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The Limits and Dangers of Civil Disobedience: The Case of Martin Luther King, Jr.

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Abstract

At the heart of the American character is a seeming paradox: America is a republic of laws, yet it has a long tradition of civil disobedience. Martin Luther King, Jr., the most renowned advocate of civil disobedience, argued that civil disobedience is not lawlessness but instead a higher form of lawfulness, designed to bring positive or man-made law into conformity with higher law—natural or divine law. As King's own legacy reveals, however, civil disobedience is complicated in its theoretical basis and problematic in its practical effects. It is justifiable, in exceptional circumstances, by the first principles of free, constitutional government, but it is dangerous in that it poses a threat to the rule of law. The judgment as to when circumstances warrant, along with the practice of civil disobedience itself, must be governed by the most careful prudential regulation. To gain our bearings amid today's protests, characterized more by disruption and coercion than persuasion, we should look beyond contemporary justifications and return to the best of King's thinking—and beyond King, to the understanding of civil disobedience grounded in America's first principles.

Introduction

At the heart of the American character, evident since our nation's birth, is a seeming paradox: Americans take pride in our self-image as a republic of laws and no less pride in our propensity toward righteous disobedience. The "very definition of a Republic," John Adams remarked, "is 'an Empire of Laws, and not of men'"—words he wrote in the spring of 1776, even as his compatriots were engaged in an armed uprising that they as a people, with Adams's own assistance, would shortly thereafter declare to be revolutionary and justified by a law higher than any human law.[1] Acutely aware of the turbulent history of republics,[2] America's revolutionary Founders hoped that Americans would prove exceptional in our lawfulness: lawful both in our obedience and, where need be, in our disobedience.

This idea of rightful disobedience has inspired protests in various degrees and kinds in America ever since the Boston Tea Party, and it continues to inspire such actions even to the present day. Beginning in the mid-20th century, however, a significant modification of the idea has gained legitimacy and prestige in this country and around the world, as many Americans and others have become persuaded that organized disobedience can be not only rightful and, in a higher sense, lawful, but also *civil*—it can effect a popular uprising against injustice

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even as it remains in conformity with the requirements of civility and social stability.[3] Such actions have become increasingly normalized in post-1960s America, as groups protesting a wide range of issues—including, in a partial list, nuclear armaments, abortion, environmental policy, and more recently, alleged misdeeds in the financial-services industry, immigration policy, and alleged police misconduct—have laid claim to the method of civil disobedience.

Broadly defined, "civil disobedience" denotes "a public, non-violent and conscientious breach of law undertaken with the aim of bringing about a change in laws or government policies."[4] The idea entered America's public consciousness in 1849 via Henry David Thoreau's essay "Civil Disobedience," prompted by Thoreau's objections to the Mexican War as an instrument of the slaveholding interest.[5] Its present legitimacy and prestige, however, reflect the influence of the Civil Rights movement of the 1950s and 1960s, a movement characterized by its leader, Martin Luther King, Jr., as "the greatest mass-action crusade for freedom that has ever occurred in American history."[6] Prompted by that movement, America has undergone sea changes in law and in public sentiment regarding race relations and the antidiscrimination idea, and King's "Letter from Birmingham Jail," containing his most elaborate justification of the practice of civil disobedience, has become a widely anthologized writing and a fixture in U.S. secondary and collegiate civics education.

To its proponents, led by King, the idea of civil disobedience represents a compelling linkage of morality and efficacy, a happy marriage of moral ends to moral means in the pursuit of social or political reform. Yet, however glorious its historical associations and however appealing it may be on its face, the idea is complicated in its theoretical basis and problematic in its potential practical effects.

The conventional definition of civil disobedience leaves open some basic and challenging questions concerning its justifying causes and its permissible scope and objectives. How, for instance, are we to know that protestors' claims of injustice are valid and the changes they demand are salutary? How can civil disobedience be explained and justified so as to foreclose the possibility that it could implicitly license uncivil, non-rightful disobedience, or to ensure that even its legitimate usages will not prove corrosive of the rule of law?

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Such questions reflect more than merely theoretical concerns. For enthusiasts of rightful disobedience (civil or not), events such as the American Revolution and the Civil Rights movement serve as congenial examples—but the participants in the slaveholders' rebellion of 1861 and the mid-20th century campaign of "massive resistance" to desegregation no less firmly believed their causes to be just. Enthusiasts of civil disobedience proper should likewise recall the eruption of hundreds of urban riots in the years 1965–1968, almost immediately following the civil rights movement's moment of greatest

1. John Adams, "Thoughts on Government," in *The Works of John Adams*, edited by Charles Francis Adams (Boston: Charles C. Little and James Brown, 1851) Vol. 4, p. 194.
2. See *Federalist* No. 9, in Alexander Hamilton, John Jay, and James Madison, *The Federalist Papers*, edited by Clinton Rossiter (New York: Signet Classics, 1961/2003), pp. 71-72.
3. See Peter Ackerman and Jack DuVall, *A Force More Powerful: A Century of Nonviolent Conflict* (New York: St. Martin's Press, 2000); and Erica Chenoweth and Maria J. Stephan, *Why Civil Resistance Works: The Strategic Logic of Nonviolent Conflict* (New York: Columbia University Press, 2011).
4. Kimberley Brownlee, "Civil Disobedience," in *Stanford Encyclopedia of Philosophy*, Winter 2016, edited by Edward N. Zalta, https://plato.stanford.edu/archives/win2016/entries/civil-disobedience/ (accessed December 12, 2017). See also H. A. Bedau, "On Civil Disobedience," *Journal of Philosophy* Vol. 58 (1961), pp. 653–661; and John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971), p. 364.
5. Henry David Thoreau, "Civil Disobedience," in *Thoreau: Walden and Other Writings*, edited by Joseph Wood Krutch (New York: Bantam Books, 1962).
6. Martin Luther King, Jr., *Why We Can't Wait* (New York: Harper & Row, 1963), p. 25.

triumph. Moreover, all should consider the degree to which the successful practice of civil disobedience in the early 1960s, by virtue of its very success, has functioned in the post-Civil Rights era to normalize the practice of lawbreaking as an element of protest and commensurately to erode popular respect for law.

The nation's experience over the past half-century or so highlights the need for a careful reconsideration of the case for civil disobedience. The discussion that follows is meant to provide such a reconsideration. Its primary finding may be summarized in this lesson: Civil disobedience is justifiable but dangerous. It is justifiable, where circumstances warrant, by the first principles of the American republic and of free, constitutional government, and it is dangerous in that it poses a threat to the rule of law. Consequently, its practice must be confined to rare and exceptional circumstances. The judgment as to when circumstances warrant, along with the practice of civil disobedience itself, must be governed by the most careful prudential regulation.

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The discussion begins with a consideration of America's founding principles, focusing in particular on the natural-rights principles summarized in the Declaration of Independence, and then moves to an extended analysis of the arguments of Martin Luther King, Jr. It centers on King primarily because of the near-universal acclaim now accorded King's "Letter," which stands as the most influential defense of civil disobedience in our time, if not in all U.S. history. For present purposes, however, King serves as a source of useful lessons in both positive and negative ways.

Complications arise foremost from the fact that King did not hold a unitary and coherent position on civil disobedience. His argument for civil disobedience in the later phase of his career diverges significantly from the relatively moderate argument he presented in his earlier, more successful phase. That earlier argument, the argument presented in the "Letter," conforms for the most part with the closely circumscribed idea of civil disobedience supported by the Founders' understanding of natural rights and the rule of law. Yet even King's earlier argument conforms only imperfectly with the Founders' principles, and the manner in which it departs from them prefigures his excesses in his later phase.

The disorders that follow from ill-considered notions of civil or rightful disobedience are abundantly and frighteningly evident in the late 1960s and lately resurgent in lesser degrees. To ward off such disorders, it is necessary to sort out the virtues and vices of King's arguments and to use the virtues in those arguments to light the way back to the sounder understanding of civil disobedience and the rule of law that is implicit in America's first principles.

Civil Disobedience and America's First Principles

In his major statement on civil disobedience, the "Letter from Birmingham Jail," King wrote that the practitioner of civil disobedience does not disregard or undervalue the rule of law but, to the contrary, "express[es] the highest respect for law."[7] The rule of law itself, in his reasoning, entails the legitimacy of civil disobedience. A consideration of America's first principles, as explicated in the political thought informing the American Founding, corroborates King's view.

Americans' simultaneous devotion to law and insistence on a right to disobey unjust laws signifies a fruitful tension in American principles, inherent in our foundational idea of the rule of law. "In republican governments," wrote James Madison in *Federalist* No. 51, "the legislative authority necessarily predominates."[8] Madison followed the teaching of John Locke, who explained in his *Second Treatise of Government* that "the first and fundamental positive law of all commonwealths is the establishing of the legislative power," which stands as "the supreme power of the common-wealth."[9]

7. Ibid., pp. 83–84.

8. Madison, Hamilton, and Jay, *The Federalist Papers*, p. 322.

9. John Locke, *Two Treatises of Government*, edited by Peter Laslett (Cambridge: Cambridge University Press, 1988), Second Treatise, § 134, pp. 355–356.

The constitutional primacy of the legislative power is the institutional corollary of the rule of law. The legislative must be the primary, supreme power because the alternative to legislative supremacy is subjection to the arbitrary will of another—to the will of an unchecked, potentially despotic prince or ruling class. "Absolute arbitrary power," Locke maintained, is equivalent to "governing without settled standing laws," and to be subject to it is to be exposed to the worst evils of a state of war with another. Such exposure is a condition to be avoided at all costs; to escape or avoid it is the primary objective in the formation of political society.[10]

When Locke said the ruling power "ought to govern" by law, he meant that the law must rule so "that both the people may know their duty ... and the rulers too kept within their bounds."[11] In Locke's design and in that of the American Founders, governmental powers are bounded in that they are limited to those specifically delegated by the people who are to be subject to them. In the Founders' design, of course, the instrument for specifying those delegations is the U.S. Constitution, promulgated as the higher law to which the ruling authority is subject.

As the Declaration makes clear, the right to disobey the laws or decrees of unjust government, whether by civil or uncivil means, must be exercised with great caution.

For both Locke and the Founders, however, the ultimate law to which human government is subject—including the fundamental legislative authority of constitution-framers and ratifiers—is a law beyond human making, the law of nature. Legitimate, constitutional government can possess only those powers delegated to it by the people who are its constituents, and the people in turn can delegate only powers they rightfully possess under the law of nature.[12]

It follows that should government attempt to exercise powers beyond those duly delegated to it, it would forfeit its legitimacy and therewith its claim to popular allegiance and obedience. The people in such circumstances hold rights to petition and protest, and should those appeals prove unavailing, to take action to effect such changes as are needed. In the Declaration of Independence, the ultimate recourse is a right, again where circumstances dictate, to full-blown revolution: "Whenever any form of government becomes destructive of [its proper] ends, it is the right of the people to alter or to abolish it, and to institute new government."

Further, it should be clear that the imperative subjection to the rule of law applies no less to the people themselves, as represented by a ruling majority, than to government. "All ... will bear in mind this sacred principle," Thomas Jefferson noted, that "the will of the majority ... to be rightful must be reasonable," and to be reasonable it must respect the "equal rights" of the minority.[13] A democracy is as capable of injustice as is a monarchy—and a societal majority as capable of it as a government. An aggrieved minority also has a right to take actions necessary and proper to prevent or correct governmental or societal transgressions.[14]

At this point arises the issue of civil disobedience. In circumstances justifying greater forms of disobedience, it is reasonable to infer that lesser forms are permissible. Where uncivil or violent disobedience would be rightful but unwise, the lesser means of civil disobedience must likewise be rightful.

As the Declaration makes clear, however, the right to disobey the laws or decrees of unjust government, whether by civil or uncivil means, must be exercised with great caution. Because, as Madison put it, "the latent causes of faction are ... sown in the nature of man,"[15] the doctrine of a right to resist unjust

10. Ibid., §137, p. 360. On the state of war, Second Treatise, §§ 16–21, pp. 278–282.
11. Ibid.
12. Ibid., § 135, p. 357.
13. Thomas Jefferson, "First Inaugural Address," March 4, 1801, in *The Essential Jefferson*, edited by Jean Yarbrough (Indianapolis: Hackett Publishing Company, 2006), p. 55.
14. See Locke, *Two Treatises,* Second Treatise, § 168, p. 379: "[W]here the body of the people, *or any single man*, is deprived of their right ... and have no appeal on earth, then they have a liberty to appeal to heaven, whenever they judge the cause of sufficient moment" (emphasis added).
15. Madison, Hamilton, and Jay, *Federalist* No. 10, p. 79.

government carries the danger that it might itself be put to unjust uses and thus might operate to undermine the rule of law. To provide against this danger, the Declaration appends to its announcement of the right "to alter or abolish" unjust government a crucial qualifying admonition: "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes."

Here, in fuller elaboration, is the logic informing the Declaration's dictates of prudence with respect to actions leading up to and including revolutionary uprising. Revolution, the outermost extreme among acts of protest or resistance, is justified, according to the Declaration, only where all of the following conditions are present:

- government perpetrates or abets clear violations of natural rights, involving clear "abuses" and/or "usurpations";
- the violations at issue are not isolated or exceptional but occur in "a long train" indicative of a "design" to subject their victims to "absolute Despotism";
- the violations, persisting despite "repeated petitions" by the injured parties, are reasonably judged to be irremediable by any lawful measures;
- the violations are reasonably judged to be irremediable by any extra-lawful but non-revolutionary measures;
- the violations are reasonably judged to be remediable by revolutionary action.

Informing the Declaration's admonition of prudence is the rule that revolutionary actions are to be taken only as a last resort—only in acquiescence to "necessity," as the Declaration states, to the end of correcting injustice. Prudence, in other words, dictates a narrow-tailoring rule, according to which less radical alternative measures are to be preferred, explored, and exhausted prior to the adoption of more radical measures.

These prudential regulations circumscribing the right to revolution apply similarly to acts of civil disobedience. To say that less radical measures are to be preferred to more radical measures is to say that actions outside established legal and political channels are to be taken only *where* necessary and only *so far as* necessary. All plausibly viable lawful alternatives are to be attempted prior to the adoption of extra-lawful measures, just as all plausibly viable peaceful means are to be employed prior to any recourse to violent force. Protests against domestic injustices are to be conceived with a view toward preserving or restoring conditions of basic concord. They are to be conceived in the Declaration's spirit of "justice and consanguinity," and likewise in the spirit of Abraham Lincoln ("We are not enemies, but friends. We must not be enemies") and of King ("the end is reconciliation; the end is redemption; the end is the creation of the beloved community").[16] For the same reason, they are to embody the greatest respect for man-made positive laws that circumstances permit.

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This point concerning the regulation of civil disobedience by the dictates of prudence yields a vitally important corollary: Acts of civil disobedience are not necessarily revolutionary actions and do not necessarily rest on premises that justify revolutionary action. In the definition cited above, the general objective of civil disobedience, to effect a "change in laws or government policies," encompasses a variety of possible specific objectives, ranging from reform of particular laws or policies to fundamental change in constitutional order. The correction of unjust government may not require radical, thoroughgoing regime change—and in the Declaration's teaching of prudence, where such revolutionary change is not required, it is not permitted: Actions to "alter" unjust government are to be preferred, where possible, to actions taken to "abolish" it. All lawful

16. Abraham Lincoln, "First Inaugural Address," March 4, 1861, in *Lincoln: Selected Speeches and Writings*, edited by Roy P. Basler (Da Capo Press, 2001), p. 588; Martin Luther King, Jr., "Facing the Challenge of a New Age," December 1956, in *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King, Jr.*, edited by James M. Washington (New York: Harper Collins Publishers, 1986), p. 140.

alternatives are to be attempted prior to the adoption of extra-lawful measures, and all plausibly viable non-revolutionary measures are to be attempted prior to the adoption of revolutionary measures.

However paradoxical it might appear, America's founding principles of natural rights and the rule of law permit the practice of civil disobedience narrowly conceived.

In the early Civil Rights Era, the paradigmatic acts of civil disobedience were designed to achieve relatively limited, reformist objectives. This fact, along with the profession of nonviolence, helps explain the mainstream legitimacy accorded such acts, but it also means that civil disobedience so conceived may pose a greater threat to America's republican constitutional order than would a conception of civil disobedience as an inherently revolutionary practice. So far as it is dissociated from the objective of full, fundamental regime change, it would become more widely available and appealing as a means of mere reform, and thus normalized, it would tend to act over time to corrode popular respect for the rule of law. In cases of reformist no less than of revolutionary civil disobedience, it is therefore imperative to define clearly and to circumscribe closely the conditions under which this mode of protest is warranted.

In sum, however paradoxical it might appear, America's founding principles of natural rights and the rule of law permit the practice of civil disobedience narrowly conceived. It is permissible, on those principles, only where necessary and, in a context of functioning constitutional, republican government, only in exceptional cases. As we will see, American civil disobedience in its most widely admired form, in the theory and practice of King, is mainly—but not perfectly—in accord with those founding principles.

Martin Luther King, Jr.'s Discovery of Civil Disobedience

From his adolescence to the end of his life, Martin Luther King, Jr., found inspiration in the promise inherent in the Declaration of Independence, although he was acutely aware that for black Americans, that promise had gone unfulfilled. In his very first public speech (as a prizewinner in his high school's oratory contest), King protested that decades after Emancipation, "Black America still lives in chains." For the remainder of his secondary and advanced education, he searched for the proper means, as he put it in that initial speech, to "cast down the last barrier to perfect freedom."[17]

In his first book, *Stride Toward Freedom*, King recalled the discoveries that would supply the moral power for the social revolution he envisioned. First was the famous essay by Thoreau, who therein declared:

> I know this well, that if one thousand, if one hundred, if ten men whom I could name—if ten *honest* men only, ay, if *one* HONEST man, in this State of Massachusetts, *ceasing to hold slaves*, were actually to withdraw from this copartnership, and be locked up in the county jail therefor, it would be the abolition of slavery in America.[18]

"During my student days at Morehouse," King wrote, "I read Thoreau's essay 'Civil Disobedience' for the first time. Fascinated by the idea of refusing to co-operate with an evil system, I was so deeply moved that I reread the work several times. This was my first intellectual contact with the theory of nonviolent resistance."[19]

A still more powerful influence was Mohandas (Mahatma) Gandhi, whose teaching King discovered as a seminary student a few years thereafter. He attended a talk on Gandhi's life and teaching and found the message "so profound and electrifying" that he immediately bought a half-dozen books on Gandhi. "As I delved deeper into the philosophy of Gandhi," King reported, "my skepticism concerning the power of love gradually diminished, and I

17. Martin Luther King, Jr., "The Negro and the Constitution," May 1944, in *The Papers of Martin Luther King, Jr.*, edited by Clayborn Carson, Ralph Luker, and Penny A. Russell (Berkeley: University of California Press, 1992), Vol. 1, pp. 110–111.

18. Thoreau, "Civil Disobedience," in *Thoreau: Walden and Other Writings*, p. 93 (emphasis original).

19. Martin Luther King, Jr., *Stride Toward Freedom: The Montgomery Story* (Boston: Beacon Press, 1958/1986), p. 78.

came to see for the first time its potency in the area of social reform .... It was in this Gandhian emphasis on love and nonviolence that I discovered the method for social reform that I had been seeking."[20]

Here, for King, are the primary and overarching conditions of morally sound protest:

- Such protest must be nonviolent and must be animated by a spirit of love for the perpetrators of the injustice against which one protests.
- Nonviolent protest so conceived may or may not involve actions in violation of positive law, but where such protest *does* involve disobedience of law, it must be civil in character.
- In addition to being nonviolent, it must proceed from a devotion to the ideal of moral community.
- It must convey a respect for law as a necessary bond of moral community—including, so far as possible, the laws governing the particular community one means to reform.

As a subclass of nonviolent protest, civil disobedience in King's understanding is marked by:

- a conscientious refusal to submit to a law deemed unjust;
- a respectful acceptance of the legal consequences (typically jailing) of one's action; and
- a design to restore or to create a bond of community between the erstwhile victims and perpetrators of the injustice at issue.

King's awareness of the power of civil disobedience as a protest method quickened in the course of his first nonviolent direct-action campaign, the Montgomery bus boycott, and developed further as he reflected on the sit-in movement initiated by black college students in early 1960.[21] It reached its full fruition in the pivotal campaign of the entire movement, the Birmingham campaign in the spring of 1963, which occasioned his most extended and influential reflection on the subject.

King's Classic Exposition of Civil Disobedience: The "Letter from Birmingham Jail"

On Friday, April 10, 1963—Good Friday—King marched purposefully to a Birmingham jail cell, where he was confined for leading a protest march in violation of a local ordinance. That same day, the local newspaper published a public letter addressed to King and his fellow protesters, written by a group of eight Birmingham clergy (seven Christian pastors and one rabbi). The eight were not segregationists; they were moderate proponents of gradual integration. Their letter, entitled "An Appeal to Law and Order and Common Sense," urged the protesters to desist, arguing that direct-action street protests, especially those involving lawbreaking, were unhelpful as means for repairing race relations in Birmingham. Their appeal provided a perfect occasion for a response from King, who with other movement leaders had been contemplating, since a previous campaign in Albany, Georgia, the composition of a prison epistle to serve as a manifesto for their movement. Thus originated the famous "Letter from Birmingham Jail."[22]

The Objections to Civil Disobedience. In roughly the first third of the letter, King responded to the clergymen's charge that it was imprudent of him to lead protests at that moment in Birmingham. He then turned to their specific objection to the tactic of civil disobedience. He conceded that it was "certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court's decision of 1954 outlawing segregation in the public schools ... [o]ne may well ask: 'How can you advocate breaking some laws and obeying others?'"[23]

20. Ibid., pp. 84–85.
21. Ibid., pp. 91, 116–121, 135–142, 212–214; King, "Love, Law, and Civil Disobedience," November 16, 1961, in *A Testament of Hope*, pp. 43–53.
22. See Jonathan Bass, *Blessed Are the Peacemakers: Martin Luther King, Jr., Eight White Religious Leaders, and the "Letter from Birmingham Jail"* (Baton Rouge: Louisiana State University Press, 2001). See also Jonathan Rieder, *Gospel of Freedom: Martin Luther King, Jr.'s Letter from Birmingham Jail and the Struggle That Changed A Nation* (New York: Bloomsbury Press, 2013), ch. 1.
23. Various published versions of the "Letter" exist. The most complete version of which I am aware appears as chapter 5 of *Why We Can't Wait*, from which I draw all quoted passages. The passage quoted here appears on p. 82.

The objection was familiar to King. It had been raised not only by moderate southern whites such as the eight clergymen but also by defenders of segregation and by some conservative, moderate, and even liberal black supporters of the cause. In a 1960 televised debate with King, the segregationist James J. Kilpatrick, editor of the *Richmond News Leader*, remarked that in the controversy over public school integration, "[W]e at the South ... were exhorted on every hand to abide by the law ... and it is therefore an interesting experience to be here tonight and see Mr. King assert a right to obey those laws he chooses to obey and disobey those that he chooses not to obey."[24] Prominent black leaders also objected to the practice of civil disobedience, as Emory O. Jackson, editor of the black newspaper *The Birmingham World*, Joseph H. Jackson, president of the National Baptist Conference, and even the great civil-rights attorney (and, subsequently, the first African-American U.S. Supreme Court Justice) Thurgood Marshall, all called for fidelity to the law in pursuance of the movement's objectives.[25]

Positive or man-made law must conform with higher law—with natural or divine law.

Reduced to its essence, King's response appears in a simple, if paradoxical formulation: Civil disobedience is not lawlessness but instead a higher form of lawfulness. Drawing upon the higher-law tradition of American and western political thought, King argued that to qualify as law in the proper sense, a given statute or ordinance must conform with the principles of justice. Positive or man-made law must conform with higher law—with natural or divine law. If it conflicts with the higher law, it cannot be binding as law. "'An unjust law is no law at all,'" King declared, holding it to be both a right and a moral duty to disobey any such measure: "[O]ne has a moral responsibility to disobey unjust laws."[26]

Beyond such simple formulations, King took seriously the objections Kilpatrick, the clergymen, and others raised. Mindful of the dangers in an excessively permissive justification, he rejected the sort of disobedience that "would lead to anarchy" and explained his own practice in terms that indicate an earnest intention to negate or minimize any anarchic effects.[27]

As we will see, King failed to provide a rigorous account of civil disobedience, and it is also arguable that his practice of civil disobedience failed to adhere strictly to his principles. Yet despite these shortcomings, his discussion adumbrates several regulating and confining conditions that, properly elaborated, could supply a defensible justification of the practice. In summary, as King presented it in the "Letter," civil disobedience may only be undertaken: (1) for the right reasons; (2) in the right spirit; and (3) by the right people.

King's Defense: The Right Reasons. That civil disobedience may be practiced only for the right reasons is first and fundamental among the regulating conditions King suggested. This means that the practitioner of civil disobedience must judge properly in identifying unjust laws as the justification for disobedience. To repeat, King rejected the legal positivism that he imputed (unfairly) to his interlocutors: "We can never forget that everything Adolf Hitler did in Germany was 'legal' and everything the Hungarian freedom fighters did in Hungary was 'illegal'.... I had hoped that the white moderate would understand that law and order exist for the purpose of establishing justice."[28] He also rejected the error Kilpatrick had ascribed to him, a reliance on conscience to distinguish just and unjust laws that reduces in practice to a mere idiosyncratic choice. It is notable in this regard that the numerous authorities King cited in the "Letter" do not include Thoreau, whose highly individualist

24. "Debate with James J. Kilpatrick on 'The Nation's Future,'" November 26, 1960, *Papers of Martin Luther King, Jr.*, Vol. 5, p. 560.

25. Bass, *Blessed Are the Peacemakers*, p. 105; Rieder, *Gospel of Freedom*, p. 29; Wallace Best, "'The Right Achieved and the Wrong Way Conquered': J.H. Jackson, Martin Luther King, Jr., and the Conflict Over Civil Rights," in *Religion and American Culture: A Journal of Interpretation*, Vol. 16, No. 2 (Summer 2006), pp. 195–226; Juan Williams, *Thurgood Marshall: American Revolutionary* (New York: Three Rivers Press, 1998), pp. 245–253.

26. King, "Letter from Birmingham Jail," in *Why We Can't Wait*, p. 82; see also King, *Papers*, Vol. 5, pp. 535–536, 545.

27. King, "Letter," p. 83.

28. Ibid., pp. 84–85.

idea of conscience, disdain for majoritarian democracy, and pronounced antinomianism King did not share.[29]

Justice, King maintained, is manifest in a higher law that is accessible to human reason. 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." An unjust law, he continued, invoking St. Thomas Aquinas, "is a human law that is not rooted in eternal law or natural law." A law "that uplifts human personality is just," and one that "degrades human personality is unjust." Governmentally mandated segregation by color is unjust, because it "distort[s] the soul and damages the personality," producing in perpetrators and victims false senses of superiority and inferiority. Like slavery in this respect, segregation violates the moral law by "relegating persons to the status of things."[30] Such practices and the positive laws that support them do violence to the divine and natural order by denying to some classes of human beings the status of full moral humanity or personhood.

Further, the dignity of human personality signifies the *equal* dignity of human persons. In King's account, therefore, justice entails the principle of equality under law, and legitimate government derives from the consent of the governed. An enactment to which lawmakers subjected only others, not themselves, would be no true law, and a similar disqualification would apply to any legislation imposed upon an unjustly disfranchised portion of the population.[31]

Acknowledging the seriousness of any act of lawbreaking, King recognized his responsibility to explain the criteria for judging the injustice of law and the rightfulness of disobedience. That is not to say that he fully met that responsibility, either in the "Letter" (which he continued to compose and revise after his release[32]) or elsewhere in his published work. King's account of unjust laws in the "Letter" specifically targeted laws in America's Old South that sustained race-based segregation and disfranchisement, laws inconsistent in principle with any plausible understanding of human moral equality. In that specific application, his explanation of just cause for civil disobedience may be judged successful. He was less successful, however, in clarifying the ideas of personhood and equality that were to supply the basis and the limiting principle for claims of rights and of rights violations.

Justice, King maintained, is manifest in a higher law that is accessible to human reason.

In the "Letter," King indicated that the sources of his thinking about the moral law were eclectic. They included the Protestant theology of personalism that he had studied as a graduate student,[33] the philosophy of Aquinas, and the charter of liberty that he described as a repository of America's "sacred values, the Declaration of Independence."[34] Those sources contain overlapping (but not identical) accounts of the moral law and its basis, and King failed to explain precisely what he drew from each, how they were compatible with one another, or their order of priority in his argument. Nor did he address in the "Letter" the implications of his idea of equality for other, more difficult questions pertaining to justice in race relations and to the cause of social

29. See Thoreau, "Civil Disobedience," in *Thoreau: Walden and Other Writings*, p. 86: "[T]he practical reason why .... a majority are permitted ... to rule is not because they are most likely to be in the right, nor because this seems fairest to the minority, but because they are physically the strongest .... It is not desirable to cultivate a respect for the law, so much as for the right .... Law never made men a whit more just."

30. King, "Letter," p. 82.

31. Ibid., p. 83.

32. Bass, *Blessed Are the Peacemakers*, pp. 134–138.

33. Regarding "personalism," the pertinent entry in the *Stanford Encyclopedia of Philosophy* states in summary: "Personalism is a ... diffused and eclectic movement" that affirms "the centrality of the person for philosophical thought.... It emphasizes the significance, uniqueness, and inviolability of the person, as well as the person's essentially relational or communitarian dimension" [Williams, Thomas D. and Bengtsson, Jan Olof, "Personalism", *The Stanford Encyclopedia of Philosophy* (Summer 2016 Edition), Edward N. Zalta (ed.), URL = https://plato.stanford.edu/archives/sum2016/entries/personalism/]. King became acquainted with the doctrine through the writings and teaching of Professor Edgar S. Brightman at Boston University.

34. Zalta, ed., pp. 82–83, 94.

and political equality in general—questions controversial even among proponents of equality. Readers receive only very limited guidance as to how they are to judge, amid a wide range of plausible interpretive possibilities, what sorts of laws work to uplift or to degrade human personality.

The result of these shortcomings is that the argument of King's "Letter," while strong and clear enough to identify the injustice of racial segregation and disfranchisement, is also abstract and ambiguous enough to expose a broad range of positive laws to charges of injustice—and therefore, potentially, to acts of disobedient protest. One cannot say that King's explanation of the distinction between just and unjust laws suffices in itself to ward off the charges of anarchism leveled by critics. To establish the compatibility of his practice of civil disobedience with the rule of law, he needed to say more.

Readers receive only very limited guidance as to how they are to judge, amid a wide range of plausible interpretive possibilities, what sorts of laws work to uplift or to degrade human personality.

The Right Spirit. King's second main regulating condition, that civil disobedience must be undertaken in the right spirit, means foremost that civil disobedience must convey a proper respect for law. In the endeavor to fulfill the law, the would-be reformer must be properly mindful of the danger of destroying it. Civil disobedience must convey a respect for the authority of law as an indispensable and inherently fragile instrument of human governance, no less than for the rational principles from which the law must ultimately derive. Moreover, as his illustrations of unjust law make clear, it must convey a special respect for the authority of democratically enacted law. Against his critics, King insisted that civil disobedience signifies no disrespect but, to the contrary, "the highest respect for law."[35] For King, as in the logic of the Declaration, civil disobedience may be practiced only *where* necessary and only *so far* as necessary to the purpose of reforming an unjust human law.

To practice civil disobedience only where necessary means, in the precise sense, to practice it as a next-to-last resort, short only of uncivil or violent resistance to tyranny. In the Declaration, as previously noted, prudence dictates that action to alter or abolish an unjust order may be taken only by "necessity"—only after "patient sufferance" of "a long train of abuses," wherein "repeated Petitions" offered "in the most humble terms ... have been answered only by repeated injury."

In the "Letter," King contended that the history of race in America met and exceeded those criteria. "We have waited for more than 340 years for our constitutional and God-given rights." In the specific locale of Birmingham, anti-black segregation was enforced by the most brutally violent means. "There have been more unsolved bombings of Negro homes and churches in Birmingham," King reported, "than in any other city in the nation." In response, "Negro leaders sought to negotiate with the city fathers. But the political leaders consistently refused to engage in good-faith negotiation." Nor was there a legitimate opportunity for effecting change by the normal electoral process: "Throughout Alabama all types of devious methods are used to prevent Negroes from becoming registered voters."

In sum, King argued, "we had no alternative" but to engage in street protests, and—after Birmingham Police Commissioner Eugene "Bull" Connor obtained an anti-demonstration injunction from an Alabama court—no alternative but to engage in civil disobedience. Our impatience, he said, was "legitimate and unavoidable." The implication is that civil disobedience was undertaken as a last, nonviolent resort and was justified as such.[36]

The action in Birmingham was King's first disobedience of a court order, and he found it a very difficult decision. For present purposes, the fundamental questions concern whether his judgments to disobey the court's injunction and to justify that disobedience by an appeal to natural and divine law rather than U.S. constitutional law are properly characterized as last resorts, taken in response to a genuine necessity. In the "Letter," King contended that as

35. King, "Letter," in *Why We Can't Wait* pp. 83–84.

36. Ibid., pp. 78, 82, 83.

applied to his direct-action campaign, the ordinance that the injunction was issued to enforce was a violation of the U.S. Constitution, in particular of the First Amendment's guarantee of rights of peaceful assembly and protest. He added that "federal courts have consistently affirmed" his position that the threat of violence by others—the so-called "rioter's veto—provides no legally defensible ground for an abridgement of the right of peaceful protest.[37]

The difficulty in King's position appears still more challenging in light of the impressive victories equal-rights activists had achieved over the previous two decades by a combination of political pressure and legal challenges. Those victories included:

- Executive Order 8802, issued in 1941 by President Franklin D. Roosevelt under pressure from A. Philip Randolph, mandating antidiscrimination provisions in government defense contracts;

- Executive Order 9981, issued in 1948 by President Harry S. Truman, mandating the desegregation of the U.S. armed services;

- the U.S. Congress's enactment of the Civil Rights Acts of 1957 and 1960; and

- above all, the U.S. Supreme Court's landmark *Brown v. Board of Education* ruling, the culmination of the National Association for the Advancement of Colored People's (NAACP's) campaign of legal challenges to segregation and other discrimination.

So far as it was taken not as a last resort but, to the contrary, amid a period of accumulating successes for the equal-rights cause achieved by scrupulously lawful means, King's decision to practice civil disobedience in Birmingham appears precipitant, unwarranted by his own criterion of justification. Pursuant to his own insistence on respect for law, it appears that King's proper initial recourse in Birmingham was the legal channel of judicial appeal rather than disobedience, and that until legal and political channels for reform proved clearly unavailing, his justification for his actions should have remained within the realm of positive, constitutional law.

Two main considerations, however, convinced King of the immediate necessity of civil disobedience in the Birmingham campaign. He believed that among the available channels for such demands, action via the court system was at best dilatory and often ineffectual; it needed reinforcement by direct-action, demonstrative protest. Further, he was convinced that his direct-action movement, having suffered notable setbacks since the initial victory in Montgomery in 1956, had arrived at a crisis moment in Birmingham, such that any significant delay at that juncture would likely prove fatal to the movement as an effective force for reform. Noting that "the injunction method" was proving an effective tool for segregationists in thwarting blacks' rights to peaceful protest, King therefore decided to reject his father's advice to submit to the court's ruling.[38] "If we obey this injunction," he concluded, "we are out of business."[39]

In Birmingham, the very citadel of southern segregation, the movement would either revitalize itself, King believed, or it would fail and all previous gains would come to naught. Here is the key point: King's actions in Birmingham and elsewhere were born of a deep impatience, informed, as he wrote in the "Letter," by a centuries-long history of injustice, including promises made and unfulfilled, that had taught him to equate slow or partial progress with no progress: "Half a loaf is no bread."[40] Despite his generally gracious recognition of NAACP efforts, King held that the courtroom victories won by that senior organization, along with the other apparent successes achieved in the electoral branches to that point, would prove practically worthless unless reinforced by further, stronger measures that would be enacted only in response to sustained, intensified pressure.[41] At bottom, it was this deep mistrust for merely partial, preparatory, or ephemeral gains that moved him to consider civil disobedience a moral imperative.

37. Ibid., pp. 83, 85.

38. Ibid., pp. 70–71.

39. Quoted in Taylor Branch, *Parting the Waters: America in the King Years, 1954–63* (New York: Simon & Schuster, 1988), p. 730.

40. Ibid., p. 32.

41. King, *Why We Can't Wait*, p. 34.

Recall, too, however, that civil disobedience as King conceived it was to be practiced only *so far* as necessary. Even where it proves necessary to disobey an unjust law, to disobey the law in its entirety may be unnecessary to the purpose of reform—and indeed may conflict with that purpose. To convey the proper respect for law, one must obey as much of the law as possible. In a general sense, King's conformity with this precept in the first phase of his activism appears, despite his sometimes eager usage of the language of revolution, in his scrupulous expressions of respect for the principles and institutions established by the American Founders. In its most concrete manifestation, however, the precept of obeying law so far as possible appears in his insistence on submitting to the legally prescribed punishment for disobedience. "In no sense do I advocate evading or defying the law," he explained. "One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty."[42]

In this way both the disobedience and the acceptance of the penalty are essential to King's effort to reform the law by means of moral suasion.

King's distinction between disobedience that is evasive or defiant and disobedience marked by acceptance of the authority of law is vividly meaningful in context. The former described the practice of "rabid segregationist[s]," while the orderly disobedience of freedom movement protesters exemplified the latter. To gain a full, sympathetic understanding of King's position, it is necessary, as King scholar Jonathan Rieder has commented, to think concretely about the distinction: "In Birmingham, the lawbreakers [castrated] a black man; they bomb[ed] ordinary families .... Bull Connor, the chief lawman, colluded with the Klan so they could carry out bloody mayhem on Freedom Riders." Given the context, it would seem a gross distortion of perspective to see in King's and his fellow protesters' actions a danger to law and order comparable to that posed by pro-segregation extremists.[43]

The insistence on accepting the prescribed penalty for disobedience was integral to King's larger design of presenting to the broad American public the sharpest possible contrast between the characteristically lawful practitioners of disobedience and the lawless defenders of the local statutes and ordinances. It was integral, in other words, to his larger design of exposing the stark conflict between local positive laws sustaining racial subordination and the moral laws of nature. To reform the city's—and the region's and the country's—laws, it was necessary to expose that conflict, and to expose that conflict it was necessary to demonstrate to a national public the effect of those laws in inflicting brutality and imprisonment on a class of decent and law-abiding people, who would demonstrate those qualities most visibly by their voluntary acceptance of the penalties for disobeying the city's law. In this way both the disobedience and the acceptance of the penalty are essential to King's effort to reform the law by means of moral suasion.

The Right People. Conceiving of civil disobedience as a willing submission of self to a higher discipline, King made clear that this mode of protest carried a high risk. He noted the silence in the room when, at a meeting of supporters to finalize plans for the Birmingham campaign, Reverend Fred Shuttlesworth of Birmingham remarked, "You have to be prepared to die before you can begin to live." King meant quite literally his statement in the "Letter" that in direct-action protest, his group "would present our very bodies as a means of laying our case before the conscience of the local and the national community." His praise for the protestors' "sublime courage" was no mere exercise in boosting morale.[44]

42. Ibid., pp. 82–83; see also King, *Papers* Vol. 5, pp. 535–536, 545; King, "Love, Law, and Civil Disobedience," *A Testament of Hope*, p. 49.

43. Rieder, *Gospel of Freedom*, p. 67. To their credit, the eight clergy who addressed King had also, a few months earlier (in response to the belligerent "Segregation Forever" inaugural address by Governor George Wallace), implored Alabama's segregationists to respect the dictates of law and order by complying with the Supreme Court's *Brown v. Board of Education* ruling. They posited no equivalency between pro- and anti-segregation forces but rather were concerned that the disobedience King recommended would be taken to excuse far worse acts of disobedience by segregationists. See Bass, *Blessed Are the Peacemakers*, Appendix 1, pp. 233–234. See also King, *Papers of MLK*, Vol. 5, p. 561, for Kilpatrick's response to King's mention of resistance to the *Brown* ruling: "We thought *we* were resisting an unjust law, you see" (emphasis added).

44. King, *Why We Can't Wait*, pp. 58, 78, 94.

The dangers were sufficiently great that the average person, naturally concerned for the preservation of life and limb, could not be presumed willing or able to brave them. Something similar was true with respect to the indignations and provocations to which protestors would be subjected, which could be expected often to surpass the limits of the average person's patience. The practice of civil disobedience required a special kind of person—meaning, in most cases, a specially *trained* kind of person. "Mindful of the difficulties involved," King wrote, "we decided to undertake a process of self-purification. We started having workshops on nonviolence, and we repeatedly asked ourselves the questions: 'Are you able to accept blows without retaliating?' 'Are you able to endure the ordeal of jail?'"[45]

The training that protesters received was rigorous in itself, but the moral formation King judged requisite to nonviolent protest and properly civil disobedience required more than any relatively brief workshop could produce. What sort of person, marked by what sorts of qualities, volunteers for such training in the first place? A concern about injustice was a minimum condition, but King insisted that civil disobedience must be animated also by an ethic of love and service for other human beings, including perpetrators as well as primary victims of injustice.

Indicative of the moral qualities required are the tenets of the "Commitment Card" the leadership of the Southern Christian Leadership Conference (SCLC) required volunteers to sign:

> I hereby pledge myself—my person and body—to the nonviolent movement. Therefore I will keep the following ten commandments:
>
> **1.** Meditate daily on the teachings and life of Jesus.
>
> **2.** Remember always that the nonviolent movement in Birmingham seeks justice and reconciliation—not victory.
>
> **3.** Walk and talk in the manner of love, for God is love.
>
> **4.** Pray daily to be used by God in order that all men might be free.
>
> **5.** Sacrifice personal wishes in order that all men might be free.
>
> **6.** Observe with both friend and foe the ordinary rules of courtesy.
>
> **7.** Seek to perform regular service for others and for the world.
>
> **8.** Refrain from the violence of fist, tongue, or heart.
>
> **9.** Strive to be in good spiritual and bodily health.
>
> **10.** Follow the directions of the movement and of the captain on a demonstration.[46]

It is meaningful, if unsurprising, that the SCLC required of protesters a commitment suffused with the moral spirit of Christianity. Granted, the commitment pledge did not quite signify a religious test for participation; it required meditation on Jesus's teaching, not worship of Jesus, and it required prayer to a God of love, not necessarily to the God Christians recognize.[47] Nonetheless, it is significant that King stipulated, as a requisite of civil disobedience, that the practitioner must possess a distinctive set of religiously grounded moral qualities, including a firm commitment to a higher, natural and divine law and a faith that suffering in the service of that law can be redemptive for oneself and others. He proudly described his movement as "a mass-action crusade," but by insisting on proper training and character formation, he made clear that not simply anyone was suitable for direct-action protest and civil disobedience: "Not all who volunteered could pass our strict tests."[48]

King's Achievement. Judged by its main objectives of reforming the law and strengthening the bonds of moral community, King's direct-action protest movement of the 1950s and early 1960s appears to have been a resounding success. The Birmingham

45. King, "Letter," pp. 78–79.

46. Ibid., pp. 63–64.

47. See King, "Palm Sunday Sermon on Mohandas K. Gandhi," March 22, 1959, *Papers of MLK*, Vol. 5, pp. 147–148: "[T]he greatest Christian of the twentieth century was not a member of the Christian church."

48. King, *Why We Can't Wait*, p. 63.

campaign, epitomized by the now-canonical "Letter," is credited with generating an irresistible momentum for the passage of the Civil Rights Act of 1964. The subsequent campaign in Selma, organized on the same principles and initiated by its own act of civil disobedience, generated a similar energy for the enactment of the Voting Rights Act of 1965. Those two statutes constitute the most ambitious and effective civil- and political-rights guarantees in the nation's history, and their enactment coincides with the onset of a profound reformation in Americans' moral sentiments about race relations.

Admirers of King and the movement might contend further that these successes were achieved by generally peaceful means, without effecting lasting ruptures in civil order in the southern venues in which protesters campaigned. Critics had predicted that the tactics of direct action and civil disobedience would degenerate into uncivil disobedience, marked by lawlessness and violence. Those evils did ensue—but as King emphasized, they came in the main from the actions of segregation's defenders, not from its protesters. The protests he led and supported did not incite violence so much as they exposed pre-existing violence to the view of a national public. By attaching to the practice of civil disobedience the regulatory conditions that he described in the "Letter," King helped contain disorders that might otherwise have so expanded as to scuttle the possibility of meaningful reform. By this means, his admirers might plausibly argue, King acknowledged the seriousness of critics' major concern and effectively addressed it.

Nonetheless, critics of King's arguments and actions relative to civil disobedience even in this more successful phase of his career have a point in warning of their tendency to propagate disrespect for law and an enthusiasm for (purportedly) righteous disobedience. It is not clear that a patient reliance on the judicial process in the Birmingham campaign would have doomed the direct-action movement to failure, as King feared. One might also discern in King's eagerness to deploy the language of revolution and natural rights in preference to that of constitutional law a certain zeal for revolution at odds with his insistence on respect for positive law. One might further suggest that even in the first phase of his activism, King's actions and his rhetoric did not fully accord with the strict criteria for civil disobedience that he adumbrated in the "Letter." Critics have a point in charging that King bore a measure of responsibility for the eruptions of lawlessness that would begin to sweep U.S. cities from 1965–1968, even as the direct-action movement was achieving its greatest triumphs.[49]

The details of his second-phase proposals varied over time, but the general idea was to call for a new federal antipoverty initiative, unprecedented in size and scope.

For his own, very different reasons, King, too, judged the first phase of his movement as only a partial and mixed success. In this respect, his dissatisfaction with the "half a loaf" gained in previous decades applied also to his movement's accomplishments, which marked, in his view, not the end of its work but only "the end of the beginning," as President Lyndon Johnson said in anticipation of the Voting Rights Act.[50]

In the years that followed, King would radicalize his calls for civil disobedience.

Civil Disobedience Radicalized

"With Selma and the Voting Rights Act," King wrote in his final book, *Where Do We Go From Here?* "one phase of development in the civil rights revolution came to an end." He announced the advent of a second phase, targeting conditions in impoverished urban ghettoes across the country and aiming at "the realization of [socioeconomic] equality" across lines of class and color.[51] The details of his second-phase proposals varied over time, but the general idea was to call for a new federal antipoverty initiative, unprecedented in size and scope. Dissatisfied with Johnson's "War on Poverty," King called for a multifaceted "real war on poverty" designed to provide "jobs, income," and housing for all in need

49. See, for example, Burns, "Martin Luther King, St. Augustine, and Civil Disobedience," pp. 155–156, 159–161; Schlueter, *One Dream or Two?* p. 140.

50. Lyndon B. Johnson, "Commencement Address at Howard University: 'To Fulfill These Rights,'" June 4, 1965, *Public Papers of the Presidents*, at http://www.presidency.ucsb.edu/ws/index.php?pid=27021&st=johnson&st1=howard (accessed May 22, 2017).

51. Martin Luther King, Jr., *Where Do We Go from Here: Chaos or Community?* (Boston: Beacon Hill Press, 1968/1986), pp. 3–4.

of them: in sum, "a new economic deal for the poor," consisting in "a massive, new national program."[52]

To hasten the achievement of his second-phase objectives, King renewed and intensified his call for civil disobedience. In the fourth of his Massey Lectures,[53] delivered in late 1967 and published under the title, *The Trumpet of Conscience*, he stated:

> There is nothing wrong with a traffic law which says you have to stop for a red light. But when a fire is raging, the fire truck goes right through that red light, and normal traffic had better get out of its way .... Or, when a man is bleeding to death, the ambulance goes through those red lights at top speed. There is a fire raging now for the Negroes and the poor of this society .... Disinherited people all over the world are bleeding to death from deep social and economic wounds.[54]

Even after the enactment of the Voting Rights Act, King believed, America remained in a state of social emergency, "a desperate and worsening situation" even more serious than the country had faced in 1963. King held further acts of civil disobedience to be warranted because he regarded prevailing conditions of poverty and rising discontentment as effects of a set of "terrible economic injustices" no less grievous and even more widespread than the wrongs of the Jim Crow regime: "In our society it is murder, psychologically, to deprive a man of a job or an income .... You are in a real way depriving him of life, liberty, and the pursuit of happiness, denying in his case the very creed of his society. Now, millions of people are being strangled that way."[55]

Violent in itself, that injustice was in King's view also violent in its emerging effects—above all in the rioting that began in Watts just days after the Voting Rights Act became law and spread, in the two years thereafter, to hundreds of cities across the U.S. As was the case in Watts, the riots were often precipitated by disputes involving police—but evidence suggests that neither charges of police brutality nor discontentment at socioeconomic deprivation was the predominant cause. Anger at the brutality inflicted upon King and the southern protesters was, however, widespread among northern blacks. Whatever the broader causes, the Watts riots left 34 people dead and over 1,000 injured. Two years later, a riot in Detroit wrought even greater destruction.[56]

The failure of federal authorities to adopt antipoverty measures on the schedule—and in the degree and kind he desired—necessitated, in King's view, a new round of protests.

King was profoundly alarmed at these events and at the corresponding emergence of the "black power" faction that rejected his calls for nonviolent means and integrationist ends. Believing that only prompt remedial action by the federal government could bring peace to the cities, he amplified his demands for the enactment of his phase two, antipoverty measures as "an emergency program." Congress's failure to enact that program angered him; he called it a provocation and ascribed it to a "white backlash" indicative of a broader and deeper racism among whites than he had previously estimated. The failure of federal authorities to adopt antipoverty measures on the schedule—and in the degree and kind he desired—necessitated, in King's view, a new round of protests. He reiterated his calls for nonviolent action, including civil disobedience, but this time in a significantly modified form. In his first Massey Lecture, he declared:

> Nonviolent protest must now mature to a new level to correspond to heightened black impatience and stiffened white resistance. This higher level is mass civil disobedience. There must be more than a statement to the larger society; there must be a force that interrupts its functioning at some key point ... Mass civil disobedience

52. Martin Luther King, Jr., *The Trumpet of Conscience* (New York: Harper & Row, 1967), p. 61.
53. The Massey Lectures are a Canadian lecture series created in 1961 to honor the former Governor General of Canada.
54. King, *Trumpet of Conscience*, p. 53.
55. Ibid., pp. 53, 55.
56. Stephan and Abigail Thernstrom, *America in Black and White: One Nation, Indivisible* (New York: Simon & Schuster, 1997), pp. 158–165.

> as a new stage of struggle can transmute the deep rage of the ghetto into a constructive and creative force. To dislocate the functioning of a city without destroying it can be more effective than a riot because it can be longer-lasting, costly to the larger society, but not wantonly destructive.[57]

King called this modified conception a more "mature" form of civil disobedience. A closer analysis makes clear, however, that it signifies a radical departure from the practice he defended in the "Letter." Whereas in that earlier account he explained that civil disobedience must be practiced only for the right reasons, in the right spirit, and by the right people, the "mass civil disobedience" he advocated in 1967 effects decisive modifications of all three of those regulating conditions.

Reasons. King characterized poverty and unemployment as deprivations of the rights of life, liberty, and the pursuit of happiness, and he conceived of poverty as a form of segregation.[58] He contended that the social and economic rights he demanded are no less firmly rooted in America's first principles than are the civil and political rights for which he campaigned in his movement's first phase. These are untenable claims.

The difficulty appears first in the fact that, as King at times acknowledged, his expansive, second-phase conception of rights was rooted in principles outside America's constitutional tradition: "We have left the realm of constitutional rights," he remarked in *Where Do We Go From Here?* "and we are entering the area of human rights."[59] To say that King's later claims about rights fall outside America's constitutional tradition is not necessarily to discredit them, but by construing poverty itself as indicative of injustice, irrespective of any action or inaction by those who suffer it, he implicitly placed rights on an infirm foundation. He adopted an idea of rights grounded in indefinite human needs rather than in definite and distinctive human faculties, thus leaving rights claims with no clear foundation or limiting principle even as he endorsed a great expansion of those claims.[60]

By adopting this controversial and problematic conception of rights, King effectively discarded his earlier regulating condition that civil disobedience may be undertaken only for the right reasons, clearly identifiable as such in the light of the natural law philosophy exemplified in the U.S. constitutional tradition.

King characterized poverty and unemployment as deprivations of the rights of life, liberty, and the pursuit of happiness, and he conceived of poverty as a form of segregation.

Spirit. King's later conception departs, too, from his earlier insistence that civil disobedience must be practiced in a spirit of respect for law, respect for democratic governance, and redemptive good will, manifesting a desire for reconciliation with one's erstwhile adversaries.

A corollary of King's earlier position that civil disobedience may be practiced only where necessary is that such disobedience should cease as soon as possible—i.e., as soon as the necessary reforms are achieved or lawful, political avenues to their achievement become available. Mindful of the same socioeconomic conditions that alarmed King, Bayard Rustin (King's longtime adviser and perhaps the movement's shrewdest tactician and organizer) called for activism within the regular democratic processes of petition, electoral persuasion, and voting; he endorsed "a strategic turn toward political action and a temporary curtailment of mass demonstrations."[61] By failing to heed Rustin's advice, King departed from his previously stated principles

57. King, *The Trumpet of Conscience*, pp. 9–10, 14–15. See also King, *Where Do We Go from Here*, pp. 1–22.
58. See King, *Why We Can't Wait*, p. 23.
59. King, *Where Do We Go from Here*, p. 138, 211.
60. On poverty as a violation of rights, see ibid., pp. 170–175. For a fuller discussion of the bases for rights claims, see Peter C. Myers, "From Natural Rights to Human Rights—And Beyond," Heritage Foundation *Special Report* No. 197, December 20, 2017, http://report.heritage.org/sr197.
61. Bayard Rustin, "From Protest to Politics," *Commentary*, Vol. 39, No. 2 (February 1965), https://www.commentarymagazine.com/articles/from-protest-to-politics-the-future-of-the-civil-rights-movement/ (accessed December 13, 2017).

regarding civil disobedience. At least momentarily, he lost faith in the democratic processes the Voting Rights Act had newly reformed.

King departed from his previously held regulatory principles in another, related respect. Note that in his call for a more "mature" form of civil disobedience, he emphasized the exercise of "force" aimed at interrupting society's functioning "at some key point."[62] In the "Letter," King explained civil disobedience as a form of moral suasion, designed "to arouse the *conscience* of the community."[63] The earlier model of civil disobedience thus contrasts sharply with the model King later proposed, which was not demonstrative or persuasive in character but instead disruptive and coercive and, moreover, targeted not unjust laws but instead just laws necessary to the ordinary functioning of society. The latter sort of action is unintelligible as a claim upon conscience. To the contrary, it signifies a purposeful encroachment on others' rights and interests as members of civil society.

King's illustrations of the sorts of actions he envisioned are useful in clarifying the distinction. His first illustration was offered as a hypothetical, though it has since become a common method in actual protests. Traffic laws are not in themselves unjust, King allowed, but their operation may be legitimately suspended for emergency purposes. The disruption of traffic, infringing on a right of access to a public road, is in his view a permissible means of extracting a public concession to an aggrieved group's demands. He offered a second illustration in the form of a direct suggestion. "[We] will move on Washington," he resolved, "determined to stay there until the legislative and executive branches of the government take serious and adequate action .... A delegation of poor people can walk into a high official's office with a carefully, collectively prepared list of demands. And if that official [is nonresponsive], you can say, 'All right, we'll wait.' And you can settle down in his office for as long a stay as necessary."[64]

In advocating this radicalized form of civil disobedience, King contended that those who perceive a serious societal injustice have the right to disobey *just* laws to the end of reforming unjust laws or policies. They have the right, by his logic, to *violate the rights* of innocent parties (travelers, office workers, or public officials, along with their clients, patrons, and constituents). So understood, King's later idea of civil disobedience is properly if bluntly characterized as a form of extortion clothed in moral purposes. It is plainly at odds with his insistence on the correspondence of moral ends and moral means.[65] It is no less at odds with his insistence that the ultimate objective of direct-action protest and civil disobedience is reconciliation between the erstwhile victims and perpetrators of injustice, enabled by a "change of heart" in the latter.[66]

King's later idea of civil disobedience is properly if bluntly characterized as a form of extortion clothed in moral purposes.

People. Finally, as for the principle that civil disobedience may be practiced only by people of properly formed character, King's call for an expanded and disruptive campaign of civil disobedience did include a training period. Describing his plan to recruit "three thousand of the poorest citizens" from various urban and rural areas to participate in a "Poor People's March on Washington," he indicated that "this nonviolent army, this 'freedom church' of the poor, will work with us for three months to develop nonviolent action skills."[67]

Even so, King's remarks relative to the character and motivations of this newly recruited "army" suggest that here, too, he departed significantly from his earlier account. Although the enlistees in that new army might receive training similar to what their

62. King, *Trumpet of Conscience*, p. 15 (emphasis added).
63. King, "Letter," in *A Testament of Hope*, p. 294 (emphasis added).
64. King, *Trumpet of Conscience*, pp. 53, 60–61.
65. *Stride Toward Freedom* pp. 79–80; *A Testament of Hope*, p. 45, 102, 109, 214; *Trumpet of Conscience*, pp. 70–71.
66. King, *Stride Toward Freedom*, p. 86.
67. King, *Trumpet of Conscience*, p. 60.

first-phase predecessors received, the fact remains that the latter, drawn substantially from a population of southern churchgoers imbued with a Christian ethic of love and service, were beneficiaries of a moral heritage that many of those solicited for the later phase did not share. Attempting to find virtue in the difference, King offered a troubling description of the prospective participants in his second-phase project, highlighting not their moral discipline but their social desperation: "The only real revolutionary, people say, is a man who has nothing to lose."[68]

In a similar vein, King attempted to find even in the riots themselves support for his contention that the disaffected urban poor constituted a promising new class of potential pilgrims to nonviolence. Among "the most striking features of the city riots," he argued, was that "the violence, to a startling degree, was focused against property rather than against people." The overwhelming majority of people killed during the riots, he went on, were protesters killed by law enforcement officers. In those facts, he discerned an "unmistakable pattern," in which "a handful of Negroes used gunfire substantially to intimidate, not to kill; and all of the other participants had a different target—property." On closer examination, then, the riots were actually characterized by a "restraint" that gave cause for hopefulness. King concluded: "If one can find a core of nonviolence toward persons, even during the riots when emotions were exploding, it means that nonviolence should not be written off for the future as a force in Negro life."[69]

King's apologetic discussion of the rioting raises troubling questions. What defensible basis is there for his finding of "a core of nonviolence" in acts of intimidation against persons and of violence against property? Is there any tenable moral distinction between the intimidation he equivocally decried and the disruption and coercion he advocated as elements of his "mature" form of civil disobedience? On what ground could he continue in his second-phase arguments to affirm the moral imperative of nonviolence, given his justification of coercion? On what ground could he locate the natural rights of persons, given his denigration of the property right—a right affirmed in classical natural-rights philosophy as a direct corollary of the liberty of the person?[70] Finally, in his second-phase advocacy of intensified civil disobedience—justified, he claimed, by the force of the "white backlash" and the depth of white racism in America—what remained of the ethic of redemptive love that animated his first-phase argument?

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To such questions King offered no compelling answers. The conclusion seems inescapable that in his desperate zeal to add rapid socioeconomic uplift to his movement's previous victories in securing civil and political rights, King again neglected a piece of wise counsel from Rustin, who observed: "There is a strong moralistic strain in the civil rights movement which would remind us that power corrupts, forgetting that absence of power also corrupts."[71] Especially in his final two years, King overestimated his ability to govern the anger of the urban poor that he purposely assisted in arousing. He lent his moral authority to a radicalized form of civil disobedience that was more likely to sow disrespect than respect for law and more likely to foster division than moral reconciliation.

Conclusion

"One of the great glories of democracy," King remarked at the outset of the Montgomery Bus Boycott, "is the right to protest for right."[72] Americans in the exercise of that right gave birth to a new and singular

68. Ibid.

69. Ibid., pp. 55–58.

70. See Locke, *Two Treatises*, Second Treatise, §§ 27, 44, pp. 287–288, 298–299.

71. Rustin, "From Protest to Politics."

72. King, *Stride Toward Freedom*, p. 50.

republic, and the same right endures as an endowment by nature and a precious national heritage. Of this venerable right, the practice of civil disobedience is extolled by its proponents as an ingeniously conceived variant—a finely calibrated method of protest, at once safe and effective—not so radical as needlessly to unsettle an established order and just radical enough to remediate governmental or societal injustices.

This right, like every other, however, comes with correlative responsibilities, among which the most fundamental are responsibilities to law and republican government. Above all, because the right to civil disobedience is intelligible only as a corrective of rulers' lawlessness, it must not itself foster lawlessness. The practice of civil disobedience must preserve or enhance respect for law and therewith for constitutional republicanism. Further, because the rule of law is not only indispensable to free and just government but also inherently fragile, the practice of disobedient protest can only qualify as properly civil if it is circumscribed with the greatest care.

That sort of care is especially needed at the present time. A half-century after the Civil Rights movement, an upsurge in disobedient protest has moved some observers to proclaim a new era of civil disobedience in America, even as the boundary between civil and uncivil disobedience in this latest wave of protests appears increasingly permeable.[73]

This upsurge appears unlikely soon to abate. Americans' trust in government has fallen to historic lows as our partisan divisions and animosities have intensified;[74] large and increasing numbers of Americans are convinced, for one set of reasons or another, of the illegitimacy of the ruling order. Moreover, a broad national consensus now glorifies the Civil Rights movement as a 20th century American revolution, conferring moral prestige on its signature methods of direct-action protest and civil disobedience. Attempts to emulate those methods have naturally followed, and the multiplication of such attempts must heighten the likelihood of a corrosive effect on the public's attachment to law. Locke's prudent admonition, "the reigns of good princes have been always most dangerous to the liberties of their people,"[75] applies equally well to the danger even the best protest leaders or movements pose to the rule of law.

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Most worrisome in the recent waves of purportedly civil disobedience is their participants' disregard for the divided legacy of the Civil Rights movement. It is crucial to bear in mind that as the movement proceeded from its first to its second phase, two very different models of civil disobedience emerged. Despite its shortcomings, the initial model, epitomized in King's "Letter from Birmingham Jail," was marked by a high degree of moral discipline, by professions of conscientious respect for law and for America's founding principles, and, not by mere coincidence, a remarkable degree of success in achieving its practical objectives. The later model was altogether more problematic: less respectful of law, of the moral sentiments of the American public, and of democratic government, and less grounded in the American tradition of natural-rights liberalism.

In the recent wave of protests and calls for protest one can find semblances of the first approach, but those more closely resembling the second model have predominated. Recent protesters have been generally heedless of the obligation to compose

73. For example, Jelani Cobb, "The Return of Civil Disobedience," *The New Yorker* January 9, 2017, http://www.newyorker.com/magazine/2017/01/09/the-return-of-civil-disobedience.

74. See Pew Research Center, "Public Trust in Government: 1958-2017," http://www.people-press.org/2017/05/03/public-trust-in-government-1958-2017/?utm_source=Pew+Research+Center&utm_campaign=be5de05165-EMAIL_CAMPAIGN_2017_05_04&utm_medium=email&utm_term=0_3e953b9b70-be5de05165-400294601], and Pew Research Center, "The Partisan Divide on Political Values Grows Even Wider," http://www.people-press.org/2017/10/05/the-partisan-divide-on-political-values-grows-even-wider/?utm_source=Pew+Research+Center&utm_campaign=d6e8f54e99-EMAIL_CAMPAIGN_2017_10_04&utm_medium=email&utm_term=0_3e953b9b70-d6e8f54e99-400294601.

75. Locke, *Two Treatises,* "Second Treatise," §166, p. 378.

well-reasoned, empirically careful, rights-based arguments to support the justice of their cause, and their protests have consisted largely of efforts at disruption and coercion rather than persuasion. Moreover, the most prominent eruptions in the past decade of what supporters persist in calling civil disobedience, including the Occupy Wall Street movement, the Black Lives Matter movement, and the anti-Trump "Resistance,"[76] have in fact featured a volatile mixture of acts of nonviolent and violent disobedience. Those two facts are related: The disruptive form of disobedience, even if it qualifies as civil at the outset, is likely to issue in acts of uncivil or violent disobedience, because by endorsing acts of coercion and rights violation, it undermines the rationale for a principled commitment to civility or nonviolence.

When proponents of this lately predominant form conflate King's two models,[77] therefore, they undermine the justification for civil disobedience altogether. Against their own purposes, they corroborate warnings by critics to the effect that acts of purportedly civil disobedience are likely to turn lawless and violent.[78]

Recent protesters have been generally heedless of the obligation to compose well-reasoned, empirically careful, rights-based arguments to support the justice of their cause, and their protests have consisted largely in efforts at disruption and coercion rather than persuasion.

In sum, at the present moment in American public life, the practice of purportedly civil disobedience is becoming increasingly normalized even as its proper basis, tactics, and objectives are subject to increasing confusion. Such a condition poses a clear danger to the rule of law. As for a corrective response, the optimal approach ultimately would involve looking beyond lately canonical discussions of civil disobedience and returning to the position grounded in America's first principles. The Declaration of Independence, as explained above, contains clear criteria for judging just and unjust government, along with a summation of dictates of prudence that yield an endorsement of civil disobedience only in exceptional and compelling circumstances.

The same conditions, however, that recommend a return to the Declaration's tightly circumscribed justification may also render such a response presently unavailable. Amid these conditions, a reconsideration of King could serve as a useful first step—drawing our guidance from the *best*, not the whole, of King's thinking regarding civil disobedience. Although his zeal for prompt reform moved him at times to transgress his own prudential regulations, in his earlier phase King showed himself to be a more sober and careful exponent of civil disobedience than the despairing, radicalized King of the second phase, advocate of the disruptive, disorderly mode of disobedience lately prevalent. To read his "Letter from Birmingham Jail" with particular attention to this conservative dimension of his argument may therefore serve to initiate a renewed and enhanced public appreciation of the rule of law, both of its basis and its centrality to the health of America's constitutional republic.

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76. The other major protest movement of recent times, the Tea Party movement, has not, to date, incorporated disobedience of positive law into its protest strategy. See, however, Charles Murray, *By the People: Rebuilding Liberty Without Permission* (New York: Crown Forum Books, 2015); see also Pat Buchanan, "A Coming Era of Civil Disobedience," July 9, 2015, https://www.teaparty.org/buchanan-coming-era-civil-disobedience-107099/ (accessed December 12, 2017).

77. See, for example, Charles Blow, "The Power of Disruption," *New York Times*, February 13, 2017, https://www.nytimes.com/2017/02/13/opinion/the-power-of-disruption.html?rref=collection%2Ftimestopic%2FOccupy%20Wall%20Street&action=click&contentCollection=timestopics&region=stream&module=stream_unit&version=latest&contentPlacement=6&pgtype=collection&_r=1 (accessed December 12, 2017).

78. Herbert J. Storing, "The Case Against Civil Disobedience," in *On Civil Disobedience*, edited by Robert A. Goldwin (Chicago: Rand McNally, 1968), pp. 95–120.