

Resisting in Times of Law and Order

Civil Disobedience, American Conservatism, and the War on Crime

Eraldo Souza dos Santos

Introduction: What Is Civil Disobedience?

On May 28, 2014, Secretary of State John Kerry argued on the CBS TV show *This Morning* that Edward Snowden should accept punishment for his actions: “He should man up, come back to the United States. If he has a complaint about what’s wrong with American surveillance, come back here and stand in our system of justice and make his case.” A few days later, on June 4, in an article for *Just Security*, Michael J. Glennon criticized the arguments of those who, “absent the macho bluster,” considered Snowden a “coward” and a “traitor.” For Glennon, the idea that civil disobedience necessarily involves a willingness to accept legal punishment mischaracterizes a tradition that “is vastly more complex than the argument recognizes.” To be sure, Henry David Thoreau, Mahatma Gandhi, Martin Luther King, and Rosa Parks did not “seek to evade punishment” but many other disobedients did not do so and justifiably:

“Other disobedients’ activities have permitted concealment, however, and some were in fact carried out covertly. The ‘underground railroad’ by which people aided runaway slaves is one prominent example. The Fugitive Slave Act of 1850 made it unlawful to do so, but no one seriously claimed that the thousands of individuals who evaded punishment for its violation ought to have come forward and accepted prison sentences for its violation. The Boston Tea Party is another. Are the disguised ‘Mohawk Warriors’ who illegally dumped 342 chests of tea into Boston’s harbor to be condemned because they did not give themselves up and stand trial?”¹

One day later, on June 5, Rahul Sagar argued in the same outlet against Glennon’s position and Snowden’s act of whistleblowing. For Sagar, American abolitionists and anticolonial revolutionaries cannot be considered part of the civil disobedience tradition: “Arguably their actions amounted to justified rebellion, not civil disobedience. Their actions expressed a wholesale rejection of the political, legal, and social structure of colonial America and the South, respectively. The events Glennon refers to were harbingers of war.” Civil disobedience would be, in contrast, much more restrained:

¹ Michael J. Glennon, “Is Snowden Obligated to Accept Punishment?”, *Just Security* (June 4, 2014): <https://www.justsecurity.org/11068/guest-post-snowden-obliged-accept-punishment/> (accessed 27 Oct. 2023).

“An individual engaged in civil disobedience refuses to obey in order to express moral opposition to a law that she considers unjust. A crucial feature of such an act is that the disobedient person *appeals* to the conscience of the authorities – in a democracy, her fellow citizens – urging them to overturn an unjust law or provision. She does not take the law into her own hands. Another feature of such an act is that the cost of disobedience is borne principally by the dissenter. Rosa Parks’ refusal to give up seat did not endanger the other passengers on the bus, much less the United States.”²

The debate between Glennon and Sagar is just one example of the multiple controversies over the history of civil disobedience and the legal framing of social protest since the 1960s. In efforts to judge whether civil disobedience is politically and morally justified today, most political commentators, pundits, and activists turn to how it was conceptualized in the past.

Between the 1940s and the 1970s, civil disobedience became a key political concept in the United States amidst debates about the activism of antinuclear organizations, the civil rights movement, and political groups opposed to the Vietnam War. Since then, but especially in the past two decades, the meaning of the phrase has been contested on more than one occasion: from discussions on the radicalism of Occupy Wall Street and Black Lives Matter to recent debates about the appropriation of the concept by climate movements such as Extinction Rebellion and far-right groups such as PEGIDA. In newspapers such as *The New York Times*, *The Washington Post*, and *The Spectator*, political commentators and pundits from across the political spectrum have insisted that civil disobedience must necessarily be nonviolent, that activists must accept punishment for the illegal acts they commit, or that most movements which marked the 2010s and the beginning of the 2020s would never have been considered acceptable by luminaries such as Thoreau, Gandhi, or King.³ Throughout all these debates, political actors imply a conception of civil disobedience that an American liberal philosopher already considered commonsensical in the early 1970s: “A man breaks the law, but does in ways which do not challenge the legitimacy of the legal or political systems.”⁴

As scholars like Alexander Livingston and Erin Pineda have shown, what the history of civil disobedience until the 1960s reveals is, from Thoreau to Gandhi and the

² *Rahul Sagar*, “Is Edward Snowden Engaged in Civil Disobedience? – A Response to Glennon”, *Just Security* (June 4, 2014): <https://www.justsecurity.org/11267/edward-snowden-engaged-civil-disobedience-a-response-glennon/> (accessed 27 Oct. 2023).

³ See, for example, *Bernard Harcourt*, “Occupy Wall Street’s ‘Political Disobedience’”, *The New York Times* (October 13, 2011): <https://archive.nytimes.com/opinionator.blogs.nytimes.com/2011/10/13/occupy-wall-streets-political-disobedience/>; *Ruth Marcus*, “Edward Snowden Is No Hero”, *The Washington Post* (July 18, 2013): https://www.washingtonpost.com/opinions/ruth-marcus-edward-snowden-is-no-hero/2013/07/18/91731766-efcc-11e2-a1f9-ea873b7e0424_story.html; *Nick Cohen*, “Edward Snowden Shouldn’t Play the Coward”, *The Spectator* (June 24, 2013): <https://www.spectator.co.uk/article/edward-snowden-shouldn-t-play-the-coward/> (accessed 27 Oct. 2023).

⁴ *Michael Walzer*, *Obligations: Essays on Disobedience, War, and Citizenship*, Cambridge, Massachusetts: Harvard University Press, 1970, p. 24.

civil rights movement, the history of a fundamentally anticolonial, anticapitalistic, and antimilitaristic political practice. This history was progressively erased from our political imagination as the phrase was reconceptualized by American liberal lawyers and scholars in the late-1960s and early-1970s.⁵ These liberals argued that civil disobedience was not a revolutionary but an essentially reformist form of action, at a time when social movements were accused of endangering American democracy amidst rising crime rates in the United States. Civil disobedience, the argument ran, would encourage a criminal attitude toward a legitimately elected government. In the midst of conservative calls for law and order and the election of Richard Nixon to the presidency, affirming that civil disobedience was not a radical form of political action became a key rhetorical strategy for American liberals during the so-called War on Crime. In this essay, I retrace debates about civil disobedience and criminality in this context. I consider in closing how liberal conceptualizations of peaceful protest have served to delegitimize and criminalize activism until today.

I. Civil Disobedience and the War on Crime

The today predominant conception of civil disobedience originated in the context of the development of “law and order” policies in the U.S. during the mid-1960s and early 1970s. Engaged in public debates about protest and criminality, liberals sought to give a precise meaning to a phrase that had a floating signification until then: “civil disobedience.” While conservatives accused the civil rights movement of being responsible for the rising crime rates in the U.S.,⁶ Black, student, and antiwar radicals defended the necessity of resorting to more militant or revolutionary forms of action in order to fight injustices perpetrated by the U.S. government both domestically and abroad.⁷ During this time, lawyers and scholars coming from different political and theoretical backgrounds such as Hugo Bedau,⁸ Abe Fortas,⁹ John Rawls,¹⁰ and Mi-

⁵ Alexander Livingston, “Fidelity to Truth: Gandhi and the Genealogy of Civil Disobedience”, *Political Theory* 46 (4), 2018, pp. 511–536; Erin Pineda, *Seeing Like an Activist: Civil Disobedience and the Civil Rights Movement*, New York: Oxford University Press, 2021.

⁶ Michael W. Flamm, *Law and Order: Street Crime, Civil Unrest, and the Crisis of Liberalism in the 1960s*, New York: Columbia University Press, 2005.

⁷ See David Steigerwald, “The Liberal-Radical Debates of the 1960s”, in: Michael Flamm/David Steigerwald (eds.), *Debating the 1960s: Liberal, Conservative, and Radical Perspectives*, Lanham: Rowman & Littlefield, 2008, pp. 3–71.

⁸ Hugo A. Bedau, “On Civil Disobedience”, *Journal of Philosophy* 58 (21), 1961, pp. 653–665.

⁹ Abe Fortas, *Concerning Dissent and Civil Disobedience*, New York: The New American Library, 1968.

¹⁰ John Rawls, “The Justification of Civil Disobedience”, in: Hugo A. Bedau (ed.), *Civil Disobedience: Theory and Practice*, New York: Pegasus, 1968, pp. 240–255; John Rawls, *A Theory of Justice*, Cambridge, Massachusetts: Harvard University Press, 1971.

chael Walzer¹¹ intervened in academic and public discussions on law enforcement, political authority, and criminality by introducing more precise conceptual differences between civil disobedience and criminal action on the one hand, and civil disobedience and revolutionary action on the other. In their interventions, they mostly rejected radical movements as their interlocutors and addressed the conservatives who opposed civil disobedience.

From 1964 onward, the already widespread call for “law and order” within U.S. public discourse shifted to the center of the debate on state policies designed to fight crime.¹² On 16 July 1964, James Powell, a fifteen-year-old Black teenager, was shot dead in Harlem by an off-duty white police officer. The event triggered major civil unrest for several days in the state of New York. In the same day and almost at the same time, Republican Senator Barry Goldwater insisted in his acceptance speech to the Republican Convention in San Francisco that security from domestic violence would be a priority for his government. In Goldwater’s words, “crime grows faster than the population, while those who break the law are accorded more consideration than those who try to enforce the law.”¹³ In order to guarantee public order and fight criminality, which had been rising since the 1950s, more incisive policies of law enforcement were said to be necessary. Although then-President Lyndon Johnson won the election against Goldwater, conservatives were successful in the following years in the way they likened the image of the Black rioter to that of the Black criminal already widespread in coverage of violent crimes featuring Black men as assailants.¹⁴ Following the events of 1964, personal security and law enforcement progressively became the major domestic concern of U.S. citizens. This concern strengthened in the wake of the riots following King’s assassination in April 1968.¹⁵ By accusing the civil rights movement of weakening public respect for law and authority, conservative discourse nullified the differences between nonviolent direct action, civil unrest, and crime, insisting that increasing crime rates were the sign of liberal governments’ failure in ensuring law compliance. Episodes of “civil disorder” were said to be the indication of how “racial integration” and “permissive liberalism” could be harmful to public safety.¹⁶ “In the midst of a conservative resurgence against racial equality and New Deal liberalism,” we can historically observe in this respect “the political construction of the problem of violence and disorder, and the tendentious and empirically questionable thesis that civil disobedience, riots, and violent crime are somehow of a piece, each one bleeding inevitably into the next.”¹⁷ In this context, Johnson signed Executive Order #11412, establishing the National

¹¹ Walzer (op. cit. fn. 4).

¹² See *Michael W. Flamm*, *In the Heat of the Summer: The New York Riots of 1964 and The War on Crime*, Philadelphia: University of Pennsylvania Press, 2017.

¹³ Cited in *Flamm* (op. cit. fn. 6), p. 33.

¹⁴ See *Flamm* (op. cit. fn. 12), pp. 1–2.

¹⁵ *Pineda* (op. cit. fn. 5), p. 26.

¹⁶ See *Flamm* (op. cit. fn. 6), p. 39.

¹⁷ *Pineda* (op. cit. fn. 5), p. 26.

Commission on the Causes and Prevention of Violence, which concluded in its final report that disobedience to law, such as the one displayed by the civil rights movement for more than a decade, “is disastrous from the standpoint of the maintenance of a democratic society.”¹⁸

These criticisms found their echo in the conservative literature on civil disobedience produced during the mid- and late-1960s. Lewis F. Powell, Jr.’s John Randolph Tucker Lecture, delivered at the School of Law of Washington and Lee University on 16 April 1966, is exemplary in this regard.¹⁹ Powell, who would be appointed to the Supreme Court by President Richard Nixon in 1971, called civil disobedience a “heresy which could weaken the foundations of our system of government, and make impossible the existence of the human freedom it strives to protect.” “Putting the old wine of revolution into the new wineskin of constitutional government,” civil disobedience theorists and advocates would seek to transmute “the ancient justification for revolt against tyranny [...] into a rule for day-to-day life under a system of government under law.”²⁰ Activists would reject “reforms and improvements that could be achieved politically” by taking a “revolutionary posture” that endangered the foundations of the American system of government.

The published version of his lecture dedicated an entire section to the relationship of civil disobedience to riots. From his point of view, “no one knows the extent to which the doctrine of disobedience, and especially the widespread resort to the streets, has contributed to the general deterioration of respect for law and order and specifically to major outbreaks – such as riots in Harlem, Rochester, Philadelphia, Chicago and Watts.”²¹ The “spiraling disobedience in the streets”²² would show, however, that the consequences were already observable. “One chilling example of where the doctrine of disobedience may inadvertently lead us,” he added, “is the spiraling addiction to drugs (especially LSD) by teenagers and college students,” which is attributed to the “growing collegiate uncertainty about how binding laws ought to be.”²³ By insisting that the Constitution, “both by amendment and interpretation,” must be the only tool for social change, Powell asseverated that “the street mob and massive civil disobedience, so familiar in countries not governed by the rule of law, have had no place in our country.”²⁴

Many conservatives argued against the very idea of “civil disobedience,” by insisting that civility – usually understood as the civic commitment of American citizens to their government – is incompatible with the very practice of disobedience. In 1964,

¹⁸ Cited in *Pineda* (op. cit. fn. 5), p. 25.

¹⁹ *Lewis Powell, Jr., A Lawyer Looks at Civil Disobedience*, 23 Wash. & Lee L. Rev. 205 (1966).

²⁰ *Ibid.*, p. 205.

²¹ *Ibid.*, p. 225.

²² *Ibid.*, p. 227.

²³ *Ibid.*, p. 229.

²⁴ *Id.*

Morris I. Leibman defended this idea in his address before the American Bar Association: “I would suggest that you experts in criminal law consider whether there can be ‘civil’ disobedience where there is a specific intent to disobey the law. Such a specific state of mind is ordinarily treated as the essence of criminality, hence not ‘civil.’ Therefore, it seems to me that there is an inherent contradiction in the concept of pre-meditated, ‘righteous’ civil disobedience.”²⁵ In 1966, FBI Director J. Edgar Hoover invited former Justice Charles E. Whittaker to write a piece for the *FBI Law Enforcement Bulletin* on the dangers of “planned, mass disobedience of our laws.”²⁶ In his essay, Whittaker stated similarly that the civil rights activists’ conduct “cannot honestly be termed ‘civil disobedience,’ for the simple reason that willful violation of the criminal laws is not ‘civil disobedience,’ but is ‘criminal disobedience’.”²⁷ Hoover himself would contribute to the critique of civil disobedience along similar lines:

“To my mind, there are two frightening aspects to civil disobedience. One, sowing contempt for law and order and promoting pride in lawbreaking among the Nation’s youth can only result in the acceleration of our serious crime problem [...] Secondly, where is the line to be drawn against the snowball effect of civil disobedience? Willfully disobeying misdemeanor statutes today and committing felonies tomorrow is a logical regression from a government of law to an anarchic society. [...] Rioting, looting, burning, and killing – deliberate crimes – are outrages spawned under the banner of civil disobedience, a dangerous philosophy based on shallow reasoning.”²⁸

When Richard Nixon issued the following words in a radio address to the American nation 1968, law-and-order arguments against civil disobedience were therefore already familiar to his audience:

“The old violence today parades in a new uniform. Both at home and abroad, it has wrapped itself in propaganda. At home, it may masquerade as ‘civil disobedience,’ or ‘freedom,’ and sometimes it marches under the banner of legitimate dissent [...] The sloganeering of the new violence confuses many people. That’s what it intends to do. But when the slogans are stripped away, it is still violence plain and simple, cruel and evil as always, destructive of freedom, destructive of progress, destructive of peace.”²⁹

It is in this historical context that most theories of civil disobedience circulating in the United States and in Europe today were formulated. Since the 1940s, activists and scholars sought to respond to the objection that civil disobedience was incompatible

²⁵ *Morris Leibman*, “Civil Disobedience: A Threat to Our Law Society” (December 1, 1964): <https://fee.org/articles/civil-disobedience-a-threat-to-our-law-society/> (accessed 27 Oct. 2023).

²⁶ *Charles E. Whittaker*, “The Effects of Planned, Mass Disobedience of Our Laws”, *FBI Law Enforcement Bulletin*, September 1966, p. 9.

²⁷ *Ibid.*, p. 10.

²⁸ *Edgar J. Hoover*, “Message From the Director,” *FBI Law Enforcement Bulletin*, November 1965, p. 1; “Message From the Director,” *FBI Law Enforcement Bulletin*, November 1966, pp. 1–2. Cited in *Pineda* (op. cit. fn. 5), p. 28.

²⁹ *Richard Nixon*, “A Commitment to Order”, *NBC Radio Network* (March 7, 1968). Cited in *Pineda* (op. cit. fn. 5), p. 29.

with the main values of the American constitutional system. After the mid-1960s, new dimensions came into play in the debate on political disobedience in the U.S., however. After the passing of the Civil Rights Act of 1964 and the Voting Rights Act of 1965, civil disobedience became for many activists and scholars unjustifiable. Since African Americans could *de jure* already participate in the electoral process as full citizens, protest was supposed to be replaced, so argued for example African American civil rights activist Bayard Rustin, by “institutional action.”³⁰ Resorting to civil disobedience to fight poverty or to protest the Vietnam War was therefore deemed undemocratic. As Justice Abraham “Abe” Fortas, appointed by his close friend President Johnson to the Supreme Court, wrote in the first book ever dedicated to civil disobedience, disobedience to laws such as traffic regulations would be unjustifiable in the American system, as civil disobedience must be limited to laws which are unconstitutional, hence invalid. Further injustices could be protested and redressed via political or juridical channels such as legal protest and judicial review.³¹ As part of the same political dynamics, direct attacks on racial integration after 1964 “gave way to a coded discourse about crime and disorder”³² targeting Black activists and those considered to be their allies through criminal law.

Importantly, the history of civil disobedience cannot be understood without taking into consideration the crisis that American liberalism was undergoing at that historical moment. Despite Johnson’s “War on Poverty” policies, which were said to be the most effective way of reducing criminality, criminal rates continued to rise during his term in office. As Nixon won the election of 1968, he radicalized the War on Crime declared by his predecessor in 1965. In 1972, he would declare, in turn, a concomitant War on Drugs. As conservatives’ accusations against social movements won credibility in the public opinion, civil disobedience advocates sought to establish a clear-cut difference between criminal and political lawbreaking. Nonviolence, openness, conscientiousness, and willingness to accept legal sanctions were more and more said to be the main features of civil disobedience and to indicate the civil or civic character of this form of political action.³³ Insisting that civil disobedience did not thereby challenge the legitimacy of American political system was a way of ensuring its democratic credentials. Advocates of civil disobedience sought, in this regard, either to show that civil disobedience was essentially different to militant or revolutionary action – the most persistent understanding of civil disobedience until today – or, less often, that civil disobedience was a sign of the persistence of the American Revolu-

³⁰ Bayard Rustin, “From Protest to Politics: The Future of the Civil Rights Movement”, in: Devon W. Carbado/Donald Weise (eds.), *Time on Two Crosses: The Collected Writings of Bayard Rustin*, Jersey City: Cleis, 2015, pp. 116–129.

³¹ Fortas (op. cit. fn. 9), pp. 61–62.

³² Pineda (op. cit. fn. 5), p. 27.

³³ See, for example, Rawls (op. cit. fn. 10).

tion's spirit in the political life of the post-revolutionary republic.³⁴ Figures such as Socrates, Jesus, Thoreau, Gandhi, and King, but also events such as the Boston Tea Party, the Shay's Rebellion, and the Whiskey Insurrection as well as evasions of the Fugitive Slave Law and the campaigns of the American labor movement were marshaled into a continuous tradition of resistance, which was mobilized to prove the noble precedents of civil disobedience in American history.³⁵ In this process, rebellions and revolutions were continuously relegated to a distant past, and the radicalism of Thoreau, Gandhi and King was progressively denied in favor of a more reformist understanding of civil disobedience. The late-1960s and early 1970s would witness the creation of a tradition that remains to this date a commonplace that shapes the political imagination of activists, pundits, and students of civil disobedience.

II. Liberalism and Conservatism

Today's most influential theoretical approaches to civil disobedience took shape in this context through public-facing articles in American magazines such as *Dissent*, *The New Yorker*, and *The New York Review of Books*.³⁶ In them, scholars sought to influence public opinion against the growing criminalization of civil disobedience in the U.S. In their articles, they humanized protesters not only by shedding light on the relevance of the causes they were fighting for, but also by arguing that civil disobedience was a form of political action compatible with the spirit of American institutions. As Hannah Arendt argued in her influential 1970 *New Yorker* essay on civil disobedience, the latter should not be characterized as criminal action, as it was compatible with the American Constitution and the constitutional spirit that shaped the American nation after the revolution. Since the voyage of the Mayflower, the U.S. have been shaped, Arendt argued, by voluntary political associations such as the ones behind the civil disobedience campaigns of the 1960s. To recover the legacy of the American Revolution in order to tackle the challenges facing the U.S. democratic regime in the early 1970s, lawmakers should find a "constitutional niche" for civil disobedience among American institutions. Differentiating the associative, political character of civil disobedience from the egoistic, individualistic character of criminal action, Arendt sought to defend the social movements of her time.³⁷ In the process,

³⁴ See, for example, *Hannah Arendt*, "Civil Disobedience," in: *Crises of the Republic*, San Diego/New York/London: Harcourt Brace, 1972, pp. 49–102; *Howard Zinn*, *Disobedience and Democracy: Nine Fallacies on Law and Order*, New York: Vintage/Random House, 1968.

³⁵ See *Powell* (op. cit. fn. 19), pp. 208–209.

³⁶ Rawls, whose conception of civil disobedience is arguably the most influential until today, is certainly an exception to this. His contributions to debates on civil disobedience circulated mainly within university circles. Nevertheless, his conception of civil disobedience was very similar to that of other liberal intellectuals who had been proposing theories of civil disobedience in the U.S. public debate since the early 1960s. See *Katrina Forrester*, *In the Shadow of Justice: Postwar Liberalism and the Remaking of Political Philosophy*. Princeton: Princeton University Press, 2019.

³⁷ *Arendt* (op. cit. fn. 34).

however, she delegitimized and criminalized movements that, in her view, endangered American institutions, such as the Black and student movements of the late 1960s and early 1970s that she considered too radical.³⁸

Another common strategy among liberals, which would become influential through a 1965 law review article by Burke Marshall, Attorney General for the Civil Rights Division of the Department of Justice between 1961 and 1965, consisted of claiming that the social movements of the 1960s had not practiced civil disobedience.³⁹ Either their actions were protected by the First Amendment, which would provide for the right to peaceful protest, or the laws the demonstrators were breaking were unconstitutional, as declared retroactively by the Supreme Court since the 1950s. In the latter case, civil disobedients would not be committing a crime or breaking the law, as one cannot practically disobey a constitutionally invalid legal rule. The strength of this argument is shown by the fact that it gained traction even among more conservative political actors like Herbert Storing in the late-1960s. Storing defended certain campaigns of the civil rights movement, which would be for him legitimately challenging unconstitutional laws,⁴⁰ but considered the idea of civil disobedience ultimately undemocratic among other reasons for trying to circumvent the necessity for democratic deliberation on matters of common concern. Similarly, American lawyer and philosopher Ronald Dworkin argued in his influential 1968 essay for *The New York Review of Books* that antiwar activists had a moral right to disobey even constitutionally valid laws because, in his legal interpretation, the Vietnam War was unconstitutionally declared.⁴¹ Invited by the German philosopher Jürgen Habermas in the early 1980s to a conference in support of the movement against the deployment of

³⁸ See, for example, *Hannah Arendt*, “On Violence”, in: *Crises of the Republic*, San Diego/New York/London: Harcourt Brace, 1972, pp. 103–198.

³⁹ *Burke Marshall*, *The Protest Movement and the Law*, 51 *Va. L. Rev.* 801–802 (1965).

⁴⁰ *Herbert Storing*, “The Case Against Civil Disobedience”, in: Hugo A. Bedau (ed.), *Civil Disobedience in Focus*, Londres: Routledge, 1991, p. 87: “civil disobedience is to be distinguished from testing the constitutionality of law. This distinction is often obscured because what starts out as the former may end as the latter, and very often in practice the two kinds of activities are pressed forward at the same time. But the distinction in principle is clear. If a Negro makes use of facilities reserved by local law for whites and if upon being arrested and fined he appeals and secures a decision from the Supreme Court that the local law is unconstitutional, he has not committed an illegal act. (...) The institution of judicial review, in which the acts of governmental authorities are tested in the light of the higher law of the Constitution, provides for a kind of tamed or civilized ‘civil disobedience.’ One of the practical consequences of this institution is to divert disobedience and even revolution into the channel of law. Judicial review mediates between the positive claims of the legislature or official of initial jurisdiction and the universal claims of justice, through the higher positive law of the Constitution. But it is only a mediation; and the distinction remains between ‘breaking’ a ‘law’ that is invalid under the Constitution, which involves no unlawful behavior, and breaking a valid law because it is claimed to be unjust, which does of course involve unlawful behavior – even if the claim of injustice is sound and even if it is recognized as sound by a subsequent amendment of the law.”

⁴¹ *Ronald Dworkin*, “Civil Disobedience”, in: *Taking Rights Seriously*, Cambridge, Massachusetts: Harvard University Press, 1978, 206–222.

Pershing II and GLCM missiles in Germany, Dworkin argued against civil disobedience, like Storing, on democratic grounds: for Dworkin, the movement was illegitimate because it did not respect the democratic will of West Germany's democratic majority and its representatives.⁴²

The history of liberal efforts to decriminalize civil disobedience in the American public debate has therefore a double face: these efforts involved legitimizing certain movements whilst criminalizing others or legitimizing certain movements with the aim of criminalizing others as threats to social progress and democratic life. To be sure, these distinctions are understandable as well as necessary in political practice. But many of the movements that were considered illegitimate in this context sought to address pressing social and political problems, ranging from the persistence of racial segregation and disenfranchisement along racial lines to American militarism and expansionism as well as rising economic inequality. Liberals and conservatives mostly attacked such movements, without offering theoretical or practical solutions to the problems they identified. The affinities between liberal and conservative ideas on civil disobedience, as the cases of Storing and Dworkin reveal, are considerable in this regard. This is due to the fact that in the battle to legitimize peaceful protest, liberals joined conservatives in attacking movements they considered to be radical or extreme, even if those movements did not resort to violence.

The main question that preoccupied liberals during the Johnson administrations was, in this regard, “[h]ow to claim ownership over the victories of the civil rights era while discrediting the forms of social disorder that seemed to follow in their wake—or brought them about in the first place.”⁴³ Tamed conceptions of civil disobedience were mostly aimed at denouncing the occupations on American campuses and the activism of movements such as the Black Panther Party. By rejecting the legitimacy of these movements, liberals and conservatives found common ground. This is key to understanding how, in an ironic fashion, civil disobedience became subsequently compatible with conservative discourses on social protest. Beyond political labels, liberal and conservative approaches to social protest and civil disobedience were very similar, as both sides in the debate ultimately considered social movements to be actual or potential threats.⁴⁴ The key difference between liberals and conservatives was the effort by many liberals to embrace at least some forms of disobedience “as a politics of *order*, at home within the established legal structure, and posing no intrinsic threat to stability and lawful democracy.”⁴⁵ Even so, liberals and conserva-

⁴² See *Ronald Dworkin*, “Civil Disobedience and Nuclear Protest”, in: *A Matter of Principle*, Cambridge, Massachusetts: Harvard University Press, 1995, pp. 104–116; *Peter Glotz* (ed.), *Ziviler Ungehorsam im Rechtsstaat*, Frankfurt am Main: Suhrkamp, 1983.

⁴³ *Pineda* (op. cit. fn. 5), pp. 26–27.

⁴⁴ Ultimately, conservative, liberal and radical are qualifiers that can change according to the position of political actors on different issues. As the debates on civil disobedience analyzed here show, such categories can prevent us from recognizing key affinities between political actors occupying different positions on the political spectrum.

⁴⁵ *Pineda* (op. cit. fn. 5), p. 29.

tives agreed that any social movement that radically challenged the principles and public policies of the American government was essentially illegitimate. Ideas such as (dis)order and stability ultimately served as the guiding principles for the legitimization or criminalization of social movements on both sides of the debate. The consequence was that in most cases the protection of the existing order was given precedence, as King argued, over the realization of justice and democratic principles.⁴⁶

III. Conclusion: Liberal Disobedience Today

The progressive criminalization of social movements in the 1970s and 1980s by conservative administrations shows that liberals were not successful in their efforts.⁴⁷ Instead, they contributed to creating an often unattainable ideal of what legitimate protest is. Despite their intentions, this ideal was emphasized and successfully appropriated in the decades to come by conservative political actors. To this day, it allows most forms of political disobedience, when not political protest in general, to be framed as illegitimate, criminal, and ill-timed. At a time when civil disobedience has once again become a watchword for activists around the world, liberal conceptions of civil disobedience have been mobilized to delegitimize and criminalize progressive social movements. In many instances, moreover, such conceptions have

⁴⁶ *Martin Luther King, Jr.*, "Letter from Birmingham City Jail (1963)", in: James M. Washington (ed.), *A Testament of Hope: The Essential Writings and Speeches of Martin Luther King Jr.*, New York: HarperCollins, 1986, p. 295: "I must make two honest confessions to you, my Christian and Jewish brothers. First, I must confess that over the last few years I have been gravely disappointed with the white moderate. I have almost reached the regrettable conclusion that the Negro's great stumbling block in the stride toward freedom is not the White Citizens Council or the Ku Klux Klanner but the white moderate who is more devoted to order than to justice; who prefers a negative peace which is the absence of tension to a positive peace which is the presence of justice; who constantly says, 'I agree with you in the goal you seek, but I can't agree with your methods of direct action'; who paternalistically feels that he can set the timetable for another man's freedom; who lives by the myth of time; and who constantly advises the Negro to wait until a 'more convenient season.' Shallow understanding from people of good will is more frustrating than absolute misunderstanding from people of ill will. Lukewarm acceptance is much more bewildering than outright rejection." See, in contrast, Rawls's insistence on the ideas of order and stability as crystalized in the idea of a duty of civility: "we have a natural duty of civility not to invoke the faults of social arrangements as a too ready excuse for not complying with them, nor to exploit inevitable loopholes in the rules to advance our interests. The duty of civility imposes a due acceptance of the defects of institutions and a certain restraint in taking advantage of them. Without some recognition of this duty mutual trust and confidence are liable to break down. Thus in a state of near justice at least, there is normally a duty (and for some also the obligation) to comply with unjust laws provided that they do not exceed certain bounds of injustice." *John Rawls, A Theory of Justice (Revised Version)*, Cambridge, Massachusetts: Harvard University Press, 1999, p. 312. From the perspective of the white moderate in King's argument, the civil rights movement probably fails to fulfil this duty.

⁴⁷ *Jason Sokol, The Heavens Might Crack: The Death and Legacy of Martin Luther King Jr.*, New York: Basic Books, 2018.

served to politically legitimize conservative and far-right movements. By insisting on the three criteria of non-violence (understood narrowly as avoiding resorting to physical violence), openness, and a willingness to accept legal sanctions, these movements have reclaimed the concept of civil disobedience in the court of public opinion.⁴⁸ They have done so to the detriment of more substantial ideas with which disobedience has been associated before its liberal codification, such as the fight for inclusion and against injustice and inequality. To support these claims, the far-right has appropriated the same domesticated histories of civil disobedience formulated by liberals since the 1960s. The intellectual history of civil disobedience can contribute, in the face of these trends, to clarifying how the past has been used and abused to justify our words and deeds in the present.

Zusammenfassung

Die Geschichte des zivilen Ungehorsams bis zu den 1960er Jahren ist, wie Historiker und politische Theoretiker gezeigt haben, die Geschichte einer grundlegend anticolonialen, antikapitalistischen und antimilitaristischen politischen Praxis. Diese Geschichte wurde nach und nach aus unserer politischen Vorstellungskraft getilgt, als der Begriff in den späten 1960er und frühen 1970er Jahren von liberalen US-amerikanischen Juristen und Wissenschaftlern neu konzipiert wurde. Diese Liberalen argumentierten, dass ziviler Ungehorsam keine revolutionäre, sondern eine im Wesentlichen reformistische Aktionsform sei, und zwar zu einer Zeit, als soziale Bewegungen angesichts steigender Kriminalitätsraten beschuldigt wurden, die US-amerikanische Demokratie zu gefährden. Ziviler Ungehorsam, so das Argument, würde eine kriminelle Haltung gegenüber einer rechtmäßig gewählten Regierung fördern. Inmitten konservativer Aufrufe zu Recht und Ordnung und der Wahl Richard Nixons zum Präsidenten wurde die Behauptung, ziviler Ungehorsam sei keine radikale Form der politischen Aktion, zu einer zentralen rhetorischen Strategie amerikanischer Liberaler während des sogenannten War on Crime. In diesem Artikel zeichne ich die Debatten über zivilen Ungehorsam und Kriminalität in diesem Kontext nach. Abschließend gehe ich darauf ein, wie liberale Konzeptualisierungen des friedlichen Protests bis heute dazu genutzt werden, Aktivismus zu delegitimieren und zu kriminalisieren.

⁴⁸ That was most notably the case of the German far-right extremist political movement PEGIDA during the mid-2010s, which reclaimed the idea of civil disobedience to characterize their anti-Islam campaigns of direct action. See *Christian Volk*, “Ziviler Ungehorsam in modernen Demokratien. Eine demokratietheoretische Nachlese”, *sub|urban. Zeitschrift für kritische Stadtforschung* 2 (2), pp. 137–142.