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CONTEMPORARY CIVIL DISOBEDIENCE: SELECTED EARLY AND MODERN VIEWPOINTS

In the early 1960’s the American Negro’s struggle for civil rights underwent a fundamental transformation. The long-used procedure of seeking progress through judicial decision and legislative action, while not abandoned, was overshadowed by the more direct and dramatic method of challenging discrimination through calculated acts of civil disobedience.¹ This use of civil disobedience raises once again the perennial jurisprudential issue of a citizen’s duty to obey enacted law, and perhaps the issue has not been so clearly raised since the post-War reflection on Hitler’s reign of terror.²

This note will first discuss the characteristics of this contemporary civil disobedience; secondly, relate it to the ideas of three earlier philosophers who represent three schools of natural law; thirdly, consider it in relation to four recent writings on civil disobedience; and finally, point out two central issues which recur in the writings of the seven men. The three earlier writers have been selected because each is an important representative of his school who gives extensive consideration to the question of obedience to law, while the four contemporary writers were chosen because their attitudes toward civil disobedience range from disapproval to acclaim.

Outside the scope of this note is the issue, raised in the famous Hart-Fuller debate,³ of whether “legal positivism” at least by implication favors submission to all enacted law, no matter how unjust. This issue is not discussed because much of the disagreement centers on whether such a position is implied in the positivist’s avowal to study the law “as it is” or as a “fact,”⁴ and less time is devoted to the merits of such position

¹. Hill, RHETORIC OF RACIAL REVOLT 286-91 (1964); KIng, WHY WE CAN’T WAIT 1-14 (1963); Westin, FREEDOM NOW! V (1964).
². For discussion of the duty of obedience under the Third Reich, see, e.g., Fuller, AMERICAN LEGAL PHILOSOPHY AT MID-CENTURY, 6 J. LEGAL ED. 457, 581-85 (1954); Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 593, 615-21 (1958). For recent articles on contemporary civil disobedience see, e.g., Freund, Civil Rights and the Limits of Law, 14 BUFFALO L. REV. 199 (1964); Leonard, Morality in Race Relations, 11 CATHOLIC LAW 202, 206-7 (1965); MacGuigan, Civil Disobedience and Natural Law, 11 CATHOLIC LAW. 118 (1965); Tweed, Segal & Parker, Civil Rights and Disobedience to Law: A Lawyer’s View, 36 N.Y.S.B.J. 290 (1964); Comment, The Sit-In: An Analysis of Competing Interests, 10 WAYNE L. REV. 714 (1964).
³. Hart, supra note 2; Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630 (1958).
⁴. See Ross, ON LAW AND JUSTICE 31-32 (1959); Fuller, supra note 3, at 631-33, 657-61, 669-72; Hart, supra note 2, at 596-98, 606, 615-21.
from a moral or legal standpoint. Rather than digressing to attempt—
against their protests—to "read into" the positivists' position a particular
stand on the question of disobedience, this note is limited to writers who
openly discuss disobedience as a legal and moral question.

Characteristics of Contemporary Civil Disobedience.

It is erroneous to look upon the Civil Rights Movement as a monolithic,
well-disciplined organization, for the Movement ranges from the
radical separationism of the Black Muslims, through the activist, but es-
sentially conciliatory Southern Christian Leadership Conference of Mar-
tin Luther King, Jr., to the more conservative and legally oriented Na-
tional Association for the Advancement of Colored People. Therefore,
any generalizations valid for all civil rights groups must of necessity be
limited to such banalities as "interest in improving the Negro's status" or
"opposition to the present social and economic structure." In order to
avoid the problem created by this lack of coherence, this note will con-
centrate on the "middle group" of civil rights organizations—the South-
ern Christian Leadership Conference, Students' Non-violent Coordinat-
ing Committee, and the Congress on Racial Equality. This group of
organizations best fits the purposes of this note, because these organi-
zations have been primarily responsible for the promotion of civil dis-
obedience as a tool in the civil rights struggle, whereas the Muslims seek
to become "in but not of the society," while the NAACP has concent-
trated on legalism. Further, the statements of Martin Luther King, Jr.,
will be used to show the ideological and philosophical basis of this civil
disobedience, for King is probably the best known leader of the "middle
group," and an articulate defender of civil disobedience as a legitimate
instrument of the Civil Rights Movement.

Perhaps the most striking characteristic of the Negro Revolution is
that it does not seek to overthrow the present legal and political system;
its avowed objective is not the destruction of American society, but
rather, full participation in it. Unlike the French Revolutionaries who
sought to crush the ancien régime, the civil rights leaders desire to fulfill
the American Way of Life by allowing Negroes to become full partici-

5. For such characterization of the civil rights organizations, see LOMAX, The
Negro Revolt 127-29, 147-63, 177 (1962).
6. For use of the term "'in' but not 'of' the society," and for discussions of the phe-
nomenon of a minority which is physically, but not spiritually, within a society, see I
TOYNBEE, A Study of History 41 n.3 (1962).
7. This categorizing of the organizations of course is not absolute, for the NAACP
does assist the demonstrators, and both the "middle group" and the Black Muslims do
not hesitate to avail themselves of the courts.
supra note 5, at 84-100.
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pants in it. Their aim is to eradicate patterns of discrimination which they believe prevent this full participation, and while one may argue that the methods employed, or even the eradication itself, will radically alter this Way of Life, the fact remains that the expressed goal is fulfillment, not destruction, of American ideals.

Another characteristic of contemporary civil disobedience is perhaps a result of the moderate nature of its goal, that is, the disobedience has received the sympathy, if not approval, of many high governmental officials. Likewise Congress and the federal courts have frequently reacted to the disobedience by legislating against the complained-of condition, or nullifying the disobeyed law, rather than acting to suppress the disobedience.

An important consideration in any jurisprudential examination of civil disobedience is whether or not any legal means exists to change the disapproved law or condition. The answer to this question also happens to be a central point of disagreement between the advocates and opponents of contemporary civil disobedience. Much of the disagreement seems to be over what constitutes satisfactory legal means of redress. Most civil rights leaders would hardly dispute that at least theoretically legal means to correct the conditions do exist—indeed they constantly assert that government has the power to make the corrections, and forcefully urge that it employ such power. However, while conceding the theoretical possibility of success through strictly legal means, they maintain that in practice legal solutions, without the catalyst of civil disobedience, will either come too slowly, or perhaps not at all.

Finally, there is an important dichotomy apparent in the acts of civil disobedience—disobedience of laws considered unjust in themselves, e.g., laws calling for segregated eating facilities, and disobedience of laws not considered unjust in themselves, e.g., laws forbidding obstruction of

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9. See, e.g., King, op. cit. supra note 1, at 137-69.
10. See, e.g., John F. Kennedy, speech to the nation, June 11, 1963 (White, op. cit. supra note 8, at 172-3).
13. See, e.g., Lomax, op. cit. supra note 5, at 124-5; RaaB, American Race Relations Today 23-27 (1962); White, op. cit. supra note 8 at 165-66; King, The Civil Rights Struggle in the United States Today, 20 Record Suppl. 5 (1965); Waldman, Civil Rights—Yes; Civil Disobedience—No (A Reply to Dr. Martin Luther King), 37 N.Y.S. B.J. 331-2 (1965).
Likewise the aims of the two situations are different; in the former it is to eradicate the law itself, and in the latter, to use defiance of the law as a means of drawing attention to grievances not directly connected with the law. The two types of disobedience at times raise different issues, and when necessary, they will be treated separately.

King at least tacitly recognizes this dichotomy when justifying civil disobedience, for generally his defense of civil disobedience assumes that defiance is of unjust laws. Perhaps his best known statement on civil disobedience is contained in his "Letter from a Birmingham Jail," written in April, 1963:

... there are two types of laws: just and unjust. I would be the first to advocate obeying just laws. One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that 'an unjust law is no law at all.'

... A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: 'An unjust law is a human law that is not rooted in eternal law and natural law. . . .'

... An unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself . . . a just law is a code that a majority compels a minority to follow and that it is willing to follow itself. . . .

... A law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law. . . .

... In no sense do I advocate evading or defying the law, as would the rabid segregationist. That would lead to anarchy. One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. [An individual who does this] to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.19

16. Civil rights leaders consider laws unjust if either "unjust on their face," such as segregation laws, or "unjust in their administration," e.g., parade restrictions which are in practice applied only to Negro groups. For purposes of this note, a law "unjust in itself" covers both situations.
17. See note 19 infra and accompanying text.
18. See note 20 infra and accompanying text.
19. King, op. cit. supra note 1, at 84-86.
Thus in 1963, King limited his justification of civil disobedience to unjust laws; however, in 1965 he was willing to extend this defense to include defiance under certain circumstances of laws not unjust in themselves. In a question and answer period following an address before the Association of the Bar of the City of New York, April 21, 1965, King was asked: "Does your concept of civil disobedience include such tactics as obstructing sites where Negroes are not employed, where those who use such means . . . are not quarreling with the justice of any law?" King answered:

... [A]ll civil disobedience must be centered on something. . . . the goals must be clearly stated. . . . [T]here are instances wherein the process of frustration with the structure of things, people find themselves in positions of not quite being able to see the unjust law. But they see injustice in a very large sense existing. Consequently, they feel the need to engage in civil disobedience to call attention to overall injustice. At that point they are not protesting against an unjust law. [Where communities do not work to remove injustice] men of conscience and men of good will have no alternative but to engage in some kind of civil disobedience in order to call attention to the injustices, so that the society will seek to rid itself of that overall injustice. Again . . . there must be a willingness to accept the penalty.20

Three Earlier Writers and Contemporary Civil Disobedience.

The three philosophers discussed here represent the three general schools of earlier natural law philosophy—ancient, medieval and classical.21 Each is an important and not atypical representative of his particular school of philosophy, and each addresses himself to the question of a citizen's duty of obedience to law.

Ancient. Law is the "central, unifying subject of Plato's philosophy,"22 and in Crito he has Socrates speak at length on the citizen's duty to obey the laws.23 Plato's position seems to be that a citizen has an almost absolute duty to submit to law, even when he believes a law to be unjust. Socrates says:

20. See King, op. cit. supra note 13, at 24.
21. For this classification of natural law, see Bodenheimer, Jurisprudence 3-59 (1962).
23. XI-XV. The quotations from the dialogues are from Church's translation (1880).
Shall I reply, “But the state has injured me: it has decided my case wrongly?” . . . And suppose the laws were to reply, “Was that our agreement? Or was it that you would submit to whatever judgments the state should pronounce? . . . [Y]ou must do whatever your city and your country bid you to do, or you must convince them that their commands are unjust.”

While this statement appears unequivocal, it should be kept in mind that Plato is referring to law in the ancient Greek sense of a body of rules which have a long tradition of honored usage, and which are in harmony with the law of Nature. Whether Plato would maintain this attitude of obedience when confronted with an utterly arbitrary rule of a tyrant is left unanswered. However, that answer being what it may, given the condition of a reasonably honorific legal system, Plato would “submit to whatever judgments the state should pronounce.” Therefore at this point the conclusion seems unavoidable that Plato would disapprove of contemporary civil disobedience, since it does not condemn the entire legal system, but chooses to disobey only certain laws considered unjust. Obviously the same would hold true for disobedience of laws not considered unjust in themselves.

However, this judgment might be tempered by two statements that Plato has Socrates make. Socrates quotes the laws as saying “if any man of the Athenians is dissatisfied with us, he may take his goods and go away whithersoever he pleases; we give that permission to every man.” If Plato is offering this as a reasonable alternative to obedience, then it could be said that since the Negro cannot simply pack up and “leave Athens,” the two situations are not analogous. However, the laws continue “But we say that every man of you who remains here . . . has agreed . . . to do whatsoever we bid him.” It is an all or nothing situation—once you accept the laws, you must obey them all, not merely those that please you. The advocates of civil disobedience do not wish to “leave Athens,” i.e., reject the general legal system, and thus Plato would have the laws tell them: “If you had desired to reject us entirely, and were unable to do so, obedience might be a different matter, but since you do not desire to reject most of us, you must accept all of us.”

A second possible qualification comes when the laws tell Socrates “we gave him his choice, either to obey us, or to convince us that we were

24. Id. XI-XII.
26. See text accompanying note 24 supra.
27. Crito XIII.
28. Ibid.
wrong.”\textsuperscript{29} Thus, assuming King is correct in stating that they disobey only laws which “a minority . . . as a result of being denied the right to vote, had no part in enacting or devising,”\textsuperscript{30} then one might contend that the Negro has been denied the alternative of convincing the law that it is wrong. However, it is doubtful that Plato is maintaining that this opportunity to convince the laws of their error is a requisite to their validity, once the legal system is accepted. As quoted previously, the laws say “you must do whatever your city and your country bid you to do, or you must convince them that their commands are unjust.” Since in either alternative the final decision remains in the state, “or you must convince them” seems to mean “unless you convince them,” and thus persuasion is not always an available alternative to obedience. The non-essential nature of this alternative is further seen when Socrates in \textit{The Apology} scolds the judges for their unwillingness to listen to reasoned argument on his behalf.\textsuperscript{31} Plato has Socrates accept his own condemnation without having had much opportunity to convince his triers of their error, and thus it is doubtful that he considered this opportunity to be a condition necessary for obedience.

\textit{Medieval.} Martin Luther King, Jr., cites Thomas Aquinas as supporting his position,\textsuperscript{32} and indeed the thirteenth century giant of Scholastic Philosophy does consider at length both law, and man’s obligation to obey law. In Questions 90 through 97 of \textit{Summa Theologica} he discusses the nature of law, and defines law as “an ordinance of reason for the common good, made by him who has care of the community, and promulgated.”\textsuperscript{33} After giving this general definition of law, Aquinas distinguishes four kinds of law and explains their interrelationship. Eternal law is a type of Divine Wisdom, or Exemplar in God, which directs all things to their end;\textsuperscript{34} natural law is man’s perception of, and participation in, the eternal law by use of his reason;\textsuperscript{35} and human law (positive law) is the body of “particular determinations” devised by human reason from the precepts of natural law.\textsuperscript{36} Finally, there is Divine law, or Holy Scripture, which consists of certain commandments given to man by God directly, so that such commandments will not be subject to imperfections in man’s perception of the eternal law.\textsuperscript{37}

\begin{itemize}
\item \textsuperscript{29} Ibid.
\item \textsuperscript{30} See text accompanying note 19 supra.
\item \textsuperscript{31} XXIX.
\item \textsuperscript{32} See text accompanying note 19 supra.
\item \textsuperscript{33} Quest. 90, art. 4.
\item \textsuperscript{34} Quest. 93, art. 1.
\item \textsuperscript{35} Quest. 91, art. 2.
\item \textsuperscript{36} Quest. 91, art. 3.
\item \textsuperscript{37} Quest. 91, art. 4.
\end{itemize}
Thus, as King suggests, Aquinas maintains that human law must be in accord with natural law (and therefore eternal law) or else "it is no longer a law but a perversion of law."\textsuperscript{38} Further, Aquinas quotes St. Augustine, as does King, as saying "that which is not just seems to be no law at all."\textsuperscript{39} Aquinas states that a law may be unjust in two ways: first, by being contrary to natural law, and second, by being opposed to Divine law, i.e., Scripture.\textsuperscript{40}

Concerning man's right to disobey unjust law, he establishes two standards, one for each type of unjust law. In the case of a human law which violates Divine law, Aquinas' position is unequivocal—"laws of this kind must nowise be observed"\textsuperscript{41}—a subject has not only a right, but also a duty to disobey such commands. Thus, if contemporary civil disobedience is directed toward laws which violate Divine law, that is, Scripture, then indeed Aquinas would agree it is justified and even obligatory. However, apparently he meant for this absolute invalidity to apply to only a narrowly defined group of laws which are in direct conflict with Scripture, as evidenced by the example he gives—"laws of tyrants inducing to idolatry."\textsuperscript{42} This type of unjust law is contrasted with the other kind of unjust law which more generally violates natural law because it is not "ordained to the common good."\textsuperscript{43}

Therefore, contemporary civil disobedience seems aimed at laws which, assuming their unjustness, Aquinas would place under the latter broader category of unjust laws, that is, laws which, while not ordained to the common good, are not directly in violation of Scripture. King defines an unjust law as "a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself,"\textsuperscript{44} and such definition seems to agree with Aquinas' definition of laws that violate natural law. He says that laws are just when "burdens are laid on the subjects, according to an equality of proportion and with a view to the common good," and unjust "when burdens are imposed unequally on the community,"\textsuperscript{45} and further he states that "whatever law a man makes for another, he should keep himself."\textsuperscript{46} Admittedly, one should be aware that Aquinas is discussing general precepts, and he himself recognizes that conclusions to be drawn from such precepts must take into account

\textsuperscript{38} Quest. 95, art. 2.
\textsuperscript{39} Ibid.
\textsuperscript{40} Quest. 96, art. 4.
\textsuperscript{41} Ibid.
\textsuperscript{42} Ibid.
\textsuperscript{43} Ibid.
\textsuperscript{44} See text accompanying note 19 supra.
\textsuperscript{45} Quest. 96, art. 4.
\textsuperscript{46} Quest. 96, art. 5.
all contingencies, and thus such conclusions are not immediately perceptible and certain.\textsuperscript{47} However, the central theme of this note is the nature of a citizen's duty to obey enacted law when faced with injustice, and therefore for the sake of discussion it will be assumed that the defied laws do fall within Aquinas' definition of a law that is unjust because it is not ordained to the common good.

Turning to man's duty of obedience in relation to this kind of unjust law, he says "such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right" and "neither in such matters is man bound to obey the law, provided he avoid giving scandal or inflicting a more grievous hurt."\textsuperscript{48} Therefore man has no obligation to obey such law, unless the ensuing disorder is more harmful to the common good than is the unjust law itself. There are two reasons why contemporary civil disobedience may conform to this standard.

First, the Movement, as visualized by King, aims at open defiance of certain unjust laws without violence, while professing respect for all other law, and thus "arouse the conscience of the community over [their] injustice."\textsuperscript{49} In contrast to a general assault on the whole legal system, this approach seems calculated to keep disorder within narrow limits, and at a minimum. However, by the same standard, that is, an effort to keep disorder at a minimum, disobedience of laws not considered unjust, for the express purpose of creating disorder to draw attention to non-legal injustice, would tend not to conform to this standard.

Secondly, the fact that the disobedience has elicited a generally positive response from the courts and Congress, seems to indicate that rather than create undue "scandal or disturbance," the disobedience has attacked the unjust law without rending apart the social fabric. However, if in fact this program of disobedience is generating an attitude of general disrespect for law, as is contended by some observers,\textsuperscript{50} then it would seem subject to Aquinas' injunction to yield the right.

Furthermore, in considering contemporary civil disobedience in light of Aquinas' standard for permissible disobedience, a key question is the existence of satisfactory legal means to change disfavored laws. As mentioned previously, this question is a central point of dispute in the civil rights debate. If this legal means of redress does exist, then disobedience would be much more difficult to justify under the Aquinas position.

\textsuperscript{47} Quest. 94, art. 4.
\textsuperscript{48} Quest. 96, art. 4.
\textsuperscript{49} See text accompanying note 19 supra.
\textsuperscript{50} See, e.g., Powell, Respect for Law and Due Process—The Foundation of a Free Society, 18 U. FLA. L. Rev. 1 (1965).
Aquinas is saying that human law should promote both justice and order which together work for the common good. Admittedly Aquinas is not completely clear as to which of these two values is primary in case of irreconcilable conflict: for on one hand, he suggests that it is order when he states “to avoid scandal or disturbance . . . a man should even yield his right.” On the other hand, he intimates that the true test is one of “balancing the interests” to promote the greatest common good, for he says one should not obey unjust law “provided he avoid giving scandal or inflicting a more grievous hurt.” In any case, whatever is the actual priority between justice and order, undoubtedly order is a value to be preserved even at considerable cost, and thus if legal means of redress are available, both justice and order can be accommodated, and disobedience is not to be approved.

*Classical.* Bodenheimer gives the name “classical natural law” to the legal philosophy which arose in the seventeenth and eighteenth centuries along with the post-Reformation transformation of the European social and political structure. This classical natural law is distinguished from medieval natural law by its divorce of law from theology, elaboration of concrete details from general principles, emphasis on the “natural rights” of man, and its shift from a “teleological to a causal and empirical view of the nature of man.”

John Locke is perhaps the best known classical advocate of the doctrine of the inalienable natural rights of man, and his writings greatly influenced the thinking of the founders of the American Republic. Locke states that “all men are naturally in . . . a state of perfect freedom to order their actions . . . as they see fit, within the bounds of the law of nature, without asking or depending on the will of any other man.” However, because of the difficulty, danger and inconvenience involved in having every man his own judge and enforcer of his natural rights, men by their mutual consent join together into a political society, or commonwealth. Thus, “[T]hose who are united into one body and have a common established law and judicature to appeal to, with authority to decide controversies between them . . . are in civil society. . . .” Every man gives his “consent,” at least tacitly, to become a part of the commonwealth, and to be bound by its laws, when he holds and enjoys

51. See text accompanying note 48 *supra.*
52. *Ibid.* (Emphasis added.)
53. *BODENHEIMER,* *op. cit.* *supra* note 21, at 32-3.
54. See, e.g., *MASON,* *FREE GOVERNMENT IN THE MAKING* 3 (1956).
56. *Id.* ch. VII, § 87.
possessions under its dominion.\textsuperscript{58}

However, in joining in this social contract, men do not submit themselves to the arbitrary and unlimited power of the commonwealth, because in nature each man did not have such power over himself, but only the power to preserve and protect his life and his property;\textsuperscript{59} not having such arbitrary power over himself, he could not transfer it to the commonwealth.\textsuperscript{60} Therefore the government which is formed by the commonwealth has only the right to act for the public good, and cannot deprive any man of his property, or subject him to its arbitrary will.\textsuperscript{61}

Moreover, Locke makes it emphatically clear that when a government transgresses these limits, the people have a right to resist and overthrow this government.\textsuperscript{62} On this general proposition, that the people have a right to resist an oppressive government, Locke's position is as unequivocal as it is well-known. However, difficult complications appear when this doctrine, as elaborated by Locke, is considered in relation to contemporary civil disobedience.

The basic difficulty centers around the question of the right of an aggrieved minority, not majority, to resist the unjust acts of the government. As Martin Luther King, Jr., points out, the civil rights movement seeks to disobey laws imposed unjustly by a majority upon a minority. In considering this question of minority rights, it is important to recognize that Locke postulates two agreements. The first is that "brings men out of the loose state of nature into one politic society [and] which everyone has with the rest to incorporate and act as one body, and so be one distinct commonwealth,"\textsuperscript{63} and the first and fundamental act of this commonwealth is the establishment of a legislature in which resides the supreme power of the commonwealth.\textsuperscript{64} The second agreement occurs when the people, as a commonwealth, delegate this legislative power to one or many, and in doing so, form a government.\textsuperscript{65}

\textsuperscript{58.} Id. ch. VIII, §§ 119-20.

\textsuperscript{59.} "Property," as defined by Locke, includes "lives, liberties, and estates" See Id. ch. IX, § 123.

\textsuperscript{60.} Id. ch. IX, § 130; ch. XI, § 135.

\textsuperscript{61.} Id. ch. XI, §§ 137-38.

\textsuperscript{62.} Id. ch. XIII, § 149; § 155; ch. XVIII, §§ 203-09; ch. XIX, § 222; §§ 231-32.

\textsuperscript{63.} Id. ch. XIX, § 211; see also ch. IX, § 131.

\textsuperscript{64.} Id. ch. XI, § 134.

\textsuperscript{65.} Id. ch. X, § 132. Admittedly, Locke is somewhat ambiguous on this point at times, for he speaks of the majority making laws for the community, in which case "the form of government is a perfect democracy," as contrasted with placing this power in the hands of delegates. \textit{Ibid.} In the former situation there would seem to be no difference between the original commonwealth and the government. However, there is no doubt that he does make a distinction between the society and the government, as evidenced by his statement that one should "distinguish between the dissolution of the society and the dissolution of the government." Id. ch. XIX, § 211. A further distinction to be kept in mind is that within the government itself there will be an executive which
When Locke speaks of the right of the people to resist arbitrary legislative power (or executive power which, in turn, is derived from and dependent on the legislative power), he is referring to the exercise of such power under this secondary arrangement, that is, by the "government," not the "society" or "commonwealth." He talks of the right of the people to remove the legislative power from those who abuse it, and to re-entrust it to others; further, he states that almost the only way society can be dissolved is by foreign conquest, whereas government can be dissolved when the people remove the legislative power from it, or where the prince, i.e., executive, hinders the legislature. The upshot of this is that the acts of the people as a body, or society, are absolutely binding on all within the society. In fact Locke makes it clear that once such society is formed, "the act of the majority passes for the act of the whole," and that everyone in the society is under an obligation "to submit to the determination of the majority and to be concluded by it." A further indication that Locke considered the majority as the final arbiter of rights is his answer to the question: "Who shall be the judge whether the prince or legislative act contrary to their trust?" He replies: "The people shall be the judge." However, while Locke says that the will of the majority is conclusive on all, he also states, as mentioned previously, that a man "cannot submit himself to the arbitrary power of another," and can give up only so much power as "the law of nature gave him for the preservation of himself," and that "this is all he can or does give up to the commonwealth." This indicates that Locke recognizes a limitation to the power of the commonwealth (society) as well as to that of the government. The question he does not address himself to is the one which is central to our problem—the right of a minority to resist when the majority actively supports laws which deprive this minority of its "inalienable rights." A basic assumption of The Second Treatise is that the people, if allowed to express their will by majority action, will not single out and mistreat any

is subordinate to, and derives its power from, the legislative. Id. ch. XIII, §§ 150-53. Apparently the legislative power, although the "supreme power" is still subject to a "more" supreme power in the people to remove or alter it! Id. ch. XIII, § 149.

66. See note 65 supra.
67. Locke, op. cit. supra note 55, at ch. XIII, § 149.
68. Id. ch. XIX, §§ 211-12.
69. Id. ch. VIII, §§ 96-97. Locke does suggest that a minority, or even a single individual, has the right (although perhaps not the physical power) to resist the unlawful acts of the executive; however, it is clear that he is speaking of the executive as distinguished from the "legislative," and even more from "the people," because he says such suppression of a minority may be tolerated by the bulk of the people until the illegal acts affect a majority or at least arouse its indignation. See Id. ch. XVIII, § 208.
70. Id. ch. XIX, § 240.
71. Id. ch. XI, § 135.
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minority. Of course it is just such mistreatment of a minority by the majority that is the avowed target of the civil rights movement.

While Locke does not address himself to this essential question, another position of his is at least indirectly relevant to contemporary civil disobedience. He makes it clear that every individual, and the people as a whole, owe absolute obedience to the legislative power, i.e., the government, until the people should choose to replace it, and thus "the legislative can never revert to the people while that government lasts." Therefore, while he does not consider the possibility of an aggrieved minority rejecting the rule of the majority, Locke does suggest that no one, including the majority, can selectively disobey certain laws enacted by the legislature—until he decides to reject its authority entirely, he is bound to obey all of its acts. Thus, even assuming that the minority has the same right to resist the laws of the majority that the latter has to resist the laws of the government, by the same standard, the minority is precluded from disobeying certain laws until it is willing to reject the whole legal system. This selective disobedience, while maintaining allegiance to the general legal system, is of course exactly what is favored by the advocates of the present civil disobedience.

If legal means to redress wrongs and remove unjust laws exist—a proposition which is disputed by the proponents of civil disobedience—another implication of Locke's theory of the social contract is relevant. As noted, a primary purpose of men uniting into a society is to have an authority to settle disputes and thus eliminate the need for each man to resort to self-help in vindicating his rights. Of course Locke is here speaking of settling disputes between two men, and not of conflicts between men and laws of the government. However, the relevant point for this discussion is that this implies that a fundamental value of society, and of men generally, is the orderly and peaceable settlement of conflicts. This suggests that even if a right to disobey ordinarily exists, if the grievance can be redressed without disobedience and disorder, then such disobedience should be foregone.

Comment on the Earlier Writers.

In considering contemporary civil disobedience in relation to the standards set down by these earlier writers, there is an important point which should not be overlooked. This is of course the fact that they are not viewing the problem of disobedience in the context of a modern demo-

72. Id. ch. XIX, § 243; see also ch. XIII, § 149.
73. Locke is speaking here of the legislative power, because the people do have the power to disobey the executive whenever it conflicts with the legislative power. See note 69 supra.
cratic society. If, in a democratic society, the right of all normal adults to participate, at least indirectly, in the law-making process, is considered a requisite to the validity of the laws, then a member of a minority group arbitrarily excluded from the law-making process may not be under the same duty of obedience as is a full participant in the process. On the other hand, if, as in the societies of these earlier writers, participation by all adults is not considered a requisite to the laws' validity, then the inability to participate in the law-making process will not affect the duty of obedience. In other words, a minority group faced with systematic exclusion from the law-making process, in a society which has as a fundamental presumption the right of participation, may not be in the same moral position in relation to obedience as is a comparable group in a society with no such presumption. Unfortunately for our purposes, these earlier writers were dealing with societies in which no such presumption existed.

In fact, this same condition of differing historical contexts may be one reason it is difficult to find a common theme running through the writings of the three men. Plato lived in a Greek city-state, and he emphasizes that one has an almost absolute duty to obey the laws based on an honorable bargain made with the city-state. Aquinas gives a citizen the right to disobey "unjust" laws—subject to the condition of not creating undue disorder—but perhaps accompanying this concession is the unarticulated assumption that most laws will be "ordained to the common good" in Aquinas' relatively static medieval society under the aegis of the Church, and thus unjust laws which may be disobeyed are not apt to be often encountered. Likewise Locke's opposition to the divine right of kings should be noted when considering his position which gives the majority nearly unlimited right to oust the government, while paying little attention to the possibility of a minority being persecuted by the majority.

This is not to suggest that philosophical and ethical principles have no relevance beyond the chronological position of their authors, but to keep in mind that in applying such principles, the historical context of their formulation is a factor to consider.

Recent Writings on Civil Disobedience and Contemporary Civil Disobedience.

As this note has already indicated, a great deal has been written on contemporary civil disobedience as an aspect of the larger question of a citizen's duty to obey enacted law. Here recent writings by four con-

74. See note 2 supra.
temporary legal philosophers and jurists will be discussed for the purpose of examining current civil rights civil disobedience in light of the attitude of each toward civil disobedience as a general legal and philosophical proposition. The four writers here considered have been selected because their respective attitudes toward civil disobedience in a democratic society range from strong disapproval to strong approval under certain circumstances. It is important to note that all four address themselves to disobedience in a democratic society, and not in a totalitarian regime, and that fact in itself raises a significant question in relation to contemporary civil disobedience, a question which will be touched upon in the course of the discussion. It should also be noted that while two of the writers indicate that they view favorably contemporary civil disobedience, one disapproves and one takes no position, this note will not merely accept their conclusions on this point, but will consider the logical implications of their propositions as these implications relate to contemporary disobedience.

Louis Waldman, a prominent member of the New York bar and a leader of the legal profession, takes a firm stand against civil disobedience in a reply to Martin Luther King's earlier speech before the Association of the Bar of the City of New York. Waldman's central position is that King's philosophy—that a citizen has a right to disobey a law he considers unjust—by logical implication means that every group should do this, and the result would be the breakdown of the legal system. He says "civil disobedience cannot end with Negroes alone. You cannot build a fence around this kind of program." He strongly emphasizes that the United States has a "democratic constitutional system" and that "laws enacted pursuant to our Constitution must be obeyed whether the individuals or groups affected by those laws believe they are just or not."

However, Waldman does not devote enough attention to at least four points, discussion of which seems essential to the defense of his position. The first is an important qualification which King places on the right to disobey a law viewed as unjust, that is, the willingness to accept punishment for the violation. If the civil disobedient adheres to this restriction, then it seems likely that the use of disobedience as an easy way to get what one wants would be greatly reduced, and would result in a personal sacrifice on the part of the protestor—a sacrifice likely to

75. See note 13 supra.
76. See note 13 supra.
77. See, Waldman, supra note 13, at 334.
78. Id. at 337.
79. See text accompanying note 19 supra; see also, text accompanying note 20 supra.
be undertaken only in the case of deeply felt injustice. Waldman, for example, suggests that under King's doctrine the members of the AFL-CIO should refuse to obey all labor legislation believed to be unjust; however, that doctrine says they should do so only if they feel strongly enough about the injustice to go to jail for it—a far cry from a simple attitude of "if I don't like it, I won't obey it."

The second inadequately discussed point, related to the first, is Waldman's central assumption that "you cannot build a fence around this kind of program," and thus disobedience by one group under certain circumstances is likely to lead to disobedience by other groups under different circumstances. Admittedly, King leaves himself open to being accused of advocating such a doctrine, for he does speak of the "moral responsibility to disobey unjust laws." However, there are at least implied in his articulation of the civil disobedient's position, two important limitations on this disobedience. The first, as mentioned above, is the willingness to accept punishment, and the second is the need for the injustice to be genuinely and deeply felt. Although he does not directly state the second limitation, it is suggested by his definition of an unjust law as one which does not "square with the moral law or the law of God." Thus, under this restrictive definition of an unjust law, one would not have a right to resort to civil disobedience every time he came out on the short end of a legislative or judicial decision; it would have to involve a very fundamental value. Quite possibly disobedience even under these conditions would lead to the general breakdown feared by Waldman, but since he did not adequately take them into consideration in his article, proof of his point remains incomplete.

The next point involves the highly disputed question of whether legal means of redress exist for grievances. Waldman outlines the great legal progress civil rights programs have made in the past—progress which is not denied by King—but he does not address himself to the possibility that such legal means have reached a plateau, and further progress requires the catalyst of civil disobedience. Nor does he discuss the nature of an aggrieved person's duty, should it become obvious that the democratic processes will not correct a deeply felt injustice.

Finally, his answer to King's position, that an unjust law is one which is made binding on a minority who had no part in its making, while not binding on the majority who made the law, seems to miss

80. See text accompanying note 77 supra.
81. See text accompanying note 19 supra.
82. See text accompanying note 19 supra.
83. See text accompanying notes 13-15 supra.
84. See Waldman, supra note 13, at 331-32.
King's point. He says there are thousands of laws which are binding on minorities only, such as laws affecting only cities of a certain size, or only certain professions, and that everyone under 21 is denied the right to vote, yet they must obey the law. However, these classifications which meet the equal protection requirements of the fourteenth amendment, and voting qualifications based on age or mental capacity, are not comparable to a systematic exclusion from the political processes of a group on the sole criteria of race, unless one is willing to maintain that this racial classification is in some sense “reasonable”—in fact Waldman emphatically denies any such bias. It is likely that King's argument is susceptible of attack, perhaps on the basis that legal means exist to obtain full participation in the legal processes, or even on the basis that if one accepts the other benefits of society, he must obey the laws regardless of his inability to take part in the making of the laws—but not on the theory that age requirements for voting, or laws based on classifications permitted under the fourteenth amendment, are comparable to a systematic disenfranchisement of a racial minority.

John Rawls of Harvard University is less absolute in his disapproval of civil disobedience; and in the article here examined, he deals with the duty of obedience to law as a general proposition, and gives no particular consideration to the contemporary Civil Rights Movement. He states that assuming the legal system is a constitutional democracy, “sometimes we have an obligation to obey what we think, and think correctly, is an unjust law.” Rawls bottoms this obligation upon the “duty of fair play.” He explains this by saying that a society is a cooperative effort which yields advantages because everyone, or nearly everyone, is willing to restrict his own liberty by submitting to the will of the majority. However, any one person can obtain the benefits of the system even though he refuses to restrict his own liberty, because as long as nearly all of the others so cooperate the system will continue to yield its benefits, despite his own non-cooperation. “Under these conditions a person who has accepted the benefits of the scheme is bound by a duty of fair play to do his part and not take advantage of the free benefit by not cooperating.”

The reason that a person has a duty to obey laws which he considers unjust is based on the acceptance of two principles. The first principle

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85. Id. at 332-33.
86. Id. at 332.
87. Id. at 331.
89. Id. at 5.
90. Id. at 4.
91. Id. at 9-10.
is that a just procedure for law making creates social conditions which are better than anarchy, and the second is that, of the limited number of just procedures available, none can make the judgment of any single individual as to what is just always decisive (and if it did, it would not be "just"). Therefore every individual accepting the system must at times acquiesce in what he thinks is unjust in order to preserve the procedure which he considers to be a generally just procedure.  

Rawls emphasizes that this rationale for obedience applies only to a constitutional democracy, which presupposes that "there is a constitution establishing a position of equal citizenship and securing freedom of the person, freedom of thought and liberty of conscience, and such political equality as in suffrage and the right to participate in the political process." This limitation of his justification for obedience to a constitutional democracy raises the question of whether his rationale is applicable to contemporary civil disobedience. To the extent that civil rights protesters defy a law which is unjust because "it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law," Rawls’ rationale seems inapplicable.

However, the matter cannot be so easily dismissed, for at this point two ambiguities develop in considering this disobedience in light of Rawls’ reasoning. These ambiguities become more obvious when the following language is considered:

... if the constitution is just, and if one has accepted the benefits of its working and intends to continue doing so, and if the rule enacted is within certain limits, then one has an obligation, based on the principle of fair play, to obey it when it comes one’s turn.

The first ambiguity involves the definition of a "just constitution" in relation to the American federal system. Assuming that the civil disobedients consider the overall constitutional system as essentially fair, can one single out a part of that system—e.g., the State of Alabama—to disobey, while submitting to the rest? In other words, can a citizen conform to Rawls’ standard by agreeing to submit to all laws enacted and enforced by the federal government, even though he thinks some such laws are unjust, because he accepts the federal government as a just system, while at the same time having no obligation to obey unjust laws of a particular state, because it is not believed to be a just system? To push
the same idea further, could one be loyal to a state which has a just constitution, while having no such obligation to obey the ordinances of a particular county (or township), because a politically corrupt group has control of the local governmental machinery? Thus in a simplistic unitary model of a legal system, it is much easier to judge whether it is of a quality to deserve the citizen’s obedience under a duty of fair play, but when the unity system is replaced by a pluralistic, and to some extent hierarchial, system, with several levels of government, of varying degrees of justness, the problem of duty of obedience becomes much more complicated. Of course the crucial factor in determining the possibility—from both a theoretical and practical standpoint—of maintaining such a schizophrenic allegiance is whether the federal and state (and perhaps local) levels of government make up an integral and essentially inseparable legal system, or whether these levels comprise two (or three) systems which are at least to a large degree separate. If the latter alternative is correct, then by Rawls’ standard the civil rights advocates can defy the unjust laws of an unjust state, while maintaining allegiance to the rest of the American legal system; if the former presents the more realistic picture, then selection of a certain aspect of the legal system for defiance is not compatible with allegiance to the rest of the system.

The second ambiguity concerns the phrase “if one has accepted the benefits of its working and intends to continue doing so.” Apparently Rawls is saying that this acceptance of the benefits of a legal system does not in itself create an obligation to obey laws that one believes are unjust, for such obligation exists only when there is this acceptance and the constitution is just. Assuming one accepts the benefits of the legal system—as the civil rights advocates apparently have—but reserves the right to disobey laws he believes to be unjust because the constitution is not just, the question then is whether such a person ought to expect others within the system to obey laws they believe unjust. In other terms, can the civil rights advocates disobey segregation laws which they believe to be unjust, while expecting the segregationists to obey desegregation orders which they believe to be unjust? If Rawls based his duty of obedience strictly on the principle of fair play, the answer would seem to be “no,” and under the condition of an unjust constitution, all a person would

96. This question is not necessarily a reductio ad absurum because a local entrenched political machine may be nearly impossible to eradicate, and thus a certain class, may feel that, to use Rawls words, “a permanent majority, or majority coalition, has deliberately set out to undercut its basis” at least on local matters, and unless the discriminatory practices are gross enough to be unconstitutional, there may be “no chance of successful constitutional resistance.” Id. at 15.

97. See text accompanying note 95 supra.
have a right to expect is that others will obey only laws which they do not consider unjust.

However, Rawls implies that there are other standards of right and wrong which transcend an obligation of obedience based on the reciprocal duty of fair play, for in the same paragraph quoted above, he says “if the rule enacted is within certain limits.” Likewise at other places he talks of certain crimes which involve “wrongs as such” and of “the depth of the injustice of the law enacted.” All of this suggests that Rawls is ultimately relying on certain fundamental principles of justice to which a law must conform in order to deserve a citizen’s obedience, and if one looks to these moral principles—the nature of which Rawls does not clearly spell out—to decide if he has a duty to obey a law, then one could say he has a right to disobey laws he considers unjust while expecting others to obey laws they consider unjust. In other words, the civil rights advocates could maintain, with at least no violence to consistency, that they have no duty to obey segregation laws because these laws violate certain fundamental principles, but that segregationists do have a duty to obey orders they consider unjust, because by the standard accepted by the civil rights proponents, such orders are in reality not unjust. Of course, all of this is assuming that the citizen does not believe that the constitution is just, for if it is accepted as just, then Rawls’ principle of fair play compels both to obey all laws (“within certain limits”), aside from any question of fundamental principles of justice.

This willingness by Rawls to look ultimately to transcendental standards leads back to a question touched on earlier—does Martin Luther King limit the right to disobey laws to only those laws inflicted on a disenfranchised minority, that is, laws made under an unjust constitution? While he is not altogether clear on this point, the answer is apparently “no” because he speaks of the substantive requirement of a law that it “squares with the moral law or the law of God.” The implication is that regardless of the justness of the legal system, if a law is unjust, a citizen has a right to disobey it. At this point according to Rawls such disobedience would be wrong because of the duty of fair play. However, as suggested earlier, Rawls is willing to abandon this principle if the law is not “within certain limits” and a person “simply

98. See, Rawls, supra note 88, at 4.
99. Id. at 15.
100. Rawls does talk of the “principles of a just constitution,” which are, first, “that everyone have an equal right to the most extensive liberty compatible with a like liberty for all,” and secondly, that “inequalities are arbitrary unless it is reasonable to expect that they will work out for everyone’s advantages and . . . the . . . offices to which they attach . . . are open to all.” Id. at 11.
101. See text accompanying note 19 supra.
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CIVIL DISOBEDIENCE has to balance his obligation to oppose an unjust statute against his obligation to abide by a just constitution. Therefore, if the injustice is believed to be very great, then one can disobey the law, and still, apparently, expect others to tolerate what they consider unjustness for the sake of the just constitution, until they also are faced with a great injustice.

As noted in the discussion of Waldman's position, there is at least implied in Martin Luther King's doctrine a restriction of the right of disobedience to laws which are believed to be extremely unjust, and thus, if he does so restrict this right, then there seems to be agreement between King and Rawls as to the right of disobedience even under a just constitution.

Sidney Hook, in Chapter Three of The Paradoxes of Freedom, favors civil disobedience in a democratic society under limited circumstances, and if the protestor is willing to accept openly the punishment for the violation.

Hook says that a democratic society is an attempt to "escape the dilemma between the acceptance of tyranny, on the one hand, and anarchy, on the other." In a democracy major policies of government depend upon the consent of the governed. Tyranny is avoided because one who disagrees with a law is free to try to convince the majority of its unjustness, and anarchy is avoided because once the vote is taken, the majority's decision is accepted and the enacted law is obeyed by all, until it is repealed by the same process.

It is the faith of the democrat that all legitimate aims can eventually be reconciled or achieved through this process, and thus "there is a presumption of validity in any law passed by democratic process, in the sense that it commands a prima facie justified obedience."

However, this faith can be strained in two ways. One way in which it can be strained is by procedural violation, which means that the democratic processes are so distorted that doubt arises as to whether the processes still retain their democratic character.

Hook says that if such a point is reached, the citizen is as free to oppose the law as he is to oppose an unjust law of any tyrannical government. As to the right to resist the laws of a dictatorship, Hook states that it is "axiomatic" that any person who truly believes in self-government cannot oppose, in prin-

102. See, Rawls, supra note 88, at 7.
103. See text accompanying note 82 supra.
105. Id. at 112.
106. Id. at 112-13.
107. Id. at 113.
108. Id. at 114.
109. Id. at 118.
principle, revolutionary resistance to such government, although for practical reasons he may forego such resistance. Therefore, if civil rights advocates are limiting civil disobedience to laws "inflicted on a minority that . . . had no part in enacting or devising the law," then Hook would agree that at least in principle they have the right to disobey these laws because they are acts of despotism, and not of the democratic process. However, Hook implies (but he is not altogether clear) that this rejection must be based on a failure of the entire legal system, and not merely on a few isolated instances of undemocratic action. He states: "But so long as one still regards the community, despite its procedural lapses, as still functioning under a democratic political system, revolutionary opposition to it cannot be justified on democratic grounds."

Thus, apparently as long as the civil rights leaders accept the legal system as essentially democratic, they are not free to disobey, under the same justification that tyranny may be resisted, particular laws which have not met the procedural requirements of a democracy.

However, as mentioned previously, King does not limit the right of disobedience to laws which fail to meet the procedural standards of the democratic process, and extends it to laws which are substantively unjust, regardless of the mode of their enactment. This point is similar to the second way in which Hook says the faith of a democrat can be strained, that is, by "extremely unwise or oppressive substantive action"—enactments which are so morally iniquitous that regardless of observance of procedural forms some citizens may feel compelled to disobey them.

Hook states that one possible justification for disobedience of these procedurally correct, but substantively immoral laws, is to reject the democratic ideal of self-government, and frankly admit you are appealing to a higher law or principle which you value more than the democratic ideal. However, asks Hook, how can a democrat, i.e., one who remains faithful to the principle of the democratic compromise, ever defend disobedience of constitutionally enacted laws? He answers that he can defend such disobedience "only if he willingly accepts the punishment entailed by his defiance of the law, only if he does not seek to escape or

110. Id. at 109-10.
111. See text accompanying note 19 supra.
112. See, Rawls, supra note 88, at 118-19.
113. For the possibility of having an undemocratic subdivision within a larger, generally democratic, legal system, and the possible complicated problems it may create in relation to the duty of obedience, see text between notes 95-97 supra.
114. See text accompanying note 101 supra.
116. Id. at 113-14.
117. Id. at 117-18.
subvert or physically resist it.” This willingness to accept the punishment is a necessary condition to such justification because it can serve as a “moral challenge and educational reinfluence on the attitudes of the majority,” and can arouse in the majority second thoughts as to the law’s justness and wisdom. This language is of course very similar to that used by Martin Luther King, and in fact, Hook cites the civil rights sit-in and sit-down strikes as an example of such proper civil disobedience within a democratic community.

However, Hook does caution that “civil disobedience is at best a danger to a democracy,” and from the standpoint of the democratic ideal can only be justified so long as it does not begin to rend apart the social fabric, or endanger the democratic process itself. In other words, all civil disobedients in a democratic society, including civil rights advocates, must constantly be alert to this danger, and be prepared to cease the disobedience when this danger becomes imminent.

Morris Keeton, in an article entitled The Morality of Civil Disobedience, takes the position that civil disobedience under the proper conditions is not merely a danger to be tolerated as the lesser of evils, but can be a positive force for good. “We should enlarge the role of civil disobedience and enhance its effectiveness for constructive change.”

Keeton defines civil disobedience as “an act of deliberate and open violation of law with the intent, within the framework of the prevailing form of government, to protest a wrong or to accomplish some betterment in the society.” He distinguishes civil disobedience from evasion of the law where the violator attempts to conceal his violation; from civil rebellion whose purpose is overthrow of the government by non-constitutional means; from permitted exceptions to a law, such as conscientious objection to military service; from pranks which violate the law, but which do not have the moral intent which is part of civil disobedience, and finally, from acts which inadvertently violate a law because of the actor’s ignorance.

Keeton believes that contemporary civil rights protests fit within his definition of civil disobedience, and a review of the characteristics of

118. Id. at 117. (Emphasis Hook’s.)
119. Id. at 119.
120. Id. at 124.
121. Id. at 124.
122. Id. at 120, 124-25.
123. 43 TEXAS L. REV. 507 (1965).
124. Id. at 507.
125. Id. at 508.
126. Id. at 508-11.
127. Id. at 510, 516-21.
this movement, as discussed earlier,\textsuperscript{128} indicates that this is a correct conclusion. Martin Luther King states that the violation must be open,\textsuperscript{129} and as pointed out, the Movement seeks the improvement, not overthrow, of the present legal system.\textsuperscript{130}

After thus defining civil disobedience, Keeton says that civil disobedience is right and good only if certain conditions exist, and he proceeds to give guidelines, in the form of questions, to determine if such conditions are present.\textsuperscript{131}

The first guideline asks if the protestors are willing to allow their opponents to use the same tactics to promote their own cause. Looking at one's own actions as if performed by an opponent will give the would-be civil disobedient a more objective view of its probable consequences.\textsuperscript{132} Martin Luther King does not say directly that he would allow the segregationists to use the same tactics to oppose civil rights laws, but he does contrast breaking a law “openly, lovingly, and with a willingness to accept the penalty” with the segregationist’s “evading or defying the law.”\textsuperscript{133} However, the difficulty with this test is that if a civil disobedient takes the position that there are certain absolute values which should not be violated—as King's language about a law "squar[ing] with the moral law or law of God" implies—and not the relativistic position that all beliefs have equal right to actualization, then the test is inappropriate. This is true because such civil disobedient is saying that if, and only if, laws violate these basic values may they be disobeyed. This need for the civil disobedience to be directed against an evil law is a fundamental condition to its rightness, and thus one cannot test its rightness by asking if a person may also use it as a tactic to promote an evil (as viewed by the civil disobedient who is testing his own actions). It is analogous to saying that in determining whether a certain degree of violence is justifiable in physical self-defense, one must ask: "Would I permit another person to employ such measures in an aggressive attack?" In other words, this test ignores the possibility that a civil disobedient may believe that the moral rightness of his cause is the only reason such action is justified, and if he must ask himself whether his opponent (who by his definition is morally wrong) should be allowed to employ the same tactic, his answer will inevitably be "no." If the test simply means that one

\begin{itemize}
\item \textsuperscript{128} See text accompanying notes 5-20 supra.
\item \textsuperscript{129} See text accompanying notes 19, 20 supra. Keeton cites the same statement by King, supra, note 123, at 517.
\item \textsuperscript{130} See text accompanying note 9 supra.
\item \textsuperscript{131} See Keeton, supra note 123, at 513-14.
\item \textsuperscript{132} Id. at 514-15.
\item \textsuperscript{133} See text accompanying note 19 supra.
\item \textsuperscript{134} Ibid.
\end{itemize}
should attempt to be objective about the consequences of his action, then it
seems that it should be put in terms of whether another person in a simi-
lar moral position, but on a different issue, should be allowed to so act.
To put it in terms of an opponent’s right to do so, results in a test which
does not consider one of the relevant circumstances, that is, the violation
of a moral right.

The second guideline question asks if the civil disobedients have no-
tified the authorities of their intended disobedience, to assure the open-
ness of their violation, and to allow the police to maintain order. How-
ever, this duty to inform the authorities exists only so long as the police
do not attempt to use this notice to frustrate the intended acts of dis-
obedience.135 Contemporary civil disobedients have generally met this
criteria, for most of their demonstrations have been announced in ad-
ance,136 and King unequivocally advocates open violation.

Thirdly, is the violation aimed at a specific grievance which is clearly
identified by the protestors and communicated to the rest of society? This
pinpointing of the protested wrong is important both for the deci-
sion to protest, and for the effectiveness of the protest in arousing the
sentiment of others in favor of the protestor’s position.137 While this
standard seems to be met when the law protested against is “unjust in
itself,” this conclusion is much more doubtful when the disobeyed law is
not considered unjust in itself, but is disobeyed to convey dissatisfaction
with other more general conditions.138 As Martin Luther King says,
even where the injustice of a particular law is hard to see, it is often
necessary to disobey it “to call attention to overall injustice.”139

However, Keeton further states that this need for clarity of goals
and communication is not an absolute, for “[S]ometimes the victims of
injustice are not able to articulate the grievance that is nevertheless great
and real.”140 Thus even disobedience of otherwise just laws by civil
rights advocates to draw attention to general injustices meet with Kee-
ton’s approval, under certain unspecified situations. However, this po-
sition raises several questions which Keeton does not discuss. The first
is, if the purpose of civil disobedience is correction of injustice, and if
those who are protesting the injustice (and thus should be more keenly
aware of its existence) cannot articulate the injustice, how can the rest
of the population be expected to recognize the condition causing the in-

135. See note 123 supra, at 515.
136. See King, op. cit. supra note 1, passim.
137. See Keeton, supra note 123, at 515.
138. For this dichotomy, see text accompanying notes 15-20 supra.
139. See text accompanying note 20 supra.
140. See Keeton, supra note 123, at 515.
justice in order to correct it? Secondly, since the purpose of civil disobedience is to "work within the framework of the legal system to rectify specific wrongs," does not a general protest, which does not clearly distinguish the "unjust laws" from the rest of the legal system, amount to a condemnation, at least by implication, of the whole legal system? In other words, if the general legal system is accepted as good, then a protest aimed at a specific unjust law is saying in effect that this particular law is not typical—it is an anomaly in the legal system—and thus the protest's negative effect on the rest of the legal system is reduced by the sharp separation; whereas if this distinction is not constantly and sharply maintained, then are not the good laws brought into disrepute along with the bad? The third question is, if civil disobedience is based on "felt" injustices, and not on specific and defined grievances, does this not make much more difficult the restriction of the disobedience to narrow bounds, than if it is centered on a specific wrong? For example, if a certain religious minority disagrees with a law, e.g., compulsory school attendance, then to refuse to obey this law is a relatively restricted act whose limits are fairly easily determined, that is, the refusal to send the children to school. But if the minority just feels in general "persecuted," then the limits of action are not obvious, and almost anything and everything which causes a disturbance can be fair game as a means of drawing attention to the fact that the minority is dissatisfied.

The fourth guideline asks if the means of protest are "relevant to, and among the more effective ways of securing, the specific end being sought?" This is a factual question which must be asked of each act of disobedience; to use Keeton's example, does a sit-in at a chain store in New York have any effect on discrimination practiced by the same chain in New Orleans? It may or may not, depending on the relationship among the individual units in the chain.

Fifth, can the civil disobedients prevent violence on their own part, and are they taking care to keep violence by their opponents to a minimum? Keeton cites the civil rights groups, specifically SNCC, SCLC, and CORE, as examples of protestors who make every effort to fulfill this criterion. At the same time he condemns recent riots in the North as violating this rule and the rule requiring centering on a specific wrong, and of course such riots are likewise strongly condemned by

141. Id. at 509.
142. Id. at 516.
143. Id. at 516.
144. Id. at 516.
145. Id. at 516.
146. Id. at 517.
the above cited “middle group” of civil rights organizations.\textsuperscript{147}

The sixth guideline asks if the disobedients are sincerely protesting for the reasons given for the protest, or is the protest really to gain some other, unstated, objective? Keeton suggests that the willingness to suffer the legal consequences of the violation is a minimum test of this sincerity.\textsuperscript{148}

The next test inquires if other less hazardous means to remove the wrong have been employed without success.\textsuperscript{149} This is very close to the important question discussed earlier,\textsuperscript{150} that is, whether or not a legal means for redress exists, and as stated then, this is a central point of disagreement. Keeton maintains that civil disobedience need not always be a last resort,\textsuperscript{151} and thus he seems to agree with the position of those civil rights advocates who concede that legal redress is possible, but contend that such correction will be too slow.\textsuperscript{152}

The final test asks if the civil disobedients have used reasonable care to foresee and to evaluate the consequences of their action.\textsuperscript{153} Keeton emphasizes that this is not the same standard as that of the philosophers who look upon civil disobedience as a measure to be employed only to correct grave injustices. He says that this is a different test: “not the magnitude of the benefit sought, but the net worth of the anticipated benefit over its probable costs.”\textsuperscript{154} Thus in a society that distinguishes civil disobedience from other kinds of violations, “it may be morally permissible to incur a small penalty deliberately in order to meet a minor emergency or to correct a minor grievance.”\textsuperscript{155} Of course under this permissive standard the actions of contemporary civil disobedients are more apt to be approved than under the “grave wrongs” test. However, Keeton does not discuss an important possible implication of his “net worth” test, and that is, he does not give due consideration to the possibility that adherence to law is a positive value in itself, aside from the utility to be gained from each act of obedience. While the “grave wrongs” test at least suggests that obedience to law is the normal, expected conduct, the “net worth” test implies that the existence of law is only one of many factors to be weighed in determining how one is to

\textsuperscript{147} For this classification of civil rights organizations, see text accompanying notes 5-8 supra.
\textsuperscript{148} See Keeton, supra note 123, at 517-18.
\textsuperscript{149} Id. at 518-19.
\textsuperscript{150} See text accompanying notes 13-15 supra.
\textsuperscript{151} See Keeton, supra note 123, at 518.
\textsuperscript{152} See text accompanying note 15 supra.
\textsuperscript{153} See, Keaton, supra note 123, at 519-22.
\textsuperscript{154} Id. at 521.
\textsuperscript{155} Id. at 521.
conduct himself externally, and thus law is not given a position of pri-
macy as a behavior determinant. Perhaps this implication need not re-
sult from his test, or perhaps Keeton would maintain that indeed law
should not be given a position of primacy, but in any case the possibility
should have been more fully considered.

Central Points of Disagreement.

Much of the disagreement among the seven writers seems to center
around two issues which are formulated in various ways in their writ-
ings. One issue involves the "rightness" of civil disobedience, in the
sense of whether a citizen "owes" obedience to society as a price he must
pay for the benefits he receives from it. Plato has Socrates raise this
question when he quotes the laws as asking "Was that our agreement?
Or was it that you would submit to whatever judgments the state should
pronounce?" \[156\] Rawls calls it the "duty of fair play"; \[157\] it is Locke's
"social contract," \[158\] and Hook's "democratic process" whereby everyone
is free to agitate for his position, but once the vote is taken all must sub-
mit to the decision. \[159\] It is basically the principle of exchange, or quid
pro quo; in terms applicable to any government, it is obedience given in
exchange for benefits accepted; in democratic terminology, it is the
agreement to submit to every majority decision even when a particular
decision is disapproved, in exchange for like submission by others even
when they disagree with a decision. Putting this concept in terms of the
question of contemporary civil disobedience, those writers who tend to
disapprove of civil disobedience would stress the logic of the position that
civil rights proponents cannot expect their opponents to submit to civil
rights laws which the latter consider unjust, if the civil rights proponents
themselves refuse to obey the law when the decision goes against them.
On the other hand, those favoring civil disobedience would emphasize
that in accepting punishment for the disobedience, the disobedients make
a sacrifice, admittedly of a different sort, in exchange for the expected
obedience of the rest of the society, and thus do not get a "free ride" in
society. Of course this does not obviate the point that others in society
submit to law in expectation of receiving like obedience from the protes-
tors, and not in exchange for the protestors' willingness to accept pun-
ishment for disobedience.

At least one of the philosophers, Thomas Aquinas, avoids the logi-
cal inconsistency by positing an objective natural law which gives to all

\[156\] See text accompanying note 24 supra.
\[157\] See text accompanying notes 90-91 supra.
\[158\] See text accompanying notes 56-61 supra.
\[159\] See text accompanying notes 105-07 supra.
persons a common standard to determine if a law is just.\textsuperscript{160} The existence of this standard means there are “right” and “wrong” ideas of what is just, and if a person “correctly” believes that a law is unjust, he does not have the same duty to obey that law as has another person to obey a law which the latter “incorrectly” views as unjust. Thus, if one maintains that this objective standard exists, the agreement among men may be to submit to only laws that are not unjust, and at least theoretically, all men can perceive which laws are unjust. This same concept of objectivity of moral standards is implied in Rawls’ position when he abandons “the duty of fair play” as controlling once one gets beyond “certain limits,”\textsuperscript{161} which suggests that these limits are ascertainable by all.

The second issue focuses on the consequences of disobedience, and asks, even assuming disobedience is “justified” in this instance, if such disobedience will cause all law to fall into disrepute, and thus promote disorder which is more onerous than the original grievance. Aquinas speaks of yielding the right to “avoid scandal or disturbance” or “inflicting a more grievous hurt,”\textsuperscript{162} and Waldman fears “you cannot build a fence around this kind of program.”\textsuperscript{163} Unlike the first issue, this question is to a large extent a “factual” one of whether disobedience of some laws, under certain circumstances, will create disrespect for all law. As in the first issue, emphasis differs according to the writer’s attitude toward civil disobedience (or perhaps the attitude differs according to the emphasis)—those unfavorable tend to concentrate on the fact that there are a great many different ideas of what is just, and thus most laws could be disobeyed by some segment of the population; those approving disobedience stress the conditions which they would place on disobedience, such as willingness to accept punishment and the limitation of disobedience to deeply felt injustices.

Obviously these two central issues are closely related to each other, and are not completely separable. The duty owed by a citizen to his fellow citizens may not simply be that of permitting the fulfillment of the purpose of each particular law, but may also include the obligation to promote respect for the legal system by obeying all law. Conversely, the society’s view of the “right” of a citizen to disobey a law he believes to be unjust, may affect the chance that such disobedience will create general disrespect for law.

\textsuperscript{160} See text accompanying notes 34-37 supra.
\textsuperscript{161} See text accompanying notes 95, 98-99 supra.
\textsuperscript{162} See text accompanying note 48 supra.
\textsuperscript{163} See text accompanying note 77 supra.