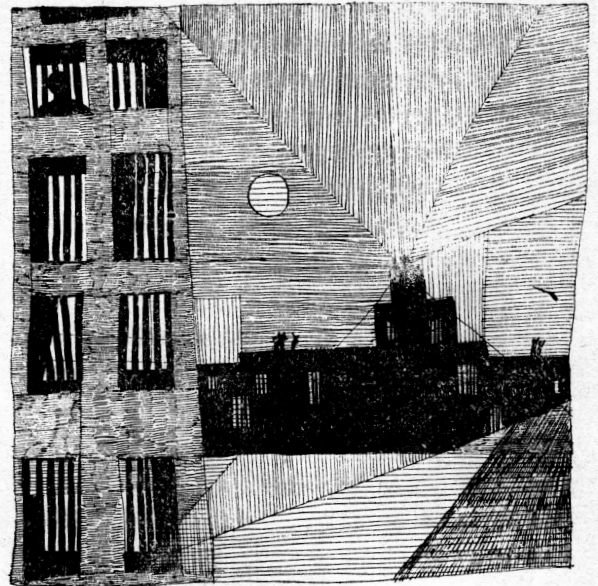


A LAWYER'S CASE FOR CIVIL DISOBEDIENCE

Harris Wofford



I COULD MAKE a case for civil disobedience based on St. Augustine's description of the "melancholy and lamentable judgments"—the injustices—inherent in the law in this sinful City of Man, and, with pacifism as a check on the commission of new injustices, call for peaceful resistance to unjust laws. It is a good American case, defended and demonstrated by Thoreau and by a whole generation of abolitionists. "Unjust laws exist," said Thoreau. "Shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?" Thoreau asked, as I think we each must ask. His answer was: "If this injustice is part of the necessary friction of the machine of government, let it go, let it go: perchance it will wear smooth . . . but if it is of such a nature that it requires you to be an agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine." So he advised the abolitionists not "to wait till they constitute a majority of one." It is enough, he said, "if they have God on their side, without waiting for that other one." And he went to prison for refusing to pay taxes to a government that was upholding slavery by imprisoning and returning runaway slaves. He said that "Under a government which imprisons any unjustly the true place for a just man is also prison." But people did not understand and a distant aunt paid his taxes for him and he was put out of prison after only a one-night stand. Still, I think, his apocryphal answer to Emerson made an imprint on the American mind. When Emerson asked him why he was in jail, Thoreau replied, "Why are you outside?"

But I do not think I am a pacifist and I know I am not an anarchist and I did pass the bar. So I want to make a lawyer's case for civil disobedience. We have

been reading Justice Holmes in my class, and as always he has renewed my passion for this jealous mistress, the Law, whose loyal lover I claim to be even as I stand here advocating civil disobedience. By the way, there is a Thoreau text for this, too. "They are the lovers of law and order who observe the law when the government breaks it."

Now I realize that this involves a paradox—a central paradox of natural-law jurisprudence—that for many people spells anarchy. One man's natural law is all too often another's poison. For Socrates there was a higher law whispering to him from outside the cave of this world that told him it was the nature of man and the first principle of the teaching profession to ask questions—to question everything—and that therefore he should not obey the edict of Athens abridging his freedom of speech. But the Athenians who served him the hemlock were also obeying the highest law they knew, the need to preserve their society from subversion. I think you will agree with me that at least this one act of civil disobedience proved to be effective. For out of the cheerful prison-going and death of Socrates we learn academic freedom, and I would say that Socrates also teaches us the first principle of any Republic, the principle established for this Republic by the First Amendment.

I suppose that almost everyone here would agree that civil disobedience would be justified toward any man-made law prohibiting the public worship of God. St. Thomas said that human laws contrary to divine law ought nowise to be obeyed. The Church has gone to the catacombs before, in its exercise of the freedom of religion. And the lives of many martyrs and saints should be enough to convince us of the educational potentialities of such civil disobedience. The question is,

where else in the field of law and on what other occasions is civil disobedience also necessary and proper?

I would cite the second part of the First Amendment, freedom of speech, and the principle of equal protection of the laws in the Fourteenth Amendment as two other areas where any laws in conflict with these commands of the natural law, according to my view of man's nature, ought to be civilly disobeyed.

But as soon as I say this, I have opened a Pandora's box from which many furies may fly, including the present disobedience of the Supreme Court's school decisions by many white citizens in the South. If you doubt that the white resistance to desegregation is based, in part at least, on a firmly held and often conscientiously held, though to me wrong-headed view of natural law, then listen to this colloquy from the Congressional Record. Senator Eastland asked: "Is not the segregated way of life a better life? Is not that the law of nature?" And Senator Thurmond replied: "Well, that is the way God made the races. I presume it is."

And yet, despite the risks involved in letting loose differing ideas of natural law to contend with each other, I believe that there is a great hope for the law, particularly for the law of a Republic, at the bottom of this Pandora's box. That hope is embodied in a view of law that transcends the old idea which says that law is nothing but the command of the sovereign. In a Republic, or with men who like Mark Twain's Connecticut Yankee have the idea of a Republic in their heads, every command of the law should be seen as a question.

A Socratic philosopher of the law, Scott Buchanan, has stated this thesis to show how "law teaches those who make and obey it"—and I would add, disobey it. "Laws," he says, "are questions asked by God, history, nature, or society to be answered by men individually and collectively. This formulation penetrates the heart of human freedom. It says that no law, not even divine law cancels out human freedom; the answer can be Yes or No or something else. It also tacitly warns of consequences of the answer. But primarily it forces the human being to think about ends, or purposes."

In this view, there is implicit in each law the alternatives of obedience, or of civil disobedience with full acceptance of the consequences. Once we no longer see law as a mechanical thing, once we free ourselves from the idea that as good citizens we have no choice but to obey any law passed by the legislature, no matter how bad, then of each law we must ask ourselves, is this a law that I should obey? Is it a just law? Is it so unjust that it needs to be resisted from the very inception, and cannot await the slow process of parliamentary reform?

So we are back with Thoreau, but with a difference. He thought in terms of disobedience serving as a

counter-friction to stop the whole machine of the law. I am presenting civil disobedience as a natural and necessary part of the great Due Process of our Law, that process of persuasion through which we govern ourselves. Civil disobedience, as I see it, is a kind of persuasion, the persuasion of last resort, within the boundaries of the law, sometimes the only kind available.

Of course any kind of disobedience of law may have the effect of persuasion, just as force can at times be a powerful persuader. The disobedience of the prohibition laws was violent, secret, rather cynical and largely uncivil, yet it finally led to the repeal of the 18th Amendment. But this kind of disobedience was truly beyond the legal pale. By teaching disrespect for this one law, it was indeed subversive of the Law. To have been *civil* disobedience, the resistance to prohibition would have had to be open, in the sight and knowledge of the authorities, and those thus disobeying the law should have not only been prepared to accept the consequences, but should have deliberately invited them. If those who considered the 18th Amendment a violation of their natural right to drink had courted the jails in protest, if they had, as Gandhi urged his countrymen, entered the prisons "as a bridegroom enters the bride's chamber," I think the 21st Amendment would probably have come sooner. Certainly it would have come better. I do not think we would have had the organized crime that came in the wake of the less respectful forms of persuasion that were used.

Civil disobedience is within the legal pale—within the Canons of Ethics of our profession—because it involves the highest possible respect for the law. If we secretly violated the law or tried to evade it or violently sought to overthrow it, that would be disloyalty to the idea of law itself. But when we openly disobey a law that we hold to be unjust and ask for the penalty, we are saying that we so respect the law that we belong in jail until it is changed. Thus Socrates refused to listen to his friends' plan for his escape from the verdict of Athens but chose instead to peacefully drink the hemlock, giving the respect he considered due to the state and to the laws in which he had lived and had his being.

Is this anarchy? I hope not, for I agree with Justice Brandeis that our government is "the potent, the omnipresent teacher" that "teaches the whole people." And I do not agree with Thoreau that "the law will never make men free." It is through law that we, like Socrates, find our freedom. But the law will play its full role as teacher only when we look upon it as a question. For it is the voice of our body politic with which we must remain in dialogue.

If the proposition to which we are dedicated is self-government, then we must respond to the law, resist it, change it, and fulfill it, even as it challenges, changes,

and educates us. Civil disobedience is one way in which we can exercise the choice that the law gives us. It is the choice that makes us free.

Now I have not even come to Gandhi, and all I will say about him is that he, too, was a lawyer—trained in London's Inner Temple—and I think he always saw civil disobedience as a constitutional form of persuasion, as a way to reach and move the minds and hearts of people and thus to mould the law.

Nor have I tried to consider the many uses and abuses of this theory. I recall a Kentucky mayor who called on his people to adopt Gandhi's method of fighting injustice, as the only remaining form of resistance to court-imposed integration. The mayor added that of course the white people wouldn't want Gandhi to come to their town, however useful his idea of civil disobedience might be for their purposes.

This doesn't disturb me. For the beauty of *civil* disobedience is that, in part at least, it answers a problem of law that has bothered people from St. Thomas to the present. Aquinas held that laws contrary to human good were not binding in conscience except in order to avoid "scandal or disturbance." Since violent disobedience, in the violent centuries that followed, did indeed often cause scandal and disobedience contrary to the common good, St. Thomas's exception has gen-

erally proved to be the rule, at least the rule for lawyers. But *civil* disobedience by its nature avoids the kind of scandal or disturbance that St. Thomas rightly feared.

In fact, what is wrong with the theory of civil disobedience in this country is not that our jails would fill. For jail-going is not the natural disposition of most men. A little jail-going against some of our laws might be good yeast to leaven the lump of our modern Leviathan. Civil disobedience could be an antidote to the centralization and standardization of our life, to the sense of fatality of the multitude as well as to the tyranny of the majority. We certainly need some kind of Socratic gadfly to stir society from its dogmatic slumbers.

No, the problem, I fear, is rather that by nature we seem more inclined to disobey not unjust laws but just ones. We all engage in civil disobedience in the form of jaywalking or speeding, to name only two popular varieties. But we hesitate to resist an unjust law. We do not take personal responsibility for injustice. Instead of taking Socrates straight, we seem to prefer the comic version. I am referring to Aristophanes' portrayal in "The Clouds," where the student of Socrates says: "But I wish to succeed, just enough for my need, and to slip through the clutches of the law." But there again, we are free to choose which Socrates—which inner light or higher law—to follow, and it is the choice that makes us free.

POEM

After my father died, I, one night, in a dream,
Entered the ground in which they had planted him.
I found him, not asleep, but lying at anchor, propped
In a narrow boat, on his elbows, as if rising in bed.
The ribs of the boat were his ribs, old wood,
And his head, toward me, was its figurehead.
A tangle of matted roots, his hair
Had sprouted thickly through the air.
Air, earth, or was it water? All here
Was one dark but transparent matter.
In awe again of parting with him, I dropped
To my knees. Despair of meaning in our lives
Fluttered in me. I groped to touch him. Unreasoning
Hope then thrust my hands
Into the thicket sprung from his brows.
The floating shaggy web embraced me;
I felt my blood race back and forth to me along the vine,
And my breath stop; the sour strong perfume
Of upturned earth choked my lungs;
And in the one harsh stroke
I felt my life renew, and woke.

Barbara Deming

EPITAPH FOR MR. ANONYMOUS

He appeared in the telephone book
But not in WHO'S WHO.
He left high school early,
Because his teachers interfered with his miseducation.
After three years in the army,
Almost setting the world free,
He came home to subscribe to the reactionary paper,
Where his suspicions were embalmed in the editorial page.
In his marriage, he soon gave up trying to use his handcuffs
As if they were bracelets.
He did not see, outside, dilemmas rage
And slowly spill
Over his window sill.
Sunken deep in ennui,
His two best friends were Miltown
And the First Mortgage Company.
Evenings, in the easy-chair of the Trite Proverb,
He used to mutter, as his shibboleth,
"Where there's smoke there's fire."
The local newspapers laured him "Ideal Citizen,"
When they exaggerated
His imperceptible transition to death.

Louis Ginsberg