




10-11-1965

Civil Disobedience v. The Rule of Law

Lewis F. Powell Jr.

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/powellspeeches>

 Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Law and Politics Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Lewis F. Powell Papers, box 116/folder 16.

This Speech is brought to you for free and open access by the Lewis F. Powell Jr. Papers at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Powell Speeches by an authorized administrator of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

24/167 11/5/65

Notes for Lecture
Union Theological Seminary
Richmond, Virginia
October 11, 1965
Lewis F. Powell, Jr.

CIVIL DISOBEDIENCE vs. THE RULE OF LAW

In recent months there has been increasing concern over the worsening crime situation in this country. There is good reason for this concern. Crime, and especially juvenile crime, may well be our number one domestic problem.

But at least the public understands the seriousness of this problem, and its relation to law and order. Indeed, the public is now alarmed and is demanding remedial action on a broad front.

Lawyers are also concerned about a different aspect of deteriorating law and order. This relates - not to ordinary crime as such - but to the accelerating lack of respect for law and for due process, and to the growing use of coercion as a means of attaining ends. The public is largely unaware of the scope and implications of this dangerous trend.

We have witnessed, over the past decade, the development of a heresy that could threaten the foundations of our system of government under law. This is the doctrine that each person may determine for himself what laws are "just", and

that laws and court orders are to be obeyed only so long as this seems "just" to the individuals or groups concerned. This heresy has taken various forms.

Brown v. Board of Education*, ordering desegregation of schools, was decided in 1954. During several turbulent years which followed, many in the South contended that this and other desegregation orders were unconstitutional and unjust and that massive disobedience was proper and commendable. Indeed, there were some leaders who sought to resurrect the doctrine of "nullification", holding that each state could interpose its own will against federal laws and decisions.

In more recent years there have been others - with quite opposite goals - who insist that civil disobedience of orders and laws deemed to be unjust is a legitimate means of asserting rights and attaining objectives. Indeed, it is not too much to say that this form of civil disobedience - and its own unique tactics of demonstrations, sit-ins, lie-downs and mob pressure - has become the principal weapon of certain minority and dissident groups.

* * * * *

*347 U.S. 483 (1954).

In view of the interest of the church in this doctrine, and its endorsement by various organizations of the church, it was suggested that I talk about this tonight. I do so with misgivings, as whatever one says in this sensitive area is likely to be misunderstood. Moreover, it is impossible to deal adequately with such a complex subject in a single lecture.

But perhaps it will be useful to explore some of the fundamentals, and cite some examples. I will do this from the viewpoint of a lawyer dedicated to the rule of law, and also as one who considers the right of dissent to be a vital part of our heritage. I emphasize at the outset that rights to assemble, to petition and to test the validity of challenged laws are also a part of this heritage - protected by the rule of law. But our Constitution and tradition contemplate the orderly assertion of these rights.

I will not venture into the field of theology, although all history records that freedom of religion - as well as our other cherished freedoms - depends ultimately upon the preservation and viability of the rule of law.

May I also say that, in an area in which there is an abundance of emotion - and often too little of cool reason -

I have at least been consistent. Eleven years ago, when Brown v. Board of Education became the law of the land, I opposed the view, then widely held in Virginia and the South, that disobedience and massive resistance were proper and justified.

It is my conviction that those who believe in the rule of law have a duty to oppose disobedience in all of its devious forms, whether urged in causes deemed worthy or unworthy, and whether it purports to be practiced lovingly or in varying degrees of calculated lawlessness.

We must judge this doctrine on its merits, rationally and free from the emotions of causes. If it is a valid doctrine for civil rights missionaries it is also valid for Klansmen and Black Muslims.

The doctrine must be judged within the framework of the American system of freedom under law - where we have a free and vigilant press, where free speech and the right to assembly are zealously protected, where minority groups often have political power disproportionate to their actual numbers, and where - with rapidly diminishing exceptions in the Deep South - the courts and legislative halls are open to all.

It must also be remembered that there is rarely a wide consensus, much less unanimity, as to which laws are in fact just and fair to all concerned. If carried to its logical end, civil disobedience could destroy every cherished value of western civilization. It was Mr. Justice Frankfurter, I believe, who said:

"If each man may determine for himself what is the law, then every man can. This mean first, chaos: then, tyranny."

The historical precedents invoked for civil disobedience are at least imaginative. They range from the tyrannies of Nebuchadnezzar to those of George III and Adolph Hitler. The total irrelevancy of these - and many similar alleged precedents - seems rarely to concern those who cite them.

It is fashionable to rely on Henry David Thoreau as the modern inspiration and authority for the doctrine. Indeed, it is said that Mahatma Ghandi adopted Thoreau's ideas as expressed in his essay on civil disobedience, published in 1848.

One may wonder how many of those who cite Thoreau have actually read him. His basic premise was "that government is best which governs not at all", and he argued for a utopia in which there would be no government. He did indeed assert

that each man should determine which laws were just and obey only those so classified. He said:

"It is not desirable to cultivate a respect for the law, so much as for the right. The only obligation which I have . . . is to do at any time what I think is right."

He was opposed to slavery and to the war against Mexico. He refused to pay taxes, and spent one night in jail.

I suppose we all find a certain appeal in Thoreau's idea of paying no taxes where one disagrees with the government.

But however appealing this may be, and whatever may be said of his literary talents, Thoreau's political philosophy is a doctrine of anarchy, and often has been described as such.*

Ghandi's heroic struggle for India's independence is the precedent most frequently cited for the doctrine of civil disobedience. Yet this technique was used in India, not as a means of enforcing alleged legal or constitutional rights, but to attain national independence. There were no courts and no democratically established political institutions in which the issue of independence could be contested. Indeed with lawful remedies unavailable, Ghandi's alternatives were civil

*See One Hundred Years Ago, American Writing of 1848, edited by James Wood, Funk & Wagnals Co. (1948), p. 2.

disobedience or bloodshed. There is no parallel situation in America today where wrongs may be redressed in the courts and through established political institutions.

* * * * *

The frightening aspects of the doctrine of civil disobedience are that its use and techniques tend inevitably to escalate. They spread geographically and numerically. The worthiness of causes becomes increasingly marginal - and often wholly indefensible.

It also becomes increasingly difficult to maintain the distinction between genuine peaceful protest and assembly on the one hand, and disorderly conduct and mob violence on the other. The common denominator of most civil disobedience tends to be physical coercion in varying degrees.

Moreover, the techniques of disobedience are made to order for adoption and infiltration by subversives and lawless extremists.

In the field of civil rights, proponents of civil disobedience customarily rely for justification upon the injustices which have been tolerated - if not affirmatively

perpetuated - by the law in certain sections of the South. All of us should condemn these injustices and strive to eradicate them by lawful means. But neither lawyers nor theologians, of all people, should justify the use of unlawful means by citing the unlawful conduct of others. Or, quite simply, two wrongs do not make a right.

It is also fair to say that redress is readily available in the federal courts and increasingly so in the state courts, even in the Deep South. Moreover, national legislation has demonstrated that in this country - as compared to India, Nazi Germany or even the American colonies - relief is available through orderly political action.

But those who advocate civil disobedience have not confined it to the South nor discontinued its use when major reforms were accomplished by legislation or court decisions. Indeed, there is reason to think that with success the escalation of goals and tactics has merely tended to accelerate.

There have probably been more sit-ins, lie-downs and disorderly demonstrations in the North than in any other section of the country. Certainly mob violence has occurred predominantly outside of the South - in Harlem, Rochester,

Philadelphia, Chicago, and most recently in Los Angeles.

Let us pause for a look at Los Angeles, which has prided itself on just and generous race relations: In the August anarchy which lasted for three days, 36 persons were killed, 895 were injured, and nearly a thousand buildings were damaged or destroyed - with property loss alone exceeding fifty million dollars. Nothing comparable has ever happened in the South.

I do not cite the Watts rebellion as a classic example of civil disobedience. Despite a dubious record, this doctrine professes to be loving and nonviolent. We may assume that most of those who have advocated disobedience were profoundly shocked by Watts - although the loudest denunciation was of the police and not the rioters.

Yet the question which must concern the more thoughtful leaders is the extent to which the civil disobedience movement contributed to Watts and similar riots?* And an even more

*In a letter to the Herald Tribune, Rabbi Jacob S. Cohen of N.J., held that Watts was influenced by civil disobedience. He wrote: "It matters not whether the inhabitants of Watts knew Dr. King. What is important is that all America knew that disobedience to law based upon a justifiable claim was a method to achieve results. The hoodlums in Watts merely transferred this principle to acts of social destruction." Reprinted in Richmond Times-Dispatch, 10/11/65.

disquieting question is whether the emotions which have been engendered will lead to further anarchy?

Is it possible for the masses of the people to draw fine legal distinctions between various methods of disobedience, and for street multitudes to respect subtle differences between peaceful protest, disorderly conduct and mob violence? Is this possible, particularly where respected leaders appeal to class and race consciousness, where less responsible leaders openly incite class and race hatred, where the news media seldom exercise restraint in publicizing racial discord, where misconduct and crime are often held to be justified, and where radical racists (e.g. the Klan, Deacons and Muslims) stimulate and exploit this explosive climate of opinion. Who can wonder that the cry in Watts was "Burn, Baby - Burn!" and "Kill Whitie!"

Or, to use a less dramatic example, who can draw the line between the following: On the one hand, a small private restaurant is occupied by sit-in demonstrators who prevent the restaurant's use by its lawful owner and by other customers. On the other hand, the demonstrators go just one step further; they loot the restaurant and perhaps break its windows. There are differences of degree, of course. But how many of us would

care to explain these differences to a group of emotionally inflamed teenagers.

Let us take another actual example of civil disobedience - one currently being headlined in Chicago. Civil rights groups there are determined to "get" Superintendent Willis because he will not further disrupt public education by busing pupils and destroying the neighborhood school.

As a result, Chicago has experienced a series of so-called "nonviolent" demonstrations - numbering nearly 100 in recent months - directed against the Democratic Mayor and the Board of Education to force removal of Mr. Willis. Groups of demonstrators lie down in the middle of streets during the rush hours, blocking traffic and causing extreme inconvenience to thousands of innocent citizens. More than 800 people have been arrested in Chicago during the summer, and yet this form of lawless coercion continues under the banner of peaceful civil disobedience.

* * * * *

One of the naive misconceptions is that civil disobedience relates only to the civil rights movement. Its use by other groups and in other causes was predictable.

It has now become the favorite technique of the small, but growing group of malcontents who are promoting "causes" on college campuses. The sit-ins and other disturbances on the Berkeley campus of the University of California are an illuminating example. The cause there, professing initially to be unfettered free speech, soon deteriorated into a "filthy speech" movement.

The new cause on many college campuses is Vietnam. There are sound reasons for concern over the dangerous situation in Southeast Asia. There have been constructive and responsible discussions by students and faculties at a number of universities. This type of discourse is to be commended, and my remarks are certainly not directed to such discussions or to those who participate in them.

But there are several left-wing student organizations which are contemptuous of rational discussion and orderly debate. Some of these are well financed and skillfully led, often by experienced agitators who are neither students nor professors.

The techniques employed by these organizations were recently described in an article in the Christian Science Monitor as those "tested by civil rights leaders in this country, and by a variety of demagogues - and idealists - in many other countries."*

The famed journalist, Marguerite Higgins, recently returned to her alma mater, the University of California, to report on the plans of the student Vietnam Day Committee. This organization opposes the war in Vietnam, and plans major demonstrations to disrupt our military effort. One of its targets is to immobilize the Oakland Army Terminal by disobedience tactics.

Miss Higgins reported the following statement made to her by a leader in the movement:

"There are just laws and unjust laws . . . we don't see any reason to obey unjust laws. We see every reason to break unjust laws, especially for a righteous cause like ending the war in Vietnam."**

The liberal political columnists of the New York Herald Tribune, Roland Evans and Robert Novak, also have

*Christian Science Monitor, September 23, 1965, review by C. Michael Curtis of the new book entitled The Berkeley Revolt by Lipset and Wolin.

**The Philadelphia Inquirer, Thursday, Sept. 23, 1965.

recently reported on campus protest and disobedience movements at the University of California. They described the situation there as the "Agony of Berkeley":

There are posters on the campus with pictures of the President over the caption, "Lyndon Johnson: Wanted for Murder in Vietnam".

Petitions are being circulated among students pledging them to "defy the draft."

"This radical hardcore (some 300 student leftists) control a network of student organizations - concerned both with campus affairs and foreign affairs - with a tendency to follow the Chinese Communist line in foreign affairs."

Messrs. Evans and Novak concluded with this assessment of civil disobedience at the University of California:

"Time is running out. Distinguished professors are considering leaving here if the situation does not change soon. Simultaneously, professors at other schools who view the University primarily as an instrument of social revolution are attracted here like a bee to honey. If this informal faculty transfer assumes mass proportions, the cost to one of America's great universities of its student movement will be high indeed."*

Although the conduct at California is the best known example of disobedience tactics on the campus, they have been

*Evans and Novak, "Inside Report: The Agony of Berkeley", New York Herald Tribune, 9/30/65.

used at Brooklyn College,* Columbia, Howard University and other schools.

James Reston, associate editor of the New York Times, has referred to the mood on some campuses as one of "violence", with sit-ins and inflammatory demonstrations taking the place of reasoned discussion. Mr. Reston pointed out that some of the student and teacher demonstrations have been "backed by (anti-American) propaganda of the most vicious nature."**

There is good reason to believe that the radical left, which considers the college campus to be its number one target, is benefiting both from the respectability of the civil rights movement with which it professes to associate, and from the adoption and expansion of tactics of civil disobedience. It is also true that a substantial number of loyal, idealistic but politically innocent students are being taken in all over our country.

America is at war with the Communist enemy in Vietnam. We are still free to discuss this war and even criticize

*See documents filed by Dr. Gideonse, President of Brooklyn College, with the Senate Judiciary Committee Subcommittee Investigating Communist Youth Programs, as published by the U. S. Government Printing Office on May 18, 1965, part 2, p. 123, et seq.

**New York Times, April 21, 1965.

it. But American boys are being killed and maimed by an enemy which seeks to destroy freedom everywhere. This is a time for loyalty and patriotism. It is no time for burning draft cards, staging sit-ins, and disseminating false and vicious propaganda against our own country.

Traditionally our universities have been the citadels of free inquiry, devoted to the proposition that rational discussion was the surest way to truth. This, they must ever be. Those who now recklessly break this tradition of respect and tolerance by resorting to coercion, whether "violent" or "non-violent", menace the spirit of responsible inquiry so essential to an institution of learning. They also contribute to the growing disrespect for law and orderly processes - whether these be the law of the land or duly adopted rules of a university.

* * * * *

I have cited examples of the manner in which civil disobedience tends to escalate - from the genuine peaceful protest march in a southern town to race riots and mob violence in great cities, and from worthy causes (where acknowledged civil rights have been denied) to vicious and obstructive action against our country.

This type of escalation is likely to continue until responsible leaders - in government, in the church and throughout the land - recognize the fallacies and dangers of civil disobedience and denounce it as a doctrine which is inherently incompatible with the rule of law.

In times of passion it is especially important for intellectual and spiritual leaders to think in terms of principle. We are discussing here the fundamental principle of law and order and due process. But even if one takes a pragmatic view, it is well to remember that public opinion is capable of abrupt swings. Particular groups can never be certain that they will always be strong enough to force others to respect their rights. Much ill will has already been engendered by civil disobedience tactics. Those who invoke these tactics in worthy causes may in the end suffer the most.

The very rights now sought to be vindicated can be assured only so long as laws are observed and due process followed. The courts and legislative halls, rather than the streets, are the only dependable places where differences can be fairly reconciled and individual rights ultimately protected.

Mr. Justice Black has spoken eloquently on this subject:

"Minority groups . . . are the ones who always have suffered and always will suffer the most when street multitudes are allowed to substitute their pressures for the less glamorous but more dependable and temperate process of the law."*

We have preserved individual freedom, including genuine freedom of conscience, under the Anglo-American system of law for the longest sustained period in human history. It has not been a perfect freedom for all citizens, and yet as a system it affords more hope than any other which man has yet devised. We shall continue to preserve this system, and assure its benefits to all citizens, only by acceptance of the rule of law and strict adherence to lawful means.**

*Dissenting opinion in Cox v. Louisiana, 379 U.S. 559, 575, at 583-584 (1965). Mr. Justice Black further said: "Experience demonstrates that it is not a far step from what seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends . . . Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket the streets whenever they choose in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause or their country."

**Mr. Justice Douglas has put it quite simply: "We reject the philosophy that the end justifies the means. The vitality of human rights means respect for procedure as well as respect for substantive rights." Douglas, Address before the Judicial Conference of the Americas, San Juan, Puerto Rico, May 26, 1965.

The bringing about of a wider public understanding of these truths should be a first duty of all who wish to strengthen the foundations of freedom. I would rank lawyers and ministers in the forefront of those who have the greatest responsibility.