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REMARKS ON VIOLENCE AND PAYING THE PENALTY

by

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I

I labor under the misfortune of almost entirely agreeing with what Professor Cohen has to say about civil disobedience in a constitutional democracy. To add to my discomfiture, the one place where I seriously question his argument, I accept and take to be of crucial importance the underlying point behind his argument.

What I shall do in this circumstance is first to bring out my one important disagreement with Professor Cohen and then very briefly discuss violence as a political tactic. The latter is relevant to our deliberations here, for it is now felt by many that over such major issues as the oppression of the blacks, the draft and the Indo-Chinese war the time for civil disobedience is past, that things have been escalated to such an extent and the perfidy and moral sloth of the American government is so great, that continued civil disobedience is of no avail. We are left, as we face Babylon, with the stark alternatives of submission (perhaps accompanied by what the Germans call *innere Emigration*), literal immigration or a resistance going beyond civil disobedience which may involve some forms of violence. It is terribly important and terribly difficult to try to ascertain whether this is our situation and whether over such large issues acts of civil disobedience are useless. These are also embarrassing questions for a philosopher for they are not questions which can be resolved simply by using the tools of his trade, i.e. conceptual analysis, though conceptual analysis is relevant to their resolution. But they are weighty human and political issues, so let us see if we can make some headway with them.

II

I shall commence with the point where I have a disagreement with Marshall Cohen. Cohen remarks that "After openly breaking the law, the traditional disobedient willingly pays the penalty." This might be taken in two ways. It might be taken simply as a description of what people who regard themselves as engaging in civil disobedience do. But then it is surely not the case that all people who engage in what they believe to be civil disobedience are willing to pay the penalty. Their public defiance of a law, they regard as so immoral that it requires disobedience, is sometimes followed by forms of legal evasion. I think Cohen would reply

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that in such a circumstance their acts are not properly characterizable, as 'civil disobedience'. And if this would be his reply, then his "After openly breaking the law, the traditional disobedient willingly pays the penalty" would take my second reading, namely it would be a statement about the defining characteristics of what could count as 'legitimate civil disobedience'. That is to say, an act would not be a legitimate act of civil disobedience unless the obedient were willing to pay the penalty if the courts find against him.

Cohen's claim – taken now in this second way – is too strong. What is a standard way, no doubt the most important way, of showing the disobedient's fidelity to the law is not the only way. Moreover, there are cases, as I shall show below, that cannot be handled by Cohen's condition.

First consider a situation in which what the disobedient finds particularly objectionable about a law is the penalty for its violation. Suppose the penalty for possessing marijuana was twenty years imprisonment. A disobedient might deliberately and openly violate the law, making a political, moral point with his violation, and yet be quite unwilling to accept such a penalty. He could quite consistently with being a civil disobedient fight that penalty. His fighting such a penalty need not evidence any betrayal of the community – though he would need some alternative means to show his fidelity to the law. But surely he could do this by willingly submitting to control of the courts rather than attempting to become a fugitive. He need not endure the very penalty he regards as thoroughly unjust.¹

Moreover, there are situations in which the civil disobedient need not knuckle in to the law where the law's control of his behavior in a certain determinate way flows from his act of civil disobedience. For this dark saying to become clear, consider this example. Suppose – say around 1950 – a doctor in a small town in the United States with a predominately Catholic population announces that when it is medically feasible he will perform free abortions to people seeking them. Let us further suppose that he actually does this and that the Catholic Church makes a great outcry against him. As a result of this outcry, he is barred from the two hospitals in town, his practice falls off and the like. But suppose he persists in performing abortions, until finally legal action is taken against him. If he then flees the country to evade imprisonment, after losing his fight in the courts, it is surely not the case that he has shown that he was insincere, that his acts contributed toward eroding the moral foundations of civil disobedience, betrayed the community or exhibited contempt for the law. He surely in his behavior was showing high moral integrity. It was without a profit motive and could very well have been without any exhibitionistic intent. He had a moral point to make and he made it

through his words and deeds and he had much to lose personally by persisting in this behavior. Even in evading the law by fleeing the country, he has not shown contempt for the law or a lack of fidelity to the law if his evasions meet two conditions. First of all, they are all derivative from his attempting to evade imprisonment for his deliberate act of disobedience, which – but for the question of his evading punishment – would have *clearly* counted as a civilly disobedient act. Second of all, they must be acts which do not violate anyone's rights in a serious way or cause greater misery or injustice all around, than would his submitting to punishment.

More generally there are alternative ways for the civil disobedient to show his seriousness and the depth of his commitment than by being willing to accept the punishment. Accepting the punishment is only one test among many for the disobedient's actually having acted out of conscience in order to remind the public that in his judgment grave injustices are occurring and that conditions essential for humane social cooperation are not being honored. Being willing to pay the penalty is no doubt the most common test of the disobedient's intent but it is not the only one. It is not a necessary condition for an act's being a genuine act of civil disobedience.

Cohen's essay is admittedly indebted at several points to Ronald Dworkin's brilliant essay "Civil Disobedience The Case Against Prosecution".² Yet just at the very point we are presently discussing Cohen misses, I believe, an important insight in Dworkin's essay. When people challenge the draft laws, for example, and refuse to obey them in the public, principled and deliberate fashion of a civil disobedient, they are persuaded that the laws are often unconstitutional and in such a situation, Dworkin argues, their case about constitutionality is a strong one. But then they do not regard themselves as having broken a law, for they believe on reasonable grounds that the law they are disobeying is invalid, e.g. unconstitutional, and believing this they have no obligation at all in terms of fair play or anything else to accept the punishment.

What Cohen fails to give sufficient attention to in *this context*, though he generally does, is that there are cases and cases and situations and situations and that civil disobedience will not come to the same thing in all circumstances. He is perfectly correct in maintaining that it is "especially important" for a civil disobedient in a democratic society to accept the punishment for his civil disobedience, for "by accepting the punishment prescribed by the law the disobedient is able to emphasize commitment to law". He reinforces his claim about the gravity and the urgency of the plea he makes to his government and fellow citizens by his willingness to suffer for his beliefs. Clearly this is an important matter. I have only been concerned to show that this is

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not the only way to exhibit a commitment to the rule of law or a determination to civilly fight corruption in the palace of justice.

III

I would now like to turn to the topic of violence and authority. An act of civil disobedience must be nonviolent at least in intent. Gandhi and King argued for such limitations on religious grounds, but Rawls and Cohen give grounds for such a limitation which are independent of any religious commitment.³ In engaging in civil disobedience, we are in the very nature of the case making appeals to the conscience of our fellow citizens and – in the typical case – to the men who run the government. We are trying to persuade intellectually and morally; we are not – and indeed cannot – since we are making a moral and politically educational appeal, seeking to change behavior and laws non-rationally through threats and by fear. Cohen's conclusion then seems to be the appropriate one: "There is a time for violence in human affairs, but when it arrives, civil disobedience is no longer an appropriate form of political activity." The question then becomes, when is the appropriate time for violence in human affairs? In what contexts is it justifiable, what ends may it legitimately serve, what forms may it take and what limits must it observe for it to be justified violence? A lover of violence, a man indifferent to human suffering or injury, is scarcely human. Violence is indeed something which is in normal circumstances morally outrageous. It is infantile and immoral to romanticize it, but under certain circumstances it may be a grim moral and political necessity. What might those circumstances be?

What I want to say about this is quite simple. It has been said thousands of times before and it will be said thousands of times again. My excuse for repeating it is that it continually gets neglected in much of the current rather hysterical and/or romantic talk about violence.

Consider first what violence is. To do violence to someone is to injure him. Violence is the infliction of injury or damage on some person(s) or property and it is *in itself* always bad. But it is sometimes *instrumentally* valuable, i.e. worth doing, when, everything considered, the pain, suffering and injustice we overcome by engaging in violence outweighs the pain, suffering and injustice that results from allowing the conditions to remain which the violent action, and the violent action alone, could effectively overcome.

There is, of course, great difficulty in ascertaining when these conditions obtain. Many, who would accept this as an abstract principle, feel that it is of very little practical value, for we have no way on such a vast scale of determining the relative amounts of suffering and injus-

tice. At best we can act confidently with hindsight. Surely such 'a calculus of historical possibilities' could never be anything like exact; the best we could reasonably hope for is some not implausible estimate of the likely consequences. But some doubt that we can even attain that.

No one in his right mind would deny that there is a problem here, but I think that it is an exaggeration to maintain that we can never make anything resembling plausible estimates here. As horrible as the French revolution and to a lesser degree the long English revolution were, they did bring about an improvement of conditions which would not otherwise have obtained. No good case has ever been made for the claim that the improved conditions would have, with less suffering and misery, come about without the revolution. This may well have been true of the American revolution, but it is hardly true for such major transformations of the social order as are represented by French and English revolutions.

To the objection that this is knowledge we can only gain with hindsight, from the long perspective of history, but could not have been known or reasonably believed at the time these revolutions were impending or occurring, the answer should be that there are recent revolutions, i.e. the Chinese, the Cuban or the Yugoslavian revolutions, of which it is far from clear that the violence necessary to make them and sustain them was not justified. They are, of course, engulfed in controversy and there is much to be said on all sides of this question, but we have some sense of the criteria to be used in making such a judgement and – to take an outstanding example – it is far from clear, American propaganda to the contrary notwithstanding, that the Cuban revolution was not justified and an advance, hardly otherwise obtainable, in freedom and social justice for the Cuban people.

In asking whether in a given situation revolutionary violence is justified, we should consider whether it would bring about the kind of improvement in the quality of life characterized above to a degree which is not otherwise obtainable, and with what is on balance the avoidance of greater evil and/or the achievement of a greater good than would otherwise have obtained. In speaking of 'a greater good' here we are talking about the extension of freedom, the achievement of greater equality and justice and an increase in human happiness.

What must be reiterated is that violence is intrinsically evil and can only be justified as something which is sometimes an instrumental good. (After all something can be intrinsically good and instrumentally bad, instrumentally good and intrinsically bad and the like, e.g. the stabbing pain one feels when one touches a hot object.) No more violence is justified than the violence necessary to secure the revolution under the conditions characterized above or, where the violence is not revolutionary

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violence, to secure the desired social change where it, everything considered, would result in less misery and more happiness and justice all around, than would obtain if the employment of violence is rejected.

It is often said that violence is never justified in a democracy. But it seems to me that exactly the same considerations apply here as apply generally. We only have to add, as another important consideration, the instrumental value of sticking with democratic procedures. This would make us ask tough questions about how well these procedures are functioning or are likely to function in the future without resort to violence.

We must also, of course, ask to what extent resort to violence will even further undermine them and what alternatives are at hand. But surely there is nothing *intrinsically* desirable about democracy such that we could reasonably make the general claim that violence is never justified in a democracy. It depends on the democracy and the conditions there, including whether it is only a democracy in name or whether it is a functioning democracy. We must go case by case. Revolutionary violence in Sweden or Canada would be quite unjustified. Conditions exist there which make possible a peaceful and orderly transition to socialism. Rhodesia and the United States are something else again. Concerning these latter countries, besides the moral considerations discussed above, there are all kinds of hard practical questions to be asked. In the United States, for example, morality aside, the recent bombings and window breaking during demonstrations are plainly unjustified. There is no revolutionary base at present in the United States from which to launch a revolution or a basic social transformation. This base must be built around working class people who have the potential power, numbers and organization to make such a transformation. But while there is a revolutionary *potential* among working class people -- half of the blue collar workers make less than ninety dollars a week -- the workers have for the most part not attained class consciousness. A central role of students and other intelligentsia in such an activity is to develop -- difficult as that indeed is -- solidarity with workers and to help awaken class consciousness in them and a recognition that a socialist transformation of society is in their own interests and in their own power.⁴ Questions of the legitimacy of violence must always be seen against this background.

Talk of violence along with 'Law and Order', in the United States at least, is for the most part ideological talk. Powerful established interests and their Yes Men -- their paid hirelings -- among the intelligentsia decry violence instead of considering the circumstances in which it is not in order. Utilizing the emotive force of 'violence' they by ideological legerdemain play on people's fears and moral sentiments -- after all violence is intrinsically evil -- and thus help make them antagonistic to

the Left. Irrational resort to violence by the neanderthal Left plays into the hands of such defenders of the *status quo* and produces in reactionary forces much greater and even less justified forms of violence. Such political behavior should not drive a reasonable man into some absolute acceptance of the principles of non-violence, but should make him wary of ill-considered uses of violence and should drive him to a general consideration of the conditions under which violence is justified. I have tried to contribute something toward the answer to that central question. What I have said is perhaps overly simple, but it seems to me at least a base from which we should start, and it very much needs to be shown, amidst all the loose talk pro and con about violence, how it is overly simple and where it needs to be modified, if it indeed is overly simple or needs to be modified.

1. For the first example and some of the conceptual points I am indebted to an unpublished essay by Sidney Gendin.
2. Ronald Dworkin, "Civil Disobedience the Case Against Prosecution," in *Social Justice*. Howard Kiefer & Milton Munitz (eds.) (New York: 1970).
3. John Rawls "The Justification of Civil Disobedience" in *Civil Disobedience: Theory and Practice*. Hugo Adam Bedau (ed.) (New York: 1969), pp. 241-255.
4. Hilary Putnam has some interesting and level-headed things to say about this. Hilary Putnam "From 'Resistance' to Student-Worker Alliance" in *The New Left: A Collection of Essays*. Priscilla Long (ed.) (Boston: 1969), pp. 318-334.