

## § IV §

# THE PUNISHMENT OF CIVIL DISOBEDIENCE

### 1. CIVIL DISOBEDIENCE SHOULD BE PUNISHED

One who deliberately breaks the law should be punished for that conduct. The civil disobedient deliberately breaks a law he knows applies to him, and he is no exception to the rule. He is properly subject to the normal punishment for the offense he commits.

What is this offense? And why is one normally punished for committing that offense? Answers to these questions will render the entire issue of punishment in such cases much clearer.

The first question is easily answered. It is some element in the criminal law that the civil disobedient disobeys. By definition, he commits some crime, although it is likely to be a very minor one. However, it is not "civil disobedience" that is his crime; as noted earlier, there is no such crime. He is guilty of an infraction of some particular law—of doing something the law forbids, or refusing to do something the law commands. The determination of appropriate punishment in every case, therefore, depends upon the character and

gravity of the particular criminal offense of which he is found guilty. A punishment standard for all civil disobedients is clearly out of the question.

Once the guilt of the disobedient has been formally established, the precise punishment to be imposed depends largely, in the American legal system, upon the judge of the trial court. Within limits established by the statute, the court usually has wide discretionary powers in fixing sentence. The intelligent use of these discretionary powers is rightly left to the good judgment of the magistrate. Some observations concerning the use of these discretionary powers, however, are in order.

## 2. THE GROUNDS AND SEVERITY OF PUNISHMENT

Three possible objectives traditionally have been distinguished as the chief aims of the punishments provided by criminal law. The first is *deterrence*—keeping the offender from acting similarly in the future, and, by example, causing others who might be tempted to refrain from committing that offense. “This law means business,” the punishing authority says in effect. “He who violates it will be fined or imprisoned in such-and-such a way. This clearly applies now to you who have already broken this law. Let your punishment serve as public notice to all potential future violators of it that they must not expect to avoid the same treatment.” Many of the punishments inflicted by parents on their children, by teachers on their students, and by courts on criminal offenders, are based chiefly (and sometimes solely) on this deterrence theory. In some cases it is a bad theory. Punishments, even when certain to follow the offense, do not ef-

fectively deter some offenders from some kinds of forbidden activity. But deterrence is effective in many situations. The rigorous enforcement of traffic laws, for example, may not be the best assurance of highway safety, but it is one very useful device for maintaining a degree of good order and reasonable sanity on the roads. Many are they who would occasionally or frequently disregard traffic regulations were it not for the deterring threat of punishment if caught.

A second objective of law enforcement through punishment is *reform*. The criminal being one who has broken the rules by which society lives, he must be caused to see the gravity of his offense. He must be punished (if that is the right word) or treated in such a manner as to create in him a respect for the law, and a desire and ability to live within it in reasonable harmony with fellow citizens. Punishment is here conceived as a device to develop or reinforce an accord between the internal motivations of the offender and the external demands of law and order. "We seek to instruct you, and to rehabilitate you," say the punishing officers to the offender, in effect, "not merely to visit you with pain, or to make good our threats. For your own sake, and that of your society, you must be changed. That change is the aim of what we now do to you." Most courts and penal systems profess some such goal as their highest objective, but in practice the punishments commonly meted out are not consistent with that stated intention. Most fines and jail sentences—by far the most common forms of punishment—do little to effect the internal reform of the offender. There is overwhelming evidence to show, in fact, that prisons especially are a contributing cause of hardened criminality, and that they promote rather than prevent lives of habitual lawless-

ness. The reform theory of punishment is enlightened and humane. But it clearly cannot be the sole or even the prime justification for most actual legal punishments, and very likely it could not suffice, even in a more nearly ideal society, to explain why law-breakers should be punished.

A third theory upon which punishment is often based is that of *retribution*. It is right and fitting, according to this view, that the wrongdoer be visited with some evil proportionate to his crime. "An eye for an eye and a tooth for a tooth" seemed a suitable principle in more primitive times; retribution has now become far more sophisticated. Finding the appropriate penalty may be difficult in many cases, but the effort goes on.

*My object all sublime  
I shall achieve in time—  
To make the punishment fit the crime,  
The punishment fit the crime.*

So sings Gilbert and Sullivan's Mikado, and his goal is the essential goal of every modern penal system, according to this retributive theory. Hence, very serious crimes are punished with long prison terms; less serious crimes with shorter sentences or fines alone. The point is not that a twenty-year sentence will deter twice as effectively as a ten-year sentence, or that it will reform twice as well. Probably it will do neither. Yet some crimes seem to *deserve* heavier sentences than others. It is not what the punishment may accomplish in the future, for those convicted or for other persons, but how suitable it is in view of past acts that determines its justice. "The legal wrong you have committed," says the law to the offender, "being of a certain kind, calls for your punishment in a certain degree. It is to be hoped that you will reform

your ways, and that you and others will be at least deterred from offending so in the future, but however that may be the punishment now meted out to you is your just desert." Retributive theories of punishment have often been attacked as being primitive, cruel, and unenlightened, exhibiting a spirit of vengeance not becoming in civilized men. There is truth in these criticisms; yet there is truth, too, in the claim that our practice of punishing (in enforcing the law, and in other less formal circumstances) almost invariably incorporates some retributive element. We seek the punishment that is not only *effective* (in deterring or reforming) but *just*, and we often seem to suppose that its justice is a matter at least partly separable from its consequences. Retribution by itself is no satisfactory guide to appropriate legal punishment; but no system of punishment is likely to be complete without recognizing some retributive elements.

These three theories of punishment—deterrence, reform, and retribution—have been much discussed and refined by philosophers and penologists. Probably it is not one of them alone, but some mixture of two or the three, that will provide the best theoretical ground for legal punishment. In determining the appropriate penalty for particular concrete cases the punishing authority is usually obliged to use considerable discretionary powers. Making the best use of those powers requires a clear understanding of the aims of punishment in cases of the kind in question. Only with some end in view can a sentence be imposed that is most likely to achieve that end.

This is especially true for civil disobedients, because they are not run-of-the-mill outlaws. Rather, they break the law under special circumstances and in special states of mind.

The severity of punishment meted out to them, therefore, will be very largely dependent upon the aims of the authorities, upon the theory of punishment chiefly relied upon by the sentencing magistrate.

If the magistrate views punishment as basically retributive, he is likely to impose upon the civil disobedient a near maximum penalty for the specific offense committed—say, trespass. For, he will argue, this offender's act was much worse than that of most trespassers. Not only did he do what the law forbade, but he did so with full knowledge that he was committing a crime, and with the deliberate intention and desire to commit that crime. His aim was not merely to do a particular thing but to break the law in doing it. His offense, therefore, when fully understood, is as bad as it can be under this statute. He did the wrongful deed, *and* did it with a spirit of deliberate defiance and lawlessness that, if generally acted out, would undermine a society. That precisely is what the law deems most culpable, and must therefore punish most severely.

This line of reasoning has been most commonly adopted by judges before whom civil disobedients have been tried. Their reaction has frequently been one of irritation and anger. The sentence they impose has often been accompanied by a lecture sternly reprimanding the protester for the willful disobedience that has been freely admitted. And often they have inflicted punishment with all or almost all of the severity their discretionary powers would permit.

Some trial judges have gone to the other extreme. Conscious of the deep ethical commitments of the civil disobedients before them, and very possibly sharing the moral ideals those disobedients sought to further, they have im-

posed punishments at or near the minimum permitted by the law in question. An infraction of the statute has been established, such judges reason, and punishment must be given. But if the ultimate object of the law is to encourage citizens to build a peaceful and harmonious society in which one's fellows are respected and principles of justice manifested, there is no need to punish these civil disobedients severely. They are already of that mind. Consistency requires some punishment; human decency and an understanding of the correct reasons for punishment requires that it be, in such cases, as light as can be. Here the underlying theory of punishment is reform. The aim of law enforcement is supposed (explicitly or implicitly) to be the development and reinforcement of wholesome social habits and attitudes. If the civil disobedient—his single infraction to the contrary notwithstanding—is known to have the desired attitudes and habits; if the testimony of his associates and teachers establishes the high integrity of his character, and the record of his past conduct establishes his understanding and support of good social practices; and if in the judge's own estimation the morality and intelligence of the disobedient are high, perhaps much higher than the average of persons appearing before that court, it would be quite unreasonable, he might conclude, to impose any sentence beyond the minimum. It would be appropriate, in sentencing, to remind the disobedient firmly of the seriousness of his deliberate violation of law; and it might even be appropriate to add an appreciation of the moral integrity which led to that violation.

An intermediate course might well be followed by a magistrate whose prime concern in fixing punishment is deterrence. The disobedient has, without lawful excuse, committed an

act the statute specifically forbids. The same statute provides that punishment be imposed (within certain limits), and it does so with the pretty clear intention that all persons be thus warned of the consequences of a disregard for that law. Now this civil disobedient, such a magistrate may reason, is clearly one of those to whom that law refers. It is a straightforward and simple statute and makes no reference either to the spirit of defiance or the nobility of character of the violator. Such matters do not bear upon the guilt for, or the punishment of, the crime he has committed. It is an essential element in the just execution of all laws that every person found guilty of violating them be treated alike (or as nearly so as possible) provided their record of past infractions is also like. Now it has been the long-standing practice of this court (his reasoning may continue) to impose upon persons found guilty of this crime, who have no record of earlier convictions, a sentence of  $x$  days in jail, and a fine of  $y$  dollars, suspending both (or the jail sentence only) when it is a first offense. There is no good reason within the purview of the court on this occasion to treat this civil disobedient any differently. The aim of this punishment being to deter this and other potential offenders from future like offenses, it is important that this threat not be weakened by letting off lightly those whom the court may happen to admire. By the same token it is unreasonable to impose special severity upon those of whom the court happens to disapprove. The issue is solely one of the infraction of this (trespass or other) statute, not of the motivating spirit of that infraction. For such infractions, under circumstances like these, effective deterrence requires consistent punishment for all, civil disobedients included.



Thus the three theories of punishment, whether explicitly or implicitly held, are likely (but not certain, of course) to lead to different decisions in practice.

A fourth analysis, wisest of all, is also likely to lead to the intermediate result supported by the deterrence theory alone. According to this analysis, the magistrate may suppose that the ground for punishment lies not in retribution or reform or deterrence taken singly, but in some complicated mixture of the three. Unlike the pure deterrence analysis above, such a magistrate may reason that, in fixing sentence within the discretionary limits set for him, it is not only possible but obligatory for him to inquire into the spirit with which the law was broken and the moral objectives of the disobedient act. These factors are irrelevant, he may allow, in determining the guilt of the accused. But once guilt is established, they are highly relevant factors in deciding upon appropriate punishment. Guilt is for the crime alone, and looks narrowly at the act. Punishment is of the criminal, and looks widely at the actor as well as at his act. Having genuinely intended to do just what he did, and knowing that act was a violation of a duly enacted statute, the noblest motives in the world will not expunge his guilt; nor would a spirit of willful defiance create any legal guilt had the law not been broken in deed. The law having been broken, however, the task becomes that of setting the most appropriate punishment (given the complex goals of punishment) for that specific person, under the specific circumstances of his time and place. The attitude he adopts toward the arresting officer, the court, and the laws in general tell much about him and how he might be most appropriately treated. That he breaks the law knowingly, and perhaps with a defiant spirit, does not speak well for him, al-

though much the same description can be given of many offenders against the same laws who are not civil disobedients. But if the deliberateness of his act may weigh against him, it must be registered in his favor that his act was not done out of self-serving interests but (however misguided it may have been) with honorable motives and out of real concern for the welfare of the whole society. The absence of selfishness, the candor, the moral integrity that the civil disobedient is likely to manifest, all should serve at least to balance any tendency toward increased severity of treatment. In the end, a wise judge may conclude, the factors possibly calling for special treatment approximately cancel each other out. And since deterrence is likely to be a major objective of punishments imposed under the criminal laws, and both that deterrent effect and fairness in view of the circumstances are best achieved by consistent punishment for such infractions, the most just punishment for a civil disobedient, all things considered, is the same punishment that would normally be set for an ordinary infraction of the same law. Principles of consistency and equal treatment are thereby honored, the charge of partiality toward or prejudice against the civil disobedient is forestalled, and the legal system as a whole is protected from abuse.

In short, it would not be unreasonable, in determining proper punishment, to treat a case of civil disobedience simply as an infraction, without attending to its special circumstances. If, however, its circumstances are to affect the punishment, all circumstances, those in the protester's favor as well as those not, should be weighed. Results of the two procedures are likely to be substantially the same.

One qualification needs to be added for cases of direct

civil disobedience in which the legal offense is grave. In such cases—for example, deliberate refusal to report for induction into military service—the fixing of punishment is a most serious and delicate matter. The fact that the disobedient act was done openly and out of conscience might, in these cases, reasonably be given some weight in mitigating punishment. “Evasion of the draft” might be the crime of which the disobedient is technically convicted, but his act, although criminal, is likely to have been in no way evasive or clandestine. Similarly in other acts of direct, moral disobedience, the good character of the man, and the reformatory aim of the laws, may play a very considerable role in determining punishment. The deterrence of others who are not civil disobedients from breaking that law may require that the civil disobedient be punished; but nothing is gained, in such cases, by imposing more than the minimal punishment the law permits. Extra-long prison terms will not make better men of these disobedients, nor much deter others of similar conviction. Severe punishment, however, may hinder the contribution those persons can make to society, and it is quite likely to further enrage and embitter them. If a man’s conscience forbids him to comply with what he deeply believes to be an unjust law, that conflict does not excuse him from compliance or from punishment for disobedience. But the response of the community to such a man will be an index of its sophistication and humaneness.

### 3. THE ROLE OF PUNISHMENT IN DISOBEDIENT PROTEST

The civil disobedient fully understands that his unlawful act is properly subject to legal punishment. Being, like most

men, fond of his freedom, the prospect of arrest and punishment cannot please him and is likely to frighten him. He must recognize, nevertheless, that such punishment is an unavoidable consequence of the protest he has chosen to make.

Most civil disobedients have no doubt in their own minds, and make no issue in court, over their legal guilt. Their disobedience was deliberate and knowing. They expect to be arrested and charged with a crime. Normally they intend from the outset to plead guilty to that charge if it is accurate. In some cases, believing their act to be morally right although legally wrong, they may, rather than admitting guilt, plead no contest (*nolo contendere*), which has essentially the same result as a guilty plea. In any event, they expect to be found guilty of a crime (usually a very minor one) and expect to be punished for it by fine or prison sentence or both.

This legal punishment is more than a possible outcome of the disobedient's act—it is the natural and proper culmination of it. His disobedient act is essentially one of protest, but it is protest within a framework of laws whose legitimacy he accepts. His submission to public punishment is therefore essential. It is vital in exhibiting his intense personal concern over the issue at hand. It gives concrete proof of his deep commitment to the cause for which he protests. He demonstrates thereby his willingness even to sacrifice himself in behalf of that cause.

As a tactical matter, as well as one of principle, the disobedient may welcome punishment, while personally dreading it. Arrest and trial and conviction all are likely to catch the public eye, especially if the protester be one of respected position in the community. The reason for his disobedience—the wrong he hopes to help correct—will be appearing repeatedly in news reports and commentary as a result of this

punishment. Even refusing the option of a fine and deliberately going to jail for five or ten days, or more, may be one way to increase the publicity of his protest and, if his community is morally sensitive, to increase its effectiveness as well.

For similar reasons it generally will be inappropriate for him to seek acquittal of the crime he deliberately committed. Knowing that his act was a violation of law, he must realize that legal punishment cannot be bypassed, or the infraction excused, because of the noble (or at least subjectively conscientious) motivation of his protest. Indeed, it is just because it is a crime, and known by actor and public to be punishable, that the act is chosen and serves as a dramatic form of protest. It is inconsistent, therefore, with the whole spirit of his enterprise for the civil disobedient, having deliberately disobeyed the law in protest, to seek to be let off from punishment because his motives were good. He would be foolish to expect that result and wrong to pursue it.

Moreover, it is tactically unwise, in view of the protester's own objectives, for him to seek acquittal. The effectiveness of his protest is largely a result of the impression made upon an apathetic public by a zealous and devoted minority. Because he suffers the unpleasant consequences of his disobedience, and does so willingly, his act has a moral impact, and that impact is vital to whatever success he hopes for. So soon as any effort is begun to escape those consequences, the self-sacrificial element in the protest is publicly dissipated, the moral impact much reduced. Were the civil disobedient to seek acquittal of the crime he did in fact commit, a skeptical public would be reinforced in doubt. Freed from the need to ponder the reasons for the disobedience, they will grasp

quickly at the now plausible explanation that it was sheer defiance mixed with self-interest that lay behind the act. By giving apparent support to that claim, any civil disobedient who pleads not guilty undermines whatever beneficial effects his own and allied protests might produce. (See Chapter VI, Section 2.)

Some argue, in opposition to the view here expressed, that the civil disobedient ought not accept punishment for his act, because such acceptance gives support to an unjust legal system. Professor Howard Zinn has been the most forceful advocate of this latter view. It is a fallacy, he contends, to suppose that

*a person who commits civil disobedience must accept his punishment as right. . . . Why must the citizen "accept the result" of a decision he considers immoral? To support "the rule of law" in the abstract? . . . To support a wrong rule of law does not automatically strengthen the right rule of law, indeed may weaken it. . . . The sportsmanlike acceptance of jail as the terminus of civil disobedience is fine for a football game, or for a society determined to limit reform to tokens. It does not suit a society which wants to eliminate long-festering wrongs. [Howard Zinn, *Disobedience and Democracy*, Random House, New York, 1968, pp. 27, 31.]*

Zinn's argument comes to this: if a law is grossly unjust, any punishment for deliberately breaking it is unjust, and therefore the disobedient need not accept any such punishment administered by the state.

The argument has some plausibility, but its conclusion is partly wrong, and the mistake is a consequence of an insufficiently refined analysis. The matter is complicated; Zinn and others try to make it appear simple.

Whether a civil disobedient ought to "accept his punishment as right" depends upon what he did, what kind of law he broke, and under what circumstances. The distinction between direct and indirect civil disobedience, emphasized earlier (see Chapter III, Section 2), is an important factor in determining the "rightness" of punishment. If the disobedience was direct, the protester deliberately disobeying a law he honestly thought immoral in itself, he is justified, of course, in fighting punishment in every reasonable way at his command, chiefly through the courts. He will seek to have the bad law struck down, or at least to have it declared inapplicable in his case. If he loses in the end, he is likely, as a citizen who is generally law-abiding, to accept the punishment, not as *right* but as a painful price he pays to help maintain a law-governed community. If the law he broke really was in itself immoral (and we may be in some doubt about that), the legal system will have done an injustice in punishing him; but no system can allow every man to sit as the judge in his own case. Of course justice is not always done, and the battle against bad laws must never stop; but miscarriages of justice do not, in themselves, justify the abandonment of a legal system, or the abandonment of normal procedures whenever one accused under them complains of injustice.

If, on the other hand, the disobedience has been indirect, the disobedient having broken what he knows to be itself a good law (a traffic or trespass law, or the like) to protest some other evil (say, the testing of nuclear weapons), it is right for him to be punished, not because he is a bad man but because, as I argued above, liability to punishment in cases of indirect disobedience is an essential part of the act of protest itself. If indirect civil disobedience is to be an effective tactic, it must

do much more than disrupt; it must exhibit the depth and intensity of the commitment of the protester. To be a successful political act within the system, it must be a genuinely moral act within that system. It cannot be such if the system is disregarded or despised. The beauty of this kind of protest lies in the fact that, although the law is broken, the system of laws is respected. (See Chapter II, Section 3.) Accepting the punishment, when one has deliberately broken a good law, is the only way to show this respect convincingly. To evade punishment in such cases, therefore, is to emasculate the protest.