

Introduction

WARTS AND ALL

AS WITH MOST WARS, the American war on terror has been depicted in simple terms: America, a defender of democracy, is engaged in a battle against foreign terrorists who are “enemies of freedom,” as George Bush has put it. American democracy is on one side of this struggle; terrorism is on the other. The problem with this simple depiction is that it ignores America’s long history of a homegrown version of terrorism. Militant abolitionists like John Brown, vigilantes on the western frontier, violent labor groups, lynch mobs in the post-Reconstruction South, and violent right-wing organizations like the militia movement were all terrorists by today’s standards. What’s more, these violent groups were not opposed to democracy. Indeed, democratic ideas nurtured and legitimated their terrorism.

Consider, for instance, this intriguing bit of American history. In 1854 an interracial mob led by a Unitarian minister smashed down the door of the Boston courthouse in order to free Anthony Burns, a fugitive slave. The mob intervened at almost the last possible moment: the following morning Burns would be escorted to the Boston harbor and, in accordance with the Fugitive Slave Act of 1850, returned to slavery in Virginia. Morally opposed to Burns’s rendition and the law that sanctioned it, the Boston mob aimed its battering ram at the courthouse door. Climbing over the splintered rubble, several individuals engaged in hand-to-hand combat with a phalanx of guards. The abolitionist mob was repulsed in fairly short order, and its attempt to free Burns was unsuccessful. Though brief, its battle with the legal authorities was intense and deadly. In the melee, a guard was killed.

The killing caused a furor among abolitionists in Boston and beyond. Debate centered on two prominent abolitionists who delivered fiery speeches minutes before the attack on the courthouse. Wendell Phillips, an abolitionist crusader known for his oratorical eloquence, and Theodore Parker, the president of the Boston Vigilance Committee, exhorted their audience of five thousand to act on behalf of liberty rather than only talking about its value and import. Phillips urged his audience to recall that they lived in the revolutionary city of Boston, where, he hoped, “the children of Adams and Hancock may prove that they are not bastards.” “Let us prove,” he urged, “that we are worthy of liberty.” Parker confronted

legal obligation to the Fugitive Slave Act and the issue of violence directly. Advising disobedience to slave law, he exhorted his audience to instead follow “the law of the people,” which “is in your hands and arms” and can be executed “just when you see fit.” Execution of this populist law, Parker suggested, could require drastic measures. There “is a means and there is an end; liberty is the end, and sometimes peace is not the means toward it.”¹

Whatever their immediate effect on the abolitionist audience, Phillips and Parker’s speeches proved prophetic. By the 1850s, militant abolitionists were increasingly willing to entertain the idea that, like their revolutionary predecessors, they might have to employ violent means to attain liberty. More abolitionists openly and violently defied the Fugitive Slave Act. By 1856 the violence had escalated: John Brown led a deadly raid on a pro-slavery settlement in Kansas in which five men were dragged from their cabins and hacked to death on the banks of Pottawatomie Creek. Three years later Brown attacked the federal armory in Harper’s Ferry, West Virginia, in a desperate attempt to spark more widespread violent resistance to slavery. Brown was pilloried by some and lauded by others. Thoreau, for instance, compared Brown to Ethan Allen and Cromwell and defended his “perfect right to interfere by force with the slaveholder in order to rescue the slave.” His violence was “employed in a righteous cause.”²

Like the Boston mob, other American groups have become enamored with the idea of righteous violence. They might logically be called “uncivil disobedients”—that is, groups of citizens who, protesting unjust laws or legal actions and upholding established political ideals, commit illegal and violent acts. Uncivil disobedients typically lay claim to many of the same ideals that prompted the American Revolution. They often look at the American revolutionaries with admiration for their idealistic commitment to liberty, their participatory zeal, and their militancy. The citizens who violently protested against the government in the late eighteenth century—in Shays’s Rebellion in 1786–87, the Whiskey Rebellion in 1794, and then Fries’s Rebellion in 1799—did not, for instance, see themselves as rebels. Rather, they understood their acts as preserving republicanism, guarding liberty, and upholding the ideals of the Declaration of Independence.

Vigilantes have also traditionally justified their violence by appealing to the right of revolution and self-preservation and the ideal of popular sovereignty. The first instance of vigilantism occurred in 1780 when Colonel Charles Lynch, a lapsed Quaker, and a band of leading citizens arrested, tried, and punished Tories plundering property on Virginia’s western

¹Stevens, *Anthony Burns*, 38–39, 293–95.

²Thoreau, *Higher Law*, 132–33.

boarder. Offenders received thirty-nine lashes and were required to proclaim “Liberty Forever!” More vigilantes followed. Over two hundred vigilance committees formed on the western frontier, and, in the post-Reconstruction South, lynch mobs claimed nearly three thousand victims. As I write this introduction, a vigilante group called the Minutemen has recently made national headlines as they police the U.S.-Mexico border searching for undocumented immigrants. There’s reason to think that this latest resort to vigilantism is not an anomaly. Vigilante themes are prevalent in Hollywood, ranging from the trite and harmless (*Batman*, *Spiderman*) to the violent and vengeful (*Death Wish*, *Falling Down*). Moreover, polling data suggest that a portion of the American population is sympathetic to the idea that vigilantism is sometimes appropriate: a CBS/*New York Times* Monthly Poll found that 31 percent of respondents agreed that there are times when people might need to take the law into their own hands.³

As well as cropping up regularly throughout American history, uncivil disobedients have appeared on both ends of the political spectrum. On the left, portions of the labor movement adopted violent methods to improve the lot of working men and women. The results include the terrorism of the Molly Maguires, a group of anthracite coal miners in Pennsylvania that bullied supervisors for better working conditions in the 1860s, the infamous explosion in Haymarket Square in 1886, the violent strikes in Coeur d’Alene and Pullman in the 1890s, and the dynamiting of the *Los Angeles Times* in 1910. The Weather Underground, the Symbionese Liberation Army, and radical environmental and animal rights groups have also claimed the mantle of righteous violence. On the right, Carry Nation and her hymn-singing compatriots in the temperance movement smashed bars and stock with hatchets to protest weakened prohibition laws in Kansas. More recently, violent religious groups have killed those who provide abortions, and the militia movement has advocated violent resistance to a tyrannical and oppressive government. Looked at from the vantage point of the history of righteous violence, American civil society has had a notable uncivil streak.⁴

The Burns affair and this larger history of uncivil disobedience remind us of an ignored relationship between democratic ideas, violence, and terrorism. Our history shows clearly that admirable democratic ideas and motivations can lead to violence and unjustified killings. The striking thing about the Burns mob and the violent abolitionists was that they were driven by commendable democratic desires for liberty, rights, and direct civic participation. This is true of many uncivil disobedients.

³ CBS News/*New York Times* Monthly Poll, April 1992, question 53.

⁴ This uncivil streak has been called “bad” civil society. Chambers and Kopstein, “Bad Civil Society.”

Angered by a disjunction between law and justice, uncivil disobedients are convinced the law can be redeemed by direct civic activism outside of established legal channels. Many violent uncivil disobedients are also committed to civic empowerment, believing that citizens in a democracy can and should change laws they believe are unjust. For the militant abolitionists in Boston, for instance, the Burns case brought the evil of the Fugitive Slave Act into focus and made its unjust consequences tangible and undeniable. The Boston abolitionists understood that they were morally implicated in the injustice of the Fugitive Slave Act: *their* police were being used to carry out its dictates, *their* courthouse jailed Burns, and *their* tax money was being spent to send a free man back to a life of chains.

Like the Boston mob, uncivil disobedients generally assume that, as citizens, they can exercise political authority and are responsible for making certain laws or legal actions accord with justice, as they see it. This can-do approach to politics is evident in the will to act. Consider, for instance, the fact that the Boston mob chose to act collectively to right a wrong. This may seem like a small thing in retrospect, but it is not. The decision to act—and, more specifically, to act together in the public realm without shame or remorse—suggests that the mob was an empowered group confident in its moral and political judgment. While members of the Boston mob certainly felt disempowered by the political situation and were acutely aware of the law's oppression and injustice, they did not accept this state of powerlessness. The Boston mob was neither composed of browbeaten subjects who had grown used to injustices nor of self-interested individuals who had ceased to care about public life. Rather, the mob was composed of *citizens* who felt a moral responsibility to make the law just and cared passionately about what legal officials were doing in their name. The mob assumed that it had a role to play in relation to the law. In this respect, the Boston mob was not obviously different from *civil* disobedients. Like civil disobedients, the Boston mob believed that citizens should be morally and politically involved in the laws that governed them. And, like civil disobedients, the abolitionist mob was stymied by institutional channels of change and, thus, acted outside of them.

Because uncivil disobedients complain bitterly about inefficiency, inequacy, and corruption in political and legal institutions, it is logical to wonder if these charges have merit. This is an important question, first, because we may have more sympathy for uncivil disobedients if political institutions are failing them. Second, if political institutions are at the heart of the problem, then a means to address uncivil disobedience presents itself—that is, the reformation of political institutions, making them more efficient, responsive, competent, and honest. In some cases, most notably on the western frontier, political institutions were in shambles and vigilante complaints about inebriated judges, corrupted justices of

the peace, and outlaw sheriffs had merit. In other cases like lynching in the post-Reconstruction South, the lynch mob's perception that the legal system was too lenient in applying the death penalty to African American defendants has not been borne out by statistical analysis.⁵ In one major set of cases, then, institutional efficacy was low, while in another it was not.

The relationship between institutional efficacy and uncivil disobedience becomes more complicated still when we take cases like the Burns affair into account. As militant abolitionists in Boston saw it, the problem was not that political institutions were ineffective but rather that they were *too* effective. This was especially the case in Boston since the federal government was determined to make an example of Burns. President Franklin Pierce's orders were clear: "Incur any expense deemed necessary . . . to ensure the execution of the law."⁶ In response, Secretary of War Jefferson Davis sent marines, cavalry, and artillery to make certain that Burns's procession from his jail cell to the Boston harbor was without incident. The show of force succeeded. Though an estimated fifty thousand individuals watched as Burns and a mass of federal guards processed through the streets of Boston, order was maintained and the law was enforced.

The Burns case and others like it suggest that the motivations behind uncivil disobedience are broader than the efficacy of political institutions. Uncivil disobedients are concerned about perceived injustices of the law and the legitimacy of legal and political institutions. What constitutes an injustice changes from case to case. Beliefs about whether the legal wrong was caused by political institutions that were too careless in executing their duties or too zealous in fulfilling them, too bloated with bureaucratic procedures or too inattentive to the requirements of due process, too willing to bend to contingencies or too formalistic and rigid also change from case to case. What does not change, however, is that the government is the object of enmity. Also unchanging across the cases is the steadfast belief that the corrective to institutional problems lies in shifting power away from legal institutions and officials and depositing it in the people.

The passionate call for liberty and the participatory democratic ideas elucidated by the Boston mob may have been commendable, but its results—violence and killing—were not. Looked at in terms of results and consequences, the picture of uncivil disobedients changes radically. They seem markedly different from civil disobedients. Rather than protests, sit-ins, and marches, the Boston mob took up a battering ram and used deadly force. And, rather than thinking carefully about tactics, the mob focused primarily on accomplishing its goal of freeing Burns. As Parker predicted in his speech at Faneuil Hall, ends trumped means.

⁵ Tolnay and Beck, *Festival of Violence*, 86–118.

⁶ Von Frank, *Trials of Anthony Burns*, 174.

The tendency of uncivil disobedients to engage in indiscriminate killings is of even greater concern. Not all uncivil disobedients have been arbitrary and unsystematic in the targets of their violence. Many frontier vigilantes only targeted individuals they believed to be guilty of wrongdoing. Though frontier vigilantes were swayed by racism and xenophobia and they certainly made errors in assessing guilt, many also made efforts to punish the appropriate individual. In the Burns affair, Frederick Douglass defended the killing of the guard along similar lines. The guard chose to be allied with a pro-slavery government, and he was actively assisting to send a free man back into slavery. As Douglass saw it, the guard was guilty. In this sense, violent uncivil disobedience is somewhat different from terrorism. The paradigmatic example of terrorism is a bomb on a bus: the explosion kills whoever happens to be on the bus, despite the fact that the woman riding the bus to work or the man running errands is not responsible for the political problem that the terrorists seek to remedy.⁷ The violence is random and unassociated with guilt.

In other instances of uncivil disobedience, however, guilt has been a ruse and violence has been random. Some lynch mobs in the post-Reconstruction South killed innocent relatives when they could not locate the ostensibly guilty party. They strung up cousins, uncles, and brothers instead. Other southern lynching crowds made it clear that their goal was to terrorize local freedmen and -women into submission. In these cases and others, guilt is gutted of meaning. What, for instance, were the children killed in the bombing of the federal building in Oklahoma City guilty of? Absent guilt, the distinction between uncivil disobedience and terrorism is less apparent. To capture these points of similarity and dissimilarity and to acknowledge this movement from targeted violence to indiscriminate violence, I've called uncivil disobedience a homegrown version of terrorism. Regardless of what one calls it, it is important to note that the phenomenon has affinities with terrorism, though it is not exactly the same as terrorism.

A crucial question, then, is how have advantageous democratic motivations and ideas been twisted to justify indiscriminate violence? How has an impulse to make the law just and a desire for popular sovereignty facilitated random killing? The appearance of indiscriminate violence is crucial. It signals that democratic motivations and ideas have gone terribly awry. Moreover, it reveals a decisive difference between uncivil disobedience and its civil counterpart. Yet, the violence itself discloses very little about *how* democratic ideas have been distorted to justify the recourse to brute force. Arbitrary violence suggests that democratic ideas have been twisted to support malevolent ends, but it does not reveal what

⁷ Walzer, *Just and Unjust Wars*, 197–206.

this twisting looks like. The observation that uncivil disobedients tend to see violence as legitimate while civil disobedients do not runs into a similar problem. In and of itself, this distinction reveals little about why some dissenting groups choose violence and others do not. Violence alone does not tell us very much about how uncivil disobedients have conceptualized law, citizenship, and popular sovereignty or how their conceptions of these key terms facilitated a turn toward random killing.

One way to address the role of democratic ideas in justifying indiscriminate violence is to look more closely at historical cases of uncivil disobedience. Many of the largest and most significant groups of domestic terrorists left copious documents defending their actions. These manifestos, constitutions, articles, diaries, editorials, books, poems, memoirs, and letters show us how uncivil disobedients understood the law, citizenship, and the relationship between citizens and legal officials. A “lay political theory” is revealed in these documents, if you will. The defenses and apologies for violent uncivil disobedience show how legal and political ideas operate at the bottom of the political pyramid, and how, more specifically, ideas can be adopted, appropriated, and manipulated by ordinary citizens. The “lay political theory” that emerges around uncivil disobedience is more intriguing and complex than one might expect. Uncivil disobedients are typically unschooled in canonical political theory and do not have an academic approach to political ideas. Yet, despite their lack of intellectual discipline and tradition, many uncivil disobedients are familiar with their nation’s dominant political ideas and frameworks and feel free to use them in unexpected ways. Their political theory is startling, but it’s not incoherent or inconsequential.

These cases of violent uncivil disobedience are instructive because they suggest that an activist approach to the law is not dangerous in and of itself. Rather, a *particular* conception of the relationship between citizens, laws, and legal institutions has opened the way to indiscriminate violence. Problems may arise when citizens think that the law ought to replicate popular will or morality as closely as possible. Parker, in his passionate speech to the abolitionists, hinted at this tight connection between law and morality or will when he urged the audience to enforce “the law of the people,” that is, their immediate, personal understanding of justice in Burns’s case rather than the government’s distant and compromise-driven law. Other vigilantes and lynch mobs have carried Parker’s logic further, arguing that vigilante “law” is purer than institutional law because it represents the will of the people or their morality in an unadulterated form. Uncivil disobedients tend to idealize the law as a mirror: The law should reflect their will or their morality without distortions or flaws. In their view then, the rule of the people should dominate the rule of law, and democracy should trump constitutionalism. This instrumental view of law as a mirror

of popular sovereignty provokes a crisis mentality in which any discord between the law and popular will or morality becomes a catastrophe. Moreover, it prompts collective solipsism. While it would be too strong to say that uncivil disobedients truly think that they are the only things existent, they tend to act as if this were the case. They are apt to care only about their own will or morality in relation to the law, not that of others.

To put this point differently, problems may arise when citizens conceive of democracy as a series of perfect identity relationships. As uncivil disobedients see it, the governed should be identified with the government, the people should be identified with the law, and the law should be identified with justice. It's important to note that this emphasis on identification is not unique to uncivil disobedients. Carl Schmitt argued that "all democratic arguments rest logically on a series of identities . . . the identity of the governed and governing . . . the identity of the people with their representatives in parliament . . . the identity of the state and the law, and finally an identity of the quantitative (the numerical majority or unanimity) with the qualitative (the justice of the laws)." When these identities seem to hold, Schmitt suggested, the government seems democratic. Hence, policies and procedures that tighten the sense of identification between the governed with the governing, the people with law, and the law with justice—like, for instance, "extension of the suffrage, the reduction of electoral terms of office, the introduction of referenda and initiatives"—are elements of democratic governments.⁸

Schmitt noted that these democratic procedures and policies "can never reach an absolute, direct identity that is actually present at every moment." Absolute and perfect identification, he suggested, is a dream. Mundane democratic politics will never quite get to a point of precise identification in which, for example, the people can identify fully with law and see their will in it.⁹ Cases of uncivil disobedience suggest that the problem is only partly the gap between the real (mundane politics) and the ideal (perfect identification). The deeper difficulty is with the ideal itself—that is, with the conception of democracy as a series of identifications. Cases of uncivil disobedience suggest that once this ideal is in play, it may be difficult to resist the logic of perfect identification and absolute equivalence. The gap between the real and the ideal can become intolerable, and the need to close it can be irresistible.

To explicate this problematic view of an activist approach to law and democracy, I examine three particularly prolific and well-documented groups whose disobedience degenerated into indiscriminate killings: vigilance committees on the American frontier, lynch mobs in the post-

⁸ Schmitt, *Crisis of Parliamentary Democracy*, all quotations from 26–28.

⁹ Indeed, Schmitt goes on to note "Democracy seems fated then to destroy itself in the problem of the formation of a will."

Reconstruction South, and militant abolitionists. In the first chapter's discussion of justifications for violence, I examine the contemporary militia movement. The order of my case studies breaks with chronology. Although the abolitionists preceded Western frontier vigilantes and lynch mobs historically, they follow these groups in my analysis. A portion of the abolitionist movement, radical political abolitionism, offers insight into early attempts at breaking the connection between legal activism and terrorism and a glimpse of a different conception of the relationship between democracy and constitutionalism that resists the dream of perfect identification with law. I draw out the implications of this embryonic idea of law in the conclusion.

GOING NEGATIVE

It is important to say a few words about why examining this negative example of uncivil disobedience is a worthy enterprise. Why look at when things go wrong with democratic ideas and action, as opposed to when they go right? Why examine uncivil disobedients, groups of citizens who commit illegal and violent acts while claiming to uphold democratic ideals and serve justice? Most of the literature exploring disobedience as a political phenomenon and discussing the limits of an obligation to obey the law has focused instead on the more uplifting case of civil disobedience and, in particular, on the civil rights movement in the 1950s and 1960s. My approach is different. To the extent that I discuss civil disobedience, it is to illuminate the characteristics of uncivil disobedience. So, it makes a good deal of sense to ask why *this* focus.

First, instances of uncivil disobedience argue against moralizing democracy, claiming it as the ultimate positive political stance and flattening it into an unassailable force of good. Democracy is far more intriguing and complex by a good measure. Cases of uncivil disobedience underscore that complexity by showing that sound democratic ideas and motivations may not necessarily result in just outcomes. To chart the path between admirable democratic ideas and terrorism is, in some sense, to indict these ideas as being potentially dangerous. The notion that democratic ideas can be risky may seem strange in an era of exporting democracy to other parts of the globe. Yet, the Western canon of political thought is well populated with critics of democracy. They stress the instability of democracy's diffused schema of political power and its inclination toward internecine violence.

Tocqueville's "tyranny of the majority" tapped into (and tweaked) this tradition by suggesting that democratic aspirations toward uncontained popular sovereignty could be destructive. As Tocqueville saw it, an

unimpeded popular sovereign could trample the rights of minorities and encourage a soul-crushing culture of conformity and homogeneity. The image of unconstrained popular sovereignty that Tocqueville left us with is that of an ouroboros, a snake eating its own tail. Like the ouroboros, Tocqueville's tyranny of the majority suggests that the very ideas that sustain democracy can lead to its destruction. In the spirit of Tocqueville's insight, democratic theorists should not shrink from exploring the unsavory outcomes of democratic ideas. Violent uncivil disobedience is one place to begin this work.

The push to spread democracy elsewhere—and the realization that exported versions will not be like the American version that we have today—underscores the need to explore the dangerous potential of democratic ideas. America's own history of uncivil disobedience will not, I think, provide too much specific insight into the troubling turn that democratic ideas could take in other regions of the world. Such results would be governed by culture, religion, and the political history of those individuals who pick up democratic ideas and, reinterpreting them anew, make these concepts their own. But, America's history of uncivil disobedience does urge humility, caution, and, most importantly, the recognition that democracy is a fragile and demanding form of government. Democracy requires a great deal from citizens. But its demands can be confusing and opaque. It can be difficult for citizens to know precisely what is demanded of them or how to give it.

Second, cases of uncivil disobedience give a new vantage point on the fraught and complex relationship in liberal democracies between democracy and constitutionalism. Liberal democracies tend to ground their legitimacy in both the rule of law and the rule of people, and tend to claim that law and the will of the people are determinative. Yet, how can this be? What happens when law demands one course of action but people (or their representatives) demand another? Perhaps the people and their representative institutions should be passive before the requirements of law, understanding law as “an essential safeguard against the occasional ill humors in the society,” as Alexander Hamilton put it in *The Federalist*, no. 78. This seeming solution shows the intractability of the problem, however. The idea that the rule of law should trump the rule of the people raises a question about the democratic character of the polity. If the rule of law always dominates the rule of the people, then in what sense are liberal democracies actually *democracies*? Moreover, it is harder to eliminate people from the rule of law than Hamilton's neat solution suggests. Arguing that the rule of law should trump leaves open a large question: Who should decide what the rule of law means? Law is not self-acting. It needs people for its construction, interpretation, and execution. This fact surreptitiously opens a back door to the rule of the people.

For the most part, two dominant approaches have been employed to explore the tension between democracy and constitutionalism. The first has been theoretical. Political and legal theorists have argued for particular normative conceptions of democracy and constitutionalism. They have also considered whether these values are truly at odds with one another. In general, the theoretical approach has tended toward abstraction and steered clear of historical cases or events. Jürgen Habermas, for instance, has emphasized the contradictory “idea that the addressees of the law must also be able to understand themselves as its authors” and that the will of the people must be bound to and constrained by reason.¹⁰ Bonnie Honig has also analyzed the “tense relationship between constitutionalism and democracy” at the core of liberal democracies, “which take as their ground and goal both the rule of law and the rule of the people.”¹¹ Others such as Stephen Holmes and Jeremy Waldron have considered the ways in which a “precommitment” view of constitutional constraints—that is, constraints rationally chosen by the people at some point in the past in anticipation of their irrational behavior in the future—facilitates or impinges on rule of the people.¹² Sheldon Wolin presents the tension between democracy and constitutionalism in starker terms and as two distinct kinds of politics: a “fugitive” eruption of democracy “conceived of as a moment of experience, a crystallized response to deeply felt grievances or needs on the part” of ordinary citizens and a governing form of representative politics that means “accommodating to bureaucratized institutions that, *ipso facto*, are hierarchical in structure and elitist, permanent rather than fugitive—in short, anti-democratic.”¹³ One side of this strained contradictory relationship implies identification between the people and law based on engagement and action, as the “authors” of the law express their “will” or “deeply felt grievances” in a “democracy.” The other implies constraint and repose, as the “addressees” of the law are bound by the restrictions and “bureaucratized institutions” encompassed in “constitutionalism” and “the rule of law.” Each presents risks. Constitutionalism can induce civic complacency and a dissipated sense of legitimacy. Fugitive democracy, as George Kateb observes, “may be only demotic,” consisting of “a rage driven by resentment, envy, and rancor.”¹⁴

The second approach to constitutionalism and democracy has been institutional. Political scientists and legal scholars have considered how

¹⁰ Habermas, “Constitutional Democracy,” 767.

¹¹ Honig, “Dead Rights, Live Futures,” 792–93. Also see Honig, “Between Decision and Deliberation,” 14.

¹² Holmes, *Passions and Constraint*, Waldron, “Precommitment and Disagreement.” Also see Elster and Slagstad, *Constitutionalism and Democracy*.

¹³ Wolin, *Politics and Vision*, 601–606. Also see Wolin, “Fugitive Democracy”; and Wolin, “Norm and Form.”

¹⁴ Kateb, “Wolin as a Critic of Democracy.”

tension between constitutionalism and democracy has played out between the Supreme Court and the political branches. In contrast with the theoretical approach, this body of work is empirical and historical. Debates about judicial review have, for instance, focused on the “counter-majoritarian difficulty” or the Supreme Court’s capacity to thwart “the will of representatives of the actual people of the here and now” and to exercise “control, not on behalf of the prevailing majority, but against it.”¹⁵ Addressing this tension, Bruce Ackerman has argued that the Constitution creates a dialectic system of politics: The mundane, day-to-day system of politics in which citizens are politically passive recipients of law is counterbalanced with transformative moments of higher law-making in which “We, the people” rule. Larry Kramer has more recently argued for a return to “popular constitutionalism,” a practice in which the people have final interpretive authority over the Constitution, making courts and legislatures subordinate to their judgments.¹⁶

Cases of uncivil disobedience unsettle established ways of thinking about democracy and constitutionalism by examining them from an unexplored perspective, that of ordinary citizens. Like institutional scholarship on judicial review, these cases bring history to the fore, emphasizing how the tension between democracy and constitutionalism has been experienced in a particular historical context and how it has changed over time. Yet, the focus here is on citizens not institutions. To borrow Habermas’s phrasing, the focus is on exploring how citizens can be both “authors” and “addressees” of the law. The virtue of this approach is that a tension that can seem abstract is made concrete and specific. Looking at cases of uncivil disobedience clarifies that radical popular sovereignty has been associated with making the law respond to justice, reasserting the rights of the people, and taking the law into one’s own hands. Radical popular sovereignty has also been connected with open hostility to legal institutions and officers and with strong opposition to the idea that the sovereign people must be an “addressee” of the law. Likewise, it has been linked to the notion that the people should exert control over the law to make it reflect sovereign will (and in this sense “author” it). These cases remind us of a persistent appeal in the United States of uncoupling author from addressee. Through them, we can see a recurring dream of radical popular sovereignty as an escape from the rule of law and as pure, unmediated expression of popular will.

On a normative level, these cases also suggest caution about conceptually fragmenting the roles of author and addressee, as well as severing de-

¹⁵ Bickel, *Least Dangerous Branch*, 17.

¹⁶ Kramer, *People Themselves*.

mocracy from constitutionalism. They warn more specifically against imagining one role or one kind of rule as dominating and suppressing the other. This kind of thinking has been associated with a valorization of social and political homogeneity and with violence and antagonism toward those seen as different. As many vigilantes and lynch mobs saw it, the people had to be a cohesive and uniform group in order to legitimately express its will and to control the law. Thus, they celebrated their own uniformity and homogeneity, seeing themselves as united by similar civic and moral commitments and often linked by racial bonds. Likewise, many vigilantes and lynch mobs were hostile to dissent from within their own ranks and intolerant of anyone who might erode the perception that they acted as one sovereign people with one cohesive will. The connection between the idea (elevating the rule of the people over the rule of law) and the action (intolerance of dissent and difference) is not causal. Still, it has been repeated enough times to give one pause.

Third, examining cases of uncivil disobedience exposes and clarifies the gray area that exists between lawful and lawless actions. Uncivil disobedients have repeatedly situated themselves in this gray area by claiming to break the law in a lawlike manner. As one apologist of frontier vigilantism put it, “vigilance becomes omnipotent, not as a usurper, but as a friend in an emergency . . . and if law must be broken to save the state, then it breaks it soberly, conscientiously, and under the formulas of law.”¹⁷ Some uncivil disobedients have gone further by denying “that the word ‘crime’ should be applied to lynchings at all. Such a crime, condoned by the people, cannot be a crime, since people make the law.”¹⁸ Though it is clear that uncivil disobedients do violate law, it is harder to reject that their ideas and rationalizations are often bound up with law in intriguing ways. Frontier vigilantes conducted elaborate trials, for instance, in which judges were elected, witnesses called to the stand, and prosecutorial attorneys made closing arguments to the jury. Militant abolitionists arguments were also deeply enmeshed in the legal categories, critiques of the Constitution, and analysis of legal precedent.

The historical and legal scholarship on vigilantism and lynching has also emphasized that these groups seem to be inside and outside of the law. Influenced by the scholarship of Eric Hobsbawm, George Rudé, and Charles Tilly, who have stressed the importance of studying collective violence and the rational and purposeful nature of crowds, contemporary scholars have noted that vigilantes and lynch mobs typically garnered the approval of the community. Indeed, Robert Maxwell Brown has demonstrated that vigilantes even garnered the approval of the legal community,

¹⁷ Bancroft, *Works of Hubert Howe Bancroft*, 36:10.

¹⁸ Waldrep, *The Many Faces of Judge Lynch*, 187.

and, in this sense, their acts can be described as “lawless lawfulness.”¹⁹ Moreover, scholars have noted that vigilantes and lynch mobs were seen as legitimate because their actions were participatory and public. As Lawrence Friedman noted about frontier vigilantism, “the ‘respectable’ citizens—the majority perhaps—in western towns were not really lawless. Quite to the contrary, people were accustomed to law and order.”²⁰ John Phillip Reid has found evidence that pioneers “outside” of the law on the overland trail were scrupulously attentive to property rights and contracts, and that they were careful to establish popular acceptance of informal punishments on the trail.²¹ Vigilante political rhetoric, Linda Gordon has observed, “frequently takes us back to the source of authority, and more specifically to the vigilantes’ conviction that the popular will transcends the law. They do not despise the law, but only supersede it, overrule it, when it has deviated from its duty to express the popular will.”²²

Yet how could uncivil disobedients truly be lawless and lawful? How could they be inside and outside law at the same time? This question clearly runs into the thorny issue of political legitimacy. To be answered fully, it requires a judgment of just how much political legitimacy a particular group of uncivil disobedients has. It may also demand thoroughgoing assessment of the legitimacy of extra-legislative action by the people—what Gordon Wood has referred to as “the people out-of-doors”²³—in American politics. Such an assessment is likely to vary a great deal depending on the historical context, the alleged injustice that prompted the uncivil disobedience, and the consequences of it. No historical context, it seems to me, would make indiscriminate violence toward uninvolved individuals legitimate. Even uncivil disobedience that avoids this type of violence has been harmful to American democracy and dangerous to some of its central precepts. Certain acts of uncivil disobedience might be legitimate nonetheless. In this respect the Burns case gives us much to think about. Was the storming of the courthouse to rescue Burns legitimate? These are questions of great consequence. To address them sufficiently requires a different kind of analysis and approach than I undertake here.

A narrower approach to illuminating the shadowy position of uncivil disobedients in relation to law is to examine more closely how they violate law. Uncivil disobedience is a particular kind of dissent. It is not random, but rather follows a pattern of law breaking. As such, it is essential to determine what kind of laws uncivil disobedients typically violate. Criminal laws? Civil laws? Constitutional laws? Local laws? State laws?

¹⁹ See chapter 6, “Lawless Lawfulness” in Brown, *Strain of Violence*.

²⁰ Friedman, *History of American Law*, 277.

²¹ Reid, *Law for the Elephant; Policing the Elephant*.

²² Gordon, *The Great Arizona Orphan Abduction*, 256–57.

²³ Wood, *Creation of the American Republic*, 319.

To ask this question somewhat differently, how are uncivil disobedients distinct from other kinds of lawbreakers? Uncivil disobedients are different from common criminals, who break law solely for personal gain. They are also distinct from pirates and bandits, who purposely operate beyond the boundary of law. Uncivil disobedients are not the same as revolutionaries, who break law with the hope of establishing an entirely new legal regime.

One crucial distinction of uncivil disobedients' lawlessness stands out: Uncivil disobedients tend to shelve second-order rules governing who is empowered to interpret, adjudicate, and enforce law. To use H.L.A. Hart's useful distinction, they disregard power-conferring rules.²⁴ By this, I mean that uncivil disobedients attempt to suspend the rules dictating that certain individuals and institutions are authorized to judge and enforce law (judges, lawyers, police officers, sheriffs, courts, and so on). As they see it, the sovereign people ultimately govern power-conferring rules and, thus, the people preside over legal officials as well. By the same logic, uncivil disobedients tend to be dismissive of the idea of accepting punishment for breaking the law. Why should the people be punished for asserting its sovereign will? Why should a self-governing people be penalized for doing what it thinks is right? Focusing on power-conferring rules provides a sharper picture of the gray area of "lawful lawlessness" that is characteristic of acts of dissent and resistance. If we imagine a continuum that stretches from obedience of the law to outright revolution, uncivil disobedience lies in between civil disobedience and revolution. Uncivil disobedients are more lawless than civil disobedients, who typically do not intercede in power-conferring rules, and less lawless than revolutionaries, who hope to radically alter existing power-conferring rules not just suspend them. Particular historic groups of uncivil disobedients are arguably more like civil disobedients, while others are more like revolutionaries. Still, uncivil disobedience is a type of dissent that is distinct from civil disobedience and revolution in important respects.

Focusing on power-conferring rules also clarifies a common difference drawn between uncivil and civil disobedients: the acceptance of punishment. A number of political theorists have argued that civil disobedience is legitimate in part if it involves accepting the given punishment for one's crimes. The history of uncivil disobedience suggests this basis of legitimacy is problematic. Consider, for instance, the case of a post-reconstruction lynch mob that killed a brother or uncle or whomever it could find in the place of the alleged offender. It is difficult to imagine that accepting the punishment would make the killing legitimate. Emphasizing that civil disobedients should perform certain actions like willingly accepting punish-

²⁴Hart, *Concept of Law*.

ment can potentially obscure why these actions matter. There is a risk of fixating on the act at the expense of the thinking behind it. Accepting punishment is significant because it reveals an approach to law in general (and power-conferring rules in particular) that is markedly different from that of uncivil disobedients. Civil disobedients accept the law as an external limitation. Unlike uncivil disobedients, they tend to understand democracy and constitutionalism as entwined, and to conceptualize autonomy as bound up with domination. Uncivil disobedients pull the rule of the people and the law apart. Civil disobedients hold these values in tension, breaking the law as an act of democratic autonomy and submitting to it as well. Focusing less on the act and more on what it reveals also suggests that there may be other acts of dissent that hold democracy and constitutionalism in tension. Accepting the punishment is one way to do this. It may not be the only way.

When the Boston mob picked up its battering ram and together forced it through the courthouse door, it joined a larger group of uncivil disobedients who have violently opposed laws they believed to be unjust. In a sense, the chapters follow this battering ram as it moves from group to group throughout American history. The reason these groups have battered down law's door have varied considerably. The Boston mob assaulted its courthouse door to save an African American man; others in the post-Reconstruction South broke down courthouse doors to kill African American men and women. These are vital distinctions. But they should not overshadow the broad similarity of the tactics and approaches to the law among uncivil disobedients. They should not stop us from considering why this form of dissent has at times turned into a kind of terrorism. Nor should they deter us from exploring the role of democratic ideas in a turn to terrorism. And, to address the questions, we need to look less at the battering ram and more at the groups that have wielded it.