

1970

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Recommended Citation

Kent Greenawalt, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48 (1970).

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A CONTEXTUAL APPROACH TO DISOBEDIENCE*

KENT GREENAWALT**

INTRODUCTION

Edmund Burke once noted that the rebelliousness of colonial America was largely a consequence of the size and prominence of the legal profession, under whose influence the people "snuff the approach of tyranny in every tainted breeze."¹ Today, however, most members of the legal profession take a much dimmer view of civil disobedience, although some do acknowledge its justification in special circumstances.² Few who write on the subject recognize that in making judgments about the morality of disobedient acts the lawyer's perspective is limited.

Disputes over whether an illegal action is morally justified in a particular instance can be conceptually reduced to four basic areas of disagreement. 1. Is the disobedient act committed pursuant to a goal which is considered desirable and sufficiently important? One might condemn an illegal act to promote racial segregation on the ground that no efforts toward that end are morally defensible. Massive dislocation to improve food in the college cafeteria might be rejected because the goal, though desirable, is not very important. 2. What are the probable effects of disobedience? This is theoretically a factual inquiry, although the relevant "facts" may be unascertainable and highly complex. It encompasses both an inquiry into the likelihood that the actor's goal will be achieved and an examination of other possible effects of the act. 3. Are the probable effects desirable? If particular consequences are predictable, one may think them good or bad. This evaluation will be particularly difficult if one value, such as equality, is promoted at the expense of another, for example security. And if among many consequences some are considered desirable and others undesirable, their respective importance must be weighed. 4. Is obedience to law a moral claim on individuals that overrides moral claims in favor of disobedience? The thesis of this discussion, in large part, is that the answer

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1. *Speech on Conciliation with the Colonies*, in E. BURKE, *SPEECHES AND LETTERS ON AMERICAN AFFAIRS* 95 (Everyman ed. 1961).

2. See, e.g., COX, *Direct Action, Civil Disobedience, and the Constitution*, in A. COX, M. DEW. HOWE, & J. R. WIGGINS, *CIVIL RIGHTS, THE CONSTITUTION, AND THE COURTS* (1967); A. FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* (1968); address by E. N. Griswold, George Abel Dreyfous Lecture on Civil Liberties, at Tulane University School of Law, April 16, 1968; MORRIS, *American Society and the Rebirth of Civil Obedience*, 54 A.B.A.J. 653 (1968); address by E. V. Rostow, *The Consent of the Governed*, 114 CONG. REC. S8794 (daily ed. July 17, 1968). See also *A Declaration of Confidence in Columbia's Future*, statement of members of the Columbia Law School Faculty, N.Y. Times, May 17, 1968, § 1, at 41, col. 2. Since the arguments discussed in this essay are generally familiar, I do not, for the most part, cite the persons who have made them.

to the last question depends on answers given to questions 2 and 3. Others, however, may believe it to be an independent inquiry. Indeed one possible position is that this is the only necessary inquiry; if one is always morally obligated to obey the law, goals and probable effects are irrelevant. Few, I think, would take this position upon serious reflection.³

Questions involving values are ones to which human reason can provide no final answers, and the "factual" inquiries involved in determining possible effects of disobedience are too complex for social science to give confident responses. Despite these difficulties, the second question is one with which the social scientist is best equipped to deal. The other three are most closely within the domain of the social and moral philosopher. Certainly no discipline has a monopoly on relevant truth or understanding in these areas. Although these inquiries are not central to his professional training, a lawyer is used to weighing values and making judgments about complex social facts. But that is hardly enough to justify the sublime confidence with which some members of the bar pontificate on the subject. Lawyers would do well to recognize that when they do discuss this topic, they are stepping beyond the narrow area of their particular professional competence. They should also be aware of the possibility that vocational commitment to the law is double-edged. At the same time it enriches comprehension of conflict management and the worth of orderly process, it may lead to a partial view of the relative importance of observance of legal norms as opposed to other social values.

In this essay, I first suggest an unoriginal criterion for determining when disobedience of law is morally justified, one that is based upon the probable consequences of the disobedient act. This leads me to reject the conclusion advanced by some commentators that certain conditions, such as nonviolence and a willingness to be punished, are always essential if illegal behavior is to be justified. I then try to demonstrate why such factors are relevant, and often determinative, for justification. The application of the criteria advanced to specific disobedient acts does not produce simple answers to questions of moral justification. But simplicity of application, whatever may be its importance for legal norms, is not, in my view, a necessary hallmark of a principle of moral judgment.

My focus is on the arguments one would offer for and against a particular disobedient act before it is done, and the criteria for deciding if it was correctly undertaken. Since I am interested in judging the act rather than the actor, I am not concerned with the actor's motives. I by no means want to deny the significance of evaluating the actor in light of his act or even to imply that passing a moral judgment on the act is more important than passing a moral

3. It is most effectively rebutted in Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A.L. REV. 780 (1963). My debt to his analysis in the development of other positions taken in this essay is considerable.

judgment on the actor. We are continually engaged in making both sorts of judgments. Here, however, I discuss only the reasons one would put for and against someone's engaging in certain acts, rather than the circumstances in which an actor should be considered personally blameworthy for what he has done. For my purposes, a well-intentioned but predictably disastrous action would not be justified, and an act might be morally justified though undertaken hatefully. Thus, helping a slave to escape might be morally justified even if the actor was moved solely by a wish to harm the owner whom he detests. By "morally justified" I mean an act that would be done by someone who is well-intentioned and well-informed, and can judge objectively.

As the generality of my language has already indicated, the discussion is not limited to illegal acts falling within the category of civil disobedience. This is partly a result of the difficulty of definition. But more importantly, I believe the reasons thought to justify civil disobedience coincide to a great extent with those advanced to defend other kinds of illegal behavior. These matters are dealt with in more detail below.

There are two issues rightly given attention by lawyers which I do not mean to discuss in the main body of the essay, but to which I do return briefly in the postscript.⁴ The first is when an act which is apparently disobedient when committed is not really disobedient because the law violated is adjudged unconstitutional. The analysis proceeds here on the assumption that the law to be obeyed or disobeyed is plainly valid within the system of positive law, that is, is legally valid in the sense that any law passed by the Parliament in Great Britain is valid.⁵ I recognize that in the United States the contention that a statute is immoral can on many, and probably most, occasions be the basis for a plausible argument that it violates the Constitution in some respect, but the core issues of disobedience are most clearly seen when an apparently illegal act cannot be defended as consistent with underlying positive law.

The second issue concerns the appropriate attitude of those who enforce the law towards persons who claim that moral justification supports their illegal acts. While a discussion of this subject has been reserved for a postscript, I shall assert as part of the main thesis developed here, that the actor's evident willingness to accept punishment may bear on the possibility of justifying the act morally.

I. MORAL JUSTIFICATION DEPENDS ON PROBABLE CONTRIBUTION TO THE SOCIAL GOOD

My basic criterion for judging acts of disobedience can be stated quite simply. *An act with social consequences is morally justified if it will probably*

4. See text accompanying notes 31-36 *infra*.

5. I mean to avoid the controversy as to whether some laws are so immoral they are not properly called laws at all. In this essay the term "law" does not include any implicit notion of moral acceptability.

contribute to the social good. Before considering the application of this vague utilitarian formulation, I must enter some disclaimers and clarifications, and consider some possible qualifications. It is not my purpose to develop a systematic theory of what it means to say that an act is moral or immoral, a task that, in any event, I am not equipped to undertake. Such a course might be necessary if I believed that disagreements on this point were responsible for most disputes over the morality of illegal acts. On the contrary, frequently those with sharply divergent views accept, explicitly or implicitly, some premise approaching the one suggested above. Even for those who reject it, the main body of this essay will have relevance so long as they think social consequences are of some weight in making an evaluation of disobedience from a moral perspective.

A. *Definitional Clarifications*

The criterion *will probably contribute to the social good* requires some elaboration. I do not intend any mystical concept, such as the "common good" or "general will" are sometimes thought to be; social good for these purposes is synonymous with "desirable social consequences." Nor is the phrase "social good" meant to exclude any relevant favorable or unfavorable consequences. I do not mean to decide difficult questions by definition. To illustrate, the moral acceptability of abortion turns largely on whether a fetus should be considered as having interests that should be protected. I would not dispose of that problem by saying that a fetus is not a part of society so that possible claims on its behalf have no bearing on the social good. Any relevant favorable or unfavorable consequences should be weighed, even if some of them might best be considered "nonsocial," either because the entity on whose behalf claims are rightly made is not a member of society or because the claim, though made by a member of society, is a nonsocial one, such as the avoidance of eternal damnation. "Social good" is simply shorthand for the kinds of values that are commonly involved when social acts are performed.

No attempt is made here to decide what is socially good. Those who disagree most strongly about disobedience are often in general agreement over the human values a society should protect and enhance. And when critics of disobedience do reject the notions of social good of disobedient actors, they commonly wish to make arguments against the illegal acts that would be valid even if those notions were accepted. If what appears to be a disagreement over disobedience is in reality a conflict over what social ends are desirable or the comparative priorities of admittedly desirable social ends, the discussion should clearly center around those broader questions, rather than the appropriateness of disobedience to law as a means.⁶ Although I do not engage in any extensive

6. The matter is more complicated than the text suggests. When either of two competing social ends could be embodied in law, racial segregation or racial integration, private property or public ownership, discussion about the desirability of these ends can

analysis of what is socially good, I do in the remainder of the essay assume the desirability of social values I believe widely shared by thoughtful persons in contemporary society.

The formulation I have chosen not only begs the question of "what social good" but "whose social good." It is obviously true that most people act as if their own interests and those of their "in-group" are more important than the interests of outsiders. This is perhaps most sharply evident in the realm of foreign affairs, where each country pays comparatively little attention to the interests of other countries except insofar as they coalesce with its own advantage. It is possible to defend at least some forms of special attention to "in-group" interest as consistent with ultimate acceptance of a principle that interests should be weighed equally. When a wage earner turns money over to his family rather than to strangers who may actually need it more, he might argue that given societal institutions he has special responsibilities for his own family that others will not fulfill; if he fails to support them reasonably well the family unit is likely to be destroyed, to the long run detriment of its members and of society. Pressing the claim of a particular group in the social process to the exclusion of the interests of other groups could be defended on the ground that, given the general selfishness that pervades society, any one group would receive less than its due if it did not assert more than its due. Thus, barring widespread reform of human nature, ultimate fairness is served by a group's weighting its own claims very heavily. In some circumstances apparent emphasis on the interests of a particular group might be translated into emphasis on the overriding importance of particular social values. If equality and freedom from discrimination are believed to be by far the most important social values, one might in this society press the claims of blacks with little attention to those of whites, not because black interests count for more than white interests but because blacks are the ones who now suffer deprivation in regard to this, hypothetically, most basic interest.

Though special attention to "in-group" interest can sometimes be persuasively reconciled with a principle of equal weighting, this is often not the case. Even when it is not true, however, actors may assert that the interest of their own group is consistent with that of the other members of society. Such assertions are common in this society, where the assumption that humans' interests should be treated as roughly equal is widely accepted, if not observed. Although these assertions are sometimes simply hypocrisy, frequently they are honest rationalization. Other actors may bluntly acknowledge that they are concerned with the welfare of a particular social group and have little or no regard for the welfare of others.

be separated from discussion about the appropriateness of disobedience as a tactic. When, however, one of the ends may be inconsistent with disobedience, say the security of fulfilling expectations created by law, the two discussions are not really divisible.

Two persons who agree on what kinds of social consequences are good may still disagree about the desirability of a social action if they weigh the interests of affected groups differently. Let us suppose that this country's involvement in the Vietnam war is moderately good for the United States but very bad for South Vietnam. The person who believes that American policy should be formulated solely or primarily from the viewpoint of our own national interests may reach a conclusion quite different from the person who thinks that the interests of the United States and the interests of South Vietnam should be granted at least equal consideration. Some arguments over disobedient acts can, no doubt, be reduced to this kind of disagreement. Since hypocrisy and rationalization do often obscure such divergences,⁷ spadework will often be required to expose the ultimate point at issue; once it is exposed, however, it should be the focus of discussion.

I do not try to resolve this complicated ethical problem.⁸ Instead, I make the assumption that the interests of all those who live in a society count. My own view is that each person should count equally. If there are those who unyieldingly think that only the interests of their own group are significant, the only relevant arguments against an act for them will be ones that demonstrate probable harm to that group.

The standard *contribute to the social good* would, of course, include situations in which all one can do is minimize impairment of the social good. Reducing losses is as much a contribution as increasing gains. There are some acts which may produce no consequences of moral importance, and, theoretically at least, there may be some in which good and bad consequences are evenly balanced. Since performing such acts is not immoral, I shall speak of them as being morally justified though nonperformance would be equally justified.

The concept of *probably contribute* requires more lengthy elucidation. The ideal criterion should include all the facts and arguments that could be presented to an actor before he acts. Consequences that are fortuitous, given the limits of human knowledge, are not relevant, nor are consequences predictable only on the basis of what I shall describe as private knowledge. A recent tragic example will demonstrate these distinctions. Students barricaded a university official in his office for several hours. That same night he suffered a heart attack. Let us assume, a causal relationship. If the official had never had heart trouble before, neither the students nor anyone else could have predicted that he would be affected in the way that he was, although the

7. Discussion about United States involvement in the war is a good example. Supporters invariably contend that it is good for both the United States and South Vietnam and opponents invariably contend that it is bad for both.

8. A related problem is how the interests of future generations should be weighed in comparison with those of present members of society. See Golding, *Ethical Issues in Biological Engineering*, 15 U.C.L.A.L. REV. 443, 451-63 (1968).

general risk that persons subject to emotional strain may have serious adverse physical effects should have been taken into account. If the official's doctor had only privately diagnosed heart trouble, again the particular consequence was not foreseeable by the students. If, on the other hand, the official was publicly known to have a weak heart, the students should have estimated that there would be a particularly high risk of an attack following their acts.

I have earlier indicated that for my purposes actual motive is irrelevant. A more difficult problem with respect to justification is the state of the actor's knowledge. Here we may distinguish between facts of which he was actually aware, facts of which he was not aware but of which he should have been aware, and facts of which he was not aware but which might have been known by him or by someone of greater intelligence in the same circumstances. If the primary purpose of the inquiry was to pass a moral judgment on the actor, one would condemn him when ignorance leads to an undesirable act only if he could reasonably be held responsible for not ascertaining the facts correctly. My concern, however, is not with what knowledge a particular actor should be held responsible for, but rather with how a reflective, intelligent, and well informed observer would recommend that he act. When I speak of an act as morally justified I mean that given any knowledge available before the act and judged at the point of time of the act, the act appears to be desirable, that is, that it will probably contribute to the social good.

B. *Some Possible Alternatives and Qualifications*

Although this essay is not a systematic defense of a standard for judging disobedience that focuses on probable social consequences, it seems wise to discuss three commonly asserted complete or partial alternatives. The weaknesses of these alternatives help demonstrate why an emphasis on probable social consequences is preferable.

1. *Citizens are bound by consent to obey.* One position is that citizens have an overriding moral obligation to obey the law, because they have consented to be bound by it. This, of course, is the heart of social contract theories of political obligation.⁹ For Locke and others, the consent of the governed is the source of the duty to obey laws. The obligation to obey is analogous to the obligation of a person who has made a promise voluntarily agreeing to perform a certain act. However, acceptance of the thesis that there is an obligation to obey the law in the same sense as there is an obligation to keep a promise does not necessarily compel a conclusion that the law should always be obeyed. In terms of the analogy itself, virtually everyone would acknowledge that it is sometimes good to break a promise.¹⁰ A more difficult question is whether the

9. See, e.g., J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* §§ 95-98 (J. W. Gough ed. 1946).

10. Some theologians have argued that acts like lying or breaking promises are always evil, though they may be in some circumstances lesser evils than alternative

obligation to keep a promise does constitute an independent source of moral duty, or conversely, if the duty to keep promises is subsumed totally under a duty to perform socially beneficial acts (usually it is useful to keep promises). The classic example posing this issue is whether one should keep a promise to a dead man if more desirable social consequences will ensue from breaking it. No attempt is made here to resolve this dilemma. But if promises do constitute an independent source of moral duty, that is, if the obligation to keep them cannot be subsumed under some broader duty, then the obligation to keep a promise must be weighed against a conflicting moral duty when the two collide. Thus, even if the "consent" of the governed is like a promise, the most that follows is that there is an independent duty to obey the law, which will sometimes, but not necessarily always, override considerations of social consequence if those would lead to breaking a law.

There are, however, strong reasons¹¹ for not treating the average citizen's responsibility toward the law like his responsibility to keep promises. Locke's core notion is explicit voluntary consent; in leaving the state of nature, people agree to live together in society and accept the decisions of those placed in positions of authority. But faced with the problem that most people in most societies never give such voluntary consent, Locke is forced to retreat to a concept of tacit consent:

I say that every man that hath any possession, or enjoyment of any part of the dominions of any government, doth thereby give his tacit consent, and is as far forth obliged to obedience to the laws of that government during such enjoyment as any one under it; whether this his possession be of land to him and his heirs for ever, or a lodging only for a week; or whether it be barely travelling freely on the highway; and in effect it reaches as far as the very being of any one within the territories of that government.¹²

In these broad terms any one enjoying the benefits of a society has consented to its government, however tyrannical, and laws. Now it makes some sense to say that acceptance of social benefits implies correlative social duties, but this acceptance is quite different from explicitly and voluntarily undertaking to obey the society's governors. Every human lives in some society, which makes acceptance of social benefits, including the protection of a legal system, unavoidable. Since the prospect of living alone on a desert island is rarely a viable alternative, it is not very helpful to say one "chooses" to live in society. Even the possibility of moving to a different society is hardly a real one for most people, and such a change inevitably involves serious disabilities. The "choice" to remain in one's native country is not a "choice" in the normal

courses of action. By good or justified I mean any preferable course of action judged from a moral point of view.

11. See Ladd, *Legal and Moral Obligation*, in NOMOS XII: POLITICAL AND LEGAL OBLIGATIONS ch. 1 (to be published 1970).

12. J. LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 119 (J. W. Gough ed. 1946).

sense, and genuine choice is central to the notion of consent. Finally, it seems strange to say that because one accepts the benefits of society, including its legal system, one is under a duty to obey the law even if the welfare of the other members of society will be promoted by disobedience. In short, an acceptance of social benefits may be useful in explaining why a citizen should obey the law if obedience conflicts with his self interest or perhaps the interests of those outside his society, but it does not afford a basis for arguing that the law should be obeyed when an illegal act would contribute to the good of his own society.

A more defensible theory postulates that in a representative democracy, citizens consent to laws by participating in the process of government. As J. P. Plamenatz states in a new postscript to his earlier book on *Consent, Freedom and Political Obligation*:

Where there is an established process of election to an office, then, provided the *election is free*, anyone who takes part in the process consents to the authority of whoever is elected to the office. This, I think, is not to ascribe a new meaning to the word *consent* but is only to define a very ordinary and important political use of it. The citizen who votes at an election is presumed to understand the significance of what he is doing, and if the election is free, he has voluntarily taken part in a process which confers authority on someone who otherwise would not have it. . . . By consenting to someone's authority, you put yourself under an obligation to do what the possessor of it requires of you. . . .¹³

This contention is relatively persuasive if the process consists of a small meeting at which everyone understands that a majority vote will decide a specific question and at which it is implicitly understood that the act of voting implies consent to the result. If, for example, at a faculty meeting a participant announced that he had no intention of abiding by the result if his side lost, his right to vote on that issue, and perhaps even his continued participation in the community, might be questioned by others. In such circumstances, the act of voting, at least absent a disclaimer, may be considered an implied promise to accept the result. This analysis is less convincing, however, when applied to the role of a citizen in a complex society. In the first place, in most liberal democracies, the avowed revolutionary is permitted to vote. Thus, someone would be allowed to vote even if he explicitly stated, "I believe in the violent overthrow of this corrupt society. I am willing to use any means to change it, but since the situation is not yet ripe for revolution I will do my best to alter it by the ballot." It is hard to see how his vote represents consent to the authority of the winner of the election. But even in the case of a citizen generally satisfied with the political system, voting in a public election is very

13. J. P. PLAMENATZ, *CONSENT, FREEDOM AND POLITICAL OBLIGATION* 170, 171 (2d ed. 1968).

different from participating in and voting at a meeting. He votes for someone who will then decide on a broad range of particular issues, many unforeseen at the time of election. His choices even with regard to individuals are severely limited by a preliminary political process. He has no real chance to present his own views directly to the body voting on the laws.¹⁴ In short, though it may be correct to say that in some sense the person who accepts the system has "consented" to the authority of the person elected, it is much more difficult to argue in contrast with the small meeting situation that he has impliedly promised to accept the result of every deliberation of the body in which the person elected sits. In summary, the relationship between accepting the benefits of society, voting in public elections and obeying the law is not the same as that between making a promise and performing it. One may contrast here the public official, such as a judge, who voluntarily swears to uphold the law; how much stronger his obligation of fidelity to the law seems to be. This may suggest one relevant distinction between the disobedient citizen and the governor who blocks a student's entrance to the state university after a contrary court order. Even if we grant that a promise is an independent source of moral duty, participating by voting in an industrial democracy may not be. Such an act imposes no obligation that must be weighed against desirable social consequences, even if such a weighing must be undertaken when desirable social consequences conflict with a promise.

If this analysis is correct and there is not a "promise-like" obligation to obey ordinary laws, there may still be such an obligation to obey rules one has participated in formulating or to which one has given explicit consent, as by joining a club. If so, and assuming promises do impose an independent moral obligation, the suggested criterion for judging possible disobedience could be modified to "whether the act will make a contribution to the social good large enough to outweigh the independent moral duty to obey the rule."¹⁵

2. *The law should be obeyed because individual judgment is unreliable.* It can be argued that social consequences are so difficult to predict and an individual's judgment so subjective and biased that opposing one's own judgment to that of society as reflected in its laws is never justified. This argument may appear to be inconsistent with a social-consequence criterion but in some aspects at least it is really an application of that criterion rather than an alternative. If positive laws invariably do a better job of formulating rules

14. I do not wish to denigrate such forms of political action as testimony before legislative committees and letters to representatives. These opportunities, however, are still far removed from direct participation in the deliberations of a legislative body, and relatively few citizens have the time and information to use them effectively.

15. Readers who believe that voting in general elections is enough like a promise to constitute an independent source of duty can make the same modification in the standard for evaluating disobedience of laws. See Section III D for the argument that the form of government is highly relevant to whether disobedience is justified, but for reasons that are not independent of social consequences.

of action than the judgments of even the most intelligent and dispassionate individuals, then we could conclude that disobedience of law will never "probably contribute to the social good." This is not to say that an illegal act will never do more good than harm but only that it can never be predicted that an illegal act will do more good than harm. Thus, the social consequence analysis would not be inconsistent with a conclusion that individual judgment is so unreliable that laws should always be followed. A second more limited version of the unreliable judgment argument is that although individuals can sometimes correctly judge that positive laws are harmful, disobedience will be even more harmful, both because of its immediate ill effects and because of the possibility that its example will cause disobedience in other situations in which the law is good. If this were true, disobedience again would probably never contribute to the social good. A third form of the argument is more difficult to deal with. It contends that although on some occasions some individuals can correctly conclude that the social good will be promoted by disobedience (even after taking into account the likely effects of the example), on most occasions most people exercise woefully inadequate judgment; therefore the use of such a flexible criterion will be socially harmful because it will be more often misused than well-used. The argument has some force in that people probably perform better with clear moral standards that usually produce good results than they do with complicated standards that are theoretically more accurate but easier to misapply. If people come to believe, for example, that adultery is sometimes justified, they may commit it more often when it is not justified than when it is. Even if this argument were fully compelling, however, I should be inclined to believe that an act is justified when the more complicated much abused standard is correctly applied. When one speaks of a moral act, he means to suggest what a completely objective and reasonably intelligent person would do. If people are so far removed in character from this model that the best society can do is to inculcate simple norms which, if followed, usually produce the correct result, it still makes sense to speak of an act as morally justified if it conforms to the more difficult standard with which society could trust objective and intelligent actors. At any rate, my own view is that the fallibility of individual human judgment is highly relevant in determining the proper occasions for disobedience, but that it should not rule out disobedience in all circumstances.

3. *Unjust laws should be disobeyed.* Unlike the last two possible objections to a social consequence criterion, this one is raised by those claiming moral justification for disobedience. Illegal acts have often been defended on the ground that the law requires something that is absolutely forbidden from a moral or religious point of view. When early Christians refused to worship pagan gods, it was not because they feared such worship would have adverse

social consequences.¹⁶ Antigone did not refer to the social good when she defied Creon's edict. If someone were told by a tyrant to choose five out of six innocent people to be killed, he might well decline even if certain that in the absence of his choosing all six would be killed. There may, in short, be some acts that are immoral whatever the social consequences. In my view, such acts are rare. It is difficult to imagine more appalling acts than those required of Jewish prisoners at the camps where their fellow Jews were put to death. Refusal by one person to cooperate in the execution of mass murder would simply have resulted in another death, serving no constructive purpose. The book *Treblinka*,¹⁷ reconstructing the lives of these prisoners at one death camp, makes a persuasive argument for their cooperating and thus staying alive, in the hope one day of revolting and reporting to the world outside what had gone on. South Africa's apartheid laws are surely among the world's most iniquitous, yet I would argue that a responsible opponent of those laws should act in a way likely (if any way is likely) to achieve their demise; he should not just disobey them all. If the example of disobedience is, in fact, the method most likely to lead to change, then disobedience should take a form that will create an example strongly and widely felt.

Although the Jewish death camp and the law of race relations in the Union of South Africa are exceptional in degree, no social institution is entirely free from evil. Participation in any existing society involves compromise with what one believes to be ideal. There is room for argument, of course, that at some point, compromise becomes so intolerable that the morally responsible act is withdrawal of one's participation regardless of consequence. One influential modern writer on Christian ethics, as well as the classic Utilitarians, can conceive of no such situation. For Joseph Fletcher, "one's 'duty' is to seek the goal of the most love possible in every situation,"¹⁸ and this means for him always being guided by the likely consequences of one's acts. One need not accept the proposition that probable consequences are always determinative of the morality of an act to believe that at least across most of the spectrum of social behavior the rightness or wrongness of an act depends on its consequences.

In addition to the narrow class of circumstances in which I would find the claim at all persuasive that a law is so evil that obedience is morally wrong regardless of consequence, there is another reason why I shall not discuss these claims further. Such absolute moral assertions may invite disagreement but not analysis. Those who do believe that there are a significant number of

16. Some of them may have been moved by a different kind of consequence, the prospect of a desirable life after death, but fervent religious behavior is rarely so calculating.

17. J. F. STEINER, *TREBLINKA* (1967).

18. J. F. FLETCHER, *SITUATION ETHICS* 96 (1966).

circumstances in which disobedience is absolutely enjoined whatever the consequences can consider what follows as relevant to circumstances that do not fit within that category.

Before leaving this subject, I should note what strikes me as a paradoxical element. It may well be that a defense of disobedience, or for that matter any social act, will have a greater impact on others if couched in absolutist moral terms than if phrased in more qualified language. Compare the statement, "this war is so evil any aid to it is absolutely immoral," with "this war is evil, and nonparticipation seems to be the best way to end it." It is, therefore, quite possible, assuming a situation in which disobedience is justified, that it may be socially useful for those who disobey to advance an absolutist ethic. It is also possible, of course, that in situations where the law should be obeyed, absolute moral injunctions, such as "A citizen should never violate the law," may be more effective in winning obedience than some weaker, less sweeping moral principle. We might conclude, therefore, that on some occasions at least, an ethic that disregards social consequences is actually valuable to society because it helps promote the social good.

II. APPLICATION TO DISOBEDIENT ACTS OF THE CRITERION OF PROBABLE CONTRIBUTION TO THE SOCIAL GOOD

In this section, I suggest the relevance for questions of justification of some varying characteristics of illegal acts. As the earlier discussion indicates, I do not, as do most writers, start with a definition of civil disobedience. The breadth of the definition often seems to depend on the writer's approval or disapproval of particular kinds of violations of law, the unspoken implication being that illegal acts that cannot be defined as "civil" disobedience are impossible, or at least more difficult, to justify. To qualify as "civil disobedience" under a relatively narrow and fairly common definition, an illegal act must be committed to change a law or policy, and better society; the act must be nonviolent and public; and the actor must intend to accept punishment.¹⁹ Some definitions, however, are much more expansive. For Howard Zinn, civil disobedience is any "deliberate violation of law for a vital social purpose."²⁰ No one, I think, would dispute that acts meeting the former criteria are acts of civil disobedience. What are generally thought of as typical acts of civil disobedience, those of the civil rights movement in this country and those led by Ghandi in India, do conform to them. One could, of course, try to decide which of the elements of those acts are essential for acts to qualify as "civil" disobedience and which are not. My concern, however, is with whether dis-

19. See Adams, *Civil Disobedience: Its Occasions and Limits*, in NOMOS XII: POLITICAL AND LEGAL OBLIGATIONS ch. 13 (to be published 1970).

20. H. ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 39 (1968).

obedient acts are morally justified, and I do not think the line between morally justified and morally unjustified illegal acts is coincident with the line between acts that are considered to be civil disobedience, however defined, and those that are not. Thus, I do not attempt a definition of my own. I wish, however, to indicate the wide spectrum of kinds of distinctions among illegal acts, many of which are also central to various definitions of civil disobedience, and to discuss why some of these distinctions bear on the issue of moral justification.

Before proceeding to this topic, I should here make explicit an obvious corollary of the standard of "probable contribution to the social good." In deciding whether a particular social act is morally justified, tactical judgments are of the utmost importance. When one is trying to accomplish a desirable end it is morally preferable to use productive rather than futile tactics, assuming similar indirect consequences. Of two tactics equally likely to produce the desired end, it is immoral to use the one that will have more harmful consequences. And when the only tactics available to achieve a particular end are likely to cause more harm than the good obtained from the end accomplished, the moral course is to bear the existing evil. In the extreme case this is obvious. No one would advocate a mass slaughter of university officials to improve the food in the cafeteria, even if that were the only means likely to succeed. And few would suggest killing nine-tenths of the country's white population if that were the only way of reaching genuine racial equality. In short when it is sometimes said, "In those circumstances any tactic is justified," the speaker is guilty either of inaccuracy or hyperbole. As Professor Adams indicates in his suggestive analogy to the doctrine of just wars,²¹ notions of proportionality are central in judging acts of disobedience.

The major kinds of distinctions drawn among illegal acts by those who discuss disobedience can be divided into four broad inquiries; what damage is done to the interests of others; what is the purpose of disobedience; do the actors willingly accept punishment; under what form of government does the disobedience occur. In the remainder of the essay, I shall develop some of the distinctions within these major categories and their relevance to moral justification.

A. *Damage to the Interests of Others*

Illegal acts may or may not seriously interfere with the legitimate interests of other individuals. I have used the term "interest" rather than "right" because of its broader connotations; the citizen has an interest in having the roads open after a snowstorm but he may have no such right, or at least not a legally enforceable one. The qualifier "legitimate" is employed to allow the possibility of excluding asserted interests that deserve no recognition. For

21. Adams, *supra* note 18.

example, the strong desire of a sadistic parent to beat his child might well be thought unworthy of any consideration.

Some acts violative of the law involve no direct interference with the interests of others. A law may be designed to protect those interests but not operate in such a fashion in particular circumstances. A good example is a very low speed limit, 20 miles per hour, set to protect pedestrians in a crowded area. For the sake of administrative convenience the law does not vary at different times of day, but at five o'clock on a Sunday morning the law may serve no genuine protective purpose. Other laws are designed to protect the person against whom they are directed. Laws against jaywalking are meant to protect pedestrians against their own bad judgment. People are required to take cover during civil defense drills as a part of training for their own protection. Laws against drug use and consenting deviant sexual behavior are similarly not designed mainly to protect the interests of others. (In regard to deviant acts it can be argued that knowledge of their performance offends the sensibilities of other members of society. Whether that is a "legitimate" interest is a point much debated; it is enough to say here that it is an interest much less tangible than those now to be discussed.)

Some illegal acts cause inconvenience to others. A loudspeaker that exceeds permissible limits of noise will disturb persons engaged in other activities. The person who double-parks is likely to slow down traffic. So also are demonstrators who block a bridge, and subway employees who go on strike. Students who take over buildings interfere with the educational process, as do teachers who go on strike. By calling these interferences "inconveniences," I by no means intend to minimize them. They may be slight or very serious. For the person paid by the hour losses of times can be translated into losses of money, and though the calculation for others may be less precise, time wasted is time lost for valuable activity.

These situations may, however, be distinguished from those in which something that is "owned" is taken or destroyed, that is when property rights are impaired. The line between inconvenience and loss of property is not a clear one; it depends largely on which interests the legal system recognizes as possessing the status of legal rights,²² though a strong sense of owning something is not always based on legal right. Members of a family, for example, may consider objects as "theirs" that are legally owned by someone else in the family. Some forms of illegality involve aspects of both inconvenience and impairment of property. When striking teachers or demonstrating students take over a building, they interfere temporarily with the exercise of rights of property by the institution that owns the property. So also a

22. In this sense, "property" might include legal rights, such as contractual ones, that would not strictly be called property rights within the legal system.

person who takes a one day joyride and then returns the car to where he found it prevents for a time the enjoyment of property rights.

A different kind of damage is physical injury to persons. Even when no physical injury occurs, inconvenience or impairment of property may be accompanied by a threat of personal injury. The robber pulls a gun expecting not to use it; students in a building say no one will be allowed to come in, not really expecting to have to repel entrants by force. On other occasions even when the actor does not directly injure someone physically, such injury may be a predictable consequence of what he does. When fuel oil drivers strike in midwinter during a flu epidemic, it is a near certainty that some people will die who would otherwise have lived.

Some violations of law involve only a possibility rather than a certainty or a probability of injury to the interests of others. In the vast majority of instances of traffic violations, for example, no one suffers, though the violations do increase the risk of property loss and physical injury.

It is obvious that the degree of injury to others is relevant to whether disobedience of law is justified. The more serious the injury,²³ the greater must be the good accomplished by the act. If there is no such injury or risk of it, little or no countervailing good is required. One should be hesitant to conclude, however, that even in circumstances involving no direct injury others will not be harmed by illegal acts. In the first place, there is no clear line between self-regarding and other-regarding acts. The person who commits suicide may leave a family emotionally and financially bereft. So also, the incompetent jaywalker may injure the car that runs over him, delay traffic, and cause monetary and emotional hardship. Pacifists who refuse to take shelter during a civil defense drill may, if jailed, leave families temporarily without support. When it is plain that the law has been violated, either because the illegal act is open or because there is other evidence that the law has been broken, society expends resources to determine guilt and to impose appropriate punishment; that social cost is often very considerable.

Two other kinds of possible harm are less apparent. One is the need of humans to discipline themselves. Men are creatures of habit as much as reason. The driver who does not observe speed limits when it is safe not to do so is more likely, one would guess, than the driver who observes them scrupulously to become sloppy or make an error of judgment, and speed when it is not safe. The other problem is that of example. Examples are rarely, if ever, perceived by others precisely as the actor intends, and the limits of an example of disobedience may be misinterpreted. The teenage son who sees his father speeding may not understand that speed limits can be disobeyed only in special circumstances. The nimble-footed jaywalker encourages less

23. If people have a moral responsibility to protect themselves from injury as well as others, then possible harm to the actor must also be considered.

artful traffic dodgers. The actor who wishes to do something itself socially harmless must take into account the possible unintended encouragement of harmful acts which may result.

Most illegal acts cause some direct injury to others. There is no need to argue that inconvenience, loss of property, and personal injury are social harms. Death and physical pain, and the fear of them, are everywhere considered bad; so also is the loss of the power to enjoy or enrich life, to which time and property contribute. But the matter is much more complicated than that. Human beings come to expect that certain of their interests will be protected by society. When this protection fails, the reaction is not only one of loss, but also of frustration and insecurity. The sense of insecurity, at least, also extends to others who fear that at some future date they may be subjected to similar harm. Most persons probably suffer inconveniences more readily than equally costly losses of property. The sense of loss is usually stronger when what is taken is something that one actually "owns"; the deprivation of social expectations in these circumstances is felt more immediately and sharply.²⁴ Thus destruction of a given amount of property is a more serious social harm than traffic delays causing the same amount of financial damage. Perhaps this aspect of the analysis should be qualified when damage is to institutional property, *e.g.*, a government building, about which no individuals have a sense of ownership. A sense of insecurity is likely to be most intense when it involves fear of one's physical well-being.

Frustration and insecurity are bad not only because they are unpleasant emotional feelings, but also because they are destructive of fruitful human intercourse. Contact, particularly with the group from which one fears injury, is made more difficult. If a sense of insecurity is pervasive enough, members of society lose confidence in themselves and their social institutions to solve problems, and either personal withdrawal (insofar as possible) or the acceptance of extreme measures to remedy the situation is likely to result. Foremost among the possibilities is strong suppression of those who are thought to cause the insecurity.

It is conceivable, however, that the emotional disturbance caused by loss will lead to good results. The person injured may be shaken to question his complacent assumptions, and come to recognize the injustice of the law or policy against which the persons who directly damaged him were protesting. So, radicals may believe, keeping students forcibly away from class may contribute to their long-term radicalization. Certainly this theory has little general plausibility when the injury to interest is a loss of property or physical harm.

24. This conclusion, like other empirical observations in this essay, is based on introspection, conversation, and general reading rather than specific scientific evidence. It, like the other observations, is, of course, subject to any qualifications revealed by more precise evidence.

Even when what is involved is only inconvenience, perhaps accompanied by a threat to use force if necessary, one doubts whether that is more likely to achieve the result of radicalization than other tactics that will gain attention and polarize the uncommitted but do not directly interfere with their interests.

Another counterweight to the social harm of injuries to others is the possibility that the infliction of them will benefit the actors. Speaking of violence directed at colonial oppressors, Frantz Fanon states:

But it so happens that for the colonized people this violence, because it constitutes their only work, invests their characters with positive and creative qualities. The practice of violence binds them together as a whole

At the level of individuals, violence is a cleansing force. It frees the native from his inferiority complex and from his despair and inaction; it makes him fearless and restores his self-respect.²⁵

Fanon seems to be saying that a violent overthrowing of colonial rule is preferable to peaceful tactics, even if the latter are equally likely to win. To this reader, there is a disturbing discrepancy between this kind of rhetoric in the front of Fanon's book, and his description in the back of mental disorders arising out of colonial war. Even if his argument has validity in the colonial context, the situation is very different when the oppressed must continue to live with the oppressors after their fight is won. Nevertheless, if it is in fact true that some acts of disobedience promote the psychological health of those engaging in them, that is a relevant consideration.

Also of relevance is the possibility that acts that do some injury are the only available substitute for acts that do even more serious injury. A leader who convinces a mob set on murder to block traffic instead has performed in a highly desirable way if he correctly judges that the mob could not have been persuaded to forego all antisocial acts.

With regard to many instances of disobedience that cause harm to others, there is an important difference between expected harmful consequences and hoped for beneficial ones. The former are virtually certain. If a bridge is blocked, traffic will be slowed; if students occupy buildings, classes cannot be held; if an assassination succeeds, the victim will die. What good will be accomplished by acts like these is usually problematic. The greater the uncertainty that any good will be achieved, the greater that good would have to be to outweigh a certain or highly probable amount of harm. Here is a point at which the fallibility of human judgment becomes important. The responsible actor should recognize how complex and little understood are the reactions of social organisms, and how uncertain any judgments of non-

25. F. FANON, *THE WRETCHED OF THE EARTH* 93, 94 (C. Farrington transl. 1968).

immediate social consequences are. He should also consider the tendency of virtually all humans to overestimate not only the weight of their own claims for satisfaction in comparison with those of others but also the potential significance of their acts in achieving desirable change. He should, therefore, be slow to conclude that contemplated long term goods will outweigh certain and immediate harms.

Both because of obvious immediate harmful consequences and highly probable indirect harmful consequences, any disobedient act that interferes in a significant way with the interests of others can be justified only by strong countervailing reasons; the greater the interference the stronger these reasons must be. It does not follow, however, that even the worst kinds of interference are never justified. Most observers would commend rather than condemn the conspirators who planned to kill Hitler, even though the bomb which was planted was also likely to kill others more innocent than he was. Few Americans consider the Revolutionary War immoral, although extensive loss of life was a certain consequence. I shall consider below the assertions sometimes advanced that violent disobedient acts are never justified in a democracy and that revolution is something entirely apart from other acts of disobedience. It is sufficient to conclude this section with the observation that the kind and degree of injury done to others bears heavily on whether a disobedient act is justified.

B. *The Reason for Disobedience*

Most illegal acts are committed by persons pursuing their own interests at the expense of others; these actors would not usually advance a moral justification for what they do. But many illegalities are thought by the actors not to be morally wrong. Often they believe they do not cause real harm. The person who drives at 30 m.p.h. in a 20 m.p.h. zone at five on Sunday morning would defend his non-observance of the letter of the law on the ground that he proceeded in a way to protect all social interests sheltered by the law. On other occasions an actor might acknowledge a slight increase in the risks to the interests which the law is designed to minimize, but assert that these were outweighed by a more pressing claim, for example, the need to get his wife in labor to the hospital as quickly as possible. A starving man who stole some bread might make a similar claim. These persons need have no objection to the law they violate or any other law, yet they would claim a moral justification for their disobedience.²⁶

When people believe a law is unjust, they may violate it either simply to avoid its impact, or in order to secure a change. Those who take drugs do

26. In some criminal codes, failure to observe the letter of the law in circumstances such as these may not be criminal. See, e.g., MODEL PENAL CODE § 3.02 (Proposed Official Draft 1962); N.Y. PENAL LAW § 35.05 (McKinney 1967).

not use them, at least primarily, in order to get the law changed. Nor did those who violated the fugitive slave laws do so to obtain repeal as much as to ameliorate the unjust consequence of an unjust law. On the other hand, in the typical instance of civil disobedience, the object is usually to get some law or policy changed. Sometimes the law violated is the one to which the actors object. On other occasions a law to which the actors do not object is violated in order to get a different law changed, a policy altered, or a new course of government action undertaken. When demonstrators unlawfully block traffic to protest racial segregation they have no objection to the traffic laws. Sometimes illegal acts may be aspects of a revolutionary course of behavior designed to overturn the existing government or entire social system and substitute a new one.

This categorization makes it clear, I think, that purposes other than the open protest normally associated with civil disobedience may underlie a valid claim that disobedience is morally justified. Sometimes a law is so wicked that the actor rightly tries to circumvent it. The person who contrary to the law assisted Jews to escape from Nazi Germany acted morally. It is also clear that disobedience is sometimes justified, although the law violated is acknowledged to be a just one, as when the husband speeds his wife to the hospital. When the violation is designed not to ameliorate an unjust law or evade a just one in special circumstances, but to draw attention to some injustice and get the government or other authority to change its laws or policies, does it matter whether the law disobeyed is the one thought to be unjust? Abe Fortas believes so, for he says: "In my judgment civil disobedience—the deliberate violation of law—is never justified in our nation where the law being violated is not itself the focus or target of the protest."²⁷ One problem with this position is the elusiveness of its application. If someone who violates the draft law thinks the Vietnam war is immoral but accepts the need for a peacetime draft, is the draft law the focus or target of the protest? If Negroes "sit-in" at a voluntarily segregated restaurant, do they violate the general trespass law (to which they do not object) or the existence of legal principles that allow segregation?²⁸ The difficulty of applying this test points up the more serious concern of whether the distinction drawn is relevant. It might be argued that if the law violated is the focus of concern, the interests impaired are not ones deserving of protection. But this is not necessarily so. The violation of a state law requiring segregation in stores (assuming, incorrectly, for the moment, the constitutionality of such laws) will hurt the interests of the stores owners subject to the sit-ins but not other stores owners. The inequality with which adverse consequences will fall and the fact that they may fall on

27. A. FORTAS, *supra* note 1, at 63.

28. This sentence wrongly assumes, given existing federal legislation, that those who sit in have no statutory right to service.

persons individually innocent are socially undesirable results even though the law itself may be completely unjust. It may well be that the interests of those owners are outweighed by other considerations, but they are not negligible. One consequence of a refusal to submit to the draft is that another young man who would otherwise have escaped the draft will be called up. If the draft is unjust, or unjust at a particular time because of a given war, the call-up of an innocent young man willing to be drafted violates an interest deserving protection.

A stronger argument for the Fortas distinction is that if disobedience of just laws is countenanced, the danger to society is much greater and the interference with legitimate interests much more extensive. He seems to have in mind massive disruptive activities like a general strike. It is certainly true that such actions are likely to do more substantial harm than disobedience to one unjust law, both because of their contemplated impact and because of the greater danger that violence will erupt. They would therefore generally require much stronger justifying reasons; but that cannot be said of every illegal act not directed at the law which is violated. A peaceable but trespassory sit-in on government property may cause less harm than would actual violation of a law protested against. And Howard Zinn gives the following example of disobedience designed to elicit positive government action: after a child is killed, mothers block traffic on their street to pressure the government into installing a light.²⁹ In neither of these two instances would the harmful consequences of disobedience be widespread.

The breadth of the example provided to others who believe laws are unjust or would like to change policies is, one could argue, also relevant to the Fortas distinction. Thus, if action is directed only at the unjust law itself, the example has a self-limiting scope: the principle extends only to acts of disobedience directed at other laws believed by the actors to be unjust. (For reasons suggested earlier, however, the limiting principles in the mind of the actor are unlikely to be fully perceived by others, and disobedience directed to an unjust law may give others some encouragement to engage in broader forms of disobedience not directed at the law to which the actors object.) Since the only limiting principles for disobedience of laws not the focus of complaint are highly flexible weighings of probable social harm against probable social good, the misapplication of these principles by others is quite likely. Therefore, it may be that an act of disobedience will create a more dangerous precedent if not directed at an unjust law. But that hardly leads to the absolute principle laid down by Fortas. It would only lead one to conclude that some stronger grounds are necessary to justify such an act than one directed at an unjust law itself. If, contrary to the assumption of the immediately preceding analysis, one accepts Professor Zinn's view that people

29. ZINN, *supra* note 19, at 21, 32.

are too prone to obey the law,³⁰ then the fact that a particular kind of disobedience would serve as a broad example might even be counted in its favor.

Writers often seem to regard the question of a right to revolution as entirely separate from other issues of disobedience to law. Once it is admitted, however, that revolution—that is, armed over-throw of the government—is sometimes justified, it follows that other violence short of revolution might also be justified. If the evils of a social order are great enough to justify the suffering inevitable during revolutionary violence, they are great enough to justify lesser forms of violence, if the latter are likely to accomplish as much good. A possible answer to this proposition might be the argument that only a revolution can assure a breadth of change great enough to outweigh the harm of violence, and only when a revolution occurs can a society put past violence behind it. The second assertion is highly doubtful; revolutions seem as likely to lead to subsequent violence as other violent illegal acts. With regard to the first assertion, revolutions frequently lead to smaller changes than are envisioned and sometimes very substantial changes are accomplished without an overthrow of government. While it may possibly be true that violent acts short of revolution are rarely likely to achieve enough good to justify them, it cannot be laid down as an absolute rule that this is always so. Another point about revolution is also worth making briefly. When one undertakes a revolutionary course of action, he should still obey laws except when disobedience will contribute to the revolution or some other positive goal. Being a revolutionary should not be, as is sometimes implied, a wholesale warrant for disobedience of all legal norms.

C. *Is Punishment Willingly Accepted?*

The typical criminal seeks to avoid punishment, in marked contrast to many of those violating laws as a form of protest who have often willingly accepted punishment. There are two separable elements involved where the actor demonstrates a willingness to accept punishment. One is that the actor behaves in a manner which allows the authorities to impose punishment if they wish. The second is that the actor acknowledges the appropriateness of punishment if it is determined that the law has been violated. Raising possible legal defenses is not, of course, inconsistent with either of these elements. Sometimes the first element will be present without the second, that is, an actor will submit without resistance to penalties but still deny society's right to punish him.

At first glance the distinction between avoiding and accepting punishment may appear to coincide with that between surreptitious and open violation of the law. But the perpetrator of a carefully planned surreptitious murder may, as soon as he is successful, give himself up and willingly subject himself to legal penalties. Conversely, open violations are not always accompanied by

30. *Id.* at 16-18.

even the first element of this willingness. A rioter may count on not being apprehended; those engaging in unlawful strikes may rely on the pressure they can bring to bear to avoid penalties; students who take over buildings may similarly attempt to gain amnesty as a condition of settlement.

A willingness to accept punishment is not always a condition of a morally justified act of disobedience. If someone was illegally engaged in helping Jews escape from Nazi Germany, to have given himself up would have made it impossible for him to continue in that aid. It would have been perfectly moral for him to try to avoid punishment. But it does not follow that acceptance of punishment is never essential to moral justifiability. The effect of an illegal action is likely to be significantly different if the violators submit to punishment. In the first place the frustration, resentment, and insecurity caused to those whose interests may be injured will be substantially reduced if they realize that those who have caused them harm are themselves willing to pay a more costly price. Second, submission to punishment serves as a test for the actor of the strength of his conviction. When he asks himself the hard question whether he is willing to be penalized, he will be careful to consider his course of action and its value; thus submission to punishment imposes some check on irresponsible judgment. Third, submission to punishment demonstrates to others the depth of the actor's conviction. People are understandably skeptical when others merely assert a strong sense of injustice about particular laws or policies; common use of language includes a great deal of hypocritical rhetoric, rationalization of self-interest, and simple overstatement. Illegal action to change a law is, of course, further evidence that feelings are strong, but it is not nearly as convincing as a willingness to suffer serious penalties. Thus, insofar as actors wish to convince others of the magnitude of the injustice against which they protest, they are likely to be much more persuasive if they submit to punishment.

Submission to punishment also sets an important limit on the example of disobedience. If an effort is made to avoid punishment the actors seem to be communicating to others: If you believe a law or policy is very unjust, you can consider yourself justified in utilizing disobedience to attempt to alter it. "Very," however, is a vague term: future actors may underestimate the strength of feeling that supported actors before them, and they may overestimate their own feelings. There is, on the other hand, a substantial and less amorphous restriction on when disobedience can be thought justified if the example seems to say: If you believe a law or policy is so unjust that you are willing to suffer serious penalties to alter it, then you can think yourself justified in disobedience.³¹

31. A word of explanation about the phrase "think yourself justified" may be useful. As I have used the term, "justification" exists only when an action will probably promote the social good, not when the actor thinks that is the case because he misconceives what is good. In this sense, the person who violates the law in order to promote integration may argue that his acts provide no example at all for segregationists,

The reasons advanced so far for encouraging a willing submission to punishment would be largely satisfied simply by a course of action that allows the authorities to impose punishment, without any acknowledgement of its moral appropriateness. For the discussion that follows, both these elements of willing submission do become important. If punishment is accepted, the actors demonstrate a commitment to the fundamentals of the existing social order. Although they do not accept the judgment of society as expressed in the law about the proper course of behavior, they do ultimately accept that judgment in the form of punishment for behavior which society considers wrongful. This may involve an implicit admission that society may possibly be right after all, and it may therefore express a certain humility about the actor's moral judgment, although this need not always be the case. Even the most self-righteous and morally certain person might believe that society operates most fruitfully if the judgments expressed in law are accepted as the final criteria of what is wrongful behavior, even when those judgments are plainly misguided. By the possible admission of fallibility of judgment, by adherence in at least one respect to the existing method in society for determining what is wrongful behavior, the actor reaffirms his sense of being a member of the community at the same time that he defies its judgment. This is virtually certain to reduce the sense of anxiety and anger which disobedient acts may cause to other members of the community. And the affirmation of membership in the community reduces the probability that the actor will be considered an outsider, a heretic who has rejected the basic premises of a social system. It, therefore, reduces the likelihood of massive repression by those who disagree with his positions; successful repression, it must be remembered, may not only undo any good the actor has achieved, but itself do great independent social harm.

As the preceding discussion suggests, the argument for submission to punishment is strongest when actors are primarily concerned with the moral force of their example (rather than with trying to put pressure on evil men who are considered beyond redemption) and when they at least accept the basic premises of the social system.

D. *The Form of Government Under Which Disobedience Takes Place*

Disobedience may occur in any kind of society. Many commentators on civil disobedience have thought it relevant to questions of justification whether laws are made in a democratic fashion. Since disobedience may be directed

since, whatever their tactics, their aims are harmful, and therefore any acts to achieve those aims are unjustified. But this response is too facile. The action of the integrationists is in part their implicit statement of when disobedience is an appropriate tactic, and that part of the example may well affect others with different ideas about what is socially good. The only response of the original actors if that part of the example is followed by those pursuing segregationist ends is "You have picked the wrong goal." If that response fails, they have no other argument against disobedience. I mean "can think yourself justified" to include situations in which the only doubt about justification relates to the good sought rather than the tactic of disobedience.

against privately made rules as well as positive laws, the argument that rule-making is undemocratic may be available even in a democratic society. Students have often made this claim against university rules. The proper analysis here is clearly complex because this arguably undemocratic rule-making power is conferred by democratically made laws and supported by the sanctions, *e.g.*, for trespass, provided for by those laws.

It is sometimes said that violent disobedience, though it may sometimes be justified under other forms of government, is never justified in a democracy. It is usually not clear whether this is thought to follow logically either from the people's power to choose decision makers or from their power to influence decisions, or represents a rough empirical generalization about the limits of injustices likely to occur in a democracy. Let us return to the attempted assassination of Hitler. If Hitler had been freely elected as an absolute ruler for four years in 1941, would that have made unjustified the attempt on his life? Given the enormity of his crimes and the destruction of German life likely to result from his continuing role as ruler, I should think not. Nor does the fact that a policy is approved, or even made, by a majority necessarily lead to the conclusion that a minority should not use violence to overcome it. If a majority of Germans approved genocide, would not a minority nevertheless have been justified in violent resistance, at least if that resistance promised some greater hope of success than alternative courses?

It may, of course, be argued that a genuine democracy would simply not evolve such a wicked policy, and, if it did, more peaceable alternative courses of action would be equally available to change or ameliorate it. Given the sad history of mankind, however, I lack confidence that a democratic majority would never approve policies wicked enough to justify violent disobedience; after all, a majority in a large part of this country once approved of slavery; and it seems wrong to conclude without careful examination of particular instances that peaceable alternatives would always be equally effective in leading to change.

But if absolute limits on disobedience may not be drawn from the fact of representative democracy, more moderate conclusions are warranted. If leaders are popularly elected and citizens can affect policies by open discussion and peaceable petition, it may be somewhat more likely that policies and laws will promote the social good. If this is accurate, a citizen in a democracy has an additional reason to question whether his fallible judgment that a law or policy may be unjust is wrong. This is particularly true when the democratic system fairly represents competing interests, such as labor and management; it would be less true for foreign policy decisions. It is equally important that in a democracy there is a greater opportunity to affect what the government does by peaceable means, with less harmful social consequences resulting. The occasions, then, when extra-legal steps are justified may be more limited.

There are also some more complicated considerations. In a representative democracy most of the citizens believe that the system for reaching decisions is reasonably fair. And they regard the results of that system as a generally equitable balancing of the interests of diverse members of society. To the extent that they do have this attitude they are likely to view disobedient acts as a blow not only at the government but at the majority of the population including themselves. And they may be particularly resentful because that blow comes from others who are themselves allowed to participate in the decision-making process. Thus, the sense of outrage caused by illegal protests against injustice is likely to be greater in a democracy than under a more authoritarian government. This in itself may be a social harm of some consequence, but it also enhances the possibility of hostility toward, rather than sympathy for, the demonstrators' goals and the eventual likelihood of repression that is popularly supported. If these consequences do occur, disobedience is likely to be counterproductive.

Another reason for not resorting to disobedience in a democracy may be the general desirability of having decisions made by orderly process. Though one thinks a particular policy or law unfortunate, he may believe the process generally reaches good results. If the example of disobedience is followed by others of different persuasions, and the ordinary processes for reaching decisions are circumvented with some frequency, the result may be more often harmful than good. There is, of course, also the possibility that repression will shut off not only extralegal tactics but also reduce the availability of legal methods of change.

These arguments, which, if valid, make it much more difficult to justify disobedience in a democracy, are weakened insofar as the society and government do not actually reflect the democratic model. This is particularly true if the supposed injustice occurs at a point where the discrepancy between the model and the reality is greatest. Perhaps the clearest kind of case is one in which part of the population is excluded from any political voice. Athens is the classic example but the United States before the Civil War serves just as well. A majority of the voting population accepted slavery (and if we discount the denial of the franchise to women, which is probably not relevant for this purpose, the great majority of people in the country could vote), but that hardly provided an assurance that the interests of the slaves were fairly reflected in the system. Nor could anyone protest that if slaves declined to follow the law, they had unfairly departed from orderly processes for expressing their views, since they had no access to those processes. If the existence of democracy was not relevant to acts of disobedience contemplated by slaves, what was its relevance to those who wished to support the slaves? On the one hand, it might be argued that their ability to participate in decision-making limited the kind of acts that could be justified. On the other,

one might contend that since they had chosen to act on behalf of a non-participating group, they could act in any way that would be justified for a member of that group. For me the truth lies somewhere between these two views. Their continuing participation in the democratic process (limited as the process was) possessed some relevance, since illegal acts performed by them would have had consequences different from illegal acts performed by non-participants. But the arguments against disobedience based on the likelihood of incorrect judgment and the fairness of the process were as inapplicable to the supporters as to the slaves themselves, since there was little reason to suppose that a process in which a group was totally unrepresented would reach results fair to that group.

It is important to note here that exclusion from the channels of orderly change may be partial rather than total. When women were fighting for equal rights, they could not vote but they could still bring considerable influence to bear without departing from lawful channels. The same is true today of young people who cannot vote. Given the vast difference between the owner-slave relationship, and the husband-wife relationship, there was also more reason to hope that the interests of women were sympathetically dealt with by the full participants in the process. Again, the same may now be said about the interests of those under twenty-one.

Apart from children, virtually everyone can now participate in the formal political process, but it does not necessarily follow that laws and policies in the United States conform to a model of representative democracy that includes the notion that people's interests are to be given roughly equal consideration. One theoretical possibility which may deviate from this notion is a permanent minority, a group whose numbers are fairly represented but always outvoted. Given the shifting alliances and extensive political compromises in this society, however, that possibility is probably of less practical significance than the unequal distribution of political power. Money, personal influence, professional position, education, and intelligence all add to one's potential weight in the political process. The ability of the President of General Motors or the Editor of the New York Times to affect the course of public decisions can hardly be compared with the prospect of an individual ghetto resident's doing so. If one makes the plausible assumption that the interests of the wealthy and influential in society often conflict with those of the poor and less articulate, one may conclude that laws and policies will be balanced in their favor to a greater degree than their numbers would dictate.

According to social philosophers like Robert Wolff and Hebert Marcuse, the situation is much worse than this simple difference in political weight might suggest.³² The accepted pattern of interest group representation and

32. See, e.g., H. MARCUSE, *ONE-DIMENSIONAL MAN* (1964); Marcuse, *Repressive Tolerance, and Wolff, Beyond Tolerance*, in H. MARCUSE, B. MOORE, JR., & R. P. WOLFF, *A CRITIQUE OF PURE TOLERANCE* (1965).

reconciliation tends to exclude those not part of some recognized interest group and to divert attention from problems common to all members of society, such as air pollution. Moreover, the very values and assumptions which underlie the claims of society's members are themselves largely determined by those who control the flow of information, that is the government and other members of the "Establishment." In foreign policy, for example, the government defines the posture of this country on the basis of ideological assumptions and evaluations of interest which pervade its public statements. The unwitting citizen accepts these as substantially accurate, so firmly are they embedded in most discussions of foreign affairs questions, and he is not likely to challenge the policies that emanate from them. The government can then be repressive, in the sense of preventing effective dissent from its fundamental directions, at the same time that it is tolerant of radical criticism.

I do not wish to engage in extensive analysis of this critique of pluralist democracy. It is enough to point out here that insofar as these criticisms are valid, they weaken the arguments against disobedience based on the desirability of following orderly processes in democracies. If the existing channels of political decision-making are rigged, then one who disagrees with laws may have less reason to doubt his own judgment of their unfairness and less confidence that orderly attempts to achieve change will succeed. He may also believe that shock rather than ordinary persuasion is required to jolt people into questioning the society's shared but misguided assumptions. I suspect that many disagreements about the justification of disobedient acts are essentially reducible to divergent estimates of the health of the political order.

III. CONCLUSION. A PERSONAL NOTE

If this essay seems inconclusive, it is because I do not believe disobedience of law is subject to any simpler judgments from a moral perspective than other kinds of social behavior. The moral appropriateness of an act can be determined only by examining its probable effects in a concrete context. It is impossible, I have argued, to categorize some kinds of illegal acts as always being unjustified, and the considerations that bear on whether or not a particular act is justified are many and complex. Too often in arguments about disobedience, they are neither openly identified nor candidly discussed, and debate proceeds with each side engaging in rhetorical reiteration of premises which the other side rejects.

The general standard I have suggested for judging issues of justification is highly flexible; its application can lead to conservative or radical conclusions depending on one's social values and estimation of human potentialities and the ways in which change occurs in a highly complicated society. The reader is entitled to some notion of how I would apply it. I am much impressed by the subjectivity and unreliability of human judgment, especially

when the interests of the person making the judgment are at issue. Although this society is far from perfect, it is not nearly so bad as the radical critique suggests. Since it is hard for me to conceive of a society in which the political processes are not geared to some extent to favor those who benefit from the status quo, I am skeptical that any new order would be highly preferable. I also believe that this society is relatively responsive to the claims of oppressed groups and that these claims are put before it with reasonable effectiveness through legal means, though not as rapidly or as fully as one would like. I regard substantial inroads on people's sense of security as serious social harms, which may be counterproductive to the goals of those who cause them. That attempts are made to deal with the claims of the oppressed is in part a reflection of genuine idealism which is bound to suffer from a continuing atmosphere of confrontation. In social affairs at least, most people are primarily self-interested and great pressure is likely to make them more so rather than more altruistic. And if pressure causes anxiety it may narrow rather than broaden their view of their self-interest. I think a social order and particularly vulnerable fragments such as universities are much more fragile than advocates of extensive disobedience acknowledge, and I lack confidence that a profound crisis would lead to more desirable change than use of orderly processes. Such a crisis might well produce repressive change of the most detrimental sort. In short, I believe that the appropriate occasions for disobedience as a tactic to change laws and policies are very limited in this society, and that even in those circumstances justification will usually depend on non-violence and willing submission to punishment, which reduce the destructive potential of disobedience. I would urge sober reconsideration and great restraint on those moved to disobedience as a form of protest. Still, I would refrain from trying to lay down absolute rules and would admit that my own views are based on arguable assumptions about complex social facts.

IV. POSTSCRIPT

At the outset of the essay, I put aside two difficult questions. The first is the relevance for contemplated acts of "disobedience" of a claim that the law that forbids the acts is unconstitutional, or at least unconstitutional in its application to those acts. The second concerns the appropriate response of those who prosecute or punish illegal actors to violations based on moral concerns. Each of these subjects deserves extensive treatment; in what follows I only try to suggest how each of them might be viewed from the general perspective advanced in this essay.

A. *"Disobedience" That May Be Constitutionally Protected*

No one seems to doubt that a citizen properly refuses to comply with a statute that clearly contravenes the Constitution; but much more commonly

a statute's constitutional status is not evident. When may such a statute justifiably be disobeyed because of its possible invalidity? When the citizen believes it likely to be held unconstitutional? When he is doubtful of success but wishes a test of constitutionality? When he is nearly certain on the basis of past decisions that the courts will sustain the law but thinks it should be held unconstitutional? Only when he has made an attempt to get the law changed through other means?

The standard I have advocated for judging social acts is whether they will probably contribute to the social good. The likelihood that disobedience will contribute to the social good can be sharply affected by a constitutional claim. If the claim succeeds in the courts, an unconstitutional statute will be eliminated,³³ a constitutional principle will be established that will affect the future development of the law, and the apparent disobedience will appear in retrospect not to have been disobedience of basic law. Thus any reasonable chance of winning on the constitutional issue greatly enhances the probability of desirable consequences and reduces the magnitude of undersirable ones. Since efforts to change a law through the legislative process are usually drawn out and uncertain of success, and repeal does not have the same effect on the law's development as the establishment of a constitutional principle, pursuit of that avenue should not be a precondition for engaging in activities that have a reasonable chance of being held constitutionally protected.³⁴

Even when the likelihood of victory in the courts is very slight, the claim of constitutional justification is relevant. A justification formulated in constitutional terms appears to demonstrate a commitment to accepted processes of reaching decisions which would otherwise be absent. Furthermore, such a claim may be more persuasive to the general public simply because of its constitutional nature, since most citizens have great respect for the Constitution. But it must be remembered that most of the population does not consist of constitutional lawyers. The formulation of a moral claim in constitutional terms will very often be regarded by many people (sometimes accurately) as window dressing of no real significance. The weaker the legal claim that is advocated, the more likely it is that this view will be dominant.

It is not sufficient for justification solely that the actor himself believes the Constitution should be interpreted to protect his behavior. If it is quite clear that his view has not been accepted by the courts and is not likely to be accepted in the foreseeable future, the argument for disobedience must rest on something other than the actor's personal view of the Constitution. Although

33. If the challenge is to the application of a statute to particular acts, then, of course, success will result only in the nonapplication of the statute to similar future acts.

34. If the constitutionality of the law can be equally well tested without a violation, by a declaratory judgment action or motion for injunctive relief, that would, of course, be relevant to the question of whether to disobey, as would the fact of the law's already being tested in a pending case.

a judicial decision, or line of decisions, on constitutionality is not the same as legislative decision, the reasons why an actor who disagrees with the result should generally accept it as a rule of behavior are much the same.³⁵

B. How Should the Prosecutor and Sentencing Judge Treat Actors Who Claim Moral Justification?

Most lawyers who have written on the subject believe that a person asserting moral justification for his illegal act should be punished. They would rest this judgment on the notion that the law should be applied with an even hand. Though many lawyers would admit that a belief in moral justification may be a ground for mitigation of punishment, some might argue that behavior supported by such claims shows disrespect for law and encourages emulation, and may occasionally necessitate punishment even harsher than ordinary.

In a thoughtful and thought-provoking piece,³⁶ Ronald Dworkin contends that those moved by moral concerns to commit illegal acts should sometimes not be prosecuted. It is well established, as he points out, that prosecutors and the police have considerable discretion about what laws will be enforced vigorously and which particular violations of law will be prosecuted. No one takes exception to the fact that even when actually observed by policemen, jaywalkers are usually left unmolested; nor would many object to a failure to prosecute someone who may technically aid or abet a crime but who has no central role in its commission. If the purposes of the criminal law are individual and general deterrence, isolation, and rehabilitation the prosecutor may properly consider to what extent these ends are worth achieving and are likely to be achieved by an individual prosecution. In doing so it may be that a prosecutor should think of himself as attempting to make decisions that would be made by society at large (or the legislature) if the facts of a particular case and the need for establishing priorities in response to limited resources could be put before it.³⁷ Whether or not the prosecutor should act on

35. It is true that a legislative decision can be changed without a violation of its commands, whereas disobedience may be necessary to cause judicial reconsideration. *See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). But spurring reconsideration is relevant to justification because of the possibility of change and development of principles of constitutional law, not because of the actor's private view of the Constitution.

36. Dworkin, *On Not Prosecuting Civil Disobedience*, N.Y. Rev. of Books, June 6, 1968, at 14.

37. A concrete example is the decision whether or not to prosecute someone who publicly burned his draft card after Congress had specifically legislated against draft card burning. *Cf. United States v. O'Brien*, 391 U.S. 367 (1968). A particular United States attorney might well suppose that it is a waste of time and energy to prosecute for this relatively slight interference with the functioning of the Selective Service System. But it is quite clear from its action that Congress has a different attitude. In reaching a decision on prosecution, should not a federal prosecutor be primarily responsive to the legislative will in such a situation? He can, of course, resign if he finds that will too objectionable.

his own particular judgment or on his view of the likely judgment of those to whom he is responsible, or some combination of these two factors, one thing that is relevant to his decision is its likely effect on others. Usually the decision not to prosecute is one of low visibility, of little or no general impact. But in a highly publicized case of public disobedience, a failure to prosecute may anger those who support the challenged law and create anxiety about the willingness of the officers of the law to protect legal rights. It may also encourage others who conform to the law to consider disobedient acts.

There is no doubt that those with moral claims can, like others, be deterred by the threat of punishment, though on occasion, punishment can kindle a moral anger that results in more rather than less violations. There is also a unique social cost in deterring persons from doing what they are moved by conscience to do that is not present in cases involving ordinary legal deterrence. A person can accept a society which deters fulfillment of desires he recognizes as selfish and antisocial much more comfortably than he can accept one which deters him from doing what he believes is right. There is, therefore, an important social interest in minimizing the occasions on which the exercise of conscience is penalized. Confinement of a person moved by conscience to illegal acts may serve some purpose if his behavior reflects a likelihood of future similar acts. Confinement seems least useful, or positively harmful, when the actor would not have violated the law but for his belief in its unconstitutionality. If "rehabilitation" means an alteration of character that socializes the criminal actor, then punishment of someone acting from conscience is more likely to have the contrary result, even though it may deter the actor from subsequent violations.

There is no simple answer to the question of prosecution of the actor moved by conscience. The kind of act and the extent to which it does real injury to the interests of others are obviously relevant, for the more antisocial the act is, the greater the need for deterrence and isolation. Some aspects of conscientious disobedience militate against a decision to prosecute, but the very publicness of most such disobedience may suggest the contrary result. We can conclude that a decision not to prosecute (or a general amnesty) is sometimes right and sometimes wrong, and only a sensitive examination of the kind of violation and particular circumstances can lead a decision-maker to a sound answer.

Most of the considerations discussed above are also relevant to the question of punishment once prosecution has gone forward and guilt is determined. Since mitigation of punishment is likely to be more acceptable to those who support a particular law or are adversely affected by the illegal act, it will sometimes be justified even though a failure to prosecute would be unsound. Occasionally public and conscientious disobedience may be so likely to cause

emulation, to the detriment of society, that exceptional severity of penalty is justified to maximize deterrence;³⁸ but the authority setting the penalty should always remember that the greater the danger of emulation the broader the sympathy for the actor, and heavy penalties for disobedience widely believed to be morally right is bound to reap a destructive harvest of bitterness and alienation.

38. *But see* Note, *Sentencing in Cases of Civil Disobedience*, 68 COLUM. L. REV. 1508 (1968), in which it is argued that to punish acts of civil disobedience more severely than other similar illegal acts violates the first amendment.