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Moral Preemption: Part II: Claims of "Right" Under the Positive Law

By WILLIAM T. SWEIGERT

UNDER the general title "Moral Preemption" I have been asked the question: "When, if ever, does an individual have the right and/or duty in a democracy to disobey the law of the state?" Within the limitations of these few pages and my own meagre abilities, I will attempt to give and explain my answer to this question, fully realizing that such a synoptic treatment of an old and politically basic question may leave much to be desired, but hoping, nevertheless, to stimulate and, if possible, to clarify discussion of the issue.

Passing until later the word "duty" (as it is coupled with the word "right" in the question) I answer that an individual in a democracy does not have the "right" to disobey the law of the state under any circumstances.

The phrase "law of the state" connotes man-made law—the law promulgated by civil government—sometimes referred to as the positive law to distinguish it from other kinds of law, such as the "divine law" or the "natural law"—both sometimes called the "moral law" or the "law of conscience."

Before we attempt to explain why we believe that an individual has no "right" to disobey the law of the state, we should briefly consider the nature of the law of the state.

The Law of the State

Since men are born into society and must live among their fellows, each individual is exposed to interference by stronger or better advantaged persons. Likewise, the stronger or better advantaged are ever vulnerable to interference by others stronger or better advantaged than they—and so on to the strongest or best advantaged. Such interferences, whether operating directly or indirectly, would impinge upon the human survival needs of many in a society Only

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to the extent that the society, seeking to maintain some semblance of order, stands behind an individual can he be protected from the interference of other individuals by something more than his own strength or resourcefulness.

A community expresses itself for this purpose initially through custom, an early form of law, and eventually, as communities become more complex, through rules, decrees, statutes, ordinances or decisions promulgated by some agency of the state—its government. The law of the state means a body of rules promulgated by a politically organized society for the regulation of the conduct of its members upon sanction of penal or other remedial consequence for violation of the rules.

Since no individual or group, as such, has any more right to make a law than another, the right to make law necessarily resides in the whole people of a society. It is not feasible, however, for all the people to speak out at one time or with unanimity concerning the political organization of their society, from which will emanate the rules under which they must live.

Because of this inherent impracticability, government originates, not as a matter of right at all, but as a tour de force of some kind accomplished by some individual, some minority, or some majority claiming the right, and able to maintain the claim of right, to constitute the government through which law will be declared for all in the society.

Even a written constitution, although a basic law to which all subsequent laws are expected to conform, is just another man-made law which originates in this way. Our own federal republic came into being by a suffrage in which only a comparatively small minority of the American colonists were entitled to participate. Its principle of lawmaking by representatives of the people implies that the vote of the majority will prevail. The majority rule formula, however, is not a magical expression of popular unanimity. It is a practical, but, nevertheless, arbitrary expedient for reaching decisions. Thus, even in a democracy, the will of any dissenting minority remains ineffective. Nevertheless, that minority becomes bound by the law as fashioned by those who are in the majority in terms of either numbers or influence.

Theorists have advanced various grounds to explain and justify this sovereignty of the state over all within its claim, regardless of their personal consent. For the greater part of the Christian era in Europe it was generally assumed, according to the teaching of
churchmen like St. Augustine, St. Bernard, John of Salisbury and Thomas Aquinas, that since men must necessarily live under civil authority, civil authority must be deemed to derive from God; that a ruler, however he may have come to rule, rules in this sense by divine right, and that laws promulgated by the ruler must be obeyed by all so long as they manifest a concern for the common welfare of the people who are entitled by the same divine law to be ruled in their own interest.

Whether a particular emperor, king or duke actually ruled for the common welfare was left largely to the determination of the ruler himself, subject, however, to the supervision of the church. For many centuries the church was able to maintain its preemptive claim of co-governmental or super-governmental authority to command all, even civil rulers, in terms of what the higher law of God, as interpreted and declared by the church, might require in spiritual and moral matters.

This combination of divine law with man-made law proved quite useful, even beneficent, so long as the unquestioning, virtually universal faith of Christendom enabled the church to maintain and enforce its theocratic claim. Out of this historical background has come the notion, frequently expressed in the literature of jurisprudence by devotees of the divine or natural law, that the validity of man-made law depends upon its consonance with the higher law.

During the last three or four centuries, however, large segments of this medieval Christendom, and of many other societies as well, have come to question the preemptive authority of any one church to interpret and declare the divine or natural law for all in the society—so much so that philosophers of the seventeenth and eighteenth centuries—the period of the so-called Enlightenment—sought to explain the sovereignty of the state, and the binding quality of its law, upon rationalistic rather than theistic grounds. Men like Thomas Hobbes, John Locke and Jean Jacques Rousseau proposed their several versions of a so-called "social compact" or "general will" through which a theoretical "consent of the governed" was supposed to explain and define the entitlement of government to obedience of its law by all. These theories, however, soon came to be regarded by writers like David Hume and Francis Lieber as inexplicable and unrealistic.

Many theorists frankly state that the sovereignty of the state can be explained only upon one of two possible theories—the force theory or the utilitarian theory. The force theory, stressed by Machiavelli
and later by Von Treschke and others, is simply to the effect that the state, having come into existence by a tour de force, can, does and should maintain itself by the same means and that, therefore, the highest function of government is to maintain its authority by whatever means of force are essential for the purpose—a theory which, although compatible with dictatorial or class lawmaking, is repugnant to advocates of modern constitutional democracy.

The utilitarian theory, which became the basic approach of men like Jeremy Bentham, John Austin, James Mill, and John Stuart Mill, and is now the approach of most modern political scientists, simply recognizes that, although man existed before the state, he becomes a complete individual only in society; that the state exists for the purpose of bringing about the greatest good for the greatest number and that, therefore, each individual owes obedience to the law promulgated by civil authority as the only known device for the preservation of order among individuals seeking to work out their lives.

Whatever theory one may prefer, the universally evident fact is that in every society the state does manifest itself in the form of man-made law—the edicts of a single lawmaker, e.g., a conquering dictator; the decrees of some ruling group or party, e.g., the aristocracies of the past or the more recent Nazi, Fascist, Communist or Junta parties; the statutes of democratically chosen legislatures or the ordinances of provincial or town councils among which the lawmaking function may be constitutionally distributed.

The alternative to acceptance of the law of the state as a natural social necessity would be to reject the civil authority of government, absolve individuals from any political duty to obey its law, and concede to each a political right to do as he thinks fit. This alternative, although it has been idealistically advocated by the anarchistic school of William Goodwin, Pierre Proudhon and Mikhail Bakunin, would be a reversion to lawless society in which (absent an ideal social climate of mutual unselfishness, forbearance and cooperation) the strong, the self-seeking and the best advantaged would indeed pose a constant threat of disorderly coercion against others.

On the other hand, we must concede that man-made law, itself, is based upon and enforceable by the sanction of force—penal or other remedial consequences for its violation. Without such sanction it would not be law at all—merely a counsel or request.

When this force of law operates to frustrate the will of an individual to act or not to act as he wishes, that individual is obviously deprived of a certain kind of freedom which he would otherwise have
had—just as much as if the force had been exerted upon him, not through law, but at the hands of some stronger or better advantaged individual in a lawless society. The only, but nevertheless, significant difference is that the force of law proceeds, not from individuals, but from the politically organized community—its government—which, however constituted, becomes, or at least is designed to become, a monopoly of force in the community.

Deprivation of freedom by governmental coercion can, and often does, engender resentment against a particular law—sometimes against law in general. However, the *raison d'être* for law is its compensation for this restriction upon one’s tentative, often precarious freedom, by the creation of a corresponding assured “freedom under law” for all in the society.

Although this ideal has seldom been fully achieved, has often been lost sight of, and has been at times perverted, it is increasingly involved in modern political movements for changes in policy and content of man-made law—changes that would greatly restrict individualistic enterprise and property accumulation—the “economic freedom” of the market place—and broaden the function of the state with a view to assurance by law of fulfillment of the human needs of all. These movements for the transformation of society by law from individualistic to social orientation have been gathering momentum for more than a century and are now the central political trends of our day. However, we are not here concerned with legislative policy—only with the law of the state as it may exist at any given time.

**The “Right” to Disobey—Grounds of Creed or Conscience**

Having in mind this brief outline of the law of the state, we approach the question: When, if ever, does an individual, whose will to act or not to act is frustrated by a law with which he does not agree and which he does not willingly accept, have a “right” to disobey that law?

The word “right” implies an entitlement of a person to do or not to do something by virtue of a moral power (as distinguished from a mere physical power) which entitlement others have a corresponding “duty” to recognize and allow. A “right” without such a corresponding duty is meaningless. Since one person’s right implies another’s duty and since neither can unilaterally create either a right or a duty, it follows that the right of the one and the duty of the other must necessarily stem from some rule or standard extraneous to each but
applicable to and binding upon both. In other words, both the "right" and the "duty" must be referable to some law.

To what kind of law is the "right" mentioned in our subject (and any corresponding duty of the state to allow it) referable? Clearly, not to the man-made law itself. Such an argument would involve the contradiction that man-made law commands and releases at the same time.

Generally the argument is made that the right of a person to disobey the law of the state stems from a law that is not only different from, but higher than man-made law—the divine or natural law of morals or conscience. A person, it is argued, has a "right" to disobey a law of the state which he considers unjust or immoral and, therefore invalid, because of its contravention of the higher law.

This concept of a divine or natural or moral law or law of conscience assumes that man has a moral faculty—an ability to know what he and all others "ought" or "ought not" do according to some objective, universal standard of human conduct. This standard is conceived either as a divine law supernaturally revealed to mankind by the Supreme Being or as a virtually equivalent, implanted natural law of conscience—or both.

Of course, if all men agreed upon such a higher law, then the higher law, declared by the community, reflected in its own law and implemented with appropriate sanctions, would be the only law needed to provide a community with order. The fact of the matter, however, is that such divine or natural law is not so clear as to be evident to all men for all purposes. So far as it may be supernaturally revealed by the Supreme Being, it becomes knowable only for those who accept the historical authenticity of the revelation. Actually, only comparatively small minorities of mankind follow any one such revelation. Each claimed revelation differs in some respects from another. The total acceptance of all claimed divine revelations is far less than universal. Even where there is acceptance, the revelation is so general or so equivocal as to leave the divine law in doubt for many practical social purposes.

So far as the natural law may be implanted in man's conscience, it is likewise insufficiently clear to provide a basis of agreement for all men for all purposes. What the natural law of conscience dictates for any particular situation may be one thing for one individual and something else for another. It may be one thing for the collective conscience of one society and something else for another society.

Poets may think and write that "mankind are one in spirit, and
an instinct bears along, round the earth’s electric circle, the swift flash of right and wrong.”¹ The unfortunate fact of the matter, however, is that the divine and natural law—the moral law of conscience—stand ever in need of interpretation and exposition before they can be effectively applied as law for a society. Any such interpretation and exposition must necessarily be made by someone—either someone claiming authority from the Divine Lawmaker—a church or a prophet—or by some other kind of moralist claiming the wisdom to understand and interpret the natural law for all in a society.

Historically, the divine or natural law, interpreted and declared in this theocratic, or at least authoritarian fashion, has provided the various societies of the world with their particular versions of divine and natural law. These versions of the higher law, reflected in the customary or man-made law of the various societies, have given to each its characteristic mores.

However, the gradual separation of theocracy and moral authoritarianism from the political organization of societies, the fragmentation of religions and moral ideologies and their relegation to extrapoli
tical status, have lessened the practical usefulness of the divine and natural law for political purposes—for the worse according to some; for the better according to others.

During the last three centuries more and more individuals and groups have been interpreting the divine and natural law according to their own lights. No one church or equivalent moral authority in any society is now able to maintain a claim of right to preempt the political field to the extent of laying down the divine, natural or moral law for all. The result is that controversies abound and constantly increase, not only among individuals but even among and within the churches and moral ideologies, concerning what the divine or moral law is, or what it requires under the various circumstances to which it must be applied. For this reason the moral preemption taught by Thomas Aquinas under the unique politico-religious constitution of an earlier Christendom has become impractical in a pluralistic society.

Those who argue that the state is obliged to recognize and allow an individual’s claim of right under some higher law to disobey the law of the state, generally concede that the substantiality of any such claim could not be safely left to the mere ex parte assertion of each and every individual. The promptings of some unenlightened, pos-

sibly warped consciences might lead to weird or outright dangerous acts. Obviously, claims of creed or conscience would have to be determined according to some fairly well established version of the divine or natural law.

If so, according to whose version? The version of a church or moral ideologist? If so, then which church or ideology among many in the society holding different versions? Should, and if so how, will the state determine which version is "well established," "reasonable," "respectable," and which are "odd," "extreme" and, therefore, socially unacceptable?

For these reasons we conclude that in a democracy, wherein church and state are separate, the state, having promulgated a law, need not as a matter of duty and generally cannot as a matter of practice, recognize or allow the claimed "civil right" of some individuals to disobey its law with impunity.

Of course, it would be ideal if all man-made laws conformed to the conscience and the liking of all in the society. This is the ideal to which framers of man-made law should strive. To a considerable extent man-made law does reflect the mores of the society—whatever these may be. The higher the ideals, the more compassionate the concern, and the finer the moral indignation of the society, the better will eventually be its man-made law. But the ultimate ideal is hardly possible.

The state often attempts in other ways to accommodate its law to individual religious belief and conscience. The first amendment to our own Constitution precludes the making of any law prohibiting the free exercise of religion or abridging free speech, free press, peaceable assembly and petition for redress of grievances. Thus, individual opinion and conscience, and the expression thereof, remain inviolate. Statutes further accommodate to religious belief. For example, existing law exempts from military service persons opposed to such service by reason of religious training or belief, i.e., an individual's belief in relation to a Supreme Being involving duties superior to any human relationship. Although this exemption has been broadly interpreted, the statute expressly withholds the exemption from those who object upon political, sociological or philosophical views or a personal moral code.

These provisions merely demonstrate that it is possible for the

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state to impose limitations upon its own lawmaking powers to any extent which it deems fit. The law can recognize and adjust to a considerable degree of pluralism in the society. Many, for example, Otto Gierke, F. W. Maitland, J. N. Figgis, Leon Duguit, H. J. Laski, Roscoe Pound and H. Belloc, believe that the state should so decentralize the lawmaking function, not only through the political device of federalism and separation of powers, but even among commercial, labor, educational, religious or other functional or group loyalties which, although not strictly speaking political, might be accorded by the state an autonomous rule-making authority of their own. However, only when and to the extent that the state is actually so constituted, can persons be said to have a civil “right” in the matter.

To what extent the state “should” accommodate its own law to this kind of pluralism is a matter involving, not civil disobedience, but legislative policy—a subject not within the question under discussion. In any event, even in a pluralistic society an overall, final lawmaking function must be vested somewhere. We are concerned here only with the lawmaking function as it may be vested in a particular governmental organization and as it may be exercised at a given time.

The “Duty” to Disobey—Grounds of Creed or Conscience

We now take up the word “duty” (as that word is coupled with the word “right” in the subject question) and rephrase the question to ask: When, if ever, does an individual in a democracy have a “duty” to disobey the law of the state?

Our answer to the question in this form is that an individual, finding himself subject to a law promulgated by the state but believing himself bound by some version of the higher divine or natural law of conscience to which the state has not accommodated, can choose to adhere to the latter even though it involves disobedience to the law of the state. In such case, however, the individual acts pursuant to what he regards as his duty under the higher law—not under a right stemming from or imposing any corresponding duty upon the law of the state to recognize and allow it.

That this is not a mere semantical distinction becomes evident when we bear in mind the important, practical result of the difference, i.e., that such an individual must expect and should willingly submit to whatever penalty is imposed by the state for the disobedience—a penalty which the state could not impose if the disobedi-
ence were truly based on a "right" which the state had a correspond-
ing duty to recognize and allow.

One who, when pressed to such a choice, disobeys the law, not
for selfish, venal purposes, but to fulfill a duty sincerely regarded as
imposed by a higher law, may be said to act in the pattern of the
eyearly Christian martyrs and those countless other heroic figures who
through the centuries have made such decisions and willingly paid
the price. Such courage may enkindle admiration and at times temper
the penalty. It is, nevertheless, civil disobedience which, if recog-
nized or allowed by the state, would strike at the principle of equal
obedience of man-made law by, and its equal enforcement against,
all without distinction.

Although the decision to disobey rests ultimately with the in-
dividual involved, it should be borne in mind that in a democracy,
wherem the law, itself, recognizes the political right of all to have
a vote in the lawmaking process and the further right of the dis-
senting minority freely to advocate change of the law, the martyrdom
of civil disobedience for conscience' sake should seldom become neces-
sary.

It would seem that in such a free society one's confidently held
version of the divine law or the natural law of conscience could be
made so similarly evident to his fellows through persuasion or ex-
ample that it would ultimately be reflected in the civil law itself.
Those who advocate or resort to civil disobedience on grounds of
creed or conscience have, therefore, reason to ponder whether the
fault may lie in their own failure successfully to proselytize their con-
victions to their fellows in the market place of ideas.

The "Right" to Disobey—to Further Some Cause

Whatever may be the theory of state sovereignty over all withm
the society, the fact is that conflicts of interest do create differences
of opinion concerning the proper form and function of the state, the
proper kind of law and its proper administration. In the final analysis
the law in force at any given time, and its admmistration, reflect the
view and policy of those who, constituting a majority in terms of
numbers or influence, have for the time being secured legislative ap-
proval of existing law and control of its administration. Others in
the society, having interests which, they believe, are injured or ne-
glected by the law in force, find themselves subject to it.

Any government, especially one that recognizes the right of the
minority to advocate and demonstrate for change of the law, must
continually maintain itself by preserving a political balance between the law in force and the counter-pressure for change. At one end of the balance is the status quo and at the other end is this pressure for change. If the pressure is not relieved through orderly, lawful channels, it may, and often does, explode when the affected minority resorts to such means as it deems expedient to ameliorate its situation. When this happens the problem of civil disobedience is presented in another form. Individuals, generally acting in concert, set out to dramatize some cause arising out of some version of higher law or some self-interest—some demand for change of law or policy or some protest against administrative denial of their legal rights under existing law. So long as this advocacy remains within the bounds of existing law—the exercise of constitutional rights of free speech, assembly and petition for redress of grievances—no civil disobedience is involved and no problem is presented by the subject question.

How our own man-made law protects these civil rights may be seen in such cases as *Thornhill v. Alabama*, dealing with the civil right to picket in labor disputes and holding that such picketing, when it involves no danger of destruction of life or property or breach of the peace, must be allowed as within the area of free discussion guaranteed by the Constitution, and *Cox v. Louisiana*, holding to the same effect with respect to use of the public streets for marches and demonstrations for any cause. Advocacy has been held to fall within the protection of these civil rights even though it may go so far as to include incitement to overthrow the government or disobedience of its law—unless the incitement is made under circumstances presenting a clear and present danger of achieving success.\(^7\)

A problem is presented, however, when the demonstrators step beyond these limits actually to disobey some positive law of the state. If the disobedience is under claim that the violated law—for example, a national or state statute or a local ordinance—contravene the “supreme law” of the land and is, therefore, an “unconstitutional” impingement on some civil right, then, of course, the violation is more apparent than real and the issue must be resolved through the judicial channels provided by the state.

Argument is sometimes made to the effect that civil disobedience

\(^5\) 310 U.S. 88, 102, 105 (1940).
\(^6\) 379 U.S. 536 (1965).
is a civil "right" because only through such disobedience can one obtain a court determination of the meaning or validity of the law. Certainly, one has a right to have his claims of fact or law in a particular case judicially determined. But this does not mean, as is speciously argued, that one has a "right" to disobey the law. Quite the contrary. The judicial determination will finally resolve whether one has acted lawfully or unlawfully and the penalty or remedy will follow accordingly.

When, however, some valid law of the state, designed to assure the person or private property of others, or the public property, need, or convenience, against interference or misuse, is violated—not under compulsion of religious, conscientious or legal objection to that law, but voluntarily and deliberately as a means of dramatizing or pressing some other cause—then the issue of the existence of a "right" of individuals in a democracy so to disobey the law to enforce their claimed "just" cause is squarely presented.

When the violation is not merely transitory or symbolic, but one involving persistence and resistance to lawful arrest (thus compounding the one violation with another), its purpose is obviously to impose the will of the demonstrators upon the state and others, not by mere persuasion, but by a duress that necessarily invites the countercoercion of the state. The potential is created for conflict between representatives of the state, the demonstrators, their allies and their antagonists; the lawmaking and law enforcement function of the state is called into question; its ability to maintain law and social order is defied and imperiled—if not upset.

Although no physical violence may be involved, such a "violation" of law is itself (as the common derivation of the word suggests) a form of "violence" directed at the state and others in the society. To say that unlawful interference with the person or property of others, or with the public property, need or convenience, is a civil "right" so long as others affected, being unable or unwilling physically to counter the unlawful interference, are not physically injured or their property physically damaged, nor any great commotion created, is, to say the least, an attenuation of the word violence. This is merely a quibble over the difference between the "dare" and the "do"—the thrust and the blow. In any event, the stage is set for violence; rebellion, although not outright or intended, is incipient.

The question whether one has a "right" so to disobey the law of the state must, therefore, be tested by the same principles as are applicable to rebellion.
It has sometimes been said that there is a "right" to rebel against existing government. The Declaration of Independence recites that, "all men are endowed by their Creator with certain unalienable rights," and that, when government evinces a design to reduce the people to absolute despotism, "it is their right, it is their duty, to throw off such government." Thomas Jefferson recognized an ultimate right of the people to rebellion, asking: "What country can preserve its liberties if its rulers are not warned from time to time that this people preserves the spirit of resistance. Let them take arms" 8 Lincoln stated. "This country with its institutions belongs to the people who inhabit it. Whenever they grow weary of the existing government, they can exercise their constitutional right of amending it, or their revolutionary right to dismember or overthrow it." 9 Henry David Thoreau asserted: "All men recognize the right of revolution, that is, the right to refuse allegiance to, and to resist the government when its tyranny or its inefficiency are great and unendurable." 10

This use of the word "right" is correct only in the limited sense in which it was obviously used, namely, that any such right arises, certainly not from the law of the state which invariably uses all means necessary to repress rebellion as "unlawful" and "subversive," but from some different, higher law or standard which, the demonstrator believes, gives him a right, or even imposes a duty, to disobey the law.

Here we are faced once more with the same inherent difficulty already discussed in reference to the single conscientious objector. Absent political recognition of the preemptive authority of some church or similar moral authority to interpret and declare the divine, natural or moral law for all in the society, how will the substance—"the "justice"—of the cause as ground for disobedience of existing law be determined? For the state to recognize one version of "justice" among different versions would be to impose upon and disregard the legal rights of others.

Thoreau, preferring to live like a hermit, evaded this obvious difficulty by simply presuming that whatever he thought "just" should end the matter, saying: "The only obligation which I have a right to assume is to do at any time that I think is right any man more

9 First Inaugural Address of Abraham Lincoln, Mar. 4, 1861, in 4 Collected Works of Abraham Lincoln 269 (Basler ed. 1953).
10 Thoreau, Essay on Civil Disobedience, in Walden and Other Writings 88 (Krutch ed. 1962).
right than his neighbors is a majority of one already." It was upon this rather arrogant premise that Thoreau counseled civil disobedience by such "minorities of one" with a view to what he described as a clogging of civil authority. Other proponents of "right" of civil disobedience indulge in generalities about "conscience" and "justice" as if these relative concepts are readily identifiable standard brands to be found on every shelf. But, when pressed to applications and cases, they disclose that they really mean their own special version of divine or moral law which, however sincerely and firmly held, differs from the equally sincere and firm conclusions of others.

Thus the civil disobedients presume to interpret and apply the higher law or standard which they invoke. They alone determine the "justice" of their cause. They alone determine who constitute "the people." They alone decide which laws they will disobey and which laws they will invoke for their own protection, forgetting that others, taking a leaf from the same book of civil disobedience, may claim a "right" to disobey the latter and under such claim physically interfere even with the demonstrators' "civil right" of lawful advocacy.

Further, they alone decide that the social disorder and harm to others incident to widespread civil disobedience are less important than the goal they seek, forgetting that the tables can be turned. For, history shows that rebellious disobedience has been the resort, not always of sincere people, sorely aggrieved, but of tyrants, miscreants and fanatics.

For the reasons herein set forth we conclude that such civil disobedience is not a civil "right" in the sense that it creates any corresponding duty of a democratic state or society to recognize and allow it.

**The Judicial View**

That this conclusion squares with current judicial exposition of the subject may be confirmed by reference to such a recent case as *In re Bacon*, decided this year in the California district court of appeal, affirming convictions of certain minors, students of the University of California, for unlawful assembly, refusal to leave a public building after closing time, and resisting and delaying an officer. The evidence showed that "sit-downs" and "stand-ins" were staged in Sproul Hall to express the students' grievance with University rules regulating the content of student speech, assembly and petition on the campus.

11 Id. at 86.

Justice Molinari, writing for the court, states: "[W]e are led to the conclusion that, although appellants undoubtedly possessed the constitutional right to express their grievances, these constitutional rights did not abrogate appellants' duty to refrain from violating laws of our state which are clear as to the conduct they prohibit, which reasonably provide for the protection of the public and of public property and which were not arbitrarily applied by the authorities."\textsuperscript{13}

That the Supreme Court of the United States is reaching a point of clear distinction between the liberally interpreted civil rights of advocacy and demonstration, on the one hand, and civil disobedience on the other, is indicated by the recent case of \textit{Brown v. Louisiana},\textsuperscript{14} in which Justice Hugo Black writes a strong dissent (Justices Clark, Harlan and Stewart joining) from the reversal of convictions of anti-segregation demonstrators who staged a non-violent "stand-in" at a public library, for violation of a breach of the peace—refusal to leave a public building—statute.

Differing from the majority premise that no law had in fact been violated and writing from his point of view that there had been such a violation, Justice Black said:

\begin{quote}
It is high time to challenge the assumption in which too many people have too long acquiesced, that groups that think they have been mistreated or that have actually been mistreated have a constitutional right to use the public's streets, buildings, and property to protest whatever, wherever, whenever, they want without regard to whom it may disturb. Though the First Amendment guarantees the right of assembly and the right of petition, along with the rights of speech, press and religion, \textit{it does not guarantee to any person the right to use someone else's property, even that owned by the government and dedicated to other purposes, as a stage to express dissonant ideas}. [T]he prevailing opinion nevertheless exalts the power of private nongovernmental groups to determine what use shall be made of governmental property over the power of the elected governmental officials of the States and the Nation.
Governments like ours were formed to substitute the rule of law for the rule of force. . . "Demonstrations" have taken place without any manifestations of force at the time. But I say once more that the crowd ruled by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in.\textsuperscript{15}
\end{quote}

\textsuperscript{13} Id. at 58, 49 Cal. Rptr. at 336. (Emphasis added.)
\textsuperscript{14} 386 Sup. Ct. 719 (1966).
\textsuperscript{15} Id. at 734, 736-37. (Emphasis added.)
This distinction between the civil right of advocacy and demonstration, on the one hand, and civil disobedience on the other is really nothing new. In *NLRB v. Fansteel Metallurgical Corp.*, the Supreme Court, dealing with a “sit-down” seizure of a factory to further the “just” cause of strikers, recognized the limits of economic demonstration when it held that, although the fundamental policy of the National Labor Relations Act is to safeguard the rights of self-organization and collective bargaining, “there is not a line in the statute to warrant the conclusion that it is any part of the policies of the Act to encourage employees to resort to force and violence in defiance of the law of the land.”

Similarly in *Cox v. Louisiana*, the Court recognized the limits of demonstration marches and parades, saying:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by attempted exercise of some civil right which, in other circumstances, would be entitled to protection.

Whatever claimed “right” or “duty” may be invoked by the disobedience in such cases, stemming as it necessarily must, from some self-determined version of a different, higher law or standard, may and generally in practice must be regarded by the state and others in the society not as a politically recognizable “right,” but as a bare tour de force. Although it may be argued that such a tour de force is not much different from that out of which governments originate in the first place and upon which man-made law, itself, depends, there is presented, nevertheless, the inescapable choice between the politically controlled law of the state and the socially more intolerable force of uncontrolled individual will and action.

Whoever indulges in civil disobedience must, therefore, expect

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18 306 U.S. 240 (1938).
and should willingly risk and accept, whatever penalty may follow the failure of the attempt—just as the single conscientious objector must endure martyrdom. Martin Luther King recognizes this when he writes in his famous letter from the Birmingham jail: “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 I submit that one who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.”

We are well aware of the fact that in the course of history notable changes in law and government have seldom come about through voluntary concession by the existing political regime. Whatever progress has been made in man’s effort to improve his worldly environment has often been achieved through the idealism and courage of men who, believing that all else had failed, disobeyed the law and defied governments. Posterity has acclaimed many of these struggles as “glorious.” Democracy, itself, is the child of civil strife.

In 1776 the Founding Fathers pledged to one another their lives, their fortunes and their sacred honor—and they were successful. This the men of the Confederacy did in 1861—but they failed.

In a Democracy

Happily, the civil right of a dissident minority in a democracy, such as ours, to plead the claimed “justice” of its cause by all means within the ample compass of free speech, press, assembly, petition and under protection of procedural due process, has rendered irrelevant many of the political restrictions that may have provoked civil disobedience in the past.

When the United States of America made the first attempt in the history of the world at government by the people through their own chosen representatives, Washington spoke of the event as an “experiment.” He realized that its success would depend upon whether the people would be sufficiently intelligent and patient to seek desired changes in the law by the slower, orderly processes of law rather than by rash resort to civil disobedience. Jefferson, no foe of rebellion, recognized this, saying: “Educate and inform the whole mass of the people. Enable them to see that it is in their interest to

21 King, Why We Can’t Wait 83-84 (1963).
preserve peace and order and they will preserve them." This is why civil disobedience in a democracy often mars the image of an otherwise just and appealing cause.

Samuel Adams, who had been one of the most forward leaders of the American Revolution, took the position in 1787 that, although otherwise among subjects of a monarchy, civil disobedience by citizens of a republic, which has achieved regular constitutional government, is useless, dangerous and should be sternly repressed.

That there is no politically recognizable "right" or "duty" of civil disobedience in a democracy, except only as self-determined by the demonstrator, is further suggested by the fact that the Founding Fathers, having successfully achieved their own revolution, quickly and sternly used all force at their command to repress the civil disobedience of Shay's aggrieved Massachusetts farmers in 1787. A few years later, Washington called up the militia to put down the similar civil disobedience of Pennsylvania farmers in the so-called Whiskey Rebellion of 1794. Also, be it remembered, it was Lincoln who sadly but resolutely met the civil disobedience of Southern dissidents on the slavery issue with a call for 75,000 volunteers to uphold the law of the Union.

Some may still feel that their causes are such that they can be advanced only by resort to widespread disobedience of the law of the land. It may well be that our own society, with all its concessions to suffrage and to the minority civil right of advocacy, has not yet cultivated sufficient social restraint nor fashioned adequate political methods to obviate the necessity for civil disobedience.

The decision, of course, is up to the individuals involved.

The considerations set forth in our answer to the subject question merely suggest that such persons should not obscure the issue by indiscriminate use of such terms as their civil "right" to disobey the law. Rather, they should recognize and frankly describe their action for what it really is—a form of violence with all the risks and dangers that such acts imply and generate—an act, the worth of which cannot be evaluated in terms of "right" but only in pragmatic terms of its ultimate success or failure in imposing their will upon the state and others in the society.

Concluding these remarks, we say that man-made law, originating as it does in a tour de force and dependent as it is on the sanction


23 Coker, Democracy, Liberty and Property 315 (1942).
of politically controlled force, may be unwisely, short sightedly, selfishly and unfairly drawn or administered; it can, of course, be defied, disobeyed and upset by the cumulative counterforce of civil disobedience and rebellion. But, in a democracy, it can also be changed and improved by well-organized and well-directed persuasion and orderly process better to assure fulfillment of the human needs and spiritual aspirations of all men—not only within nations but also among nations in the still woefully lawless field of international relations. The comparatively peaceful, orderly transformation of the law of our own society during the last half century demonstrates that a law-abiding, orderly society need not be a static society. In any event, man-made law is man’s only known safeguard against the alternative anarchy of individual will and force run riot—the prelude, as history shows, to ultimate dictatorship.

Only when the law of God reigns in final consensus among men will their worldly lot be determined by something higher, something finer than the tour de force from which governments originate and upon which man-made law depends.