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An Exploration of Civil, Uncivil and Radical Disobedience

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Protest & Dissent. NOMOS LXII. Melissa Schwartzberg, ed. New York University Press, 2020. 289 pp., \$40.99, ISBN 978-1-47981-051-2

The year 2020 was a most discombobulating year – the Covid 19 pandemic, economic disruption, massive movements for racial justice and police reform, a Presidential election, worsening climate change, and growing uncertainty about “our democracy”. Also, 2020 saw the publication of a most challenging book; a book of essays, *Protest and Dissent*, focused on African American political thought and Gandhian non-violence. This book is additionally valuable for its references to the literature.

The editor of the volume in her introduction presents the broad themes discussed by the 10 essayists:

- Whether the difference between civil and uncivil disobedience is tenable?
- Whether radical and liberal forms and justifications of protest should be distinguished?
- Whether the means and ends of protest should be distinguished?
- Whether the protest enhances or harms democratic participation?

Protest organizers recognize that the answer to each of the first three questions is “yes,” and to the last question is “both.” But they will ask themselves these questions in a different, more action-oriented form:

- When is uncivil disobedience appropriate?
- When are radical forms of protest justified?
- What are we trying to accomplish in this protest?
- Will we be encouraging or undermining future democratic participation by the protestors and others?

The essay by Tabatha Abu El-Haj (“Defining Non-violence as a Matter of Law and Politics”) addresses what is in a sense the central question of the volume - Is our democracy dysfunctional? And how best to change it ?

On our democracy:

Executive branch officers routinely engage in what anywhere else in the world would be called kleptocracy. The president routinely attacks the free press and believes that the pardon power extends to pardoning cronies and criminals -- far from its original conception. Our legislatures rarely govern but actively seek to disenfranchise voters directly and indirectly through gerrymandering. Meanwhile attacks on judicial independence are rampant -- and not just from the President and his Twitter account. The leaders of our political parties increasingly are willing to break with constitutional norms

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and practices to hold out for Supreme Court justices more amenable to their ideological views, and calls for judicial impeachment in the face of decisions that are disliked are no longer off the table (Abu El-Haj, p. 228).

Some of the authors see this as evidence the system is “near-just” (e.g., Delmas, “Uncivil Disobedience”) others see it as unjust (e.g., Akbar, “The Radical Possibilities of Protest”).

An essential question in any discussion of protest and dissent is what kind of a social-political-economic system are we protesting? Is it at its core “just,” needing specific, limited reform? Or is it only “near-just” requiring more fundamental change? Or is it “unjust” requiring revolution? Different systems permit or require different forms of protest and dissent -- Gandhian/King principled civil disobedience; strategic civil disobedience; uncivil disobedience; or radical disobedience.

Jose Medina’s argues in his essay titled “No Justice, No Peace” that “There is a complex continuum of cases between the paradigm case of (Gandhian/King) fully civil protest (e.g., a demonstration with a permit that uses only respectful language and a moderate tone) and the paradigm case of fully uncivil protest (e.g., an unruly uprising or riot that includes physical violence and destruction of property).” He continues “the decision that activists, organizers, and participants in protest must make about what form their political confrontation should take ... is essentially *strategic* ... The use of physical violence (is) only justifiable for the sake of stopping, de-intensifying, or de-escalating already existing violence” (Medina, p. 124-25).

On the other hand, rather than a continuum, the significant differences between Gandhian or Kingian civil disobedience; uncivil disobedience; and radical disobedience are central to the analysis of most of the authors.

Gandhi/King Civil Disobedience. Generally it is agreed that both men considered civil disobedience as active, but also a “ conscientious, nonviolent, public, respectful breach of law intended to protest and call for the reform of (an unjust) law or policy, and for which the agent takes full responsibility”(Schwartzberg, p. 11). This understanding, especially Gandhi’s, excluded coercion. The limits were intended to persuade the establishment of the deeply and sincerely held feelings of the protestors, and to permit those in power to see the injustice of the protested norm. There is a further difference between Dr. King and the other authors of these essays He was convinced that the human heart must be liberated from the assumption that self-preservation was the first law of nature.

Uncivil Disobedience. Proponents of uncivil disobedience see the Gandhian/King approach as “state legitimizing.” They also see it as excluding many ends sought by protestors today (e.g., expressions of the need for systemic overhaul, building a shared sense of community among participants) and of many necessary means (e.g., guerilla street art, “black bloc” tactics, eco-sabotage). They further believe the Gandhi/King approach sees the system as basically sound, where injustice is not its essence; justice is even a contradiction. (This is similar to Frederick Douglass’ view of the US constitution). To the contrary, the proponents of uncivil disobedience see the system as only “near- just,” as fundamentally flawed. There is a “need” to violate even otherwise just laws to accomplish a legitimate change.

Radical Disobedience. This approach permits “a larger array of law breaking, and does not resort to civility as a primary index of value” (Akbar, p. 66). “Political law breaking” (Akbar, p. 74) is permitted, even required, because the system is unjust at its core. Abolition has become the goal. It is

more than a call to tear down -- it is a call to transform our political, economic, social order, to build alternative systems for collective self-governance, to work towards in the words of W.E.B. Du Bois and Angela Y. Davis ‘abolition democracy’ (Akbar, p. 75-6).

Radical disobedience is also validated because protest is more than communication to the public, it is also an expression of the feelings of the protestors, and more importantly, a vital means of “constituting a political community alternative” (Akbar, p.67).

The approach of Dr. King, referred to throughout the book as “principled nonviolence,” is grounded in what Karuna Mantena in her essay “Competing Theories of Nonviolent Politics” is “often defined as an ethical action”.(Mantena, p. 85), in a personal “love” towards the oppressor. The nonviolence in the other forms of protest disobedience are valued only for instrumental or strategic reasons; not as intrinsic to the protest. While individual efforts certainly have great impact, without larger mobilization such efforts cannot mount a serious challenge to an unjust social order. There must be an infrastructure through which people can join organizationally with others to articulate demands that facilitate working towards substantive sustainable power. That is because the Law can be, and too often is, a critical element of the architecture of injustice, both in its establishment and maintenance. Recall Bull Connor’s dogs and hoses or the police tactics at Ferguson, Standing Rock, and Occupy Wall Street.

The remaining essays engage helpfully in the debates about the strategies and tactics of disobedience, civil, uncivil, and radical.

Juliet Hooker in her essay “Disobedience in Black--On Race and Dissent” emphasizes that one of the most important areas of disagreement with defenders of the distinction of civil and uncivil disobedience is the possibility of moral suasion. That is because there is “a general tendency in democratic theory to overstate the ability of protest/dissent to induce shame and thereby produce a moral reorientation” (Hooker, p. 56-57). In some circumstances only disruption will be heard, so to speak.

Karuna Mantena in presenting “Competitive Theories of Nonviolent Protest” reconceptualizes nonviolence as two concepts: Collective Action (an insurgent form of organized mass power jettisoning the role of suffering and discipline; almost anything short of coordinated armed struggle or direct physical harm may be considered nonviolence) and Disciplined Action (the need to build into actions certain restraints to keep the focus on the injustice being suffered, and protested. The aim is to undermine or transform the powerful, not to defeat them.

John Medearis “On Strikes and Democratic Protest” sees strikes as an early model for protest. They help workers achieve consciousness of their agency. They have as a central aim setting in place of the hierarchies of the work place more horizontal egalitarian structures.

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There are also two essays on “Protest Fatigue.” Richard Ford argues that mass protest has been “overused and often misused.” Further, to “try to distinguish legitimate and potentially useful protests from those that are needlessly irritating or downright counterproductive (is) wearisome” (Ford, p. 164). There is a dilution of sympathy and worse, “large, unruly crowds”. (Ford, p. 165).

Susan Brison responds in “No Ways Tired.” She argues that “more, not less, protesting -- by more people, in more places, on more occasions is what we need now...” In the words of Ella Baker (set to music by Bernice Johnson Reagon) “We who believe in freedom cannot rest until it comes” ! (Brison, p.197).

Democracy and Protests. The book ends with an essay by Susan Stokes asking, “Are Protests Good or Bad for Democracy?” She argues, on the one hand, that they improve democracy. They provide inclusiveness, equality, communications, information, and accountability. She argues on the other hand, they detract from democracy in that protesters espouse repugnant goals, provoke authoritarian backlashes, are anti-deliberative, destructive (not constructive), and subvert both representation and majority rule. Nevertheless, she concludes that protests “are a natural by-product of freedoms of expression and association which, if curtailed, would threaten democracy itself.” This is because democratic theory requires some modicum of mutual respect. It is recognized that while everything may affect everything else, individuals are responsible only for the foreseeable and proximate consequences of their actions. Protests that disrupt the general population in its ordinary day to day behaviors are often necessary because the “cries of the poor” and other victims of societal injustice are otherwise not heard. In such circumstances clarity as to the precise goals of the protest is important. Otherwise it will be difficult, if not impossible, to persuade those disrupted that the disruption is justified.

Questions of Constitutionality. While the authors manifest little or no concern about the legality of their preferred form of protest, Stokes’ last sentence mentions the basic Constitutional context in which these authors are arguing: what forms of protest does the First Amendment’s freedom of speech and association protect? The leading U.S. Supreme Court opinion is NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982). It concerned a 1966 boycott by the NAACP of local businesses in Claiborne County Mississippi. The goal was to change the Jim Crow practices of the White business community. The principal organizer of the boycott used particularly violent rhetoric to get the black community to participate. And violent rhetoric was addressed to the white community as to the urgency of the need to change its behavior.

The U.S. Supreme Court wrote a long opinion (54 pages plus 80 textual footnotes) finding that the protest organizers were engaged in protected First Amendment activity. I believe the following quote from the opinion, while a bit long, sheds important light on the legality, so to speak, of the actions favored by the several essayists. Frankly, in a sense there are innumerable tactics available to protestors. As the Court said the legality of any protest can only be determined after formal determination of just what tactics were used, what kind of rhetoric took place, and what the surrounding circumstances were. And because of the enormous value the Constitution and most of society places on freedom of speech and of association, determining whether protests that are or become violent are legal is a very fact sensitive and difficult question

In litigation of this kind, the stakes are high. Concerted action is a powerful weapon. History teaches that special dangers are associated with conspiratorial activity. And yet one of the foundations of our society is the right of individuals to combine with other persons in pursuit of a common goal by lawful means.

At times, the difference between lawful and unlawful collective action may be identified easily by reference to its purpose. In this case, however, petitioners' ultimate objectives were unquestionably legitimate. The charge of illegality -- like the claim of constitutional protection -- derives from the means employed by the participants to achieve those goals. The use of speeches, marches, and threats of social ostracism cannot provide the basis for a damages award. But violent conduct is beyond the pale of constitutional protection.

The taint of violence colored the conduct of some of the petitioners. They, of course, may be held liable for the consequences of their violent deeds. The burden of demonstrating that it colored the entire collective effort, however, is not satisfied by evidence that violence occurred or even that violence contributed to the success of the boycott. A massive and prolonged effort to change the social, political, and economic structure of a local environment cannot be characterized as a violent conspiracy simply by reference to the ephemeral consequences of relatively few violent acts. Such a characterization must be supported by findings that adequately disclose the evidentiary basis for concluding that specific parties agreed to use unlawful means, that carefully identify the impact of such unlawful conduct, and that recognize the importance of avoiding the imposition of punishment for constitutionally protected activity (Stevens J. p. 932-33).

Conclusion.

Two years ago I wrote an essay published in this Journal on Dr. King's views about lawbreaking: "Martin Luther King Jr., Civil Disobedience and the Duty to Obey the Law: Where Do We Go From Here?" (2019). There I concluded that Dr. King, despite everything, never lost faith that the arch of the universe bends towards justice. If society is to avoid chaos, it is necessary that it recognizes certain timeless truths, truths for which Dr. King gave his life.

We are all equal. We are all imperfect. No human system is or can be perfect. We are faced with imperfect societal alternatives. Humility and mutual respect are preconditions for freedom and democratic governance.

Reading this book, and other reading, discussion, and debate about my earlier essay, has made the pervasiveness of systemic racial injustice clearer to me. One must recognize, in Dr. King's words, that "the American people are infected with racism (and militarism and economic inequality) -- that is the peril. These injustices must be confronted. They can not be accepted as inevitable" and there should be no doubt that Dr. King has shown the way - the answer to the question "where do we go from here: community or chaos? must be Community.

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