5. DECONSTRUCTING CIVIL DISOBEIDENCE
A Semiotic Definition*

I. INTRODUCTION

A. History of the Spirit of Resistance and Revolution in the United States

The United States was founded on the principles of resistance and revolution.1 Decades before the Revolutionary War, Americans in all the colonies protested unlawful acts of the British government, including colonists resisting British efforts to enforce the Stamp Act in 1765. Henry David Thoreau stated that “all men recognize the right of revolution: that is, the right to refuse allegiance to and to resist the government, when its tyranny or its inefficiency is great and unendurable.”2 During the revolutionary period “the right, the need, the absolute obligation to disobey legally constituted authority had become the universal cry.”3 Many of our Founding Fathers believed that civil disobedience, resistance, and revolution were inalienable rights that they wrote into the Declaration of Independence. One of the most famous Founding Fathers, Thomas Jefferson, asked rhetorically, “What country can preserve its liberties if their rulers are not warned from time to time that their people preserve the spirit of resistance?”4

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Jefferson’s “spirit of resistance” refers to both the rights of revolution and of civil disobedience. Nonviolent resistance is a compromise, a way to safely vent emotion about unjust laws, a middle ground between blind obedience to tyrannical rulers or unjust laws and outright revolution. Before the American Revolution, the Founding Fathers reasoned that resistance to unlawful acts could not be deemed per se illegal, but they also understood resistance and revolution were not legally available to them within the judicial procedure for redress of grievances set up by the British government. Even after the Revolution, the spirit of resistance continued. It was particularly noticeable in Massachusetts, where throughout the 1780s citizens set up committees and conventions to protest high taxes and urge reform of their state constitution. When the committees failed, the people turned to mob action, and actually closed down the state courts in the famous Shays’ Rebellion of 1786–87.

Following the Revolution, American leaders both accepted and feared the spirit of resistance. Thomas Jefferson, who never completely renounced the right of revolution, included the doctrine of nullification and implied threat of secession when writing the Virginia and Kentucky Resolutions. Jefferson won his election to the presidency of the United States in 1800 partially based on his continued belief in the right of revolution, even though he actually assumed an antirevolutionary stance during his term of office.

Unlike Jefferson, Alexander Hamilton was very suspicious of the right of resistance and revolution “by the multitude, who have not a sufficient stock of reason and knowledge to guide them, for opposition to tyranny and oppression, very naturally leads them to a contempt and disregard of all authority . . . and are apt more or less to run into anarchy.” Hamilton ultimately renounced the idea that people had the right to overthrow the central government.

After the Revolution, when mobs turned against the newborn American government, many American leaders began to question the appropriateness of the old “spirit of resistance.” At this point, resistance clashed with the need for a stable, strong government in a new republic. Upon the founding of the United States of America as one nation, even the radical Bostonian Samuel Adams (once the most vocal proponent of resistance and revolution) revised his views about the right to revolt. He now saw the inherent dangers of too much resistance

6. Id. at 392.
7. Mirkin, supra note 1, at 62.
9. Thompson, supra note 5, at 393.
10. Id. at 390.
leading to a breakdown of the rule of law in society. James Madison, who did not renounce the right of revolution and originally included it as one of the rights protected by the Bill of Rights, actually feared revolution.\textsuperscript{11} And George Washington, the father of the United States, prayed that God “would incline the hearts of the citizens to cultivate a spirit of subordination and obedience to government.”\textsuperscript{12}

Among the Founding Fathers of America, Jefferson best typifies the duality inherent in the right of resistance and revolution. He believed rebellion was a protection of freedom, a “medicine necessary for the sound health of government.”\textsuperscript{13} Among the Founding Fathers, Jefferson was the least fearful of the right of resistance and revolution, and he supported populist rebellions such as Shays’ Rebellion and the effectiveness of a threat of rebellion such as the Virginia and Kentucky Resolutions.\textsuperscript{14} Jefferson was an ardent supporter of the French Revolution, maintaining his support after both the Terror\textsuperscript{15} and his presidency. Jefferson also continued to support the radical natural rights philosophy enunciated in the Declaration of Independence, implying in a 1799 letter to Edmund Randolph that the nation retains the right of revolution because it is the people’s will “which creates or annihilates the organ which is to declare and announce it.”\textsuperscript{16} Jefferson is most remembered for his revolutionary statements: “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants” and “If the happiness of the mass of the people can be secured at the expense of a little tempest now and then, or even a little blood, it will be a precious purchase.”\textsuperscript{17}

However, despite Jefferson’s continued belief in the right of revolution, he was not willing to see the American constitutional system destroyed by rebellion and resistance.\textsuperscript{18} He was suspicious of revolt by the masses or the mob, and ideally, Jeffersonian revolts probably would have been led by the

\textsuperscript{11} See Mirkin, supra note 1, at 61.


\textsuperscript{13} Letter to James Madison (Jan. 30, 1787), in 12 The Papers of Thomas Jefferson, supra note 4, at 61, 92, cited in Mirkin, supra note 1, at 64, n.13.

\textsuperscript{14} Mirkin, supra note 1, at 66.

\textsuperscript{15} Id. at 63.


\textsuperscript{17} See Mirkin, supra note 1, at 72, n.5 (explaining that most of Jefferson’s famous revolutionary statements were made relatively early in his career in support of Shays’ Rebellion). See also Jefferson’s Letter to William Smith (Nov. 13, 1787), in 12 The Papers of Thomas Jefferson, supra note 4, at 356.

\textsuperscript{18} See Mirkin, supra note 1, at 62.
natural aristocrats. To resolve the tension between the right of resistance and the right to live in a safe, orderly system of government, Jefferson actually preferred the use of alternatives to revolution such as elections, constitutional amendments, threats of revolution, and partial rebellion. Although Jefferson continued to talk in terms of real revolution, he actually used rebellion and the threat of revolution as a persuasive tool of reform. Even though Jefferson incorporated civil disobedience into the constitutional structure, he actually relied far more on limited rebellions that are short and contained rather than on the checks and balances of the constitutional system for the preservation of minority rights.

In the eighteenth century, the French Revolution and its aftermath persuaded Americans of the need to limit popular sovereignty to avoid the chaos and anarchy that consumed France. Everyone in the United States knew that after the French Revolution, France “groaned under the tyranny of the mob”; government became anarchy, and violence replaced law and order. The French drafted, ratified, and then abrogated constitutions with alarming frequency. They formed illegal assemblies that usurped the powers of existing French legislatures. The Americans looked at France and feared that popular sovereignty unbridled in the United States could lead to a similar state of chaos. The leaders in the United States sought to establish a balance between the right to dissent and the need to maintain a stable government. The right to revolution and rebellion became obsolete in this climate, and the right to resistance needed careful limitations.


After the Revolutionary War, American leaders sought to dampen the “spirit of resistance” by drafting and ratifying a new constitution that created a stronger national government with the power to suppress unlawful resistance. Article IV, Section 4 of the new constitution granted the national government the power to protect the states “against domestic violence.” This power was used against the

19. Id. at 68.
20. Id. at 63.
21. Id. at 70.
22. Id.
23. Francis Bowen, The Recent Contest in Rhode Island 64 (1844).
25. Bowen, supra note 23, at 64.
26. Id.
27. Thompson, supra note 5, at 393.
28. U.S. Const. art. IV, § 4. However, the U.S. Constitution also provides U.S. citizens with the right to criticize, to protest, and to peaceably assemble, and the states must respect
states to suppress uprisings in Pennsylvania in 1794 and 1799 when federal troops were sent in to stop the Whiskey Rebellion and the Fries Rebellion.

A few of the Founding Fathers believed there was a need to defend the spirit of resistance, even in the new republic. Thomas Jefferson wrote that the “spirit of resistance” was “so valuable on certain occasions, that I wish it to be always kept alive.” This spirit of resistance survived after the Revolution in the form of popular sovereignty, which gave the people a direct role in their government by allowing them to monitor their rulers and investigate abuses. Defenders of popular sovereignty and the right of resistance pointed to the Declaration of Independence that they reasoned granted the people the right “to alter or abolish” their government whenever they deemed it expedient. They argued the Declaration of Independence empowered the people to exercise the right of resistance without the consent of their current government.

Espousing what would be termed today a theory of constitutional interpretation known as original understanding (sometimes referred to as original intent), defenders of popular sovereignty in the eighteenth century based their belief in the constitutional right of resistance on historical evidence. They argued that the manner in which the U.S. Constitution of 1787 was drafted and ratified confirmed their belief that it is constitutionally legal for the people to abolish their existing government and build a new one. Instead of merely revising the Articles of Confederation (which was the original plan), the framers proceeded to set up an entirely “new system of government.” Those who drafted the Constitution of 1787 defied the instructions of Congress and the amendment provisions in the Articles of Confederation themselves that allowed for amendments only by unanimous consent of all states. Thus, popular sovereigntists reasoned that the “irregular and unauthorized” manner in which the Constitution was drafted and

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32. See Thompson, supra note 5, at 407–08 for a discussion of Dorr’s Rebellion, the Dorrites’ view of popular sovereignty, and the right of resistance in the United States in the eighteenth century.

33. Id. at 410.

ratified justified their continued right of resistance.\textsuperscript{35} Thus, the U.S. Constitution of 1787 was in itself an act of civil disobedience because the framers did not comply with the onerous amendment procedures of the Articles of Confederation and the requirements of the Continental Congress.

Consistent with the original intent theory, Professor Saul Cornell argues that the dissenters or anti-federalists are the founders of a long and powerful dissenting tradition in American politics, with anti-federalist ideas being at the center of American constitutionalism.\textsuperscript{36} Professor Paul Finkelman defines \textit{anti-federalism} as a belief in limited government, a weak national leader, and great deference to Congress as representing the “states” through the Senate.\textsuperscript{37} Dissenting minorities, such as birth control advocates, abolitionists, persecuted religious minorities, and civil rights advocates such as the Reverend Martin Luther King, Jr. have turned to the Constitution for protection.\textsuperscript{38} Rather than denouncing the Constitution, the most oppressed minorities in America have embraced it.\textsuperscript{39} Finkelman persuasively shows that the Confederation embraced much of the spirit and philosophy of the anti-federalists because it was a state-centered nation that stressed limited national powers. Finkelman also argues that the Articles of Confederation resembled the Constitution of 1787 as amended by the Bill of Rights.\textsuperscript{40} The Confederation embodied anti-federalist ideas such as rotation in office, limited government, and states’ rights, while it simultaneously (and inconsistently) attempted to create a modern national state.\textsuperscript{41} This inconsistency reflects the duality of civil disobedience itself which at once protects the right of dissent and threatens the right to live in an ordered society under the principle of the rule of law.

To protect the stability of government, the U.S. Constitution and state constitutions limited popular sovereignty by setting up a judicial and legislative process to effectively object to law and policy. Conservatives like John Calhoun argued:

\begin{quote}
It would be the death-blow of constitutional democracy, to admit the right of the numerical majority, to alter or abolish constitutions at pleasure, regardless
\end{quote}

\textsuperscript{35} Thompson, \textit{supra} note 5, at 411.


\textsuperscript{37} Finkelman, \textit{supra} note 36, at 853. Finkelman believes that the anti-federalists, known as the “loyal opposition,” were “people with little faith, limited vision and to a great extent, horrifying notions of how society ought to work and government ought to operate.” \textit{Id.} at 856.

\textsuperscript{38} \textit{Id.} at 892.

\textsuperscript{39} \textit{Id.} at 893.

\textsuperscript{40} \textit{Id.}

\textsuperscript{41} \textit{Id.} at 894.
of the consent of the Government, or the forms prescribed for their amend-
ment. It would be to admit that it had the right to set aside, at pleasure, that
which was intended to restrain it, and which would make it just no restraint
at all.42

A constitution can be changed in two ways: (1) by complying with the
amendment procedures in the constitution, or, if there is no amendment provi-
sion, (2) by obtaining the consent of the existing government. Daniel Webster
said that by adopting a constitution, “the people agreed to set bounds to their
own power.”43 Therefore, the state constitutions and the U.S. Constitution limit
the right of resistance. U.S. Supreme Court Justice Taney clearly stated “the right
of revolution” which requires “a change by force,” “is nowhere sanctioned . . . in
the Constitution of the United States. . . .”44

In light of this historical and cultural context of the use of civil disobedience
and the right of resistance, Part II will examine different definitions proposed for
the term civil disobedience in an attempt to uncover its deep structures. Part III will
examine the inherent duality of the term civil disobedience and the impact of that
duality on legal protection for civil disobedients. Part IV will examine arguments
for and against the use of civil disobedience to protect minority rights in American
society. Part V will examine whether the U.S. Constitution protects the act of civil
disobedience under the First Amendment rights to protest, dissent, peaceably
assemble, and the most precious of all constitutional guarantees, free speech.

II. THE DEEP STRUCTURE OF CIVIL DISOBEDIENCE

Let us begin by decoding the term civil disobedience and its hidden meanings.
Civil disobedience is a nonviolent act of breaking the law openly and publicly,
without harming others, which is accompanied by a willingness to accept pun-
ishment.45 The term is built on an oxymoron that reflects the positive and nega-
tive aspects of the concept. Strict law and order proponents take the view that the
term civil disobedience is “semantically inaccurate”46 because disobedience cannot
be civil (i.e., acceptable in a civilized society), stating: “In democratic societies
any violation of the law is an uncivil act.”47 Opponents of civil disobedience claim

42. Thompson, supra note 5, at 424.
43. See THE RHODE ISLAND QUESTION: ARGUMENTS OF MESSRS. WHIPPLE AND WEBSTER
IN THE CASE OF MARTIN LUTHER PLAINTIFF IN ERROR, VERSUS LUTHER M. BORDEN AND
OTHERS 1, 40 (Charles Burnett ed., 1848).
45. WILLIAM SLOANE COFFIN, JR. & MORRIS I. LEIBMAN, CIVIL DISOBEDIENCE; AID OR
46. Id. at 13.
47. Id. at 12.
that civil disobedients actually flaunt their lack of civility. In other words, civil disobedience is about disobeying the law, and disobeying the law simply cannot be deemed “civil” in a society that values order and stability.

But civil disobedience is more than disobeying the law—it is a means by which the disobedient can accomplish a higher moral or political purpose. This purpose may be the accomplishment of necessary legislative enactment or reform. Civil disobedience is about disobeying man-made laws that the disobedient believes are unjust or unconstitutional. Civil disobedients disobey invalid law in order to obey a higher law. Martin Luther King believed that people have a moral duty to disobey unjust law, which King defined by using the words of St. Thomas Aquinas, who extolled the virtues of civil disobedients: “An unjust law is a human law that is not rooted in eternal and natural law.” King not only justified the illegal acts of civil disobedience but raised civil disobedients to the level of near-sainthood:

I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.

Civil disobedients are not just lawbreakers. Some of our greatest heroes violated the laws: Socrates, Thoreau, Gandhi, and King. Some of our finest leaders, such as George Washington, Benjamin Franklin, Alexander Hamilton, Thomas Jefferson, and Samuel Adams, were civil disobedients who were deemed to be traitors by some and patriots by others. U.S. Supreme Court Justice Abe Fortas said that civil disobedience is an act of courage, even though each of us is subject to the law and each of us is duty-bound to obey it:

But if I had lived in Germany in Hitler’s days, I hope I would have refused to wear an armband, to Heil Hitler, to submit to genocide . . . If I had been a Negro living in Birmingham or Little Rock or Plaquemines Parish, Louisiana, I hope I would have disobeyed the state laws that said that I might not enter the public waiting room in the bus station reserved for ‘Whites’. . . . I hope I


49. See Tiefenbrun, supra note 48, at 274.

50. See King supra note 48, at 193 (citing St. Thomas Aquinas).

51. Coffin & Leibman, supra note 45, at 2.
would have had the courage to disobey, although the segregation ordinances were presumably law until they were declared unconstitutional.\textsuperscript{52}

The term \textit{civil disobedience} has a fixed composite structure that requires the adjective \textit{civil} to be linked to the term \textit{disobedience}. The word \textit{civil} is a necessary element in the concept and reflects the duality inherent in the act of civil disobedience. What is so “civil” about “civil disobedience”? The word \textit{civil} conjures up notions of \textit{civility} and \textit{civilization}, both of which lend a positive connotation to the otherwise unacceptable act of disobeying the law in a society that believes in the rule of law. Civil disobedience is a deliberate but nonviolent act of lawbreaking designed to call attention to a particular law or set of laws of questionable legitimacy or morality. Civil disobedience is thought to be a morally justifiable violation of the law,\textsuperscript{53} an act of obedience to natural law. Civil disobedience is conduct that is distinguishable from ordinary disobedience and from crime itself—that is why it is called “civil.” Civil disobedience, as with social protest, serves the law’s need for growth and reform.\textsuperscript{54}

The positive connotations of the act of civil disobedience are reflected in the connotations rather than the denotations of the term \textit{civil}. The first meaning of \textit{civil} refers to that which relates to the state or to its citizenry, such as \textit{civil rights}, or that which relates to private rights and remedies sought via lawsuits (as distinct from criminal proceedings)\textsuperscript{55} such as \textit{civil litigation}. The term \textit{civil} also refers to any of the modern legal systems derived from Roman law, such as that of France or Louisiana’s civil law jurisdiction derived from the Napoleonic Code. But the term \textit{civil} also relates to the concept of \textit{civility}: politeness, behavior characterized by civilized society, and the civilized way of dealing with other human beings. Ironically, civility is the antithesis of anarchy, lawlessness, or chaos, the very thing those engaging in civil disobedience have been accused of producing.\textsuperscript{56} The relationship of the term \textit{civil} to \textit{civility} adds a positive connotation to the otherwise negative concept of civil disobedience that is grounded in an impermissible violation of the law.

There are two kinds of civil disobedience. One is protest in the form of a refusal to obey a law the disobedient seeks to have overturned. This form of civil

\textsuperscript{52} See Fortas, \textit{supra} note 28, at 18.
\textsuperscript{53} See Coffin \& Leibman, \textit{supra} note 45, at 12.
\textsuperscript{54} Archibald Cox, \textit{Civil Rights, the Stimulus of Protest}, 40 N.Y. State B.J. 161, 169 (1968).
\textsuperscript{55} \textit{Black’s Law Dictionary} 238 (7th ed. 1999).
\textsuperscript{56} See Coffin \& Leibman, \textit{supra} note 45, at 23: “These doctrines of civil disobedience have been eroding our civilization in recent years. In action they have led to what I call brinkmanship. In other words, they have encouraged people to express discontent—with the system, with the laws, with government officials and policies, and with ideas—by organizing mass groups that create the potential for violence and law-breaking. This severely strains the necessary function of social order almost to the breaking point.”
disobedience (which is what Martin Luther King practiced) is protest against the
law itself. The other form of civil disobedience is the violation of laws that the
protester does not challenge because of their own terms or effect. In other words,
the laws are not the subject of attack in this form of civil disobedience; instead,
dissenters violate the laws to turn attention to a greater cause such as freedom
from oppression and the right to self-determination. Mahatma Gandhi practiced
this type of civil disobedience.57

III. CIVIL DISOBEDIENCE AND TERRORISM

The term civil disobedience, just like the currently popular term terrorism,58 has
been misapplied in recent years.59 Civil disobedience is not an effort to over-
throw the government. Civil disobedience is a person’s refusal to obey a law
which that person believes to be unconstitutional or immoral. Civil disobedience
is also not the use of violence to compel the government to grant autonomy to a
specific group. That is rebellion or revolution, whose aim is to seek change by
destroying the system. In contrast, King and other civil disobedients sought
reform within the established order.60 Violation of the law is a necessary part of
civil disobedience to publicize the protest and to bring pressure on the public or
the government to accomplish purposes that may have nothing to do with the
law that is breached.61

Civil disobedience is clearly not terrorism, although there are certain simi-
larities between the two concepts. Both are associated with anarchy and chaos.
Both are about protest. Terrorists and civil disobedients both have an overarch-
ing cause (political, military, religious, ethnic, ideological, etc.) that they want to
publicize by their symbolic acts. Terrorist acts are always intentional and always
associated with violence and harm to innocent civilians. Civil disobedience is
also an intentional act, but not necessarily violent, and rarely (if ever) intention-
ally harmful to innocent civilians. The main difference between terrorists (who
are sometimes viewed as heroes) and civil disobedients (who are also sometimes
viewed as heroes) is that terrorists intend to cause fear in order to coerce or
intimidate an enemy. Civil disobedience does not work on the principle of fear.
The main structural element of civil disobedience is resistance against a law that
is conceived of as an unjust law.

57. Fortas, supra note 28, at 63.
58. See Susan Tiefenbrun, A Semiotic Approach to a Legal Definition of Terrorism, supra
Chapter 3 of this book.
59. Fortas, supra note 28, at 59.
60. Id. at 60.
61. Id. at 61.
A. The Duality of Civil Disobedience

Martin Luther King’s definition of civil disobedience clearly reflects the duality inherent in the term. King advocated both obedience and disobedience of the law. He implored his followers to obey just laws, but encouraged them to engage in open, public, nonviolent direct action in violation of unjust laws that are out of harmony with what he called the “moral laws of the universe.”62 Understanding the publicity value of incarceration, King fully expected to be punished for the unlawful act of civil disobedience: “One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty.”63

Like Martin Luther King, U.S. Supreme Court Justice Abe Fortas defined civil disobedience as the violation of a law that is believed to be immoral or unconstitutional.64 Justice Fortas and Reverend King were both opposed to violence, and both sought legislative reform within the established order.65 Susan B. Anthony, the legendary American suffragette, is a perfect example of this form of civil disobedience. She committed voter fraud twice and willingly refused bail in order to go to jail simply to have her day in court to challenge women’s right to vote.66 Ironically, Anthony’s own lawyer deprived her of her right of appeal to the U.S. Supreme Court on a petition for habeas corpus because (against her wishes) he posted a bond, thereby liberating her from prison.67

Her case is one of the most egregious examples of due process violations in history. At trial, her case was decided not by a jury, but by a judge. She was denied the right to speak during the trial because as a woman, she was declared by the judge to be “incompetent” to testify on her own behalf.68 The judge ultimately decided by directed verdict in her criminal trial (a violation of due process) that she was guilty of illegal voting. He fined her $100 but refused to give her a jail sentence because he did not want her to become a martyr for the cause of women’s right to vote.69 This refusal to incarcerate Anthony reflects the importance of punishment in civil disobedience and why it is necessary to accept punishment in order to achieve results.

Gandhi defined civil disobedience more broadly than King. Gandhi’s civil disobedience has two different forms: (1) King’s form of civil disobedience, which is nonviolent disobedience of unjust laws in order to reform the law, and (2) disobedience of the law not to protest the law, but purely as a symbolic

62. See King, supra note 48, at 193.
63. Id. at 194.
64. See Fortas, supra note 28, at 59.
65. Id. at 60.
67. Id. at 1507.
68. Id. at 1508.
69. Id. at 1513.
gesture of revolt against a corrupt or tyrannical State.\textsuperscript{70} Gandhi was a great proponent of violating laws to publicize a protest and bring pressure on the public or the government to accomplish purposes that had little to do with the law being breached.\textsuperscript{71}

John Rawls defined civil disobedience as acts that are “public, non-violent,\textsuperscript{72} conscientious yet political. . . done with the aim of bringing about a change in the law or policies of government.”\textsuperscript{73} The key elements missing in Rawls’ definition are the word illegal and the expectation by those who engage in civil disobedience to be punished for their illegal act. Rawls defined three conditions that a movement must meet to practice civil disobedience in a reasonably just society. The first is to determine whether the object of protest is appropriate for civil disobedience.\textsuperscript{74} The second is to prove that the political process failed, even though “normal appeals to the political majority have already been made in good faith.”\textsuperscript{75} The third condition arises when the natural duty of justice requires a certain restraint.\textsuperscript{76} Society can absorb only so much civil disobedience, or serious disorder could follow and disrupt “the efficacy of the just constitution.”\textsuperscript{77} Rawls assumes that civil disobedience has a limit because if it goes too far, it may lead to a breakdown in the respect for law. Thus, for Rawls as well as for Justice Fortas, there is a need to balance a person’s constitutional right to protest with the person’s duty of civility in society, which prohibits the use of violence even to accomplish a just purpose.\textsuperscript{78}

Thus, an act of civil disobedience must be nonviolent, open and visible, illegal, and performed for a moral purpose to protest an unjust law or to object to

\textsuperscript{70} MAHATMA GANDHI, NON-VIOLENT RESISTANCE 175 (1961).
\textsuperscript{71} See Fortas, supra note 28, at 61 (discussing Gandhi’s form of protest, which is not directed to an unjust law but to a government policy).
\textsuperscript{72} LAWRENCE R. VELVEL, UNDECLARED WAR AND CIVIL DISOBEDIENCE: THE AMERICAN SYSTEM IN CRISIS 191 (1970) (claiming that violence is necessary in order to bring about change because people do not listen to reasonable arguments); cf. Fortas, supra note 28, at 80 (1968) (claiming that violence “is never defensible . . . where there [are] alternative methods of winning the minds of others to one’s cause and securing changes in the government or its policies”).
\textsuperscript{73} JOHN RAWLS, A THEORY OF JUSTICE 365 (1971).
\textsuperscript{74} Id. at 371–73.
\textsuperscript{75} Id. at 373.
\textsuperscript{76} Id.
\textsuperscript{77} Id. at 374.
\textsuperscript{78} See Roger Higgins, Vittitow v. City of Upper Arlington: As Mixed Questions of Law and Fact, Should Ordinances and Injunctions be Reviewed under the Madsen and Frisby Standards of Review by Using a De Novo Standard or a “Clearly Erroneous” Standard, Note, 33 SAN DIEGO L. R. 453, 492 (Winter 1996) (discussing the court’s review for content-neutral limits to methods of protest in abortion clinic cases).
the status quo and with the expectation of punishment. Within the confines of this definition, we may ask why anyone would choose civil disobedience over other permissible forms of reform, and whether the U.S. Constitution protects civil disobedience as a form of dissent or protest. In view of the definition proposed, it is clear civil disobedience is more than mere dissent or protest, both of which are constitutionally permissible. Civil disobedience is an illegal form of protest, a kind of dissent that is probably not protected by the constitutional right of dissent or the right to assemble peaceably. Moreover, civil disobedience involving unlawful acts is a form of expressive speech or conduct that is probably not protected by the First Amendment right of free speech. Even though King, one of the great proponents of civil disobedience in the United States, believed that the U.S. Constitution was on his side, it is my contention that the Constitution cannot protect civil disobedience. To do so would undermine the very force of this particular speech act. Civil disobedience is by its very nature designed to draw attention to the moral or political cause the disobedient is proposing to reform.

IV. ARGUMENTS FOR AND AGAINST CIVIL DISOBEDIENCE

Civil disobedience is an oxymoron that reflects a basic duality inherent in its meaning. Civil disobedience falls somewhere on the continuum between blind obedience to the law, the right to resistance, and total revolution. The concept is confusing, and like the term terrorism, civil disobedience has no universally accepted definition. Some consider civil disobedience to be a permissible form of dissent, protest, speech or expressive conduct: a last ditch effort to be used when the courts and Congress have failed to reform unjust law or to create necessary legal protections for minorities. Others consider civil disobedience to be impermissible lawlessness—the road to anarchy—and even if the conduct is nonviolent and done for a moral purpose, civil disobedience is per se illegal in a society built on the principles of the rule of law.

79. See Susan Tiefenbrun, On Civil Disobedience, Jurisprudence, Feminism and the Law in the Antigones of Sophocles and Anouilh, 11 Cardozo Stud. L. & Literature 35, 36 (Summer 1999), and as revised here in Chapter 7.
80. Leslie Gielow Jacobs, Applying Penalty Enhancements to Civil Disobedience: Clarifying the Free Speech Clause Model to Bring the Social Value of Political Protest into the Balance, 59 Ohio St. L.J. 185, 197 (1998) (discussing civil disobedience as expressive conduct not currently protected by the free speech clause of the U.S. Constitution).
81. Coffin & Leibman, supra note 45, at 5 (“...the Supreme Court decided that it was not King but the segregationists he opposed who were civilly disobedient”).
A. Arguments For Civil Disobedience

Proponents of civil disobedience claim it is an alternative means to accomplish a valid purpose in society and should be protected as political speech under the First Amendment. John Rawls compares civil disobedience to public speech. But to adduce a free speech argument for civil disobedience, we must determine how far the protection of free speech really goes and whether the form of illegal protest in question is like other protected forms of communication (i.e., gestures, symbolic responses, and other nonverbal acts protected under the First Amendment). Carl Cohen claims that open and uninhibited political criticism is of such fundamental importance in a democracy that such conduct will be protected even when it may appear otherwise rightly unlawful. Martha Minow argues persuasively that the legal system itself needs people willing to break the law for political reasons: “The legitimacy of the system itself requires confrontation with disobedience defended by individuals who view compliance as immoral or by individuals seeking to persuade lawful officials to change.” Ronald Dworkin refers to civil disobedience as “justifiable disobedience” because the conduct is morally motivated. Henry David Thoreau, in his famous essay on *Civil Disobedience*, reminds his readers that all men have the right of revolution, the right to rebel, and the right to refuse allegiance to and to resist the government, when its tyranny or its inefficiency are great and unendurable. Thoreau goes on to say that men who blindly obey the law are “not as men mainly, but as machines.” He advocates breaking the law rather than waiting for the slow process of the majority to alter unjust laws.

King, in his famous *Letter from Birmingham Jail*, written while he was in prison for violating a permit to parade and demonstrate, adopts many of Thoreau’s radical theories. King refuses to wait any longer for the constitutional and God-given

83. See Jacobs, supra note 80, at 197.
84. See Rawls, supra note 73, at 365.
85. See infra, text accompanying notes 118–32 for a discussion of the constitutionality of civil disobedience as a form of free speech.
86. Carl Cohen, *Civil Disobedience: Conscience, Tactics, and the Law* 179 (1971), protecting the “proud national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials”).
89. See Thoreau, supra note 2, at 227.
90. Id. at 226.
91. Id. at 231. See King, supra note 48, at 192 (“We have waited for more than 340 years for our constitutional and God-given rights”).
rights of Blacks, and he espouses his own form of legal relativism. King goes so far as to say that one has a moral duty to disobey unjust laws that are man-made. King’s moral argument reflects the legal reasoning of the Nuremberg Tribunal and the London Agreement of August 8, 1945, creating the International Military Tribunal that conducted trials of Nazis. The London Agreement and the Nuremberg trials established the principle that an individual is legally and personally responsible for carrying out unjust laws, even if the individual claims to have merely obeyed superior orders. King claims all people have a moral and a legal obligation to obey just laws, but they have an equally important moral obligation to disobey unjust laws in order to obey a higher, natural, or divine law whose authority preempts man-made laws.

Those who argue that civil disobedience is protected or should be protected by the Constitution find the origins of this argument in conflict-of-law theory. Civil disobedients are torn between obedience to man-made law and to a higher natural law. This argument has deep roots in the history of Western thought: Cicero, Aquinas, Grotius, Locke—even Jefferson who inscribed these words on the Great Seal of the United States: “Rebellion against tyrants is obedience to God.” St. Thomas Aquinas declared that “human law does not bind a man in conscience, and if it conflicts with the higher law, human law should not be obeyed.” Aquinas is claiming that natural law preempts man-made law. The difficulty inherent in the conflict-of-law argument is the vagueness of natural law and the impossibility to codify it or to determine what it requires or prohibits; therefore, natural law is inapplicable to concrete cases.

92. See King, supra note 48, at 193 (“You express a great deal of anxiety over our willingness to break laws . . . How can you advocate breaking some laws and obeying others? The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws”).

93. Id. at 193–94. “One has not only a legal but a moral responsibility to obey just laws. Conversely, one has a moral responsibility to disobey unjust laws. I would agree with St. Augustine that ‘an unjust law is no law at all.’” Id. at 193. “Of course, there is nothing new about this kind of civil disobedience . . . It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks rather than submit to certain unjust laws of the Roman Empire . . . In our own nation, the Boston Tea Party represented a massive act of civil disobedience.” Id. at 194.

94. See Fortas, supra note 28, at 111.

95. King, supra note 48, at 193.

96. See Heinrich Rommen, The Natural Law: A Study in Legal and Social History and Philosophy (Thomas R. Hanley trans., 1947), discussing Thomistic philosophy. See also Tiefenbrun, supra note 79, at notes 33–37 and infra Chapter 7 of this book.

97. See generally Rommen, supra note 96.

98. Tiefenbrun, supra note 79, at notes 33–37 and infra Chapter 7 of this book.
B. Arguments Against Civil Disobedience

There is much opposition to civil disobedience. For the past two thousand years, philosophers have asked themselves whether people have an obligation to obey an unjust law. Scholars have grounded an obligation to obey unjust laws in six different legal theories: (1) the duty to obey the law out of gratitude to an existing legal system (i.e., Socrates and Plato’s *Crito*); (2) the duty to obey the law because of the individual’s contractual agreement or consent to obey (i.e., John Locke and Jean-Jacques Rousseau); (3) the duty to obey because of the negative consequences of disobedience; (4) the duty to obey out of fairness; (5) the duty to obey in order to support just institutions (i.e., H.L.A. Hart and John Rawls), and (6) the duty to obey in order to support the community (i.e., Ronald Dworkin).

Proponents of the argument to obey unjust laws out of a debt of gratitude to our legal system have met with three oppositions. First, citizens of the State arguably receive benefits involuntarily, and therefore they do not need to show gratitude to the State by obeying unjust laws. Second, obedience to the law does not necessarily represent the only appropriate way in which to express gratitude to the law. Third, a benefactor must operate from altruistic motives to deserve the beneficiary’s gratitude—and the State is not necessarily altruistic.

Proponents of the argument to obey unjust laws out of implied consent to obey the law have been challenged on the theory that citizens did not knowingly “agree” to obey the laws of their community. We cannot infer consent to obey the laws of a place just from continued residence in that location.

Theorists also criticize the argument that it is necessary to obey unjust laws because to do otherwise would have negative consequences. Undesirable consequences do not flow from every act of disobedience; thus, the argument from negative consequences is insufficient to justify a general obligation to obey. The negative consequence theory is even more fallacious when applied to obedience to “bad laws.” A bad law might be the very cause of the negative consequences rather than the act of disobedience of the law.

Critics of the duty to obey unjust law based on a fairness theory argue that fairness does not supply a ground for an obligation to obey the law. Rawls argues that an individual’s duty to support just institutions requires that individuals “comply with and . . . do their share in just institutions.” Opponents argue that


100. *Id.* at 480.

101. *Id.* at 482.

102. *Id.* at 486–87.

103. *Id.* at 487.

104. *Id.* at 489.

105. RAWLS, *supra* note 73, at 114.
individuals have difficulty determining when institutions apply to them. Moreover, a “natural duty” to support institutions does not tie political obligations to the particular community to which individuals have an obligation to belong.  

Professor Ronald Dworkin argues that the obligations attaching to familial relationships and friendships do not arise from free choice. The obligation to obey the law derives from the same source as do communal obligations. Dworkin, like Rawls, believes that individuals have natural duties towards justice that override any communal obligation in contravention to justice.

Another argument based on the Machievellian principle that laudable ends do not justify purely illegal means is often used by law-and-order supporters who refuse to consider the benign motivation of civil disobedients. They argue that legitimizing civil disobedience is contrary to a system governed by respect for the rule of law. Erwin Griswold (cited by Dworkin) believes “it is of the essence of law that it is equally applied to all, that it binds all alike, irrespective of personal motive. For this reason, one who contemplates civil disobedience out of moral conviction should not be surprised and must not be bitter if a criminal conviction ensues . . . organized society cannot endure on any other basis.” Judge Robert H. Bork believes that civil disobedience is pure lawlessness, political anarchy, and that “there is no reason for courts to protect any advocacy of law violation since that is merely advocacy of a piecemeal overthrow of the democratic system.” Critics of civil disobedience as a means of legal reform remind us that under the U.S. system, a person is entitled to challenge the validity of a law being applied against him by resisting its enforcement in court on a plea of invalidity, and that lawful resistance to law is a cornerstone of our liberties. Civil disobedience should be only a last resort after negotiation, conciliation, the courts, and Congress have failed.

V. CIVIL DISOBEDIENCE IS NOT PROTECTED BY THE CONSTITUTIONAL RIGHT TO DISSENT OR FREE SPEECH

A. Constitutional Right to Dissent

The First Amendment of the U.S. Constitution guarantees us the right to dissent, to protest, to assemble peaceably, to criticize a law or government, and to

106. Bruce, supra note 99, at 491.
107. Dworkin, supra note 88, at 206.
109. Id. at 335.
111. Id. at 97.
oppose a law. The more difficult question is how we may permissibly dissent if our first legal and moral imperative is to obey the law. Using means of opposition and dissent permissible under the U.S. system of law will not subject a dissenter to punishment by the State. The right to dissent may be exercised by the use of written and spoken words and by acts or conduct such as picketing, “peaceable” mass assembly, sit-ins and demonstrations (which are referred to as “symbolic speech”). The basic means of permissible protest under the U.S. system is the right to vote, the right to organize, and the right to elect new officials to enact and administer the law. Burning the American flag has been defended as a permissible form of protest and was protected as symbolic speech; however, burning a draft card was found not to be protected because it interfered with the record-keeping function of the U.S. government.

There are occasions when a person may feel morally justified in resorting to impermissible methods of dissent, such as a direct disobedience of a law. The use of impermissible means of dissent is an act of civil disobedience that is done intentionally and for moral purposes, and the disobedient (believing there is no other alternative to accomplish the moral aim) expects to be punished for the unlawful act, irrespective of the noble motivation. U.S. Supreme Court Justice Abe Fortas insisted that a punishable offense will not—and should not—be excused unless the law which is violated (such as a law segregating a public library) is unconstitutional or invalid. If the right to protest or to assemble peaceably is exercised for the purpose of violating valid laws that are reasonably designed to avoid interference with others, the Constitution's guarantees will not shield the protester.

B. Constitutional Right to Free Speech

Breaking the law can be a forceful means of expression and can have effective social value if the violation ultimately accomplishes a reform of bad law. However, the free speech clause of the First Amendment does not protect this form of expressive conduct even if breaking the law is done for a good purpose. The fact that a particular criminal's purpose in breaking the law is to publicize an injustice is no defense to prosecution, and accepting the penalty is part of the dissident's speech. Thus, the U.S. Constitution does not protect civil disobeients from imposition of punishment for their crimes—and to do otherwise

113. Fortas, supra note 28, at 25.
116. Id. at 34.
117. Id.
118. See generally Jacobs, supra note 80.
119. Id. at 186.
would subvert the rule of law upon which the U.S. constitutional democracy is based.\textsuperscript{120}

There are limitations on the right to free speech. For example, the State has been known to require a permit for mass meetings or demonstrations, or to prescribe reasonable regulations as to when and where to assemble a crowd. Justice Oliver Wendell Holmes made it clear that no one may falsely cry “Fire” in a crowded theater and cause a panic, even though that person may be motivated by good intentions. Good motives do not excuse action that will injure some or diminish the rights of others.\textsuperscript{121}

Constitutional First Amendment theory divides protected speech into two categories: (1) speech or pure speech covering expressions through verbal or written words, and (2) conduct. The line between speech and conduct is sometimes hazy.\textsuperscript{122} Conduct is either expressive (i.e., communicates a message and is understood by an audience) or non-expressive.\textsuperscript{123} Another way to analyze free speech issues is not to classify different types of “speech” or “conduct,” but to classify kinds of government restrictions on such speech or conduct. The question then becomes whether the government restriction is aimed at the expressive content of the behavior or whether the government restriction is content-neutral.

The Court will apply a three-pronged test to determine if government restrictions on expressive conduct are permissible: (1) whether the action is within the government’s power, (2) whether the action serves an important or substantial governmental purpose, and (3) whether the incidental restriction of speech is no greater than necessary to serve the government’s purpose. The inquiry is similar to the deferential rational basis standard.\textsuperscript{124} If government action restricting speech is directed at the content of the message, then a strict scrutiny standard applies (unless the government is regulating speech on its own property that it has not opened for expression or the content of the speech falls within one of the categories that the Supreme Court has determined to be entirely unprotected or less protected than most speech).\textsuperscript{125}

The U.S. government may suppress unprotected speech and less protected speech subject to a less rigorous balancing test because the Supreme Court has determined that the particular type of speech is of lesser social value than fully protected speech.\textsuperscript{126} Only a compelling interest and “means narrowly tailored” to meet that interest will justify a content-based regulation of protected speech. Where a government action is content-neutral, regulating the time, place, or

\begin{itemize}
  \item \textsuperscript{120} \textit{Id.} at 187.
  \item \textsuperscript{121} \textit{Fortas, supra} note 28, at 28.
  \item \textsuperscript{122} \textit{Jacobs, supra} note 80, at 194.
  \item \textsuperscript{123} \textit{Id.} at 194–95.
  \item \textsuperscript{124} \textit{Id.} at 196–97.
  \item \textsuperscript{125} \textit{Id.} at 198.
  \item \textsuperscript{126} \textit{Id.}
\end{itemize}
manner of speech rather than its message, the analysis is a balancing test that weighs the legitimacy and importance of the government interest, the impact of the government action, the availability and adequacy of alternate means of speech, the traditions associated with the place of expression, and the affect of the regulation on discrete groups.  

Professor Leslie Jacobs applies the traditional free speech clause model to civil disobedience and concludes that civil disobedience is not protected by the U.S. Constitution, even though she recognizes its important social value. Civil disobedience is expression conveyed by means of breaking the law, and its most fundamental message is the symbolic statement that comes from deliberately breaking the law. Thus, lawbreaking is conduct rather than pure speech. Under the Supreme Court’s two-pronged test that looks to speaker intent and audience perception, civil disobedience should, by definition, be deemed expressive conduct. It is possible though that civil disobedience would be classified as per se non-expressive conduct because it produces noncommunicative harms that stem from the functional act of breaking the law. If this is true, the free speech clause inquiry would be over at this point. Even if the Court were willing to view civil disobedience as expressive conduct, the traditional free speech clause analysis would terminate almost as quickly. If the government’s action is directed at the speech component of the conduct, the government’s action becomes highly suspect. If government action is content-neutral, judicial deference would apply, and the action would be deemed valid according to an inquiry that is equivalent to rational basis scrutiny.

Professor Jacobs asserts that civil disobedience should not be judged according to the traditional free speech model summarized above. Moreover, Jacobs argues in favor of the adoption of a different free speech model that would include the public value of civil disobedience and the harms it necessarily causes. Because civil disobedience is intentional lawbreaking done for the purpose of expression and under circumstances where it is likely to be understood, civil disobedience should be viewed as expressive conduct. However, as civil disobedience differs from the broad class of lawbreaking and also from the other broad class of expressive conduct, Jacobs believes that civil disobedience requires a free speech analysis all its own. Nevertheless, Jacobs realizes that lawbreaking as a protected form of expression could lead to anarchy, and therefore she reasons that civil disobedience cannot be protected under the First Amendment. This reasoning brings to mind the example that we cannot conceive of political assassination as constitutionally protected expression. Moreover, the Supreme Court decided in 1993 that physical assault cannot be “expressive conduct

127. Id. at 200.
128. Id. at 202.
129. Id. at 218.
130. Id. at 231.
protected by the First Amendment.” Although Jacobs rightly concludes that civil disobedients should be subject to penalty, she argues persuasively that civil disobedients should not be subject to enhanced penalties.

VI. CONCLUSION AND THE DELICATE BALANCE

This chapter has shown that the U.S. Constitution probably will not—and should not—protect nonviolent civil disobedience by exempting it from punishment because to do so would undermine respect for the rule of law and erode effectiveness of the very act of civil disobedience itself. Arguably, the Constitution may “permit” civil disobedience and offer some protection against excessive punishment, but the Constitution cannot exempt civil disobedients from reasonable punishment or penalties for disobeying the law. The Constitution might protect civil disobedients from excessive or enhanced penalty because of the expressive or even moral purpose of civil disobedience. Those who in good faith engage in civil disobedience as a form of protest with the aim of reforming what they consider to be unjust laws are caught in the tension between the right of resistance and the right to live in a safe, orderly system of government. The Constitution certainly will not protect civil disobedience coupled with violence. The individual’s constitutional rights to free speech, to protest, and to dissent must be balanced delicately with the right to live in an ordered society.

Supreme Court Justice Abe Fortas explained that the Constitution seeks to accommodate two conflicting values, each of which is fundamental: (1) the need for the right to speak freely, to protest effectively, to organize and to demonstrate; and (2) the need to maintain order so that other people’s rights and the peace and security of the State will not be impaired. To strike the proper balance between these two competing principles, the courts will decide whether a particular form of protest or resistance to the law is within the confines of the First Amendment or whether the protesters have overstepped the broad limits in which constitutional protection is guaranteed. If the dissenting, protesting, picketing, or staging “freedom walks” or mass demonstrations are peaceable, and if the protesters comply with reasonable regulations designed to protect the general public without substantially interfering with effective protest, then the Constitution will protect this form of expressive speech. Moreover, the State is obligated constitutionally to protect protestors who march peaceably as in the famous Selma march. Many of us stood by speechless as Neo-Nazis marched in Skokie with

132. Jacobs, supra note 80, at 233.
133. Fortas, supra note 28, at 36.
134. Id. at 37.
135. Id. at 44.
the constitutionally mandated protection afforded by the government under the First Amendment. But if any of these forms of dissent or protest are done with the intent to cause unlawful action (such as a riot or an assault upon others), or to cause injury to the property of others (such as a stampede for exits or the breaking of doors or windows), and if such unlawful action or injury occurs, the dissenter will not be protected by the Constitution. The dissenter may be arrested, and if properly charged and convicted of violating a law, the dissenter will not be saved by the First Amendment. For civil disobedience to be an effective means of legislative reform, penalty must be a component of the free speech act and a necessary result of breaking the law, even if the purpose is noble and the ultimate consequences of the act are beneficial to society.

136. Id. at 38.