

## Civil Disobedience

IN THE SPRING of 1970, the Bar Association of the City of New York celebrated its centennial with a symposium on the rather dismal question "Is the law dead?" It would be interesting to know what precisely inspired this cry of despair. Was it the disastrous increase in crime in the streets or was it the farther-reaching insight that "the enormity of evil expressed in modern tyrannies has undermined any simple faith in the central importance of fidelity to law" in addition to "ample evidence that skillfully organized campaigns of civil disobedience can be very effective in securing desirable changes in the law"?<sup>1</sup> The topics, at any event, on which participants were asked by Eugene V. Rostow to prepare their papers clearly encouraged a somewhat brighter outlook. One of them proposed a discussion of "the citizen's moral relation to the law in a society of consent," and the following remarks are in answer to this. The literature on the subject relies to large extent on two famous men in prison—Socrates, in Athens, and Thoreau, in Concord. Their conduct is the joy of jurists because it seems to prove that disobedience to the law can

<sup>1</sup> See Graham Hughes, "Civil Disobedience and the Political Question Doctrine," in *New York University Law Review*, 43:2 (March, 1968).

be justified only if the lawbreaker is willing and even eager to accept punishment for his act. There are few who would not agree with Senator Philip A. Hart's position: "Any tolerance that I might feel toward the disobeyer is dependent on his willingness to accept whatever punishment the law might impose."<sup>2</sup> This argument harks back to the popular understanding, and perhaps misunderstanding, of Socrates, but its plausibility in this country seems to be greatly strengthened by "one of the most serious oddities of our law [through which an individual] is encouraged or in some sense compelled to establish a significant legal right through a personal act of civil disobedience."<sup>3</sup> This oddity has given rise to a strange and, as we shall see, not altogether happy theoretical marriage of morality and legality, conscience and the law of the land.

<sup>2</sup> In *To Establish Justice, to Insure Domestic Tranquility*, Final Report of the National Commission on the Causes and the Prevention of Violence, December, 1969, p. 108. For the use of Socrates and Thoreau in these discussions, see also Eugene V. Rostow, "The Consent of the Governed," in *The Virginia Quarterly*, Autumn, 1968.

<sup>3</sup> Thus Edward H. Levi in "The Crisis in the Nature of Law," in *The Record of the Association of the Bar of the City of New York*, March, 1970. Mr. Rostow, on the contrary, holds that "it is a common error to think of such breaches of the law as acts of disobedience to law" (*op. cit.*), and Wilson Carey McWilliams in one of the most interesting essays on the subject—"Civil Disobedience and Contemporary Constitutionalism," in *Comparative Politics*, vol. I, 1969—seems to agree by implication. Stressing that the court's "tasks depend, in part, on public action," he concludes: "The Court acts, in fact, to authorize disobedience to otherwise legitimate authority, and it depends on citizens who will take advantage of its authorizations" (p. 216). I fail to see how this can remedy Mr Levi's "oddity"; the lawbreaking citizen who wishes to persuade the courts to pass on the constitutionality of some statute must be willing to pay the price like any other lawbreaker for the act—either until the court has decided the case or if it should decide against him.

Because "our dual system of law permits the possibility that state law will be inconsistent with federal law,"<sup>4</sup> the civil-rights movement in its early stages, though clearly in disobedience to ordinances as well as laws of the South, could indeed be understood to have done no more than "to appeal, in our federal system, over the head of the law and the authority of the state, to the law and authority of the nation"; there was, we are told—a hundred years of nonenforcement notwithstanding—"not the faintest real doubt that the [states'] ordinances were void under federal law" and that "the defiance of the law was all on the other side."<sup>5</sup> At first glance, the merits of this construction seem considerable. The jurist's chief difficulty in construing a compatibility of civil disobedience with the legal system of the country, namely, that "the law cannot justify the breaking of the law,"<sup>6</sup> seems ingeniously solved by the duality of American law and the identification of civil disobedience with the violation of a law for the purpose of testing its constitutionality. There is also the added advantage, or so it seems, that because of its dual system American law, in distinction from other legal systems, has found a nonfictitious, visible place for that "higher law" on which "in one form or another jurisprudence keeps insisting."<sup>7</sup>

It would require quite a bit of ingenuity to defend this

<sup>4</sup> Nicholas W. Puner, "Civil Disobedience: An Analysis and Rationale" in *New York University Law Review*, 43:714 (October, 1968).

<sup>5</sup> Charles L. Black, "The Problem of the Compatibility of Civil Disobedience with American Institutions of Government," in *Texas Law Review*, 43:496 (March, 1965).

<sup>6</sup> See, in the special issue of the *Rutgers Law Review* (vol. 21, Fall, 1966) on "Civil Disobedience and the Law," Carl Cohen, p. 8.

<sup>7</sup> *Ibid.*, Harrop A. Freeman, p. 25.

doctrine on theoretical grounds: the situation of the man who tests the legitimacy of a law by breaking it is "only marginally, if at all, one of civil disobedience";<sup>8</sup> and the disobeyer who acts on strong moral conviction and appeals to a "higher law" will find it rather strange if he is asked to recognize the various decisions of the Supreme Court over the centuries as inspired by that law above all laws whose chief characteristic is its immutability. On factual grounds, at any rate, the doctrine was refuted when the civil disobedients of the civil-rights movement smoothly developed into the resisters of the antiwar movement who clearly disobeyed federal law, and this refutation became final when the Supreme Court refused to rule on the legality of the war in Vietnam because of "the political question doctrine," that is, precisely for the same reason that unconstitutional laws had been tolerated without the slightest impediment for such a long time.

Meanwhile, the number of civil disobedients or potential civil disobedients—that is, of people who volunteered for demonstration duty in Washington—has steadily increased, and with it the inclination of the government either to treat the protesters as common criminals or to demand the supreme proof of "self-sacrifice": the disobedient who has violated valid law should "welcome his punishment." (Harrop A. Freeman has nicely pointed to the absurdity of this demand from a lawyer's point of view: "No lawyer goes into court and says, 'Your Honor, this man wants to be punished.'"<sup>9</sup>) And the insistence on

<sup>8</sup> See Graham Hughes, *op. cit.*, p. 4.

<sup>9</sup> *Rutgers Law Review*, *op. cit.*, p. 26, where Freeman argues against the opinion of Carl Cohen: "Because the civil disobedient acts within a framework of laws whose legitimacy he accepts, this legal punishment is more than a possible consequence of his act—it is the

this unfortunate and inadequate alternative is perhaps only natural "in a period of turmoil," when "the distinction between such acts [in which an individual breaks the law in order to test its constitutionality] and ordinary violations becomes much more fragile," and when, not local laws, but "the national lawmaking power" is being challenged.<sup>10</sup>

Whatever the actual causes of the period of turmoil—and they are of course factual and political ones—the present confusion, polarization, and growing bitterness of our debates are also caused by a theoretical failure to come to terms with and to understand the true character of the phenomenon. Whenever the jurists attempt to justify the civil disobedient on moral and legal grounds, they construe his case in the image of either the conscientious objector or the man who tests the constitutionality of a statute. The trouble is that the situation of the civil disobedient bears no analogy to either for the simple reason that he never exists as a single individual; he can function and survive only as a member of a group. This is seldom admitted, and even in these rare instances only marginally mentioned; "civil disobedience practiced by a single individual is unlikely to have much effect. He will be regarded as an eccentric more interesting to observe than to suppress. Significant civil disobedience, therefore, will be practiced by a number of people who have a community of interest."<sup>11</sup> Yet one of the chief characteristics of the

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natural and proper culmination of it. . . . He thereby demonstrates his willingness even to sacrifice himself in behalf of that cause" (*ibid.*, p. 6).

<sup>10</sup> See Edward H. Levi, *op. cit.*, and Nicholas W. Poner, *op. cit.*, p. 702.

<sup>11</sup> Nicholas W. Poner, *op. cit.*, p. 714.

act itself—conspicuous already in the case of the Freedom Riders—namely, “indirect disobedience,” where laws (for instance, traffic regulations) are violated that the disobedient regards as nonobjectionable in themselves in order to protest unjust ordinances or governmental policies and executive orders, presupposes a group action (imagine a single individual disregarding traffic laws!) and has rightly been called disobedience “in the strict sense.”<sup>12</sup>

It is precisely this “indirect disobedience,” which would make no sense whatsoever in the case of the conscientious objector or the man who breaks a specific law to test its constitutionality, that seems legally unjustifiable. Hence, we must distinguish between conscientious objectors and civil disobedients. The latter are in fact organized minorities, bound together by common opinion, rather than by common interest, and the decision to take a stand against the government’s policies even if they have reason to assume that these policies are backed by a majority; their concerted action springs from an agreement with each other, and it is this agreement that lends credence and conviction to their opinion, no matter how they may originally have arrived at it. Arguments raised in defense of individual conscience or individual acts, that is, moral imperatives and appeals to a “higher law,” be it secular or transcendent,<sup>13</sup> are inadequate when applied to civil dis-

<sup>12</sup> Marshall Cohen, “Civil Disobedience in a Constitutional Democracy,” in *The Massachusetts Review*, 10:211-226, Spring, 1969.

<sup>13</sup> Norman Cousins has set forth a series of steps in which the concept of a purely secular higher law would function:

“If there is a conflict between the security of the sovereign state and the security of the human commonwealth, the human commonwealth comes first.

“If there is a conflict between the well-being of the nation and the well-being of mankind, the well-being of mankind comes first.

obedience; on this level, it will be not only “difficult,” but impossible “to keep civil disobedience from being a philosophy of subjectivity . . . intensely and exclusively personal, so that any individual, for whatever reason, can disobey.”<sup>14</sup>

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“If there is a conflict between the needs of this generation and the needs of later generations, the needs of the later generations come first.

“If there is a conflict between the rights of the state and the rights of man, the rights of man come first. The state justifies its existence only as it serves and safeguards the rights of man.

“If there is a conflict between public edict and private conscience, private conscience comes first.

“If there is a conflict between the easy drift of prosperity and the ordeal of peace, the ordeal of peace comes first.” (*A Matter of Life*, 1963, pp. 83-84; cited in *Rutgers Law Review*, *op. cit.*, p. 26.)

I find it rather difficult to be convinced of this understanding of higher law “in terms of first principles,” as Cousins thinks of his enumeration.

<sup>14</sup> Nicholas W. Poner, *op. cit.*, p. 708.

# I

THE IMAGES of Socrates and Thoreau occur not only in the literature on our subject, but also, and more importantly, in the minds of the civil disobedients themselves. To those who were brought up in the Western tradition of conscience—and who was not?—it seems only natural to think of their agreement with others as secondary to a solitary decision *in foro conscientiae*, as though what they had in common with others was not an opinion or a judgment at all, but a common conscience. And since the arguments used to buttress this position are usually suggested by more or less vague reminiscences of what Socrates or Thoreau had to say about the “citizen’s moral relation to the law,” it may be best to begin these considerations with a brief examination of what these two men actually had to say on the matter.

As for Socrates, the decisive text is, of course, Plato’s *Crito*, and the arguments presented there are much less unequivocal and certainly less useful for the demand of cheerful submission to punishment than the legal and philosophical textbooks tell us. There is first the fact that Socrates, during his trial, never challenged the laws themselves—only this particular miscarriage of justice, which he spoke of as the “accident” (τύχη) that had befallen him.

## CIVIL DISOBEDIENCE

His personal misfortune did not entitle him to “break his contracts and agreements” with the laws; his quarrel was not with the laws, but with the judges. Moreover, as Socrates pointed out to Crito (who tried to persuade him to escape and go into exile), at the time of the trial the laws themselves had offered him this choice: “At that time you could have done with the state’s consent what you are trying now to do without it. But then you gloried in being willing to die. You said that you preferred death to exile” (52). We also know, from the *Apology*, that he had the option of desisting from his public examination of things, which doubtless spread uncertainty about established customs and beliefs, and that again he had preferred death, because “an unexamined life is not worth living.” That is, Socrates would not have honored his own words if he had tried to escape; he would have undone all he had done during his trial—would have “confirmed the judges in their opinion, and made it seem that their verdict was a just one” (53). He owed it *to himself*, as well as to the citizens he had addressed, to stay and die. “It is the payment of a debt of honor, the payment of a gentleman who has lost a wager and who pays because he cannot otherwise live with himself. There has indeed been a contract, and the notion of a contract pervades the latter half of the *Crito*, but . . . the contract which is binding is . . . *the commitment involved in the trial*” (my italics).<sup>15</sup>

Thoreau’s case, though much less dramatic (he spent one night in jail for refusing to pay his poll tax to a government that permitted slavery, but he let his aunt pay it

<sup>15</sup> See N. A. Greenberg’s excellent analysis, “Socrates’ Choice in the *Crito*” (*Harvard Studies in Classical Philology*, vol. 70, no. 1, 1965), which proved that the *Crito* can be understood only if read in conjunction with the *Apology*.

for him the next morning), seems at first glance more pertinent to our current debates, for, in contradistinction to Socrates, he protested against the injustice of the laws themselves. The trouble with this example is that in "On the Duty of Civil Disobedience," the famous essay that grew out of the incident and made the term "civil disobedience" part of our political vocabulary, he argued his case not on the ground of a *citizen's* moral relation to the law, but on the ground of individual conscience and conscience's moral obligation: "It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous, wrong; he may still properly have other concerns to engage him; but it is his duty, at least, to wash his hands of it, and, if he gives it no thought longer, not to give it practically his support." Thoreau did not pretend that a man's washing his hands of it would make the world better or that a man had any obligation to do so. He "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." Indeed, this is how we all come into the world—lucky if the world and the part of it we arrive in is a good place to live in at the time of our arrival, or at least a place where the wrongs committed are not "of such a nature that it requires you to be the agent of injustice to another." For only if this is the case, "then, I say, break the law." And Thoreau was right: individual conscience requires nothing more.<sup>16</sup>

Here, as elsewhere, conscience is unpolitical. It is not primarily interested in the world where the wrong is committed or in the consequences that the wrong will have for the future course of the world. It does not say, with

<sup>16</sup> All quotations are from Thoreau's "On the Duty of Civil Disobedience" (1849).

Jefferson, "I tremble *for my country* when I reflect that God is just; that His justice cannot sleep forever,"<sup>17</sup> because it trembles for the individual self and its integrity. It can therefore be much more radical and say, with Thoreau, "This people must cease to hold slaves, and to make war on Mexico, *though it cost them their existence as a people*" (italics added), whereas for Lincoln "the paramount object," even in the struggle for the emancipation of the slaves, remained, as he wrote in 1862, "to save the Union, and . . . not either to save or destroy slavery."<sup>18</sup> This does not mean that Lincoln was unaware of "the monstrous injustice of slavery itself," as he had called it eight years earlier; it means that he was also aware of the distinction between his "official duty" and his "personal wish that all men everywhere could be free."<sup>19</sup> And this distinction, if one strips it of the always complex and equivocal historical circumstances, is ultimately the same as Machiavelli's when he said, "I love my native city more than my own soul."<sup>20</sup> The discrepancy between "official duty" and "personal wish" in Lincoln's case no more indicates a lack of moral commitment than the discrepancy between city and soul indicates that Machiavelli was an atheist and did not believe in eternal salvation and damnation.

This possible conflict between "the good man" and "the

<sup>17</sup> *Notes on the State of Virginia*, Query XVIII (1781-85).

<sup>18</sup> In his famous letter to Horace Greeley, quoted here from Hans Morgenthau, *The Dilemmas of Politics*, Chicago, 1958, p. 80.

<sup>19</sup> Quoted from Richard Hofstadter, *The American Political Tradition*, New York, 1948, p. 110.

<sup>20</sup> Allan Gilbert, ed., *The Letters of Machiavelli*, New York, 1961, letter 225.

good citizen" (according to Aristotle, the good man could be a good citizen only in a good state; according to Kant, even "a race of devils" could solve successfully the problem of establishing a constitution, "if only they are intelligent"), between the individual self, with or without belief in an afterlife, and the member of the community, or, as we would say today, between morality and politics, is very old—older, even, than the word "conscience," which in its present connotation is of relatively recent origin. And almost equally old are the justifications for the position of either. Thoreau was consistent enough to recognize and admit that he was open to the charge of irresponsibility, the oldest charge against "the good man." He said explicitly that he was "not responsible for the successful working of the machinery of society," was "not the son of the engineer." The adage *Fiat justitia et pereat mundus* (Let justice be done even if the world perishes), which is usually invoked rhetorically against the defenders of absolute justice, often for the purpose of excusing wrongs and crimes, neatly expresses the gist of the dilemma.

However, the reason that "at the level of individual morality, the problem of disobedience to the law is wholly intractable"<sup>21</sup> is of still a different order. The counsels of conscience are not only unpolitical; they are always expressed in purely subjective statements. When Socrates stated that "it is better to suffer wrong than to do wrong," he clearly meant that it was better *for him*, just as it was better for him "to be in disagreement with multitudes than, being one, to be in disagreement with [himself]."<sup>22</sup> Politically, on the contrary, what counts is that a wrong has been done; to the law it is irrelevant who is better off

<sup>21</sup> *To Establish Justice . . .*, *op. cit.*, p. 98.

<sup>22</sup> *Gorgias*, 482 and 489.

as a result—the doer or the sufferer. Our legal codes distinguish between crimes in which indictment is mandatory, because the community as a whole has been violated, and offenses in which only doers and sufferers are involved, who may or may not want to sue. In the case of the former, the states of mind of those involved are irrelevant, except insofar as intent is part of the overt act, or mitigating circumstances are taken into account; it makes no difference whether the one who suffered is willing to forgive or the one who did is entirely unlikely to do it again.

In the *Gorgias*, Socrates does not address the citizens, as he does in the *Apology* and, in support of the *Apology*, in the *Crito*. Here Plato lets Socrates speak as the philosopher who has discovered that men have intercourse not only with their fellow men but also with themselves, and that the latter form of intercourse—my being with and by myself—prescribes certain rules for the former. These are the rules of conscience, and they are—like those Thoreau announced in his essay—entirely negative. They do not say what to do; they say what not to do. They do not spell out certain principles for taking action; they lay down boundaries no act should transgress. They say: Don't do wrong, for then you will have to live together with a wrongdoer. Plato, in the later dialogues (the *Sophist* and the *Theaetetus*), elaborated on this Socratic intercourse of me with myself and defined thinking as the soundless dialogue between me and myself; existentially speaking, this dialogue, like all dialogues, requires that the partners be friends. The validity of the Socratic propositions depends upon the kind of man who utters them and the kind of man to whom they are addressed. They are self-evident truths for man insofar as he is a thinking being; to those who don't think, who don't have intercourse with them-

selves, they are not self-evident, nor can they be proved.<sup>23</sup> Those men—and they are the “multitudes”—can gain a proper interest in themselves only, according to Plato, by believing in a mythical hereafter with rewards and punishments.

Hence, the rules of conscience hinge on interest in the self. They say: Beware of doing something that you will not be able to live with. It is the same argument that led to “Camus’s . . . stress on the necessity of resistance to injustice for the resisting individual’s own health and welfare” (my italics).<sup>24</sup> The political and legal trouble with such justification is twofold. First, it cannot be generalized; in order to keep its validity, it must remain subjective. What I cannot live with may not bother another man’s conscience. The result is that conscience will stand against conscience. “If the decision to break the law really turned on individual conscience, it is hard to see in law how Dr. King is better off than Governor Ross Barnett, of Mississippi, who also believed deeply in his cause and was willing to go to jail.”<sup>25</sup> The second, and perhaps even more serious, trouble is that conscience, if it is defined in secular terms, presupposes not only that man possesses the innate faculty of telling right from wrong, but also that man is interested in himself, for the obligation arises from

<sup>23</sup> This is made quite clear in the second book of the *Republic*, where Socrates’ own pupils “can plead the cause of injustice most eloquently and still not be convinced themselves” (357-367). They are and remain convinced of justice as a self-evident truth, but Socrates’ arguments are not convincing and they show that with this kind of reasoning the cause of injustice can just as well be “proved.”

<sup>24</sup> Quoted by Christian Bay, “Civil Disobedience,” in the *International Encyclopedia of the Social Sciences*, 1968, II, 486.

<sup>25</sup> *To Establish Justice . . .*, *op. cit.*, p. 99.

this interest alone. And this kind of self-interest can hardly be taken for granted. Although we know that human beings are capable of thinking—of having intercourse with themselves—we do not know how many indulge in this rather profitless enterprise; all we can say is that the habit of thinking, of reflecting on what one is doing, is independent of the individual’s social, educational, or intellectual standing. In this respect, as in so many others, “the good man” and “the good citizen” are by no means the same, and not only in the Aristotelian sense. Good men become manifest only in emergencies, when they suddenly appear, as if from nowhere, in all social strata. The good citizen, on the contrary, must be conspicuous; he can be studied, with the not so very comforting result that he turns out to belong to a small minority: he tends to be educated and a member of the upper social classes.<sup>26</sup>

This whole question of the political weight to be accorded moral decisions—decisions arrived at *in foro conscientiae*—has been greatly complicated by the originally religious and later secularized associations that the notion of conscience acquired under the influence of Christian philosophy. As we use the word today, in both moral and legal matters, conscience is supposed to be always present within us, as though it were identical with consciousness. (It is true that it took language a long time to distinguish between the two, and in some languages—French, for instance—the separation of conscience and consciousness has never taken place.) The voice of conscience was the voice of God, and announced the Divine Law, before it became the *lumen naturale* that informed men of a higher law. As the voice of God, it gave positive prescriptions whose validity rested on the command “Obey God rather than

<sup>26</sup> Wilson Carey McWilliams, *op. cit.*, p. 223.

men"—a command that was objectively binding without any reference to human institutions and that could be turned, as in the Reformation, even against what was alleged to be the divinely inspired institution of the Church. To modern ears, this must sound like "self-certification," which "borders on blasphemy"—the presumptuous pretension that one knows the will of God and is sure of his eventual justification.<sup>27</sup> It did not sound that way to the believer in a creator God who has revealed Himself to the one creature He created in His own image. But the anarchic nature of divinely inspired consciences, so blatantly manifest in the beginnings of Christianity, cannot be denied.

The law, therefore—rather late, and by no means in all countries—recognized religiously inspired conscientious objectors but recognized them only when they appealed to a Divine Law that was also claimed by a recognized religious group, which could not well be ignored by a Christian community. The present deep crisis in the churches and the increasing number of objectors who claim no relation to any religious institution, whether or not they claim divinely informed consciences, have thus created great difficulties. These difficulties are not likely to be dissolved by substituting the submission to punishment for the appeal to a publicly recognized and religiously sanctioned higher law. "The idea that paying the penalty justifies breaking the law derives, not from Gandhi and the tradition of civil disobedience, but from Oliver Wendell Holmes and the tradition of legal realism. . . . This doctrine . . . is plainly absurd . . . in the area of

<sup>27</sup> Thus Leslie Dunbar, as quoted in "On Civil Disobedience in Recent American Democratic Thought," by Paul F. Power, in *The American Political Science Review*, March, 1970.

criminal law. . . . It is mindless to suppose that murder, rape or arson would be justified if only one were willing to pay the penalty."<sup>28</sup> It is most unfortunate that, in the eyes of many, a "self-sacrificial element" is the best proof of "intensity of concern,"<sup>29</sup> of "the disobedient's seriousness and his fidelity to law,"<sup>30</sup> for single-minded fanaticism is usually the hallmark of the crackpot and, in any case, makes impossible a rational discussion of the issues at stake.

Moreover, the conscience of the believer who listens to and obeys the voice of God or the commands of the *lumen naturale* is a far cry from the strictly secular conscience—this knowing, and speaking with, myself, which, in Ciceronian language, better than a thousand witnesses testifies to deeds that otherwise may remain unknown forever. It is this conscience that we find in such magnificence in *Richard III*. It does no more than "fill a man full of obstacles"; it is not always with him but awaits him when he is alone, and loses its hold when midnight is over and he has rejoined the company of his peers. Then only, when he is no longer by himself, will he say, "Conscience is but a word that cowards use,/Devised at first to keep the strong in awe." The fear of being alone and having to face oneself can be a very effective dissuader from wrongdoing, but this fear, by its very nature, is unpersuasive of others. No doubt even this kind of conscientious objection can become politically significant when a number of consciences happen to coincide, and the conscientious objectors decide to enter the market place and make their voices heard in

<sup>28</sup> Marshall Cohen, *op. cit.*, p. 214.

<sup>29</sup> Carl Cohen, *op. cit.*, p. 6.

<sup>30</sup> Thus Marshall Cohen, *op. cit.*

public. But then we are no longer dealing with individuals, or with a phenomenon whose criteria can be derived from Socrates or Thoreau. What had been decided *in foro conscientiae* has now become part of public opinion, and although this particular group of civil disobedients may still claim the initial validation—their consciences—they actually rely no longer on themselves alone. In the market place, the fate of conscience is not much different from the fate of the philosopher's truth: it becomes an opinion, indistinguishable from other opinions. And the strength of opinion does not depend on conscience, but on the number of those with whom it is associated—"unanimous agreement that 'X' is an evil . . . adds credence to the belief that 'X' is an evil."<sup>81</sup>

<sup>81</sup> Nicholas W. Puner, *op. cit.*, p. 714.

## II

DISOBEDIENCE to the law, civil and criminal, has become a mass phenomenon in recent years, not only in America, but also in a great many other parts of the world. The defiance of established authority, religious and secular, social and political, as a world-wide phenomenon may well one day be accounted the outstanding event of the last decade. Indeed, "the laws seem to have lost their power."<sup>82</sup> Viewed from the outside and considered in historical perspective, no clearer writing on the wall—no more explicit sign of the inner instability and vulnerability of existing governments and legal systems—could be imagined. If history teaches anything about the causes of revolution—and history does not teach much, but still teaches considerably more than social-science theories—it is that a disintegration of political systems precedes revolutions, that the telling symptom of disintegration is a progressive erosion of governmental authority, and that this erosion is caused by the government's inability to function properly, from which spring the citizens' doubts about its legitimacy. This is what the Marxists used to call a "rev-

<sup>82</sup> Wilson Carey McWilliams, *op. cit.*, p. 211.

olutionary situation"—which, of course, more often than not does not develop into a revolution.

In our context, the grave threat to the judicial system of the United States is a case in point. To lament "the cancerous growth of disobediences"<sup>33</sup> does not make much sense unless one recognizes that for many years now the law-enforcement agencies have been unable to enforce the statutes against drug traffic, mugging, and burglary. Considering that the chances that criminal offenders in these categories will never be detected at all are better than nine to one and that only one in a hundred will ever go to jail, there is every reason to be surprised that such crime is not worse than it is. (According to the 1967 report of the President's Commission on Law Enforcement and Administration of Justice, "well over half of all crimes are never reported to the police," and "of those which are, fewer than one-quarter are cleared by arrest. Nearly half of all arrests result in the dismissal of charges.")<sup>34</sup> It is as though we were engaged in a nationwide experiment to find out how many potential criminals—that is, people who are prevented from committing crimes only by the deterrent force of the law—actually exist in a given society. The results may not be encouraging to those who hold that all criminal impulses are aberrations—that is, are the impulses of mentally sick people acting under the compulsion of their illness. The simple and rather frightening truth is that under circumstances of legal and social permissiveness people will engage in the most outrageous criminal behavior who under normal circumstances per-

<sup>33</sup> *To Establish Justice . . . op. cit.*, p. 89.

<sup>34</sup> *Law and Order Reconsidered*, Report of the Task Force on Law and Law Enforcement to the National Commission on the Causes and Prevention of Violence. n.d., p. 266.

haps dreamed of such crimes but never considered actually committing them.<sup>35</sup>

In today's society, neither potential lawbreakers (that is, nonprofessional and unorganized criminals) nor law-abiding citizens need elaborate studies to tell them that criminal acts will probably—which is to say, predictably—have no legal consequences whatsoever. We have learned, to our sorrow, that organized crime is less to be feared than nonprofessional hoodlums—who profit from opportunity—and their entirely justified "lack of concern about being punished"; and this state of affairs is neither altered nor clarified by research into the "public's confidence in American judicial process."<sup>36</sup> What we are up against is not the judi-

<sup>35</sup> Horrible examples of this truth were presented during the so-called "Auschwitz trial" in Germany, for whose proceedings see Bernd Naumann, *Auschwitz*, New York, 1966. The defendants were "a mere handful of intolerable cases," selected from about 2,000 S.S. men posted at the camp between 1940 and 1945. All of them were charged with murder, the only offense which in 1963, when the trial began, was not covered by the statute of limitations. Auschwitz was the camp of systematic extermination, but the atrocities almost all the accused had committed had nothing do with the order for the "final solution"; their crimes were punishable under Nazi law, and in rare cases such perpetrators were actually punished by the Nazi government. These defendants had not been specially selected for duty at an extermination camp; they had come to Auschwitz for no other reason than that they were unfit for military service. Hardly any of them had a criminal record of any sort, and none of them a record of sadism and murder. Before they had come to Auschwitz and during the eighteen years they had lived in postwar Germany, they had been respectable and respected citizens, undistinguishable from their neighbors.

<sup>36</sup> The allusion is to the million-dollar grant made by the Ford Foundation "for studies of the public's confidence in the American judicial process," in contrast to the "survey of law-enforcement officials" by Fred P. Graham, of the *New York Times*, which, with no

cial process, but the simple fact that criminal acts usually have no legal consequences whatsoever; they are not followed by judicial process. On the other hand, one must ask what would happen if police power were restored to the reasonable point where from 60 to 70 per cent of all criminal offenses were properly cleared by arrest and properly judged. Is there any doubt that it would mean the collapse of the already disastrously overburdened courts and would have quite terrifying consequences for the just as badly overloaded prison system? What is so frightening in the present situation is not only the failure of police power per se, but also that to remedy this condition radically would spell disaster for these other, equally important branches of the judicial system.

The answer of the government to this, and to similarly obvious breakdowns of public services, has invariably been the creation of study commissions, whose fantastic proliferation in recent years has probably made the United States the most researched country on earth. No doubt the commissions, after spending much time and money in order to find out that "the poorer you are, the more likely you are to suffer from serious malnutrition" (a piece of wisdom that even made the *New York Times's* "Quotation of the Day"),<sup>37</sup> often come up with reasonable recommendations. These, however, are seldom acted on, but, rather, are subjected to a new panel of researchers. What all the commissions have in common is a desperate attempt to find out something about the "deeper causes" of what-

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research team, came to the obvious conclusion "that the criminal's lack of concern about being punished is causing a major and immediate crisis." See Tom Wicker, "Crime and the Courts," in the *New York Times*, April 7, 1970.

<sup>37</sup> On April 28, 1970.

ever the problem happens to be—especially if it is the problem of violence—and since "deeper" causes are, by definition, concealed, the final result of such team research is all too often nothing but hypothesis and undemonstrated theory. The net effect is that research has become a substitute for action, and the "deeper causes" are overgrowing the obvious ones, which are frequently so simple that no "serious" and "learned" person could be asked to give them any attention. To be sure, to find remedies for obvious shortcomings does not guarantee solution of the problem; but to neglect them means that the problem will not even be properly defined.<sup>38</sup> Research has become a technique of evasion, and this has surely not helped the already undermined reputation of science.

Since disobedience and defiance of authority are such a general mark of our time, it is tempting to view civil disobedience as a mere special case. From the jurist's viewpoint, the law is violated by the civil, no less than the criminal, disobedient, and it is understandable that people, especially if they happen to be lawyers, should suspect that civil disobedience, precisely because it is exerted in public, is at the root of the criminal variety<sup>39</sup>—all evidence and arguments to the contrary notwithstanding, for evidence

<sup>38</sup> There is, for example, the well-known over-researched fact that children in slum schools do not learn. Among the more obvious causes is the fact that many such children arrive at school without having had breakfast and are desperately hungry. There are a number of "deeper" causes for their failure to learn, and it is very uncertain that breakfast would help. What is not at all uncertain is that even a class of geniuses could not be taught if they happened to be hungry.

<sup>39</sup> Justice Charles E. Whittaker, like many others in the profession, "attributes the crisis to ideas of civil disobedience." See Wilson Carey McWilliams, *op. cit.*, p. 211.

"to demonstrate that acts of civil disobedience . . . lead to . . . a propensity toward crime" is not "insufficient" but simply nonexistent.<sup>40</sup> Although it is true that radical movements and, certainly, revolutions attract criminal elements, it would be neither correct nor wise to equate the two; criminals are as dangerous to political movements as they are to society as a whole. Moreover, while civil disobedience may be considered an indication of a significant loss of the law's authority (though it can hardly be seen as its cause), criminal disobedience is nothing more than the inevitable consequences of a disastrous erosion of police competence and power. Proposals for probing the "criminal mind," either with Rorschach tests or by intelligence agents, sound sinister, but they, too, belong among the techniques of evasion. An incessant flow of sophisticated hypotheses about the mind—this most elusive of man's properties—of the criminal submerges the solid fact that no one is able to catch his body, just as the hypothetical assumption of policemen's "latent negative attitudes" covers up their overt negative record in solving crimes.<sup>41</sup>

Civil disobedience arises when a significant number of citizens have become convinced either that the normal channels of change no longer function, and grievances will not be heard or acted upon, or that, on the contrary, the government is about to change and has embarked upon and persists in modes of action whose legality and constitutionality are open to grave doubt. Instances are numerous: seven years of an undeclared war in Vietnam; the growing influence of secret agencies on public affairs; open or thinly veiled threats to liberties guaranteed under the First Amendment; attempts to deprive the Senate of its constitu-

<sup>40</sup> *To Establish Justice . . .*, *op. cit.*, p. 109.

<sup>41</sup> *Law and Order Reconsidered*, *op. cit.*, p. 291.

tional powers, followed by the President's invasion of Cambodia in open disregard for the Constitution, which explicitly requires congressional approval for the beginning of a war; not to mention the Vice President's even more ominous reference to resisters and dissenters as "vultures' . . . and 'parasites' [whom] we can afford to separate . . . from our society with no more regret than we should feel over discarding rotten apples from a barrel"—a reference that challenges not only the laws of the United States, but every legal order.<sup>42</sup> In other words, civil disobedience can be tuned to necessary and desirable change or to necessary and desirable preservation or restoration of the *status quo*—the preservation of rights guaranteed under the First Amendment, or the restoration of the proper balance of power in the government, which is jeopardized by the executive branch as well as by the enormous growth of federal power at the expense of states' rights. In neither case can civil disobedience be equated with criminal disobedience.

There is all the difference in the world between the criminal's avoiding the public eye and the civil disobedient's taking the law into his own hands in open defiance. This distinction between an open violation of the law, performed in public, and a clandestine one is so glaringly obvious that it can be neglected only by prejudice or ill will. It is now recognized by all serious writers on the subject and clearly is the primary condition for all attempts that argue for the compatibility of civil disobedience with law and the American institutions of government. More-

<sup>42</sup> *The New Yorker's* many excellent comments on the administration's almost open contempt of this country's constitutional and legal order, in its "Talk of the Town" column, are especially recommended.

over, the common lawbreaker, even if he belongs to a criminal organization, acts for his own benefit alone; he refuses to be overpowered by the consent of all others and will yield only to the violence of the law-enforcement agencies. The civil disobedient, though he is usually dissenting from a majority, acts in the name and for the sake of a group; he defies the law and the established authorities on the ground of basic dissent, and not because he as an individual wishes to make an exception for himself and to get away with it. If the group he belongs to is significant in numbers and standing, one is tempted to classify him as a member of one of John C. Calhoun's "concurrent majorities," that is, sections of the population that are unanimous in their dissent. The term, unfortunately, is tainted by proslavery and racist arguments, and in the *Disquisition on Government*, where it occurs, it covers only interests, not opinions and convictions, of minorities that feel threatened by "dominant majorities." The point, at any rate, is that we are dealing here with organized minorities that are too important, not merely in numbers, but in *quality of opinion*, to be safely disregarded. For Calhoun was certainly right when he held that in questions of great national importance the "concurrence or acquiescence of the various portions of the community" are a prerequisite of constitutional government.<sup>43</sup> To think of disobedient minorities as rebels and traitors is against the letter and spirit of a Constitution whose framers were especially sensitive to the dangers of unbridled majority rule.

Of all the means that civil disobedients may use in the course of persuasion and of the dramatization of issues, the only one that can justify their being called "rebels" is the means of violence. Hence, the second generally accepted

<sup>43</sup> *A Disquisition on Government* (1853), New York, 1947, p. 67.

necessary characteristic of civil disobedience is nonviolence, and it follows that "civil disobedience is not revolution. . . . The civil disobedient accepts, while the revolutionary rejects, the frame of established authority and the general legitimacy of the system of laws."<sup>44</sup> This second distinction between the revolutionary and the civil disobedient, so plausible at first glance, turns out to be more difficult to sustain than the distinction between civil disobedient and criminal. The civil disobedient shares with the revolutionary the wish "to change the world," and the changes he wishes to accomplish can be drastic indeed—as, for instance, in the case of Gandhi, who is always quoted as the great example, in this context, of nonviolence. (Did Gandhi accept the "frame of established authority," which was British rule of India? Did he respect the "general legitimacy of the system of laws" in the colony?)

"Things of this world are in so constant a flux that nothing remains long in the same state."<sup>45</sup> If this sentence, written by Locke about three hundred years ago, were uttered today, it would sound like the understatement of the century. Still, it may remind us that change is not a modern phenomenon, but is inherent in a world inhabited and established by human beings, who come into it, by birth, as strangers and newcomers (*véou*, the new ones, as the Greeks used to call the young), and depart from it just when they have acquired the experience and familiarity that may in certain rare cases enable them to be "wise" in the ways of the world. "Wise men" have played various and sometimes significant roles in human affairs, but the point is that they have always been old men, about to dis-

<sup>44</sup> Carl Cohen, *op. cit.*, p. 3.

<sup>45</sup> Locke, *The Second Treatise of Government*, No. 157.

appear from the world. Their wisdom, acquired in the proximity of departure, cannot rule a world exposed to the constant onslaught of the inexperience and "foolishness" of newcomers, and it is likely that without this interrelated condition of natality and mortality, which guarantees change and makes the rule of wisdom impossible, the human race would have become extinct long ago out of unbearable boredom.

Change is constant, inherent in the human condition, but the velocity of change is not. It varies greatly from country to country, from century to century. Compared with the coming and going of the generations, the flux of the world's things occurs so slowly that the world offers an almost stable habitat to those who come and stay and go. Or so it was for thousands of years—including the early centuries of the modern age, when first the notion of change for change's sake, under the name of progress, made its appearance. Ours is perhaps the first century in which the speed of change in the things of the world has outstripped the change of its inhabitants. (An alarming symptom of this turnabout is the steadily shrinking span of the generations. From the traditional standard of three or four generations to a century, which corresponded to a "natural" generation gap between fathers and sons, we have now come to the point where four or five years of difference in age are sufficient to establish a gap between the generations.) But even under the extraordinary conditions of the twentieth century, which make Marx's admonition to change the world sound like an exhortation to carry coals to Newcastle, it can hardly be said that man's appetite for change has canceled his need for stability. It is well known that the most radical revolutionary will become a conservative on the day after the revolution. Obviously, neither man's capacity for change nor his capacity for preservation is boundless, the former being limited by the extension of

the past into the present—no man begins *ab ovo*—and the latter by the unpredictability of the future. Man's urge for change and his need for stability have always balanced and checked each other, and our current vocabulary, which distinguishes between two factions, the progressives and the conservatives, indicates a state of affairs in which this balance has been thrown out of order.

No civilization—the man-made artifact to house successive generations—would ever have been possible without a framework of stability, to provide the wherein for the flux of change. Foremost among the stabilizing factors, more enduring than customs, manners, and traditions, are the legal systems that regulate our life in the world and our daily affairs with each other. This is the reason it is inevitable that law in a time of rapid change will appear as "a restraining force, thus a negative influence in a world which admires positive action."<sup>46</sup> The variety of such systems is great, both in time and in space, but they all have one thing in common—the thing that justifies us in using the same word for phenomena as different as the Roman *lex*, the Greek *νόμος*, the Hebrew *torah*—and this is that they were designed to insure stability. (There is another general characteristic of the law: that it is not universally valid, but is either territorially bound or, as in the instance of Jewish law, ethnically restricted; but this does not concern us here. Where both characteristics, stability and limited validity, are absent—where the so-called "laws" of history or nature, for instance, as they are interpreted by the head of state, maintain a "legality" that can change from day to day and that claims validity for all mankind—we are in fact confronted with lawlessness, though not with anarchy, since order can be maintained by means of compulsive organization. The net result, at

<sup>46</sup> Edward H. Levi, *op. cit.*

any rate, is criminalization of the whole governmental apparatus, as we know from totalitarian government.)

Because of the unprecedented rate of change in our time and because of the challenge that change poses to the legal order—from the side of the government, as we have seen, as well as from the side of disobedient citizens—it is now widely held that changes can be effected by law, as distinguished from the earlier notion that “legal action [that is, Supreme Court decisions] can influence ways of living.”<sup>47</sup> Both opinions seem to me to be based on an error about what the law can achieve and what it cannot. The law can indeed stabilize and legalize change once it has occurred, but the change itself is always the result of extra-legal action. To be sure, the Constitution itself offers a quasi-legal way to challenge the law by breaking it, but, quite apart from the question of whether or not such breaches are acts of disobedience, the Supreme Court has the right to choose among the cases brought before it, and this choice is inevitably influenced by public opinion. The bill recently passed in Massachusetts to force a test of the legality of the Vietnam war, which the Supreme Court refused to decide upon, is a case in point. Is it not obvious that this legal action—very significant indeed—was the result of the civil disobedience of draft resisters, and that its aim was to legalize servicemen’s refusal of combat duty? The whole body of labor legislation—the right to collective bargaining, the right to organize and to strike—was preceded by decades of frequently violent disobedience of what ultimately proved to be obsolete laws.

The history of the Fourteenth Amendment perhaps offers an especially instructive example of the relation be-

<sup>47</sup> J. D. Hyman, “Segregation and the Fourteenth Amendment,” in *Essays in Constitutional Law*, Robert G. McCloskey, ed., New York, 1957, p. 379.

tween law and change. It was meant to translate into constitutional terms the change that had come about as the result of the Civil War. This change was not accepted by the Southern states, with the result that the provisions for racial equality were not enforced for roughly a hundred years. An even more striking example of the inability of the law to enforce change, is, of course, the Eighteenth Amendment, concerning Prohibition, which had to be repealed because it proved to be unenforceable.<sup>48</sup> The Fourteenth Amendment, on the other hand, was finally enforced by the legal action of the Supreme Court, but, although one may argue that it had always been “the plain responsibility of the Supreme Court to cope with state laws that deny racial equality,”<sup>49</sup> the plain fact is that the court chose to do so only when civil-rights movements that, as far as Southern laws were concerned, were clearly movements of civil disobedience had brought about a drastic change in the attitudes of both black and white citizens. Not the law, but civil disobedience brought into the open the “American dilemma” and, perhaps for the first time, forced upon the nation the recognition of the enormity of the crime, not just of slavery, but of chattel slavery—“unique among all such systems known to civilization”<sup>50</sup>—the responsibility for which the people have inherited, together with so many blessings, from their forefathers.

<sup>48</sup> The widespread disobedience of the Prohibition amendment has, however, “no rightful claim to be called disobedience,” because it was not practiced in public. See Nicholas W. Puner, *op. cit.*, p. 653.

<sup>49</sup> Robert G. McCloskey in *op. cit.*, p. 352.

<sup>50</sup> On this important point, which explains why emancipation had such disastrous consequences in the United States, see the splendid study *Slavery* by Stanley M. Elkins, New York, 1959.

### III

THE PERSPECTIVE of very rapid change suggests that there is "every likelihood of a progressively expanding role for civil disobedience in . . . modern democracies."<sup>51</sup> If "civil disobedience is here to stay," as many have come to believe, the question of its compatibility with the law is of prime importance; the answer to it may well decide whether or not the institutions of liberty will prove flexible enough to survive the onslaught of change without civil war and without revolution. The literature on the subject is inclined to argue the case for civil disobedience on the rather narrow grounds of the First Amendment, admitting its need of being "expanded" and expressing the hope "that future Supreme Court decisions will establish a new theory as to [its] place."<sup>52</sup> But the First Amendment unequivocally defends only "the freedom of speech and of the press," whereas the extent to which "the right of the people peaceably to assemble and to petition the government for a redress of grievances" protects freedom of action is open to interpretation and controversy. According to Supreme Court decisions, "conduct under the First

<sup>51</sup> Christian Bay, *op. cit.*, p. 483.

<sup>52</sup> Harrop A. Freeman, *op. cit.*, p. 23.

### CIVIL DISOBEDIENCE

Amendment does not enjoy the same latitude as speech does," and "conduct, as opposed to speech, is [of course] endemic" to civil disobedience.<sup>53</sup>

However, what is basically at stake here is not whether, and to what extent, civil disobedience can be justified by the First Amendment, but, rather, with what *concept* of law it is compatible. I shall argue in what follows that although the phenomenon of civil disobedience is today a world-wide phenomenon and even though it has attracted the interest of jurisprudence and political science only recently in the United States, it still is primarily American in origin and substance; that no other country, and no other language, has even a word for it, and that the American republic is the only government having at least a chance to cope with it—not, perhaps, in accordance with the statutes, but in accordance with the *spirit* of its laws. The United States owes its origin to the American Revolution, and this revolution carried within it a new, never fully articulated concept of law, which was the result of no theory but had been formed by the extraordinary experiences of the early colonists. It would be an event of great significance to find a constitutional niche for civil disobedience—of no less significance, perhaps, than the event

<sup>53</sup> Nicholas W. Poner, *op. cit.*, p. 694. For the meaning of the First Amendment's guarantee, see especially Edward S. Corwin, *The Constitution and What It Means Today*, Princeton, 1958. As to the question to what extent freedom of action is protected by the First Amendment, Corwin points out: "Historically, the right of petition is a primary right, the right peaceably to assemble a subordinate and instrumental right. . . . Today, however, the right of peaceable assembly is ' . . . cognate to those of free speech and free press and is equally fundamental. . . . The holding of meetings for peaceable political action cannot be proscribed. These who assist in the conduct of such meetings cannot be branded as criminals on that score' " (pp. 203-204).

of the founding of the *constitutio libertatis*, nearly two hundred years ago.

The citizen's moral obligation to obey the laws has traditionally been derived from the assumption that he either consented to them or actually was his own legislator; that under the rule of law men are not subject to an alien will but obey only themselves—with the result, of course, that every person is at the same time his own master and his own slave, and that what is seen as the original conflict between the citizen, concerned with the public good, and the self, pursuing his private happiness, is internalized. This is in essence the Rousseauan-Kantian solution to the problem of obligation, and its defect, from my point of view, is that it turns again on conscience—on the relation between me and myself.<sup>54</sup> From the point of view of modern political science, the trouble lies in the fictitious origin of consent: "Many . . . write as if there were a social contract or some similar basis for political obligation to obey the majority's will," wherefore the argument usually preferred is: We in a democracy have to obey the law because we have the right to vote.<sup>55</sup> But it is precisely these voting rights, universal suffrage in free elections, as a sufficient

<sup>54</sup> Another important defect has been pointed out by Hegel: "To be one's own master and servant seems to be better than to be somebody else's servant. However, the relation between freedom and nature, if . . . nature is being oppressed by one's own self, is much more artificial than the relation in natural law, according to which the domineering and commanding part is outside the living individual. In the latter case, the individual as a living entity retains its autonomous identity. . . . It is opposed by an alien power. . . . [Otherwise] its inner harmony is destroyed." In *Differenz des Fichte'schen und Schelling'schen Systems der Philosophie* (1801), Felix Meiner edition, p. 70.

<sup>55</sup> Christian Bay, *op. cit.*, p. 483.

basis for a democracy and for the claim of public freedom, that have come under attack.

Still, the proposition set forth by Eugene Rostow that what needs to be considered is "the citizen's moral obligation to the law *in a society of consent*" seems to me crucial. If Montesquieu was right—and I believe he was—that there is such a thing as "the spirit of the laws," which varies from country to country and is different in the various forms of government, then we may say that consent, not in the very old sense of mere acquiescence, with its distinction between rule over willing subjects and rule over unwilling ones, but in the sense of active support and continuing participation in all matters of public interest, is the spirit of American law. Theoretically, this consent has been construed to be the result of a social contract, which in its more common form—the contract between a people and its government—is indeed easy to denounce as mere fiction. However, the point is that it was no mere fiction in the American prerevolutionary experience, with its numerous covenants and agreements, from the Mayflower Compact to the establishment of the thirteen colonies as an entity. When Locke formulated his social-contract theory, which supposedly explained the aboriginal beginnings of civil society, he indicated in a side remark which model he actually had in mind: "In the beginning, all the world was America."<sup>56</sup>

In theory, the seventeenth century knew and combined under the name of "social contract" three altogether different kinds of such aboriginal agreements. There was, *first*, the example of the Biblical covenant, which was concluded between a people as a whole and its God, by virtue of which the people consented to obey whatever laws an

<sup>56</sup> *Op. cit.*, No. 49.

all-powerful divinity might choose to reveal to it. Had this Puritan version of consent prevailed, it would, as John Cotton rightly remarked, have "set up Theocracy . . . as the best form of government."<sup>57</sup> There was, *second*, the Hobbesian variety, according to which every individual concludes an agreement with the strictly secular authorities to insure his safety, for the protection of which he relinquishes all rights and powers. I shall call this the vertical version of the social contract. It is, of course, inconsistent with the American understanding of government, because it claims for the government a monopoly of power for the benefit of all subjects, who themselves have neither rights nor powers as long as their physical safety is guaranteed; the American republic, in contrast, rests on the power of the people—the old Roman *potestas in populo*—and power granted to the authorities is delegated power, which can be revoked. There was, *third*, Locke's aboriginal social contract, which brought about not government but society—the word being understood in the sense of the Latin *societas*, an "alliance" between all individual members, who contract for their government after they have mutually bound themselves. I shall call this the horizontal version of the social contract. This contract limits the power of each individual member but leaves intact the power of society; society then establishes government "upon the plain ground of an original contract among independent individuals."<sup>58</sup>

All contracts, covenants, and agreements rest on mutuality, and the great advantage of the horizontal version of the social contract is that this mutuality binds each mem-

<sup>57</sup> See my discussion of Puritanism and its influence on the American Revolution in *On Revolution*, New York, 1963, pp. 171ff.

<sup>58</sup> John Adams, *Novanglus. Works*, Boston, 1851, vol. IV, p. 110.

ber to his fellow citizens. This is the only form of government in which people are bound together not through historical memories or ethnic homogeneity, as in the nation-state, and not through Hobbes's Leviathan, which "overawes them all" and thus unites them, but through the strength of mutual promises. In Locke's view, this meant that society remains intact even if "the government is dissolved" or breaks its agreement with society, developing into a tyranny. Once established, society, as long as it exists at all, can never be thrown back into the lawlessness and anarchy of the state of nature. In Locke's words, "the power that every individual gave the society, when he entered into it, can never revert to the individuals again, as long as the society lasts, but will always remain in the community."<sup>59</sup> This is indeed a new version of the old *potestas in populo*, for the consequence is that, in contrast to earlier theories of the right to resistance, whereby the people could act only "when their Chains are on," they now had the right, again in Locke's words, "to prevent" the chaining.<sup>60</sup> When the signers of the Declaration of Independence "mutually pledged" their lives, their fortunes, and their sacred honor, they were thinking in this vein of specifically American experiences as well as in terms of the generalization and conceptualization of these experiences by Locke.

Consent—meaning that voluntary membership must be assumed for every citizen in the community—is obviously (except in the case of naturalization) at least as open to the reproach of being a fiction as the aboriginal contract. The argument is correct legally and historically but not existentially and theoretically. Every man is born a

<sup>59</sup> *Op. cit.*, No. 220.

<sup>60</sup> *Ibid.*, No. 243.

member of a particular community and can survive only if he is welcomed and made at home within it. A kind of consent is implied in every newborn's factual situation; namely, a kind of conformity to the rules under which the great game of the world is played in the particular group to which he belongs by birth. We all live and survive by a kind of *tacit consent*, which, however, it would be difficult to call voluntary. How can we will what is there anyhow? We might call it voluntary, though, when the child happens to be born into a community in which dissent is also a legal and *de-facto* possibility once he has grown into a man. Dissent implies consent, and is the hallmark of free government; one who knows that he may dissent knows also that he somehow consents when he does not dissent.

Consent as it is implied in the right to dissent—the spirit of American law and the quintessence of American government—spells out and articulates the tacit consent given in exchange for the community's tacit welcome of new arrivals, of the inner immigration through which it constantly renews itself. Seen in this perspective, tacit consent is not a fiction; it is inherent in the human condition. However, the general tacit consent—the “tacit agreement, a sort of *consensus universalis*,” as Tocqueville called it<sup>61</sup>—must be carefully distinguished from consent to specific laws or specific policies, which it does not cover even if they are the result of majority decisions.<sup>62</sup> It is often ar-

<sup>61</sup> “The republican government exists in America, without contention or opposition, without proofs or arguments, by a tacit agreement, a sort of *consensus universalis*.” *Democracy in America*, New York, 1945, vol. I, p. 419.

<sup>62</sup> For the importance of this distinction, see Hans Morgenthau, *Truth and Power*, 1970, pp. 19 ff.; and *The New Republic*, January 22, 1966, pp. 16-18.

gued that the consent to the Constitution, the *consensus universalis*, implies consent to statutory laws as well, because in representative government the people have helped to make them. This consent, I think, is indeed entirely fictitious; under the present circumstances, at any rate, it has lost all plausibility. Representative government itself is in a crisis today, partly because it has lost, in the course of time, all institutions that permitted the citizens' actual participation, and partly because it is now gravely affected by the disease from which the party system suffers: bureaucratization and the two parties' tendency to represent nobody except the party machines.

At any rate, the current danger of rebellion in the United States arises not from dissent and resistance to particular laws, executive orders, and national policies, not even from denunciation of the “system” or the “establishment” with its familiar overtones of outrage at the low moral standards of those in high places and the protective atmosphere of connivance that surrounds them. What we are confronted with is a constitutional crisis of the first order, and this crisis has been effected by two very different factors whose unfortunate coincidence has resulted in the particular poignancy as well as general confusion of the situation. There are the frequent challenges to the Constitution by the administration, with the consequential loss of confidence in constitutional processes by the people, that is, the withdrawal of consent; and there has come into the open, at about the same time, the more radical unwillingness of certain sections of the population to recognize the *consensus universalis*.

Tocqueville predicted almost a hundred and fifty years ago that “the most formidable of all the ills that threaten the future of the Union arises,” not from slavery, whose abolition he foresaw, but “from the presence of a black

population upon its territory."<sup>63</sup> And the reason he could predict the future of Negroes and Indians for more than a century ahead lies in the simple and frightening fact that these people had never been included in the original *consensus universalis* of the American republic. There was nothing in the Constitution or in the intent of the framers that could be so construed as to include the slave people in the original compact. Even those who pleaded eventual emancipation thought in terms of segregation of Negroes or, preferably, of deportation. This is true of Jefferson—"Nothing is more certain written in the book of fate than that these people are to be free; nor is it less certain that the two races, equally free, cannot live in the same government"—as it is true of Lincoln, who tried, as late as 1862, "when a deputation of colored men came to see [him] . . . to persuade them to set up a colony in Central America."<sup>64</sup> It was the tragedy of the abolitionist movement, which in its earlier stages had also proposed deportation and colonization (to Liberia), that it could appeal only to individual conscience, and neither to the law of the land nor to the opinion of the country. This may explain its strong general anti-institutional bias, its abstract morality, which condemned all institutions as evil because they tolerated the evil of slavery, and which certainly did not help in promoting those elementary measures of humane reform by which in all other countries the slaves were gradually emancipated into the free society.<sup>65</sup>

We know that this original crime could not be rem-

<sup>63</sup> *Op. cit.*, p. 356.

<sup>64</sup> Hofstadter, *op. cit.*, p. 130.

<sup>65</sup> Elkins, in Part IV of his book noted earlier, gives an excellent analysis of the sterility of the abolitionist movement.

edied by the Fourteenth and Fifteenth Amendments; on the contrary, the *tacit* exclusion from the *tacit* consensus was made more conspicuous by the inability or unwillingness of the federal government to enforce its own laws, and as time went by and wave after wave of immigrants came to the country, it was even more obvious that blacks, now free, and born and bred in the country, were the only ones for whom it was not true that, in Bancroft's words, "the welcome of the Commonwealth was as wide as sorrow."<sup>66</sup> We know the result, and we need not be surprised that the present belated attempts to welcome the Negro population explicitly into the otherwise *tacit consensus universalis* of the nation are not trusted. (An explicit constitutional amendment, addressed specifically to the Negro people of America, might have underlined the great change more dramatically for these people who had never been welcome, assuring them of its finality. Supreme Court decisions are constitutional interpretations, of which the Dred Scott decision, which held, in 1857, that "Negroes are not and cannot be citizens in the meaning of the federal Constitution," is one.<sup>67</sup> The failure of Congress to propose such an amendment is striking in the light of the overwhelming vote for a constitutional amendment to

<sup>66</sup> See George Bancroft, *The History of the United States*, abridged edition by Russell B. Nye, Chicago, 1966, p. 44.

<sup>67</sup> The case of *Dred Scott v. Sandford* came on appeal before the Supreme Court. Scott, a slave from Missouri, had been taken by his owner to Illinois and other territory where slavery was outlawed. Back in Missouri, Scott sued his owner, "arguing that these journeys to free areas had made him a free man." The court decided that Scott could "not bring suit in federal courts . . . because Negroes are not and cannot be citizens in the meaning of the federal Constitution." See Robert McCloskey, *The American Supreme Court*, Chicago, 1966, pp. 93-95.

cure the infinitely milder discriminatory practices against women.) At any rate, attempts of integration often are met by rebuffs from black organizations, while quite a number of their leaders care little about the rules of nonviolence for civil disobedience and, often, just as little about the issues at stake—the Vietnam war, specific defects in our institutions—because they are in open rebellion against all of them. And although they have been able to attract to their cause the extreme fringe of radical disobedience, which without them would probably have withered away long ago, their instinct tells them to disengage themselves even from these supporters, who, their rebellious spirit notwithstanding, were included in the original contract out of which rose the tacit *consensus universalis*.

Consent, in the American understanding of the term, relies on the horizontal version of the social contract, and not on majority decisions. (On the contrary, much of the thinking of the framers of the Constitution concerned safeguards for dissenting minorities.) The moral content of this consent is like the moral content of all agreements and contracts; it consists in the obligation to keep them. This obligation is inherent in all promises. Every organization of men, be it social or political, ultimately relies on man's capacity for making promises and keeping them. The only strictly moral duty of the citizen is this twofold willingness to give and keep reliable assurance as to his future conduct, which forms the prepolitical condition of all other, specifically political, virtues. Thoreau's often quoted statement "The only obligation which I have a right to assume is to do at any time what I think right" might well be varied to: The only obligation which I as a citizen have a right to assume is to make and to keep promises.

Promises are the uniquely human way of ordering the future, making it predictable and reliable to the extent

that this is humanly possible. And since the predictability of the future can never be absolute, promises are qualified by two essential limitations. We are bound to keep our promises provided that no unexpected circumstances arise, and provided that the mutuality inherent in all promises is not broken. There exist a great number of circumstances that may cause a promise to be broken, the most important one in our context being the general circumstance of change. And violation of the inherent mutuality of promises can also be caused by many factors, the only relevant one in our context being the failure of the established authorities to keep to the original conditions. Examples of such failures have become only too numerous; there is the case of an "illegal and immoral war," the case of an increasingly impatient claim to power by the executive branch of government, the case of chronic deception, coupled with deliberate attacks on the freedoms guaranteed under the First Amendment, whose chief political function has always been to make *chronic* deception impossible; and there has been, last but not least, the case of violations (in the form of war-oriented or other government-directed research) of the specific trust of the universities that gave them protection against political interference and social pressure. As to the debates about the last, those who attack these misuses and those who defend them unfortunately incline to agree on the basically wrong premise that the universities are mere "mirrors for the larger society," an argument best answered by Edward H. Levi, the president of the University of Chicago: "It is sometimes said that society will achieve the kind of education it deserves. Heaven help us if this is so."<sup>68</sup>

<sup>68</sup> *Point of View. Talks on Education*, Chicago, 1969, pp. 139 and 170.

"The spirit of the laws," as Montesquieu understood it, is the principle by which people living under a particular legal system act and are inspired to act. Consent, the spirit of American laws, is based on the notion of a mutually binding contract, which established first the individual colonies and then the union. A contract presupposes a plurality of at least two, and every association established and acting according to the principle of consent, based on mutual promise, presupposes a plurality that does not dissolve but is shaped into the form of a union—*e pluribus unum*. If the individual members of the community thus formed should choose not to retain a restricted autonomy, if they should choose to disappear into complete unity, such as the *union sacrée* of the French nation, all talk about the citizen's *moral* relation to the law would be mere rhetoric.

Consent and the right to dissent became the inspiring and organizing principles of action that taught the inhabitants of this continent the "art of associating together," from which sprang those voluntary associations whose role Tocqueville was the first to notice, with amazement, admiration, and some misgiving; he thought them the peculiar strength of the American political system.<sup>69</sup> The few chapters he devoted to them are still by far the best in the not very large literature on the subject. The words with which he introduced it—"In no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than in America"—are no less true today than they were nearly a hundred and fifty years ago; and neither is the conclu-

<sup>69</sup> All the following citations of Tocqueville are from *op. cit.*, vol. I, chap. 12, and vol. II, book ii, chap. 5.

sion that "nothing . . . is more deserving of our attention than the moral and intellectual associations of America." Voluntary associations are not parties; they are *ad-hoc* organizations that pursue short-term goals and disappear when the goal has been reached. Only in the case of their prolonged failure and of an aim of great importance may they "constitute, as it were, a separate nation in the midst of the nation, a government within the government." (This happened in 1861, about thirty years after Tocqueville wrote these words, and it could happen again; the challenge of the Massachusetts legislature to the foreign policy of the administration is a clear warning.) Alas, under the conditions of mass society, especially in the big cities, it is no longer true that their spirit "pervades every act of social life," and while this may have resulted in a certain decline in the huge number of joiners in the population—of Babbitts, who are the specifically American version of the Philistine—the perhaps welcome refusal to form associations "for the smallest undertakings" is paid for by an evident decline in the appetite for action. For Americans still regard association as "the only means they have for acting," and rightly so. The last few years, with the mass demonstrations in Washington, often organized on the spur of the moment, have shown to what an unexpected extent the old traditions are still alive. Tocqueville's account could almost be written today: "As soon as several of the inhabitants of the United States have taken up an opinion or a feeling which they wish to promote in the world," or have found some fault they wish to correct, "they look out for mutual assistance, and as soon as they have found one another out, they combine. *From that moment, they are no longer isolated men but a power seen from afar, whose actions serve for an example and whose language is listened to*" (my italics).

It is my contention that civil disobedients are nothing but the latest form of voluntary association, and that they are thus quite in tune with the oldest traditions of the country. What could better describe them than Tocqueville's words "The citizens who form the minority associate in order, first, to show their numerical strength and so to diminish the moral power of the majority"? To be sure, it has been a long time since "moral and intellectual associations" could be found among voluntary associations—which, on the contrary, seem to have been formed only for the protection of special interests, of pressure groups and the lobbyists who represented them in Washington. I do not doubt that the dubious reputation of the lobbyists is deserved, just as the dubious reputation of the politicians in this country has frequently been amply deserved. However, the fact is that the pressure groups are also voluntary associations, and that they are recognized in Washington, where their influence is sufficiently great for them to be called an "assistant government";<sup>70</sup> indeed, the number of registered lobbyists exceeds by far the number of congressmen.<sup>71</sup> This public recognition is no small matter, for such "assistance" was no more foreseen in the Constitution and its First Amendment than freedom of association as a form of political action.<sup>72</sup>

<sup>70</sup> See Carl Joachim Friedrich, *Constitutional Government and Democracy*, Boston, 1950, p. 464.

<sup>71</sup> Edward S. Corwin, *loc. cit.*

<sup>72</sup> I do not doubt that "civil disobedience is a proper procedure to bring a law, believed to be unjust or invalid, into court or before the bar of public opinion." The question is only ". . . if this is indeed one of the rights recognized by the First Amendment," in the words of Harrop A. Freeman, *op. cit.*, p. 25.

No doubt "the danger of civil disobedience is elemental,"<sup>73</sup> but it is not different from, nor is it greater than, the dangers inherent in the right to free association, and of these Tocqueville, his admiration notwithstanding, was not unaware. (John Stuart Mill, in his review of the first volume of *Democracy in America*, formulated the gist of Tocqueville's apprehension: "The capacity of coöperation for a common purpose, heretofore a monopolized instrument of power in the hands of the higher classes, is now a most formidable one in those of the lowest.")<sup>74</sup> Tocqueville knew that "the tyrannical control that these societies exercise is often far more insupportable than the authority possessed over society by the government which they attack." But he knew also that "the liberty of association has become a necessary guarantee against the tyranny of the majority," that "a dangerous expedient is used to obviate a still more formidable danger," and, finally, that "it is by the enjoyment of dangerous freedom that the Americans learn the art of rendering the dangers of freedom less formidable." In any event, "if men are to remain civilized or to become so, the art of associating together must grow and improve *in the same ratio in which the equality of conditions is increased*" (my italics).

We need not go into the old debates about the glories and the dangers of equality, the good and the evil of democracy, to understand that all evil demons could be let loose if the original contractual model of the associations—mutual promises with the moral imperative *pacta sunt servanda*—should be lost. Under today's circumstances, this could happen if these groups, like their counterparts in

<sup>73</sup> Nicholas W. Puner, *op. cit.*, p. 707.

<sup>74</sup> Reprinted as Introduction to the Schocken Paperback edition of Tocqueville, 1961.

other countries, were to substitute ideological commitments, political or other, for actual goals. When an association is no longer capable or willing to unite "into one channel the efforts of *divergent* minds" (Tocqueville), it has lost its gift for action. What threatens the student movement, the chief civil-disobedience group of the moment, is not just vandalism, violence, bad temper, and worse manners, but the growing infection of the movement with ideologies (Maoism, Castroism, Stalinism, Marxism-Leninism, and the like), which in fact split and dissolve the association.

Civil disobedience and voluntary association are phenomena practically unknown anywhere else. (The political terminology that surrounds them yields only with great difficulty to translation.) It has often been said that the genius of the English people is to muddle through and that the genius of the American people is to disregard theoretical considerations in favor of pragmatic experience and practical action. This is doubtful; undeniable, however, is that the phenomenon of voluntary association has been neglected and that the notion of civil disobedience has only recently received the attention it deserves. In contrast to the conscientious objector, the civil disobedient is a member of a group, and this group, whether we like it or not, is formed in accordance with the same spirit that has informed voluntary associations. The greatest fallacy in the present debate seems to me the assumption that we are dealing with individuals, who pit themselves subjectively and conscientiously against the laws and customs of the community—an assumption that is shared by the defenders and the detractors of civil disobedience. The fact is that we are dealing with organized minorities, who stand against assumed inarticulate, though hardly "silent," majorities, and I think it is undeniable that these majorities

have changed in mood and opinion to an astounding degree under the pressure of the minorities. In this respect, it has perhaps been unfortunate that our recent debates have been dominated largely by jurists—lawyers, judges, and other men of law—for they must find it particularly difficult to recognize the civil disobedient as a member of a group rather than to see him as an individual lawbreaker, and hence a potential defendant in court. It is, indeed, the grandeur of court procedure that it is concerned with meting out justice to an individual, and remains unconcerned with everything else—with the *Zeitgeist* or with opinions that the defendant may share with others and try to present in court. The only noncriminal lawbreaker the court recognizes is the conscientious objector, and the only group adherence it is aware of is called "conspiracy"—an utterly misleading charge in such cases, since conspiracy requires not only "breathing together" but secrecy, and civil disobedience occurs in public.

Although civil disobedience is compatible with the *spirit* of American laws, the difficulties of incorporating it into the American legal system and justifying it on purely legal grounds seem to be prohibitive. But these difficulties follow from the nature of the law in general, not from the special spirit of the American legal system. Obviously, "the law cannot justify the violation of the law," even if this violation aims at preventing the violation of another law.<sup>75</sup> It is an altogether different question whether it would not be possible to find a recognized niche for civil disobedience in our institutions of government. This political approach to the problem is strongly suggested by the Supreme Court's recent denial of certiorari to cases in which the government's "illegal and unconstitutional" acts

<sup>75</sup> Carl Cohen, *op. cit.*, p. 7.

with respect to the war in Vietnam were contested, because the court found that these cases involve the so-called "political question doctrine," according to which certain acts of the two other branches of government, the legislative and the executive, "are not reviewable in the courts. The precise status and nature of the doctrine are much in dispute," and the whole doctrine has been called "a smoldering volcano which may now be about to fulfill its long promise of erupting into flaming controversy,"<sup>76</sup> but there is little doubt about the nature of those acts on which the court will not rule and which therefore are left outside legal controls. These acts are characterized by their "momentousness"<sup>77</sup> and by "an unusual need for unquestioning adherence to a political decision already made."<sup>78</sup> Graham Hughes, to whose excellent examination of the political question doctrine I am greatly indebted, immediately adds that "these considerations . . . certainly seem to imply *inter arma silent leges* and cast doubt on the aphorism that it is a Constitution that is being expounded." In other words, the political doctrine is in fact that loophole through which the sovereignty principle and the reason of state doctrine are permitted to filter back, as it were, into a system of government which in principle denies them.<sup>79</sup> Whatever the theory, the facts of the matter suggest that precisely in crucial issues the Supreme Court

<sup>76</sup> Graham Hughes, *op. cit.*, p. 7.

<sup>77</sup> Alexander M. Bickle, as quoted by Hughes, *op. cit.*, p. 10.

<sup>78</sup> Court decision in the case of *Baker v. Carr*, as quoted by Hughes, *ibid.*, p. 11.

<sup>79</sup> To quote Justice James Wilson's early remark (in 1793): "To the Constitution of the United States the term sovereignty is totally unknown."

has no more power than an international court: both are unable to enforce decisions that would hurt decisively the interests of sovereign states and both know that their authority depends on prudence, that is, on not raising issues or making decisions that cannot be enforced.

The establishment of civil disobedience among our political institutions might be the best possible remedy for this ultimate failure of judicial review. The first step would be to obtain the same recognition for the civil-disobedient minorities that is accorded the numerous special-interest groups (minority groups, by definition) in the country, and to deal with civil-disobedient groups in the same way as with pressure groups, which, through their representatives—that is, registered lobbyists—are permitted to influence and "assist" Congress by means of persuasion, qualified opinion, and the numbers of their constituents. These minorities of opinion would thus be able to establish themselves as a power that is not only "seen from afar" during demonstrations and other dramatizations of their viewpoint, but is always present and to be reckoned with in the daily business of government. The next step would be to admit publicly that the First Amendment neither in language nor in spirit covers the right of association as it is actually practiced in this country—this precious privilege whose exercise has in fact been (as Tocqueville noted) "incorporated with the manners and customs of the people" for centuries. If there is anything that urgently requires a new constitutional amendment and is worth all the trouble that goes with it, it is certainly this.

Perhaps an emergency was needed before we could find a home for civil disobedience, not only in our political language, but in our political system as well. An emergency is certainly at hand when the established institutions of a country fail to function properly and its authority

loses its power, and it is such an emergency in the United States today that has changed voluntary association into civil disobedience and transformed dissent into resistance. It is common knowledge that this condition of latent or overt emergency prevails at present—and, indeed, has prevailed for some time—in large parts of the world; what is new is that this country is no longer an exception. Whether our form of government will survive this century is uncertain, but it is also uncertain that it will not. Wilson Carey McWilliams has wisely said, "When institutions fail, political society depends on men, and men are feeble reeds, prone to acquiesce in—if not to commit—iniquity."<sup>80</sup> Ever since the Mayflower Compact was drafted and signed under a different kind of emergency, voluntary associations have been the specifically American remedy for the failure of institutions, the unreliability of men, and the uncertain nature of the future. As distinguished from other countries, this republic, despite the great turmoil of change and of failure through which it is going at present, may still be in possession of its traditional instruments for facing the future with some measure of confidence.

<sup>80</sup> *Op. cit.*, p. 226.

## On Violence

THESE REFLECTIONS were provoked by the events and debates of the last few years in view against the background of the nineteenth century, which has to some indeed, as Lenin predicted, a century of wars and revolutions, hence a century of that violence which is currently believed to be their common denominator. There is, however, another factor in the present situation which, though predicted by nobody, is of at least equal importance. The technical development of the instruments of violence has now reached the point where no political goal could conceivably outweigh its destructive potential or justify their employment in armed conflict. Hence, war—both the international and the civil—has become an international dispute—has lost much of its character and nearly all its glamour. The "apocalyptic" ideal gone before the days of the "great war" has now to some extent been replaced by the "new war" which is being played according to the rules of "total war" and in which the only goal is the annihilation of the enemy. It is believed that the revolution in scientific and technical progress will eventually lead to the annihilation of the enemy and the victory of the "stronger" side.

<sup>1</sup> Henry Wilson, *The "Strongly Governed" in Night Gown*, Doubleday Press, New York, 1915, p. 109.