

“Civil Disobedience: Destroyer of Democracy

By Lewis Van Dusen, Jr.

Biography:

Lewis H. Van Dusen Jr. (born 1910) is a graduate of Princeton (B.A., 1932) and Oxford, where he was a Rhodes Scholar and earned a law degree (1935). A lawyer in Philadelphia, he has been president and chancellor of the Philadelphia Bar Association. His activities in the American Bar Association include chairing the Committee on Ethics and Professional Responsibility and serving on the Committee on the Federal Judiciary. This essay was originally published in the American Bar Association Journal in 1969, shortly after the Vietnam war protests and their accompanying civil disobedience disrupted the 1968 Democratic National Convention in Chicago (see allusion 27). Nevertheless, instead of being full of the legal jargon, case references and technical legal arguments that we might expect an argument for an audience of lawyers to contain, Van Dusen’s argument here seems addressed more to people like ourselves, people who might appear as peers on a jury of general citizens. His argument provides a counterpoint to the argument of Martin Luther King, Jr., “Letter from Birmingham Jail” in defense of civil disobedience for racial equality. Weigh the merits of both arguments before you decide where you stand.

As Charles E. Wyzanski, Chief Judge of the United States District Court in Boston, wrote in the February 1968, *Atlantic*: “Disobedience is a long step from dissent. Civil disobedience involves a deliberate and punishable breach of legal duty.” Protesters might prefer a different definition. They would rather say that civil disobedience is the peaceful resistance of conscience.

10 The philosophy of civil disobedience was not developed in our American democracy, but in the very first democracy of Athens. It was expressed by the poet Sophocles and the philosopher Socrates. In Sophocles’ tragedy, Antigone chose to obey her conscience and violate the state edict against providing burial for her brother, who had been decreed a traitor. When the dictator Creon found out that Antigone had buried her fallen brother, he confronted her and reminded her that there was a mandatory death penalty for this deliberate disobedience of the state law. Antigone nobly replied, “Nor did I think your orders were so strong that you, a mortal man, could overrun the gods’ unwritten and unfailing laws.”

Conscience motivated Antigone. She was not testing the validity of the law in the hope that eventually she would be sustained. Appealing to the judgment of the community, she explained her action to the chorus. She was not secret and surreptitious—the interment of her brother was open and public. She was not violent; she did not trespass on another citizen’s rights. And finally, she accepted without resistance the death sentence—the penalty for violation. By voluntarily accepting the law’s sanctions, she was not a revolutionary denying the authority of the state. Antigone’s behavior exemplifies the classic case of civil disobedience.

20 Socrates believed that reason could dictate a conscientious disobedience of state law, but he also believed that he had to accept the legal sanctions of the state. In Plato’s *Crito*, Socrates

from his hanging basket accepted the death penalty for his teaching of religion to youths contrary to state laws.

The sage of Walden, Henry David Thoreau, took this philosophy of nonviolence and developed it into a strategy for solving society's injustices. First enunciating it in protest against the Mexican War, he then turned it to use against slavery. For refusing to pay taxes that would help pay the enforcers of the fugitive slave law he went to prison. In Thoreau's words, "If the alternative is to keep all just men in prison or to give up slavery, the state will not hesitate which to choose."

30 Sixty years later, Gandhi took Thoreau's civil disobedience as his strategy to wrest Indian independence from England. The famous salt march against a British imperial tax is his best-known example of protest.

But the conscientious law breaking of Socrates, Gandhi, and Thoreau is to be distinguished from the conscientious law testing of Martin Luther King, Jr., who was not a civil disobedient. The civil disobedient withholds taxes or violates state laws knowing he is legally wrong, but believing he is morally right. While he wrapped himself in the mantle of Gandhi and Thoreau, Dr. King led his followers in violation of state laws he believed were contrary to the Federal Constitution. But since Supreme Court decisions in the end generally upheld his many actions, he should not be considered a true civil disobedient.

40 The civil disobedience of Antigone is like that of the pacifist who withholds paying the percentage of his taxes that goes to the Defense Department, or the Quaker who travels against State Department regulations to Hanoi to distribute medical supplies, or the Vietnam war protester who tears up his draft card. This civil disobedient has been nonviolent in his defiance of the law; he has been unfurtive in his violation; he has been submissive to the penalties of the law He has neither evaded the law nor interfered with another's rights. He has been neither a rioter nor a revolutionary. The thrust of his cause has not been the might of coercion but the martyrdom of conscience.

Was the Boston Tea Party Civil Disobedience?

50 Those who justify violence and radical action as being in the tradition of our Revolution show a misunderstanding of the philosophy of democracy.

James Farmer, former head of the Congress of Racial Equality, in defense of the mass action confrontation method, has told of a famous organized demonstration that took place in opposition to political and economic discrimination. The protestors beat back and scattered the law enforcers and then proceeded to loot and destroy private property. Mr. Farmer then said he was talking about the Boston Tea Party and implied that violence as a method for redress of grievances was an American tradition and a legacy of our revolutionary heritage. While it is true that there is no more sacred document than our Declaration of Independence, Jefferson's "inherent right of rebellion" was predicated on the tyrannical denial of democratic means. If there is no popular assembly to provide an adjustment of ills, and if there is no court system to
60 dispose of injustices, then there is, indeed, a right to rebel.

The seventeenth century's John Locke, the philosophical father of the Declaration of independence, wrote in his Second Treatise on Civil Government: "Wherever law ends, tyranny begins...and the people are absolved from any further obedience. Governments are dissolved from within when the legislative [chamber] is altered. When the government [becomes]...arbitrary disposers of lives, liberties and fortunes of the people, such revolutions happen...."

70 But there are some sophisticated proponents of the revolutionary redress of grievances who say that the test of the need for radical action is not the unavailability of democratic institutions but the ineffectuality of those institutions to remove blatant social inequalities. If social injustice exists, they say, concerted disobedience is required against the constituted government, whether it be totalitarian or democratic in structure.

80 Of course, only the most bigoted chauvinist would claim that America is without some glaring faults. But there has never been a utopian society on earth and there never will be unless human nature is remade. Since inequities will mar even the best-framed democracies, the injustice rationale would allow a free right of civil resistance to be available always as a shortcut alternative to the democratic way of petition, debate and assembly. The lesson of history is that civil insurgency spawns far more injustices than it removes. The Jeffersons, Washingtons, and Adamases resisted tyranny with the aim of promoting the procedures of democracy. They would never have resisted a democratic government with the risk of promoting the techniques of tyranny.

Legitimate Pressures and Illegitimate Results

90 There are many civil rights leaders who show impatience with the process of democracy. They rely on the sit-ins, boycott or mass picketing to gain speedier solutions to the problems that face every citizen. But we must realize that the legitimate pressures that won concessions in the past can easily escalate into the illegitimate power plays that might extort demands in the future. The victories of these civil rights leaders must not shake our confidence in the democratic procedures, as the pressures of demonstration are desirable only if they take place within the limits allowed by law. Civil rights gains should continue to be won by the persuasion of Congress and other legislative bodies and by the decision of courts. Any illegal entreaty for the rights of some can be an injury to the rights of others, for mass demonstrations often trigger violence.

Those who advocate taking the law into their own hands should reflect that when they are disobeying what they consider to be an immoral law, they are deciding on a possibly immoral course. Their answer is that the process for democratic relief is too slow, that only mass confrontation can bring immediate action, and that any injuries are the inevitable cost of the pursuit of justice. Their answer is, simply put, that the end justifies the means. It is this justification of any form of demonstration as a form of dissent that threatens to destroy a society built on the rule of law.

100 Our Bill of Rights guarantees wide opportunities to use mass meetings, public parades, and organized demonstrations to stimulate sentiment, to dramatize issues, and to cause change.

The Washington freedom march of 1963 was such a call for action. But the rights of free expression cannot be mere force cloaked in the garb of free speech. As the courts have decreed in labor cases, free assembly does not mean mass picketing or sit-down strikes. These rights are subject to limitations of time and place so as to secure the rights of others. When militant students storm a college president's office to achieve demands, when certain groups plan rush hour car stalling to protest discrimination in employment, these are not dissent, but a denial of rights to others. Neither is it the lawful use of mass protest, but rather the unlawful use of mob power.

Justice Black, one of the foremost advocates and defenders of the right of protest and dissent, has said:

...Experience demonstrates that it is not a far step from what to many seems to be the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.

Society must censure those demonstrators who would trespass on the public peace, as it must condemn those rioters whose pillage would destroy the public peace. But more ambivalent is society's posture toward the civil disobedient. Unlike the rioter, the true civil disobedient commits no violence. Unlike the mob demonstrator, he commits no trespass on others' rights. The civil disobedient, while deliberately violating a law, shows an oblique respect for the law by voluntarily submitting to its sanctions. He neither resists arrest nor evades punishment. Thus, he breaches the law but not the peace.

But civil disobedience, whatever the ethical rationalization, is still an assault on our democratic society, an affront to our legal order and an attack on our constitutional government. To indulge civil disobedience is to invite anarchy, and the permissive arbitrariness of anarchy is hardly less tolerable than the repressive arbitrariness of tyranny. Too often the license of liberty is followed by the loss of liberty, because into the desert of anarchy comes the man on horseback, a Mussolini or a Hitler.

Violations of Law Subvert Democracy

Law violations, even for ends recognized as laudable, are not only assaults on the rule of law, but subversions of the democratic process. The disobedient act of conscience does not ennoble democracy; it erodes it.

First, it courts violence, and even the most careful and limited use of nonviolent acts of disobedience may help sow the dragon-teeth of civil riot. Civil disobedience is the progenitor of disorder, and disorder is the sire of violence.

Second, the concept of civil disobedience does not invite principles of general applicability. If the children of light are morally privileged to resist particular laws on grounds of conscience, so are the children of darkness. Former Deputy Attorney General Burke Marshall said: "If the decision to break the law really turned on individual conscience, it is hard to see in law how [the

140 civil rights leader] is better off than former Governor Ross Barnett of Mississippi who also believed deeply in his cause and was willing to go to jail.”

Third, even the most noble act of civil disobedience assaults the rule of law. Although limited as to method, motive and objective, it has the effect of inducing others to engage in different forms of law breaking characterized by methods unsanctioned and condemned by classic theories of law violation. Unfortunately, the most pertinent lesson of civil disobedience is not so much nonviolence of action as defiance of authority.

Finally, the greatest danger in condoning civil disobedience as a permissible strategy for hastening change is that it undermines our democratic processes. To adopt the techniques of civil disobedience is to assume that representative government does not work. To resist the
150 decisions of courts and the laws of elected assemblies is to say that democracy has failed.

There is no man who is above the law, and there is no man who has a right to break the law. Civil disobedience is not above the law, but against the law. When the civil disobedient disobeys one law, he invariably subverts all law. When the civil disobedient says that he is above the law, he is saying that democracy is beneath him. His disobedience shows a distrust for the democratic system. He is merely saying that since democracy does not work, why should he help make it work. Thoreau expressed well the civil disobedient’s disdain for democracy:

160 As for adopting the ways which the state has provided for remedying the evil, I know not of such ways. They take too much time and a man’s life will be gone. I have other affairs to attend to. I came into this world not chiefly to make this a good place to live in, but to live in it, be it good or bad.

Thoreau’s position is not only morally irresponsible but politically reprehensible. When citizens in a democracy are called on to make a profession of faith, the civil disobedients offer only a confession of failure. Tragically, when civil disobedients for lack of faith abstain from democratic involvement, they help attain their own gloomy prediction. They help create the social and political basis for their own despair. By foreseeing failure, they help forge it. If citizens rely on antidemocratic means of protest, they will help bring about the undemocratic result of an authoritarian or anarchic state.

170 How far demonstrations properly can be employed to produce political and social change is a pressing question, particularly in view of the provocations accompanying the National Democratic Convention in Chicago last August and the reaction of the police to them. A line must be drawn by the judiciary between the demands of those who seek absolute order, which can lead only to a dictatorship, and those who seek absolute freedom, which can lead only to anarchy. The line, wherever it is drawn by our courts, should be respected on the college campus, on the streets, and elsewhere.

180 Undue provocation will inevitably result in overreaction, human emotions being what they are. Violence will follow. This cycle undermines the very democracy it is designed to preserve. The lesson of the past is that democracies will fall if violence, including the intentional provocations that will lead to violence, replaces democratic procedures, as in Athens, Rome, and the Weimar Republic. This lesson must be constantly explained by the legal profession.

We should heed the words of William James:

Democracy is still upon its trial. The civic genius of our people is its only bulwark and...neither battleships nor public libraries nor great newspapers nor booming stocks: neither mechanical invention nor political adroitness, nor churches nor universities nor civil service examinations can save us from degeneration if the inner mystery be lost.

That mystery at once the secret and the glory of our English-speaking race, consists of nothing but two habits....[O]ne of them is the habit of trained and disciplined good temper towards the opposite party when it fairly wins its innings. The other is that of fierce and merciless resentment toward every man or set of men who break the public peace. (James, *Pragmatism* (1907), pp. 127–28)

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