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HISTORICAL TRADITIONS IN CIVIL DISSENT AND THEIR CORRESPONDING CONCEPTIONS OF LAW

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I. INTRODUCTION

There was much controversy recently over the question of civil disobedience. The discussion broke up into factions, with each accusing the other of misrepresenting, in his concept, the meaning of civil disobedience. The boundary lines were drawn narrow or wide depending on ones conceptual framework. I hope to show in this paper that much of of the confusion was the result of radically different and incompatible philosophies, on which the systems of the antagonists were built.

There seem to be at least two distinct traditions in the history of civil dissent, the Constitutionalist and the Lockean. Mahatma Gandhi's system of Satyagraha does not fall squarely in the Lockean tradition, but it does have some significant parallels, regarding their similar conception of law, obligation and duty, and for that reason will be associated with it in this paper. Each tradition has distinct features which become apparent immediately.

The Constitutionlists tend toward cojoining morality and positive law, with the latter having priority over the former; the morality of society is enforced by the legal system. This is commonly referred to as "legal moralism". This tradition insists that the citizen has a duty to the "rule of law", i.e. valid law should be obeyed at all times at all costs—even in the face of grave personal consequence. Constitutional law is supreme and must not be broken, to do such would threaten the very foundation of society. Law violation causes disorder and promotes general disrespect for the law. Changes in the law and society in general, must occur through the legal channels provided for such. Violators of valid laws must incur the penalty, and any exercise of civil disobedience must be done non-violently. In this tradition, the right of the citizen is subordinated to the "rule of law".

Members of the Lockean tradition tend to divorce morality from positive law, and when there is a dispute between these two, morality takes precedence. It follows that one, who is sympathetic to this view, will not feel obligated to always obey the law, he reserves the right to correct the law when it violates his sense of morality, and when it is not amenable to correction, then he reserves the right to extinguish it. This tradition views the system of laws as conventional enactments, devised by the people for their benefit and security. The laws and their guardians, govern at the pleasure of the citizen, and submission to the law is done only when other basic and fundamental liberties are not violated by this system of laws. When such do

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occur the citizens have the right, or more strongly, it is their duty to disobey the law and resist the guardians and enforcers of the law, even by force when necessary. When the legal system fails to be reconciled with these basic and inalienable rights, then the citizens are free to abolish it and to erect one more suitable to their needs.

The Gandhian system is closely related to the Lockean tradition. It is strictly nonviolent, however, insisting that the forceful resolution of any problem still leaves evil extant, and this it wants to eliminate completely. Laws which fail to respect the human rights of citizens are evil in nature, and must be resisted through the use of "Satyagraha" which includes civil disobedience, noncooperation, nonviolence, love of fellow man (agape), and belief in Truth (God). Those that exercise Satyagraha must be pure in soul, and their use of it purifies the soul of the evil-doer, rights the wrong, and extinguishes the injustice. When it becomes ones duty to practice civil disobedience, then this is the form that Satyagraha takes. Satyagraha entails that the activist incurs all suffering coincident to his activity. The citizen is not duty bound to obey the law, but rather he is duty bound to disobey unjust laws. In this sense, as we shall see below, Socrates was not a practitioner of Satyagraha.

Let us turn now to a more detailed discussion of the concepts that members of these traditions have espoused. We will first discuss the Constitutionalist tradition, then the Lockean tradition and lastly the Gandhian system.

II. CONSTITUTIONALIST TRADITION

A. *Socrates: Contract and Legal Paternalism*

Different philosophers from diverse trends of thought on the concept of civil disobedience have claimed Socrates as representative of their particular school of thought. It seems that a careful reading of Plato's *Crito*, however, places him more accurately in the camp of the Constitutionlists. In this dialogue, Socrates, after having been convicted of a crime against the state and condemned to death by the state, explained to his friend Crito why he refused to use the latter's plan of escape which would ensure Socrates' freedom and avoidance of punishment. Socrates insisted that the state was sovereign and that its laws "ought" to be obeyed absolutely, even if they are unjust. It is the citizens right, however, to persuade the state against a particular course of action. Socrates then gives, in detail, his reasons for not escaping.

Right and wrong are not determined by popular opinion, he says, and the ends do not justify the means. It is wrong to do wrong, even if the results are right, or in Socrates' own words, "to do wrong is in every sense bad and dishonorable for the person who does it".¹ The Constitution or system of laws represent an agreement between the citizen and the state, which is necessary for the latter's existence. Furthermore, Socrates thought, the state is like the citizen's father in that it warrants and insists on being obeyed by its subjects (a kind of paternalism where the state is the strict and stern father figure that must be obeyed, whatever the cost, for in the long run the general

1. PLATO: THE COLLECTED DIALOGUES 34 (E. Hamilton and H. Cairns, eds. 1971).

welfare is secure in the state's hands). Socrates further claimed that the citizen gives tacit consent to the law and agrees to obey them, when he remains within their jurisdiction. Violation of the "rule of law" for a particular constitution means infidelity to all constitutions. Socrates believed that infidelity to law was a contradiction to the belief that "goodness and integrity, institutions and laws, are the most precious possession of mankind".² Finally, it is not only wrong to disobey law, but dishonorable as well.³

Socrates contends that laws are not only conventional and of this world, but there are also higher laws which transcend man in the state, and each person owes a duty to both systems of law. The violation of any of these laws have a degenerating affect on society. It sets a bad example and injures not only other citizens, but the better part of the violator himself. We cannot disobey the law simply because we entertain a different opinion, Socrates maintains, and its final decision must always be respected. But the question of what to do when there is a conflict between the two levels of law is not resolved.

The distinction between deontological (good is reducible to right) and teleological (right is reducible to good) ethics was not present in Greek thought, and they remained cojoined until much later—Kant was one of the first to distinguish the two. We find the constitutionalist approach to the law and civil disobedience, however, to be highly teleological. Let us examine Abe Fortas' concept of civil disobedience.

B. *Abe Fortas: Legal Moralism*

Abe Fortas, perhaps, is one of the strongest advocates among the constitutionalists of the concept, "rule of law". For him, law is the balance of equilibrium between liberty and restraint, or in his own words "the rule of law is the essential condition of individual liberty as it is of the existence of the state."⁴ The acceptance and imposition of restraints are necessary to ensure liberty in an ordered society. One of the liberties or rights guaranteed by the Constitution and the courts is that of dissent. But this is possible only if each of us respects our "duty of obedience to law. This is a moral as well as a legal imperative."⁵ Moreover, our right to protect must not violate our duty to law, Fortas reminds us. He criticizes Thoreau for the latter's noncompliance with the rule of law. Fortas says that in not paying his taxes, Thoreau refused submission to the authority of the state. He demanded obedience to the law, by the government, Fortas continues, but refused such himself, and assumed that he had a right to break the law without punishment or penalty.⁶

When the law is broken, Fortas maintains, out of a deep moral conviction and the courts decide the law is constitutional, then the penalty must be accepted. It is the "rule of law" which must be obeyed. Fortas explains:

Both the government and the individual must accept the result of proce-

2. *Id.* at 38.

3. The distinction between "good" and "right" was not made in ancient Greek thought, as it is today.

4. A. FORTAS, CONCERNING DISSSENT AND CIVIL DISOBEDIENCE 118 (1968).

5. *Id.* at 24.

6. This latter claim of Fortas' is not substantiated, nor can it be.

dures by which the courts, and ultimately the Supreme Court, decide that the law is such and such, and not so and so . . . that it is or is not constitutional, and that the individual defendant has or has not been properly convicted and sentenced.⁷

The state, court and citizen are all bound by the adopted system of laws, and must abide by the ultimate ruling of the court, regardless of the margin of the decision. This notion of Fortas' is referred to by some as the "double barrel" of the law, where both the citizen and the state are subservient to the duly prescribed laws. We should not seek to avoid penalties when we break the law. Fortas says: "[E]ach of us is a member of an organized society. Each of us benefits from its existence and its order. And each of us must be ready, like Socrates, to accept the verdict of its institutions if we violate their mandate and our challenge is not vindicated."⁸

Fortas lists three general principles which he thinks the civilly disobedient must keep in mind: (1) the Constitution guarantees the right to protest consistent with the Bill of Rights "if the protesters comply with reasonable regulations designed to protect the general public, without substantially interfering with effective protest"; (2) the Constitution does not protect protesters with criminal intentions against the property and welfare of others, or against the law in general; (3) the Constitution does not protect protesters who break valid laws which assigns a duty to him not to interfere with others. Fortas says further that civil disobedience can be prompted by either or both of two motives: (1) a desire to increase public awareness and disapproval of an unjust law, and (2) as a test case for challenging an unjust law in court.

Essential to Fortas' view on civil disobedience is the concept of non-violence. He praises this aspect of Gandhi and King's civil disobedience. He thinks that civil disobedience never applies to acts of violence, the use of force in overthrowing the government or controlling areas, or the use of violence to force the government to grant self-determination to part of its population. To him, such activities are revolution not civil disobedience. Fortas warns that the use of violence will lead to repression, and will invoke in the majority population "a reason for refusing to endure the discomfort and burden of the vast job of restitution and reparation." Violence is never justified, he says, furthermore, where there have been alternative ways of gaining sympathy for one's causes and reform in government, the way of violence has been less successful. The Bill of Rights and the ballot, Fortas suggests, is the alternative to violence.

Another important aspect of Fortas' civil disobedience is his emphasis on procedure and method, which he thought was a critical question for the civil rights movement of the 1960's. For him, the very survival of the democratic system depends upon which procedures, rules of conduct, methods, and practices that dissenters use. The methods he proposes for the civilly disobedient to use are: written and spoken word; picketing and the like which symbolizes communication because of the transference of ideas between minds; peaceful demonstrations and assembly; the ballot; and the courts. Fortas insists, emphatically, that protest must not result in injury to

7. A. FORTAS, *supra* note 4, at 58.

8. *Id.* at 125.

others. The liberties guaranteed by the Bill of Rights are themselves subject to conditions, circumstances, time and location, e.g. protesters are not allowed to obstruct the orderly flow of traffic, or to trespass illegally and needlessly on private property. It is the attendant circumstances and not the words which occasion punishment, he states. The methods that protesters adopt must be "within the limits which an organized democratic society can endure."

The last point I would like to mention about Fortas' civil disobedience is his position on indirect, in contrast to direct civil disobedience.⁹ Fortas is confident that the government will do its part in ensuring that those avenues provided by the Constitution for the protester will be left open for him to dissent within. Consequently, it is not necessary for the protester to violate any law other than the one which is specifically the target of the protest. Any violation of valid laws in this way, is not dissent, but an act of rebellion, Fortas claims. Fortas even asserts that such violations "may be morally as well as politically unacceptable."

C. *Archibald Cox: Legal Moralism and Individual Sovereignty*

Turning now to Archibald Cox we find his conception of law and civil disobedience more piercing and double barreled than Fortas'. He seems to get closer to the essence of the Constitution than his cohort, which makes his view somewhat more equitable.

Cox is straight forward when it comes to the "rule of law." It depends upon voluntary compliance, he says, and this is what is meant by "government by the consent of the governed." Cox asserts that law is an instrument in men's hands and is self justifying only if it meets the needs of the citizen—including ethical judgments and moral aspirations. He gives, therefore, three moral justifications for law; "(1) it secures for men the maximum of individual liberty, freedom of speech and association, religion and privacy, and equality before the law; (2) it secures the greatest opportunity for peaceful change, not only today but in the future; (3) the ultimate commitments of those devoted to the rule of law is to the belief that the growth of each individual toward responsibility and the freedom to choose the best he can discern is a purpose which must never be made subservient to other objectives."¹⁰

The rule of law is a substitute for rule by power, Cox maintains. Constitutionalism is based on maximum reasoning and minimum force—both Fortas and Cox agreed that constitutionalism offers an alternative to violent revolution. Cox is very much aware, in a sense that Fortas seemed not to be, that the people are the ultimate rulers in a democracy, and they "voluntarily" submit to the restraint of law. Rule of law is a process and not a static

9. Direct civil disobedience occurs when the protest against injustice, i.e., the violation of law, is levelled directly at a specific law considered to be unjust. Whereas, indirect civil disobedience occurs when a law is violated—which may not be unjust itself—in protest of injustice elsewhere in the system.

10. A. COX, H.D. HOWE and F.R. WIGGINS, *CIVIL RIGHTS, THE CONSTITUTION AND THE COURTS* 20 (1967). Cox's legal moralism is apparent here. The law embodies morality, and in short, it allows the citizen to be moral. Cox thinks that it is the existence of law which separates the barbarous society from the civilized one.

set of rules. Law must spring from conditions of contemporary society and serve the current needs of men, Cox adds. Furthermore, he continues:

The capacity for change and growth is as essential an element of the rule of law as reason and voluntary compliance . . . to win consent of the governed, the law must deserve acceptance. When the pace of social change or the growth of social conscience is revolutionary, so must be the changes in the law.¹¹

Cox believes that, because people will freely agree to law,¹² it is able to replace power, and this, in course, permits the existence of a free society.

Cox supports the right of citizens to exercise their liberties guaranteed under the Constitution regardless of the likelihood of violence by those, who would try to repress these rights. He says:

The prospect that antagonism toward demonstrations will lead to outbreaks of violence affords no justification for suppressing a demonstration. Constitutional rights may not be denied because of hostility to their assertion. . . . The state's first duty, however, is to keep the peace by protecting the exercise of constitutional rights—not by suppressing them.¹³

Cox does insist though, that civil disobedience must not be used to impose ones' will on the community "without regard to the beliefs and rights of others." Moreover, he thought, laws that are violated in the name of civil disobedience cannot be done so at random. One "cannot pick and choose among good laws and bad laws according to each individual's conscience without destroying the whole concept of the rule of law," he cautions. Moreover, he believed that the right to protest, whether through peaceful assembly, demonstration, marching, or whatever, should be in proportion to the magnitude and severity of the wrongs that are being dissented against. Cox does realize, however, that major changes in the law depend at least "upon the stimulus of protest." At least one of Cox's main concerns seemed to be that he wants to guard against widespread civil disobedience which he thinks would undermine the principle of "government by consent of the governed."

Cox distinguished between moral and legal acts. Although unsuccessful, due to the constitutional context of his viewpoint, he does make the effort that Fortas does not, and that is to separate legality and morality. This is evident in his discrimination between sincere nonviolent civil disobedience and intentional criminal acts. He says that the civilly disobedient—a person can only be labelled such if he breaks the law on moral grounds and accept the consequences, or only if he protests within the guidelines of the Constitution, otherwise he is a criminal—is morally exonerated even if his act is ruled illegal, whereas the criminal is both morally and legally wrong in his act. An example of an act that was ruled illegal, but morally justified, he thought was sit-ins staged in various parts of the south. Cox's attempt to dissect his legal moralism, however, manifests itself when he says:

[w]hen the cause is just, when there is urgency, and when other channels

11. A. Cox, *supra* note 10, at 22.

12. A fine point that the Constitutionalist sometimes under emphasize is that a voluntary act entails that the agent has the liberty to have done the opposite or neither. Certainly if the people have the liberty to "freely submit to the law," i.e., they are not compelled into it, then they must *ipso facto* have the liberty to voluntarily disavow such subordination or never to submit at all.

13. A. Cox, *supra* note 10, at 25.

are closed, we should defend the social and moral right to disobey a law that one sincerely believes will be held unconstitutional, even though he turns out to be wrong. Whatever harm is done to the principle of consent is balanced by the need to confirm the law to the demands of conscience.¹⁴

Although Cox is able to say, on the one hand, that the legal question as to the constitutionality of a law is usually subsequent to the breaking of the law, but the ethical question as to the morality of the law is antecedent to the breaking of the law, he is quick to interject, "if the illegality is plain . . . then the teaching of conscience as well as of law would ordinarily seem to call for compliance until change is achieved by constitutional process."¹⁵

The constitutionalists essentially agree that the Constitution, both guarantee crucial liberties to the citizen and provides the political processes necessary for effective government. Because of this, Cox thought Martin Luther King had a vehicle for redress that Socrates, Gandhi, and the "violent revolutionary founding fathers," did not have. He thought that in Thoreau's case of civil disobedience he wanted to avoid social and legal obligations that were reciprocal. Even in our civil disobedience, Cox thought, we are amenable to the rule of law.

D. *John Rawls: Civil Disobedience and the Principles of Justice*

Perhaps the most thorough and comprehensive of any of the Constitutionalists, here, is John Rawls. He lists three conditions which he thinks are legitimate grounds under which citizens may engage in civil disobedience. First, he says that civil disobedience is legitimate under instances of substantial and clear injustice, such as serious infringements of the first principle of justice (the principle of equal liberty), and blatant violation of the second part of the second principle (fair equality of opportunity). Obvious cases of injustice are those involving denial of the right to vote, hold office, own property, to move from place to place or religious repression of various kinds. Not so obvious, Rawls points out, are those injustices resulting from infractions of the difference principle—which to me is why it should never be relied on by well meaning and cautious individuals.¹⁶ It is difficult, Rawls realizes, to check the influence of self-interest and prejudice.

Secondly, when one has exhausted all the means at his disposal, such as appeal to the political majority, legal means of redress, exercise of free speech, etc., then civil disobedience is again legitimate.

Lastly, when there are competing claims, all legitimate to civil disobedience by different groups and they select a system such as rotation or lottery, whereby each can be met in an orderly and manageable fashion, then civil disobedience is again permissible. Rawls thinks that this method avoids undermining the whole political system, which none of the groups wish to do anyway.

Rawls' concept of civil disobedience is derived from the public conception of justice which characterizes any democratic society. Civil disobedi-

14. *Id.* at 27.

15. *Id.* at 28-9.

16. J. RAWLS explains that "[T]he intuitive idea (of the difference principle) is that the social order is not to establish and secure the more attractive prospects of those better off unless doing so is to the advantage of those less fortunate," A THEORY OF JUSTICE 75 (1973).

ence, he thinks, is part of the theory of free government, in that it provides a method of dissent that does not destroy fidelity to law. Engagement in civil disobedience, expounds Rawls, addresses the sense of justice of the majority—the principles of justice are public—and it serves fair notice that in ones' sincere and considered opinion the conditions of free cooperation are being violated. This conception of civil disobedience, in the Rawlsian context, becomes a stabilizing device in the constitutional system. It maintains and strengthens just institutions because "by resisting injustice within the limits of fidelity to law, it serves to inhibit departures from justice and to correct them when they occur."¹⁷ Rawls further explains that civil disobedience, in light of the majority's sense of justice, take away unjust advantage and points out the untenability of certain social positions. Rawls is convinced that: "Both sides must believe that however much their conceptions of justice differs, their views support the same judgment in the situation at hand, and would do so, even should their respective positions be interchanged."¹⁸

Rawls makes the same unsuccessful effort that Cox makes, when he tries to split his legal moralism into separate judgments of what is legal and what is moral. In a democratic society, Rawls claims, each citizen is responsible for his interpretation of the principle of justice and his behavior. He is not morally bound to accept anyone elses interpretation, Rawls asserts, not even the Supreme Court's or the Legislature's. Any decision by the court in Rawls' opinion, however, must be sound enough to persuade the citizens. But the final appeal, by the civilly disobedient, is not to the court, Executive or Legislature, but to the electorate as a whole. Although Rawls identifies the moral aspect of civil disobedience, he denies that it is religious in character—of course Gandhi would claim that it is, as will be evident below. Rawls' legalistic approach to civil disobedience with its attempted distinction between morality and legality still fails to give morality equal status with legality. Fidelity to law is imperative, even in the midst of extensive civil disobedience.

Before preceding to discuss the Lockean-Jeffersonian tradition of civil disobedience, it will help facilitate the general discussion if we take a critical look at the notions of civil disobedience that these Constitutionlists have propounded.

E. *Critique of the Constitutionalist Concept of Civil Disobedience and Its Relationship to the Law*

It can be seriously argued that Fortas' notion of civil disobedience does not really embody the essence of civil disobedience. He labels as "nullities" those local ordinances or enactments which are disobeyed by dissenters and which are later found to be unconstitutional. Now, if they are not really laws, then the protesters have not broken any "real" laws, even though they were jailed, tried and punished. Fortas requires strict obedience to the Constitution, which is the only real law. The protesters can dissent only within the limits allowed and in doing so this is still obedience to the law. Any

17. *Id.* at 383.

18. *Id.* at 383.

violation to the Constitution is not permitted, hence no violation of law is permitted. If Fortas' viewpoint would have been taken seriously during the nineteenth century, then this would have entailed obedience to the Fugitive Slave Law, the *Dred Scott* decision, the *Plessy v. Ferguson* decision, etc., which were all held to be constitutional. It seems inconsistent that he would disobey Hitler, if he was a German in the 1940's, but obey the Supreme Court if he was Dred Scott. He seems to be writing from behind the "veil of illusion" which covers the minds of the majority of citizens in this country.

The "veil of illusion," if Rawls will allow me this paraphrase, is the myth that originates in, and springs out of, the political concerns of a people, that all is well, except for a few minor problems which can be corrected. So, for the most part, justice reigns in our political system. The citizen is led to believe; that the external goods that the Constitution was set up to protect, ensure and enhance are accessible to all; that the system guarantee channels and procedures for redress of grievances and for correction of injustice, that given the difference in personality, customs and goals of individuals, by in large our society is built on brotherhood and fairness toward each other. The myth further depicts the government as a charitable, compassionate, and benevolent benefactor who extends this concern to the world community.

Now, this may not be believed at all, especially by the more experienced, but for the vast majority of the citizens, this illusion is embraced, believed and past on to their posterity; it is like a veil that stands between them and reality.

In the beginning the illusion was not really an illusion in the proper sense of the word, but rather it was the hopes, the desires, the aspirations, in short the very ideas of the "Founding Fathers." But in the hands of the self-interested and corrupted, it has become a tool—an instrument—to enhance their own position by forging and manipulating the public's attitude, opinion and conviction. They play on the credulity and optimism of the citizen and actually solicits the citizens help in keeping himself ignorant to the real state of affairs. Constitutional democracy, with its executive, legislative and judicial systems is used to control the citizen and to maintain good order—the powerful self-interested class cannot sustain and extend its dominance without this order. The judicial system, especially, ensures that the citizen is law abiding, those that are not or who upsets the order are quickly removed. Jurists and philosophers of law expound such concepts as "rule of law" or "fidelity to law," with many being sincere and believing in these doctrines. Others do manage to step out from behind the veil, survey reality, realize the limitation of the system and their inability to do very much about it, and then through a strange pragmatic utilitarian ratiocination they decide that the "veil of illusion" is more expedient than the "priority of rights."

The so-called progress of the 1960's—Fortas thinks it was a revolution—was part of the grand illusion of reform which were consequent to the civil rights movement. But the gains won were piecemeal, temporary (note the recent emergency of neo-conservatism and the retraction of public policy which represented reform measures designed to remove inequities in the system) and beneficial only to a few. Reason and ethics compel one, even the recipient of such gains, to dissatisfaction, especially when the quality of

life of the masses of citizens, toward which the protests were originally directed, have not changed significantly. The great wonder of the judicial and political system, as Rawls understood as well, is their flexibility, their capacity to absorb shock and disturbances, and their ability to stabilize themselves, to restore harmony and order without changing their essential character and aims.¹⁹

The passage of civil rights legislation during the 1960's is a testament to this "gyro effect" in our political system. It is designed to give the illusion of change, but in reality it elevates the status quo. That legislation was superfluous and should have come under Ocham's Razor. The Constitution, under Amendments I, XIII, XIV, and XV already provided for the liberties that they were supposed to grant—all subsequent civil rights legislation is redundant. It is important to keep in mind that European emigrants to this country never required the passage of such laws. Once naturalized they were immediately free and equal citizens.

The thirteenth amendment in its abolition of slavery is self explanatory. But it was the fourteenth amendment which established citizenship for the ex-slave and his descendants with all the liberties thereof. This legislation should have reversed the *Dred Scott* decision and been insurance against similar actions in the future. The Congressional Research Service Library of Congress quotes from the case of *Afroyim v. Rusk*,²⁰:

The amendment can most recently be read as defining a citizenship which a citizen keeps unless he voluntarily relinquishes it. Once acquired, this fourteenth amendment citizenship is not to be shifted, cancelled, or diluted at the will of the federal government, the states, or any other government unit. . . . This undeniable purpose of the fourteenth amendment to make citizenship of Negroes permanent and secure would be frustrated by holding that the government can rob a citizen of his citizenship without consent by simply proceeding to act under an implied power.

The fifteenth amendment established what should have been once and for all the right of all citizens to vote. Congressional Research Service explains that voting privileges were being abused in both the North and South, consequently, Congress passed this amendment to halt this neglect of citizens' rights.²¹ It says:

[I]n the 2nd session of the 39th Congress, the right to vote was extended to Negroes . . . in the District of Columbia and the territories, and the seceded States as a condition of readmission had to guarantee Negro suffrage. . . . In all cases where the former slaveholding States had not removed from States had not removed from their Constitution the words 'white man' as a qualification for voting, this provision did, in effect, confer on him the right to vote, because . . . it annulled the discriminating word 'white', and thus left him in the enjoyment of the same right as white persons. And such would be the effect of any future constitutional provision of a State which would give the right of voting exclusively to white people.²²

19. H. ZINN in *DISOBEDIENCE AND DEMOCRACY*, explains that this order-keeping mechanism is a combination of repression and reform.

20. 387 U.S. 253, 262-63 (1967).

21. *THE CONSTITUTION OF THE UNITED STATES OF AMERICA*, Congressional Research Service, at 1305.

22. *Id.* at 1541-42.

Now considering the preceding discussion, Fortas has yet to explain what, in his system, is a valid law. He said that local enactments which were later shown to be constitutional were nullities. History shows that decrees of the Supreme Court—the highest legal appeal in this nation—have been shown to be not valid, therefore unconstitutional, hence not laws. Are these nullities also invalid? If so, then in what sense can one be said to be practicing civil disobedience, insofar as law violation is concerned, when no real law is being broken? Fortas' narrow view squeezes the concept of civil disobedience practically out of existence.

Zinn thinks that Fortas never reveals his moral criteria for testing adherence to or violation of law. There is an inconsistency, he thinks, for Fortas to insist, on the one hand, that it is only correct to disobey invalid and unconstitutional laws, but on the other hand, that profoundly immoral laws may be disobeyed. But Zinn then points out, as we saw above, that profoundly immoral laws may be constitutional. He further takes issue with Fortas' contention that the protester should accept the penalty if the courts rule against his civilly disobedient act. Zinn thinks that the protester should question himself as to whether or not he will submit to punishment consequent to the breaking of a "profoundly immoral" law.

Peaceful submission to punishment for civil disobedience presupposes a system of justice and fairness—otherwise the act would be masochistic. Under such conditions, then the act can rationally be deemed proper and dignified, whereas peaceful submission to punishment by a system of laws known to be administered unjustly, which has a history of protecting and propagating injustice, is irrational, counter to common sense, and demonstrates a disregard for one's own good and the good of others like himself.

Fortas' boundaries for permissible civil disobedience, according to Zinn, is limited and narrow because of some apparent "mystical value" placed on the "rule of law," greater than those human rights that the Constitution was originally set up to protect. He thinks that there are nine fallacies in Fortas' doctrine: (1) the rule of law has intrinsic value apart from moral ends; (2) the civilly disobedient should accept, as right, his punishment; (3) civil disobedience should be limited only to wrong laws themselves; (4) civil disobedience must be absolutely non-violent; (5) the political structure in the United States is adequate, as it is, to effect reform; (6) the judicial system is reliable in upholding the first amendment; (7) the principle which governs the behavior of the protester is not applicable to nations or the United States in the world; (8) in face of the changing times, the Supreme Court is still relevant in its role of arbiter between State and citizen; (9) the citizenry should behave as if we are the State, and our interests are the same.

Cox, like Fortas, permits civil disobedience only if the act does not violate a valid law. This requirement implies that all valid laws are constitutional, otherwise what do they mean by valid laws? But history has shown the invalidity of many constitutional laws which have aided and abetted injustice. If the Constitution and the decrees of the Supreme Court are supposed to be the ultimate determinants as to the validity and invalidity of all other laws, then at what point in their history can we safely say that they represent valid laws. It is because systems of laws devised by man, whatever their potential toward justice, lend themselves to abuse and misuse by au-

thority that Thoreau, Gandhi, Jefferson, and others refused total submission to "the rule of law." In the words of Thoreau, "for it is, after all, with men and not with parchment that I quarrel."²³

The absurdity that follows from Cox's view can be pointed out when he claims that both law and conscience compel us to keep our conduct and activity within legal bounds, if we perceive that they might be judged otherwise. This type of reasoning demonstrates the "one-eyed-vision" of those individuals whether guardians of the law or fellow citizens, who enjoy the status of being outside the domain of the injustice being protested. It is counter to self interest, a conflict of conscience (for some people at least), and against human nature for a person to submit to a condition of extreme, and in some cases life long injustice, simply to demonstrate "fidelity to law." The principle of such a government, if it is "government by the consent of the governed," has long been lost when its system of laws allow such a phenomenon to exist. The upshot in this case is that if the protester complies with the rule of law, then he in effect, allies himself with the very forces that perpetuate the force. Contrary to being faithful to the law, in such cases, the protester has a right and duty to register his infidelity to these laws.

Much of what has been said so far can also be applied to Rawls. However, I would like to take issue with him on another point that he makes: "I assume that the society in question is one that is nearly just, and this implies that it has some form of democratic government although serious injustice may nevertheless exist."²⁴ It is comprehensible in a comparative sense, to speak of our society being more just than another, although neither may be completely just, but it is not at all clear what Rawls means by a society nearly just. An explanation of such would seemingly entail an appraisal by someone. But generally, what one spectator would consider nearly just, another would take it to be quite unjust. The requirement that there be a democratic government does not necessarily place it within the domain of justice, for even democratic governments that are corrupted or generally unrealized, can be the source of extensive wickedness. And Rawls' willingness to allow serious injustice in a democracy, but yet maintain that it can be nearly just, borders on contradiction, if it is not in fact contradictory.

In other places Rawls confines civil disobedience to a very small area by imposing certain restrictions, or a limited context, within which ones actions can be judged to be civilly disobedient. He claims that the militant is opposed to the entire political system, adding that he shows no fidelity to the law, and his conduct and behavior is outside the law. The militant avoids punishment, Rawls observes, because it would amount to playing into the hands of the enemy and would mean acknowledging, if not showing respect for, the legitimacy of the political order which he is contending with.

Rawls is clearly placing the actions of the militant outside that class of actions labelled civil disobedience. But this point is very questionable. The militant might not necessarily reject the grounds on which the political system is founded, it may be the deviation from such grounds that he is opposed to. He might object to the economic system and its relationship to the political system; he might object to the social system and its relationship to

23. H.D. THOREAU, WALDEN AND CIVIL DISOBEDIENCE 259 (1965).

24. J. RAWLS, *supra* note 17, at 382.

either or both of the other two systems, but express his consternation through political channels (he recognizes that the political system has the capabilities of initiating or influencing social and economic reform).

In pursuit of his goals the militant may resort to methods other than non-violent ones, because of the later's inefficacy—people who, originally were made painfully aware of certain injustices through nonviolence, and who subsequently became sympathetic to the aspirations of the protester, may have lost their enthusiasm in face of the long struggle required in righting extensive and serious wrongs (a phenomenon that Fortas was cognizant of), they may have become disenchanted at failures to influence or correct a rigid and highly resistive system which is devoid of any morality not grounded on goods or benefits for the majority.

The actions of the militant can be interpreted as civil disobedience if it is directed at preserving the same type of political system, even if it does mean tearing it all down and rebuilding again. An artist that sets out to make a violin, but after finding it defective, disassembles it and rebuilds it over, is still working with his art—which is violin-making—and his destruction of the defected instrument does not entail any disrespect for the art (and the reconstructed violin may be from the same blueprint as the original). Quite the contrary, it manifests a deeper love, care and concern for, not only the art, but his particular relationship to the art. The actions of the militant that lead to violence—non-aggressive, but provoked by the very conditions of oppression—can still be interpreted as civil disobedience, rather than either forceful revolution or criminal behavior, if they are directed toward preserving the ideal behind their system.

One must always take into account the spirit under which Thoreau, Gandhi, King and others, practiced civil disobedience. It is the same spirit in which Locke and Jefferson penned their immortal documents, where they laid out the circumstances under which it is the right of a people to abolish a government when it no longer serves them. And to Thoreau, who coined the phrase, this is civil disobedience at its most serious level. Let us now examine this tradition of which Thoreau is a representative.

III. LOCKEAN TRADITION

A. *John Locke: Social Contract, Democracy and Individual Sovereignty*

In this paper this tradition is traced back to John Locke. To fully appreciate the conception of civil disobedience associated with this tradition, let us first examine the philosophical underpinning which was the soil from which this concept sprouted.

Locke was one of the earliest social contract theorist. He believed that men originally lived in a "state of nature." They were all equal in that each was his own judge, jury, and executioner for transgressors of their lives, liberties, and property. But when men form the social contract, they give up these liberties. He says:

And this is done, wherever any number of men, in the state of nature, enter into society to make one people, one body politic, under one supreme government; or else when anyone joins himself to, and incorporates with any government already made: for hereby he authorizes the society, or which is one, the legislative thereof, to make laws for him, as the public good of

the society shall require. . . And this puts men out of a state of nature into that of a commonwealth, by setting up a judge on earth, with authority to determine all the controversies, and redress the injuries. . . . And wherever there is any number of men, however associated, that have no such decisive power to appeal to, there they are still in the state of nature.²⁵

The reasons men form a political society, Locke explains, is to avoid the dangers of a primitive community, where their property, lives, liberties and estates are in constant jeopardy.

In Locke's political community, democracy (rule by the majority), is imperative. Those who consent to forming the social contract must be willing to give up as much power—(1) the power of self preservation by any means within the limits of the law of nature, and (2) the power to punish transgressors of the law of nature—as is required, to the majority, for ensuring the ends for which the pact was initiated. A political society or government is lawful only if its existence is consented to by a majority. The power of the legislative, executive and judicial branches are given to those who hold the office, by the people.

The legislature is created fundamentally for the preservation of society, in Locke's governmental framework. And so long as the actions of the legislative branch is "pursuant to the trust" given it by the people, the citizen owes obedience to it strictly. But there are limitations on the power of the legislature. Locke enumerates these:

First, their power in the utmost bounds of it, is limited to the public good of the society. It is a power that hath no good end but preservation, and therefore, can never have a right to destroy, enslave, or designedly to impoverish the subjects. . . .

Secondly, the legislative or supreme authority cannot assume to itself a power to rule by extemporary, arbitrary decrees; but is bound to dispense justice, and to decide the rights of the subject, by promulgated, standing laws, and known authorized judges. . . .

Thirdly, the supreme power cannot take from any man part of his property without his own consent. . . . Men therefore in society having property, they have such right to the goods, which by the law of the community are theirs . . . without this they have no property at all; for I have truly no property in that, which another can by right take from me, when he pleases, against my consent.

Fourthly, the legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others.²⁶

For Locke, the obligations that one has to a particular government begins and ends with the individual's enjoyment of the protection and guarantees of that government. When an individual who has given tacit consent, gives up ownership to the land he holds within the jurisdiction of the government he rejects, then he is free to "go and incorporate himself into any commonwealth; or to agree with others to begin a new one, in *vacuis locis*, in any of

25. J. Locke, *Concerning Civil Government*, Second Essay, in 35 BRITANNICA GREAT BOOKS 44 (1952).

26. *Id.* at 56, 57, 58. Zinn was himself aware of this function of the legislative when he said, "surely the state—except in totalitarian ideology—is an instrument as Locke and Jefferson understood, for the achievement of human values (life, liberty, the pursuit of happiness, as Jefferson put it). And the state's needs, even its existence, must be weighed against its capacity to achieve these values. ZINN, *supra* note 18, at 80.

the world they find free and unpossessed," i.e. Locke asserts the right to self-determination, that Fortas wants to deny.

The dissolution of society and the dissolution of government, is distinguished by Locke. Dissolution of the former entails dissolution of the latter, and this usually results when there is an evasion or act of war from some external force. It is implicit in Locke's writing that a government might be dissolved without the same necessarily happening to society (as was the case with the American colonies, a century later, when they abolished the English government in America, and set up their own) rebutting the contention by the Constitutionalist that there is a logical connection between disobedience of law and dissolution of society. A government may be dissolved either externally—as above—or internally. With reference to the latter, there are also two ways: first, by altering the legislative. The "essence" and "union" of society consists in having one "will," and it is the job of the legislative to protect that "will." Individuals who are not duly appointed by the people are not authorized to make laws, and citizens are not obliged to obey them. They may instead sever the relationship and establish a new legislative, "as they think best, being in full liberty to resist the force of those, who without authority imposes anything upon them."²⁷

Second, when the legislative or supreme executive "neglects" and "abandons" their responsibility to the people, so that the already existing law cannot be implemented. Laws are not made for themselves,

"but to be, by their execution, the bonds of the society, to keep every part of the body politic in its due place and function. . . . Where there is no longer the administration of justice, for the securing of man's rights, nor any remaining power within the community to direct the force, or provide for the necessities of the public; there certainly is no government left. Where the laws cannot be executed, it is all one as if there were no laws; and a government without laws is a mystery . . . and inconsistent with human society."²⁸

Thomas Jefferson, over a century later and in the same vein, writes:

Whenever any form of government becomes destructive of these ends [inalienable rights such as life, liberty, pursuit of happiness], it is the right of the people to alter or to abolish it, and to institute new government. . . . When a long train of abuses and usurpations, pursuing invariably the same object evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security.²⁹

Locke maintains that elected public officials, through misconduct and illegal acts, may be responsible for the erosion or disintegration of government. To that extent he accuses them of rebellion. He explains that they place themselves into a state of war with the people. The various branches of government act against their trust when they hold the people in a general state of exploitation and oppression. Because of this breach of trust, the individuals in office forfeit the power given them by the people. The people then have the right to resume their *original liberty*, and to establish a new

27. J. Locke, *supra* note 26, at 74.

28. *Id.* at 75.

29. The Declaration of Independence, para. 2 (U.S. 1776).

government which will best provide for their safety and security, "which is the end for which they are in society."

B. *Henry D. Thoreau: Moral Conscience and the Citizen's Duty Against Injustice*

On occasion, people who have not read Henry David Thoreau, carefully have labelled him an anarchist because of statements like, "that government is best which governs not at all," found in his article "Civil Disobedience." As straight forward as this statement might seem at first glance, Thoreau clarifies his true position latter in the same article, when he says:

But to speak practically and as a 'citizen' (emphasis mine), unlike those who call themselves no government men [anarchists] I ask for, not at once no government, but at 'once' a better government. Let every man make known what kind of government would command his respect, and that will be one step toward obtaining it.³⁰

Thoreau is not an anarchist, advocating the extinction of law. He objects to the law, not out of general disrespect, but because of its utilitarian nature—rule by the majority and the priority of good over right. He can be construed to be a reformist in that he would gladly accept an institution or system of laws based on the priority of right and not expediency. For Thoreau it is impossible for a system to be based on justice when the objective is expediency and the determinant factor is the "physical strength of the majority." Moreover, any system of laws not based on justice, citizens are not obligated to obey. Thoreau is clear on this point when he says:

The only obligation which I have a right to assume is to do at any time what I think. . . Law never made men a whit more just; and, by means of their respect for it, even the will disposed are daily made the agents of injustice. A common and natural result of an undue respect for law is, that you may see a file of soldiers, colonels, captains, corporals, privates, powdermonkeys, and all, marching in admirable order over hill and dale to the wars, against their will, ay against their common sense and consciences.³¹

We see immediately that Thoreau and Fortas are products of two different and incompatible schools of thought. The former the intuitionist and the latter the utilitarian. Thoreau gives priority to "right" instead of no "good." He thinks that the citizen should never "resign his conscience to the legislator," and that we owe respect first, to what is right.

Rawls gives several objections to intuitionism which, if reviewed, might shed light on why he stayed clear of that philosophy, for the most part. He says, "first, they consist of a plurality of first principles which may conflict to give contrary directives in particular types of cases; and second, they include no explicit method, no priority rules, for weighing these principles against one another."³² Another objection of Rawls' intuitionism is its elevation of, and the primacy, it places on our intuitive capacities, which he thinks is "unguided by constructive and recognizably ethical criteria," and its inability, as Rawls interprets it, to solve the priority problem.

30. H.D. THOREAU, *supra* note 24, at 252.

31. *Id.* at 252, 253.

32. J. RAWLS, *supra* note 17, at 384.

Intuitionism is void of objective criteria, Rawls thinks, and for him, this is a fatal flaw. What he and other critics fail to perceive is that within this moral theory one must distinguish between the "morally mature mind" and the "morally uncultivated mind." It may be that in a particular society some or even a majority may evidence the latter condition. But, in most civilized and literate societies, however, there will always exist a significant number of individuals who will have little difficulty in comprehending and consenting to Thoreau's position that the "dictates of conscience" should be more coercive than legal obligations. The fact that the theory of ethical intuitionism is subjective in character rather than objective does not *ipso facto* make it null and void. The completion of justice, at times, demand that we get beyond "methods," "rules" and "procedures," where we sense with an inner barometer the correct act to perform.

In Thoreau's system it is only through the exercise of ones' will and the introspection of ones' conscience, consciously, that one can be said to act morally—which for him, takes precedence over acting legally.³³ Blind obedience to law, a built in mechanical response to certain stimuli, has the equal possibility of producing evil as well as good. To condition man in such a way puts him on the same moral plane as the beast, who mechanically acquiesces to the laws of nature.

A citizen has a duty against an unjust law or cause, both directly and indirectly, i.e. not only must one disobey laws or refuse support to causes that are themselves unjust, but he must disobey laws or refuse support to causes that are themselves harmless, but whose effects can be traced to injustice, e.g. paying ones income taxes which is used to support an unjust war. Moreover, if disobedience to a law produces more harm than good, and it is objected to on this ground, then this is further proof of the corruption of the system, as Thoreau explains. It is the system itself which makes it worse. Anytime a system of laws resists reform, hides its faults, and is rigid in its position, then it has the seeds of oppression built in.

Thoreau is constantly on guard against being an accomplice to injustice. He asserts the right to break any law which leaves him open to such. He explains how one is to proceed in the face of unjust laws:

[i]f it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.³⁴

Self reliance is central to Thoreau's view. Any dependent on the government (system of laws) is not free to act morally. The libertarian cannot be threatened or coerced into injustice. He freely accepts the punishment for his disobedience to government (civil disobedience), Thoreau espouses, because "it costs me less in every sense, to incur the penalty of disobedience . . . than it would to obey."³⁵ For Thoreau, disobedience to conscience drains to depletion man's "immortality" and "humanity."

33. H.A. BEDAU'S interpretation shades it a little different. He says, "The appeal to conscience for Thoreau and others who would justify civil disobedience, does not exist in isolation as their sole 'criterion' of political conduct. It is inseparable from an appeal to common moral standards, humane sensibilities and individual responsibility," CIVIL DISOBEDIENCE 23 (1969).

34. H.D. THOREAU, *supra* note 24, at 259.

35. *Id.* at 260.

Thoreau was not an advocate of civil disobedience. He supported the exploits of John Brown, in the latter's violent efforts to free the slaves. However, he did have a big influence on Mahatma Gandhi's formulation of his civil disobedience doctrine. Moreover, the idea behind Thoreau's refusal to pay his taxes can be construed as one of the primitive germs vital to Gandhi's later concept of "non-cooperation." Let us examine Gandhi's philosophy of civil dissent in greater detail.

C. *The Gandhian System and Satyagraha*

Satyagraha is one of those terms that defy a simple and straight forward definition. One comprehends it indirectly, by observing it in operation, by seeing what it does, and by examining its results, etc. Satyagraha is a negative approach toward combating injustice. It is a gentle but firm approach, whereas Thoreau's approach was firm and strenuous.

In Gandhi's system Satyagraha is used in not only the political sphere, but any sphere of life for redress of grievances, against government, family, society, between husband and wife, father and son, etc. Satyagraha purifies both the user and the person it is used against. To understand this concept Gandhi insisted one must have an unshakeable belief in truth and non-violence. Satyagraha can be public or private, and enlist the aid of individuals not directly involved, but only the individual or group who is experiencing the injustice, have the privilege and duty of suffering. This philosophy requires utter self-effacement, greatest humiliation, greatest patience and brightest faith. It is its own reward. Gandhi believed that anyone, however evil, can be reached through Satyagraha, and that any evil, however great, can be effectively eliminated.

A fundamental principle of Satyagraha is that a tyrant may have control over the user's body or material possession, but he does not have power over his soul (from where the protest originates). Affects on the body do not necessarily have corresponding affects on the soul. Some features of Satyagraha are: if there is error, then it only hurts those who err; the safety of the dominant group is assured; the citizen obeys the law not because he fears the sanctions, but because he thinks them good for the welfare of society; and compulsion among the ranks of those practicing it is forbidden. Satyagraha is intertwined with religion and mysticism—an aspect Rawls could not abide—in that it presupposes God, from whom the Satyagrahi (one who practices) receives all his power and guidance. Finally, Satyagraha is not solely civil disobedience, but when our duty demands civil disobedience, "then only civil disobedience can be Satyagraha."

Gandhi distinguishes between civil disobedience and criminal disobedience, explaining that it is the latter that leads to anarchy and not the former. A state must suppress the latter or it perishes, but to suppress the former is an attempt to imprison conscience. A civil resister is harmless, as he uses not arms. "Civil disobedience . . . becomes a sacred duty when the state has become lawless or . . . corrupt. And a citizen who participates in such a government shares its corruption of lawlessness."³⁶

Civil disobedience can only be practiced by those select few that will-

36. M. GANDHI, *THE GHANDI SUTRAS* 144 (1949).

fully and without fear obey the law, as they willfully and without fear disobey unjust laws.

Those laws to whom obedience dishonors must be openly and civilly broken, and the penalty suffered, in Gandhi's system. The citizen may protest the action of the courts by not cooperating with the government and through their disobedience to other laws whose infringement does not conflict with morality. Gandhi explains that the civilly disobedient may refuse to pay his taxes, enter off limits areas if it supports his civil disobedience and disregard the restraints placed on the type of picketing allowed by the state. This is possible in Gandhi's system because he avoids the narrow constraints enforced by the Constitutionalist's system, by subordinating the political sphere to his total field. For him morality supercedes legality, and his transcendental duties supercedes his earthly obligations.

In the Gandhian system one submits to the laws of state because he is free to do so, but submission to an unjust state "is an immoral barter of liberty." Obedience to evil laws or loyalty to an evil administrator makes one an accomplice to injustice. Thus, one has a duty of disobedience to such. Disobedience, however, must be nonviolent, as violent disobedience only deals with dispensable men and leaves the evil in tact, also violence by the people is potentially more dangerous than violence by the government. This nonviolence, in Gandhi's framework, is not the same as "passive resistance" which is a weapon of the weak, as Gandhi sees it, but it is a weapon of the strongest and excludes all forms of violence.

Gandhi identifies two aspects of his civil disobedience: (1) aggressive civil disobedience is nonviolent willful disobedience of laws such as those relating "to revenue or regulations of personal conduct for the convenience of the state;" (2) defensive civil disobedience is nonviolent disobedience to laws which are intrinsically bad, and whose obedience to would be offensive to self-respect and human dignity.

One of the elements in Gandhi's Satyagraha that Constitutionlists cannot abide is his doctrine of "noncooperation." This method when used is an effort on the part of the protester to avoid complicity with evil. Here, as elsewhere in Gandhi's system, the user must endure suffering rather than submit to evil. Gandhi elucidates this concept:

[n]oncooperation with evil is so much a duty as is cooperation with good . . . violent noncooperation only multiplies evil . . . withdrawal of support of evil requires complete abstention from violence. Noncooperation implies voluntary submission to the penalty for noncooperation with evil.³⁷

Gandhi's concept of noncooperation is quite compatible with Thoreau's general drift. A citizen has a duty of noncooperation with an unjust government, and is morally prohibited in sharing in that government's prosperity when obtained through injustice. Noncooperation can be used wholly or partially, whatever the situation requires for combating, successfully, the injustice. The consequences of noncooperation, although more harmless than civil disobedience, are more detrimental to the government. If carried to its

37. E.H. MADDEN and P.H. HARE, *Reflections on Civil Disobedience*, 4 THE JOURNAL OF VALUE INQUIRY 94, n.2 (Summer, 1970).

extreme, noncooperation can stop the wheels of government and bring it to a stand still.

D. *Comparative Analysis of the Lockean and Constitutionalist Traditions*

Now that we have briefly surveyed the thoughts of representatives of the Lockean tradition, there are a few points we should consider about the tradition itself. The Constitutionalist are quick to say that Jefferson and Locke wrote about revolution, not civil disobedience. What these critics fail to grasp is the very tradition, itself, that Jefferson, Locke and Thoreau were part of. The definition for civil dissent grows out of the tradition. It is not made up by the heirs of the tradition, and then retroactively applied to the forebearers of the tradition. Modern day Constitutionlists in the United States are heirs to the Lockean tradition. Consequently, their newly arrived at definitions for civil disobedience should stand on their own, as separate and different ideas, when inconsistent with long established concepts. Newly formulated concepts should not masquerade under old names, they should have their own labels, and then be submitted to the tribunal of the tradition to see if they cohere or dissolve.

The major difference between the two groups lie in their attitude toward and conceptualization of law. Although some Constitutionlists and representatives of the Lockean tradition are teleologists and proponents of democratic theory, generally they seem to be divided along deontological and teleological lines. This is not to say that all Constitutionlists are teleologists and all Lockean traditionalists are deontologists. For sure, it can be easily shown that both Locke and Jefferson were members of the former school, and that Rawls labored diligently to prove that he represented the latter camp (as such he represents a late twentieth century improvement over the earlier constitutionalist tradition). Thoreau, Martin Luther King, Jr., and other advocates of the Gandhian system were clearly deontological in their approach; and contrary to the early Lockean tradition the latter were proponents of nonviolence.

Fortas, Cox and Rawls insist on strict obedience to law, which is conceptualized by them as being the foundation or a necessary condition for a civilized society, understood to be absolute, indispensable, and enduring. The citizen ultimately is subordinated to the state. Whereas with Locke and Jefferson, the law is a tool in the hand of the citizen, an instrument which he fully controls, whose value is determined by its utility. As such it is relative, temporal, mutable and contingent. The citizen is never a slave to law. The greater ideals in life, along with those "inalienable rights" (which transcends civil and political rights, and therefore positive law) are always carefully guarded, and always take precedence over conventional political laws of society. This is the unifying treat and crucial theme in the Lockean tradition ideology, and between it and that of the Gandhian system.

There is an important point to underscore, however, and that is the convergence, however slight, of the two traditions as they have evolved toward a deontological framework. An obvious conclusion to draw from this is that as these two philosophically distinct and antagonistic traditions progress toward improving the human predicament, they approach a similar intellectual view of the world.

The Constitutionalists argue that since the establishment of this government (United States) the constitutional system is such that citizens protesting for social, economic and political reforms have the vehicle necessary—the Constitution—to accomplish these goals. Madden and Hare, criticize Fortas for disregarding the “double standard in the enforcement of law and a double standard in the respect for particular laws,” pointed out by Martin Luther King, Jr.³⁸ Madden and Hare further explain that the oppressed, often times is a minority, for which the ballot is useless because of their inferior numbers. Moreover, “there is little chance of persuading a majority to respect the rights of a minority without persuading them that it is in their interest to respect those rights. Too many Americans . . . allow themselves the luxury of respect for human rights only when such respect does not cost them anything, or preferably, is to their advantage.”³⁹

The Constitutionalists, in their references to Thoreau and Gandhi, seemed to have missed a central point in their view, and that is that men should hold authority over positive law, and not vice versa. The only time it is rational to give “fidelity to law” is when the system of law is just, or i.e., when the system of law exhibits “fidelity to the citizen,” and not ultimate allegiance to other interests. Both Thoreau and Gandhi realize that “fidelity to law” that is fair and equitable is one thing, but “fidelity to law” that is corrupt is entirely another thing. Absolute allegiance to a system which is corrupt and tolerates gross injustice, has as its ultimate reward the destruction or deterioration of society.

A final and important point to make is that the two traditions differ in their capacity to give full expression to the moral nature of humans. The individual, since he is sovereign and autonomous for Locke and a genuine moral agent for Martin Luther King, Jr., (the civil rights activist and proponent of the Gandhian system) and Henry David Thoreau, retains the authority to veto any edict or legal command by fellow humans, whether by some political authority acting alone or in concert with some other legitimate group mandated by the public and with its trust. It is within the Lockean/Gandhian framework that the notion of a “moral being” makes sense. This contrasts sharply with the view of man found in the Constitutionalists framework where we have a mechanically robotized individual acquiescing obediently and faithfully to the commands of humans, in a manner that is both dehumanizing and diminutive of human dignity. The concept of the citizen as a “moral being” does not and cannot reach majority in this context.

In contra-distinction to the Constitutionalists framework, where necessarily, the dissolution of the commonwealth means the dissolution of society, within the Lockean/Gandhian framework, the rights of the individual along with his dignity and worth, are respected independent of the existence of government. This is due to the fact that the concept of the citizen as a “moral being” is logically prior to the concept of the citizen as a “political being”.

38. *Id.* at 95.

39. *Id.*

IV. CONCLUSION

In conclusion, the objective of this paper has been to establish first of all that there are different traditions from which the multitude of views on civil disobedience have sprouted; second, to disclose briefly the philosophical commitments of these traditions; third, to critically analyze the different concepts of civil disobedience, and lastly, to investigate the philosophical ramifications of the two conceptual frameworks.

It must further be stated that the purpose of this paper was not to exhaust the list of possible candidates for these two traditions, but merely to examine the works of some main stream representatives. Moreover, I do not mean to imply that the members of the respective traditions represent a homogeneous class in their broad philosophical framework. Quite the contrary, there are wide differences vis-a-vis common central themes that link them together. And these differences, in another work broader than, or continuous with, the present effort, would be worthwhile philosophically, to pursue. Some differences in the Lockean tradition that would be worthy of exploration are: (a) the willingness of the earliest advocates—Lockean and Jefferson, etc.—to use force and violence when necessary to achieve their end, in contrast with the unalterable commitment to non-violence by Martin Luther King, Jr.; (b) the teleological dimension of Locke's and Jefferson's philosophy in contrast to the deontological thrust of Thoreau. This latter paradox has its counterpart in the Constitutionalist tradition with Fortas and Rawls, respectively. The upshot is that, it is not the difference that we are concerned with in this paper, but rather those all important threads, however slender in places, which tie them together into a definite, definable, recognizable and continuous historical phenomenon.