# V

# THE JUSTIFICATION OF CIVIL DISOBEDIENCE

## 1. RECOGNITION, JUSTIFICATION, AND GENERALIZATION

It is one thing to identify an act as a clear case of civil disobedience and another thing entirely to judge its rightness. The former requires criteria of recognition, with which I have been largely concerned up to this point; the latter requires criteria of justification, with which I shall be largely concerned from this point on. An act is justifiable if a reasoned demonstration of its rightness can be given. Because there is much uncertainty and disagreement over what is meant by rightness, and how it can be established, there is bound to be uncertainty and disagreement also over claims that acts of civil disobedience are justified or unjustified. Such issues cannot be resolved simply or beyond controversy; they will remain perennially subjects of philosophical and political dispute. Careful reflection, however, while not ending such disputes, may clarify what is at issue, and may provide a rational framework within which argument can continue intelligibly and profitably. It may also be possible to reach some larger conclusions

about how the defense (or criticism) of civil disobedience might most reasonably be carried on.

The construction of this rational framework is the aim of what follows. From the outset I disclaim any effort to show that civil disobedience, taken generally, is always justified, or is never justified. Both of these extreme views are almost certainly false. Recognizing how various are the laws the disobedient may break, how different may be the objects of his protest, and how complicated and variable may be the contexts in which the disobedience takes place, we must be very cautious indeed in affirming conclusions about all cases of civil disobedience, and very loathe to say that all of it, or none of it, is justified. What may prove justifiable, or unjustifiable, after careful analysis, is not civil disobedience *überhaupt*, but this or that act of civil disobedience in a given and well-understood social context. Only in the light of these contextual considerations can specific acts of protest be fairly judged.

In spite of the variety of contexts, however, we can reach some general conclusions about the paths that reasoned justification may or may not follow. These conclusions will not enable one to say, flatly, whether a given act of civil disobedience is right, or wrong; but they will help one to undertake the rational appraisal that the particular act of civil disobedience probably requires and deserves.

Throughout, the distinction earlier drawn between civil disobedience and revolution (see Chapter II, Section 3), should be kept in mind. What may serve to justify a rebellion may very likely justify unlawful protest also, but the converse is not true. The civil disobedient does not seek to overthrow the Constitution, or the system of laws, and we must be careful not to impose upon him the far weightier task of the

kind of justification that we rightly demand from the revolutionary. In both cases, however, deep questions regarding the limits of the obligations owed by a citizen to his state are being raised. Civil disobedience must be sharply differentiated from revolution but is, like it, a very serious matter.

## 2. CIVIL DISOBEDIENCE AND LEGAL JUSTIFICATION

It follows from the nature of an act of civil disobedience that it cannot be given a legal justification. Within a given juridical system, the law cannot justify the violation of the law. Often, it is true, laws conflict, or appear to do so. Such conflicts are ultimately resolved by determining which of the conflicting elements is controlling in the given case. Making that determination may require the invocation of some higher principle not yet explicitly expressed in the legal system. However wisely, some resolution of the conflict of laws is likely to be achieved, and the statute or common law principle overruled in that resolution is no longer, to that extent or in that context, the law. The law may justify an act, but it cannot justify an unlawful act.

A familiar illustration is the case of the motorist who, stopping at a red traffic signal, is directed by a policeman to drive through that signal. He faces no serious dilemma. It is the law that one must not drive through red lights. But it is also the law that one must obey the instructions of authorized police officers, and traffic ordinances usually make it very clear that in cases of conflict the instructions of the officer take precedence, for it is as their instruments that mechanical signals are employed. The motorist in that situation must drive through the red light, of course. In doing so he does not break

the law. Conflicts within the legal system are rarely that simple; but, however complex, their resolutions always seek, as in this easy case, to maintain or reestablish the consistency of the hierarchy of laws, so that an act, once clearly described, either is or is not an offense within that system.

Such consistency is not always realized in fact. Often a citizen, with the best of intentions and legal counsel, may be genuinely uncertain, in view of an apparent inconsistency in the legal system, whether an act he contemplates is lawful; he may be unable to determine beforehand how that legal conflict will be ultimately resolved. These uncertainties are surely regrettable, but they cannot be said to justify an act that is ultimately pronounced illegal. In the light of his unavoidable quandary, such a person may escape punishment; but if his act is held unlawful at last, there is no way in which the laws of that system can justify it.

Sometimes a specific law may open clearly restricted legal avenues to those whose conscience or religion forbids their compliance with its major commands. Outstanding examples of this are the careful provisions often made for conscientious objectors to required military service. But those who use these provisions do not disobey any law; they are, on the contrary, meticulously law-abiding. What is legally justified by such provisions is a particular course of action, given some carefully specified qualifications; they never justify, nor could they justify, deliberate disobedience. (See Chapter II, Section 2.)

Are there no exceptions to the principle that civil disobedience cannot be legally justified? A careful examination of cases sometimes claimed to be exceptions will show that there are none.

It sometimes happens that a citizen will believe, in good

faith, that a certain law deprives him of some constitutionally guaranteed right and is therefore invalid. His belief may be correct or incorrect, but to determine this the issue must be brought before the courts, whose job it is, in the American system, to judge the constitutionality of legislation. Normally, one cannot simply ask some court to rule on this matter but must bring the statute to judicial test. Such a challenge is usually possible only through an actual case, in which the right in question is exercised through an infraction of the statute that is the object of attack. This infraction is likely to be deliberate and carefully thought out in advance. It aims at the ultimate nullification of a specific law and at least seeks to compel some clarification of its constitutional status. Some might argue that since this clarification is highly desirable for all, and since it can come only as a result of a challenge through infraction, the deliberate disobedience of law that initiates such a challenge is justified by that legal system. The legal system, then, appears to justify some cases of civil disobedience.

This conclusion is not correct. It is the result of a confusion between what the structure of the system may encourage and what the laws of the system may justify. The claim of justifiability derives its plausibility from the fact that the peculiarities of our legal system may make deliberate violation of a law a convenient instrument of attack upon it. But no legal system can be said to *justify* all conduct that seeks to challenge one of its elements, and certainly it cannot justify challenge in the form of disobedience. Such challenge must go forward at the risk of the challenger. If he is not prepared to take that risk he must rely upon the channels of legislative amendment or repeal. If he does challenge the law by deliber-

ately violating it, and the law is ultimately held to be constitutional and valid, he must expect to pay not only the costs of the judicial test but the penalty of the original disobedience as well. Part of his aim may have been the laudable one of legal clarification. But if the act through which the clarification is sought is found, in the end, to have been unlawful, that laudable objective cannot be said to give the act legal justification.

Much may be said about the advantages and disadvantages of a legal system so organized as to permit the testing of the constitutionality of laws only through litigation on specific infractions. It is an inconvenient system for one who believes his rights infringed by some statute. It is, on the other hand, a system that greatly encourages restraint by the courts (who are not, after all, the originators of the laws nor usually the direct representatives of the people) and obliges them to restrict the applicability of their pronouncements to concrete cases in which the factual context is given, and to other situations essentially similar. This is a real hindrance to constitutional testing and a limitation upon the power of judges. But it has not generally prevented judicial remedy for crass violations of constitutional right; and it is probably a desirable restriction where the law-making power of the government is vested fundamentally in a legislature consisting of the people's elected representatives. In any event, that is the character of the American legal system. Fully understood, its structure cannot be held to justify disobedience of law.

It may happen that such a challenge to the constitutionality of a law will prove successful—that the law in question will be declared unconstitutional by the highest court, and hence invalid. After such a finding the act of the challenger,

originally appearing to be deliberate lawlessness, is justified and his prosecution quashed. Are not such cases instances of legal justification of civil disobedience? Surely not. What has been found lawful in such cases is the act of the challenger, and the court may do this by striking down (or otherwise invalidating for the case at hand) the statute he was charged with disobeying. The upshot of such proceedings is the establishment of the innocence of his conduct. But if the conduct was legally innocent there was not, after all, any genuine legal disobedience. The law defied proved to be not a good law at all, or proved to be inapplicable in cases of just that kind. Successful challenge in the courts cannot yield legal justification of civil disobedience, because the fact of success cancels the legal infraction that is an essential element of civil disobedience.

Deliberate challenge of a law believed unconstitutional is often not successful. When the ultimate finding of the courts upholds the law under attack the original conduct is indeed a violation of law. The disobedience may have been (although it need not be) deliberate—but the legal result provides no justification of it. Again, the law cannot justify the breaking of the law within a given legal system.

In some cases the challenge presented by apparent disobedience may not be directed at the validity of the statute but at the validity of its application in certain ways or under certain circumstances. Laws valid on their face may be improperly applied so as to defeat constitutionally protected rights. No one will deny, for example, the right of a community to enact legislation that prohibits littering and penalizes it by heavy fine. The use of such laws to prevent the distribution

of political pamphlets, however, will rightly be held an unconstitutional application of them. Again, it may be entirely reasonable to require that the organization of a parade through city streets first be cleared with municipal officials to insure that there is preparation for the consequent disruption of traffic and that the inconvenience of nonparticipants is minimized. But using such licensing powers to prohibit parades because they support political views unpopular with the city administration will be found unconstitutional. In such cases the applications of the statutes are invalidated while the laws themselves may be allowed to stand. The logical status of the justificatory procedure is the same in these situations as when statutes are altogether struck down. Ultimate legal justification of the challenger's conduct nullifies any finding of disobedience; ultimate legal finding of disobedience nullifies any claim to legal justification.

All this is very well in theory, it may be replied, but we seem to have obscured, with words, many of the actual cases of what is commonly called civil disobedience. For that expression is often used to describe the act of one who deliberately breaks a local ordinance in the honest belief that it could not stand the test of higher judicial scrutiny. Suppose (as is often the case) that he is correct in that belief. He may not have the time, or the money, or the ability to pursue his rights in court. Pressing an appeal through the courts, on constitutional principles, requires considerable financial backing and extraordinary patience. Even if one is fully prepared for this ordeal, he is likely to be tried and convicted by local authorities, and may even be punished (perhaps harshly) if he is not quick and clever in seeking judicial relief during appeal.

And the appeal, though right in principle, may fail on some procedural technicality. In short, even when the statute does infringe on constitutionally protected rights, an ultimate legal justification of the rightful act that violates that wrongful statute is only rarely forthcoming. In such cases the infraction and its punishment are indeed present. Yet (by hypothesis) we agree the act is ultimately justifiable before the law. Shall we then say that this is not civil disobedience? Or should we say that it is civil disobedience, but legally justifiable?

The puzzle presented here arises out of conflicts between principles at different levels of authority. The hierarchy of authorities is a practical necessity in a large state and a logical necessity in a federal system such as that of the United States. The citizen is properly subject to local, *and* state, *and* national laws. Within certain spheres municipal and state laws suffice; where constitutional issues, foreign affairs, or various other special matters enter, federal law is supreme. The several systems of law—municipal, county, state, national—are concomitant and are for the most part consistent. When inconsistencies arise (or are claimed to arise), only complicated litigation can fully resolve the matter.

Whether we say of the case described above (an act in deliberate violation of local statute but really protected by constitutional guarantees) that it is or is not civil disobedience, or that it is or is not legally justifiable, depends essentially upon the legal context within which we are viewing it. Taken in the context of the more restricted local (or state) legal system, it is civil disobedience and it is not (in that system) legally justifiable. Taken in the context of the larger, federal legal system, the same act may be constitutionally

justifiable, and if so it will not be viewed (in that system) as disobedient at all.

Uncertainty and confusion in the classification of particular protests is partly a consequence of a frequent and natural but unconscious shifting in thought from one to another of these contexts. Neither is *the* correct context; either may be appropriate depending upon the purpose of the judgment we seek to make. At times we view the act in the larger scheme of American law; at other times we view it in the smaller scheme of immediate law enforcement. In the former we may approve of the act, while in the latter we may conclude that, regrettably, it is a clear infraction of law and calls for legal action.

Once this shifting of context is recognized, a rational treatment of protests of this kind is greatly facilitated. Sound moral judgment of human conduct is rarely (if ever) possible without a thorough understanding of the context of fact and principle in which that conduct, and its judgment, goes on. As a practical matter, however, one should realize that the legal context of first and most pressing importance to one who deliberately breaks what he believes to be an unjust law is the immediate legal system within which that law is operative. While he may seek or believe himself entitled to ultimate constitutional justification, such a person is, in the immediate framework of law, guilty of some crime as a result of his deliberate act. In this primary context—very likely the only legal context in which his act will ever be formally judged—such a person surely is a direct civil disobedient. But in this context, of course, there is no legal justification for his act. Once again: no act can both violate the law and be justified by the law within the same legal system. (See also Chapters VII and VIII.)

## 3. CIVIL DISOBEDIENCE AND MORAL JUSTIFICATION

It follows from what has been said that if there is any possible justification of civil disobedience it must come from outside the legal system. The disobedient protester, to justify his action, must give extra-legal reasons for breaking the law, and he must show that these nonlegal considerations override his obligation to obey the law. This will not be easy for him to do.

Let us put aside the case of a grossly immoral tyranny, of doubtful legitimacy, enforcing cruel and oppressive laws. Deliberate disobedience under such circumstances (if those circumstances could be agreed upon) might be generally and even readily approved. Such, however, is not the context in which most civil disobedients see themselves. They will allow, in most cases, that their government is a reasonably decent democracy, that it acts out of legitimate authority, and that its leaders are duly constituted. They will grant that the laws, having been properly authored and enacted by the people's representatives, have a legitimate claim on the obedience of all citizens, and that that claim applies to them, the disobedients, no less than to everyone else. This obligation to obey, however, is but one component of the moral forces acting upon them, they will argue. They are under other obligations also, strong moral obligations that outweigh those imposed by the legal system, and that constrain them to disobey certain laws under certain circumstances. While not claiming to be above the law, or exempt from it, they do claim to be *right* in disobeying it in very special and perhaps even agonizing situations.

Such claims are often mistaken and are sometimes outrageous. They require careful defense. And the burden of the argument must rest upon the disobedient, since his deliberate violation of law must be presumed wrongful unless he can show why it is not. Further, his must be a rational defense. The mere allegation—even if it is in good faith—that one has a moral obligation to disobey cannot justify that disobedience. When the disobedient contends that in judging his act its circumstances as well as the letter of the law must be taken into account, he is correct. The moral obligations one is under and the resolution of conflicts among them do depend upon many complex considerations relating both to one's own circumstances and to his beliefs about those circumstances, as well as to principles entirely independent of him. But while personal beliefs and circumstances are relevant, the final determination of what a man ought to do is dependent upon very much more than his own convictions, however sincere they may be. When the claim is made, therefore, that moral considerations compelled or justified disobedience of law, that claim needs to be closely examined in the light of the facts and principles that bear on the act in question.

Clearly there are at least some circumstances in which such a claim can be made good. We know that the laws, however much we labor to improve them, are never in full accord with our highest moral standards. Even under the best of legal systems law and morality may come into conflict. Sometimes the law may prove grossly unjust. Most systems, having significant imperfections, may occasionally encounter situations in which the conflict of law and justice is grave enough to justify a moral man's claim that he ought to break the law

in protest. That "ought" cannot be a legal ought, of course. It is a moral claim for which, when pressed, the disobedient will be obliged to give weighty support. And whether or not he is able to make his case in the moral sphere, his act stands culpable and punishable before the law. We must admit, although never lightly, that there are some circumstances in which a man is morally justified in deliberately breaking the law.

Some cases of civil disobedience are of this sort; not all are. The exacting task is that of deciding which cases really are morally justifiable. Even if it does not affect the legal outcome, that determination is fundamental is passing judgment upon the character of the disobedient, and upon his conduct.

How might one go about justifying an act of civil disobedience? What forms might the reasoned defense of the morality of such conduct take? Specifically, they are many, nearly as many as the possible acts of civil disobedience themselves. Generally, however, there are two main paths the defender may follow. These two patterns of justification may prove mutually consistent in some cases, while in others the use of both may be impossible. Each civil disobedient, in any event, is likely to place ultimate reliance upon one or the other, depending upon his temperament and his philosophical convictions. It is very possible that a given disobedient may be confused on this subject. He may be mistaken about what grounds are best for the defense of his conduct, and he may even be uncertain about which pattern of justification would be his own ultimate recourse. He may not even clearly distinguish the two.

The two patterns are, nevertheless, very different, and they are in principle, if not always in practice, clearly distinguish-

able from one another. The first may be called *higher-law* justification; the second, *utilitarian* justification. I shall consider them in turn.

## 4. HIGHER-LAW JUSTIFICATION OF CIVIL DISOBEDIENCE

The civil disobedient may seek to justify his conduct by appealing to a law higher than any man-made law—a "divine" or "natural" law whose authority is supreme. Such laws, he may argue, impose duties so compelling that they override any conflicting obligations. Although the offending element of the positive law, the law of the state, be unambiguous and have general support, and even if it be the legitimate enactment of a legitimate government, if it commands an act forbidden by the supreme law of the universe it must be disobeyed. There is no right way to compromise with such supreme authority. It does not matter from what source the human opposition to it arises—King, or President, or Parliament. No act of human beings, whatever its form, can create an obligation strong enough to match the obligation imposed by the higher law.

This is a venerable line of argument, and it has often been employed by good men in the service of worthy causes. Its roots lie deep in the history of Western thought—in Cicero and Aquinas and Hooker and Grotius and Locke. It has become a prominent element in the American political tradition and underlies the epigram Jefferson hoped would be inscribed on the Great Seal of the United States: "Rebellion against tyrants is obedience to God." The civil disobedient

*Case 11. The recourse to higher-law justification for civil disobedience is also well illustrated by the case of James E. Wilson, whose story appeared in* The Catholic Worker *(March 1966). Having pleaded guilty to the charge of deliberately destroying his draft card, he was convicted and appeared in U.S. District Court in New York for sentencing on 4 March 1966. He made the following statement to the Court:*

*On November 6, 1965, I did willfully and knowingly burn and destroy my draft-classification card, as my indictment by the Grand Jury reads. I did this only after great thought and prayer. It was performed as a religious act, and more specifically as a Christian act.*

*As a Christian I am opposed to all war and violence. I believe this is the teaching of Jesus Christ, and I must take this position if my conscience demands it. Although there are many who may disagree with my beliefs, I am sure they respect my right to hold them.*

*The duty and responsibility of every Christian is to stand up for Christ and speak out against injustice wherever it presents itself. We must do this even if it means breaking an existing law, for sometimes it is the law itself that is the injustice we must speak out against. The early Christians broke the law when they refused to swear allegiance to the Emperor in the Army of Rome. This was outright disobedience of an existing law which the*

who employs this defense does not conceive his conduct to be rebellion, but very often the spirit of his act is precisely Jefferson's: when human law and divine law conflict, the moral man has no choice but to obey the latter, even if that entails deliberate disobedience of the former.

St. Thomas put the matter crisply: "Human law does not bind a man in conscience and if it conflicts with the higher law human law should not be obeyed." And the Second Vati-

*Christians could not follow. There is a great tradition of disobedience to unjust laws in the history of Christianity. This is also true of the forefathers of this country, who were looking ahead to an ideal. When the Stamp Act was passed by England, the leaders of this land burned the stamps in direct defiance of the law.*

*I believe this law, under which I was indicted, is unjust. This is why I broke it, because it is unjust, and I cannot sit back and accept an injustice the way so many of us do, who then suddenly realize that every right has been slowly taken from us.*

*Is it necessary to prove that this law is unjust, or is it obvious to every Christian, or to anyone who looks to the Constitution of this country? I think it should be obvious to every one of us that this law cannot exist, and it cannot be given its existence by obedience. It cannot be ignored or honored. Rights have been taken from people on every corner of the earth because bad laws were shrugged off as not important, or because people thought the law did not affect them. This is why totalitarianism exists, and with the passing of this law we took a big step toward totalitarianism ourselves. If we remain silent now we must face the consequences tomorrow.*

*Does a man have a right to his own political or religious beliefs? Do we have a right to free and peaceful assembly? Is dissent a natural right of every human being? Do we have a right to free speech? These are the questions this law has raised. When we*

can Council (1962), in harmony with contemporary Christians everywhere, was faithful to that tradition: "In the depths of his conscience man detects a law which he does not impose on himself but which holds him to obedience. . . . For man has in his heart a law written by God. To obey it is the very dignity of man." This conception of the supremacy of some divine or natural laws has had uncountable manifestations, formal and informal, in the political and religious documents,

*look to the Constitution we find that there is no doubt that this law is unjust. When we look to the Gospels we find out what we are to do when we are confronted with injustice. We must speak out! We must act!*

*This is what I have tried to do. This is why I broke the law, and for no other reason. I have pleaded guilty and will accept the consequences for what I have done. This protest which I have made does not end with the burning of an inexpensive piece of paper—it begins! The government have [sic] passed this law and now they must put it into practice. This is their responsibility, not mine. They must prove that this law exists while I prove it is unjust by my moral protest. This law must be enforced or it is in effect non-existent. I must force this issue on the government. They are big enough to make their own decision.*

*My freedom is very important to me. Freedom to walk through the streets of every city and catch the wind on my face. Freedom to gather with friends to drink ale and sing songs. Freedom to love people of every shape, color, and size. Freedom to bring joy to those who are sad, and sometimes the freedom to cry with those who are crying. These are the things that are important to me, and in order to keep them for myself and others, I will gladly go to jail. And others will follow me, and still others will follow them. For the free man and the Christian will soon realize that he will have to go to jail. So build more prisons and make them large, and we will all be together. The freedom that is tingling in my bones and in my soul cannot be held in by iron bars.*

speeches, and institutions of the West. Its history need not be reviewed.

Justification by resort to the higher law has been of fundamental importance to many (but not all) of those who, in recent years, have practiced civil disobedience in the United States. Martin Luther King, their most prominent spokesman, repeatedly presented this defense of such conduct. "One has

a moral responsibility to disobey unjust laws," he said, and the difference between just and unjust laws is simply this:

*A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of Saint Thomas Aquinas: An unjust law is a human law that is not rooted in eternal and natural law.* [*Martin Luther King, Why We Can't Wait, Harper & Row, New York, 1963, pp. 84–85.*]

King here goes on to argue, in defense of certain specific forms of civil disobedience, that any law that degrades human personality is unjust, that segregation statutes do just this, and that therefore they not only may but must be disobeyed. (See Case 11, pp. 106–108.)

Higher-law justifications bear some resemblance to the efforts, described earlier, to justify the disobedient act by showing that it is, when fully understood, in full harmony with the Constitution or otherwise protected by the ultimately controlling code. In those earlier cases, however, resort was made to laws or constitutional principles also man-made, but having greater authority than the law broken. So the appeal is made from the municipal to the state laws, or from the legal system of the state to that of the federated nation. All of these jurisdictions are alike, however, in having the authority only of human government; although one may overrule another, all are cut from what is basically the same cloth. Because the rulings of the higher courts specifically control the rulings of the lower courts, an act that is legally justified by the former cannot be forbidden or punished by the latter. All are parts of one greater legal system. Higher-law justification in the present sense is fundamentally different in that it

appeals not merely to a superior element in the hierarchy but to another system entirely, whose origin and authority is entirely distinct from that of the system within which the law was broken. Because the laws of this higher system have (allegedly) a completely different and special character, not narrowly juridical, it is claimed that they can provide a purely moral justification of an act that is, in every sense, a clear and deliberate violation of the positive law.

Attempted moral justifications of this general kind may vary considerably in important detail; it is useful to distinguish the major forms such justifications take.

One great distinction is that between theological and nontheological higher laws. Advocates of the former—employing directly or indirectly the authority of God in their defense—are much the more common. Very many civil disobedients are quick to say that their act was in obedience to the law of God, while the law they broke was itself a violation of that law. Of course there may be difficulties in knowing what the law of God commands, or knowing how that command bears upon the case at hand. But while possibly recognizing the seriousness of such difficulties in some situations, these civil disobedients will deny that these problems arise in their own case. They will argue that the divine law is clearly written (in the Bible or some other holy book), or that it is expressed in all of Nature, or that it is indelibly imprinted within each man (on his heart, or mind, or soul), or that it is simply self-evident. In some form, depending upon the variety of religious conviction, the theological justification supposes that each civil disobedient knows the will of God and knows that He commands that disobedient act. The disobedient acknowledges this divine authority, obeys it, and is prepared to accept

with fortitude whatever wordly punishment his act may receive.

The logic of higher-law justification, however, does not require a theological base. If the law appealed to is to have an authority greater than any human law or legal system, its source must indeed be superhuman. But it may be claimed that this superhuman source is not God or gods, but the Universe itself. The supreme moral law (according to this view) springs not from the will of persons, or some superior being, but is the inevitable product of the way things are. The supreme law is a "natural" law, but not a "divine" law. Its authority does not depend, therefore, upon the truth of any religious writings, or revelations, or beliefs. Its commands are universal and may be readily determined by each individual human being using (depending upon the variety of nontheological view) his reason, or his moral sense, or some other faculty, ordinary or special. This "natural" law is what the civil disobedient may invoke in seeking to justify his act.

The advocates of higher law, theological or nontheological, may quarrel bitterly about the true source of the moral commands (as historically they have done), and they may also be unable to agree upon the content of these commands. Or they may disagree in the former sphere, yet find themselves in general agreement in the latter. Or again; being in substantial if not complete agreement about what the supreme moral law commands, they may go on to claim that the distinction between theological and nontheological accounts is merely verbal—that talk about personal gods is only an allegorical way of talking about the Universe, or that the Universe is but another name for the one true God. In any case, what unites them at last is their conviction that there are universal moral

laws, having a superhuman source and supreme authority, and that human beings know and understand these laws. Such laws may sometimes justify—morally, but not legally—the deliberate violation of a man-made statute.

A second distinction of interest, much less commonly drawn, is that between higher laws (whatever their origin) that are categorical and those that are criteriological. A law is categorical when it flatly commands or forbids certain categories of acts. "Never do so-and-so" or "Always seek to accomplish such-and-such results." This is the form higher laws are usually claimed to take when the object is justification of civil disobedience. To some, however, it appears easier and wiser to resort to higher authority not as a giver of categorical commands but as the source of criteria for moral judgment.

The justification is put in this softer way partly because of the abuse to which the stronger form is liable. If there is widespread resort to "higher law" as authority for disobedience, the proper powers of the civil authorities may be undermined. If it were generally believed that an individual through his personal understanding of the law of God (or Nature) might justifiably disobey the state, that would create, as the theologian Emil Brunner puts it, "an intolerable menace to the system of positive law." He continues: "No state can tolerate a competition of this kind presented by a second legal system. The laws of the state actually obtaining must possess a monopoly of binding legal force for itself [sic] if the legal security of the state is to remain unshaken." (Heinrich Emil Brunner, *Justice and the Social Order*, trans. by Mary Hottinger, Harper & Brothers, New York, 1945, p. 93.) But (according to this view) if we may not appeal to higher authority as a binding *law*, we may appeal to it as a *criterion*. Natural

law does not command us to act in certain ways, but it remains nevertheless a moral standard for our conduct. We can, therefore, appeal to the standard of natural law in support of disobedience of positive laws we regard as so unjust that we cannot obey them in good conscience. In this way our conscience provides us with a criterion for conduct but is not itself law and does not exempt us from the governance of the law.

This distinction is of doubtful value. The aim in drawing it is to present the higher-law justification in a milder, less upsetting way. Lest it be thought that the recognition of the higher law will gravely weaken the necessary authority of normal government by establishing a competing juridical system, the higher authority is called "criterion" rather than "law." If natural law is not a legal system (it is suggested) it can pose no threat to the civil authorities. Whatever his conscience may require him to do, the moral man is still a citizen, and properly governed by the laws of his political community. But such talk about "criteria" instead of "laws" is a word screen only and does not really distinguish this approach from that which is more common and more direct. He who resorts to the moral law as a *law* recognizes at the same time that it is a law in a separate sphere, having separate foundations. Moral authority (according to this view) does not compete with civil government or in any way undermine it. It simply establishes certain very basic limits within which the civil government has the moral authority to operate. When the government exceeds these limits, the citizen is placed in a difficult position. He is then forced to act either illegally or immorally. If, in obedience to the higher law, he does break the positive law, he knows and all will agree that his act will be punished

under the positive law. Nothing of real significance in this situation is changed by describing it as only a conflict between civil laws and conscience, or between legality and moral criteria of conduct. Whichever of these descriptions is chosen, the argument is essentially the same: there has been a resort to some superhuman authority to provide moral justification for an allegal act.

All of these justifications—theological and nontheological, criteriological and categorical—are efforts to resolve the dilemma facing a moral citizen who honestly believes that the civil law that governs him commands an immoral act. The resort to a higher authority, which all these arguments have in common, is very appealing. Such justifications of disobedience are simple, forceful, direct. Usually they manifest high personal integrity and require much courage. On the whole, however, these justificatory arguments, in spite of their emotional appeal, do not prove intellectually satisfactory.

The difficulties inherent in such arguments are many, but they reduce ultimately to two: (a) It appears impossible to reach any objective and reliable judgment about what the higher laws command or forbid (if there be any higher laws at all); and (b) It appears impossible to reach any objective and reliable judgment about how these laws (supposing their content known) apply to concrete cases, without resort to some established judicial authority. Just how these basic difficulties will enter in any given case will depend, of course, upon the variety of higher-law justification put forward.

The first of these obstacles the higher-law advocate often finds difficult to appreciate fully. Utterly convinced of the truth of his doctrine, and completely sure of its clarity and

certainty, he is likely to think the refusal on the part of others to accept it is the result only of a deliberate and foolish blindness, or is perhaps partly disingenuous. He swears with all his heart to the truth of his Holy Writ and pities or wonders at the obtuseness of those who claim not to see the law of God written on the sacred page, or on the face of Nature, or in their own souls. Unfortunately, however deep and sincere their convictions, such advocates can provide nothing that will stand as publicly verifiable proof that the higher law is as they claim it to be. All of their evidence—of course they may claim tons of it—depends for its worth upon the reliability of their fundamental claims to knowledge of a special kind—through revelation, or moral intuition, or self-evidence, or some other. But it is just such special faculty or faculties that their skeptical critic is questioning in the first place. It is no reply to him to support the reliability of the alleged certainties with other claims having precisely the same foundation. If one questions whether a given book is the Word of God, it is not intellectually satisfying to be told that it must be the Word of God because it says so in that book. Or if one doubts the universality of a moral principle that another has claimed to intuit directly because he doubts the reality of that intuitive faculty, the questioner is most unlikely to be persuaded by the claim that he could intuit it himself if only he tried harder. In short, all partisans of the higher law face, at the outset, a grave epistemological barrier. They make knowledge claims that are practically impossible to defend. They pretend to know what the higher law demands of all men, but their argument, such as it is, is convincing only to those who already share their views. Many men—perhaps

most men—do not share their views and cannot be given satisfactory rational grounds for acknowledging the authority of their alleged supernatural commands or criteria.

All higher-law arguments meet this problem, whatever their form or the alleged content of the law they invoke. Even if their principle is one receiving widespread approval and acceptance—say, "Thou shalt not kill"—the moment that principle is claimed to have a superhuman authority that justifies disobedience of law it is subject to the same fundamental doubt leveled at that claimed authority. Of course, the advocate of higher law may seek to bypass such doubts by resorting at last to some purely emotional appeal, or to some deliberately nonrational theology. He may indeed get converts in this way, but never a genuine justification of conduct.

The second obstacle met by higher-law justifications arises from the need to apply general laws or principles to specific situations, and from the uncertainties such applications necessarily engender. Supposing the statement of the higher law to be universally known and agreed upon (which is supposing a good deal), it yet remains to be determined how that law bears on the disobedient act in question. That is a matter notoriously difficult in any complex situation, and is, after all, one of the main reasons civilized communities establish and respect the authority of a judicial system in the first place.

The laws of the state are intended to be very clear—their framers strive for great accuracy and precision in formulation and often include detailed descriptions and definitions—and still their applications present the most trying problems for the courts. Judges learned and wise will often disagree upon practical applications of the same specific law or principle. The laws of God (or Nature), supposing them known, reach

us in terms yet more general and less precise. "Thou shalt not kill," "Treat all men as equals," or other such principles, even if universally authoritative, are obviously subject to vastly different and conflicting interpretations. An individual relying upon such laws to justify his disobedience thereby claims for himself the power of interpretation and application that in the easier sphere of positive law is so carefully exercised and safeguarded by sophisticated legal institutions and carefully trained lawyers and judges. John Locke was among the greatest proponents of higher-law theories, yet even he insisted upon the fundamental need, in a civil society, for known (i.e., carefully written and promulgated) laws and known, impartial judges with independent power to enforce those laws. It is precisely the lack of these, he argued, that drives men (although governed by the natural law in some larger sense) to form civil governments, enact written legislation, establish courts of justice, and the rest. Now the civil disobedient, claiming the authority of the higher law as justification for his conduct, acts in a way that conflicts with the will and judgment of these civilized judicial institutions. He claims to be able to interpret the commands of that supreme authority with such sureness and rightness that no courts, or judges, or standard legal safeguards are needed by him. He knows the law; he knows how to apply it; that is the end of the matter. If he is pressed to show that his interpretation of the higher law is indeed correct, he can only fall back upon his own moral intuitions, or whatever other knowledge faculty he first claimed as the source of his moral inspiration. When he acts as judge in such matters, his analysis of conflicting laws and their applications in a specific case is likely to be debatable at the very least, if not grossly deficient and shallow.

All this if he is strictly impartial; in most cases he is subject to the additional distortions unavoidably introduced by the fact that it is his own case upon which he passes judgment.

No argument of this kind, moreover, can give satisfactory reply to the critic who, believing himself also governed by the divine code (or natural law, etc.), claims a sharply different and more accurate understanding of it. While agreeing that some variety of nonempirical knowledge is decisive, the two may flatly disagree about what their nonempirical sources say. No further court is open to them, since each will adamantly insist that the highest court of the universe has already decided the case for him. Whenever disobedient conduct—or indeed any political conduct—is defended on grounds such as these, the ensuing argument is likely to be irresoluble and bitter. In such conflicts the parties may soon be brought to that impasse at which they are forced to say: "Here ends the argument and begins the fight."

The resort to higher law is usually attended and encouraged by an understandable desire for certainty, universality, and justice. In practice, however, it necessarily becomes a resort to one's own convictions about God's will and how it must be carried out. What begins with a drive for universal objectivity ends, in this way, in a morass of idiosyncracy and subjectivity. Reliance upon supernatural codes, however described, gives shaky support for what are often sound principles that might prove entirely defensible on grounds that are wholly empirical but not absolute.

The obstacles facing any justification of civil disobedience by resort to higher law are indeed serious. It is very doubtful whether they can be overcome in a wholly rational way. The correctness of such a justification will be impossible to estab-

lish to the satisfaction of any who question its claimed epistemological foundations. By the same token, however, higher-law justifications cannot be wholly disproved either. Just as the ultimate evidence relied upon eludes public verification, so also it eludes public falsification. The defender of civil disobedience through higher law may stick to his claims in the face of all punishment and all objections. His critics *may* be suffering from some kind of moral blindness or corruption, and he *may* be right after all. But it will never be enough for him to claim that he may possibly be right. There is a burden of proof that lies upon him, the disobedient, and it is a very heavy burden to sustain.

Finally, the resort to higher laws in this context has a special shortcoming. These laws (as usually described) are of such a nature that they could serve to justify, if any, only *direct* civil disobedience—disobedience of the law that is itself the object of protest. The divine code, or law of nature, will address itself to specifically moral matters and not those that are mainly tactical. Whatever their particular content, therefore, the higher laws can justify disobedience only of statutes morally offensive in themselves. Much civil disobedience, however, is indirect, the law violated being not only distinct from the object of protest but in itself entirely wholesome and acceptable to the protester. The entire enterprise is then a political device in which the disobedience is used to speed a remedy for some more serious injustice in a related but separate sphere. The law to be broken will be selected openly by the demonstrators on prudential grounds, as one whose deliberate infraction might best advance their purposes. Such disobedience cannot be a direct consequence of divine command, nor can the indirect protest be reasonably defended

as the unavoidable outcome of conflict between laws of nature and laws of men. If indirect civil disobedience is ever to be justified, something other than universal moral laws will have to be relied upon.

Some have been led to assert—perhaps partly because of their recognition of this limitation of higher-law justifications—that indirect disobedience never can be justified. But this claim begs the crucial question in that it tacitly supposes that justification by higher law is the only kind worthy of consideration. This is false, and it mistakenly forecloses the issue without opportunity for reflection upon other plausible and persuasive arguments the civil disobedient might present in his own defense.

## 5. UTILITARIAN JUSTIFICATION OF CIVIL DISOBEDIENCE

The second major pattern of justification is utilitarian. The term "utilitarian" is here used in a generous way, not necessarily tied to pleasures and pains, or to any specific calculus of goods and evils. It simply indicates that the justification will rely upon some intelligent weighing of the consequences of the disobedient act. The protester here argues, in effect, that his particular disobedience of a particular law, at a particular time, under given circumstances, with the normal punishment for that disobedience ensuing, is likely to lead in the long run to a better or more just society than would his compliance, under those circumstances, with the law in question. Making this claim is only the beginning; it needs to be thoroughly defended, and providing that defense will never be a simple matter. How successful such a

defense may prove will depend not only upon the workability of its pragmatic form but upon the depth, and accuracy, and sophistication of the analysis of the consequences upon which it relies.

The protester who seeks to justify his deliberate disobedience along such lines necessarily faces a severe self-imposed handicap. Because he admits, as we have seen, that the law he breaks formally applies to him, his deliberate disobedience begins with a black mark against it. He must show that in spite of his acknowledged moral obligation to obey the laws, greatest long-range good is likely to result from disobedience in that given situation. Again, the burden is on him, and it is a heavy one.

In presenting this utilitarian justification of his conduct, the disobedient must employ two kinds of considerations, moral and factual. Here again it is unwise to construct a sharp dualism: moral principles accepted, or judgments made, are facts; and many facts have the highest moral import. But we can and should distinguish, in any given context, between the moral principles used in the evaluation of laws or conduct or social goals, on the one hand, and the factual calculations with which it is decided whether a certain law or line of conduct does accomplish or promote the goals sought. Roughly speaking, the distinction is that between ends and means. It is true that any act or institution may be viewed as either; but in any well-understood context there will be certain larger principles that function chiefly as evaluative, and a host of more detailed considerations whose importance is chiefly instrumental.

Because the civil disobedient seeks to justify his act morally, those larger evaluative principles are of fundamental im-

portance to him. Fortunately for him, they are not likely to be the source of controversy between himself (the utilitarian civil disobedient) and his contemporary critics. It is almost invariably the case that he, like they, seeks a society in which all are treated equally by the laws and all are given equal opportunity for employment, housing, and the like. He, like they, abhors violence and opposes the aggressive use of military power. He hopes, as his critics do, to live in a community in which citizens are orderly, law-abiding, and free to live as they please within the law; he agrees with them in finding deliberate disobedience of law, taken by itself, intrinsically objectionable. The point requiring emphasis here is that the moral standards of these civil disobedients are normally as good as or better than those of their communities, and their moral principles are substantially shared by the vast majority of their fellow citizens.

The ultimate philosophical ground of these evaluative standards—whether religious, or metaphysical, or again pragmatic—while it may indeed prove a serious issue in other contexts, does not bear at all upon the disobedient's present argument. In this regard his procedure differs sharply from that of the higher-law advocate who bases everything upon the supremacy of the authority behind his laws. The utilitarian disobedient, in the context of providing a defense of his protest, has no need to resort to such authority (whether or not he would accept it), because the larger moral principles he employs *are* those of his community. Moral harmony in this sense is, happily, quite general these days.

In extraordinary cases, it is true, the civil disobedient may adopt moral standards in sharp conflict with those professed by his community. So a racist may engage in civil disobedi-

ence to protest racial integration, or members of some eccentric organization or party may practice civil disobedience to further their special ends. But such cases are rare, and when any coherent effort is made to defend them, it almost invariably turns out to be some form of higher-law defense. The utilitarian justification of disobedient protest the object of which is sharply out of harmony with the moral standards of the community as a whole is almost certain to fail. This is not to assume, of course, that the community is always right. But even if the community is wrong, and the eccentrics right, deliberate disobedient pursuit of their special objectives, as long as they are in a moral minority, is not likely to advance the protesters' goals, and hence not likely to be defensible on utilitarian grounds.

In any event, most disobedients—those who protest aggressive war, seek racial equality, or economic justice, or the like—when presenting a utilitarian defense of their protests, do so upon moral foundations that are both solid and very generally approved. This solidity and approval, indeed, is the key to their defense, when it is successful.

The controversy, therefore, arises not over what the civil disobedient is after but over how he goes after it. The disobedient (that he is a utilitarian disobedient will be for the present assumed) and his critics disagree about a host of factual matters connected with the protest. The critic is usually willing to allow, if he is honest, that the ideals of the protester are wholesome enough, even noble. But he won't allow that deliberately breaking the law in that way will advance those ideals, or will advance them enough to outweigh the wrongness of the disobedience itself. In principle it may be that the factual issues arising here could be resolved by an

extensive and detailed analysis of the situation in which the protest takes place, including a deep historical examination of its background, and the most scientific estimate of its consequences, all pursued in the most impartial and scholarly spirit. In practice, however, the entering variables are so many, so complex, so difficult to measure, and so extended over time and place, as to render a clear resolution of the issues often impossible.

The success or failure of utilitarian justifications of civil disobedience, therefore, must always fall short of conclusiveness. In many cases the issue will remain very much in balance; in others the utilitarian case may pretty clearly fail; in still others it may pretty clearly succeed. The very nature of the utilitarian argument, requiring the rational balancing of many conflicting considerations, serves as warning that a definitive result will most often be an unreasonable expectation.

Without a thorough understanding of the actual context of an act of civil disobedience it is impossible to identify, much less weigh, the factual considerations central to the utilitarian defense of that act. Philosophical analysis, if not restricted in applicability to a particular case of disobedience, or a specific context, must pay for its generality by remaining less than decisive in many concrete instances. The philosophical character of utilitarian justifications of civil disobedience can be probed more deeply, however, by identifying the major spheres within which complex issues of fact are likely to arise, and by specifying the kinds of questions likely to be raised within each sphere.

The first set of issues concern the *background* of the case at hand. How serious is the injustice whose remedy is the

aim of the disobedient protest? How pressing is the need for that remedy? How vigorously and how intelligently has that remedy been sought through normal channels—party caucuses, legislative lobbying, and the like? Have extraordinary but lawful means—assemblies of protest, letter-writing campaigns, etc.—been given full trial? If all channels within the law have not been explored, or have not been explored fully enough, the resort to law-breaking is almost sure to prove unjustifiable. Finally, though the answer be always uncertain, we must ask what reasonable expectation there might have been, given previous efforts, that some remedy could yet be achieved through the continued use of lawful channels already tried.

A second set of factual questions concern the *negative effects* of the deliberate disobedience. Here we should distinguish between short-range and long-range consequences, of which the former are easier (but not easy) to assess. How serious will be the inconvenience caused other citizens who are not to blame for the wrong protested? How great is the expense incurred by the community as a consequence of the disobedience? Some such inconvenience and expense is unavoidable, but its degree may vary enormously. Is any violence entailed or threatened by the disobedient act? And if so, to property or to persons? If there is a threat to persons, justification of the act may be practically out of the question, and some may refuse even to classify it as civil disobedience. (See Chapter I, Section 8.) Even if not violent, what is the likelihood that some injury to persons or property may ensue as an *indirect* result of the protest? Increase in the probability of such injury will render the disobedience that much harder to justify. Long-range negative consequences would comprise

all injuries—most of them intangible—to the order or spirit of the community. Has a bad example been set, a spirit of defiance or hooliganism encouraged? Has respect for law been decreased in the community, or the fundamental order of the society disturbed? Has democracy been subverted, or the political processes of democracy in that community damaged? These questions are complex and difficult to answer, yet they are of central importance in determining how much evil the disobedient act incurs, and hence are also central to its utilitarian justification. (See Chapter VI.)

The third and final set of questions concern the *positive effects* of the disobedient protest. It is undertaken, after all, with good and not evil intentions; fairness requires that in appraising it we weigh the good as well as the evil consequences. Both short- and long-range factors enter here too, but the former are few in number. If the disobedience is direct, and the law broken really is immoral, some immediate good will be done through the refusal to commit the wrongful act; we must ask how valuable that refusal is, in itself and as an example to others who may be encouraged by it to resist evil themselves. Whether direct or indirect, the disobedience is almost certain to result in some immediate public attention—first to the protester and then to the object of his protest. In a democracy, public attention to controversial matters of public concern is a good thing; but we must ask how valuable this resulting publicity is. Again, long-range positive results will be extremely difficult to assess. Suppose that the change the disobedient has in view is a genuinely worthy one. How much influence will his protest have in accomplishing that change? Can that civil disobedience bring significant pressure to bear upon law-making or policy-making

authorities having the power to enact the change? If such pressure cannot be brought to bear directly, can it be done indirectly, by focusing public attention upon a community injustice long in need of remedy? How effectively can disobedient protest attract public attention to the object of protest? If it is so attracted, what is likely to be the outcome? Will the public, in turn, exert pressure upon the law-makers? Or will misunderstanding of the demonstrators, and resentment of them, cause more harm than good? One reason for the great difficulty of these questions is that their answers require a rational estimate of the future reactions of a large body of citizens to a chain of complex and controversial events. No one can know what those reactions will be, and every such estimate—even when in retrospect—may be very wide of the mark.

This third set of questions makes it clear, too, that the justification of the disobedient protest is much affected by the effectiveness of that protest. And its effectiveness, in turn, is much affected by a number of other factual aspects of the situation, some of which are these:

(a) The nature of the law broken. First, how grave is the crime actually committed? It is one thing to commit a deliberate trespass, quite another to interfere with the movement of a troop train, or to refuse to pay one's taxes. And second, if the disobedience is indirect, is the law broken so related to the object of protest as to make the point and seriousness of the demonstration abundantly clear to the general public? If it is not, its effectiveness drops sharply.

(b) The demeanor of the demonstrators. Unruly or offensive behavior is likely to be condemned out of hand; its larger objectives may then be obscured from public attention, or

conveniently ignored by the press, which is likely to focus on the most sensational aspects of the demonstration. Conduct that is sober and restrained is more likely to win consideration and respect, to force the reflection of the public, and thereby to increase the effectiveness of the disobedient protest.

(c) The precise nature of the goal. How effective a protest is judged to be depends very largely upon what it is expected to accomplish. If its objective is limited—say, that of calling dramatic attention to a community wrong, with an expressed trust in the power of the public will when that wrong is recognized and understood—a considerable measure of success might be hoped for. If the protest is judged only in terms of its immediate success in pushing through the desired change in law or policy—racial desegregation, or the immediate cessation of hostilities in some war, etc.—it is likely to be deemed a failure. Not simply "How effective is it?" but rather "How effective is it for what end?" is the question to be asked.

All of these and more are the issues likely to arise when the effort is made to justify, in some utilitarian way, any single instance of civil disobedience. It is obvious that even the attempt at such a justification must be a very complicated affair.