

Sentencing Memo Sent to Judge Gideon by Professor

I would like to take the occasion of this memorandum to continue the conversation we have had over the past five years on the nature of civil disobedience, particularly in the context of the Reaper drone control center at Hancock Air National Guard Base. I have benefited from those conversations and hope that, in some small way, you have as well. At the core of our discussions, I think, has been the question of what civil disobedience is and, specifically, how civil disobedience “works.”

I will begin by discussing the nature of civil disobedience, as defined by Gandhi and by John Rawls.

Gandhi distinguished two types of civil disobedience: “Aggressive, assertive or offensive civil disobedience is nonviolent, willful disobedience of laws of the State whose breach does not involve moral turpitude and which is undertaken as a symbol of revolt against the State. . . . Defensive civil disobedience , on the other hand, is the involuntary or reluctant non-violent disobedience of such laws as are in themselves bad and obedience to which would be inconsistent with one’s self-respect or human dignity.”ⁱ In Gandhi’s terms, our civil disobedience at Hancock involves the first type; disobeying a Jim Crow statute would have been of the second type.ⁱⁱ He also states: “civil disobedience is the inherent right of a citizen. . . . [T]o put down civil disobedience is to attempt to imprison conscience. . . . A civil resister never uses arms and hence he is harmless to a State that is at all willing to listen to the voice of public opinion.”ⁱⁱⁱ

Rawls defines civil disobedience as “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government. ... [I]t does not require that the civilly disobedient act breach the same law that is being protested.” Later, he elaborates: “[T]he civilly disobedient act is indeed thought to be contrary to law, at least in the sense that those engaged in it are not simply presenting a test case for a constitutional decision; they are prepared to oppose the statute even if it should be upheld.” Finally, he states: “The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one’s conduct. . . . To be completely open and nonviolent is to give bond of one’s sincerity.”^{iv} For Rawls, civil disobedience is a political act, and, while it involves breaking the law, it ultimately is faithful to the spirit of the law. Civil disobedience must be limited to “instances of substantial and clear injustice”^v and legal alternatives must have been tried before engaging in it.^{vi} I believe that the evidence we have produced of the harms, including harms to civilians and children, caused by weaponized drones satisfy the first condition and that my prior (and concurrent) legal attempts to address this issue satisfy the second. Rawls concludes: “Although this mode of action is strictly speaking contrary to law, it is nevertheless a morally correct way of maintaining a constitutional regime.”^{vii}

I would submit that there are several ways that civil disobedience can operate, often simultaneously. First, as you argued in our first trial, civil disobedience can affect policy by the publicity it receives when the civilly disobedient person is arrested, convicted, and punished. Public outcry might lead executives or legislatures to change policy.

Second, civil disobedience can operate as symbolic action.^{viii} Civil disobedience actions are often attempts to juxtapose symbols in a way that sparks insight, that enables persons in the audience to see things in a new way, to break out of fixed worldviews. In this sense, it has been called parabolic action, using the same principle as the parables Jesus used to shock people out of their worldviews by juxtaposing images in new ways (e.g., the Good Samaritan, in which the despised enemy is the one who comes to the rescue). Such symbolic actions would include the burning of draft records during the Vietnam War, the Plowshares actions initiated in 1980, blood poured on the Pentagon, and the symbolic die-ins we have used at Hancock. The juxtaposition of images (e.g., blood on the Pentagon) can be startling enough to shock some observers into a change of worldview, a change of paradigm if you will, that may be impossible through simple logical discourse.^{ix} This approach is often related to the third approach to how civil disobedience “works.”

Third, from a spiritual or religious perspective, the practitioner of civil disobedience should be concerned with faithfulness rather than effectiveness. Catholic theologian Henri Nouwen put this distinction in terms of fruitfulness versus effectiveness. The responsibility of a person of faith is not to be effective but to be faithful (to the Gospel if one is Christian, as I hope I am). One must follow one’s conscience and bear the consequences, but the results will be up to God. Our responsibility is to plant seeds, not to achieve results. In many ways, civil disobedience as symbolic action ties in to this way of thinking – the symbolic interaction is the planting of a seed which may or may not take root. This approach challenges the very notion of effectiveness as an offshoot of industrial civilization and harks back to a more agricultural way of seeing the world. A prime example of fruitfulness was Franz Jaggerstatter, an Austrian peasant who was executed for refusing to be

conscripted into the Nazi's army. He accomplished nothing but leaving his wife and young children without a husband and father, and his story was almost forgotten. However, decades later, this story was uncovered by sociologist Gordon Zahn, who publicized it in his book *In Solitary Witness*. In 2007, Jaggerstatter was beatified by Pope Benedict XVI. His conscientious refusal now inspires Christians around the globe.

Finally, the impact of civil disobedience on policy can be mediated by the response of judges hearing civil disobedience cases. I believe that we need human beings acting as judges within the system (as opposed, to, say, artificial intelligences) precisely because, as John Rawls argues in his discussion of civil disobedience, no human legal system is perfect. Artificial intelligence may be able to apply the existing legal rules more accurately than a human judge; however, only a human judge can take into account the larger sense of justice which animates the law; only a human judge can identify a situation in which application of even a just law becomes injustice because the law is being used to uphold a larger injustice.

Judges who have become convinced that their obligation includes a wider view of justice have chosen a variety of ways to embody that obligation.

One approach can involve the decision itself. In a 2012 lawsuit against New York City police for wrongful arrest, Federal Judge Jed S. Rakoff found for the plaintiffs and wrote:

"What a debt this nation owes to its 'troublemakers.' From Thomas Paine to Martin Luther King, Jr., they have forced us to focus on problems we would prefer to downplay or ignore. Yet it is often only with hindsight that we can distinguish these troublemakers who brought us to our senses from those

who were simply . . . troublemakers. Prudence, and respect for the constitutional rights to free speech and free association, therefore dictate that the legal system cut all non-violent protestors a fair amount of slack. Let us hope that other judges hear this decision and that nonviolent civil disobedience can continue to hold its rightful place as a cornerstone of our liberty.”^x

In my own civil disobedience career, I have sometimes been found not guilty. Two of these verdicts were, I think, attempts to address a larger justice. When I was put on trial in 1981 for civil disobedience at the Pentagon, charged with depredation of government property, for pouring blood on the Pentagon in protest of U.S. nuclear weapons, the Judge dismissed the charges because the prosecutor had not “provided me with any evidence that the government owns the Pentagon.” My mother believes that verdict was a direct result of her prayers; I believe it was an indirect attempt to address the larger issues of justice. When I was charged with trespass at the Rochester Federal Building in 2003 for protesting the impending invasion of Iraq, Rochester City Court Judge Anne Pfeiffer found us not guilty because we had been arrested before we had gone through the metal detectors. In rendering her verdict, she apologized to me (I suspect, tongue in cheek) for not addressing my international law argument that the U.S. had no jurisdiction to charge anyone with trespass because they had just committed perhaps the largest act of trespass since World War II.

Brian Terrell, a Catholic Worker whom you may remember from the Hancock 38 case, along with four other demonstrators, was acquitted of trespass in Senator Charles Grassley’s Des Moines office in a July 2007 jury trial after presiding judge Odell McGee allowed Brian to read the text of the First Amendment to the jury. Judge McGee further instructed the jury that the defendants “were not justified in remaining on the property if the State proved . . . that the defendant(s) did not have a

constitutional right to remain on the property.”^{xi}

Gandhi’s standard procedure in civil disobedience was to plead guilty and ask for the harshest possible punishment. Yet, in doing, so, he still gave the judge a choice of whether to affirm the legal system or not. His first case of civil disobedience in India involved defying a government order not to enter the district of Champaran, where he proposed to conduct an inquiry into labor conditions. He appeared in court and pled guilty; however, before his sentencing date, the Lieutenant Governor ordered the case against him withdrawn, and he was allowed to pursue his investigation. Gandhi saw this conclusion as a victory for civil disobedience, despite the fact that he wasn’t sent to jail: “The country thus had its first direct object-lesson in Civil Disobedience. The affair was freely discussed both locally and in the press, and my inquiry got unexpected publicity.”^{xii} Thus, Gandhi himself felt that civil disobedience could be fruitful even without conviction and punishment.

Another approach is to address issues of broader justice at sentencing, in the sentence itself and/or in a sentencing statement. I have previously cited the case of Federal Judge Miles Lord, who in 1984, sentenced Barbara Katt and John Laforge to a six month conditional discharge and gave one of the most powerful critiques of justice in America ever presented from that side of the bench. I cite a part of his sentencing statement:

“It is the allegation of these young people that they committed the acts here complained of as a desperate plea to the American people and its government to stop the military madness which they sincerely believe will destroy us all, friend and enemy alike.

They have made a plausible argument that international law prohibits what our country is doing by way of manufacturing

mass weapons of destruction. Common sense should, in my own personal view, dictate that such manufacture be curtailed.

The anomaly of this situation is that I am here called upon to punish two individuals who were charged with having caused damage to the property of a corporation in the amount of \$33,000. It is this self-same corporation which only a few months ago was before me accused of having wrongfully embezzled from the U.S. Government the sum of \$3.6 million. . . .

"If there be an adverse reaction to this sentence, I will anxiously await the protestations of those who complain of my attempts to correct the imbalance that now exists in a system that operates in such manner as to provide one type of justice for the rich and a lesser type for the poor. One standard for the mighty and another for the meek. And a system which finds its humanness and objectivity is sublimated to military madness and the worship of the bomb."^{xiii}

In another case, it was the sentencing itself that was significant. On March 5, 1986, Scott Schaeffer-Duffy of the Worcester MA Catholic Worker and Carol Bellin were tried and found guilty of trespassing and disorderly conduct at an anti-war protest at the GTE plant in Westborough MA. The DA recommended sentences of thirty days for the trespass and sixty days for the disorderly conduct, to be served consecutively. Judge Paul LeConto asked the defendants if they would pay a fine or do community service. Scott replied, "No, your honor. We could not pay a fine in good conscience, and we believe that our actions at GTE were a community service." The judge called for a recess, and, when he returned, said simply: "Guilty finding. You are free to go." ^{xiv}

Sometimes, judges have changed their mind and reversed their positions, even after sentencing.

As one example, in November, 1978, four protestors were

arrested for nonviolent civil disobedience at the First Annual Military Electronics Exposition in Anaheim, California. After spending a night in jail, they were given one year probation. In October, 1979, two of the protestors, LA Catholic Workers Jeff Dietrich and Kent Hoffman, were again arrested at the exposition, two weeks before their probation ran out. Robert Fitzgerald, the same judge who had ordered the probation, gave them six month sentences in the county jail, double the recommendation of the DA. And yet, he ordered their release two months later. Kent met with Judge Fitzgerald not long after that, and, as Kent recounted:

“He spoke of the confusion he experienced, of the influence provided by receiving over 700 letters of concern on our behalf, of the movement from distrust to appreciation for our sincerity and tenacity of commitment. He had gone through a rare agony for one so solidly entrenched in power and the pride of power. He had chosen to admit openly and publicly the mistake he had made.”^{xv}

Kent told the judge of a dream he had had, of Judge Fitzgerald standing beside him serving Christmas dinner to the homeless guests at the LA Catholic Worker. Judge Fitzgerald told him of someone he loved who had died on Skid Row and said he would be honored to serve Christmas dinner at the Worker.

A second example is contained in a piece by Frank Cordaro, of the Des Moines Catholic Worker, from November 5, 2009. The day before, there had been a civil disobedience action at the “Space Weapons Bazaar” in Omaha, Nebraska. Four “out of state” demonstrators were held overnight in Douglas County Jail and appeared with a group of about 60 persons, mostly poor and black, before Judge Darryl Lowe the morning of the 5th. The court session went on, in assembly line fashion, for hours, and the four protestors were the last to come before the judge. Father Louie Vitale pled “no contest” and was sentenced to five days. The Judge added “If you had pled guilty it would

have been three days. Next.” Father Jim Murphy was up next. Upon pleading guilty, he was sentenced to three days. When the third protestor, Steve Clemens, approached the bench, Judge Low asked “What were you guys doing at the Qwest Center in the first place?” Steve replied, “Your honor, we were there to protest the Strategic Space Symposium. We were there to protest the selling of space weapons technology to STRATCom!” Frank, still awaiting his appearance, called to the judge “And you just sentenced two Catholic priests to jail!” As Cordaro recounts:

“Judge Lowe just assumed the four of us were arrested for intoxication. He just thought we were four old drunks. . . . ‘Catholic priest! Protest!’ exclaimed Judge Lowe ... ‘Bring those two priests back before me. Give me their files.’ The judge asks me to join them all at the bench. We explained to him what our nonviolent protest was all about. He congratulated us for our witness. He said he believed in nonviolent civil disobedience. He said more of it needed to be done. He told us his father was active in the civil rights movement.”

Judge Lowe shook each of their hands, and they were all sentenced to time served. Judge Lowe concluded by saying “I hope you all come back again next year!”^{xvi}

Finally, in a more radical approach, judges can engage in civil disobedience themselves. The most powerful case I know of occurred in Germany. Although it occurred outside the United States, it may be of interest particularly because of your father’s involvement in the Nuremberg Trials. On January 12, 1987, twenty German judges were arrested in the small town of Mutlangen for blocking the road to the base which housed Pershing II nuclear armed missiles. Their action was part of a nonviolent campaign in which over 1,000 persons had been arrested by that time. One of the twenty, Judge Ulf Panzer, stated:

"Fifty years ago, during the time of Nazi fascism, we judges and prosecutors allegedly 'did not know anything.' By closing our eyes and ears, our hearts and minds, we became a docile instrument of suppression, and many judges committed cruel crimes under the cloak of law. We have been guilty of complicity. Today we are on the way to becoming guilty again, to being abused again. By our passivity, but also by applying laws, we legitimize terror: nuclear terror. Today we do know. We know that it needs only the push of a button and all Germany, Europe, the whole world, will be a radiating desert without human life. It is because we know this that we have to act. Many of us judges have organized 'Judges and Prosecutors for Peace.' We have raised our voices in warning against nuclear death. We have worked with local peace groups, advertised against nuclear armaments, demonstrated and submitted resolutions to our parliament ... Our warnings have died away unheard. That is the reason why we today block the U.S. air base in Mutlangen. We hope that such an action will be heard more loudly than all our words before." ^{xvii}

There had been 1,096 guilty verdicts in the Schwabish-Gmund court for blocking the base. Four days after the action of the judges, there were seven acquittals, the first in the campaign.

In light of this memorandum, Judge Gideon, I make one request – that at my sentencing you make a statement that includes your conclusions about the morality and legality of using weaponized drones. For five years, you have heard evidence about weaponized drones such as those flown out of Hancock. You have heard arguments about international law as it affects drone killings. You have heard from people who have been in Afghanistan and Iraq talk about their encounters with people living under the drones. You have heard excerpts from the United Nations Assistance Mission to Afghanistan which document that drones have killed civilians, on a regular basis. You have heard that a classified report authored by

Larry Lewis concluded that drones in Afghanistan were significantly more likely to kill civilians than were “manned” aircraft.

Judge Gideon, you are an intelligent, thoughtful person. You stated in your written opinion for the Hancock 38 that you have struggled with the issues we have raised. I would very much like to know your reactions to our evidence and arguments, whether those reactions be for or against the piloting of weaponized drones out of Hancock. I understand that such a statement would not be appropriate in the context of a trial or a verdict. However, I believe it can legitimately be done at sentencing and I hope you will consent to do that.

Thank you for your attention and engagement in this discussion. I look forward to seeing you on March 9th.

Sincerely,

Harry Murray

Professor of Sociology

i[□] M.K. Gandhi, *Non-Violent Resistance*, Bharatan Kumarappa (ed.). (1951: New York: Schoken), p. 175

ii[□] Gandhi, it seems, used the terms civil disobedience and civil resistance interchangeably. I will use the former in this memorandum.

iii[□] Ibid., p. 174

iv[□] John Rawls, *A Theory of Justice*. (1971: Cambridge, MA: Belknap Press of Harvard University Press), pp. 364-367

v[□] Ibid., p. 372.

vi[□] Ibid., p. 373.

vii[□] Ibid., p. 384.

viii[□] Murray Edelman, *Politics as Symbolic Action*. (1971: Chicago, Markham Publishing Company).

ix[□] See Thomas Kuhn, *The Structure of Scientific Revolutions: 50th Anniversary Edition* (2012: Chicago, University of Chicago Press) for a detailed analysis of how paradigm shifts work in science.

x[□] quoted in Rosalie G. Riegler, *Crossing the Line: Nonviolent Resisters Speak Out for Peace*, (2013: Eugene, OR: Cascade Books), p. xiii

xi[□] Brian Terrell, email to the author, March 2, 2007.

xii[□] Mohandas K. Gandhi, *An Autobiography: The Story of My Experiments with Truth* (1957: Boston, Beacon Press), p. 414

xiii[□] "The Statement of Judge Lord," reprinted in Peace Magazine, <http://www.peacemagazine.org/archive/v02n5p40.htm>

xiv[□] Scott Schaeffer-Duffy, *Nothing is Impossible: Stories from the Life of a Catholic Worker*. (2016: Athol, MA: Haley's).

xv[□] Kent Hoffman, preface, in Jeff Dietrich, *Reluctant Resister: The Prison Letters of Jeff Dietrich*. (1983: Unicorn Press, North Carolina).

xvi[□] Frank Cordaro, "Douglas County Jail Court Report," Nov. 5, 2009, personal copy sent to me by Rosalie Riegler.

xvii[□] “Twenty German Judges Arrested at American Air Force Base in West Germany,” January 12, 1987 and “In the Name of the :People: Away with Missiles!”, personal copies, from Jonah House website.