

GONZAGA LAW REVIEW

VOLUME 8

SPRING 1973

NUMBER 2

CIVIL DISOBEDIENCE AND THE DUTY TO OBEY†

Alexander M. Bickel*

“At what point,” asks John Rawls in his celebrated recent book, *A Theory of Justice*, to which I shall make further reference, “does the duty to comply with laws enacted by a legislative majority . . . cease to be binding in view of the right to defend one’s liberties and the duty to oppose injustice? This question involves the nature and limits of majority rule. For this reason the problem of civil disobedience is a crucial test case for any theory of the moral basis of democracy.”¹

I do not, as I shall briefly indicate later on, find it possible to accept the thesis of Professor Rawls’ book. But I do agree that the problem of civil disobedience is a critical test for any system of government. It searches the foundations of government, moral or other. An analysis of this problem is bound to illuminate the nature of any system.

I have found it useful to begin such an analysis, in context of our system, at the operational end, by asking what in fact the legal order does about certain kinds of disobedient behavior. And I have settled on certain terms, forms of words, to characterize certain phenomena. Thus I will say that the legal order “makes allowance” for disobedience when it extends an exemption to it, whether prospectively or retroactively. The legal order, I will say, “takes account of” disobedience when its response to it is not suppression through more effective enforcement, but rather what may be called a political response; and then the legal order can be said to “countenance” the disobedience, and we must ask whether what we are witnessing

† This article consists of the text of the second annual address of the William O. Douglas Lecture Series delivered at Gonzaga University School of Law, Spokane, Washington, on February 2, 1973.

* Chancellor Kent Professor of Law and Legal History, Yale University. B.S.S. 1947, C.C.N.Y.; LL.B. 1949, Harvard University.

¹ J. RAWLS, *A THEORY OF JUSTICE* 363 (1971).

can be viewed as the breach of a duty to obey, or whether it is not, in truth, part of the process of law formation, even if an extraordinary and risky part.

It is no simple task in our system to identify true civil disobedience. That is markedly true first of all because we are—and those who regret it in other conditions may perhaps take note of its significance in this context—not a unitary state. We are a federation, and we have, therefore, laws within laws and laws above laws. In this federal structure, one system of laws which is valid and fully authoritative within itself may be called into question by appeal to another, generally superior system; and in some measure, it works the other way as well. This has consequences for the duty to obey law. Thus it is possible for men to behave in a manner that is lawful, but that is not recognized as such by the legitimate authority in one or another place, and therefore constitutes defiance of that authority, and causes disorder; or in a manner that may turn out to be lawful, but at the moment violates the as yet untested law of a given place, also of course causes disorder, and what is more, cannot with any assurance be assumed to prove lawful in the end. In a unitary system, most behavior of this sort would carry every aspect of civil disobedience. It is often positively invited by the many-tiered process of law formation that is characteristic of our system.

In the spring of 1961, for example, groups of young people ran some integrated buses from a border state into the deep South—Alabama, Mississippi. These were the freedom rides, as they were called, and they led to riots, particularly in Alabama. So serious were the disturbances that finally President Kennedy sent in a quasi-military force of federal marshals. Even as of 1961, the substantive federal law, statutory and constitutional, forbade as clearly as possible the segregation of passengers in interstate travel, whether by local statute, ordinance or administrative action, or by the private choice of the carrier;² and the freedom rides were unquestionably interstate travel. The law was clear, but in much of the South, it was not accepted, it was not established, and it was not observed. Such a state of the law, as we shall note further, is not unheard of, especially but not exclusively when the law in question is formulated and declared by the federal judiciary rather than by the Congress, as in this instance it largely was. What was needed was the promulgation and application of rules and procedures of federal enforce-

² See, e.g., *Boynton v. Virginia*, 364 U.S. 454 (1960); *Henderson v. United States*, 339 U.S. 816 (1950); *Morgan v. Virginia*, 328 U.S. 375 (1946); *Mitchell v. United States*, 313 U.S. 80 (1941); *Hall v. DeCuir*, 95 U.S. 485 (1878).

ment, and that is what the freedom rides meant to and did produce, chiefly through action by the Interstate Commerce Commission.

One might expect that the way to achieve more secure establishment and more effective enforcement of the superior federal law when it is flaunted by the other, the inferior, sovereignty of the state is through the orderly process of litigation, or through the political process, which can produce remedial legislation; but not through a disorderly process of mass self-help. But in truth our system accepts both methods, and can almost be said to offer an incentive to the disorderly one, which looks so much like civil disobedience, certainly from the local point of view. The system can be said to offer such an incentive because jurisdictional and procedural rules of litigation tend to demand a concrete controversy, showing a definite, not suppositional clash between federal law and local practice.³ These are not rigid or universal rules. They by no means exclude the possibility of successful litigation to obtain enforcement without the need first to provoke a physical clash with recalcitrant local authorities or otherwise to defy them. But defiant self-help is often the surest way to invoke federal enforcement authority, and it is at the very least not systematically discouraged.

It may not always be prudent to employ the disorderly method of verifying the observance of federal law. There will be tension. There will necessarily be an assault on the local legal order which cannot be surgically limited to the locus of its pathology, the place where it has rejected the superior federal law, but will most likely affect some of its healthy features as well. And there may be violence. One can readily adduce reasons for disallowing the disorderly method of verification, and insisting on orderly processes of litigation or political action. In this instance, indeed, Attorney General Robert Kennedy advised against the freedom rides. But that was, within our system, all he did or could properly do, barring only the prospect of an emergency of catastrophic proportions. For although there is room for prudential decisions, which government may try to influence, and although success may not be assured and the wisdom of producing the pitched enforcement crisis may often be dubious, nonetheless, this method of disorderly self-help in asserting rights is legitimate and allowed for. It constitutes, itself, a right, whose exercise has a claim to protection at the hands of federal authority—a claim President Kennedy in fact honored. This is not civil disobedience. It is a process of the formation of procedures and

³ See *Poe v. Ullman*, 367 U.S. 497 (1961); *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947); *United Public Workers v. Mitchell*, 330 U.S. 75 (1947). Compare *Griswold v. Connecticut*, 381 U.S. 479 (1965).

machinery for the enforcement of law whose substance has been previously declared.

The system similarly and for the same reasons invites and countenances, and makes some though not the same degree of allowance for, a disorderly, self-help method of substantive law-formation. Historically, self-help toward the formation of substantive law will be the prior event to the one just discussed. Conceptually, however, for our purposes, it is posterior, because it bears a stronger resemblance to what by most definitions would be classified as civil disobedience.

In February, 1960, a group of Negro students walked in and sat at segregated lunch counters in Greensboro, North Carolina. They were refused service, but continued to sit, quietly, perfectly peaceably, but immovably, until they were arrested by the local police. What they did, and this was the beginning of a movement that spread through the South, was illegal, as a violation of the property rights of the private lunch-counter operators, under local laws that were valid at the time. It disturbed the peace of the community, and it not infrequently led to violence, though seldom if ever at the hands of the sitting-in students. The position of the students was that while the local law was valid and enforceable locally for the time being, it should not be, and would not long prove to be when tested by those willing to bet on its ultimate invalidity. This was an exercise in law-formation through exploitation of the natural tension between our two co-existing systems of law, state and federal. The risk of violence the students considered acceptable.

In a unitary state, the sit-ins, violating as they did valid positive law, might have been seen as an act of conscience, an appeal to what in many systems other than ours may also be a plausible concept—the higher law; but certainly they were an act of disobedience, perhaps a revolutionary act, at war with the legal order. In our federal system, however, the appeal to higher law is not a call for revolutionary change, or simply some cry from the heart; it is rather in a very practical way an appeal to existing, authoritative, higher law-making institutions, almost an appeal in a technical, legal sense. In such a system, some flouting of the local law aimed at provoking action by the law-making institutions of a higher sovereignty is necessarily invited, both in the nature of things, and more particularly by the jurisdictional and procedural rules I have mentioned.

As it happens, the sit-ins did not win their bet in the federal courts. The Supreme Court never did declare a constitutional right

to equal service in private places of public accommodation.⁴ What the sit-ins did gain was Title II of the Civil Rights Act of 1965,⁵ which is a legislative creation, under the Commerce Clause of the Constitution, of a right to service in places of public accommodation. In the meantime, hundreds of the sitting-in students had been given various fines and jail terms pursuant to trespass or disorderly conduct convictions in the state courts.

Had the sit-ins succeeded in obtaining a decision in their favor from the Supreme Court, holding that segregation in private places of public accommodation is unconstitutional, all pending convictions would have fallen. Formal allowance would have been made for the disorderly, self-help method of law formation employed in the sit-ins. But the statutory law that the sit-ins in fact formed did not automatically have the effect on the convictions that a judicial decision would have had. And yet the Supreme Court found a way, if not without some straining. It held that the Civil Rights Act implicitly forgave, abated, as if by an amnesty, convictions still pending on appeal in sit-in cases now covered by the Act that involved no violence.⁶

The conclusion to be drawn is that the unsuccessful appeal, by the method of self-help, to a higher substantive law can be costly. It is, when unsuccessful, nothing but civil disobedience. Whether successful or not, however, it is, given its intent, part of the process of law formation, and can hardly be viewed as an illegitimate breach of a duty to obey law. It is plainly countenanced as such, at least if peaceable; and the legal order makes allowance for it when it is successful, and though with difficulty, and far from always, strains to do so even when it is unsuccessful.

One remarkable example, aside from the abatement of sit-in convictions, occurred during the Second World War in the case of an unsuccessful self-help appeal, not against local law, but from the federal legislature to the federal judiciary.⁷ After Congress passed the Selective Service Act of 1940,⁸ leaders of the German-American Bund "commanded" their members (the Bund operated on the Fuehrer principle) to refuse military service: to register as required, but to refuse induction. The Bund, of course, had no love for the draft or for any other measure preparing for a possible war, obviously against Germany. But the stated and apparently quite sincerely held ground for this "command" was the opinion of the leaders,

⁴ *Bell v. Maryland*, 378 U.S. 226 (1964).

⁵ 42 U.S.C. § 2000a (1964).

⁶ *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

⁷ *Keegan v. United States*, 324 U.S. 478 (1945).

⁸ Act of Sept. 16, 1940, ch. 720, 54 Stat. 885.

including the Bund's counsel, that owing to a certain provision in it which was admittedly of very dubious validity, the entire draft law was unconstitutional, and that resistance to it would result in a test of its validity. The leaders were convicted of conspiring to counsel their membership to evade service in the armed forces, which was a crime under the draft law. The Supreme Court reversed the conviction. The defendants' view that the draft law was unconstitutional, said the Court, was "foolish." But the evidence showed that the view was nonetheless sincerely held, and that the defendants intended to provoke a judicial test of the validity of the law. They did not counsel their members not to register, which would have been the way to evade the draft "stealthily and by guile," that is, with criminal intent. What they intended, rather, was to test their own constitutional theory, however mistaken and indeed "foolish," in court. That was not evasion, and not punishable.⁹

These two examples of the operation of our system support, even though they may not in themselves establish, what I suggest is a foundation premise, namely, that our process of law formation is not just the majoritarian electoral and legislative process supplemented by the judicial. These are, rather, stages, and not the sole ones. They precede and follow other, less formal, more unruly stages, in a continual round. A related, equally basic premise rests on the insight—really the obvious observation, once attention is drawn to it—that law as manifested in statutes, and executive, administrative or judicial decisions is not always effective simply because it is there, and because violators are subject to enforcement proceedings, criminal or other.

To think that law is always effective as declared, is to forget what the late Roscoe Pound almost 60 years ago called "the limits of effective legal action."¹⁰ It is to forget that only in a certain kind of social and political situation is law self-executing through its own institutions. Actually, enactment and enforcement of law are at times merely episodes, even if the single most important and most influential episodes, in a long and varied process by which the society, working through a number of institutions, manages to realize or approximate a given purpose.

The limits of law are the limits of enforcement, and the limits of enforcement are the conditions of a free society and perhaps, indeed, the limits of government altogether. If substantial portions

⁹ Keegan v. United States, 325 U.S. 478 (1945); see Okamoto v. United States, 152 F.2d 905 (10th Cir. 1946); cf. Gara v. United States, 178 F.2d 38 (6th Cir. 1949).

¹⁰ Pound, *The Limits of Effective Legal Action*, 22 PA. B. ASS'N REP. 221 (1916).

of the statute book had to be enforced by direct action, whether through criminal or civil litigation, against large numbers of people, we would have a very different and much more disagreeable kind of society than we do have. Of course, a certain measure of enforcement will always be necessary. And there are laws, narcotics statutes are an example, which some people may be simply incapable of obeying. Still a great deal of law is effectively in force, and keeping it in force does not prevent us having a free society rather than a police state. There are crime waves, and then they pass, as the present one shall, and even in their midst a huge mass of law is observed. We invest limited resources in the effort to enforce law, and sacrifice relatively few other values in the process.

The secret of the enterprise is, of course, that most people most of the time need only be made aware of the law in order to obey it. They are, in truth, in a state of assent, acquiescence or relative indifference toward each law, and in a state of acceptance of the notion of a legal order and of the legitimacy of this one; and so they obey. By far the better part of litigation is the consequence of differences of opinion about what the law is or ought to be, not of failure to obey what is clearly the law. And yet, while it may be true that the bulk of the law is quietly effective, some important law is not, or not readily, and instead of quiet effectiveness there is loud disobedience.

Pound diagnosed the reason, on that occasion nearly 60 years ago that I referred to earlier.¹¹ In a simple system, he said such as perhaps we still had in this country a century ago, when

men demand little of law and enforcement of law is but enforcement of the ethical minimum necessary for the orderly conduct of society, enforcement of law involves few difficulties. All but the inevitable anti-social residuum can understand the simple program and the obvious purposes of such a legal system. . . . On the other hand, when men demand much of law, when they seek to devolve upon it the whole burden of social control, when they seek to make it do the work of the home and of the church, enforcement of law comes to involve many difficulties. . . . The purposes of the legal system are [then] not all upon the surface, and it may be that many whose nature is by no means anti-social are out of accord with some or even with many of these purposes.¹²

It is then, he said, that "we begin to hear complaint that laws are not enforced and the forgotten problem of the limitations upon effective legal action once more becomes acute."¹³

In these conditions of discord, the true alternatives are reduc-

¹¹ *Id.*

¹² *Id.* at 222.

¹³ *Id.* at 232.

ing the opposition to a given law by placating it, or by offering it inducements, or by persuading it; or abandoning the law. Those are the true alternatives because the only other course of action that is open is the massive and pervasive use of force.

That the alternatives are as I stated them is demonstrated, among other experiences, by two notorious episodes in American history: The substantial nullification in many places, during the decade before the Civil War, of the Fugitive Slave Act of 1850;¹⁴ and Prohibition and its repeal. About the latter, it is to be remembered that Prohibition was authorized by constitutional amendment. The amendment was proposed by the necessary two-thirds vote of the Congress, and was ratified by the legislatures of ten more states than necessary, 46 in all. That was the kind of consensus on which it rested initially. There was some thought that prohibition might be unconstitutional even though enacted pursuant to a constitutional amendment. The issue was carried to the Supreme Court by eminent counsel, Elihu Root of New York among them. The Court held otherwise.¹⁵ The point is that there had been not only a constitutional amendment, but a favorable adjudication as well. No more solemn and seemingly complete expression of the legal order is imaginable. Yet within five years, Arthur T. Hadley, President Emeritus of Yale, wrote as follows: "Conscience and public opinion enforce the laws; the police suppress the exceptions." In this instance conscience and public opinion opposed the law, he said, and the exceptions were the rule. Hence no enforcement was possible. The law was no law.¹⁶ And quite right was President Hadley.

Considered as a whole, without differentiating among various patterns of behavior that together produced the final outcome, I think one can regard the Fugitive Slave Act and Prohibition experiences as illustrations of a process of law formation—non-legislative, non-judicial, altogether extra-legal law formation through resistance and disobedience. In the terms I have used, the legal order must be viewed as having taken account of the resistance and the disobedience, and thus countenanced them. I have at least implied that when the legal order takes account of disobedience and countenances it as part of a continual process of law formation, the disobedient cannot be viewed as having violated a duty to obey. It is, rather, some sort of legitimate resistance. But do we not, then, find ourselves in a circle? Does it not turn out that there is no duty to obey so long as disobedience is widespread? There may be a duty to obey when most of us obey, but not otherwise; which would mean that

¹⁴ Act of Sept. 18, 1850, ch. 60, 9 Stat. 462.

¹⁵ National Prohibition Cases, 253 U.S. 350 (1920).

¹⁶ A. Hadley, *Law Making and Law Enforcement*, 151 HARPER'S 641 (1925).

there is no duty to obey, only the facts of obedience or disobedience, and of the consequences the legal order may impose for the latter, if the legal order catches one before disobedience has become so widespread that the legal order no longer cares to catch anyone.

But analytic defeat need not be so readily accepted. It is a fact, which no statement of a duty to obey is likely to alter, that in our society at least, and perhaps in any system, law needs assent if it is to be effective, and the assent to be inferred from the regular, constitutional manner of a law's enactment and from the availability to a new majority of the same regular, constitutional means for the revision or repeal of the law—this inferred assent is in itself not always sufficient. It suffices typically when, as Pound said, the law bespeaks "the ethical minimum necessary for the orderly conduct of society."¹⁷ It is often insufficient, as he suggested, when more is demanded of and by law; when law is used to impose more controversial and pervasive social controls.

There is recognition of this fact in the jury system. For the jury, responding to widespread sentiment in the community, may refuse to convict—refuse enforcement, this is to say—not because it really believes the particular defendant innocent of the violation with which he is charged, but because it believes that the law is a bad law. The jury is not told it may do so, but it may and does. Many juries did so during both the Fugitive Slave Act and Prohibition episodes. And the sixth amendment requires that criminal trials be had to juries in the state and district where the crime was committed, thus ensuring that the relevant community sentiment will have a chance to express itself. Prosecutors, moreover, are politically responsive in considerable measure, and as we shall see further, have and exercise a discretion whether or not to prosecute, which is also informed by community sentiment.

These are facts, and they are facts that the well-advised legislator takes into account in deciding whether or not to legislate, and in assessing the continued utility of an existing law. But while the existence of these facts must be admitted, there are still differences between what happened to Prohibition, and what is widely happening now to anti-gambling laws, anti-marijuana laws, and certain attempted regulations of private sexual practices on the one hand, and what, on the other hand, we would regard as legitimate behavior with respect to, say, the tax laws, or traffic laws, or the federal wages and hours statute, or myriad other laws.

If the objection to prohibition or to other sumptuary and like

¹⁷ Pound, *The Limits of Effective Legal Action*, 22 PA. B. ASS'N REP. 221, 222 (1916).

laws cannot be characterized as moral (where the objection to the Fugitive Slave Act certainly could be), it does nevertheless rise to a level of principle; political principle, but something more and different than simply self-serving unwillingness to obey, or desire for advantage, or rebelliousness; and political principle stated in terms that not only denote assent to the legal order as such, but that seek validation in precepts derived from the legal order's own universe of discourse. What such principles and precepts may plausibly be will vary from time to time. A great deal depends on the climate of opinion. Some generations ago, live issues of political principle were raised by infringement of property rights, which are now common in laws regulating the economy, and even by the income tax. Today, infringements on privacy, including some property rights, and on personal autonomy raise such issues.

We are required to judge whether failure to observe law is ordinary anti-social behavior, or is, rather, grounded in a plausible claim that the law is bad on principle because it is arguably inconsistent with precepts or values embodied in the legal order itself. If the latter is the case, then disobedience cannot be regarded as simply a deplorable malfunction, which may nevertheless in fact defeat the law, but must in many circumstances be viewed as a legitimate part of the process of law formation, provided that it is legitimate also in manner. The manner of disobedience was by no means always legitimate in either the Fugitive Slave Act or Prohibition experiences.

It will be well at this point to propose a definition of civil disobedience. We may say that civil disobedience is the failure to obey, on grounds of moral or political principle, a law which is not formally challenged as invalid; or the failure to obey a law which is itself no more challenged as bad than as invalid, in the course of agitating for change in public policies or actions, or social conditions, which are regarded as bad on grounds of moral or political principle; all in circumstances where the legal order makes no allowance for the failure to obey. Many writers¹⁸ insist that the act of disobedience must be public rather than covert, and that each disobedient person must be willing to accept the consequences of his act, that is, to take his punishment. No doubt, if the act is public, it is more likely to be sincere than if it is covert, but that is only a presumption on a question of fact. The critical element is sincerity, and it is a matter of proof. Willingness to take punishment will also tend to prove sincerity, as well as respect for the legal order in general, but punishment may be imposed willy-nilly, and again, sincerity and respect

¹⁸ *E.g.*, J. RAWLS, A THEORY OF JUSTICE 366 (1971).

are the critical elements, not these particular ways of manifesting them.

The full-blown Hobbesian view of the nature and foundation of society tolerates no civil disobedience at all. Nor can the liberal contractarian view, which legitimates government as a compact among citizens embodying the agreement of each to abide the judgment of a majority of all. The ends of government are substantially predetermined in the liberal contractarian view, in the sense that they are limited by timeless principles—the natural rights of the citizen (sometimes called the rights of man; but that is a misnomer, as the reference is really to the rights of constituent members of the society, by birth or adhesion). The majority is allowed some margin of error, but the premise is that it will normally act only in plausible pursuit of the predetermined ends of government. If it should not, says Locke, the remedy is revolution, and there is a right to use force against the government. Short of the right of revolution, there is an absolute duty to obey.¹⁹ Rousseau held that the people, expressing themselves through universal suffrage, give voice to the general will, although he allowed that they might also not. The general will is the highest good, and when the people by majority vote give it voice, the individual owes absolute obedience, even unto death. If at times a minority has hold of the true general will, it follows that absolute obedience is equally owed it. This in fact, said Rousseau, only forces the individual to be free.²⁰

The latest contribution to liberal contractarian theory, by Professor John Rawls in his *A Theory of Justice*, is more paradoxical. It defines the general will—called justice as fairness—in much more detail than Rousseau, and commits government to its effectuation. Like Rousseau, Rawls then insists on popular sovereignty, modified only by some power in the judges to keep government within the limits dictated by the general will. And Rawlsian theory posits a duty to obey. But it makes allowance, one may think inconsistently, for civil disobedience, defined as above, with the added requirements that the disobedience be public and that the disobedient be willing to accept punishment. Civil disobedience is allowed because, it turns out, justice as fairness—the general will—is not always readily ascertainable, the majority and the judges may be wrong, or less right than a protesting minority, and civil disobedience can play its role in helping the entire society decide what is right. But in that event, there is less to the prior detailed definition of justice as fairness than met the eye.

¹⁹ J. LOCKE, *TWO TREATISES OF GOVERNMENT* 169, 233 (Hafner library ed. 1947).

²⁰ J.J. ROUSSEAU, *THE SOCIAL CONTRACT passim* (Hafner library ed. 1954).

In the actual American legal order, ends are less permanently predetermined than by contractarian theory, faith in majoritarianism is less enthusiastic than Locke's or Rousseau's, readiness to have recourse to revolution is also not as great as Locke's, and there is little willingness to accept the righteous dictates of a minority possessed of the true general will. What is above all important is consent—not a presumed theoretical consent, but continuous, actual consent, born of continual responsiveness. There is popular sovereignty, and there are votes in which majorities or pluralities prevail, but that is not nearly all. Majorities are in large part fictions. They exist only on election days, and they can be registered on very few issues. To be responsive and to enjoy consent, government must register numerous expressions of need and interest by numerous groups, and it must register relative intensities of need and interest. For intensity on the part of one group may be sufficient justification for it to get its way when other groups, which may even constitute a majority, are relatively indifferent. Neither the vote nor speech sufficiently differentiate needs and interests, or express intensity. But the bearing of dramatic witness through civil disobedience can often do so.

Hence it is that civil disobedience has accompanied so many of the most fruitful reform movements in American history. There are the exercises in negative law formation that I have mentioned, to which might be added the achievement, however qualified, of the anti-war movement, then as ever quite likely a minority, in toppling a sitting President in the midst of war, in 1968, before a single national vote had been cast. The Mexican War, incidentally, was also attended by not a little civil disobedience. Equally if not more important have been exercises in positive law formation. There was extensive civil disobedience for half a century in labor's struggle for industrial democracy; the Populist movement in the South and West engaged in civil disobedience around the turn of the century; and so did the women's suffrage movement.²¹ So, again, more recently did the civil rights movement, which thus produced the Civil Rights Act of 1964²² and the Voting Rights Act of 1965²³—two statutes that signify more than they provide, since both have had far-reaching indirect effects in the society at large. The Voting Rights Act and the agitation that produced it constitute a particularly telling episode, demonstrating that political action can produce the right to vote; a simpler conception might lead one to believe that only the reverse can be true, and that exercise of the right to vote alone produces political action.

²¹ See, e.g., F. Allen, *Civil Disobedience and the Legal Order*, 36 CINCINNATI L. REV. 175 (1967).

²² 42 U.S.C. § 2000a (1964).

²³ 42 U.S.C. §§ 1973-1973p (1965).

Both statutes were the direct outcome of demonstrations, culminating in a series of marches in Birmingham, Alabama, in the spring of 1963, and in Selma, Alabama, nearly two years later. The demonstrations were themselves peaceful, although in both Birmingham and Selma they were met with violence. Sometimes they were the sort of civil disobedience that the first amendment domesticates. Often they could not be domesticated. They were just out and out, illegal civil disobedience.

What then, are the limits of civil disobedience? What in our system is the location of a duty to obey?

The classic statement of a duty to obey occurs in the *Crito*. "[W]hether in battle or in a court of law, or in any other place," said Socrates, "[y]ou must do what [your] city and [your] country order . . . or [you] must change their view of what is just . . ." ²⁴ But not in clarity, not in economy of application, and not in the immediacy with which the individual can affect the process of law formation does our legal order, in most of its manifestations, resemble what Socrates subsumed in the *Crito*. We are not a city state composed of citizens who make law when assembled for that purpose, but a large, federated, representative democracy. Our law is made by many institutions in which participation by the people is at best attenuated, in some instances quite fictive, and in others—namely, the judiciary—explicitly excluded. Our law, moreover, is complex, and there are many stages in its formation and its formal declaration. But we do approach, I suggest, the conditions of the *Crito* when a final judicial decree is issued against named individuals, following a trial to which they were parties.

In these circumstances, there is clarity, there is economy, and there has been immediacy of participation. The process, moreover, explicitly and insistently holds itself out as complete following adjudication. And it has to. No legal order could function if it had constantly to reexamine the myriad decisions it must make in individual cases. Finality is functionally essential in the adjudicative process, as it is not in the judicial or legislative law-declaring process. There is thus a contrast with both the formal position in respect of general law, whether judicially or legislatively declared, and with the actual experience of continuing stages in the formation of general law after its initial declaration.

A judgment or decree, the Supreme Court has said, must be obeyed by the parties to a case

however erroneous the action of the court may be, even if the error

²⁴ 1 THE DIALOGUES OF PLATO 435 (B. Jowett transl. 1892) [hereinafter cited as PLATO].

be in the assumption of the validity of a seeming but void law going to the merits of the case. It is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review . . . its orders . . . are to be respected, and disobedience of them is contempt of its lawful authority, to be punished.²⁵

Even if it should turn out on appeal that the court had no jurisdiction, no authority to act at all, yet it had authority to decide, and to decide erroneously whether it had authority, and its order is to be obeyed. Only when the court's claim to authority is transparently frivolous, "when a court is so obviously travelling outside its orbit as to be merely usurping judicial forms and facilities;" only then, in the case of an "indisputable want of authority on the part of a court,"²⁶ may an order be disobeyed.

When the late Martin Luther King and others, during the 1963 demonstrations in Birmingham, Alabama, on one occasion staged a march in violation of an order issued by a local court pursuant to a local statute which King and his friends thought was unconstitutional—when they thus staged a march in violation of a court order that was, as the Supreme Court was later to hold, in fact invalid, they were punished for violating the order, and the Supreme Court upheld the punishment.²⁷ There was no duty to obey the invalid statute, but there was a duty to obey the invalid court order issued under it.

If one is not under a moral obligation to obey at this point, then the very possibility of any legal order at all, however flexible and responsive, however ready to reexamine and question itself, is placed in the gravest doubt. Of course, obedience will be coerced. In criminal cases it nearly always is. But in civil cases, in the bulk of the occasions when regulatory law, whether statutory or judicial, is brought home to the individual, the necessity for coercion in too many instances would overload the circuits of the legal order. The necessity for potentially coercive litigation with respect to a general law that meets with resistance also overloads legal circuits. Lack of assent to, and widespread disobedience of, a general law, we have said, may nevertheless be a legitimate way of questioning it, and of continuing the process of law formation. The legal order will often respond by reexamining the law, and sometimes by receding from

²⁵ *Howat v. Kansas*, 258 U.S. 181, 189-90 (1922). See also *United States v. United Mine Workers*, 330 U.S. 258 (1947).

²⁶ *United States v. United Mine Workers*, 330 U.S. 258, 309, 310 (1947) (Frankfurter, J., concurring).

²⁷ Compare *Walker v. Birmingham*, 388 U.S. 307 (1967), with *Shuttlesworth v. Birmingham*, 394 U.S. 147 (1969); cf. *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175 (1968).

it. But disobedience of a court's judgment does not question the judgment, for it is, in theory and in practice, irreversible. Here disobedience questions the very legal order itself, which must in the end rest on something more than its power to coerce. The legal order does rest, I believe, on an acceptance of it, as such, regardless of errors and malfunctions. And at this, the irreducible point, that acceptance must manifest itself, and take the form of an individual duty to obey—voluntarily and prior to coercion.

Reading the *Crito* together with the *Apology* one finds Socrates suggesting that he may well have been guilty of corrupting the young, as charged. He seems to argue in parts of the *Apology* that he ought, as a philosopher, to be allowed to question and to corrupt, because a philosopher must. Yet a corrupt society, Thessaly, "where there is great disorder and license,"²⁸ is no place Socrates would wish to inhabit, or propound his philosophy in. So the conviction may be just, and the individual, in his own case, with his self-interest fully engaged, must undertake, if he is to disobey, to pit his judgment against the society's final one, delivered in his own case. Who can trust himself, or be trusted, to be "judge in his own case—however righteous his motives. . . ."²⁹ There is heavy emphasis on this point in the Supreme Court decisions holding that judicial orders must be obeyed.³⁰

The conscientious objector, acting at risk against the general command of the law, must guard against self-interest, but may follow a conscience disciplined by risk, and hope to change the law. So also the civil disobedient, who in addition does not stand alone. But not the individual who has been judged and found guilty. If the decree is in a civil case, and the disobedience is again undertaken at risk because it will be punished, and is undertaken perhaps selflessly to protect others, then the principal, the fully explicit answer of the *Crito* applies. At this stage, to disobey the complete, irreversible judgment of the legal order, delivered directly, following a trial at which he has been heard, is to deny the legitimacy of the legal order. And who, as Socrates asked, "would [be satisfied with] a state which has no laws?"³¹

But the duty of a party to a litigation to obey the judicial judgment is not a sufficient statement of the limits of civil disobedience. Not the least reason why this is so is that, without further limits, it would be quite fair to characterize the system I have been

²⁸ PLATO at 437.

²⁹ Walker v. Birmingham, 388 U.S. 307, 320 (1967).

³⁰ See Walker v. Birmingham, 388 U.S. 307 (1967); United States v. United Mine Workers, 330 U.S. 258, 308-09 (1947) (Frankfurter, J., concurring).

³¹ PLATO at 437.

describing and praising—as John Roche once characterized it—as an amiable anarchy resting on a foundation of cheerful nihilism. No doubt, anarchy, real anarchy, which is seldom amiable, is the ultimate destination of a course of continuous and freely permitted civil disobedience. For civil disobedience, like law itself, is habit forming; but the habit it forms is destructive of law. It is essential that there be a settled custom, conceived as a duty, generally to obey the law. It is critically important to the society that the great bulk of law, including walk and no-walk signs, be obeyed.

Anybody who wishes responsive government, a society in which law formation is a continual round, should never—never—simply for the sake of convenience, cross the street against a no-walk sign. If there is to be freedom to disobey when it matters, it can exist only if at all other times perfect obedience is yielded. There is an absolute duty to obey in order to make possible a society in which, on important occasions, and without resort to revolution, the individual may be free to disobey. These occasions, in turn, must be few. The individual is under a duty to ration himself, and assess a given occasion in terms of its relative as well as absolute importance, as of the given time and the given circumstances.

There must, overall, be an imbalance on the side of obedience. This imbalance cannot be stated as a legal rule. The Rule of Law cannot be reduced to a rule of law. But it can be stated as a moral duty—a duty to obey law except on occasions falling within the definition of civil disobedience that I have given; and then in light of a responsible judgment of the absolute and relative importance of the occasion, having regard to the overhanging threat of anarchy.

As to the manner of civil disobedience, there are three obvious problems: violence by the civil disobedients, violence against them, and the non-violent interference by the civil disobedients with the justified activities and expectations of others.

The assumption of first amendment decisions is that the law never makes allowance for violent behavior, and will even punish activity, such as speech, which is itself for the most part inherently non-violent, if it intentionally incites to violence. That is the point of the clear and present danger test, even stated in its most permissive form. It would be difficult to maintain, however, that the legal order does not at times take account of violence and countenance it; that violence does not at times play a role in the process of law formation. Here is an example, going back to the very beginnings of the Republic. When Shays' rebellion broke out, Washington was home in Mount Vernon, retired. He gets word—this is September, 1786—that some 400 men, described as ragged, disreputable,

and drunken, had threatened a court in western Massachusetts. One rebel is reported to have cried: "I am going to give the court four hours to agree to our terms, and, if they do not, I and my party will force them to it."³² The court, showing exquisite judgment, hastened to adjourn, in order, it was said somewhat ambiguously, "to prevent any coercive measures."³³

This was, of course, a debtors' rebellion, and showed signs of spreading. Washington, as the intelligence comes in, is very disturbed. He writes his former aide, David Humphreys, in Hartford:

For God's sake tell me what is the cause of all these commotions: do they proceed from licentiousness, British influence disseminated by the Tories, or real grievances which admit of redress? If the latter, why were they [the grievances] delayed until the public mind became so agitated? If the former, why are not the powers of government tried at once?³⁴

There was in fact briefly resort to force, without bloodshed. Then the legal order responded to the grievances, meeting most of the rebels's demands, and there was an amnesty for the rebels.

By contrast, when Washington, now President and nearing the end of his first term, was told of the Whiskey Rebellion against payment of the federal excise tax on liquor, in western Pennsylvania, his reaction was quite different. This grievance had been recently dealt with by a revision of the tax statute, and Washington's instinct now was to proceed instantly against the rebellion.³⁵

And yet, though in truth the legal order will sometimes countenance it, violence must be a monopoly of the state. It is, in private hands, whatever its possible misuses by the state, nearly always the weapon of the strong, not of the just; of the merely numerous, not of the righteous. Any instances of its being countenanced by the legal order should be viewed as a malfunction.

Non-violent interference with the justified activities and expectations of others often appears in a quite different light; and it is largely what Washington confronted in both the Shays and Whiskey Rebellions. The questions are whether the interference is with important activities and expectations, and whether it is contained and civil, or coercive. Mobs rampaging in Boston in Fugitive Slave Act days, or on college campuses or in Washington just a few years ago, had different objectives in mind than segregationist mobs in Little Rock in 1957, or on the campus of Ole Miss in 1962; but the

³² J.T. FLEXNER, *GEORGE WASHINGTON* 98 (1970).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 370-72.

behavior was equally intolerable in each instance, although an orderly march would be differently viewed, despite the inconvenience it would also cause.

There is finally the question of violence not caused or even provoked by civil disobedients, but predictably drawn by them from others. As under the first amendment, the possibility of a violent veto is no argument against activity that is otherwise legitimate and tolerable. The responsibility of government is to counter the violence at its source, not to act against its actual or intended victims.³⁶ The only qualification on this proposition is that in an extreme emergency, the public force having prepared itself in good faith to the best of its ability and having responsibly exerted itself, the necessity may nevertheless arise to stop speech, and more readily civil disobedience, in order to prevent a violent disaster. Even such a lawful activity as the freedom rides may be stopped under emergent circumstances of this sort.

Within limits, then, of substance, occasion and manner, civil disobedience can be regarded as a legitimate part of our happily varied and resourceful political process. Nobody has a right to be disobedient; yet no one is under a moral duty never to be. Civil disobedience, as defined, is a political action, to be undertaken rarely and prudently. Prudence, as Burke said, "is the director, the regulator, the standard" of all political and moral virtues. Like revolution, although not remotely in the same measure, every act of civil disobedience contains, as Burke said of revolution, "something of evil." Hence it is not lightly to be undertaken. "If ever we ought to be economists even to parsimony, it is in the voluntary production of evil."³⁷

³⁶ See, e.g., *Edwards v. South Carolina*, 372 U.S. 229 (1963).

³⁷ E. BURKE, *An Appeal from the New to the Old Whigs*, in 5 THE WORKS OF EDMUND BURKE 20 (World's Classics ed. 1907).