

## **CIVIL DISOBEDIENCE FOR SOCIAL CHANGE**

### **Constitutional Law as Facilitative or Distracting**

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Challenging the constitution, whether through civil disobedience or litigating a test case, provides ways of challenging the unjustness of law. This essay examines the role of constitutional law in progressive social change and critical pedagogy. It examines some of the advantages and disadvantages in bringing test cases and practising civil disobedience. It also considers what can be gained in legal education by teaching students to represent civilly disobedient clients.

#### **Introduction**

This essay raises questions about critical pedagogy, and about a variety of different approaches to social change. It examines some of the advantages and disadvantages of lawyers planning and actively promoting ‘test cases’ to challenge repressive laws as unconstitutional through the intentional open violation of the law. Open disobedience serves the political goal of galvanising opposition to the oppressive law, and the political and legal goal of forcing or encouraging the courts to examine the constitutionality of the oppressive law. There are advantages and disadvantages to a constitutional litigation strategy’s dependence on civil disobedience to create test cases, and there are advantages and disadvantages to civil disobedience of a focus on constitutional litigation. Critics of rights-based approaches to social change have shown the de-radicalising role lawyers sometimes play when grassroots or people’s movements rely on constitutional rights or on human rights. Legal education can and should reduce the tendency of lawyers to work at cross-purposes to their clients — or, in the case of those who identify themselves as activist-lawyers, to exert undue influence. I would suggest that teaching students to represent civilly disobedient clients also opens useful opportunities to explore and challenge their role as law students.

The essay proceeds in three parts. The first part discusses the practice of lawyers creating test cases, including the role of test cases in constitutional law, and the role of constitutional law in test cases. The second section discusses more broadly practices of civil disobedience and other forms of non-violent direct action and conscientious violations of the law. This part describes the law school course I teach on civil disobedience. The third and

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final part evaluates some of the advantages and disadvantages of the interaction between constitutional test cases and non-violent direct action, usually civil disobedience. I frequently refer to 'direct action' instead of 'civil disobedience', because direct action is a more open term and carries a notion of seeking immediate social change. Civil disobedience all too often conjures up images of philosophical debates about what is or is not civil disobedience — how open the action has to be and whether the law violator has to happily or willingly go to gaol for disobeying the law.

### Part I

Many and probably most constitutions around the world provide that any law enacted in violation of the constitution is void and cannot be enforced against any individual.<sup>1</sup> Some but far from all constitutions have provisions similar to the 'case or controversy' requirement of the United States Constitution. The Constitution extends federal jurisdiction only to 'cases and controversies', and courts have developed this text into a complex, constitutional 'standing' requirement, limiting who may argue particular legal issues before the federal courts, based on what constitutes a case or controversy.

Sometimes the only way to obtain 'standing' to challenge the constitutionality of a law is to violate the law and to be prosecuted for the violation. There may also be cases in which a law could perhaps be challenged without having to violate it, but lawyers will nevertheless conclude that, for legal or political reasons, it is preferable for the law to be challenged by a defendant who has violated the law.<sup>2</sup>

In fact, a great many of the famous United States constitutional law cases are test cases that were set up by lawyers. Some cases do just come along, or happen, but often the facts of a case can be more tidy and the defendant more appealing if the case did not just happen but was planned out by lawyers or by a lawyer working together in close association with a non-governmental organisation.

Susan B Anthony, the nineteenth century suffragist, went to her local polling place and voted before women were generally allowed to vote in the United States.<sup>3</sup> Although she was not herself a lawyer, she had very much in

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<sup>1</sup> In the United States, there is a kind of exception to this principle in the case of judicial orders. An injunction must be obeyed until it is overturned, even if the injunction violates the constitutional rights of an individual. See *Walker v City of Birmingham* (1967) 388 US 307. In order to be excused, a defendant would have to show that the court issuing the injunction lacked jurisdiction to issue the order, not simply that the injunction should not have been issued or that it violates constitutional rights.

<sup>2</sup> This paper will focus primarily on the practice in the United States, because the practice is more common in the United States (and because I am most familiar with US practice). In some countries where attorneys do plan and seek out test cases, it may be a less open and accepted practice to do so.

<sup>3</sup> Some of the western states allowed women to vote, in part to attract women to come to the states, and a few other states allowed women to vote in occasional, limited elections, such as for the school board.

mind the possibility of creating a test case to lodge a legal challenge to the common, almost universal, practice of refusing to allow women to vote. The ‘Scopes Monkey Trial’ is considered to be a classic set-up case designed to challenge the constitutionality of a Tennessee law forbidding the teaching of evolution. It is a good example of a case that was more successful politically than legally.<sup>4</sup>

The US civil rights movement is filled with test cases. It is popular to talk about Rosa Parks being just an ordinary woman who was tired of having to sit in the back of the bus — which often meant having to stand up in the back of the bus. But she was far from ordinary, and it seems at least 90 per cent sure that her violation of segregation practices was in fact a set-up case. The school integration project of the National Association of Colored People (NAACP) is the classic example of not just a set-up test case but also a complete set of test cases organised into litigation strategy — that is, a series of cases thought out and designed to move the courts step by step to challenge existing law and overturn the separate-but-equal doctrine of *Plessy v Ferguson*.<sup>5</sup>

There are many advantages to the practice of lawyers planning test cases and then finding clients to fit their plan. First, this practice is likely to result in a good fact pattern — a nice, clean case. Second, the lawyer is likely to have an appealing defendant (if a criminal law is being challenged) or client. In the school integration litigation, it was often a plaintiff bringing a lawsuit; these plaintiffs would be chosen with the same care with which lawyers try to choose their criminal defendants for test cases. Third, when lawyers plan the cases, they can choose the order in which issues come up — thus they can try to move the courts to take one step at a time, so that the courts are more likely to do the right thing.

There are a number of disadvantages in lawyers setting up test cases, however. The practice actually compromises the spirit behind the ‘case or controversy’ requirement. It seems to me that there is a danger — though to the best of my knowledge it has not yet materialized — that right-wingers, for example, could decide to challenge ineffectually a repressive law they in fact supported, in order to establish a test case of its constitutionality. A further disadvantage — and one that seems much more common and pervasive — is the loss of a spontaneity, when in my view spontaneity tends often to be a very positive thing.

Lawyers’ practice of setting up test cases tends to put the lawyers in control. The lawyers choose which laws to challenge and the lawyers, and not necessarily the people most oppressed by an oppressive law, make the decision when to challenge the law and which aspects of the law to challenge. The practice of lawyers setting up test cases not only empowers the lawyers, but it also may have an equal tendency to disempower non-lawyers. It may also

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<sup>4</sup> See *Scopes v State* (1927) 154 Tenn 105, 289 SW 363, rejecting constitutional claim, but overturning fine on technicality and dismissing case to avoid retrial, admittedly for the sake of Tennessee’s reputation.

<sup>5</sup> *Plessy v Ferguson* CITATION NEEDED.

make it more difficult for a non-lawyer who decides to organise a challenge to a law to find a lawyer to help them with the case.

The civil rights movement in the United States provides a good concrete example for evaluating some of these advantages and disadvantages. Some people have expressed the concern that *Brown v Board of Education*<sup>6</sup> encouraged Americans — especially oppressed African-Americans — to view the question of segregation as a primarily legal issue to be left to the lawyers.<sup>7</sup> When the Supreme Court issued the decision in 1954, it might well have had such an effect — and indeed, many people, including some who supported the decision, probably hoped that it would have this effect. I believe that the mass movement of civil disobedience against segregation was a crucially important method to keep this from happening. Instead of encouraging people to sit back and wait for the courts to act, the Court's decisions invalidating some segregation provided a justification and paved the way for massive direct action against segregation. Martin Luther King Jr and other leaders could argue that segregation was both morally *and* legally wrong, and that violating segregation laws was legally as well as morally justified.

Many more people recognise injustice than are willing to do anything to correct the injustice. It is often difficult to get people to be willing to take the step from belief to action. It is even more difficult to get people to take action when the action one wants them to take involves breaking the law. People who were reluctant to break the laws establishing and upholding segregation found it easier to do so — to take that crucial first step from quiet objection to active resistance — after the Supreme Court ruled segregation unconstitutional in *Brown v Board of Education* and in later cases. Many people find it easier to challenge and disobey an immoral law when they can consider the law unconstitutional as well as unjust.

Of course, when the courts agree that the law is unconstitutional, those violating it are vindicated and their criminal convictions should be overturned. In the course of the civil rights movement, the courts often disagreed that the laws the protesters violated were unconstitutional and upheld criminal convictions and gaol sentences. When the courts uphold an unjust law as constitutional, as courts sometimes do, people react in a variety of ways. Some people will decide to obey the unjust law, others will continue to assert its unconstitutionality and disobey the unjust law,<sup>8</sup> and others still will disobey the law simply because it is

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<sup>6</sup> *Brown v Board of Education* (1954) 347 US 483.

<sup>7</sup> I have a distinct memory of Malcolm X once complaining that *Brown v Board of Education* had done precisely that — kept people in the courts instead of protesting in the streets — and that the Supreme Court intended its decision to have such an effect. I have been unable to find this assertion in either Malcolm X's biography or in Myers (1999). It is possible that I am mistaken, or that I heard the assertion from his sister, whom I met while I lived in Roxbury, Massachusetts in January and February of 1967. While he was correct about many things, I believe Malcolm X was wrong about this (that is, assuming I am correct that he did maintain this position).

<sup>8</sup> For support for this position, see Dworkin (1968); see also Dworkin (1977), p 206.

unjust.<sup>9</sup> Those in the second category have taken a second crucial step of trusting their own judgment more than the judgment of a court, and those in the third category have taken the further step of deciding to follow their own judgment and their consciences instead of limiting themselves by trying to stay within the law. Henry David Thoreau's remains one of the most appealing assertions of the legitimacy and importance of violating unjust laws:

Must the citizen ever for a moment, or in the least degree, resign his conscience to the legislation? Why has every man a conscience, then? I think that we should be men first, and subjects afterward. It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have a right to assume is to do at any time what I think right.<sup>10</sup>

Perhaps it is this concern that explains why courts impose criminal penalties upon people who lose test cases — a practice that is warmly supported by many theorists of civil disobedience but which seems hard to justify in the case of those people who sincerely believed that they were upholding the constitution.<sup>11</sup> A conservative might argue that those people who

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<sup>9</sup> Gandhi, in *Hallucination of Law Courts*, recognised that sometimes it is crucial to debunk instead of encouraging law. See Gandhi (1962), p 127.

<sup>10</sup> Thoreau (1849). He goes on to say: 'Law never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice.' One should understand Thoreau's use of 'men' to be generic and to include all human beings.

<sup>11</sup> Associate Supreme Court Justice Abe Fortas stirred considerable attention in the late 1960s when he wrote a short book supporting, in a very limited way, civil disobedience (see Fortas, 1968). His main point was that one is entitled to violate an unconstitutional law, but since an unconstitutional law is essentially void, this permission boils down to a precept that one need not obey a law that is void or not really a law. He does go a bit further, suggesting that one is justified — 'justified' being an important term to return to shortly — in violating a law that one incorrectly believes to be unconstitutional. Thus, if one believes a law is unconstitutional, one may violate that law and if one turns out to be correct — that is, if the courts agree — then the criminal charges are properly dismissed. If one is mistaken — that is, the courts do not agree that the law is unconstitutional — then, according to Justice Fortas, one should be content to go to gaol or to suffer whatever other penalty the law provides. The good faith belief that the law is unconstitutional, even when that belief is fully reasonable, provides no defence. Choosing to violate a law one believes to be unconstitutional is thus a kind of strict liability venture — if you're wrong, you go to gaol. While in gaol, you can perhaps take comfort in knowing that Justice Fortas considered you 'justified' in testing the law. Presumably, Fortas means that the person is morally justified — for him, the person's willingness to go to gaol if they are wrong about the law's constitutionality seems to be a crucial part of what makes this law-breaking justified. From the point of view of society, however, it seems more difficult to explain the purpose of criminal sanctions in such a case. Exactly why a society should gaol a person whose actions are 'justified' is not sufficiently explained by saying that the actions are 'justified but not excused'. Apparently this strict

mistakenly think a law is unconstitutional should be gaol to prevent them from getting into the habit of thinking for themselves and either disagreeing with the court and continuing to assert the unconstitutionality of the law or deciding that they should follow their own conscience and not become a slave of their sovereign, as Thoreau might put it. It seems patently unlikely to me that someone who violates a law they believe to be unconstitutional will be particularly impressed by the legitimacy of law in general by being placed in gaol when the court disagrees and finds the law the person considered to be unconstitutional and unjust to be instead constitutional. More realistically, some people who are aware of the risk of gaol may refrain from taking the first step of violating a law they consider unconstitutional. Anyone so easily deterred, however, is probably anyway not a good candidate for embarking on a life of civil disobedience, so the failure of such a person to take the first step towards disobedience does not matter so very much.

## Part II

Some five years ago, I put together a new course about civil disobedience and got the UCLA Law School to approve it for three hours of credit. The official name of the class is not civil disobedience but 'Law and Dissidence'. I chose this name to give my students more flexibility when they were explaining their UCLA transcript or resumé to potential employers and others.

I have taught the class now every year at UCLA, and in 2003 I taught it at Tel Aviv University in Israel. At both schools, the class has been an elective, which means the students in the class are that sub-group of the students in the school who choose to take the course. At UCLA, my students tend generally to be left liberal or radical. Civil disobedience in the United States is closely associated in the public mind with the civil rights movement for racial justice and with anti-war activism, especially opposition to the war in Vietnam and more recently with opposition to Bush's wars. Certainly there are many exceptions to this left-wing political orientation — students who take the class because they want to take a class from me or because the class meeting time happens to fit well with the rest of their schedule — but so far I have not had anti-abortion extremists or would-be saboteurs in the class.

At Tel Aviv, the political orientation of the class was much more sharply split. Certainly there has been a tradition of left-wing civil disobedience in Israel. In fact, at Tel Aviv I had a 'refusenik' in my class — one of the highly

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liability extends — at least in Justice Fortas's view — even to those laws that it might be impossible to obtain standing to challenge except by violating them and being prosecuted.

Thus, in context, Abe Fortas' support for civil disobedience amounts to little other than, first, the obvious truth that a person cannot be sent to gaol for violating an unconstitutional law, and second, an attempt to justify as legitimate society's imposition of criminal penalties against those who test the constitutionality of a law that is ultimately found to be constitutional. Rather than a radical support for dissidence, *Concerning Dissent and Civil Disobedience* would appear to be an apologetic book that tries to garner support for the status quo.

decorated military reservists who signed an open letter circulated in January 2003, vowing that if and when they were called upon to do so, they would refuse to serve in the Occupied Territories.<sup>12</sup> But there is also a strong tradition of civil disobedience by the Israeli settlers who are trying to expropriate the land of the West Bank and Gaza and incorporate it into Israel, and who resist efforts to settle or resettle them back in Israel or to dismantle any of the settlements. The sharp political disagreements turned out to be very productive, in my view. I believe that part of the success was due to a general atmosphere of respect and toleration — an atmosphere set on the very first day. Although the class had over 40 students, I began the class as I traditionally do by asking each student to introduce himself or herself and say a bit about what he or she hoped to get out of the class. The third or fourth student identified himself as a military prosecutor; a few speakers later, a student identified himself as one of the military reservists who had signed the letter of refusal, and added with complete good humour, ‘and he’ll probably prosecute me’. The laughter diffused any tension, and was an important step towards the productive atmosphere of disagreement.<sup>13</sup>

Generally the first readings in the course explore the classic theory of civil disobedience as expounded by Socrates (at least in his good moments), Henry David Thoreau, Mahatma Gandhi, Martin Luther King, the African National Congress (ANC), and so on. We next focus on challenges to non-violence — for example, the biblical story of Jesus clearing the money-changers from the temple, the Boston Tea Party, John Brown’s raid upon Harper’s Ferry to try to end slavery without a civil war, Malcolm X, Nelson Mandela’s courtroom justification of the choice of to move to sabotage — and responses to these challenges.

A third topic of the course deals with contemporary uses of civil disobedience — for example, in Vieques, Puerto Rico, where people successfully stopped the Navy’s use of two-thirds of the island for military

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<sup>12</sup> There is a very interesting debate, potentially important legally within Israel, whether the ‘refusenik’ letter should be considered civil disobedience at all, since it is simply an advance statement of an intention to claim conscientious objection. Joseph Raz wrote an excellent letter in support of the position that it should be considered conscientious objection in connection with litigation in Israel (letter of Joseph Raz, in possession of the author).

<sup>13</sup> There was about one occasion on which a right-winger became hostile and attempted to disrupt a guest speaker. The speaker was Gadi Algazi, one of the founders of Ta’ayush — a particularly impressive direct action group of Israeli Arabs and Jews who challenge the military closure of villages in the West Bank and Gaza, and struggle together with the residents under occupation to prevent the expropriation of their land. Gadi Algazi handled the situation so extremely well that the attempted disruption turned out instead to provide the occasion to demonstrate a non-violent, even respectful, response to harassment. Although actually taking the whole class on one of the Ta’ayush caravans carrying food, medicine and clothing to a closed-off village of the West Bank would have been very educational, the students nevertheless had the opportunity to witness the kind of gentle insistence and high moral ground that has forced the Israeli military to retreat repeatedly in the face of Ta’ayush caravans.

purposes, including one-third as a bombing range;<sup>14</sup> the US anti-war movements, including their recent practices of blocking streets; and the ecology movement and its uses of civil disobedience, ranging from banner hanging to occupying trees and directly blocking 'development' efforts. We also examine more ambiguous uses of intentional violation of the law by some animal rights activists who intentionally exert economic pressure against scientists to force change, and anti-abortionist extremists who block access to women's health centres and try to intimidate the patients and medical personnel, making abortion more expensive and difficult to obtain, especially for poor women.

We explore non-violence and direct action training — an important development that has accelerated and expanded from the days of the civil rights movement. An activist lawyer who has been centrally involved in much of the civil disobedience in the United States during the past two decades has agreed every year to present for my students a day-long direct action workshop of the type now used extensively before such mass actions as the protests against the WTO meeting in Seattle in 1999 and at the Democratic and Republican Party conventions in 2000. At these workshops, students learn about dealing with the media; how affinity groups operate; consensus decision-making; solidarity tactics before, during and after arrest and in preparation for and in court; and neutralising or minimising police repression of demonstrations. Students usually find these workshops empowering and a lot of fun. It is also important for them to know about these workshops and what they entail, both for proper representation of clients before a demonstration and in order to know what their future clients may have experienced.

A final major focus of the course is on the ethical and professional obligations of attorneys representing direct action activists and as activist attorneys. Much of this material shows the students that the attorney has much more leeway to represent political clients effectively without getting into ethical trouble than the students often suppose. That is not to say that political lawyers are immune from government oppression. There are a series of cases from around the time of World War I in which lawyers were criminally prosecuted basically for representing their clients, and quite recently lawyers trying to provide representation to people accused of terrorism have been harassed and prosecuted.<sup>15</sup> But these are exceptions, and in general lawyers do not get into trouble with the ethics committees of the Bar associations for their representation of dissenters and dissidents.

Most or all Bar associations assert that lawyers may not counsel clients to engage in illegal behavior. There is a good argument that any law that is unjust is unconstitutional, however, and lawyers in most states have ethical leave and in some an ethical obligation to try to clear away unconstitutional laws. Thus, while lawyers in general cannot encourage the violation of law, this does not and cannot extend to the violation of an unconstitutional law. Thus, in the case of civil disobedience in direct violation of an unjust law — what is often called

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<sup>14</sup> See, for example, Olsen (2004).

<sup>15</sup> See Preston (2005).



‘direct civil disobedience’ — there is generally no problem with lawyers advocating civil disobedience. This is the basis upon which lawyers are protected when they set up test cases by advising a client how to break a law the lawyers want to challenge as unconstitutional.

The situation is less clear when an unjust law is challenged politically through violating some other law — that is, when the law being violated is not the unjust law itself, often referred to as ‘indirect civil disobedience’. In the case of indirect civil disobedience, it is advisable for the clients to learn how to pose their questions seeking legal advice as hypothetical questions: ‘Hypothetically, if one were to hang a banner off the Golden Gate Bridge protesting the destruction of the redwood trees, what kinds of penalties might be imposed and are there choices that such a hypothetical environmentalist could make that would or might reduce the legal exposure?’

I also raise issues of the particular ethical obligations lawyers have to political clients. The standard practice of criminal lawyers in the United States to try to get their clients acquitted regardless of their guilt is often completely inappropriate in the case of clients engaged in civil disobedience. To properly represent clients engaged in ethical violation of the law, it is not necessary to agree with the client, but it seems to me that it is necessary to have an understanding of the client’s ethical position, and it is useful to be aware of the literature that might have influenced the client. I also raise questions about the dangers of lawyers asserting illegitimate authority and making political decisions that they present — to the client and sometimes to themselves — as legal decisions.

### Part III

I now examine the interaction between these aspects of constitutions and constitutional practice on one hand, and on the other hand the practice of direct action, and especially of civil disobedience — that is the ethically and politically motivated violation of the law, intentionally, usually openly and non-violently — in order to persuade others to change.

The practice of violating a law in order to test its constitutionality is the most widely accepted form of civil disobedience.<sup>16</sup> The stronger the argument is that the law in question is unconstitutional, the easier it is for the public to support this form of ethically motivated violation of the law. Even an Associate Justice of the US Supreme Court could write a book supporting and defending this form of civil disobedience.<sup>17</sup> The public support for violating the law begins to drop as the unconstitutionality of the law becomes less clear. Many — perhaps most — people support the idea that testing the constitutionality of the law through violating the law is a kind of ‘strict

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<sup>16</sup> Of course, one could argue that violating an unconstitutional law is not civil disobedience at all because civil disobedience requires the violation of a valid law, while an unconstitutional law is void and thus not really a law at all. Such definitional arguments seem to me to be of little practical or theoretical value.

<sup>17</sup> See Fortas (1968).

liability' endeavour. If the law is found by the court to be constitutional, the conviction stands and a fine or gaol sentence or both is imposed.

Yet support for civil disobedience can be built step by step. It is difficult to justify imposing a fine or gaol sentence on a person who violates a law to test the constitutionality of the law when (1) the law is of questionable validity or seems likely to be unconstitutional; (2) violating the law is the only way or the only practical way to obtain standing to challenge the law's constitutionality; and (3) no one has been tangibly or recognisably injured by the violation of the law. This assertion seems especially true when the courts surprise people by finding the law constitutional, perhaps overturning prior precedent or interpreting prior precedent in an unexpectedly narrow way. Of course, many people can and do differ on the constitutionality of a law. If it seems unfair to blame or penalise a person who violates a law that many or most people expected to be overturned by the courts, it may not seem much more fair to blame or impose a penalty on a person who violates a law in the honest, good faith belief the law should be found unconstitutional — especially is this the case when the law also seems unjust. And when a law does seem unjust, it can begin to seem unfair to blame or impose a penalty on any person who violates the unjust law. In particular, it seem unfair to impose blame and penalty on the person who thinks only that the law is unfair if we decide not to impose such blame or penalty on the person who thinks that the law is unfair and also unconstitutional. The only difference between the two cases may be the constitutional theory or the degree of sophistication of the person violating the law. The mere fact that one person believes that the language of the constitution is broad enough to protect against most unfair laws, while another person has not considered that possibility or is resigned to the constitution being interpreted to permit injustice, can seem hardly to be a rational basis for imposing or not imposing blame and penalty.

In the United States, the legitimacy of civil disobedience has been sufficiently established that much energy is put into trying to limit what can be properly considered civil disobedience.<sup>18</sup> It is not uncommon to try to 'define' civil disobedience by listing requirements — such as exhausting alternative efforts at change,<sup>19</sup> being open and non-violent, and graciously or

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<sup>18</sup> In my view, David Daube captured nicely what was at stake in the definitional debate in his book *Civil Disobedience in Antiquity*: [add quote I use in Socrates article, Georgia L. Rev. 1985, about that those with power tended to want a constricted definition of civil disobedience because of the moral legitimacy that seems to be attached to the term civil disobedience in many quarters.]

<sup>19</sup> Thoreau's comments on this 'requirement' are useful: 'Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them ... As for adopting the ways which the State has provided for remedying the evil, I know not of such ways. They take too much time, and a man's life will be gone. I have other affairs to attend to. I came into this world, not chiefly to make this a good place to live in, but to live in it, be it good or bad. A man has not everything to do, but something; and because he

enthusiastically accepting arrest and ‘the consequences’ of violating the law. The ‘requirement’ of openness generally does not extend so far as to require *advance* notice to the authorities — although Gandhi, for example, did notify the British authorities weeks in advance of his intention to violate the salt laws. The element of surprise has often been an important part of civil rights actions, such as the first lunch counter sit-ins.<sup>20</sup> Some environmental activism designed to attract public attention — such as hanging banners from the Golden Gate Bridge — can only be accomplished if the authorities are kept in the dark until the banner is in place, visible to all.

Justice Abe Fortas’s view that a person who engages in civil disobedience must ‘accept the consequences’ and go to gaol even if his actions are morally justified is a position held by many participants in debates over civil disobedience. It is fair to say that the prevailing view is that willingly accepting the consequences of breaking the law is a crucial part of what distinguishes civil disobedience from simple lawlessness. As I pointed out some years ago in ‘Socrates on Legal Obligation: Legitimation Theory and Civil Disobedience’,<sup>21</sup> the concept of accepting the consequences lacks a coherent understanding or indeed coherent meaning. When the issue being discussed is what consequences should flow from the violation of the law, it is meaningless to try to answer that question by saying that one must accept the consequences of violating the law. One cannot help but accept the consequences of one’s actions. If a Vietnam War era draft refuser escaped to Canada, he did not avoid the consequences of his actions — the consequences were that he became a Canadian immigrant. When Daniel Berrigan went ‘underground’ after committing civil disobedience against the war in Vietnam, he accepted the consequences of being underground.

In constitutional test cases, judges are required to examine the constitutionality of the law before they apply it to convict the defendant. Except in cases in which the constitutionality of a law might turn on whether the law is just, the law does not require judges to examine the justness of a law before applying the law. Some would argue that judges are required to apply the law regardless of its justice or injustice and that the judges have no business examining whether they believe the law is just or unjust. Whether morality requires judges to examine the justness of a law is another question. Judges

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cannot do everything, it is not necessary that he should do something wrong. It is not my business to be petitioning the Governor or the Legislature any more than it is theirs to petition me; and if they should not bear my petition, what should I do then?’ Thoreau (1849).

<sup>20</sup> An excellent example of civil disobedience surprising people and changing the way people think about issues arose during a protracted struggle over a series of dams the Norwegian government wanted to build that would alter and destroy considerable land of the native Sami people. At one point a *lavvo* — the traditional, tipi-like housing structure of the Sami — suddenly appeared overnight on the lawn of the Parliament in Oslo and inside several Sami elders had chained themselves together and had gone on a hunger strike. The action dramatically caught the attention of the Norwegian people and changed the debate in important ways. See Lindal and Sunde (1981); Mikkelsen (1980).

<sup>21</sup> Olsen (1985).

rejecting motions to dismiss charges against defendants who engaged in civil disobedience and those sentencing the defendants typically take the position that the moral claims of the defendant and the justness or injustice of the law must be treated as irrelevant to the judges' decisions. In support of this position, the judges sometimes cite Gandhi — seen by many as the father of political civil disobedience. Sometimes the judges go back further to Socrates.<sup>22</sup>

There is a moral dishonesty in the judges' use of Gandhi to justify their disregard for the protesters' motives when they pass sentence. They frequently quote from Gandhi's speech to the judge sentencing him in 'The Great Trial'. They quote:

I ... invite and cheerfully submit to the highest penalty that can be inflicted upon me for what in law is a deliberate crime, and what appears to me to be the highest duty of a citizen.

But when the speech is put into its context, it supports nearly the opposite position than that for which it is so often quoted. Gandhi goes on to tell the judge sentencing him:

The only course open to you, the Judge, is, as I am going to say in my statement, either to resign your post, or inflict on me the severest penalty if you believe that the system and law you are assisting to administer are good for the people.<sup>23</sup>

Gandhi was not advocating a position of moral neutrality—rather he was challenging the judge not to compromise, but to stand by his position one way or the other. If the judge supports British rule, he should not salve his own conscience by giving Gandhi a short sentence. He should either sentence Gandhi to the maximum sentence or preferably he should face the injustice of the British rule and resign his judgeship.

This position of Gandhi is strikingly similar to that of Socrates, who is also misused by US judges and others to dodge moral engagement and deny moral responsibility. US judges point to Socrates' decision to drink poison and die at the hands of the law rather than to escape his sentence, as he had the opportunity to do. In fact, Socrates had at least three opportunities to avoid death. First, many Athenians would have chosen to go into exile for a while instead of standing trial. Typically — especially if the charges were political or based on a personal

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<sup>22</sup> There is particular irony in judges using Socrates' choice to 'accept the consequences' as part of their effort to avoid squarely confronting their own moral responsibility for the response the state makes through them as agents of the state. US judges have looked to Socrates, yet the importance of Socrates' choice was to hold accountable the judges/jury who condemned him and the accuser who brought the charges. His refusal to escape prison (like his earlier refusal to offer his own exile as an alternative to a sentence of death) was a refusal to retreat from a confrontation with injustice and an effort to prevent others from retreating from this confrontation. The judges in the United States are making just such a retreat.

<sup>23</sup> Author (*Mahatma Gandhi*, Vol. II) (1951) pp. 129–33.

feud — things would quiet down after a while and the fugitive could safely return to his life in Athens. At the trial, Socrates could have offered exile as an alternative to death, and few doubt but that the popular judges of Athens would have chosen to sentence him to exile rather than death. Finally, his friend Crito famously offered to help Socrates escape from gaol and go into exile. The *Crito* is the Socratic dialogue memorialising the offer, its refusal, and Socrates' death. In context, it seems less clear that Socrates was 'accepting the penalty' because the law is the law and more apparent that he was refusing to give any 'easy out' to those who opposed him.<sup>24</sup> Like Gandhi, Socrates forced his opponents to the test: if they agreed he was just, they should not simply compromise on exile or a light sentence. Rather, they must act decisively and acquit him or resign their position. If they really want to maintain the justice of charging Socrates with impiety and corrupting the youth of Athens, then they have his death on their hands. Similarly, if the judges really want to maintain the justice of British rule over India, they must have the long-term imprisonment of Gandhi on their hands.

At the same time that the practice of bringing test cases through violating the law facilitates civil disobedience, it also may limit it. It may encourage violations of the law that 'fit' constitutional challenges while also channelling protest in those directions. It may encourage thinking in terms of rights in an abstract and individualistic way, and correspondingly discourage thinking in terms of power, politics and organisation. It may create subtle conflicts between the lawyers and others in an organisation.

The interplay between law and politics is crucially important. Test cases can build on politics and will then usually be very powerful. But they also can take place without politics or as a substitute for politics. The lawyers can celebrate their victory, without the actual people involved benefiting in any concrete way.

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<sup>24</sup> For an extended argument on this point, see Olsen (1985).

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