

This essay originally appeared in Christopher B. Gray (ed.), *Philosophy of Law: An Encyclopedia*, Garland Pub. Co, 1999, II.110-113. Copyright © 1999, Peter Suber.

Civil Disobedience

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Civil disobedience is a form of protest in which protestors deliberately violate a law. Classically, they violate the law they are protesting, such as segregation or draft laws, but sometimes they violate other laws which they find unobjectionable, such as trespass or traffic laws. Most activists who perform civil disobedience are scrupulously non-violent, and willingly accept legal penalties. The purpose of civil disobedience can be to publicize an unjust law or a just cause; to appeal to the conscience of the public; to force negotiation with recalcitrant officials; to "clog the machine" (in Thoreau's phrase) with political prisoners; to get into court where one can challenge the constitutionality of a law; to exculpate oneself, or to put an end to one's personal complicity in the injustice which flows from obedience to unjust law—or some combination of these. While civil disobedience in a broad sense is as old as the Hebrew midwives' defiance of Pharaoh, most of the moral and legal theory surrounding it, as well as most of the instances in the street, have been inspired by Thoreau, Gandhi, and King. In this article we will focus on the moral arguments for and against its use in a democracy.

Objection: Civil disobedience cannot be justified in a democracy. Unjust laws made by a democratic legislature can be changed by a democratic legislature. The existence of lawful channels of change makes civil disobedience unnecessary.

Reply: Thoreau, who performed civil disobedience in a democracy, argued that sometimes the constitution is the problem, not the solution. Moreover, legal channels can take too long, he argued, for he was born to live, not to lobby. His individualism gave him another answer: individuals are sovereign, especially in a democracy, and the government only holds its power by delegation from free individuals. Any individual may, then, elect to stand apart from the domain of law. Martin Luther King, Jr., who also performed civil disobedience in a democracy, asks us to look more closely at the legal channels of change. If they are open in theory, but closed or unfairly obstructed in practice, then the system is not democratic in the way needed to make civil disobedience unnecessary. Other activists have pointed out that if judicial review is one of the features of American democracy which is supposed to make civil disobedience unnecessary, then it ironically subverts this goal; for to obtain standing to bring an unjust statute to court for review, often a plaintiff must be arrested for violating it. Finally, the Nuremberg principles require disobedience to national laws or orders which violate international law, an overriding duty even in (perhaps especially in) a democracy.

Objection: Even if civil disobedience is sometimes justified in a democracy, activists must first exhaust the legal channels of change and turn to disobedience only as a last resort.

Reply: Legal channels can never be "exhausted". Activists can always write another letter to their congressional delegation or to newspapers; they can always wait for another election and cast another vote. But justice delayed, King proclaimed, is justice denied. After a point, he argued, patience in fighting an injustice perpetuates the injustice, and this point had long since been passed in the 340 year struggle against segregation in America. In the tradition which justifies civil disobedience by appeal to higher law, legal niceties count for

relatively little. If God trumps Caesar to justify disobedience to unjust law, then God can trump Caesar to permit this disobedience sooner rather than later. In this tradition, A.J. Muste argued that to use legal channels to fight unjust laws is to participate in an evil machine, and to disguise dissent as conformity; this in turn corrupts the activist and discourages others by leading them to underestimate the numbers of their congeners.

Objection: We must obey the law under a contract with other members of our society. We have tacitly consented to the laws by residing in the state and enjoying its benefits.

Reply: Obviously this objection can be evaded by anyone who denies the social contract theory. But surprisingly many disobedient activists affirm that theory, making this an objection they must answer. Socrates makes this objection to Crito who is encouraging him to disobey the law by escaping from prison before he is executed. Thoreau and Gandhi both reply (as part of larger, more complex replies) that those who object deeply to the injustices committed by the state can, and should, relinquish the benefits they receive from the state by living a life of voluntary simplicity and poverty; this form of sacrifice is in effect to revoke one's tacit consent to obey the law. Another of Thoreau's replies is that consent to join a society and obey its laws must always be express, and never tacit. But even for Locke, whose social contract theory introduces the term "tacit consent," the theory permits disobedience, even revolution, if the state breaches its side of the contract. A reply from the natural law tradition, used by King, is that an unjust law is not even a law, but a perversion of law (Augustine, Aquinas). Hence, consent to obey the laws does not extend to unjust laws. A reply made by many Blacks, women, and native Americans is that the duty to obey is a matter of degree; if they are not fully enfranchised members of American society, then they are not fully bound by its laws.

Objection: What if everybody did it? Civil disobedience fails Kant's universalizability test. Most critics prefer to press this objection as a slippery slope argument; the objection then has descriptive and normative versions. In the descriptive version, one predicts that the example of disobedients will be imitated, increasing lawlessness and tending toward anarchy. In the normative version, one notes that if disobedience is *justified* for one group whose moral beliefs condemn the law, then it is justified for any group similarly situated, which is a recipe for anarchy.

The first reply, offered in seriousness by Thoreau and Gandhi, is that anarchy is not so bad an outcome. In fact, both depict anarchy as an ideal form of society. However, both are willing to put off the anarchical utopia for another day and fight in the meantime for improved laws; consequently, this strand of their thinking is often overlooked. Another reply is a variation on the first. Anarchy may be bad, but despotism is worse (Locke instead of Hobbes). If we face an iniquitous law, then we may permissibly disobey, and risk anarchy, in order to resist the tendency toward the greater evil of despotism. A.J. Muste extended this line of thinking to turn the slippery slope objection against itself. If we let the state conscript young men against their wills to fight immoral wars, then what will the state do next? For Muste, conscription puts us on a slippery slope toward despotism, and obedience would bring us to the bottom.

Utilitarians observe that disobedience and obedience may both be harmful. The slippery slope objection falsely assumes that the former sort of harm always outweighs the latter. In the case of an iniquitous law, the harm of disobedience can be the lesser evil. This utilitarian reply is sometimes found to coexist with a complementary deontological reply, for example in Thoreau: one simply must not lend one's weight to an unjust cause.

Ronald Dworkin replies, in effect, that the descriptive version of the argument is false and the normative version irrelevant. There is no evidence that civil disobedience, even when tolerated by legal officials, leads to an increase in lawlessness. Moreover, rights trump utility. Since (for Dworkin) there is a strong right to disobey certain kinds of unjust laws, and since the slippery slope argument points only to the disutility of disobedience, this is a case of a right in conflict with utility; hence the right to disobey must prevail.

The normative version of the slippery slope argument has little force if the criteria used by activists permit some but not all disobedience. In Kant's language again, universalizability fails if the maxim of the action is "disobey a law whenever you disapprove of it," but it can succeed if instead the maxim is, "disobey when obedience would cause more harm than disobedience," or "disobey when a law is unjust in the following specific ways...." And it must be said, virtually all activists who practice civil disobedience follow criteria which endorse some, but not all, disobedience. King, for example, did not advocate indiscriminate disobedience; he advocated disobedience of unjust laws and obedience to the just. He articulated what he regarded as public, objective criteria which help us identify the unjust laws which may or must be disobeyed, and the just laws which must obeyed. Any attempt to articulate the distinction between the two sorts of law is in effect an attempt to show that the slide down the slope can be halted, or that the maxim to disobey can be universalized.

King had a second reply, inspired by Gandhi: he deliberately made his example difficult to imitate. He pressed for negotiation before turning to disobedience; he underwent self-purification before every disobedient action; he accepted blows from police without retaliation; he accepted arrest and punishment. These tactical features of his actions had other purposes as well, but there is little doubt that they prevented onlookers from thinking that here was a criminal getting away with murder whose example could be imitated with profit.

The counter reply, made by Waldman and Storing is that the example of the careful disobedient will be imitated by the careless, and cannot be confined, especially if activists cloak their disobedient acts in the rhetoric of righteousness. If true, this instantly makes replies to the normative version of the slippery slope objection irrelevant. Caution in stating our criteria so that normatively we stop our slide far from the bottom does nothing to prevent the example from being misinterpreted or oversimplified by the less cautious. Scrupulosity in self-purification, courage in accepting blows, and sacrifice in accepting punishment do not stop the unscrupulous from being inspired by the example of disobedience as such.

One direct response, then, to the descriptive version held by Waldman and Storing comes from Rawls, who argued that civil disobedience can actually help to stabilize a community. It can be destabilizing if a very large number of people do it, but this rarely happens, and when only a few do it, it can have the beneficial and stabilizing effect of nudging a society closer to its shared vision of justice.

Thoreau and Wasserstrom argue that while many in fact might be morally justified in disobeying, few in fact will actually disobey. For Thoreau and A.J. Muste, this inertia and docility in the general population are far larger problems than incipient anarchy.

Sometimes activists can point to the lawlessness of their opponents as the real concern. Thoreau claimed that the only harmful consequences of civil disobedience were triggered by the government's reaction to it. King painted white segregationists as the group most

likely to precipitate anarchy, since it disobeyed desegregation laws without regard to their legitimacy or justice. Moreover, an activist need not be an anarchist to welcome widespread imitation. Thoreau ardently wished that all opponents of slavery would act on their convictions. He would regard a prediction of widespread imitation of his disobedience as an inducement to act, not as an objection. At this point, critics must be careful not to use the slippery slope objection inconsistently, by predicting anarchy to those who fear it, and inert indifference to those who fear that. On the other hand, activists who welcome imitation should probably do all they can to encourage this imitation; Thoreau did nothing of this kind until he wrote his extremely influential essay two years after he was arrested for withholding his poll tax.

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