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There is a sense in which the question of obedience to law is a problem solely for the natural lawyer. The positivist is concerned by hypothesis with the validity and legality of law, not with its efficacy or justice. Validity and legality are purely formal concepts: law is valid, it is "legal," if it is enacted or adjudicated into being in the proper form. Efficacy and justice on the other hand, are concerned with the content of the legal rule: a law is efficacious when it is actually being obeyed by the people whose conduct it aims to govern, and it is just when it should be obeyed by them. The natural lawyer is interested in efficacy and justice as well as in validity and legality, and so it would appear that only for him is conformity to law a problem *qua* jurisprudent or even *qua* jurist.[1] For him the ultimate theoretical question in jurisprudence "what is law?" has as a counterpart at the other end of the scale an ultimate practical question (and one by no means unrelated to the first theoretical question) "should this particular law be obeyed?"

Yet it would seem that to the more sophisticated positivist today, fidelity to law has also become a jurisprudential issue. Professor H. L. A. Hart has recently made the point[2] that

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[1] The natural lawyer is more interested in justice than in efficacy, but in order to know whether a law, even a morally good one, can be borne by a particular people at a particular time, he must also know whether it is or will be efficacious. For example, moralists appear to be reaching the conclusion that a law forbidding professional boxing would be good, but it is highly doubtful whether it would yet be supported by popular feeling.

Interest in the efficacy of law is, of course, considered more characteristic of the sociological jurisprudent than of the natural lawyer. For purposes of this discussion I have assimilated the sociologist's position to that of the naturalist, as both, in contrast to the positivist, have justicistic philosophies.

There is a sharp attack on the empty formalism of the strict positivist view on the ground that it is incompatible with the rule of law in democratic society in D'Entrèves, *Legalita e Legittimita*, Studi in Onore de Emilio Grosa (1960).

[2] Hart, *Positivism and the Separation of Law and Morals*, 71 Harv. L. Rev. 593, 620-21 (1958).

positivism has a moral as well as an intellectual contribution to make to jurisprudence: one of the most beneficial results of keeping the spheres of law and morals entirely separate is that moral criticism of law is kept clear, simple, and powerful. Hart presents his view as a mere restatement of Bentham and Austin, but in truth it is a wholesome innovation within positivism. Whether or not Professor Fuller is being overly optimistic in believing that Professor Hart's contribution to jurisprudential dialogue eliminates once and for all "the pretense of the ethical neutrality of positivism,"[3] at least it establishes a precedent for the consideration by positivists too of problems of civil disobedience. Thus recent events in Birmingham, Alabama, and Cambridge, Maryland, where the minority demonstrated in protest against inadequate legal guarantees of equality, and in Oxford, Mississippi, and Tuscaloosa, Alabama, where the majority resisted the extension of equality, are common jurisprudential ground for positivist and naturalist alike, though the orientation of the reflections may well be different. My own observations will be made within a natural law framework, but will, I hope, also appear relevant to those in other jurisprudential traditions.

The popular attitude towards civil disobedience is somewhat ambivalent. On the one hand, popular feeling exalts peace and order in society almost to the status of an absolute and views with strong disapproval any form of disobedience to lawful authority. For historical illustrations of this attitude the events of the last year or two will serve as well as any. The violent resistance of the students at the University of Mississippi to the court-ordered admission of a Negro student to their institution was regarded most unsympathetically by the vast majority of Canadians and Americans. The popular feeling was accurately expressed by President Kennedy when in his address to the people of the United States on September 30, 1962, he stated in the following words the citizen's duty of obedience to the law of the land: "Americans are free . . . to disagree with the law—but not to disobey it."[4] Similarly in the 1962 Saskatchewan medicare dispute between the government and the medical profession many who were sympathetic to the physicians' viewpoint nevertheless

[3] Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 Harv. L. Rev. 630, 672 (1958).

[4] New York Times, Oct. 1, 1962, p. 22, col. 6.

strongly opposed their withdrawal of services as an attempt to nullify an enactment of the legislature. This point of view was expressed by the *Toronto Globe and Mail,* when it wrote a propos of medicare disputes in general, words which echo President Kennedy's: "Canadians have the right to disagree with a law, but once a law has been duly passed by a duly elected government, they do not have the right to disobey that law."[5] On the one hand, then, there is the unequivocal view that citizens do not have the right to disobey the law, however unjust they may consider it.

But this is not the whole story. There is a long tradition of support in the Western world for resistance and even revolution to unjust laws or unjust rulers. For instance, do we not all applaud the very nearly successful attempt of the German conspirators to assassinate Adolph Hitler on July 20, 1944? Moreover, aside from those few who believe with Rebecca West that all revolutions are vicious, is there not now general approbation of the American Revolution, even among the British? Indeed, there is Biblical support for revolution in the revolts of the Hebrews under the Machabees against their foreign oppressors.

Disobedience of civil authority has been throughout human history both fact and theory. As fact, disobedience has ranged from the more to the less violent, according to the nature of the person or law resisted and the temper of the men who formed the resistance; among the forms of civil disobedience has taken have been revolution, regicide, "underground" resistance, riots, strikes, picketing, refusal to obey superior orders, boycotts of commodities, hunger strikes, freedom rides, marches, sit-ins, protest meetings, and simple non-compliance. As theory, disobedience has been the subject of consideration by philosophers not so much from the viewpoint of whether it is legitimate at all, and if so, when; a few philosophers like Hobbes have taught that resistance to political authority is unjustifiable in all circumstances, but for the most part philosophers have developed theories of resistance, and have attempted to say when it is justifiable and when it is not.[6]

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[5] Toronto Globe and Mail, Oct. 30, 1962, p. 6, col. 6.

[6] Hobbes allows the exercise of the right of self-defense by an individual against the sovereign, but maintains that no one else may assist him. Hobbes, Leviathan 147-157 (Waller ed. 1904).

Neither American, nor Western, nor world history or political theory will allow us, then, to interpret in an absolutistic way President Kennedy's words that a citizen is free "to disagree with the law—but not to disobey it." There are too many precedents on the other side for us to be consistent in denying all civil disobedience. What we might perhaps like to say, I suppose, is that laws which *we* think are good ought to be obeyed, and those which *we* think are unjust ought not to be obeyed, but it requires little sophistication to see that we cannot devise a neutral rationalization assigning to ourselves such powers of judgment without at the same time granting them to our fellow citizens, whose views as to justice and injustice may not be the same as ours. The white Southerner, for instance, resists desegregation according to law, not merely because he is firmly attached to the status quo of white supremacy, but because he honestly believes in white supremacy *on moral grounds,* however mistaken they may be objectively. We must recognize that, in attempting to force desegregation on the Southern minority, the American majority is attempting to substitute its morality for the minority morality. This is not to say that it should not be done, but it would be naive to expect to do it without encountering resistance.

In the ancient world the tyrant was a well-known figure both in fact and in theory. Though neither Plato nor Aristotle could be said to have had a complete theory of resistance to tyrants, both recognized the necessity of disobedience when those in power were ruling for their own good and not for the common good, and Plato's master, Socrates, chose death in preference to submission to commands which violated his sense of justice.[7]

But it was not until the later Middle Ages that the problem of resistance became a definite part of political theory. Even then there were a few voices raised on the side of patient submission to tyranny, most notably that of John Wyclif, but by far the greater number of thinkers advocated more active resistance. John of Salisbury in the twelfth century advocated the overthrow of tyrants, including death if necessary, though he

[7] Perhaps it would be more accurate to say that both Plato and Aristotle recognized the fact, rather than the theory, of resistance to tyrants. Plato, Republic VIII, 565-569; Plato, Politics V, 10.

qualified this by warning that poison was not a permissable weapon even against tyrants and that no one who was under an oath to a tyrant might kill him. Others soon dropped the qualifications and by 1407 Jean Petit was maintaining it to be a meritorious act for any subject to kill a tyrant or to cause him to be killed.[8]

By far the most important medieval treatment of civil disobedience was that of St. Thomas Aquinas. St. Thomas' fullest consideration of the issue is in an early work, his *Commentary on the Sentences of Peter Lombard,* in the context of a discussion of the obedience owed by Christians to the secular power.[9] His primary principle is that political authority is derived from God and therefore binding in conscience on Christians. There are, however, some cases in which authority is defective in title or exercise and therefore not derived from God, and in such cases there is no obligation of obedience. (The defect of personal unworthiness for his office in the ruler is not a sufficient ground for disobedience, since the duty of disobedience does not rest on the worthiness of the superior.) The first of the two situations in which the right to disobey arises is where the ruler has seized power illegally, though where his title is subsequently legitimated by the consent of the people or by the intervention of a higher authority the duty of obedience resumes.

The second situation in which the subject is freed from his duty of obedience is where the ruler abuses his authority. Where the abuse of authority is of such a character that, though the ruler is exceeding his legal power, he is not commanding the subject to the performance of something evil in itself, or forbidding him to perform something good in itself, then the subject is free either to obey or disobey; but where the abuse is of such a character that the ruler is commanding a sinful act, "in such a case not only is there no obligation to obey the authority, but one is obliged to disobey it, as did the holy martyre, who suffered death rather than obey the impious commands of tyrants."

In summary, then, for Aquinas a subject is not bound to obey a ruler who has either usurped power or who, though legitimate,

[8] On these and other medieval theories see Jaszi and Lewis, Against the Tyrant 17-34 (1957).

[9] Aquinas, Scriptum Super Sententiis, II, dist. 44, quest. 2, art. 2 (1932).

is ruling unjustly—though in a later text he adds the qualification, "unless perhaps to avoid scandal or greater evil"—and when a ruler contravenes the very purpose of his authority by ordering a sinful action, the subject is under an obligation not to obey.

This is without question a theory of disobedience, but it is far from clear that it is a theory of active resistance. St. Thomas does allow active resistance and even tyranicide where a ruler has possessed himself of power through violence and there is no possibility of appeal to a higher authority who could pass judgment on the case, but his reference to the early Christian martyrs would suggest that he does not mean to endorse anything more than passive resistance in situations of abuse of authority. This, indeed, is how he is read by his quasi-official commentator, Cardinal Cajetan, who says that a tyrant who has usurped power may rightly be killed by a private person, but that a tyrant who has gained power legitimately may not be killed, no matter how iniquitous his rule.[10] This would tie in, too, with the view expressed in that work of somewhat doubtful Thomistic authenticity, the *De Regno,* that private persons should not on their own private presumption attempt to kill rulers who are tyrants, but that it is quite legitimate for a people which has the right of providing itself with a ruler to depose (and presumably slay, if he fights back) a tyrant, for this is not done by the private prsumption of a few but rather by public authority.[11]

Tyrannicide, and resistance generally, was largely a speculative problem in the Middle Ages, but with the Renaissance and the wars of religion it became a practical political issue as well. The immediate effect of the Protestant Revolution was to strengthen the hand of those on the side of authority, for both Luther and Calvin stressed the duty of obedience to rulers.[12] For Calvin active resistance was never permissible; even a wicked ruler might not be resisted—though a subject must never perform sinful acts at the ruler's bidding, his only right is to endure punishment passively. Calvin's follower, John Knox, was, however, of a different mind, and was not hesitant in telling Mary Queen of Scots that princes—and princesses—who exceed

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[10] Cajetan, Commentarium in Summa Theologiae, II-II, quest. 64, art. 3 (1897).

[11] Aquinas, On Kingship ch. 6 (1949).

[12] On Luther and Calvin see Jaszi and Lewis, *op. cit. supra* note 8, at 44-48.

their bounds might be resisted with force by their subjects; and in France it was not long before persecution of the Huguenots drove them to the position that it is lawful to resist tyrants.

Catholic theory, too, began to stress more and more the theory of active resistance to tyranny, perhaps given impetus by Catholic practice. Henry III of France, for example, was assassinated by a Dominican friar who, himself killed on the spot, was proclaimed as a martyr by his Order and by many other Catholics. The theoretical foundations of the practice were supplied by a Spanish Jesuit, Mariana, who wrote about the year 1600.

Mariana's Jesuit contemporary, Suarez, held largely to the position of St. Thomas, distinguishing between the tyrant who is a usurper and the tyrant who is a legitimate ruler but who abuses his power. Force may be used against a usurper, he holds, but against a legitimate tyrant only passive resistance is available as a weapon. Further, he cautions that even in the case of a usurper submission is better than revolt, unless the tyrant's oppression becomes intolerable.[13]

Mariana did not, however, write with Suarezian caution and he defended in no uncertain terms the Dominican assassin of Henry III, who was clearly a legitimate ruler and not a usurper. Mariana openly endorsed the right of a private individual to slay a legitimate king turned tyrant, though he does append the qualification that he may not do so until the tyrant has first been warned by the assembly of the people that he is in danger of deposition and has failed to heed the warning. However, if the tyrant prevents the convening of a public assembly, public judgment is rendered impossible, and an assassin may then proceed on the basis of his own judgment enlightened by the counsel of "learned and grave men." The Dominican assassin had fulfilled this latter condition because before performing the deed he had consulted the theologians of his Order.[14]

Mariana's book was burned by the authorities in France and his views increased the hostility of non-Catholics—and some Catholics—towards the Jesuits, but in the long run his ideas carried the day. The principles of Suarez and Bellarmine led

[13] Suarez, Defensio Fidei Catholicae et Apostolicae ch. 4 (1613).
[14] Mariana, De Rege et Regis Institutione I, chs. 5, 6 (1605).

logically in the same direction, particularly their opposition to the divine right of kings and their advocacy of the theory that a ruler derives his authority *immediately* from the people and *only ultimately* from God:[15] such doctrines could logically lead only to one conclusion, that in any circumstances in which a ruler turns into a tyrant, whether he was originally a legitimate ruler or not, he may be deposed by the people, even by force if necessary. This became the generally accepted view in the secular world with the theories of Locke and Jefferson and the American and French Revolutions in the eighteenth century, and more especially with the rise of liberal democracy in the nineteenth century. The Catholic fought a rearguard action against popular sovreignty (and especially popular revolutions) throughout most of the nineteenth century, but with the accession of Leo XIII to the papacy in 1878 the triumph of the democratic view and the concomitant theory of active resistance to all tyrannical rule was assured.

In developing a natural-law theory of civil disobedience we must first of all clearly understand that ordinarily law is binding in conscience and must be obeyed in full. St. Thomas Aquinas' statement of this[16] is that a law which is just obliges in conscience, and he goes on to say that it is just if it is for the common good, if it establishes burdens on a basis of proportionate equality, and if it issues from duly constituted authority. A rule which does not meet all of these requirements does not oblige in conscience, except to avoid scandal, *i.e.*, where it would encourage disrespect for law generally. There is no room in this theory for the pernicious theory of purely penal law, the theory that law does not bind in conscience and that the only moral obligation is to pay the penalty assessed if one is caught in a violation. Every law which is just is for the common good and must be obeyed. Of course, such a theory imposes grave obligations on both ruler and subject.

On the side of the legislator, there is an obligation to govern in accordance with right reason and the exigencies of the common good. The legislator's duty is to guide the people to good, to expand their moral horizons. This he cannot do directly, but

[15] Suarez, Defensio Fidei Catholicae et Apostolicae III, ch. 2 (1613).
[16] Aquinas, Summa Theologiae I-II, quest. 96, art. 4 (1949).

must concentrate on creating favourable conditions for the development of fully mature persons, who will seek good, not because they are ordered to do so, but by reason of its own attractiveness to them.

On the side of the citizen there is the corresponding duty to respond to the reasonable guidance of the legislator. The subject must be docile towards the law either because he recognizes its intrinsic reasonableness or because he accepts its utility, even when it is in itself no more reasonable than the contrary rule would have been. But more important than docility to the law is engagement with it. The full moral life requires participation by the citizen in the legal process in that he must himself ratify or approve by an act of his own judgment the judgment of the legislator as expressed in the law, so that his obedience to the law can be the result of his own reasonable will, and not merely imposed from without.

Now obviously the citizen cannot himself give prolonged consideration to every law that may affect him. In the vast majority of cases he must be able to rely on the legislator's judgment, for social life could not function successfully if every man had to verify and justify in his own mind the reasonableness of every law before he obeyed it. Yet blind submission to authority is not enough for the full moral life; some understanding of the purpose and purport of the law is necessary.

It is especially necessary that a citizen should satisfy himself as fully as possible of the justice of any law which makes special demands on him because of its relation to his profession or mode of life. The purpose of the process of ratification by the citizen is that he will thus be able to make the legislator's judgment his own, and obey the law, nay embrace the law, not because the legislator threatens him with sanctions if he does not, but because his reason demands that he act this way.

It is possible, however, that the subject's consideration of a given law will lead him to have doubts as to its reasonableness. In such a case he has the obligation to do what is necessary to resovle his doubt. First, he should engage in a study of the issue involved—and it is hardly necessary to add that the extent of the study made should be proportionate to the importance of the issue. Second, he should consult with others, especially those

learned in the problem; as Chief Justice Warren remarked recently, "none of us is so perfect as to be able to rely solely on his individual judgment in moral issues, especially those which involve his deepest emotions."[17] A Christian should obviously include among his counselors in ethics theologians and ministers of religion.

If after deliberation and consultation, the citizen is still in doubt as to the reasonableness of the law, the presumption that the law is just comes into play. The famous maximum of St. Alphonsus Ligouri, *lex in dubio praesumitur justa*[18] (when it is doubtful, the law is presumed to be just), resembles the maxim of the common law, *omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to have done rightly and regularly). The presumption contained in these maxims is what lawyers call a rebuttable presumption and not an irrebuttable one.

Even if the citizen decides that the law is unjust, he must still make a decision as to whether to obey or not. In some cases, St. Thomas suggests that the citizen *must* disobey; these are cases in which the law in question is intrinsically evil and commands that the particular citizen directly perform an evil act, or forbids the performance of some good act.[19] There is no ready-made casuistry for such cases, but it would seem clear that while in such a case a citizen must disobey the particular law, he would not thereby necessarily have leave to disobey the government in other particulars. For example, there are legal procedures in some U.S. states which provide for sterilization of the feeble-minded and the indigent. Catholics believe that such sterilization laws are immoral and they may not, of course, obey these laws in any particular. However, the vast majority of Catholics would never have any occasion to come into contact with such laws and they cannot use their disapproval of government action in this one sphere to serve as an excuse to disobey the laws generally. Not

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[17] Warren, *The Law Beyond the Law*, Washington Sunday Star, Nov. 25, 1962, p. B-2, col. 5.

[18] St. Alphonsus, Theologia Moralis I, n. 9; II, n. 617 (1773). Dr. Gordon Zahn, in his book *German Catholics and Hitler's Wars* (1962), has recently called attention to the abuse of the presumption of justice by churchmen in Nazi Germany. There is no reason in a totalitarian dictatorship for a presumption that law is just, at least not with regard to politically motivated laws. In my view there is a burden of proof on such a government to establish the justice of its enactments.

[19] Aquinas, *supra* note 16.

even the Catholics who might be professionally involved with such laws could, I think, take such an approach. Unless the immoral law were of such a kind as to give rise to a general system of injustice, the disobedience even of the group directly concerned with the injustice would have to be restricted to the area of injustice.

Beside cases in which disobedience is mandatory, there are also cases of unjust laws where the injustice is not of so serious a nature, and where according to St. Thomas disobedience of the particular unjust law is permissible but not mandatory. St. Thomas, however, points out that in cases of this kind obedience may conceivably be required for extrinsic reasons, that is, to avoid scandal or greater evil.[20] For example, the unjust law might be of a very minor nature so that obedience to it would do very little harm, whereas public flouting of it might have the effect of bringing the law generally into disrepute and lead others to take a lighter view of the law than they ought. Or even if the unjust law imposed a more serious burden on those affected by it, disobedience to it might not be possible without giving rise to large-scale civil unrest and even bloodshed, and the cost of disobedience might be thus greater than the good to be achieved.

No answer can be given on principle to such cases, for they are entirely a matter of the prudential balancing of the degree of good that would be achieved by disobedience on the one hand and the degree of evil that would be caused by the disobedience on the other. But it goes almost without saying that no one should decide on a course of civil disobedience where the repercussions are likely to be of any significance at all without serious study and without consultation with men of learning and wisdom.

It will surprise no one that in a situation where the solution depends upon individual prudential application of principle, with the principles so general as to be of only minimal assistance and with almost the whole field thus left to prudence, different men will come to different conclusions. There is an amusing story in this connection about Thoreau and Emerson. Thoreau as you know wrote a book called *On the Duty of Civil Disobedience*, a

[20] *Ibid.*

subject he took quite seriously, and in 1845 he personally seceded from the United States as the most efficacious protest he could make against a country which tolerated slavery. As part of his anti-slavery campaign he spent a night in jail by way of protest. When Emerson went to see him in jail, he said, "What are you doing in there, Henry?" Thoreau looked at him through the bars and replied: "What are you doing out there, Ralph?"[21]

So far we have considered the general attitude towards disobedience and the justification found in a particular moral philosophy for disobedience, but we have done no more than mention in passing the forms that disobedience should take. To this we must now turn our attention.

The basic distinction to be drawn in this area is between active and passive resistance. This distinction does not express the difference between doing something and doing nothing, but rather the difference between a violent response to injustice and a non-violent response. Passive resistance involves action just as much as does active resistance; campaigns of passive resistance have normally been opened by acts of commission rather than by those of omission, but they have been peaceful rather than violent acts of commission.

There are a number of forms of passive or non-violent resistance. A distinction sometimes drawn is between non-cooperation and civil disobedience. Non-cooperation is the more passive of the two, involving usually resignation of certain benefits enjoyed under the system attacked, whereas civil disobedience involves the performing of certain acts which will compel a response by dominant group, whether it take the form of arrest of the resisters or some other form.

By far the most important form of passive resistance, however, is that developed by Mahatma Gandhi in the Union of South Africa before the First World War and in India after the war. Gandhi gave the name of "Satyagraha" to this type of resistance, from the Indian words "satya," love, and "agraha," firmness of force. Satyagraha is therefore "the Force which is born of Truth and Love," to use Gandhi's own words.

Gandhi distinguished "satyagraha" from ordinary passive re-

[21] This story is related in Buchanan and Lyford, A Conversation on Revolution 18 (1962).

sistance on the basis of the motives of the resisters. Orthodox passive resistance results from the weakness of the resisters. The overriding consideration is not non-violence but expediency, and the resisters would not necessarily eschew violence if their strength were equal to or greater than the strength of the majority. In "satyagraha," however, non-violence is an expression of strength, not of weakness, for it relies on the moral superiority of the soul over the body, and in Gandhi's case at least it was accompanied by a belief that violence is sinful under all circumstances.

One authority, Leo Kuper,[22] objects to this formulation of the distinction because of the difficulty of analyzing motives and because of the dissimilarity in motives among "satyagrahis." He suggests a distinction rather in terms of the means by which change is to be effected. From this viewpoint orthodox passive resistance aims at change through embarrassment of the rulers, whereas "satyagraha" aims at change through conversion of the rulers.

Common forms of orthodox passive resistance are processions, strikes, picketing, withholding of labor, boycott of administrative positions (such as posts in segregated departments), and boycott of commodities. The choice of means depends on the kind of society involved, and the relationship between ends and means is direct and observable. Success will usually depend on the extent of mass participation, because this will extend the embarrassment of the rulers.

"Satyagraha" is a method of securing rights by the suffering of the resister, not of the persons resisted. Thus suffering is a positive value in Gandhi's theory, one which is actively sought, and so "satyagraha" sets force as well as the laws at nought. The end sought is not the embarrassment or coercion of the government, but rather the conversion of the rulers through the suffering of the resisters. Some of the means used by "satyagrahis" may be the same as those used by orthodox passive resisters, but the preferred technique is a breach of laws the violation of which does not involve moral evil in itself—the breach of more regulations, for example. There need be no direct relationship between

22 Kuper, Passive Resistance in South Africa (1956). For my discussion of passive generally I am much indebted to Mr. Kuper's analysis.

means and ends; it is sufficient if the conscience of the majority is stirred by any act of the "satyagrahis," however remote from the cause of the resistance. Hence the Ghandian fast or hunger strike.

For "satyagraha" to succeed there must be a certain amount of cooperation on both sides. On the one side the rulers must impose the punishment prescribed by law for the violation of the ordinance. Publicity is essential so that the knowledge of the fact and the purpose of the suffering is brought home to all members of the ruling majority. Thus for success the act of resistance must be public and the trial must also be public and publicized. On the side of the "satyagrahis" resistance must stop short of the complete breakdown of the social order. Moreover, the "satyagrahis" must absolutely avoid all bitterness toward the rulers, for the whole campaign must be conducted with love. In practice, aside from Gandhi's fasts, pure "satyagraha" has seldom, if ever, been realized, and even Gandhi relied to some extent on mass following and accepted the impure motives of many of his followers. Perhaps it is unreasonable to expect the total exclusion of considerations of expediency from any movement, and more profitable to observe the general tendency engendered, but it is important to stress the utmost purification of means.

Gandhi's "satyagraha" was able to succeed in South Africa and in India both because it was able to gain support at the expense of its own purity and because (and I think this is the more significant reason) his victims were the British, who, in the long run, at least, have always proved themselves a people of tender conscience. "Satyagraha" in Hitlerite Germany or in Stalinist Russia would have been worthless, and it is an open question whether the commitment of the majority in both South Africa and the southern United States today to their ideologies of white supremacy is not so strong and so blind that a more active resistance is not the eventual solution.[23]

Be that as it may, I think it is not open to dispute that the more suitable form of resistance in a democratic society such as we live in is passive resistance, and that in most circumstances

[23] In fact Negro protests in the United States in 1963 seem to be verging more and more towards active resistance.

the counsel of passive resistance assumes the dimensions of a moral imperative. The physicians in Saskatchewan did not infringe this principle, but the students at the University of Mississippi did, and agregiously. In this sense, then, we can justify President Kennedy's remark that "Americans are free . . . to disagree with the law—but not to disobey it." Interpreted to mean that there is no right of resistance to duly enacted law in democratic society, the statement appears both to contradict Western history and to violate sound moral doctrine. But interpreted to mean that in a democratic society there is a right to express disagreement with the law through various forms of passive resistance but that there is not a right to disobey the law violently, the statement appears to be a reasonable commentary on the normal conditions in a free society, where violent revolutions are not necessary in order to overthrow the existing regime, for a mere majority of ballots cast at a stated interval will peacefully obtain the same result.

A democracy should be tolerant of minorities, even to the extent of allowing them to indulge in civil disobedience as far as is compatible with the common good. Minorities, on their part, must not only display a general respect for the law, but must also be painstaking in their awareness of the importance of purity of means. The physicians in Saskatchewan would have been on much surer moral ground if, instead of withdrawing their services from the public they had utilized the nobler means of carrying on as usual but refusing to accept the government's pay checks. But at least the physicians were attempting to change a merely external thing, a statute (and one which they felt was extremely unjust), and were not primarily concerned with attempting to change an attitude or state of mind.

It is not easy to make a true judgment of situations which are still in flux. It was, of course, easy to judge even at the time that the violent mob of rebellious students in Oxford, Mississippi, was acting wrongfully, but most other situations are not so clearcut. My own feeling is that the nuclear disarmers in Great Britain, who are attempting to achieve a moral result, conversion to a belief in the necessity of disarming, through physical means (mass sitdowns in the streets, disturbances at American naval bases) suitable only for the embarrassment of the rulers and not

for their conversion, are acting beyond and against the rule of law, whereas the Negro demonstrators in Birmingham, Alabama, are acting in an acceptable manner. In the latter case the mob is essentially peaceful in intent and performance, it is aiming primarily at an external achievement—equality in accommodation, service, and employment,—and it is reacting against a long-standing grievance which has failed to respond to any other treatment.[24] At this writing the fate of the President's new civil rights legislation has not been decided, but it is obvious at least that without the events in Birmingham no such bill would have been even proposed this year.

I have not stressed in this paper the objective character of the natural-law principles and the moral precepts which judge law. For one thing there is far from total agreement, even among natural lawyers, as to their content. More important, even when there is agreement on the principles, there may quite possibly be disagreement in practice, for the ultimate determinant in this area is a prudential judgment. This is not to say that there is no objectivity, but merely to say that it does not seem profitable to emphasize it.[25]

One rule that can be laid down with certainty is that the question as to whether or not to disobey a law cannot be answered in abstraction from the question as to what forms of disobedience will be employed should resistance be resolved upon. If the concrete situation is such that only active resistance can be of any avail in righting the injustice, then clearly the preponderance of good resulting from the overthrow of the existing order would have to be overwhelming indeed in order to justify such a step in a democracy.

But if in the situation at hand passive resistance, especially in one of its lesser forms, might be efficacious in restoring the order of justice, then the decision to resist might be taken with a much lesser preponderance of resultant good. In a totalitarian

[24] A judgment of this kind is very tenuous because, of course, the Negroes in the U. S. are also hopeful of changing the attitudes of whites.

[25] There is much more objectivity in the question whether a particular law is good or bad than in the question of disobedience to a bad law. In the latter case one must establish not only that the law is bad, which may be capable of demonstration, but also that toleration of it is worse than disobedience. Even men who agree on the evil of a law may disagree as to whether they ought to oppose it, even passively.

society, of course, the decision to resist may be taken comparatively easily, but it is highly doubtful if any measures of passive resistance will prove efficacious.

In summary, then, we the people are possessed of the right to disobey an unjust law, but we must exercise our right with great restraint, particularly when it is a question of violent resistance. And in a free society the normal form of disobedience to law, where disobedience is tolerable at all, is passive resistance, and only the most extraordinary circumstances could conceivably justify the employment of violent means of resistance. Our liberty, if it is to endure for more than a passing moment, must be grounded, not on the fear of civil discord, but on the freely won tolerance of our fellows.[26]

[26] I have not been concerned in this paper with the situation of the judge who faces an unjust law, but only with the plight of the citizen. Slesser, The Art of Judgment and Other Studies 38 (1962), has recently taken the position that a judge should enforce every duly enacted law regardless of his feelings about it. The view of O'Meara, *Natural Law and Everyday Law*, 5 Natural L.F. 83, 84 (1960), is that a judge must resign when confronted with a law which he cannot square with his conscience. There is a full discussion of the moral obligations of judges in Davis, The Moral Obligations of Catholic Civil Judges (1933). See also MacGuigan, *Positive Law and the Moral Law*, 2 Current L. and Social Problems 89, 111-121 (1961).