

ON THE DUTY OF ADVOCATING CIVIL DISOBEDIENCE

(Law Society of Alberta v. Harry Midgley:
Fear and Loathing in Edmonton and Camrose)

"Civil liberty is always a limited and partial thing, as much in the Twentieth century as in the Seventeenth."—Dame C. V. Wedgwood "Oliver Cromwell".

I. INTRODUCTION

The issue of whether a practicing barrister may justifiably advocate civil disobedience to an unjust or evil law is one upon which men of goodwill—from the beginning, now, and ever shall,—hold and express strong differences of opinion. Such differences of opinion may well be the products of the adversaries' diverse backgrounds, economic circumstances, positions in society, and offices held. It is the author's intention by this paper to seek to persuade opponents of philosophically and politically justifiable civil disobedience that men in an original position of the parties to the so-called "social contract" would have agreed that civil disobedience, subject to the existence of and compliance with certain conditions, is justifiable in a democratic society, and *a fortiori* that its advocacy is equally justifiable.

II. FACTS

In May 1979, Harry Midgley of Edmonton, Barrister and member of the Law Society of Alberta, and President of the Alberta Human Rights and Civil Liberties Association, was charged with conduct unbecoming a barrister and solicitor, to wit, "attempting to subvert the law by counselling or assisting in activities which were in defiance of the proposed City of Edmonton curfew by-law".

The facts "supporting" the charge are as follows: the City of Edmonton, up to 1976, had curfew rules for certain juveniles. In 1976 the curfew was abolished. In January 1979, Edmonton City Council passed a motion (carried seven to six) directing that a curfew by-law be drafted, banning every person under sixteen years from the streets between 10 p.m. and 6 a.m. The proposed curfew by-law was never in fact passed into law. The rationale for the curfew was, presumably, "crime in the streets". Barrister Midgley, allegedly, was asked his opinion of the proposed by-law in his capacity as head of the Civil Liberties Association, a volunteer organization dedicated to the advancement of Human Rights and Civil Liberties in Alberta and elsewhere. It is reported that he remarked that the proposed curfew was an "outrageous invasion of civil liberties". He is reported as stating further: "If every person and child defied this by-law, and pleaded not guilty if it came to the courts, the absurdity and enormity of it would become patently obvious in a very short time." It is presumed that Barrister Midgley, both as a lawyer and as the Civil Rights Association head, was of the opinion that the proposed by-law would be a clear violation of the Alberta Bill of Rights, and that any defence mounted on that basis would likely be successful in Court.

Subsequently, the Camrose, Alberta Chamber of Commerce, purportedly speaking through the editorial writer of the Chamber's pub-

lication "Trade Winds",¹ issued the following pronouncement: "For a person to publicly advise any group in our society to defy any particular law that it does not particularly like . . . is quite unacceptable and irresponsible". This editorial was forwarded by the Chamber with a letter of complaint to the Law Society of Alberta,² resulting in the charge against Midgley. The Chamber's letter of complaint dated March 9, 1979 to the Law Society unequivocally stated that "our members were in agreement with the concerns expressed by the author". The Chamber's complaint to the Law Society was in fact signed by the President of the Camrose Chamber of Commerce, with copy to CFCW Radio, Camrose. Suggested the Chamber: "The Law Society should reconsider whether Harry Midgley should continue to have the right to call himself a lawyer".

The Chairman of the Discipline Committee of the Law Society was quoted as saying: "Any time a lawyer over-steps his bounds and advocates civil disobedience, I consider that to be serious enough to investigate."³

Mr. Midgley stated his position to the Law Society by letter: "I wish to make it clear that I do not accept that I am required to account to the Law Society for my expression of my views on matters of public concern."

"The proponents of the by-law had no mandate for the introduction of such a measure. It was such an iniquitous proposed by-law that I advocated that young citizens and their parents should defy it if it were ever passed. By this, as I indicated in public statements at the time, I meant that they should thus cause the by-law to be contested in the Courts as being unlawful because in violation of the basic human rights of young citizens."

He added: ". . . one of the most important principles of our free society is that it is sometimes a duty to refuse to comply with an iniquitous law. At the end of the Second World War a number of persons were hanged at Nuremberg in order to establish that very principle."

III. CONDITIONS JUSTIFYING CIVIL DISOBEDIENCE

Civil disobedience is defined by John Rawls in "The Justification of Civil Disobedience" as: "A public, non-violent, and conscientious act contrary to law usually done with the intent to bring about a change in the policies or laws of the government."⁴

What are the conditions under which we may, by civil disobedience, properly oppose legally established democratic authority? Says Rawls: "One of the principles for assigning rights and duties ('Principles of Justice') is: each person is to have an equal right to the most extensive liberty compatible with a like liberty for all."⁵

And later: "Basic social arrangements are just insofar as they conform to these principles . . ." These principles of justice "are principles which

1. Aptly named, observes the charged member, "since I understand that trade winds are bodies of hot air characterized by their tendency never to move in any new direction."
2. And, no doubt as a public-spirited gesture in sporting-like recognition of Section 1(f) of the Alberta Bill of Rights, to public media.
3. *Alberta Report*, December 21st, 1979 issue, at 28.
4. John Rawls, "The Justification of Civil Disobedience", published in *Moral Problems: A Collection of Philosophical Essays*, 2nd. ed., ed. James Rachels (Harper and Row, New York, 1975) 185 at 186-7.
5. *Id.* at 183.

we would agree to in an original position of equality, when we do not know our social position and the like.”⁶

Peter Singer⁷ actually carried the justification further than Rawls. He queries why a condition precedent to civil disobedience should necessarily be the pre-existence of a concordat of natural justice by a democratic community, embracing the widest possible desirable precepts and indicia of a “just society”. Surely, he argues, the minority is also justified in disobeying a law that it considers unjust, in order to bring to the attention of the majority that it should reasonably consider widening the scope of its concepts of basic requirements of justice to include a previously excluded or unconsidered concept.

After all, reasons Singer, is there anywhere that an ideal democratic society, whose initial “social contract”, considered to apply *nunc pro tunc*, has embraced the very high standards of “equal liberties” propounded by Rawls as a condition precedent to the exercise of civil disobedience. Rawls falls into the error of the Law Society, requiring perfection of not-so-perfect men. Civil disobedience, then, according to Singer, has an element of “consciousness raising”. (Care, however. If the consciousness of the proletariat is raised too high, they could get vertigo. Also, they would run the risk of becoming “aware”, thus placing the law profession at risk!)

Continues Rawls: “In a reasonably affluent democratic society justice becomes the first virtue of institutions. Social arrangements irrespective of their efficiency must be reformed if they are significantly unjust. No increase in efficiency in the form of greater advantages for many justifies the loss of liberty for a few . . . for justification of civil disobedience rests on the priority of justice and the equal liberties which it guarantees.”⁸

In short, a deprivation of one or more of the principles of justice, without more, may be justification for civil disobedience.

It is too pat to suggest, in answer, that the only redress to a bad law in a democratic society is the opportunity to change the law through the ballot box. First, one must hold the reasonable expectation that there exists the real practical possibility of changing the law objected to by legal means, and before the harm the dissenter is concerned to prevent has occurred. It is submitted that this purely theoretical possibility cannot constitute a significant reason for obedience to an unjust law. The object of disobedience is to prevent specific harm.

Second, it is argued that the social contract asserts, as a basis for the exercise of authority by the people’s elected representatives, a theory of consent. A popular government derives its just powers from the consent of the governed. Its citizens ought to obey it because they have consented to its rule.⁹ It is therefore argued that simply by remaining a member of a society one tacitly consents to be bound by its laws. As the dissenter’s critics will be quick to state: “If you don’t like it here, if you don’t want to live by our rules, you are free to leave.”¹⁰ But mere acquiescence to a form of government is not necessarily a sign of consent to the decisions of its

6. *Id.* at 190.

7. Peter Singer, “Rawls on Civil Disobedience”, also published in *Moral Problems*, *supra* n. 4 at 195.

8. Rawls, “The Justification of Civil Disobedience”, *supra* n. 4 at 192.

9. Peter Singer, *Democracy and Disobedience* (Clarendon Press, Oxford, 1973).

10. Read the delightful response to this admonitory cliché by H. L. Mencken in *Prejudices, A Selection* (ed. James T. Farrell, Vantage Press, N.Y.).

legal representatives of the majority. "Consent, to give rise to obligations, must be voluntary, and this means there must be some alternative to consenting. The only alternative to acquiescing was disobeying, which is what the dissenter is now doing . . . although there is active and voluntary participation in the decision-procedure, this cannot be taken as proof that there is real consent to the decision-procedure The dissenter is governed, but may not have consented."¹¹ R. M. Dworkin observes, "if our practice were that whenever a law is doubtful on these grounds (i.e. that it infringes some principle of liberty or justice or fairness which is taken to be built into the constitution), one must act as if it is valid, then the chief vehicle we have for challenging the law on moral grounds would be lost, and over time the law we obeyed would certainly become less fair and just, and the liberty of our citizens would certainly be diminished."¹²

Third, the "benefits received" argument may be distinguished. "The fact that one has received benefits from the laws of a society has long been thought to be an important reason for obeying the laws," writes Singer; however ". . . it seems to be doubtful whether the argument has any relevance when the disobedience is not intended to benefit oneself but other people, perhaps not even members of one's own society, to whom some wrong is being done".¹³

Fourth, the dissenter must be prepared to face the legal consequences of his disobedience.

IV. THE APPREHENDED MISCHIEF

What is the wrong that the Edmonton Fathers sought to redress? What anti-social conduct did they seek to remedy? What was the apprehended mischief the proposed curfew purported to suppress? Riot, insurrection, gunpowder plots, the sacking of the Commonwealth Stadium? None of these. No condition of emergency, as the term is commonly understood, existed to justify the imposition of a curfew, it is submitted. There was understandable concern over late street prowling and nefarious deeds of reckless wickedness on the part of a few unruly youths. The Draconian solution was to punish the many reasonable, decent, and well-mannered youths for the admittedly obnoxious transgressions of a few of their contemporaries.

Therefore, what was contemplated was, no less, the creation of a crime of being a juvenile in a public place, found merely wandering abroad between 10 o'clock p.m. and 6 o'clock a.m. in Edmonton, Alberta. It is pointed out that the Criminal Code of Canada, prior to amendment, afforded even common prostitutes an opportunity to give an account of their whereabouts.

Rawls notes: "There is a presumption in favour of restricting civil disobedience to violations of the first principle of justice, the principle of equal liberty . . ." ¹⁴

In the language of that philosopher, it is "relatively clear" that this principle was not being honoured by the Edmonton City Council. Citizens

11. Peter Singer, *supra* n. 9 at 25-26.

12. R. M. Dworkin, *Law and Civil Disobedience*, published in *Moral Problems*, *supra* n. 4, 201 at 206.

13. Peter Singer, *supra* n. 9 at 18-19.

14. John Rawls, *supra* n. 4 at 189.

may walk abroad in precincts under the protection of Her Majesty's peace, provided:¹⁵

- (a) they are not armed with restricted weapons for purposes dangerous to the public peace, and/or
- (b) three or more of them have not become an unlawful assembly and, having begun to disturb the peace tumultuously, have failed to peaceably disperse and depart upon the Sheriff's proclamation charging them to do so (in a loud voice).

One can perceive that it is extremely difficult for a citizen—child or adult—to be at large or to assemble unlawfully in Alberta in the Twentieth century.

It is submitted that juveniles possess the similar characteristic, relevant to the equality of men, of "the capacity for moral personality".¹⁶ They therefore have as much "liberty of equal citizenship" as any adult citizen to walk peaceably outside their dwelling, from point A to point B and to lounge and dawdle as they go; to go to work and to pay taxes; and to die for Canada in some forgotten place. (*The objectivity of this essay prevails in the teeth of the writer's oft-expressed dislike of all juveniles, delinquents or not. Although I do not necessarily advocate capital punishment for children, preferring to leave such matters in the hands of the Almighty, nevertheless I am of the view that all young persons would benefit from sound thrashing to within an inch of their useless lives. But that is by the way, and the reader will oblige me by disabusing his or her mind of this sentiment.*)

It is submitted that the proposed by-law was unjust in that it would have been (if passed into law) a deliberate and clear violation, over an extended period of time, of a liberty of equal citizenship. Further, it was an attempt to legislate in an occupied field, that is, criminal law. It was *ultra vires*. It was certainly absurd.

Referring to the demonstrated excesses of municipal councils generally, it is submitted that it is not absolute power that corrupts absolutely; rather, it is the crumb or particle of power that so corrupts. This modified version of Lord Acton's dictum is commended not only to crime-busting alderpersons, but also to certain functionaries who require extraordinary conduct of other ordinary men.

V. "MEN WILL COME FROM THE SHADOWS . . ." (Leonard Cohen, "The Partisan")¹⁷

When minorities are denied equal liberties, there is no doubt that justice is not being given. When justice is not being given, there is no doubt that all lawyers—regardless of their personal views, and mindful of their oath of office—have a duty to speak out against the tyranny of the majority. Those who do *not* so speak out are more guilty of conduct unbecoming, perhaps, than those who do. And who is better qualified to pass upon the justness or not of a law than a lawyer? I wrote of the late Honourable Mr. Justice Alan J. Cullen: "He hated injustice more than most men. He told me earnestly that an advocate must have the courage to speak up at times when more prudent men are content to remain

15. The Criminal Code of Canada, Section 64 and 69.

16. Peter Singer, *Democracy and Disobedience*, *supra* n. 9 at 27.

17. Not in Alberta.

silent".¹⁸ Mr. Midgley said much the same thing as part of his response to the Law Society.

It would do some members of the Law Society a deal of good to seek to reaffirm some of the fundamental principles that inspire the profession and justify its very existence, provided, that is, that they can take time off from the perusal of their year-end balance sheets to do so.

Rawls: "It is natural to object to the view of civil disobedience that it relies too heavily upon the existence of a sense of justice. Some may hold that the feeling for justice is not a political force, and that what moves men are various other interests, the desire for wealth, power, prestige, and so on."¹⁹ Probably, Chambers of Commerce might agree with this latter priority. The writer sincerely hopes that real lawyers would not.

It may be safely assumed that most members have never heard of, let alone read, Rawls, Singer, Dworkin, Thoreau, Kant, to name a few, but at least a careful reading of this essay might be of some assistance. The members may find it not only informative, but educational. The writer would name more references, but should not want to be considered guilty of a cheap display of learning. It may be conduct unbecoming.

Meanwhile, the members dither, and take no sides. Dante observed that the hottest places in hell are reserved for those who, in a time of crisis, seek to preserve their neutrality.

VI. FREEDOM OF SPEECH

Midgley, in allegedly advocating civil disobedience of a nonexistent law, at the most exercised freedom of speech—another fundamental "liberty of equal citizenship". That is, he made a modest proposal to the odd thoughtful teenager (the minority whose essential freedom would be usurped, at least in the minds of some men of goodwill) that he or she might justifiably address the sense of justice of the majority in order to urge reconsideration of an unjust and ineffective law (two further conditions for justifiable civil disobedience), and to warn the majority that, in the sincere opinion of these dissenters, the conditions of social co-operation (the social contract doctrine as expressed by Locke, Rousseau, and Kant) are not being honoured.

Freedom of speech may be the fundamental issue here. Thoreau in *On the Duty of Civil Disobedience* alluded briefly to the U.S. Constitution: "The Constitution, with all its faults, is very good; the law and the Courts are very respectable".²⁰ He did not appear to dwell on the fundamental freedoms guaranteed by that document. Neither, in the Canadian context, would the writer, noting the Alberta and the Canadian Bill of Rights; except that some of the cognoscenti appear to be unaware of the existence of either the freedoms or of those particular statutes. Or of Magna Carta. But they are quick to lend a grave ear to the quackeries of a rabble of shopkeepers from Camrose.

It could hardly be asserted that Midgley acted from self-interest.

Notes Rawls: "If he (the citizen) concludes that conditions obtain which justify civil disobedience and conducts himself accordingly, he has acted conscientiously and perhaps mistakenly but not in any case at his

18. In Memoriam, the *Albertan* newspaper, May 1975.

19. Rawls, *supra* n. 4 at 192.

20. Henry David Thoreau, *On the Duty of Civil Disobedience* (New York, Rienhart and Co., Inc., 1959), at 301.

convenience In a democratic society each man must act as he thinks the principles of political right require him to."²¹ The principles of political right require me to defend Midgley's right to state what he did about the proposed by-law, any utilitarian qualms being submerged into the delightful prospect of a gaggle of Edmontonians of tender years peacefully thumbing their noses at Edmonton City Hall from its own steps at five minutes past curfew time.

Dworkin states, "A citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave improperly or unfairly so long as he proceeds on his own considered and reasonable view of what the law requires."²²

Perhaps a telling word in this area should belong to H. L. Mencken:²³

The most dangerous man, to any government, is the man who is able to think things out for himself, without regard to the prevailing superstitions and taboos. Almost inevitably he comes to the conclusion that the government he lives under is dishonest, insane and intolerable, and so, if he is romantic, he tries to change it. And even if he is not romantic personally he is very apt to spread discontent among those who are.

It is submitted that if the proposed by-law was not given its three readings and passed into law, that ends the matter without debate.²⁴ But assume that the by-law had become law. It is my respectful opinion that there is nothing unbecoming in a barrister's advocating disobedience of such a law, provided he also advises the client of the possible consequences of defiance thereof and of the appropriate place for the determination of its validity, that is, a court of competent jurisdiction. Of course, it is easy to be glib about such things when one is viewing them in the abstract and not actually charged.

Observes Thoreau:²⁵

The soldier is applauded who refuses to serve in an unjust war by those who do not refuse to sustain the unjust government which makes the war; is applauded by those whose own act and authority he disregards and sets at naught; as if the state were penitent to that degree that it hired one to scourge it while it sinned, but not to that degree that it left off sinning for a moment. Thus, under the name of Order and Civil Government, we are all made at last to pay homage to and support our own meanness.

It is submitted that Mr. Midgley's alleged advocacy of civil disobedience was properly limited to that part of the social system or contract that incorporated the fundamental equal citizenship liberty of "freedom of assembly and association", and that such an appeal to justice was not only definite but precise. Further, it is noted that Mr. Midgley would have advised his imaginary clients who had breached the non-law that they should conform with one of the fundamental conditions justifying civil disobedience, to wit: they should, upon defiance, be prepared to pay the legal consequences, that is, to be charged and to challenge the bad law in the appropriate forum.

VII. SUBMISSION TO OPPRESSION: THE ARGUMENT FOR A WELL-BRED ANARCHY

Says Singer: "There will, of course, be some distances in a society when the actions of the majority can only be seen as a deliberate violation

21. Rawls, *supra* n. 4 at 194.

22. Dworkin, *supra* n. 12 at 208.

23. H. L. Mencken, *A Mencken Chrestomathy* (Alfred A. Knopf, New York, 1974), at 145.

24. Note how municipal councils imitate parliament. Imitation is the shallowest form of self-aggrandisement.

for selfish ends of basic principles of justice. Such actions do invite submission or resistance."²⁶

Rawls further makes the point that: "Injustice invites submission or resistance, but submission arouses the contempt of the oppressor and confirms him in his intention."²⁷

One does not have to be an adherent of the Cosmic Giggle²⁸ to be as delighted that Mr. Midgley refuses to submit to the Law Society, as one should be with those few articulate juveniles who might see fit not to submit to the Edmonton City Council. The reader is warned that an expression of such delight may also be conduct unbecoming.

While the Law Society is about indicting any member suffering from a touch of madness, the Discipline Committee might also consider charging a number of prominent members who have publicly advocated abolition of the monarchy. Let us go further, and round up any members who, at one time in collegiate debating societies, vigorously argued the resolution that "This house will not fight for Queen and country". May I suggest that every lawyer not otherwise burdensomely engaged at this moment immediately denounce some other member of the Law Society who may have, in an unguarded moment, imagined the Sovereign's death, carried concealed sandwiches, coveted his neighbour's wife, or committed similar foul crimes and misdemeanours. Action this day.

Rawls: "We are not required to acquiesce in the crushing of fundamental liberties by democratic majorities which have shown themselves blind to the principles of justice upon which justification of the constitution depends."²⁹ Nor, I submit with respect, are members of the Law Society required to acquiesce in an unjust prosecution of a fellow member.

H. L. Mencken observed: "The notion that a man who rejects the current scheme, whatever it is, is an immoral and abandoned fellow is pure delusion. He may be, in fact, an extraordinarily rigid purist . . . no man of any intelligence whatever can escape the ethical problem, save perhaps by fleeing to a desert island."³⁰

There is something to be said for "a well bred sort of emotional anarchy". Democracies as well as dictatorships are top-heavy with people who know that they are right. Even William F. Buckley allowed himself a brief yearning for "that which is anarchic within me (which is very strong) . . ."³¹ Mencken further: "The English long ago discovered that all government is evil, and that the best way to endure it is to treat it as a suspicious character, watching it at every step."³²

"A government, at bottom, is nothing more than a gang of men. Its business, in civilized countries, seldom attracts the service of really superior individuals: its eminentissimos are commonly non-entities who gain all their authority by belonging to it, and are of small importance otherwise—their fiats, however preposterous, are generally obeyed as a

25. Thoreau, *supra* n. 20 at 288.

26. Peter Singer, *supra* n. 5 at 199.

27. Rawls, *supra* n. 4.

28. The "rush" that immediately follows any attempt to make a dent in the cosmos with a slapstick.

29. Rawls, *supra* n. 4 at 188.

30. H. L. Mencken, *Minority Report* (Alfred A. Knopf, New York, 1967), at 50.

31. William F. Buckley, *Quotations from Chairman Bill* at 28.

32. H. L. Mencken, *supra* n. 23 at 32.

matter of duty, they are assumed to have a kind of wisdom that is superior to ordinary wisdom. . . . Government is actually the worst failure of civilized man. Indeed, it would not be far wrong to describe the best as the common enemy of all decent citizens."³³

VIII. IS THE CURE WORSE THAN THE DISEASE?

*"The means has become the end, and darkness has come over the land."
Arthur Koestler, Darkness at Noon.*

Says Rawls: "There is no danger of anarchy as long as there is a sufficient working agreement in men's conceptions of political justice and what it requires. That men can achieve such an understanding when the essential political liberties are maintained is the assumption implicit in democratic institutions. There is no way to avoid entirely the risk of divisive strife. But if legitimate civil disobedience seems to threaten civil peace, the responsibility falls not so much on those who protest as upon those whose abuse of authority and power justifies such opposition."³⁴

Observes Thoreau, on this point: "Unjust laws exist: shall we be content to obey them, or shall we endeavour to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil. But it is the fault of the government itself that the remedy is worse than the evil. It makes it worse. Why is it not more apt to anticipate and provide for reform? Why does it not cherish its wise minority? Why does it cry and resist before it is hurt? Why does it not encourage its citizens to be on the alert to point out its faults and do better than it would have them? Why does it always crucify Christ, and ex-communicate Copernicus and Luther, and pronounce Washington and Franklin rebels?"³⁵

IX. THE BARRISTER'S OATH

The Legal Profession Act of Alberta requires that the applicant for enrollment shall take and subscribe before the judge, in open Court

(a) an oath of allegiance in the form prescribed by the Oaths of Office Act,³⁶

"I, _____, do swear that I will be faithful and bear true allegiance to Her Majesty Queen Elizabeth the Second, her heirs and successors, according to law. (So help me God)," and

(b) the official oath prescribed by The Oath of Office Act,³⁷

"I, _____, do swear that I will diligently, faithfully and to the best of my ability execute according to law the office of Barrister and Solicitor. (So help me God)," to which shall be added the following:³⁸

33. H. L. Mencken, *id.* at 57.

34. Rawls, *supra* n. 4 at 194.

35. Thoreau, *supra* n. 20 at 289.

36. Alberta Oaths of Office Act, Chapter 266, R.S.A. 1970.

37. *Id.*

38. The Legal Profession Act, Chapter 203, R.S.A. 1970.

"That I will as a Barrister and Solicitor conduct all causes and matters faithfully and to the best of my ability; I will not seek to destroy any man's property; I will not promote suits upon frivolous pretences; I will not pervert the law to favour or prejudice any man; but in all things conduct myself truly and with integrity; in fine, the Sovereign's interest and that of my fellow citizens I will uphold and maintain according to the law in force in this Province".

It is submitted that in the instant case, the member faithfully observed his oath in upholding and maintaining the interest of his fellow citizens according to the law in force in this Province, that is, the Bill of Rights. When he spoke, the proposed by-law was not in existence.

If a law in force in this Province was patently unjust, and in direct conflict with another law in force in this Province that was patently just, the barrister has a moral crisis: he has sworn that he will not pervert the law to favour or prejudice any man; further, that he will uphold and maintain the Sovereign's interest and that of his fellow citizens "according to the law in force in the Province". As I have submitted, the person best equipped academically and on the basis of his experience to pronounce upon the validity of any particular law is a lawyer. In the obvious conflict between the just and the unjust laws, he is required by his oath to uphold the just law, provided that he is convinced that the unjust law is a substantial and clear violation of justice and, if rectified by the application of the just law, establishes a basis for doing away with remaining injustices.

X. NECESSITY OR DESIRABILITY TO CHARGE: A WANT OR FAILURE OF PROSECUTORIAL DISCRETION

As stated at the outset, men of goodwill are expected to differ upon the issues raised in this paper. The writer would not be surprised if a majority within the Law Society were to take the position, notwithstanding the arguments in the preceding pages, that the advocacy of civil disobedience to an unjust law on the part of a barrister was *prima facie* conduct unbecoming. The question then arises whether it is necessary or indeed desirable to charge a member who has acted from moral conscience and the genuine belief that the offending legislation was in fact offensive on the basis of the authorities' tests.

It is Dworkin's view that we (the state) owe leniency to those who break doubtful laws on the grounds of conscience.³⁹

If it is unclear whether a criminal law is constitutional, in the sense that a reasonable lawyer might think it is not, and someone breaks that law out of conscience, how should the state respond . . . ? I shall argue that the state has a general responsibility of leniency in these circumstances, because our practices encourage men to follow their own judgment when the law is unclear, even though we do not guarantee immunity from punishment if they do.

In assessing whether a prosecutor should exercise his discretion in favour of not charging a citizen in such circumstances, Dworkin says that he must weigh the long-term impact of rending the society, and the strength of the responsibility for leniency, against the damage to the policies represented by the law. "If failing to prosecute would jeopardize what the law recognizes as the moral rights of other citizens, that is a

39. Dworkin, *supra* n.12 at 202.

strong argument for prosecution".⁴⁰ The prosecutor must ask himself: "How strong is the responsibility of leniency in this case—how deeply is the conscience of the minority involved, and how strong the case that the law is invalid after all?"⁴¹

The Honourable R. Roy McMurtry, Attorney-General for Ontario, addressed the legislature of Ontario on February 23rd, 1978 in the matter involving Solicitor-General Francis Fox. He said:⁴²

The protection of justice extends to every member of the community; justice must and will be administered evenhandedly, without regard to the position of the potential accused.

On the basis of the facts I have just cited, I consider that there is evidence upon which a peace officer might have reasonable and probable grounds to lay charges concerning one or more offences under the Criminal Code of Canada.

However, this does not settle conclusively the question whether a charge should be laid.

This exercise of judgment was best put by two Attornies-General of England, Sir John Simon and Sir Hartley Shawcross, both speaking in the House of Commons. *'There is no greater nonsense talked about the Attorney-General's duty than the suggestion that in all cases the Attorney-General ought to prosecute merely because he thinks there is what lawyers call a case. It is not true, and no one who has held the office supposes that it is.'*

Sir Hartley Shawcross supported Sir John Simon's position: *'It has never been the rule in this country . . . that suspected criminal offences must automatically be the subject of prosecution . . . the public interest . . . is the dominant consideration'*.

Sir Hartley outlined how he directed himself in deciding whether or not to prosecute in a particular case: *'The Attorney-General may have to have regard to a wide variety of considerations, all of them leading to the final question—would a prosecution be in the public interest, including in that phrase of course, in the interest of justice . . . ? It is not always in the public interest to go through the whole process of the criminal law if, at the end of the day, perhaps because of mitigating circumstances, perhaps because of what the defendant has already suffered, only a nominal penalty is likely to be imposed'*.

In this case, the public interest dictates that a number of factors in addition to the evidence be considered in deciding whether a prosecution would be justified.

It is submitted that, had the proposed by-law been passed into law, a prosecutor, however confident of the commission of the offence and a prima facie case, would be justified in exercising his discretion not to prosecute one who defied the by-law.

It is further submitted that the Law Society of Alberta would be justified in exercising its discretion not to proceed with the charge of conduct unbecoming against a barrister who, in a proper case, acting from proper moral principles, technically advocated civil disobedience.

XI. OTHER LAWYERS' VIEWS

In "Civil Disobedience and the Legal Profession",⁴³ a researched and thoughtful analysis of this area, Professor Dale Gibson examines the propriety of conduct by a lawyer, either in personally engaging in unlawful acts (i.e. "the open and deliberate refusal to comply with some law"), or in advising clients to do so.

40. *Id.* at 213.

41. *Id.* at 212.

42. Statement by the Honourable R. Roy MuMurtry, Attorney-General of Ontario re: Francis Fox, February 23rd, 1978.

43. Dale Gibson, "Civil Disobedience and the Legal Profession" (1966) 31 *Saskatchewan Bar Review*, 211.

Professor Gibson recognizes "three distinct problems":

1. is the lawyer legally liable?
2. is his conduct morally justifiable? and/or
3. should he be professionally disciplined?

A. *The Legal Problem*

Considering the legal problem, the author observes: "Indeed, sometimes the only way a private citizen can challenge the constitutional validity of a statute in the Courts is by deliberately disobeying it and inviting prosecution."⁴⁴

He concludes that a lawyer giving disinterested advice to a client to civilly disobey an unjust or unconstitutional law is probably not guilty of conspiracy (there being no "agreement"); he may, however, be a party to an offence under the Criminal Code by virtue of Section 21; he may also be found to have been an "inciter" or "inducer"—"but he might escape liability by simply drawing the client's attention to the possibility and probable advantages of breaking the law, without advising that it be done".⁴⁵

On the question of mitigation: ". . . if the defendant acted on a sincere and reasonable belief that the law in question was unconstitutional, his punishment ought to be lenient."⁴⁶

B. *The Moral Problem*

On the moral problem, the author cites authorities for both points of view. One of these, Dean Robert F. Drinan, of the Boston College Law School, has written: ". . . when citizens openly disobey a law that they hold to be unjust *and ask for penalty* (italicized by Gibson), they are saying in effect that they would rather be in jail than live freely in a society which tolerates such a law."⁴⁷

Adds the author, referring to "Changing Role of the Lawyer in an Era of Non-violent Action": "Dean Drinan believes that lawyers are sometimes not only justified, but morally compelled to advise clients to disobey laws they regard as offensive."⁴⁸

Concludes Gibson: "The only really important thing that can be said about the moral problem in this article, however, is that it must be solved by each individual lawyer for himself."⁴⁹

C. *The Problem of Professional Discipline*

The Canadian Bar Association *Canons* expressly prohibit disobedience to the law, says Gibson, citing: "he owes a duty to the State, to maintain its integrity and its law and not to aid, counsel or assist any man to act in any way contrary to those laws."⁵⁰ He cites the oath "in some Provinces which could be interpreted as requiring them to obey all laws in force in the Province." Then, Gibson continues: "Does this mean that a lawyer who participates in or counsels civil disobedience for reasons that he regards as morally justifiable should be subjected to

44. *Id.* at 212.

45. *Id.* at 215.

46. *Id.* at 219.

47. *Id.* at 220.

48. *Id.* at 220. The article referred to appears in (1964) *I Law in Transitim Quarterly* 123.

49. *Id.* at 220.

50. *Id.* at 221.

censure or disciplined by his professional association? I submit that it does not."⁵¹

The Canons of Legal Ethics have no legal effect, states Gibson. His article was written in 1966. The Law Society of Alberta, by ruling 1 of its *Professional Conduct Handbook*, adopted the Code of Professional Conduct on August 25th, 1974. This fact probably qualifies Gibson's statement that the Canons of Legal Ethics have no legal effect, and as such are simply a guide. However, they are surely open to reasonable interpretation by the member in any event.

Chapter XII "The Lawyer and the Administration of Justice" of the *Professional Conduct Handbook* of the Law Society of Alberta, referring to the "Broad general responsibility of the lawyer resulting from his position in the community", states: "His responsibilities are greater than those of a private citizen. He must not subvert the law by counselling or assisting in activities which are in defiance of it, and he must do nothing to lessen the respect and confidence of the public in the legal system of which he is part . . . the lawyer in public life must be particularly careful in this regard because the mere fact that he is a lawyer will lend weight and credibility to his statements. But for the same reason he should not hesitate to speak out where he sees an injustice." The member is then referred to "test cases", and dutifully turns back to Chapter III "Advising Clients", which completely muddies the former quotation:

6. When advising his client the lawyer must never knowingly assist or encourage any dishonesty, fraud, crime or illegal conduct or instruct his client as to how to violate the law and avoid punishment.

7. A bona fide test case is not necessarily precluded by the preceding paragraph *and so long as no injury to the person or violence is involved it is not improper for the lawyer to advise and represent a client who in good faith and on reasonable grounds desired to challenge or test a law and the test can most effectively be made by means of a technical breach giving rise to a test case.*

Footnote 7 to that chapter reads: "For example, to challenge the jurisdiction for or the applicability of a shop-closing by-law or a licensing measure, or to determine the rights of a class or group having some common interest."⁵²

It is nowhere suggested that Mr. Midgley instructed his non-client as to how to violate the curfew by-law and how to avoid punishment. Au contraire, has he not merely advised or advocated a bona fide test case to challenge or test a by-law and to determine the rights of a class or group having some common interest? Any member who has trouble thinking up an appropriate test case example is referred to that infamous regurgitation of the 1936 Alberta Social Credit Government: "An Act to ensure the publication of accurate news and information" (rhyming couplet).

The author further cites an excerpt from the 1956 deliberations of a prominent Canadian Bar panel (Messrs. Haines, Arnup, Robinette, and Sedgwick) in 1956 at the annual Mid-Winter meeting of the Ontario Section of the Canadian Bar Association. In considering the question: "Is it proper for a lawyer to advise a client, in reply to a request for his advice, that in his opinion it would be better for the client to pay a fine prescribed by a certain penal statute than to obey its direction", the panel appeared to reach a consensus in agreeing with Mr. Arnup: ". . . I refuse to believe that every municipality in Ontario is entitled through its

51. *Id.* at 221.

52. *Professional Conduct Handbook* of The Law Society of Alberta at 9, 11 and 49.

Council to legislate upon questions of public morality. If the statute involved can fairly be said to be legislation on public moral conduct, a lawyer has no right to advise his client to ignore it, but I do not extend that to certain kinds of municipal by-laws."⁵³

Some types of disobedience are condoned by the legal profession, concludes the author, and "professional associations should be guided by the consensus of the profession, rather than by the literal words of the Canon. Would the consensus approve conscientious civil disobedience? I don't know; but it should. If a deliberate infraction of minor statutes for reasons of personal convenience is thought permissible (e.g. ignoring parking regulations), then refusal to obey a law because of moral scruples ought certainly to be allowed."⁵⁴

In noting that the test for professional misconduct was then whether it is "personally disgraceful", he concludes that an open and peaceful refusal to obey a law because of some sincerely held moral principle cannot be so regarded, and submits "that conscientious civil disobedience would not, except in extreme cases, be sufficiently serious an offence to merit professional discipline."⁵⁵

Note, however, that our now ancestral governors, forever vigilant to plug loopholes in the members' legal fibre (leaving their misplaced moral fibre to the fires in Hell), have specifically seen to it that the Alice in Wonderland definition (*see Poste*) of professional misconduct prevails:⁵⁶

Any act or conduct that in the judgment of the Benchers or the Appellate Division or an Investigating Committee acting under Section 64, as the case may be,

(a) is such as to be inimical to the best interests of the public or to the members of the Society, or

(b) tends to harm the standing of the legal profession generally, whether or not such act or conduct is disgraceful or dishonourable, is conduct unbecoming a barrister and solicitor or a student-at-law, as the case may be, within the meaning of this section.

In *Law Society of Upper Canada Gazette*,⁵⁷ an editorial "Civil Disobedience and the Lawyer", pregnant with righteousness, advises a lawyer contemplating the counselling of or the personal resorting to civil disobedience to publicly renounce his oath of office and the Canons of Legal Ethics, in addition to accepting the legal sanctions which flow therefrom. The editorial is unsigned. Of course.

While noting "the Nuremberg and Eichman trials presented in a most dramatic form that there is a point at which a man is morally bound not to obey unjust commands or laws", the author sternly hews the stodgy line: "Certainly there can be no legal justification. Whether or not civil disobedience is inspired by legitimate goals, as for example, the change of a law considered to be unfair or unjust, is immaterial."⁵⁸ Gandhi, while praised as a citizen for his campaign of civil disobedience to unjust and discriminatory laws, is drubbed for doing so while at the same time being a practising lawyer. The conclusion is that lawyers should leave their moral principles in the closet, with the author's identity. Although the lawyer should be more concerned than others with unjust or evil laws, quoth this good burgher, he "must confine himself to advocating and

53. Gibson, *supra* n. 43 at 223.

54. *Id.* at 223.

55. *Id.* at 223.

56. The Legal Profession Act, RSA 1970 and Amendments, Section 47 (2).

57. Vol. I, No. 3/December 1967.

58. *The Law Society of Upper Canada Gazette*, Vol. I, No. 3/December 1967, at 6.

using legal means to repeal unjust laws. He cannot, without being subject to discipline, take any part in civil disobedience."⁵⁹

Sir Thomas More's refusal to subscribe to the Act of Supremacy, and John Hampden's refusal to pay ship money, are mentioned in passing, lumped in with suffragettes and the Ban-the-Bombers.

Another member subsequently replied in strong terms, in the Gazette letter column⁶⁰ to "the unfortunate editorial", also noting the author to be anonymous. It appears the member signed his letter, but the editor withheld the writer's name, apparently because of the explosive debate engendered and "in the interest of promoting a fair and balanced discussion on this important subject".

The writer of the letter cites Lord Denning in "The Road to Justice", hoping to "overcome the faint atmosphere of the 1930s in Germany that seems somehow to arise on reading that editorial":

Lawyers assume that the law is an end in itself. . . . Lawyers with this cast of thought draw a clear and absolute line between law and morals, or what is nearly the same thing, between law and justice This is a great mistake. It overlooks the reason why people obey the law They obey the law because they know it is a thing they ought to do.

The letter writer further cites the Barrister's Oath (almost identical in wording and import to the Alberta Oath), and states: "To maintain the integrity of the state and its laws, may in circumstances require a man of conscience and principle to refuse to pay ship money or to refuse to pay his income tax, or that portion of it that goes for national defence, for the man of principle may see that bad rules are a danger to the welfare of the people who make up the state. Even more so, for the lawyer as one having special responsibilities to see that justice is done there may be a positive duty to act in civil disobedience."

"At the time when the Chief Justice of Nigeria is arrested for criticizing his country's judicial system, when the defence counsel for a political defendant in Greece is arrested in the middle of the night before trial, this profession might well be better engaged in directing its voice against injustice perpetrated in the name of the law, rather than worrying unduly about attempts to produce justice in the face of the law."⁶¹

XII. INVESTIGATION OF A CITIZEN BEYOND SUSPICION⁶²

"Whatever he may seem to us, he is yet a servant of the Law; that is, he belongs to the Law and as such is beyond human judgment. It is the Law that has placed him at his post; to doubt his dignity is to doubt the Law itself." Franz Kafka (The Trial).

In the ordinary course of justice, an Investigating Committee, appointed by the member of the Discipline Committee who ordered the Secretary to charge Mr. Midgley, will try Midgley for "conduct unbecoming a Barrister and Solicitor". Once a member is ordered to be "charged",

59. *Id.* at 7.

60. Letter to the Editor, *Law Society of Upper Canada Gazette*, Vol. II, No. 3/September 1968, at 44.

61. *Id.* at 45.

62. A perceptive 1970 film study of the abuse of power that was in all probability banned in Alberta as being contrary to the conventional wisdom. It is not known whether it was exhibited in Camrose.

the Law Society machinery is in operation, and the member must be "investigated" under the Legal Profession Act by a committee of three Benchers who will hear evidence under oath, and, generally speaking, preside as a Court and make clearly judicial decisions in accordance with certain tests, the latest propounded by the Alberta Court of Appeal in *Ringrose v. College of Physicians and Surgeons of Alberta*.⁶³

This is at least a quasi-penal process, as it places an accused member "in jeopardy" of his livelihood, and exposes him to a fine and/or suspension or disbarment, and to the payment of the costs of the inquiry. The member is a competent and compellable witness for the prosecution against himself (speaking of breaches of fundamental freedoms), and even if his accusers do not show up to face him, he may nonetheless be compelled to give evidence. Further, there is no apparent mechanism enabling the "prosecutor" or "presenter of the facts" (i.e. counsel for the Law Society) to withdraw or stay a charge. Rather, as Galsworthy observed, it is a "great wheel that, when someone has once given it the starting push, rolls on of its own accord." The process lends itself to irresistible comparisons. The ducking stool comes readily to mind.

The skill testing question that all members of the Law Society should be openly asking themselves is this: who is more culpable of "conduct unbecoming"—the lawyer who expresses a mere intention to advise a non-existent client to defy a non-existent unjust law, and to test that law in a Court; or the lawyer who denies another lawyer the "equal liberty" and fundamental principle of freedom of speech? It does not take much skill to answer this question correctly.

The Law Society is not a citizen beyond suspicion, although at times it carries on as if it enjoyed such immunity. One of the privileges of being elected a Bencher is that the incumbents may, subject entirely to the biases, social pressures, and community prejudices of the day, constantly define and re-define "conduct unbecoming". The latin phrase *Ipse Dixit*, in the Idiom, translates as "it is so because he says it". Or, perhaps to put too fine a point on it, to paraphrase Humpty-Dumpty in *Alice in Wonderland*, "When I use the phrase 'conduct unbecoming', it means exactly what I say it means—no more, no less."

If one were living in the realm of Alice in Wonderland, one can imagine all manner of charges for 'conduct unbecoming'. For example only, one could postulate and allege that certain members of the Law Society of Alberta have wilfully engaged in conduct inimical to the best interests of the public and the members of the Society, or have tended to harm the standing of the legal profession generally, in actively seeking to silence the public expression by a member of a bona fide opinion on a matter of public issue that is reasonably held. Conduct unbecoming is very much in the eye of the definer.

Midgley has deposed by affidavit that he is from time to time called upon to state his Association's position in relation to matters of public interest and concern in the area of human rights and civil liberties. It is submitted that his statement on the by-law was warranted by some reasonable occasion or exigency, and was fairly made by him in the discharge of a public duty, such as would be recognized by people of ordinary intelligence and moral principle, for the common convenience and welfare of society. Further, the statement was made in such

63. (1978) 2 W.W.R. 534.

circumstances as to be construed as expressed for the purpose of obtaining redress for legitimate grievances of a minority against certain legal representatives of the majority, made to those whose duty it is to inquire into and redress such grievances, to wit, the democratic majority.

Assuming the facts set out herein to be true, it is submitted that the prosecution of such a charge is not justifiable on legal, moral, discretionary, or philosophical grounds.

XIII. CURFEWS RESISTED BY THE BAR

When Oliver Cromwell took office as Protector (1653 to 1655), the laws he declared were subject to ratification by Parliament, if and when he ever got around to calling that body. In the meantime, he made ordinances that had the force of the rule of law. Even Cromwell's Lord Chief Justice Rolle resigned his office rather than enforce an unjust customs law. Two other judges, Newdigate and Thorpe, refused to carry out his policy against rebels in the north.

One such ordinance prohibited the Barristers of the Inns of Court from meeting together. Cromwell, not surprisingly, had read for the Bar but had never completed. He went back to being a farmer, and may have kinsmen near Camrose. It is poignant, in the context of this paper, that the Bar defied Cromwell's ordinance, and met secretly. It is reported⁶⁴ that, upon dispersal, the Treasurer of each Inn addressed his fellow barristers with the following prayer:⁶⁵

May the wisdom of the common law enlighten you,
 May the logic of the common law inspire you,
 May the light of the common law guide you through the gathering
 darkness of tyranny,
 To the dawn of a rule of freedom under law.

C. D. Evans, Q.C.*

64. Attributed by John Burgess, a lawyer of Vermont, to Thomas Lambert, who in turn attributes it to the great legal scholar Roscoe Pound.

65. But do not be too emotionally aroused by this stirring passage. It should be read by lawyers in the light of the fact that Cromwell's effort to reform the Court of Chancery—with just cause—was strongly resisted by “dogged opposition of the lawyers”. Two law officers resigned as a protest against his “meddling with Chancery”. C. V. Wedgwood, *Oliver Cromwell* (Corgi Books, London, 1975) at 88, 93.

* Mr. Evans is a Bencher and a Member of the Law Society of Alberta. He practices in Calgary.