

# Watergate as Civil Disobedience

Barbara and Edward MacKinnon

It is not too early to try and anticipate some of the possible defense strategies that might be used in trials emerging from "Watergate." Some months ago, in one of those TV appearances, Richard Nixon suggested an excuse by way of comparison with the illegal antiwar demonstrations of the 1960's. Then there was Jeb Stuart Magruder before the Senate Watergate Committee arguing that his former ethics teacher, William Sloane Coffin, had inspired him with the idea that for certain higher reasons a breaking of the law was justified.

Other Watergate defendants have pleaded loyalty to Nixon and the Nixon cause as sufficient justification for their otherwise illegal actions. Notable were John Mitchell's insistence that (almost) anything was justified to prevent "the alternative" candidate from being elected; Patrick Gray asserting that loyalty to Nixon should override his own doubts about what he was asked to do; and Bernard Barker's commitment to the defeat of communism in general and Castroism in particular.

All of these defense maneuvers turn on the idea that the good end justifies the means, in this case even illegal means. Presented in such a simplistic form, the position is as untenable as is its opposite, namely, that whatever is illegal is immoral. The question is: When is the deliberate violation of a law ethically justified?

The problem is in specifying which ends justify which means and by what recognized standard might such judgments be made. In the public life of America there has been ample room for the pursuit of many and divergent causes. Pluralism is the rule rather than the exception. Some ends can be singled

out as more worthy than others, but it is often far from easy to reach consensus.

There is quite another way, however, to examine the validity of the kind of comparison Nixon has made. Rather than evaluating causes or ends, there is a tradition in which the methods themselves must possess particular qualities in order to justify breaking the law. This is the tradition of civil disobedience.

The question of civil disobedience is, of course, ancient, but has been significantly modified in contemporary discussion. Our purpose here is to sketch the growth of a consensus, to discuss the principles which seem to have won general acceptance from people of widely different philosophical, religious and political persuasions and to indicate the significances of these principles for the issues raised by Watergate.

The question of how much allegiance civil authority can command emerged as an intellectual problem only when the limitations of authority were recognized. The god-king of the Egyptians required absolute submission. The early Greeks experienced more of a conflict. Antigone transgressed the command of lawful authority that her brother lie unburied, and justified this on the grounds of a higher law. Socrates, unjustly condemned to death, resolutely acted on the belief that it would be wrong to violate the laws of the city. Any state whose laws are systematically disregarded or subverted cannot survive.

Antigone and Socrates pose the dilemma in its pristine form. Today the dilemma has taken the form of a debate between those who argue that positive law is only a limited and partial expression of the justice the majority is willing to bear and that there is a higher law written into the fabric of things which men of conscience can see and speak out for by word and deed, and those, on the other hand, who emphasize society's need for the stability that lawfulness alone can provide.

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The conflict of conscience with positive law and authority took a sharper form in the Judeo-Christian tradition. At first there were overt conflicts, such as burning incense to Jupiter or remaining faithful to the one God. Later medieval theologians and canonists gave this idea of a higher law of conscience philosophical underpinnings with the doctrine of a natural law which is known by right reason contemplating the harmonious order of a universe that follows a divine plan. The idea was simple and straightforward. Natural law gave the basic ordering, while positive law specified the details. Any positive decree contradicting natural law is a corruption of law and must be considered null and void.

Americans have inherited this tradition of a higher law that conscience must follow. But we have come, however reluctantly, to abandon the idea that there is an unambiguous and objective means of determining what these higher dictates are. The Declaration of Independence insists that man has certain inalienable rights which governments are ordained to secure so that when any government "becomes destructive" of those ends "it is the right of the people to alter or abolish it."

However, in a society that is pluralistic by principle, no individual's appeal to a higher law or a private vision can be treated as objectively valid. What the tradition of civil disobedience needed was a redevelopment concerned more with method and less with substance. When there is no agreed-upon way of determining the justness of a cause, society needs general guidelines specifying the manner and limits within which individuals are justified in supporting and promoting private causes. Appeal to higher principles is not disallowed, but it cannot be granted the same objective status as positive law.

This methodological redevelopment was not thought through as an academic exercise. It emerged from conflict and reflection, from the efforts of Thoreau, Gandhi, King and the growing multitude protesting the Vietnam war. In spite of disagreement on details there is a viable consensus on the general guidelines distinguishing true civil disobedience both from the simple lawlessness which violates the law but does not seek to change it and from revolution which seeks to destroy rather than purify the basic institutions of society. The following seven principles are largely a commentary on Martin Luther King's "Letter From the Birmingham Jail."

**F**irst, deliberate civil disobedience is a last resort. It should be adopted only when the normal means of redressing a serious injustice are known to be ineffective.

Second, civil disobedience is the violation of some civil law. It is not necessary, however, that the law one is protesting is the law one breaks. Thoreau refused to pay taxes to protest the injustice of the fugitive slave law and of the Mexican war. Draft

cards were burned to protest the Vietnam war, not necessarily to protest conscription.

Third, the protesters must have the explicit purpose of dramatizing an injustice. This was Gandhi's great contribution which King adapted to the American scene. Civil disobedience is essentially a form of education, a means of bringing the majority to see the injustice of a law or policy or the inequity of an institutionalized practice. Thus true civil disobedience expresses a respect for law in general and a faith in society's ability to rectify what is unjust.

Fourth, there must be an essential publicity both to the act and to its purpose. A covert act cannot educate the majority to the injustice of the law being protested. The message ought to be at least as clear as the action. To block the streets and paralyze traffic is not an effective act of civil disobedience unless the purpose is clearer than that conveyed by, for example, the 1969 rhetoric about shutting down Washington.

Fifth, and a more disputed point, true civil disobedience is nonviolent. Respect for human rights that have been violated is hardly enhanced by further violation of other rights. Physical violence as a deliberate method is generally a mark of revolution rather than civil disobedience. The disputed cases generally involve protests against situations where violence of some sort is already being done to victims of the situation.

Sixth, there must be a basic willingness to accept the penalties decreed for violating the law, but the way this is expressed may vary. The common factor is the purpose of protesting against an unjust law or situation while manifesting respect for the role of law in society. The imprisonment of a respected and prominent figure, such as Gandhi or King, dramatizes the injustice involved. However, the same purpose can be manifest in fighting a penalty with the means the law allows, as Daniel Ellsberg did. This principle would not cover student protesters, whose first demand is automatic amnesty for any violations committed during their protests.

Finally, there must be a reasonable proportionality between the anticipated ill effects resulting from civil disobedience and the good results that may be expected. The ill effects are both the particular disturbances that an act of civil disobedience may cause and the detrimental effects that may result from the public example of violating a general law for a private purpose. Any successful public violation of a law tends to reduce respect for law. If the violation is part of a protest that has almost no chance of success, it is difficult to see a due proportion between means and end.

**I**n "Watergate" the cause at issue was not the violation of positive laws through respect for higher law, but a partisan political victory. Normal means sanctioned by law were fully adequate

to achieve this end. The idea of protesting an unjust law or an inequitable policy has no place when the people responsible for the acts are the same people responsible for administering the law and setting public policy. Far from being open acts aimed at enlightening the public, the deeds in question were deliberately secretive in both their aims and execution. Protracted cover-up efforts, coupled with discussions of executive clemency, hardly reflect a disposition to accept the penalties imposed by law. Finally, as the perpetrators themselves readily concede, there was no proportion between the crimes and the benefits to be expected from their success. Any attempt to explain Watergate or to exonerate those responsible by citing the tradition of civil disobedience inevitably falsifies and trivializes the tradition and misrepresents the facts to which it applies.

If those responsible for Watergate can be justified at all, it is not through the principles proper to civil disobedience but through the less heroic principles concerning cooperation in wrongdoing. When someone skyjacks a plane and bargains the lives of innocent civilians against the promise of ransom money, his success depends on the cooperation of others; the confederates who assist him and the pilots who follow his directions; the gun salesmen who supply the tools and the stewardesses who carry his messages. All may cooperate to differing degrees. But all do not share the same guilt. How can one justify, or at least condone, giving aid to those who are breaking the law?

Some distinctions drawn from older moralists supply helpful guidelines, beginning with the traditional distinction between formal and material cooperation. Formal cooperation requires sharing the same intention as the agent. In this sense the man who plans a robbery or drives a getaway car shares the formal intention—and the formal guilt—with the man who actually commits the crime. Material cooperation is a matter of supplying means or contributing to conditions which help to expedite a crime, even though one does not share the criminal intention.

While formal cooperation in a crime is culpable, material cooperation obviously admits of differing degrees of guilt. Roughly speaking, the degree to which a material cooperator shares in a culprit's guilt depends on two factors—his effective freedom to give or refuse cooperation, and the closeness of the connection between his cooperation and the crime. A person forced to give over money at gunpoint is surely cooperating in the commission of a crime, but his cooperation is anything but willing. Between forced material and free formal cooperation there are degrees of freedom contingent upon such factors as psychological pressure and promise of re-

ward. Similarly, the question of closeness of connection admits of degrees. There is a difference between willingly supplying the equipment necessary for electronic eavesdropping and typing or filing the notes that result from eavesdropping.

These principles are hardly the expression of lofty ideals. Yet they and others like them supply practical guidelines for ethical reasoning in a life where compromise is inevitable. Whatever justification they afford stems not from following a higher law but from the concessions necessary to survive and function. What justification might these lowly principles afford to those involved in Watergate?

It is not a question of justifying the actions but of deciding that some individuals are less guilty, or not guilty at all, because of lack of knowledge, lack of freedom or remoteness of connection. There is no need to pursue these considerations here, for existing law supplies ample consideration for such extenuating circumstances. But these principles supply *no ethical justification* for those who set the policies leading to Watergate and related crimes, including the protracted efforts at a cover-up.

The overt harm of Watergate is, by now, obvious to all. Less obvious, but perhaps even more pernicious in the long run, is the perversion and trivialization of a moral tradition that has existed both in the form of explicit principles and, more important, in the moral sense of the American people. To suggest that the principles invoked to justify conscientious draft resisters and those struggling for civil and racial rights also cover people involved in illegal break-ins, illicit electronic eavesdropping and clandestine manipulation of campaign contributions is to manifest a total misunderstanding of this moral tradition. Prior to the Watergate revelations the incompatibility between the tradition of civil disobedience and the mentality of the Nixon Administration was blatantly manifest in, among other things, the latter's adamant refusal to consider amnesty for those who had opposed the Administration by following the tradition of ethical disobedience.

We believe that Watergate has done far more to undermine respect for moral principle than did any of the demonstrators, draft dodgers or paper leakers whom this Administration so self-righteously deplored. Any attempt to place the cause of Watergate at the doorstep of civil disobedience is a degradation of a serious tradition. If, as we hope, this moral cover-up is no more successful than the prior political cover-up, the Watergate affair may eventually contribute to a rejuvenation of the moral sense in American political life.