in some cases suspend the legal

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<sup>392</sup> *Supra* note 206, at 435-6.

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sanctions”.<sup>393</sup> For Habermas, tolerance of civil disobedience is a litmus test for democracy. If civil disobedient is treated as a criminal and punished accordingly, that means the democratic system is distorted into the authoritarian legalism.<sup>394</sup>

## **B. The Responsibility of Leniency to Civil Disobedience**

These two views about the treatment of civil disobedience have co-existed for a very long time; neither can persuade each other. Actually, this is not a question of right or wrong. Both of them tell part of the truth. However, I find the liberal view more persuasive, on balance, because after comparing democracy to dictatorship I find that democracy has a special responsibility to tolerate civil disobedience. Even if it cannot tolerate all acts of civil disobedience, it should at least tolerate some. This special responsibility comes both from the inner characteristics of democracy and from the peaceful nature of civil disobedience which determines that it is not a significant threat to the order of a democratic society.

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<sup>393</sup> *Supra* note 85, at 339.

<sup>394</sup> *Jurgen Habermas, Gradanska neposlušnost- test za demokratsku pravnu državu, Gledista, Beograd, br. 10-12/1989., str. 62.* Here cited from Branislav Stevanović, “Theoretical and Valuable Foundations of the Right to Civil Disobedience”, (2005) 4 *Philosophy, Sociology and Psychology* 1, at 8.

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### **a. The Dangers Posed by Civil Disobedience**

Civil disobedience actions have been harshly penalized in authoritarian or quasi-authoritarian regimes, past and present, because these regimes generally do not distinguish civil disobedience from ordinary crimes. The leaders and activists of civil disobedience movements are often arrested, jailed, and even executed as being no different from other criminals (and they may even be seen as worse). So why are rulers of the authoritarian regimes so afraid of civil disobedience?

The answer lies in the fact that civil disobedience poses a great danger to the rule of the authoritarian regime. From the perspective of traditional liberal theory, the rule of an authoritarian regime is illegitimate because it is not based on the consent of the governed. It is also supposed that such a system is not good at responding quickly to the needs and aspirations of the populace due to the restriction of dissenting channels. In such undemocratic systems, many individuals thus feel alienated from society; intense dissatisfaction is also prevalent among the people. However, because harsh penalties may be meted out by the authoritarian government at any time, dissatisfaction is generally only latent. But it is very easy for that dissatisfaction to be ignited by acts of civil disobedience. If the populace finds that dissenting actions go unpunished

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or the punishment imposed by the government is no longer unbearable, they might abandon their attitude of submission and silence, quickly transforming latent dissatisfaction into overt, large-scale resistance beyond the control of the authoritarian regime. This is precisely what happened in East Europe and former Soviet Union where communist rule collapsed in a short time once the people found that the control of the government became not so strict.<sup>395</sup> The act of civil disobedience itself might cause little harm to the totalitarian regime, but the enormous dissatisfaction it ignites could engulf the whole system. In fact, this is also why normal protests such as demonstrations, sit-ins, and strikes are also largely prohibited in undemocratic regimes. Dictators understand that even limited protests could ignite the enormous anger among the people. Therefore, any dissent, not merely civil disobedience, is viewed as extremely threatening by the dictatorial ruler and, therefore, the scope of dissent is so limited in authoritarian regimes that practically any form of open protest is forbidden.

But it is totally different in democratic states. Democratic systems are supposed to be founded on the consent of the people, and there are various dissenting avenues to facilitate communication between the ruled and the government. Thus, in democratic systems, intense dissatisfaction is mostly concentrated in a very limited population; even extreme forms of protest

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<sup>395</sup> For specific cases, please see Elliot M. Zashin, *Civil Disobedience and Democracy*(New York: The Free Press, 1972), at 280-4.



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evoke little sympathetic response from the general population. Therefore, civil disobedience rarely causes the disruption of the whole society in a democratic system, even though it can be very destructive to the authoritarian regime. As Gandhi remarked, while civil disobedience is dangerous to the autocratic state, it is harmless to a democratic state which is willing to listen to the voice of public opinion.<sup>396</sup> The rare instances in which serious disruptions are caused by civil disobedience only serve as a reminder that something has gone wrong in the democratic society and adjustments are urgently needed. Seen in this light, democracies need not view civil disobedience as a serious threat, at least not to the same extent as an autocratic regime. A dissent which is threatening to rulers in one system will not necessarily distress rulers in another.<sup>397</sup>

Therefore, it is reasonable to conclude that civil disobedience is a less serious threat to a democratic society than it is to an autocratic regime. In a democracy, civil disobedience enhances democratic legitimacy and at the same time poses little danger to the continuing development of democracy, whereas in an autocratic regime, civil disobedience enhances the discrepancy between the official and real order, between an artificially maintained picture of political community and the inner desire of the people for a just society.<sup>398</sup> In short,

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<sup>396</sup> M. K. Gandhi, *Non-violent Resistance* (New York: Schocken Books, 1961), at 174.

<sup>397</sup> *Supra* note 50, at 270.

<sup>398</sup> “In constitutional democracies, it contributes to the restoration and recruitment of legitimacy, while in authoritarian regimes it enhances discrepancy between the official and real order, between artificially maintained picture of political community and the normative claim in shifting its identity.” Please see Branislav Stevanović, “Theoretical

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while the effect of civil disobedience in a democratic society is to help it become more stable, its effect for a totalitarian regime is to accelerate its dissolution. It is appropriate and obligatory, therefore, for democratic systems to adopt a more tolerant attitude towards civil disobedience than totalitarian regimes which are generally intolerant of any open dissent.

### **b. The Commitment to Tolerance**

One characteristic of liberal democracy that is said to distinguish it from other types of political systems is the great tolerance that it extends to political dissenters. Rather than suppressing political dissent, as did by authoritarian regimes, democratic systems encourage different views to be expressed.

The typical attitude of authoritarian regimes toward political dissident is characterized by two essential features: orthodoxy and the repression of dissent. First, the regime maintains an orthodoxy which takes the form of an officially approved political, religious, or moral ideology. Second, dissenters from that orthodoxy are persecuted, prosecuted, or in other ways officially excluded from full participation in the political community.<sup>399</sup> Generally, such

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and Valuable Foundations of the Right to Civil Disobedience”, (2005) 4 *Philosophy, Sociology and Psychology* 1, at 8.

<sup>399</sup> Steven D. Smith, “The Restoration of Tolerance”, (1990) 78 *Cal. L. Rev.* 305, at 308.

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a regime is not prepared to tolerate any political dissent even when it is not threatened by an immediate revolution or any other substantial forces which can endanger its existence. But this is not the case in democratic systems. Democratic systems welcome, even encourage, new ideas and changes, because the existence of different theories and opinions is seen as a core requirement of democracy: “it is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected.”<sup>400</sup> Accordingly, democracy takes a very tolerant attitude toward dissenters: “Ruthless tactics that might be contemplated in other societies are not entertained as real alternatives” in a democratic society.<sup>401</sup> Democracy is a system which has a strong commitment to leniency and tolerance.<sup>402</sup>

But the commitment to tolerance does not necessarily and automatically mean that democracy must tolerate everything, from peaceful to violent dissents. Tolerance should not be unlimited. Even democratic societies must remain vigilant against the tendency of tolerating too much. As suggested by

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<sup>400</sup> In *De Jonge v. Oregon*, the United States Supreme Court, speaking through Chief Justice Hughes: “It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.” *De Jonge v. Oregon*, 299 U.S. 353 (1937).

<sup>401</sup> *Supra* note 85, at 339.

<sup>402</sup> It is argued that tolerance, traditionally conceived, involves an asymmetrical, paternalistic relationship between a sovereign party and the tolerated party. The sovereign party unilaterally bestows tolerance upon the tolerated party as an act of benevolence. Lasse Thomassen, *Deconstructing Habermas* (New York: Routledge, 2008), at 70.

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Bollinger, we have only a limited capacity to tolerate because it is dangerous to become too tolerant.<sup>403</sup> Therefore, we must see whether civil disobedience is beyond our capability to tolerate before we extend our leniency to it. Actually, the question has been answered well by Rawls' analysis. When responding to the questions: "How shall citizens of a liberal democracy treat those who are politically unreasonable? Does justice require the tolerance of the intolerant?" Rawls' answer is clearly "no" if they threaten security and public order. But he points out further that if they "are of no immediate danger to the equal liberties of others," then the intolerant should be tolerated, not suppressed.<sup>404</sup> The rationale behind Rawls' answer is clear: acts of civil disobedience may be restricted if they pose a threat to the liberty or equality of others, otherwise, they should be tolerated. This implies that civil disobedience should be tolerated in principle; only in rare cases, in Rawls' own words, "only in the special cases when it is necessary for preserving equal liberty itself", should the limitation apply. How many acts of civil disobedience threaten liberty itself by endangering the public order? This is a question which has been settled in Chapter III. In reality, very few acts of civil disobedience can endanger liberty itself due to the benign character of civil disobedience and other reasons considered earlier. Civil disobedience committed by individuals, and even mass civil disobedience, rarely brings

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<sup>403</sup> Lee C. Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (New York: Oxford University Press, 1986), at 189.

<sup>404</sup> Here cited from Leslie C. Griffin, "Fundamentalism from the Perspective of Liberal Tolerance", (2003) 24 *Cardozo L. Rev.* 1631, at 1631-36.

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panic and chaos to a democratic society. Thus, it is safe to conclude that most civil disobedience is entitled to be tolerated in some sense by the democracy.

### **c. The Problem of Punishment**

It might also be excessively unjust and problematic to punish civil disobedience as ordinary offences. As has been argued earlier, civil disobedience is committed not or not only for personal gain but for the interests of the whole society, or the so-called common good.<sup>405</sup> It is often in the interests of everyone involved, including democratic institutions, the development of which depends on the ability of different views to be fully discussed and communicated. Punishing civil disobedience which is beneficial to democracy, therefore, is counter-productive for the whole society. From this it follows that a democratic government has a special responsibility to try to protect civil disobedience and soften the predicament of its practitioners.<sup>406</sup> King on the one hand received a Nobel Prize and was honored for his contribution to society by the President of the United States, but, on the other hand, he was prosecuted and jailed for his actions. Is it always necessary, we might ask, that the person who performs civil disobedience be arrested and

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<sup>405</sup> The idea of the 'common good' is taken from Thomas Aquinas' *Summa Theologiae*. It is not a utilitarian view of the greatest number, but instead includes everyone in society.

<sup>406</sup> *Supra* note 206, at 445.

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punished? Why must a man suffer for an act which ultimately benefits society? Would it not be possible to make some provision to show leniency and to soften the predicament of such courageous practitioners?<sup>407</sup> The answers to such questions are contentious. But, if a government deserves the name of democracy, it cannot be indifferent to the suffering of these courageous practitioners and punish them as ordinary criminals, while claiming to be a democracy committed to fairness and justice.

Actually, according to classic theories of punishment, it is also problematic to punish civil disobedience. Since the civil disobedient is a good man and does not commit the “crime” for his own interests, there is no need to punish him for the purpose of correction. Similarly, it is also inappropriate to punish him for the purpose of retribution since his acts bring almost no harm and may finally be proved in the interests of the common good and helpful to the social development. It seems that the only theory which can support the punishment of civil disobedience is the deterrence theory which claims that punishment may be justified by the need to prevent more people from imitation.<sup>408</sup> That is to say, the penalization of civil disobedience is necessary because others might follow suit. This sounds reasonable under some circumstances, especially in

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<sup>407</sup> Francis A. Allen, “Civil Disobedience and the Legal Order,” (1967) 36 *U. Cin. L. Rev.* 1, at 12.

<sup>408</sup> There are theories of punishment other than retribution, correction and deterrence that we have mentioned here, but other theories seems only a different combination of these three theories.

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those cases which are very likely to stir large-scale imitation. But it must be noted that it is highly unjust to punish one person solely for the reason that his actions may be imitated by others and the severe punishment for him may deter others from imitation.<sup>409</sup> The use of such a tactic to deter imitation must be with conditions and limitations in a democracy which is committed to building a just society and treating everyone alike.

What, then, is the appropriate stance which should be assumed by the democracy to civil disobedience? The answer is clear: the democratic system has a special responsibility to be tolerant of civil disobedience; it should tolerate civil disobedience in some sense as long as its subsistence is not endangered.

## **II. Civil Disobedience and Punishment**

I considered above how democracy should respond to civil disobedience and the final answer is that democracy should assume a tolerant stance to civil disobedience. But the question remaining is how to show the tolerance, i.e. in what way should democracy express its tolerance to civil disobedience? The

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<sup>409</sup> More about the deterrence theory, please see Morgan Summerfield, "Evolution of Deterrence Theory", online: [http://www.associatedcontent.com/article/32600/evolution\\_of\\_deterrence\\_crime\\_theory.html](http://www.associatedcontent.com/article/32600/evolution_of_deterrence_crime_theory.html), last accessed on November 6, 2008.

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most important way, undoubtedly, is to reduce or eliminate the penalty for civil disobedience. But how can this be done specifically? In my opinion, the legislative branch, the executive branch and the judicial branch of the state all have a role to play. But, I believe, in most cases, that the most trustworthy branch which can be charged to protect civil disobedience is the judicial branch. This is not only because the court is a neutral place where disputes are mostly expected to be fairly resolved, but also because “the proper treatment of civil disobedience requires a highly individualized consideration of the facts of each particular case”.<sup>410</sup> In contrast, the legislature can only pose the most general criteria under most circumstances. As for the executive branch, due to the fact that it will inevitably be a party to the dispute emerging from civil disobedience, it seems unwise to trust it with the task of judging whether to punish the civil disobedient.

Thus, in the following paragraphs, I will mainly expound the courts’ role in protecting civil disobedience. But this is not to deny that the legislative and the executive branch also can play an essential role in defending civil disobedience. Under certain circumstances, for example, in those partially-liberal countries without an independent judicature, the legislature has a far more important role to play than the court in protecting civil disobedience. Therefore, the role of the legislature and the executive branch

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<sup>410</sup> Christoffel Hendrik Heyns, “A Jurisprudential Analysis of Civil Disobedience in South Africa”, Thesis submitted for the degree Doctor of Philosophy, Faculty of Law, University of the Witwatersrand.



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will also be succinctly discussed.

### **A. The Courts' Role in Protecting Civil Disobedience**

As mentioned earlier, the courts are generally in the best position to evaluate acts of civil disobedience. In the past, legal scholars have recommended a variety of options for the court to consider in protecting civil disobedience. Some suggest protecting civil disobedience by extending the necessity defense; some claim that the mistake of law defense is better while still others claim that the good motive defense is more proper. However, in my opinion, none of these suggestions is sufficient. They are either impractical or with unacceptable drawbacks. Next, I will consider these suggestions one by one.

#### **a. The Necessity Defense**

The necessity defense is a social policy that recognizes that individuals should at times be free from legal restraints in order to avoid imminent, serious harms.<sup>411</sup> When proved successfully, it justifies criminal behavior, thereby avoiding the application of the usual criminal rule. What, then, constitutes a

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<sup>411</sup> Steven M. Bauer & Peter J. Eckerstrom, "The State Made Me Do It: the Applicability of the Necessity Defense to Civil Disobedience", (1987) 39 *Stan. L. Rev.* 1173, at 1174.

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necessity defense? There are many theories about its constitution, among which the four-prong test is probably a typical one in many jurisdictions. The four-prong test holds that four requirements must be met before the necessity defense can be accepted.<sup>412</sup> First, the defendant was faced with an evil and chose the lesser evil, which is the reason why the necessity defense is also known as the “competing harms” or “choice of evils” defense<sup>413</sup>; second, the harm was imminent; third, the defendant must reasonably believe that his act is essentially helpful to the avoidance of harm, that is to say, a reasonably cause-effect relationship must be anticipated in advance; fourth, there was no other legal choice but to violate the law. All these requirements mirror the principles on which the defense of necessity is based: justice is not always served by blind adherence to the law, and there are times when a technical breach of the law will bring about a more desirable result than adherence, so it is unjust to punish such persons who seek to achieve the greatest good.

The necessity defense is very attractive to the practitioners of civil disobedience because it allows them to deny guilt without renouncing their

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<sup>412</sup> For example, in *United States v. Aguilar*, (*United States v. Aguilar*, 883 F.2d 662, 693 (9<sup>th</sup> Cir. 1989)), Judge Roger Vinson ruled as such. However, it is still a disputed issue on what makes the necessity defense and different theories may have very variable requirements. Other requirements often mentioned by scholars include: a defendant must cease to engage in the prohibited conduct as soon as the danger passed and s/he did not her/himself create the danger s/he sought to avoid etc..

<sup>413</sup> Luke Shulman-Ryan, “The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State’s Civilly Disobedient”, (2005) 27 *W. New Eng. L. Rev.* 299, at 315.

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values and beliefs. In addition, the necessity defense also allows civil disobedients to voice their reasons for lawbreaking in a public forum.<sup>414</sup> As noticed by Bauer and Eckerstrom, the elements of the necessity defense provide an excellent structure for publicizing and debating political issues in the judicial forum. “In proving the imminence of the harm, they demonstrate the urgency of the social problem. In showing the relative severity of the harms, they can show the seriousness of the social evil they seek to avert. In establishing the lack of reasonable alternatives, they can assault the unresponsiveness of those in power in dealing with the problem and prod them to action. And in presenting evidence of a causal relationship, they can argue the importance of individual action in reforming society.”<sup>415</sup> The opinion that the necessity defense should be made available to the practitioners of civil disobedience is also supported by many philosophers.<sup>416</sup> In practice, however, courts in most jurisdictions have been very unreceptive to political necessity arguments. For example, in the United States, virtually all protesters who tried to avail themselves of the defense lost in the court. Success is very rare.<sup>417</sup> It is generally insisted by the courts that there is no necessity for the protestors to

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<sup>414</sup> James L. Cavallaro, Jr., “The Demise of the Political Necessity Defense: Indirect Civil Disobedience and *United v. Schoon*”, (1993) 81 *Cal. L. Rev.* 351, at 355-356.

<sup>415</sup> *Supra* note 411, at 1176.

<sup>416</sup> There have been numerous articles about this argument. Please see, for example, Luke Shulman-Ryan, “The Motion in Limine and the Marketplace of Ideas: Advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient”, (2005) 27 *W. New Eng. L. Rev.* 299, at 299-364; And also see John Alan Cohan, “Civil Disobedience and the Necessity Defense”, (2007) 6 *Pierce L. Rev.* 111, at 111-175.

<sup>417</sup> *Supra* note 414, at 351-2.

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break the law. For example, in the protest against nuclear plants and armament, almost all protesters who committed civil disobedience by trespassing on property and blocking the entrance to nuclear plants were denied the necessity defense on the grounds that there had been no imminent danger and the trespassing protesters could not reasonably have believed that their actions would halt the manufacture of nuclear materials.<sup>418</sup> Similarly, the defense has also been denied in civil disobedience cases involving protests against U.S. policy abroad, the homeless problem, lack of funding for AIDS research, harmful logging practices, prison conditions, abortion, environment movements, and human and animal rights violations.<sup>419</sup>

Some theorists claim that it is wrong for courts to rule out the necessity defense as a way to soften the punishment for civil disobedience.<sup>420</sup> However, I cannot agree with them even though I share the view that the civil disobedient must be tolerated as far as possible in a democracy. The following reasons make me believe that the necessity defense is not the proper way to pardon the civil disobedient.

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<sup>418</sup> Please see, e.g., *State v. Marley*, 54 Haw. 450, 509 P.2d 1095 [Haw. 1973].

<sup>419</sup> “Necessity Defense”, online: <<http://legal-dictionary.thefreedictionary.com/Necessity+defense>>, last accessed on December 12, 2008.

<sup>420</sup> For example, see the arguments of William P. Quigley. William P. Quigley, “The Necessity Defense in Civil Disobedience Cases: Bring in the Jury”, (2003) 38. *New Eng. L. Rev.* 3, at 3-72.

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In the first place, applying the necessity defense to civil disobedience cases will extend the necessity defense too much. Though the rules for the necessity defense were always purposely flexible from the beginning so that justice can be served, it cannot provide a broad protection to the actions of civil disobedience. Perhaps because of this, some theorists call for the re-explanation or re-invention of the necessity defense in order to let civil disobedience actions be protected by it. William Quigley, for example, claims that the four-prong test used by American court in evaluating the availability of the necessity defense in civil disobedience cases is too strict and a re-explanation of the defense is desperately needed.<sup>421</sup> He argues, for instance, that the imminence requirement of the necessity defense should be eliminated altogether;<sup>422</sup> the causal relationship between civil disobedience action and the harm it seeks to prevent should only be proved as reasonable;<sup>423</sup> and the lack of reasonable alternatives ought to be interpreted as no highly effective

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<sup>421</sup> *Ibid.*, at 51-4.

<sup>422</sup> A significant hurdle with the necessity defense in civil disobedience cases is the requirement that the evil which is sought to be avoided be imminent. Courts will tend to find that the danger perceived by the civil disobedient was not in fact imminent, and therefore there was ample time in which to pursue reasonable legal alternatives. John Alan Cohan, "Civil Disobedience and the Necessity Defense", 6 *Pierce L. Rev.* 111, at 127.

<sup>423</sup> One of the greatest difficulties in advancing the necessity defense in civil disobedience cases is the need to show that there is a causal efficacy between the defendant's conduct and the evil sought to be averted. The courts generally make two points in connection with the causal nexus factor: first, that the defendants failed to show a reasonable belief in a causal link between their conduct and averting the imminent danger; and second, that in fact there was no causal efficacy in that the action failed to avert the imminent danger. Please see John Alan Cohan, "Civil Disobedience and the Necessity Defense", 6 *Pierce L. Rev.* 111, at 133.

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alternatives rather than no alternatives.<sup>424</sup> Undoubtedly, such purposeful re-inventions will allow civil disobedience to be covered by the necessity defense, but unfortunately these inventions unavoidably extend the necessity defense so much as to include almost all of the lawbreaking actions. According to the court in *People v. Weber*,<sup>425</sup> to accept the defense of necessity in such cases would mean that “markets may be pillaged because there are hungry people; hospitals may be plundered for drugs because there are those in pain; homes may be broken into because there are unfortunately some without shelter; department stores may be burglarized for guns because there is fear of crime; banks may be robbed because of unemployment.” The picture given by court may be an exaggeration because other deterrents to criminal conduct would still remain even if courts relax necessity requirements, but it is not totally ungrounded. A much relaxed and over-extended necessity defense is not necessarily in the interest of the whole society.

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<sup>424</sup> Courts have frequently denied the necessity defense in civil disobedience cases on grounds that legal alternatives were available to the protestors instead of violating the law, even if such efforts might well be futile. The U.S. Supreme Court gave a classic statement of this factor in holding that if there is “a reasonable, legal alternative to violating the law, a chance both to refuse to do the criminal act and also to avoid the threatened harm, the necessity defense will fail.” *United States v. Bailey*, 444 U.S. 394, 410 (1980).

<sup>425</sup> 162 Cal. App. 3d Supp. 1 (Cal. App. Dep’t Super. Ct. 1984). Similar arguments can also be found in the articles of philosophers, please see, for example, Joel H. Levitin, “Putting the Government on Trial: The Necessity Defense and Social Change”, which claims that allowing the necessity defense will result in the collapse of the criminal law. Joel H. Levitin, “Putting the Government on Trial: The Necessity Defense and Social Change”, 33 *Wayne L. Rev.* 1221, at 1251.

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A second problem with the necessity defense is that the court would have to make judgments on political issues if it is widely applied to civil disobedience cases. In effect, when the judge or jury is permitted to entertain the necessity defense in a civil disobedience cases, they are deliberating on policy issues. They are asked to make a decision whether the facts alleged by the defendant were as extreme as the defendant claims, and if so, whether the defendant made the correct choice based on prevailing community standards.<sup>426</sup> This runs counter to some important notions of constitutional democracy such as separation of powers and majority rule. Policy-making powers, in a democracy, are vested in the legislative and executive branches; therefore, the court should refrain from making decisions on political issues. The principle is famously known as the political question doctrine.<sup>427</sup> The rationale behind the doctrine is that the legislative and executive branches are more appropriate to make policy decisions than the judiciary which is neither democratically elected nor responsible to the people. Asking courts decide political issues would risk distorting “the role of the judiciary in its relationship to the executive and the legislature and open the judiciary to an arguable charge of providing government by injunction.”<sup>428</sup> Although some commentators have argued that

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<sup>426</sup> John Alan Cohan, “Civil Disobedience and the Necessity Defense”, 6 *Pierce L. Rev.* 111, at 122.

<sup>427</sup> For more about the content, history and significance of the political question doctrine. See “Political Questions”, <<http://law.onecle.com/constitution/article-3/20-political-questions.html>>, last accessed on December 23, 2008.

<sup>428</sup> *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

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jury is in a better position than the courts to make policy, actually jurors are likewise unelected and lacking in policymaking expertise: “indeed, jury selection probably ensures that the jurors sitting are as unfamiliar with the issue as possible.”<sup>429</sup>

Thus, for these reasons, it is unwise to extend the necessity defense to civil disobedience cases. It causes more problems than it solves.

#### **b. The Good Motive Defense and the Mistake of Law Defense**

Two other defenses have also been proposed by philosophers as potential solutions to the problem of punishing civil disobedience. One is the “good motive” defense; the other is the mistake of law defense.

The good motive defense arises from the fact that the most important difference between civil disobedience and crime lies in the motivation of the actor. Criminals generally commit crimes for selfish aims, nevertheless the disobedient attempts to support and to further just institutions.<sup>430</sup> Since criminal law mainly concerns itself with punishing those individuals who are

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<sup>429</sup> Brent D. Wride, “Political Protest and the Illinois Defense of Necessity”, (1987), 54 *U. Chi. L. Rev.* 1070, at 1093.

<sup>430</sup> *Supra* note 85, at 321.



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morally blameworthy, the legal system, therefore, should distinguish between those who are morally blameworthy and those who violate law out of goodness.<sup>431</sup> Thus, Martin Loesch suggests that one solution to the problem of how to respond to the difference is to allow civil disobedients to do what they all want to do: make arguments to the court about why they did what they did. The court, if convinced by the defendant that he was motivated by good reasons, can acquit them.<sup>432</sup> However, in reality, the good motive defense, just as the necessity defense, is seldom recognized by the court. For example, in *United States v. Cullen*,<sup>433</sup> the court explicitly ruled that the defendant's motive has nothing to do with the determination of guilt. The judge claims that if the defendant perpetrates the prohibited act voluntarily and knowingly (or reasonably should have known), the burden to prove the requisite intent has been met; proof of motive, good or bad, has no relevance to the judgment.

The other defense proposed by both philosophers and lawyers is the "mistake of law" defense. They claim that if a defendant really believes that a law is unconstitutional and consequently violates that law to obtain a chance to challenge the law, then the mistake of law defense should be available to the

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<sup>431</sup> The case for the good motive defense is set forth in M. J. Friedman, "Criminal Responsibility and the Political Offender", (1975) 24 *American University Law Review* 797, at 797-833.

<sup>432</sup> *Supra* note 9, at 1072-88.

<sup>433</sup> *United States v. Cullen*, 979 F.2d 992 (4th Cir. 1992).

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defendant even though the law does meet constitutional requirements.<sup>434</sup> Nevertheless, to an even greater extent than the necessity defense and the good motive defense, the mistake of law defense has never, in civil disobedience cases, been accepted by the courts, which insist that the mistake of law defense is only available to those who have genuinely misunderstood the requirements of the law. The civil disobedient cannot satisfy this requirement because he or she knowingly and intentionally violates the letter of law.<sup>435</sup>

The unreceptive attitude of the courts to these defenses has been criticized fiercely by some philosophers. The typical attack on the courts is on the ground that they are unduly influenced by unnecessary fear as to be unresponsive to the reality, i.e. the reality that civil disobedience has become an important part of political life.<sup>436</sup> This criticism is not totally ungrounded because judicial responses to civil disobedience are unsatisfactory; the significance of the civil disobedience is not properly reflected in the criminal justice system; the civil disobedient is still treated no differently from an ordinary criminal. But it is one question whether the civil disobedient should

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<sup>434</sup> *Supra* note 10, at 1.

<sup>435</sup> *Supra* note 155, at 5-61.

<sup>436</sup> For example, Martin Loesch claims that “the response of the judicial system to the good motive defense has been stymied by unnecessary fear and by reasoning which is unresponsive to the philosophical significance of the conflict between moral and legal obligation.” And he believes that these fears of the court are misplaced and not responsive to the philosophical underpinnings of civil disobedience. Please see Martin C. Loesch, “Motive Testimony and A Civil Disobedience Justification”(1991) 5 *Notre Dame J.L. Ethics & Pub. Policy* 1069, at 1104-5.

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be treated as different from the ordinary criminal; it is quite another question whether the special treatment should be given in the form of these defenses. After all, there are many ways to show our tolerance to civil disobedience, accepting these defenses may be not the best way, even not a proper one. Courts may be wrong in refusing to be tolerant, but at the same time they may be right in refusing accepting these defenses. Actually, in my opinion, the court has more reason to reject rather than embrace the good motive defense and the mistake of law defense.

The court is set up mainly as an institution to dispense justice, not as a political forum to discuss broad political issues. It therefore should refrain from encroaching on the political duties of other government branches because such encroachments are not only against the principle of separation of powers but also will adversely influence the public's perception of the court as a neutral institution.<sup>437</sup> But if the good motive defense or the mistake of law defense is allowed to be raised in the case of civil disobedience, the court will unavoidably make judgments on political issues on a large scale. In these cases, the court has to decide whether the law or policy protested by the civil disobedient is so, at least superficially, unconstitutional or unjust as to entitle

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<sup>437</sup> As ruled by Chief Justice Marshall in *Marbury v. Madison*, "The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court." *Marbury v. Madison*, 5 U.S. (1 Cr.) 137, 170 (1803).

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the defendant to be excused. Some opponents of the political question doctrine may point out that the court has never adhered to the doctrine strictly, sometimes the court can and does make political judgments.<sup>438</sup> The courts have interfered in the political issues in the past and, with the advent of constitutional court in some countries, some might think that the judiciary would intervene more often in the political issues; however, at least in the foreseeable future, there is good reason to keep the court sufficiently-detached from politics so as to remain as a neutral institution. It can intervene in politics in rare cases, especially when an issue has become deadlocked in the political area, but its intervention in politics should not become prevalent. However, the acceptance of the good motive defense and the mistake of law defense in civil disobedience cases would undermine this aspiration and further politicize the court. Due to the broadness of the policies and laws challenged by the civil disobedient, almost all of the policies, from nuclear armament, foreign and military affairs, globalization to environmental policy, freedom of abortion and homosexual marriage, have the potential to be brought into the court. Such a politicized court definitely is not desirable. Moreover, in most cases of civil disobedience, the protestors are seeking to air a generalized grievance. In other words, the disobedients themselves are seldom injured in any particularized

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<sup>438</sup> About the detailed attacks and defenses of the political question doctrine, please see Louis Henkin, "Is There a 'Political Question' Doctrine?", (1976) 85 *Yale L. J.* 597, at 597-625; also see J. Peter Mulhern, "In Defense of the Political Question Doctrine", (1988) 137 *U. Pa. L. Rev.* 97 at 97-176.

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way by the alleged illegality; they raise the issue of legality in its most abstract form. The court, obviously, is not the right place to discuss abstract policies.<sup>439</sup>

Thus, neither the good motive defense nor the mistake of law defense is a proper solution to the predicament of the civil disobedient because of their potential devastation to the judicial system.

### **c. The Establishment of the Civil Disobedience Defense**

Neither the necessity defense nor the good motive defense is a proper solution to the problem of punishing civil disobedience, then, what is the appropriate solution? In my opinion, the most appropriate solution is to establish a special defense for civil disobedience, i.e., a formal rule that a finding of civil disobedience is a factor that must be taken into account in mitigation of the penalty imposed.<sup>440</sup> Thus, in the present section, I will offer arguments in favor of the establishment of such a defense for civil disobedience in the

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<sup>439</sup> Maturity principle is an important principle in many countries' administrative proceedings, which is designed to prevent the court from intervening in a dispute too early. For a detailed discussion, see "Maturity Principle", online: <<http://baike.baidu.com/view/2033320.html?fromTaglist>>, last accessed on December 23, 2008.

<sup>440</sup> Here, I draw on Simon Chesterman's discussion of judicial responses to official disobedience. Chesterman argues that the appropriate response for official disobedience such as torturing the terrorists in order to save more lives is not to ratify the conduct officially, but to mitigate its punishment afterward. This approach has much in common with the appropriate response to civil disobedience. See Simon Chesterman "Deny Everything: Intelligence Activities and the Rule of Law", in Victor V. Ramraj (ed.), *Emergencies and the Limits of Legality*, (Cambridge, UK: Cambridge University Press, 2008), p. 314-33.

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criminal system. Owing to the different situations of politics and law in different countries, the way to establish such a defense and the parameters of the defense will not be the same. The defense must be tailored to meet the different requirements of the different situation. So, in the thesis, I will only outline the main points of the defense. The main points include: What is the content of the defense? What are its purposes? What is the outcome of a successful defense? What advantages does it have compared to other solutions? These are questions which must be answered before a theory of civil disobedience defense can be established.

I suggest that a civil disobedience defense means that when a case comes before the court, the court should first decide the case on the merits according to the normal principles of criminal law. When it finds the defendant guilty, and a claim of civil disobedience is raised, it should then decide whether the conduct amounted to civil disobedience and, if so, whether it is sufficient to warrant a reduction of or exemption from punishment. In other words, if, after a finding of guilt, the court finds that the prosecuted action fully satisfies the standards of civil disobedience (intentional breach of law in order to show a protest, committed nonviolently, publicly and with a general willingness to accept punishment, the response is reasonable and proportional etc.), then it can decide to reduce or abolish the punishment for the defendant according to the specific situation. Otherwise, the court would punish him as usual.

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The establishment of such a defense is to solve the conflict between the rigidity of the law and the benign nature of civil disobedience and show our due respect to the civil disobedient as a courageous man. At the same time, it is also an official recognition of the potential contribution that civil disobedience could make to a democratic society. However, this does not mean that all acts of civil disobedience will be automatically exonerated. Vice versa, when a case comes to the court, the court is still entitled and has a duty to decide whether the act of civil disobedience is totally justified or only partially justified, the former might result in the total exemption of the punishment while the latter would lead only to a reduction of the punishment. Which acts of civil disobedience are acceptable and which are not will inevitably depend on the specific situations of different countries. For example, the most liberal democratic states may choose to tolerate most cases of civil disobedience because the cohesion of these societies is robust enough to withstand even the fiercest civil disobedience, while those partially-liberal societies will have only a limited leeway to pardon civil disobedience because they have to pay more attention to the preservation of social order and democracy. Thus, due to the different situations of different countries, it is not possible to give a unified formula for the courts to consider when they are faced with civil disobedience cases, but it is still helpful to elaborate the elements which the courts need to take into account when civil disobedience

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cases are on trial.

The standards used by the court to judge whether an act of civil disobedience is justified could be explained from two perspectives. First, from the substantive perspective, the courts can decide whether the civil disobedience action is related to basic human rights. For those actions which are linked to the struggle for basic human rights, the courts may decide to show more tolerance when other things are equal. For those policy-based civil disobedience cases,<sup>441</sup> the courts may decide not to show tolerance or only show less tolerance. Second, from the formal perspective, the courts should at least take the following criteria into consideration: whether other reasonable means are available to the protestors and whether they have fairly tried those means before staging civil disobedience; whether the ends sought by the civil disobedient are in proportionality with the means used by the disobedient; the level of coercion and violence involved. After an overall analysis of these and other relevant elements, the courts could decide whether to pardon or partially pardon the civil disobedient, but the court should always refrain from discussing whether the proposition of the civil disobedient is a better policy than the one supported by the government. In other words, the court should

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<sup>441</sup> Policy-based civil disobedience is to persuade the government to change an unwise policy which is not related to basic human rights, but which is nevertheless is to the disadvantage of some members of the society. A typical example is the civil disobedience staged in South Korea to compel the government not to import beef from the United States.



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consider only the formal and external characteristics of the action and should not discuss the disobedient's view on the government policy. The logic behind this is that mitigation of the punishment is based on the good motives of the actor and the benign and highly self-constrained nature of the action rather than on the recognition that the protestor's alternative suggestion is superior to the one adhered to by the government. And it is also because, as argued earlier, the courtroom is not a suitable place to make such political judgments.<sup>442</sup>

The advantages in establishing such a defense for civil disobedience are obvious. First, it can help to bridge the gap that currently exists in the law between moral and legal guilt and to resolve the predicament of the civil disobedient. The civil disobedient is often hailed as a courageous person, or even as a hero, among the populace, but he or she is punishable by the law. If the gap becomes too large, the justice of the law would be doubted and its authority eroded.<sup>443</sup> The establishment of a civil disobedience defense would

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<sup>442</sup> Despite the arguments of some scholars, it is generally held that jury is not in a better position to make policy judgments than the court. "Juries should not make policy any more than courts should do." First, jurors are likewise unelected; second, jurors are likewise lacking in policymaking expertise, indeed, jury selection probably ensures that the jurors sitting are as unfamiliar with the issue as possible; third, jurors are representative of the community only in a very limited sense: large segments of the community are excluded either by being excused from service altogether or by being dismissed on peremptory challenges or for cause. Please see *supra* note 429, at 1093-4.

<sup>443</sup> It is obvious that morality and law are not identical and do not coincide always. The existence of some gap between them is unavoidable, even necessary. But it is also obvious that too much conflict between law and morality will undermine the authority of law as long as the implementation of law still more or less depends on the existence of a good morality.

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help solve the problem by exonerating justified disobedience. Moreover, the introduction of such a defense into the legal system would help to give equal protection to all civil disobedients. In the past, one of the most striking features of many civil disobedience cases on trial is the arbitrary treatment of the civil disobedient. The civil disobedients' arguments for necessity or any other defense may be found admissible or inadmissible, both arbitrarily. There is no uniformity in the way civil disobedience cases are handled by the courts, and this variation leads to dissimilar outcomes, sometimes for similar offenses. For example, sometimes the disobedient is allowed to present arguments for necessity, sometimes not; there is no unified standard.<sup>444</sup> But the establishment of a civil disobedience defense would greatly improve the situation, ensuring that all disobedients have a chance to be considered for reduction or exemption of the punishment.

Second, it can prevent the court from becoming a political forum. The implementation of this rule requires only that the court consider the formal characteristics of the protest action rather than the content of the protested policy. This would help to maintain the image of the court as a neutral

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<sup>444</sup> For example, in America, the civil disobedient has successfully argued necessity in some cases of civil disobedience even though most of them are rejected. The successful list includes *Colorado v. Bock*, *Illinois v. Fish*, *Illinois v. Jarka* and *Vermont v. Keller*. These cases are discussed in detail in Ann F. Ginger & Frank Cialone (ed.), *Human Rights and Peace Law Docket: 1945-1993*, online: <<http://sunsite.berkeley.edu/meiklejohn/meik-peacelaw/meik-peacelaw-16.html>>, last accessed on January 20, 2010.

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dispute-resolution institution. On the contrary, the necessity defense is far more dangerous to the image of the court because it requires the court to compare the importance of different political interests. For example, in the anti-Vietnam War Movements in the United States in the 1970s, if the necessity defense had been widely applied to anti-war civil disobedience cases, the courts would have to consider and compare the importance of the war to the United States and the harm which could be avoided by the prevention of the war, whereas the civil disobedience defense I proposed would require only that the courts consider whether the protest actions are consistent with the standards of civil disobedience, i.e. nonviolence, willingness to submit to punishment etc.<sup>445</sup>

Third, the civil disobedience defense I proposed would ensure a more just treatment of the civil disobedient than the good motive defense and the mistake of law defense. Civil disobedience is committed out of a good motive and sometimes there is mistake of law, but these are not the only reasons why civil disobedience should be tolerated. As discussed in the third chapter, the

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<sup>445</sup> A potential criticism which may be leveled against me here is that my suggestion is against the interests of the civil disobedient because what civil disobedients are looking for is precisely to politicize the courts and to draw attention to their causes. In my opinion, the challenge can be answered from two perspectives. First, I only mean here that the court should refrain from making judgments on the political causes of civil disobedience, which does not mean that these political causes cannot be aired in the court. Second, banning the court from excessively discussing political causes may be not in the interests of the civil disobedient, but it may be rightly beneficial to the whole society. At least in the present stage of the society, we still need a neutrally dispute-resolution institution such as the court.

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main reason is its peaceful and benign nature; justified civil disobedience is a highly self-constrained action with little or no harm to the society. Thus, this benign nature of civil disobedience must be considered by the court and reflected in the punishment; otherwise, it would be unfair to practitioners. However, neither the good motive defense nor the mistake of law defense reflects this important characteristic of civil disobedience. In contrast, the defense I suggested requires a more comprehensive evaluation of the characteristics of civil disobedience and, therefore, a just treatment of its practitioners.

Certainly, the defense suggested by me is not without potential criticisms; many opposing arguments may be leveled against it. Therefore, in the latter part of this chapter, I will respond to these arguments. The last point I would like to highlight before moving to the next topic is that the civil disobedience defense I proposed here is not in conflict with the necessity defense and any other defense available in the criminal law. If the practitioners of civil disobedience find these defenses are useful, they should still be allowed to raise it in the court.

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## **B. Alternative Means of Protecting Civil Disobedience in Not-So-Liberal States**

In the above section, I suggested the establishment of the civil disobedience defense as the preferred way to solve the predicament of the civil disobedient. But, the suggestion is based on the assumption that the courts are strong enough to shoulder such a task. However, the assumption is not always right. In some illiberal and partially-liberal states, the courts may be only a subsidiary to the executive branch or even a subsidiary to an individual ruler. Neither the independent nature of the judicial branch nor the integrity of the judges is assured. Under such circumstances, obviously, other ways must be designed to protect the civil disobedient from excessive punishment. Certainly, the fundamental solution is to build a more liberal society, but it does not mean that nothing can be done before the realization of such a society. What I am going to suggest in the following paragraphs is that when the courts are not able to provide effective protection to the civil disobedient, the constitution and the legislature may have a role to play.

### **a. Constitutional Protection of Civil Disobedience**

A useful choice to protect civil disobedience in partially-liberal states is to stipulate it in the constitution. The constitution in these states may fail to be

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enforced fully, but at least it signifies supremacy. If civil disobedience can find a way into it, the justification of civil disobedience will become clearer and the protection of civil disobedience will become much easier.

Civil disobedience is protected by the constitution is not an original idea of the thesis. As mentioned in the previous chapter, many scholars have argued that certain basic human rights such as right of participation, freedom of speech and rights of protest could provide a justification for civil disobedience.<sup>446</sup> But an obvious defect of these arguments is that the existing interpretation of these constitutional rights can provide only a partial protection to civil disobedience. Not all civil disobedience actions are symbolic speech which is aimed merely to communicate information and, consequently, protected by the freedom of speech. Similarly, not all disobedience actions could fall exactly in the shelter of the right of participation. Therefore, in order to offer a more forceful and more comprehensive safeguard to civil disobedience, it is necessary directly to stipulate it in the constitution. The Basic Law for Federal Republic of Germany has an article which says that German citizens have the right to resist any person seeking to abolish the constitution when other remedies are not available.<sup>447</sup> This article could be easily interpreted to protect civil disobedience. I propose that constitutions of the illiberal and

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<sup>446</sup> For example, Peter Meijes Tiersma insists that civil disobedience is protected by the freedom of speech. Please see Peter Meijes Tiersma, "Nonverbal Communication and the Freedom of Speech", (1993) 3 *Wisconsin Law Review* 1525, at 1525-89.

<sup>447</sup> Basic Law for the Federal Republic of Germany, Article 20(4).

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partially-liberal states should model what Germans have done. Even a state as liberal as Germany has worries about the subsistence of its constitution and determine to protect the constitution by arming the people with the right of resistance, those states less liberal than Germany have more reason to do so. Bringing civil disobedience into the constitution is not only helpful for the disobedient, but also beneficial for the subsistence of the constitution because civil disobedience is an effective way to defend democracy when all other legal means prove futile. Fortunately, some new states have realized this and began to do so. For example, the Constitution of newly independent East Timor has such an article which reads “every citizen has the right to disobey and to resist illegal orders or orders that affect their fundamental rights, freedoms and guarantees.”<sup>448</sup>

#### **b. Legislative Role in Protecting Civil Disobedience**

Another institution which may be dependent on to protect civil disobedience is the legislature. The legislature is able to make laws to pardon civil disobedience and, in some countries, the legislature may also be empowered to give amnesty to some kind of criminals. When the courts are not reliable and when it is hopeless to amend the constitution, the legislature may become critical in protecting civil disobedience. The problem of amnesty is much

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<sup>448</sup> Constitution of East Timor, Section 28, Article 1.

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complex in different countries, so I will only discuss the possibility of defending civil disobedience through legislation.

The legislature could make laws in many aspects to show tolerance to civil disobedience, but the most important is to mitigate the punishment for civil disobedience practitioners. Therefore, it is equally important for the legislature to incorporate the defense of civil disobedience which I proposed above into the criminal code. For the civil law jurisdictions and for those states which are only partially liberal (this often means the lack of a competent and independent court system), it is essential.

I suggest having such a stipulation in the criminal code:

The violation of criminal standards of conduct is justified if the violation is an act of civil disobedience and conforms to the following criteria:

- (a) committed after all other legal means have been fairly tried,
- (b) the violation is public, predominantly nonviolent and the actor is with a general willingness to accept punishment,
- (c) the ends and the means are in proportionality



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### **C. Other Means for Expressing Tolerance**

In the previous sections, I discussed in detail the possible ways to protect civil disobedience from the criminal punishment. The courts and the legislature all have a role to play. Generally, the courts are the most appropriate institution to dispense justice for the civil disobedient, but when the courts are not strong enough, the intervention of the legislature is essential. But it deserves to point here that our tolerance of civil disobedience can be expressed in much more ways than merely help them to avoid the criminal punishment. The executive branch and even ordinary citizens all have a role to play.

For example, tolerance may be expressed in the process of police enforcement. One of the main tasks of the police today is to preserve the basic orderliness of the community, but this obligation does not mean that the police must suppress any behavior which breaks habitual routine because such action would place police power in support of the status quo regardless of its imperfection. The objective of the police power should be “to limit excesses in behavior which would destroy the social life of the community but not to block change of all kinds.”<sup>449</sup> Therefore, as argued by J.L. LeGrande, the police philosophy in the case of civil disobedience should show an understanding of the social conflict

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<sup>449</sup> Elmer H. Johnson, “A Sociological Interpretation of Police Reaction and Responsibility to Civil Disobedience”, (1967) 58 *The Journal of Criminal Law, Criminology and Police Science* 405, at 407.

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and strive to balance the interests involved in the protest. On the one hand, it should be concerned primarily with the maintenance of the civil order and public safety, but it should also try to ensure that the maximum freedom of expression of the individual is permitted.<sup>450</sup>

Police officers today often have broad discretionary powers in deciding whether to make arrests to end a protest and enforce the law. Therefore, the police have enough discretion to express their tolerance of civil disobedience.<sup>451</sup> For instance, in many instances of civil disobedience, the police officer may choose to ignore the offense and warn the disobedient verbally rather than physically arresting the disobedient. When a road is blocked by disobedients, the police may choose to channel the traffic flow to another road instead of breaking up the gathering to clear the road. Moreover, taking a tolerant attitude, as proved by LeGrande's study in which he compares the tolerant and strict attitude towards civil disobedience by the police, is also in the interest of police. In many circumstances, a strict attitude could ignite the anger of the protestors which would frustrate the goal of maintaining public order and endanger the image of the police in the

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<sup>450</sup> *Supra* note 353, at 400.

<sup>451</sup> Opponents may argue here that police is the agent of law and he should refrain from using discretion of his own to tolerate illegal actions. However, this point of view requires that one subscribe to a policy of complete enforcement of all criminal law at all times against all violators regardless of the circumstances, which is obviously impossible of achievement.

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community.<sup>452</sup>

Another way of being tolerant of civil disobedience is by allowing lawyers to counsel the civil disobedient. Nowadays, it is generally prohibited by laws, ordinances or rules of professional conduct for the lawyers to counsel the civil disobedient.<sup>453</sup> The rationale behind the prohibition is to view the civil disobedience as an anti-social or criminal action which is against the rule of law. But, as I have said before, the civil disobedient is not an anarchist. At the core of his concern is a respect for the law and his effort is directed not at the abolition of law, but at its reform. The courageous and self-sacrificing character of the civil disobedient should be respected to some degree by a democratic society. Changing the rules to allow lawyers to provide advice to the civil disobedient in advance is beneficial to both the civil disobedient and to the society as a whole. Disobedients, in dialogue with their counselors, could test the strength of their ideas and the wisdom of their tactics:

“They will be informed by the law before, not after, actions are taken; the results of counsel might then be acts of civil disobedience that are more accurately targeted against offending laws and policies, or acts that would subject the disobedient to the fewest adverse consequences necessary to effectuate his purposes, or the adoption of a tactic more

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<sup>452</sup> *Supra* note 353, at 401-4.

<sup>453</sup> For Example, The Model Code of Professional Responsibility of America holds that “lawyers shall not... counsel or assist his client in conduct that the lawyer knows to be illegal...” (*Disciplinary Rule 7-102(A)(7)*).

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effective than civil disobedience.”<sup>454</sup>

The society too would gain. Lawyers’ professional advice would help the civil disobedient better understand and balance the interests involved. After counseling, the civil disobedients could become calmer and their actions may become more restricted and accurately targeted, with less disruption.

There are also many other ways to show tolerance to civil disobedience in a democratic society both in the law itself and through the enforcement of law. It is impossible to enumerate all the ways in which a government could show tolerance to civil disobedience. It suffices to observe that tolerance of civil disobedience could be expressed in various ways. One of the responsibilities of a democratic society is to find more ways to tolerate dissent, including civil disobedience. After all, the tolerance of dissent is the badge of a democracy.

## **D. Potential Criticisms Considered**

In the above, I proposed to reduce or eliminate the punishment for civil disobedience, but not everyone could agree with that proposal. The proposal will unavoidably be met with disagreement. I have already alluded to some of the pertinent objections. Therefore, in this section I will focus on two of these major complaints and respond to them respectively.

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<sup>454</sup> Charles R. DiSalvo, “The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civilly Disobedient”, (1982) 17 *Ga. L. Rev.* 109, at 150.

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### **a. No Punishment, No Civil Disobedience?**

One main argument which may be leveled against my suggestion is that if the punishment for the civil disobedient is eliminated, then there will be no civil disobedience, for breach of law is an essential character of civil disobedience. Since all civil disobedience involves illegal activity, such acts could not receive legal protection; otherwise, they could be lawfully eliminated.<sup>455</sup>

At the first blush, this is a very powerful argument because it is true, as it claims, that civil disobedience must involve some form of illegality. Illegality is the most important character which differentiates civil disobedience from lawful protests.<sup>456</sup> In this sense, if there is no illegality involved, then there will be no civil disobedience committed. But is it a sufficient argument to oppose the reduction or elimination of punishment for civil disobedience? The answer is definitely not.

The most important flaw in the argument is that it confuses punishment with illegality. Illegality and punishment, though closely connected, are two

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<sup>455</sup> *Supra* note 110, at 386-403.

<sup>456</sup> The obvious difference between legal protest and civil disobedience is that the former lies within the bounds of the law while the latter does not. Please see “Civil Disobedience”, in *Stanford Encyclopedia of Philosophy*, available online at <http://plato.stanford.edu/entries/civil-disobedience/>, last accessed on January 3, 2009.

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different phenomena. Illegality is generally followed by some kind of punishment, but not always, that is to say, illegality is a necessary cause of legal punishment, but not a sufficient one. More than often, illegal actions go unpunished, which may be because the illegal action is negligible or because the defendant is too young, too old, and so on. That no punishment is given out does not necessarily mean that no illegality is involved. Thus, one of the faults of the argument is that it fails to acknowledge the difference between illegality and punishment. The essence of civil disobedience is illegality rather than punishment; hence the pure abolition of punishment does not necessarily mean that the unpunished action would lose the character of civil disobedience. It could retain its illegal character superficially and, at the same time, go unpunished. As mentioned above, the reason that we decide not to punish some cases of civil disobedience is due to their benign nature rather than their justness and lawfulness. The logic is that these actions, while formally against the existing law, are trivial and with the potential to benefit the whole society in the future; therefore, it is better to let them go unpunished or reduce the punishment for them.

Moreover, it is important to reaffirm here that the suggestion I gave above does not mean that all civil disobedience actions would go unpunished. After the suggestion is realized in practice, some acts of civil disobedience would still be punished, or only have the penalty reduced, according to their

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consistency with the standards of principled civil disobedience. Thus, due to the uncertainty, it is not easy for the civil disobedients to know accurately in advance whether their actions would be punished or not. They have to defend themselves in the court first and only after the trial would they know the success or failure of their defense. This situation is totally different from lawful protests such as parades and demonstrations whose participants are fully aware that they could not be arrested or penalized. Therefore, it is safe to conclude that the difference between civil disobedience and lawful protests is not unduly blurred by recognizing civil disobedience as a factor to be considered in mitigation of punishment.

All in all, punishment is not an essential part of civil disobedience, illegality is. It is difficult to imagine civil disobedience without illegality, but it is reasonable to say that there can be civil disobedience without punishment. The exemption of punishment will not automatically forfeit the status of civil disobedience.

#### **b. The Efficiency of the Civil Disobedience**

Another main argument against the reduction or elimination of punishment for civil disobedience is that the defense would negatively influence the

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persuasive power and efficiency of the civil disobedience. It is believed that punishment would help civil disobedients to enhance the publicity of their claim and to gain the support and sympathy of the public.<sup>457</sup> However, the proposal here would allow some civil disobedients to avoid punishment and, consequently, reduce the effectiveness of civil disobedience. According to Brent Wride, in an important sense the exemption of punishment for the civil disobedient “not only conflicts with a commitment to order and majority rule, but also robs the protest itself of some of its demonstrative power.”<sup>458</sup>

Willing acceptance of punishment indeed can help the civil disobedient to gain sympathy by showing his sincerity and, moreover, it can be unimaginably effective sometimes, as what happened when Gandhi, King and Mandela were jailed. But it is wrong to conclude from this that accepting punishment is always the most effective way, at any time and under any circumstances. For example, the civil disobedient may decide that he should stay outside to publish criticisms of the government and to amass pressure on the state rather than accept the punishment passively and go to jail. For this reason, he avails

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<sup>457</sup> As said by McWilliams, punishment is often essential to the disobedient himself: it provides a dramatization of his concerns, an instance of his sincerity, and a challenge to complacency which may be essential if he is to command the attention of those good citizens who may be moved by the spectacle of courage taking its own path. Please see Wilson Carey McWilliams, “Civil Disobedience and Contemporary Constitutionalism: The American Case”, (1969) 1 *Comparative Politics* 211, at 224.

<sup>458</sup> *Supra* note 429, at 1095. Brent’s comments here are remarked on the necessity defense, but it is likely applicable to any other defense which is aimed to avoid punishment for civil disobedience.



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himself of the defense and remains outside. Here, it would be highly difficult to tell which is more effective in arousing the public and bringing the changes – staying outside or going to jail. The answer could be either. Thus, it is wrong to claim that avoidance of punishment will always undermine the persuasiveness and effectiveness of the civil disobedience.

Also, the availability of protection measures is meant only to provide the civil disobedient with an option of whether or not to accept punishment willingly.<sup>459</sup> According to his own judgment, he could choose to accept the punishment or try to avail himself of the protection measures. If he thinks accepting the punishment is more helpful to his struggle, he could choose not to seek the exemption of the punishment. On the contrary, if he thinks he would be better off staying outside, he could avail himself of proper measures to avoid to be jailed. It is reasonable to provide the civil disobedient with such a choice because the civil disobedient himself is in the best position to decide whether accepting punishment is more effective than seeking mitigation. Thus, the chances are small that the provision of protection measures for the civil disobedient would greatly affect the persuasiveness of the civil disobedience; rather, it would enhance the effectiveness of the civil disobedience by giving its practitioners an alternative way of avoiding punishment.

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<sup>459</sup> *Supra* note 9, at 1118-9.

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## **E. The Protection of Civil Disobedience in Situations of Emergency**

After reading the above part about the defense for civil disobedience, one puzzle may arise among the reader. What will happen to the civil disobedients when a state of emergency is declared? Will their right for no or less punishment be set aside? Or what they have is a non-derogable right which cannot be deprived or suspended even in situations of emergency?

States have a duty to protect those living in their jurisdictions from being injured by civil war, terrorist attacks, foreign invasions, natural disasters and any other enormous dangers. Often this job is facilitated by the declaration of an emergency. The broadly-recognized international legal norms also allow the states to do so when necessary. For example, the International Covenant on Civil and Political Rights<sup>460</sup>, the European Convention on Human Rights<sup>461</sup> and the American Convention on Human Rights<sup>462</sup> all have clauses which allow state parties to take measures derogating from their obligations under the instruments in times of public emergencies. But the state of emergency opens the door to possible abuses of human rights at the same time. In practice, many countries declared states of emergency too arbitrarily, only to maintain

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<sup>460</sup> Article 4.

<sup>461</sup> Article 15.

<sup>462</sup> Article 27.

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power and to silence opposition rather than to protect civil liberties. Thus, the international covenants all put strict limits on the use of emergency powers at the same time when they authorize it. In the case of ICCPR and the ECHR, state of emergency should be used only when the life of the nation is threatened and, in the case of the ACHR, only when the independence or security of the state is endangered. In addition, the international covenants recognize that even after a state of emergency is publicly proclaimed, there should still be some fundamental rights which cannot be derogated.<sup>463</sup>

Therefore, the protection enjoyed by the civil disobedients is not necessarily to be deprived under circumstances of emergency. We must further examine whether it is a derogable or a non-derogable right and, if derogable, under what circumstances. In my opinion, the protection for civil disobedience is not non-derogable at all times. As said in the justification of civil disobedience, acts of civil disobedience are not likely to create social chaos and threaten the life of the nation, but the detrimental effect of civil disobedience on the existence of the nation can be aggravated by the prevailing circumstances. Mass civil disobedience actions could, for example, erode the safety of a democratic state when it coincides with an external invasion from an authoritarian regime. Under such circumstances, it is wise to allow some

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<sup>463</sup> For example, the International Covenant on Civil and Political Rights stipulates that the rights under articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 are non-derogable even in situations of emergency.

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restrictions on the protecting measures of civil disobedience. However, this does not mean that the protection for civil disobedience must be sacrificed any time an emergency is declared. There must be some limits on the use of emergency powers in the case of civil disobedience. After all, civil disobedience is an instrument which is devised to tackle problems even in times of strife.

The first limit on the use of emergency in the case of civil disobedience is that the state of emergency must be duly proclaimed and to the extent strictly required by the exigencies. The declaration of emergency should be carried out with great care. A country's legislature should be entitled to review and oversee any such declaration and the courts should be able to rule on its validity. Any unduly proclaimed state of emergency must be resisted and, as a result, should be declared void. Our toleration to civil disobedience, under such a pseudo-state of emergency should not be discounted anyway.

Secondly, the toleration of civil disobedience should not be curbed in all kinds of emergencies. Some causes which lead to the state of emergency being declared are far from a sufficient reason to justify the curb on civil disobedience. The state of emergency declared after the Fukushima nuclear plant crisis in Japan in March of 2011, for example, could not justify a change of our attitudes towards civil disobedience. In my view, the curb on civil

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disobedience is justifiable only when the democratic system is threatened. The means should not be put before the ends. The aim of the civil disobedience action is to improve democracy. Therefore, when civil disobedience threatens the right democracy which it intends to protect and improve, the restrictions on it are justified. But for those states which are still unjust and undemocratic, any curb on civil disobedience is hardly to be justified even when the safety of the state is threatened because the toppling of the old government may mean the emerging of a new democratic society.

In conclusion, the state of emergency does not necessarily justify the curb on civil disobedience. Only in those emergencies when democracy is threatened, would it be justified to limit civil disobedience. But for those authoritarian states, the curb on civil disobedience is rarely justified even through the invocation of emergency powers.

#### **IV. Summary**

Democracy has a special responsibility to tolerate civil disobedience compared with the authoritarian regimes. Civil disobedience is consistent with the spirit of democracy and poses less danger to the democratic state than to the totalitarian regime. In the authoritarian regime, it can topple the government or

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make the government more difficult to control the society by igniting the anger which otherwise is only latent among the people; in a democratic society it can make the society more consistent with its ideals.

Civil disobedients are not ordinary criminals; any democratic state, if it is genuine rather than pseudo-democracy, is obligated to treat the civil disobedient leniently. There are various means of showing respect to the civil disobedient, but the most important way is to alleviate their punishment. Existing criminal law principles are unable to address this problem, so the establishment of a special defense for mitigating punishment of civil disobedience is necessary. Not only could it help to soften the punishment for civil disobedience, but it could also bring less harm to the role of the court as a neutral arbitrator of disputes.

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## **Chapter VII: Conclusion**

### **I. Main Findings and Suggestions**

In this thesis, I have argued for a definition of civil disobedience which is, I think, more useful and proper than the definitions provided by some scholars. I have not insisted on pure nonviolence and unconditional subservience to the authority, rather I welcomed the idea of predominantly nonviolence (discussed in Chapter II) and democratic coercion (discussed in Chapter IV). The mere existence of sporadic violence and the mere use of coercive measures should not forfeit the status of civil disobedience. The advantages of this broad definition are obvious: on the one hand, it can cover almost all typical cases of civil disobedience took place in history and keep the concept relevant to what is going on today in practice, and, on the other hand, it can keep civil disobedience as an independent phenomenon distinguishable from other kinds of protest.

Additionally, in this thesis, I have argued that civil disobedience is justified in the modern western democracy. Civil disobedience tends to be viewed as threatening, subversive and destructive of democracy and the reaction of public authorities has been mainly repressive. But, I suggested that citizens

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who are firmly committed to the democratic system in its present form have to realize that as it is currently practiced democracy is seriously malfunctioning and those citizens who are troubled by the defects of the existing democracy might find civil disobedience a viable way of eliminating the gaps between ideals and the practices, especially when conventional channels are unavailable or unlikely to bring about change.

I have also in this thesis attempted to provide evidence of the usefulness of civil disobedience to the democratic system. I argued that civil disobedience plays a very important role in both the establishment and development of the existing liberal democracies. Many liberties we take for granted today were won by civil disobedience or with the assistance of civil disobedience. In addition, by functioning as a safety-valve to prevent complaints in the society from erupting into large-scale violence, civil disobedience might be a stabilizing device. And, by taking a limited view of both the government and law, civil disobedience can help people to remain vigilant in relation to the authorities and their actions, possibly with the effect of preventing the democracy from degenerating into totalitarianism.

Another key point I argue in the thesis is that the civil disobedients are good citizens which should be cherished by democracies. In the face of grave injustices and serious erosion of the values of democracy by laws, citizens



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have two choices. One choice is to follow everything commanded by law; the other is to defend justice and democracy even by engaging in civil disobedience. Compared to the latter, the former poses a real danger for democracy. If every citizen is prepared to acquiesce to everything commanded by law, it is difficult to be optimistic about the survival of liberal-democratic values because the subservience of the citizen would constitute an invitation to monarchy and dictatorship.

A democratic system has a special obligation to tolerate civil disobedience. Civil disobedience is detrimental to an authoritarian regime, but it is beneficial to a democracy. Moreover, democracy is said to be a system committed to openness and freedom. Suppression of civil disobedience, which is a highly self-restrained protest, in defense of the system subverts the values for which it was established. In addition, the tolerance of some acts of civil disobedience in a democracy is unlikely to inspire further violence, as often happens in an authoritarian regime where the great anger of the suppressed may be ignited by even the slightest tolerance of civil disobedience.

Finally, I proposed that the best way to soften the predicament of the civil disobedients is to mitigate their punishment by establishing a special defense for civil disobedience. When a claim of civil disobedience is raised in the court, the court should decide whether the conduct amounted to civil

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disobedience, and if the court finds that the prosecuted action fully satisfy the standards of civil disobedience, it can decide to moderate or suspend punishment of the defendant. Suggestions such as the mistake of law defense and the necessity defense all have internal defects which cannot be overcome easily. On the contrary, my suggestion can be conveniently applied to all cases of civil disobedience while at the same time retaining civil disobedience as a viable means of protest in a democracy.

## **II. Final Thoughts and Proposed Areas for Further Research**

My thesis is an attempt to reconcile civil disobedience and democracy, and, to this end, I have discussed the main questions about the reconciliation of the two, such as the justification of civil disobedience in a democracy and the mitigation of punishment for civil disobedients. However, there are still questions which have been untouched or mentioned only briefly, so I would welcome further research in the following areas.

I proposed in the third chapter that civil disobedience is justified on the basis of the imperfection and tentative nature of the existing democracy, but what is left mostly unanswered in the chapter and the rest of the thesis are the precise circumstances in which civil disobedience is justified. In other words, under

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what circumstances is civil disobedience justified or what justifies civil disobedience? Some philosophers have lightly touched upon the question, for example, Rawls proposes that civil disobedience is not justified unless in the case of substantial and clear injustice<sup>464</sup> and Habermas also contends that civil disobedience is justified when law and policy are produced in an insufficiently deliberative manner.<sup>465</sup> But this is far from enough. If we want to make the theory more meaningful in practice, we must provide a clear account of the various circumstances which justify civil disobedience.

Another area which needs further clarification is in what degree the punishments for civil disobedience should be mitigated. I suggested in the thesis that the civil disobedient should be treated with due respects in the liberal democracy and the best way to do it is to mitigate their punishments by the establishment of a special defense. But I do not expound on what type of civil disobedients under what circumstances should go completely unpunished and what type of civil disobedients under what circumstances should only get the punishment reduced. This is partly because it is as much a pragmatic question as a theoretical question; different states, different cultures and different jurisdictions in different stages might have different answers to it. For example, in a state which is often endangered by social disorder, the standard

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<sup>464</sup> *Supra* note 85, at 335-343.

<sup>465</sup> Jürgen Habermas “Civil Disobedience: Litmus Test for the Democratic Constitutional State” (1985) 30 *Berkeley Journal of Sociology* at 95–116.

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for complete elimination of punishment for civil disobedience may be understandably more strict than in those states which have no difficulty at all to maintain a good social order. Therefore, further efforts are still needed in order to apply the strategy to specific countries.

Another larger question that comes out of my thesis is the place of civil disobedience in quasi-democracies and other political forms of the state. I have shown in the thesis that civil disobedience plays an important role in democracy and democracy has a special responsibility to show tolerance to the civil disobedient, but it is still in question whether it is wise at all to resort to civil disobedience to protest an authoritarian regime and whether totalitarian regimes ought formally to tolerate the disobedient in its legal regime.

These are all important and challenging questions. I hope, however, that this thesis and its attempt to reconcile civil disobedience and democracy provide a useful springboard from which they may be approached.

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## Bibliography

### Books

Allan, T.R.S. (1993), *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press).

Allan, T.R.S. (2001), *Constitutional Justice: A Liberal Theory of the Rule of Law* (New York: Oxford University Press).

Ashworth, Andrew and Von Hirsch, Andrew (eds.) (1998), *Principled Sentencing* (Oxford: Hart Publishing).

Barash, David P. (ed.) (2000), *Approaches to Peace: A Reader in Peace Studies* (New York: Oxford University Press).

Bay, Christian and Walker, Charles C. (eds.) (1975), *Civil Disobedience: Theory and Practice* (Montréal: Black Rose Books).

Bedau, Hugo A. (ed.) (1991), *Civil Disobedience in Focus* (London: Routledge).

Cohen, Carl (1971), *Civil Disobedience: Conscience, Tactics, and the Law* (New York, Columbia University Press).

Coleman, Jules and Shapiro, Scott (eds.) (2002), in *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press).

Dagger, Richard (1997), *Civic Virtues* (New York: Oxford University Press).

Duff, Antony and Garland, David (eds.) (1994), *A Reader on Punishment* (Oxford: Oxford University Press).

Duncan, R. (ed.) (1971), *Selected Writings of Mahatma Gandhi* (London: Fontana).

Dworkin, Ronald (1977), *Taking Rights Seriously* (London: Duckworth).

Dworkin, Ronald (1985), *A Matter of Principle*, (Cambridge: Harvard University Press).

Dworkin, Ronald (1986), *Law's Empire* (Oxford: Hart Publishing).

---

Dyzenhaus, David (ed.) (2007), *Law and Morality: Readings in Legal Philosophy*, third Edition (Buffalo: University of Toronto Press).

Edmundson, William A. (ed.) (1999), *The Duty to Obey the Law: Selected Philosophical Readings* (Lanham, Md. : Rowman & Littlefield Publishers).

Feinberg, Joel (1992), *Freedom and Fulfillment* (New Jersey: Princeton University Press).

Fischer, Louis (ed.) (2002), *The Essential Gandhi: An Anthology of His Writings on His Life, Work, and Ideas* (New York: Vintage).

Friedman, Leon (1971), *The Wise Minority: An Argument for Draft Resistance and Civil Disobedience* (New York: Dial Press).

Gandhi, M. K. (1924), *Young India 1919-1922* (Madras: The Huxley Press).

Gandhi, M. K. (1940), *An Autobiography or the Story of My Experiments with Truth* (Ahmedabad: Navjivan Publishing House).

Gandhi, M. K. (1961), *Non-Violent Resistance* (New York: Schocken Books).

Gans, Chaim (1992), *Philosophical Anarchism and Political Disobedience* (Cambridge: Cambridge University Press).

Greenawalt, Kent (1987), *Conflicts of Law and Morality* (Oxford: Clarendon Press).

Haksar, Vinit (1986), *Civil Disobedience, Threats, and Offers: Gandhi and Rawls* (Oxford: Oxford University Press).

Haksar, Vinit (2001), *Rights, Communities and Disobedience: Liberalism and Gandhi* (New Delhi: Oxford University Press).

Hingorani, Arnand (ed.) (1998), *Gandhi for 21st Century* (Mumbai: Bharatiya Vidya Bhavan).

Hirst, Paul (1990), *Representative Democracy and Its Limits* (Cambridge: Polity Press).

King, Martin Luther (1964), *Why We Can't Wait* (New York: New American Library).

---

Mandela, Nelson (1994), *Long Walk to Freedom: the Autobiography of Nelson Mandela* (Toronto: Little Brown & Co.).

Mill, John Stuart (1999), *On Liberty* (Peterborough, Ontario: Broadview Press).

Murphy, Jeffrie (ed.) (1971), *Civil Disobedience and Violence* (Belmont, California: Wadsworth).

Perry, Michael (1989), *Morality, Politics, and Law* (New York: Oxford University Press).

Rawls, John (1971), *A Theory of Justice* (Cambridge: Harvard University Press).

Rawls, John (1996), *Political Liberalism*, Second Edition. (New York: Columbia University Press).

Rawls, John (1999), *The Law of Peoples* (Cambridge: Harvard University Press).

Raz, Joseph (1979), *The Authority of Law: Essays on Law and Morality* (Oxford: Clarendon Press).

Raz, Joseph (1994), *Ethics in the Public Domain* (Oxford: Oxford University Press).

Shapiro, Ian (ed.) (1994), *The Rule of Law* (New York: New York University Press).

Singer, Peter (1993), *Practical Ethics* (New York: Cambridge University Press).

Sunstein, Cass (2003), *Why Societies Need Dissent* (Cambridge, Mass: Harvard University Press).

Van den Haag, Ernest (1972), *Political Violence and Civil Disobedience* (New York: Harper & Row).

Walzer, Michael (2004), *Arguing about War* (London: Yale University Press).

Washington, J. M. (ed.) (1991), *Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr* (San Francisco: Harper Collins).

Zashin, Elliot M. (1972), *Civil Disobedience and Democracy* (New York: The Free Press).

Zinn, Howard (1968), *Disobedience and Democracy: Nine Fallacies on Law and Order* (New York: Random House).

---

Zinn, Howard (1997), *Writings on Disobedience and Democracy* (New York: Seven Stories Press).

## Articles

Allan, T. R. S. (1999), 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism', in *Law Quarterly Review*, 115(April):221-244

Bauer, Steven M. and Eckerstrom, Peter J. (1987), 'The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience', in *Stanford Law Review*, 39(5): 1173-1200

Bayley, David H (1962), 'The Pedagogy of Democracy: Coercive Public Protest in India', in *The American Political Science Review*, 56(3): 663-672

Beck, Lewis W. (1971), 'Kant and the Right of Revolution', in *Journal of the History of Ideas*, 32(3): 411-422

Bedau, Hugo A. (1961), 'On Civil Disobedience,' *The Journal of Philosophy*, 58 (21): 653-661.

Bilgrami, Akeel (2002), 'Gandhi's Integrity: The Philosophy Behind the Politics,' *Postcolonial Studies*, 5 (1): 79-93.

Boxill, Bernard R. (1976), 'Self-Respect and Protest', in *Philosophy and Public Affairs*, 6(1): 58-69

Brandt, Richard B. (1983), 'The Concept of a Moral Right and its Function', in *The Journal of Philosophy*, 80(1): 29-45

Brown, A. W. (1917), 'Military Orders as a Defense in Civil Courts', in *Journal of the American Institute of Criminal Law and Criminology*, 8(2): 190-210

Brown, S.M, Jr (1961), 'Civil Disobedience', in *The Journal of Philosophy*, 58(22):669-681

Brownlee, Kimberley (2004), 'Features of a Paradigm Case of Civil Disobedience,' *Res Publica*, 10 (4): 337-351.

Brownlee, Kimberley (2007), 'The Communicative Aspects of Civil Disobedience and Lawful Punishment,' *Criminal Law and Philosophy*, 1 (2): 179-192.



---

Brownlee, Kimberley (2007), 'The communicative aspects of civil disobedience and lawful punishment', in *Criminal Law and Philosophy*, 1:179-192)

Brownlee, Kimberley (2008), 'Penalizing Public Disobedience,' *Ethics*, 118 (July): 711-716.

Buchanan, Allen (2002), 'Political Legitimacy and Democracy', in *Ethics*, 112(4): 689-719

Cavallaro, James L, Jr. (1993), 'The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. School', in *California Law Review*, 81:351-385

Chevigny, Paul G. (1969), 'The Right to Resist an Unlawful Arrest', in *The Yale Law Journal*, 78(7): 1128-1150

Childress, James F. (1972), 'Nonviolent Resistance and Direct Action: A Bibliographical Essay', in *The Journal of Religion*, 52(4): 376-396

Cohen, Carl (1970), 'Defending Civil Disobedience,' *The Monist*, 54 (4): 469-487.

Cohen, Marshall (1969), 'Civil Disobedience in a Constitutional Democracy', in *The Massachusetts Review*, 10(2): 211-226

Cohen, Marshall (1972), 'Liberalism and Disobedience', in *Philosophy and Public Affairs*, 1(3): 283-314

Conway, Janet (2003), 'Civil Resistance and the "Diversity of Tactics" in the Anti-Globalization Movement: Problems of Violence, Silence, and Solidarity in Activist Politics', in *Osgoode Hall Law Review*, 41(Summer/Fall): 505-530

Cooper, Davina (1996), 'Institutional Illegality and Disobedience: Local Government Narratives', in *Oxford Journal of Legal Studies*, 16(2):255-274

Corlett, J. Angelo (1994), 'The Problem of Collective Moral Rights', in *Canadian Journal of Law and Jurisprudence*, 7: 237-259

Cox, Archibald (1966), 'Direct Action, Civil Disobedience, and the Constitution', *Proceedings of the Massachusetts Historical Society*, 78:105-119

Crenson, M.A. and Ginsberg, B (2003), 'From Popular to Personal Democracy', in *National Civic Review*, 92(2): 173-189

---

Dean, H.W. (1955), 'Democracy, Loyalty, Disobedience: A Query', in *The Western Political Quarterly*, 8(4):601-611

DeForrest, Mark Edward (1998), 'Civil Disobedience: Its Nature and Role in the American Legal Landscape', in *Gonzaga Law Review*, 33: 653-668

DiSalvo, Charles R. (1982), 'The Fracture of Good Order: An Argument for Allowing Lawyers to Counsel the Civil Disobedient', in *Georgia Law Review*, 17(Fall):109-149

Enoch, David (2002), 'Some Arguments against Conscientious Objection and Civil Disobedience Refuted,' *Israel Law Review*, 36(Fall): 227-253.

Enoch, David (2002), 'Some Arguments against Conscientious Objection and Civil Disobedience Refuted', in *Israel Law Review*, 36(Fall):227-253

Esmond, Jackie (2003), 'Bail, Global Justice, and the Limits of Dissent', in *Osgoode Hall Law Journal*, 41(summer/Fall): 323-361

Euben, J. Peter (1978), 'Philosophy and Politics in Plato's Crito', in *Political Theory*, 6 (2): 149-172

Farrell, Daniel M. (1977), 'Paying the Penalty: Justifiable Civil Disobedience and the Problem of Punishment,' *Philosophy and Public Affairs*, 6 (2): 165-184.

Feinberg, Joel (1979), 'Civil Disobedience in the Modern World,' *Humanities in Society*, 2 (1): 37-60.

Frazier, Thomas R (1968), 'An Analysis of Nonviolent Coercion as Used by the Sit-In Movement', in *Phylon*, 29(1):27-40

Freeman, Harrop A (1958), 'A Remonstrance for Conscience', in *University of Pennsylvania Law Review*, 106: 806-830

Fudge, Judy (2003), 'Civil Disobedience, Civil Liberties, and Civil Resistance: Law's Role and Limits', in *Osgoode Hall Law Journal*, 41: 165-174

Fuld, Stanley H, 'The Voices of Dissent', in *Columbia Law Review*, 62(6): 923-929

Fung, Archon (2005), 'Deliberation before the Revolution: Toward an Ethics of Deliberative Democracy in an Unjust World', in *Political Theory*, 33(2): 397-419

---

Galston, William A. (2003), 'Expressive Liberty and Constitutional Democracy', in *American journal of Jurisprudence*, 48: 149-177

Gans, Chaim (2002), 'Right and Left: Ideological Disobedience in Israel', in *Israel law Review*, 36(19): 1-29

Goodin, Robert (2005), 'Towards an International Rule of Law: Distinguishing International Law-Breakers from Would-Be Law-Makers,' *Journal of Ethics*, 9 (1-2): 225-246.

Grady, Robert C. (1976), 'Obligation, Consent, and Locke's Right to Revolution: "Who Is to Judge?'," in *Canadian Journal of Political Science*, 9(2): 277-292

Green, Leslie (2003), 'Civil Disobedience and Academic Freedom,' *Osgoode Hall Law Journal*, 41 (2-3): 381-405.

Greenawalt, Kent (1970), 'A Contextual Approach to Disobedience', in *Columbia Law Review*, 70(1):48-80

Greenawalt, Kent (1985), 'The Natural Duty to Obey the Law', in *Michigan Law Review*, 84(1): 1-62

Griffin, L.C. (), Conference: Fundamentalism from the Perspective of Liberal Tolerance', in *Cardozo Law Review*, 24: 1631-1644

Grundmann, Reiner and Mantziaris, Christos (1991), 'Fundamentalist Intolerance or Civil Disobedience? Strange Loops in Liberal Theory', in *Political Theory*, 19(4): 572-605

Haksar, Vinit (1976), 'Rawls and Gandhi on Civil Disobedience,' *Inquiry*, 19: 151-192.

Haksar, Vinit (2003), 'The Right to Civil Disobedience', in *Osgoode Hall Law Journal*, 41(Summer/Fall): 407-426

Hall, Matthew R. (2007), 'Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law', in *Cardozo Law Review*, 28: 2083-2131

Hall, Robert T (1971), 'Legal Toleration of Civil Disobedience', in *Ethics*, 81(2): 128-142

Hammer, Leonard (2002), 'Selective Conscientious Objection and International Human Rights,' *Israel Law Review*, 36(Fall): 145-169.

---

Harel, Alon (2002), 'Unconscionable Objection to Conscientious Objection: Notes on Sagi and Shapira,' *Israel Law Review*, 36(Fall): 219-226.

Hayes, Donald M (1975), 'Book Review: Civil Disobedience and Democracy', In *Contemporary Sociology*, 4(3): 276-277

Herr, William A (1974), 'Thoreau: A Civil Disobedient?' in *Ethics*, 85(1): 87-91

Herr, William A (1975), 'A More Perfect State: Thoreau's Concept of Civil Government', in *The Massachusetts Review*, 16(3): 470-487

Honore, Tony (1988), 'The Right to Rebel', in *Oxford Journal of Legal Studies*, 8(1): 34-54

Jacobs, Leslie Gielow (1998), 'Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest', in *Ohio State Law Review Journal*, 59: 185-258

Jenco, Leigh Kathryn (2003), 'Thoreau's Critique of Democracy', in *The Review of Politics*, 65(3): 355-381

Johns, Peier (2004), 'Introduction: Law and Disobedience', in *Res Publica*, 10:319-336

Johnson, Curtis (1990), 'Socrates on Obedience and Justice', in *The Western Political Quarterly*, 43(4):719-740

Johnson, Elmer H (1967), 'A Sociological Interpretation of Police Reaction and Responsibility to Civil Disobedience' in *The Journal of Criminal Law, Criminology, and Police Science*, 58(3): 405-409

Johnson, Frank M (1969), 'Civil Disobedience and the Law', in *Tulane Law Review*, 44(1): 1-12

Karatnycky, Adrian and Ackerman, Peter (2005), 'How Freedom is Won: From Civic Resistance to Durable Democracy', in *The International Journal of Not for Profit Law*, 7(3).

Kasher, Asa (2002), 'Refusals: Some Neglected Aspects,' *Israel Law Review*, 36: 171-180.

Kasher, Asa (2002), 'Special Issue: Refusals to Serve Political Dissent in the Israel

---

Defense Forces: Comment: Refusals: Neglected Aspects', in *Israel Law Review*, 36(Fall): 171-180

Katz, Babara (1985), 'Civil Disobedience and the First Amendment', in *UCLA Law Review*, 32: 904-919

Kellner, M. Marc (1975), 'Democracy and Civil Disobedience', in *The Journal of Politics*, 37(4): 899-911

King, Martin Luther Jr (1991), 'Letter from Birmingham Jail,' in *Civil Disobedience in Focus*, Hugo A. Bedau (ed.), London: Routledge.

Klitgaard, R. E. (1971), 'Gandhi's Non-Violence as a Tactic', in *Journal of Peace Research*, 8(2): 143-153

Krause, Sharon (1999), 'The Politics of Distinction and Disobedience: Honor and the Defense of Liberty in Montesquieu', in *Polity*, 31(3): 469-499

Kritzberg, Barry (1989), 'Thoreau, Slavery, and Resistance to Civil Government', in *The Massachusetts Review*, 30(4): 535-565

Lang, Berel (1970), 'Civil Disobedience and Nonviolence: A Distinction with a Difference', in *Ethics*, 80(2): 156-159

Lawry, Robert P. (2002), 'Ethics in the Shadow of the Law: The Political Obligation of a Citizen', in *Case Western Reserve Law Review*, 52(Spring): 655-720

LeBaron, Bentley (1973), 'Three Components of Political Obligation', in *Canadian Journal of Political Science*, 6(30): 478-493

Lefkowitz, David (2004), 'Legitimate Political Authority and the Duty of Those Subject to It: A Critique of Edmundson', in *Law and Philosophy*, 23(4): 399-435

Lefkowitz, David (2007), 'On a Moral Right to Civil Disobedience,' *Ethics*, 117 (January): 202-233.

LeGrande, J. L. (1967), 'Nonviolent Civil Disobedience and Police Enforcement Policy', in *The Journal of Criminal Law, Criminology, and Police Science*, 58(3): 393-404

Lewis, John D (1973), 'Book Review: Civil Disobedience and Democracy', in *The Journal of Politics*, 35(1): 235-237

---

Lewy, Guenter (1960), 'Resistance to Tyranny: Treason, Right or Duty?' in *The Western Political Quarterly*, 13(3): 581-596

Lippman, Matthew (1990), 'Civil Disobedience: The Dictates of Conscience and International Law versus the American Judiciary', in *Florida Journal of International Law*, 6:5-62

Lippman, Matthew (1991), 'Nuremburg and American Justice,' *Notre Dame Journal of Law, Ethics and Public Policy*, 5 (4): 951-977.

Loesch, Martin C. (1991), 'Motive Testimony and a Civil Disobedience Justification', in *Notre Dame Journal of Law, Ethics and Public Policy*, 5:1069-1118

Lowman, J. and Palys, T. (2003), 'Subject to the Law: Civil Disobedience, Research Ethics, and the Law of Privilege', in *Sociological Methodology*, 33: 381-389

Lyons, David (1998), 'Moral Judgment, Historical Reality, and Civil Disobedience', in *Philosophy and Public Affairs*, 27(1): 31-49

Macfarlane, L. J. (1968), 'Justifying Political Disobedience', in *Ethics*, 79(1): 24-55

Mackie, John (1978) 'Can There Be a Right-based Moral Theory?' *Midwest Studies in Philosophy*, 3: 350-359.

MaCloskey, H. J. (1980), 'Conscientious Disobedience of the Law: Its Necessity, Justification, and Problems to Which it Gives Rise', in *Philosophy and Phenomenological Research*, 40(4): 536-557

Mansfield, Harvey C. Jr. (), 'The Right of Revolution', in *Daedalus*, 105(4): 151-162

Markovits, Daniel (2005), 'Democratic Disobedience,' *Yale Law Journal*, 114: 1897-1952.

Martin, Rex (1970), 'Civil Disobedience', in *Ethics*, 80(2): 123-139

McCown, C. C. (1944), 'Conscience v. The State', in *California Law Review*, 32(1): 1-30

McEwen, Stephen J. Jr. (1991), 'The Protester: A Sentencing Dilemma,' *Notre Dame Journal of Law, Ethics, and Public Policy*, 5 (4): 987-993.

McWilliams, Wilson C (1969), 'Civil Disobedience and Contemporary

---

Constitutionalism: The American Case, in *Comparative Politics*, 1(2): 211-227

Middlebrooks, D. M. (2004), 'Reviving Thomas Jefferson's Jury: *Sparf and Hansen v. United States* Reconsidered', in *The American Journal of Legal History*, 46(4): 353-421

Minoptaite, Grazina (1991), 'Civil Disobedience: Justice against Legality', in *The Acorn*, 1: 21-23

Myers, Frank E (1971), 'Civil Disobedience and Organizational Change: The British Committee of 100', in *Political Science Quarterly*, 86(1): 92-112

Nicholson, Peter (1976), 'Kant on the Duty Never to Resist the Sovereign', in *Ethics*, 86(3): 214-230

Paz-Fuchs, Amir and Sfard, Michael (2002), 'The Fallacies of Objections to Selective Conscientious Objection,' *Israel Law Review*, 36(Fall): 111-143.

Pocklington, Thomas (1970), 'Protest, Resistance, and Political Obligation', in *Canadian Journal of Political Science*, 3(1): 1-17

Post, Robert (1998), 'Democracy, Popular Sovereignty, and Judicial Review', in *California Law Review*, 86(3): 429-443

Power, Paul F (1972), 'Civil Disobedience as functional Opposition', in *The Journal of Politics*, 34(1): 37-55

Power, Paul F. (1970), 'On Civil Disobedience in Recent American Democratic Thought', in *The American Political Science Review*, 64(1): 35-47

Prosch, Harry (1965), 'Limits to the Moral Claim in Civil Disobedience', in *Ethics*, 75(2): 103-111

Pyrz, G. (1981), 'Obedience, Support, and Authority: the Limits of Political Obligation in a Democracy, in *Canadian Journal of Political Science*, 14(2): 337-352

Quigley, Williams P. (2003), 'The Necessity Defense in Civil Disobedience Cases: Bring in the Jury', in *New England Law Review*, 38(3): 3-72

Sabl, Andrew (2001), 'Looking Forward to Justice: Rawlsian Civil Disobedience and its Non-Rawlsian Lessons,' *The Journal of Political Philosophy*, 9 (3): 307-330.

Sagi, Avi and Shapira, Ron (2002), 'Civil Disobedience and Conscientious Objection,' *Israel Law Review*, 36(Fall): 181-217.

- 
- Schlossberger, Eugene (1989), 'Civil Disobedience', in *Analysis*, 49(3): 148-153
- Schwarz, Wolfgang (1964), 'The Right of Resistance', in *Ethics*, 74(2): 126-134
- Shulman-Ryan, Luke (2005), in 'The Motion in Limine and the Marketplace of Ideas: advocating for the Availability of the Necessity Defense for Some of the Bay State's Civilly Disobedient', in *Western New England Law Review*, 27(299):299-364
- Simmons, A. John (2001), *Justification and Legitimacy* (Cambridge: Cambridge University Press).
- Simmons, A. John (2003), 'Civil Disobedience and the Duty to Obey the Law,' in *Blackwell Companion to Applied Ethics*, R. G. Frey and Christopher Heath Wellman (eds.) (Oxford: Blackwell).
- Singer, Peter (1973), *Democracy and Disobedience* (Oxford: Clarendon Press).
- Smart, Brian (1991), 'Defining Civil Disobedience,' in *Civil Disobedience in Focus*, Hugo A. Bedau (ed.) (London: Routledge).
- Smith, Kevin H. (2000), 'Therapeutic Civil Disobedience: A Preliminary Exploration', in *University of Memphis Law Review*, 31(Fall): 99-135
- Smith, M. B. E. (1973), 'Is There a Prima Facie Obligation to Obey the Law,' *Yale Law Journal*, 82 (5): 950-976.
- Smith, M.B. (1973), 'Is there a Prima Facie Obligation to Obey the Law?' in *The Yale Law Journal*, 82(5): 950-976
- Sokoloff, William W. (2005), 'Between Justice and Legality: Derrida on Decision', in *Political Research Quarterly*, 58(2): 341-352
- Spitz, David (1954), 'Democracy and the Problem of Civil Disobedience', in *The American Political Science Review*, 48(2):386-403
- Stettner, E.A. (1971), 'Political Obligation and Civil Disobedience', in *Polity*, 4(1): 105-115
- Stevanovic, Branislav (2005), 'Theoretical and Valuable Foundations of the Right to Civil Disobedience', in *Philosophy, Sociology and Psychology*, 4(1): 1-10
- Storing, Herbert J. (1991), 'The Case against Civil Disobedience,' in *Civil*



---

*Disobedience in Focus*, Hugo A. Bedau (ed.) (London: Routledge).

Swedberg, Richard (1999), 'Civil Courage (Zivilcourage): the case of Knut Wicksell', in *Theory and Society*, 28: 5002-528

Tasioulas, John (2006), 'Punishment and Repentance,' in *Philosophy*, 81: 279-322.

Texas Zashin, Elliot (1974), 'Civil Rights and Civil Disobedience: The Limits of Legalism', in *Texas Law Review*, 52(285):1-14

Thoreau, Henry David (1991), 'Civil Disobedience,' in *Civil Disobedience in Focus*, Hugo A. Bedau (ed.) (London: Routledge).

Tiefenbrun, Susan (2003), 'Civil Disobedience and the U.S. Constitution', in *Southwestern University Law Review*, 32: 677-701

Tiefenbrun, Susan W (1999), 'Classic Greek Themes in Contemporary Law: On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh', in *Cardozo Studies in Law and Literature*, 11(35): 34-48

Tinker, Jerry M. (1971), 'The Political Power of Non-Violent Resistance: The Gandhian Technique,' in *The Western Political Quarterly*, 24(4):775-788

Tunick, Mark (1998), 'Hegel on Justified Disobedience', in *Political Theory*, 26(4): 514-535

Turenne, Sophie (2004), 'Judicial Responses to Civil Disobedience: A Comparative Approach', in *Res Publica*, 10: 379-399

Von Hirsch, Andrew (1998), 'Proportionate Sentences: A Desert Perspective,' in *Principled Sentencing*, Andrew Ashworth and Andrew Von Hirsch (eds.) (Oxford: Hart Publishing).

Waltzer, Michael (1967), 'The Obligation to Disobey', in *Ethics*, 77(3): 163-175

Watt, E. D. (1981), 'Rousseau Rechauffee-Being Obligated, Consenting, Participating, and Obeying Only Oneself', in *The Journal of Politics*, 43, (3): 707-719

Welters, Michael (2003), 'Civil Disobedience and the Courts: The British Columbia Approach', in *Journal of Environmental Law and Practice*, 12: 1-26

Wendel, W. Bradley (2004), 'Civil Disobedience', in *Columbia Law Review*, 104: (363-424)

---

Westheimer, Joel and Kahne, Joseph (2004), 'What Kind of Citizen? The Politics of Educating for Democracy', in *American Educational Research Journal*, 41(2): 237-269

Wheeler, Harvey (2003), 'The Constitutionality of Civil Disobedience', in *University of West Los Angeles Law Review*, 35(2002-2003): 440-459.