

DEMOCRACY AND CIVIL DISOBEDIENCE

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Those who make peaceful revolution impossible will make violent revolution inevitable.—President John F. Kennedy, March 13th, 1962.¹

Introduction

The Sixties witnessed the emergence in the West of two related phenomena: first, a renewed spirit of individual self-determination marked by a more situationist ethics at the theoretical level and more permissiveness at the practical level, and in social terms by a demand for greater popular participation in decision-making in every social institution; second, an awakening to a range of non-violent techniques of expressing disagreement with authority collectively termed civil disobedience.

There is no necessary connection between the new individualism and the techniques of civil disobedience. Indeed, recent history reveals that the spirit of individualism may often lead to violence rather than to the peaceful protest which is of the essence of civil disobedience. Nevertheless, the method cannot be considered wholly apart from the purpose for which it is invoked, and so a study of the contemporary phenomenon of civil disobedience demands a dual focus, purpose and method.

The *method*, civil disobedience, is not a synonym for every form of opposition to established governmental authority. It is identical neither with criminal activity on the one hand nor with revolution on the other, being distinguished from the first by its idealism and from both by its dedication to nonviolence. It is, however, like both criminal and revolutionary activity in that it is essentially a means not an end. This fundamental point cannot be overstressed: civil disobedience is not itself the purpose of an extra-legal action, but is carried out for another purpose. In fact, at one time or another it has served as a vehicle for almost all of the great human purposes: freedom of religion, freedom from imperial domination, internal political freedom, the right to organ-

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¹ Kennedy, Address on the First Anniversary of the Alliance for Progress, Public Papers of the Presidents (1962), p. 220, at p. 223.

ize for collective bargaining, racial equality, sexual equality, and universal peace through renunciation of war. Ultimately, therefore, an act of civil disobedience depends for its justification principally on the value of the cause it serves. In the employ of a good cause, civil disobedience may well be justified. Carried out for an evil end, it will itself be evil.

Yet the means employed are not themselves lacking in importance, for although a sordid cause cannot be redeemed by the nobility of a demonstration, civil disobedience in even an essentially good cause can be spoiled by viciousness or immoderation in the means. Moreover, there are some for whom there is a special value in the character of the means, seen as not only the way to a political purpose but as the key to the complete moral regeneration both of the disobedients and of society; to such people the means may be regarded as the primary value. Even when the means are considered less important than the end, they must be recognized as a vital factor in the legal and moral evaluation of a civilly disobedient act. This would be true for any type of regime, but must be taken as *a fortiori* for the justice-according-to-law system of a democracy.

But today an analysis of civil disobedience within the democratic state must broaden its perspectives beyond those of immediate ends and means. The following words, adopted by an international conference of Christians and Jews in Toronto in 1968, make it clear how far contemporary consciousness has moved from the simple identification of law and justice which marked the thought of several earlier generations dominated by legal positivism:

Law and order, though vital for society, can often be used to cover injustice. Often, national law is the will of the strongest pressure group, and international order the will of the powerful states imposed upon weaker ones. It is no longer sufficient merely to advocate obedience to law. The attainment of justice is first; without it, law is a mere facade. To attain justice, laws may sometimes have to be disobeyed, though those who disobey them must be prepared to accept the penalties prescribed. We must be ready to accept social conflict as a condition of a fair redistribution of power.²

Justice is now seen, as natural lawyers have always seen it, as an ideal beyond law, and to the attainment of which law must be directed—though the substance of the ideal might be largely unrecognizable to earlier natural lawyers. The emphasis is in fact sociological, on the social conditions which produce certain kinds

² Canadian Council of Christians and Jews, *A Report of the International Conference of Christians and Jews* (1969), p. 21. The chairmen of the Commission on Economics and Politics which prepared this report were the Hon. Mr. Justice Samuel Freedman, Gordon Milling, and James Wine.

of law and on how law can in turn help to reform those social conditions.

So broad are the perspectives that the questions raised cannot be fully resolved within the confines of an article, and probably not even within those of a single monograph. Nevertheless, by virtue of assuming without argument answers to the larger questions I hope it may be possible to treat some of the smaller ones adequately. In brief compass my assumptions are these: that civil disaffection, whether violent or nonviolent, is a consequent and concomitant of social change and can ultimately be resolved only by social change; that law even in a democracy is not a perfect instrument of justice and that it must continually become a more faithful means to the just society; that some forms of disaffection have no place in a democratic society and that their degree of inaptness depends on the extent to which they make use of violence.

The prevailing attitude to civil disobedience is strikingly illustrated by a series of statements on the subject in a 1967 issue of *The New York Times Magazine* in which the editors asked thirteen scholars for their views on civil disobedience. There was a virtually unanimous acceptance of the justifiability of civil disobedience in appropriate circumstances, with all but one of the scholars taking such a similar position that Professor Chomsky's words might be taken as indicative of the group's attitude: "After the lesson of Dachau and Auschwitz, no person of conscience can believe that authority must always be obeyed."³ In the absence of a more accurate measure of prevailing opinion, this sounding of academic opinion may be taken as representative.

There was also the same near-unanimity among the scholars as to the principles of civil disobedience. They may be summarized as follows:

- (i) civil disobedience is to be distinguished from mere dissent at the one extreme and resistance at the other;
- (ii) the use of exclusively nonviolent means is of the essence of civil disobedience;
- (iii) resort to civil disobedience is legitimate when available legal means of bringing about the desired change are exhausted.

There was evident, however, some difference of interpretation as to the "exhaustion of legal remedies" principle, and on the

³ The New York Times Magazine, November 26th, 1967, p. 27. Those who accepted civil disobedience were: William F. Buckley, Jr., Noam Chomsky, John Cogley, James T. Farrell, Lewis S. Feuer, Paul Goodman, Sidney Hook, Herbert C. Kelman, Irving Kristol, Dwight Macdonald, Richard H. Rovere, and Bayard Rustin; John Dollard appeared to allow no justification for civil disobedience, though he did not directly respond to the question.

practical question of whether civil disobedience is justified in the case of Vietnam, there was a considerable degree of disagreement.

It would be a mistake to attempt a final definition of civil disobedience at this stage of the study, but no discussion could proceed without some preliminary understanding of the subject. I therefore suggest as a working definition the following: civil disobedience is a nonviolent act of public protest which is either actually illegal or of contested legality. Of the three key elements, nonviolence, publicity, and illegality, only the third is a matter of dispute among writers on the subject.

Most authorities take the view that civil disobedience is *ipso facto* unlawful and that it can have no legal justification. As it was put by a symposium participant, "the difference between non-violent and violent resistance is not legally meaningful".⁴ Professor Harrop Freeman of Cornell has been the principal exponent of the opposite view, that "civil disobedience is in fact obedience, that it respects the law and is within the law".⁵

It would go beyond the scope of an introductory discussion to weigh the merits of Professor Freeman's position, but without adopting his views in their fullness one must, I believe, include in a preliminary definition acts of contested legality. To take the position that such acts are excluded would be to argue that acts which appeared to be illegal when performed but were subsequently held to be within the law by judicial decision, were deprived of the status on which all the parties involved agreed at the relevant time. Professor Carl Cohen's statement that "when the challenge to the constitutionality (or constitutional applicability) of a law is unsuccessful, there is disobedience but no legal justification. Where such a challenge is successful there is legal justification but no disobedience"⁶ fails to take into account the attitude of the civil disobedient and the surrounding circumstances at the most important moment of time, that is, the time at which the act of civil disobedience was performed. The inclusion in the definition of cases of contested legality would remedy this defect.

The distinction between direct and indirect disobedience is of sufficient importance to be made at the outset. Direct disobedience occurs where the law disobeyed is the very one against which the protest is being made. Indirect disobedience is the disobedience of a law other than the one which is the object of protest. Fre-

⁴ These words were spoken by Professor Wolfgang Friedmann of Columbia University Law School during a discussion of civil disobedience at a meeting of the American Society for Political and Legal Philosophy, December 28th, 1967.

⁵ Freeman, *Civil Disobedience and the Law* (1966), 21 Rutgers L. Rev. 17.

⁶ Cohen, *Civil Disobedience and the Law* (1966), 21 Rutgers L. Rev. 1, at p. 8.

quently it involves trespass and often it will be related to the law protested against. Indirect disobedience is harder to justify than direct disobedience, but most writers would recognize that it is at least sometimes justifiable. Professor Cohen accurately notes⁷ that a necessary condition of its justification will usually be the closeness of the relationship, whether symbolic or conventional, between the object of protest and the law disobeyed. Thus the nature or the time or the location of a disobedient act may assume importance.

Civil disobedience is only one of the forms which civil disaffection may take. In a disaffection scale, it would be located about midway between disagreement and revolution. Conceptually there is probably little difficulty in distinguishing it and maintaining it in distinction from all other forms of civil disaffection. But the conceptual distinction proves somewhat unstable in practice, because many men who have used civil disobedience have been equally prepared to use more violent measures when these seemed more effective to the achievement of their ends. It will therefore be impossible to study civil disobedience without adverting frequently to the other forms of civil disaffection, even violent ones.

Finally, it is worth noting that the word *civil* in the phrase *civil disobedience* does not designate a contrast with *criminal* disobedience. It connotes rather an action by citizens within a political society and in a civil, that is, nonviolent way. Civil disobedience may, of course, consist in nonviolent violations of criminal as well as of civil law.

I. Violence.

Even if it were conceptually possible, it would be unrealistic in the Seventies to write of nonviolent dissent without adverting to the alternative of violent resistance, for, since the assassination of Martin Luther King on April 4th, 1968, violence has had an increasing appeal to social reformers.

As I use the term, "violence" is restricted to physical force employed by those who do not have positions of authority in the state. Moreover, I limit it to physical force directed against people or against property where the property is damaged and not merely interfered with. I retain the words "coercion" and "compulsion" to include non-physical force. Of course, it is collective rather than individual violence which is in question in the present context.

Professor Charles Tilly has argued convincingly that collective violence has historically been an integral part of the political process in the West and that it can therefore be said to be politically normal (though neither intrinsically desirable nor inevit-

⁷ *Ibid.*, at p. 5.

able).⁸ In his view the contemporary belief that it is abnormal results from selective historical recollection: "Collective violence is part and parcel of the Western political process, and major changes in its character result from major changes in the political system."⁹

What has changed throughout Western history, he believes, are the basic forms of collective violence. Following E. J. Hobsbawm he distinguishes three broad categories of collective violence: primitive, reactionary, and modern.¹⁰ Primitive forms of collective violence (the feud, the brawl among members of rival guilds or communes, the mutual attacks of hostile religious groups) are small in scale, local in scope, involve members of communal groups as such and have inexplicit and unpolitical objectives. Reactionary disturbances (the forcible occupation of fields and forests by the landless, the revolt against the tax collector, the anticonscription rebellion, the food riot, the attack on machines) are also small in scale, but pit either communal groups or loosely organized members of the general population against those who hold power. They are reactionary in the literal sense of being reactions to changes that the participants regard as depriving them of rights they have formerly enjoyed.

Modern varieties of collective violence (the demonstration, the violent strike, the coup, most forms of guerrilla action) involve specialized associations with relatively well-defined objectives, organized for political or economic action, and may be on a large scale. These forms may be called modern both because of their organizational complexity and because the participants usually are seeking rights which they have never enjoyed but to which they believe they are entitled. They are prospective, in contrast to the retrospective character of reactionary violence. In fact, primitive disturbances might be said to involve groups maintaining positions in the power structure, reactionary disturbances groups losing such positions, and modern disturbances groups acquiring them.

Such an analysis of collective violence makes it clear that it is closely related to social change. Tilly concludes from his historical studies that:¹¹

[C]ollective violence clusters in those historical moments when the structure of power itself is changing decisively—because there are many new contenders for power, because several old groups of power holders are losing their grips, or because the locus of power is shifting from community to nation, from nation to international bloc, or in some other drastic way. Violence flows from politics, and more pre-

⁸ Tilly, *Collective Violence in European Perspective*, in *Violence in America* (ed. Graham and Gurr, 1969), vol. I, p. 5, pp. 5-6.

⁹ *Ibid.*, p. 32.

¹⁰ *Ibid.*, p. 11 *et seq.* Cf. also footnote 8, at p. 33.

¹¹ *Ibid.*, p. 31.

cisely from political change.

His studies also indicate that, surprisingly, the authorities have far greater control over the extent and timing of collective violence in the short run than do the challengers. In the century and a half of European disturbances he had studied, a large proportion turned violent only when the authorities intervened to stop an illegal but thereto nonviolent action, and the great bulk of the killing and wounding was done by troops or police, whereas the challengers did the bulk of the damage to property. Of course, the long-run outcome depends rather "on the way the entire political system apportion power and responds to grievances".¹²

Tilly is willing to grant that, in terms of the frequency and scale of disturbances over the last 150 years, England has had less collective violence than France, and France less than Spain.¹³ T. A. Critchley contends that since 1919 Britain has enjoyed a half-century in which collective violence has been almost non-existent, and that "the price paid in curtailing individual liberty has been infinitesimal".¹⁴ He sees the main elements in bringing about this happy result as being the national character (self-discipline, humanitarianism, spirit of compromise), an unarmed police force characterized by solidarity with the general population and trained to rely on a controlled application of force, a series of governments responsive to public pressure, the firm control exercised by the leaders of modern protest movements, the pacific nature of the trade union movement in Britain, the humaneness of the law and of the judiciary, and the good luck of living on an island with the consequent freedom of developing without foreign interference.

Professor Ted Robert Gurr has undertaken a comparative study of civil strife, defining civil strife as "all collective non-governmental attacks on persons or property that occur within a political system, but not individual crimes",¹⁵ though he also includes symbolic attacks on political persons or policies such as political demonstrations and political strikes. He thus ranks 114 states on the basis of their total magnitude of civil strife (TMCS) from 1961 to 1965.¹⁶ Congo-Kinshasa is found to have the highest TMCS score (48.7) and Sweden the lowest (.0). The United States ranks forty-first with a TMCS score of 10.2, the United Kingdom seventy-fourth with a score of 5.4, and Canada

¹² *Ibid.*, p. 32.

¹³ *Ibid.*, p. 26.

¹⁴ Critchley, *The Conquest of Violence. Order and Liberty in Britain* (1970), p. 197. For his analysis of the elements of the British conquest of violence see p. 198 *et seq.*

¹⁵ Gurr, *A Comparative Study of Civil Strife*, in *Violence in America* (ed. Graham and Gurr, 1969), vol. II, p. 443, at p. 444.

¹⁶ *Ibid.*, pp. 489-491.

eightieth with 4.9. Another behavioral analysis covering a longer period (1948-1965) and taking into account only violent events provides a more exact profile of political violence in eighty-four countries.¹⁷ In this analysis Finland ranks first (lowest) with a score of .0 and Indonesia last with 190. Canada stands seventeenth with a score of 10, the United Kingdom twentieth with a score of 17, and the United States seventy-first with a score of 97.

These surveys would not appear to bear out any undue complacency about Britain, but might have tempted Canadians to smugness over our present situation had it not been for the events in Quebec in late 1970. However, Professor Kenneth McNaught has recently shown that over a longer period "resort to violence has been so frequent as to be an essential ingredient in [Canadian] historical evolution".¹⁸ Apart from major events such as the Rebellions of 1837 and 1838, the Riel Rebellions of 1869 and 1885, the anticonscription riots in Québec City in 1918 and the Winnipeg General Strike in 1919, Professor McNaught has discovered that between 1876 and 1914 there were at least thirty-three interventions in strikes by the military and five occasions on which troops were called out to control Orange-Catholic rioting.¹⁹ He concludes that "the violence of protest and reform [both actual and threatened]" is "an integral part of our political processes",²⁰ and he speculates that further investigation may show that violence has been more closely related to the operations of the Canadian political system than has been the case in the United States.²¹

This historical evidence indicates how difficult it would be to establish as a universal and absolute principle that violence has no place whatsoever in a democratic society. Some of the violence has occurred because sizeable minorities sincerely believed that their grievances were not being heard and that there was no other way open to them (the Riel Rebellions). Some of it was never intended by the protesters but was provoked by the authorities (the Winnipeg General Strike). Much of it resulted in social progress, as the uprisings of Mackenzie and Papineau led to responsible government within a decade and the labor unrest of the 1930s brought about the full recognition of trade unions and collective bargaining.

Violence that is the result of desperation probably does not carefully calculate the advantages and disadvantages that may re-

¹⁷ Feierabend, Feierabend, and Nesvold, *Social Change and Political Violence: Cross-National Patterns*, in *Violence in America* (ed. Graham and Gurr, 1969), vol. II, p. 497, at p. 513.

¹⁸ McNaught, *Violence in Canadian History*, in *Character and Circumstance. Essays in Honour of Donald Grant Creighton* (ed. Moir, 1970), p. 66, at p. 70.

¹⁹ *Ibid.*, at p. 80.

²⁰ *Ibid.*, at p. 84.

²¹ *Ibid.*

sult, but one of the strongest motives behind violence in democratic societies today is the belief that it does pay social dividends. A recent newspaper article on the aftermath of the Detroit riot of 1967 makes the point that "to the city's blacks the riot was not a disaster, but a liberation",²² and quotes one black to the effect that "Rap Brown did more with one match than Martin Luther King did with a thousand TV appearances".²³ Even moderate Bayard Rustin has observed: "King was in Chicago a year and couldn't get any victories. The kids on the West Side rioted—and a few hours later they got \$8 water sprinklers."²⁴ However, the strong "law and order" reaction in the United States in the last several years should indicate the precariousness of any judgments favoring the efficacy of violence.

It is easy to conclude that violent action can never be the normal way of solving social problems in a democratic society, for violence frustrates the normal democratic processes of decision-making. It should be little more difficult to come to the conclusion that, whatever latitude must be left for the extraordinary situation, violence is not even an appropriate means of problem-solving. It infringes the rights of others to their personal integrity and arbitrarily interferes with their use of their property, and most of all it ignores the characteristic humanity of both minority and majority members, that is, their ability to solve problems rationally. It is the triumph of an irrational will (force) rather than of a rational will (love).

But there is one form of collective violence which exceeds all others in its irrational arbitrariness and which must be treated separately, that is, terror. As Thomas P. Thornton has defined it in a perceptive essay, "terror is a symbolic act designed to influence political behavior by extranormal means, entailing the use or threat of violence".²⁵ Although terror usually employs more extreme means than other forms of violence, it is not this which is its distinguishing characteristic. What really characterizes it is that its ultimate objective is the influencing of political behavior by acts which are essentially symbolic. Thus it differs from sabotage, which is aimed at the ending of the usefulness of a specific person or thing. It is similarly distinguished from assassination. The symbolic aspect of terrorism would seem to suggest that people who are chosen as victims should be major cogs in the system under attack, but in order to achieve his purpose the terrorist must choose targets which appear to be indiscriminately selected, even if they are not so in fact.

²² Toronto Globe and Mail, August 12th, 1970, p. 3.

²³ *Ibid.*

²⁴ Toronto Daily Star, June 5th, 1967, p. 7.

²⁵ Thornton, *Terror as a Weapon of Political Agitation*, in *Internal War* (ed. Eckstein, 1964), p. 71, at p. 73.

The reason for this is that the principal proximate objective of terrorism is the disorientation of the general population, followed by the infusion of new meaning into the then unstructured environment. The disorientation at which the terrorist aims is nothing less than the destruction of the social framework so as to cut the individual citizen off from his social context. Hannah Arendt observes that the ultimate effect of the terrorization process is thus the isolation of the individual, leaving him nothing to rely upon but himself, bereft of strength from his customary supports.²⁶ At the very least the citizen is likely to feel anxiety when traditional norms and established institutions are unable to deal with the situation, and he may even be moved to consider complete withdrawal from the system by his fear of the new danger. He may not even know what it is he fears, since the cause of his fear is beyond the limits of his experience.

In the light of this analysis the stakes for which the Canadian government was playing when it felt forced by actions of the *Front de Libération du Québec* to invoke extraordinary measures to meet the crisis are obvious.²⁷ What it had at all costs to prevent was the disorientation which was showing signs of developing in the face of terrorist actions which the authorities appeared to be incapable of coping with in the short run by ordinary means. Hence terrorist action designed to disorient for purposes of political separation had to be countered by government action calculated to rally support for the preservation of a single country. Beyond all the legal technicalities this was the fundamental issue.

In my view it is the symbolic and indiscriminate nature of terrorist action which denies it any shred of theoretical justification in a democracy. Terrorist victims may be made to suffer directly for sins they are not even aware of, let alone personally responsible for, and their only relationship to the status quo may well be their presumed symbolic value as representatives of the established order. Even where the victims are genuinely members of the ruling élite, they cannot reasonably be held responsible, by private judgments for all the actions of the collective authority. In a democracy no man's power is that all-encompassing. But the greatest vice of terrorism is its use of individual persons solely as symbols, prescinding from their individual characteristics and positions. People become merely means to the end of social disorientation and destruction. Such a view is totally incompatible with the

²⁶ Quoted by Thornton, *ibid.*, p. 83.

²⁷ The original proclamation of apprehended insurrection, made under the War Measures Act, occurred on October 16th, 1970: SOR/70-443. This proclamation continued in force until the coming into effect of Bill C-181, the Public Order (Temporary Measures) Act, 1970, which received Royal Assent on December 4th, 1970.

personalist character of democratic society and government, and can in no circumstances be justifiable in a democracy. No end can justify a means so intrinsically evil.

II. *The Legality of Civil Disobedience.*

1. *Legal orthodoxy.*

The orthodox legal position is that civil disobedience, however justifiable it may be on moral grounds, cannot find a legal justification, for it involves an appeal from the law to a non-legal justification and is manifested by an expressed refusal to conform to the commands of the law. The very self-image of the law renders any other attitude unlikely; as stated by Cardozo, "law is the expression of a principle of order to which men must conform in their conduct and relations as members of society . . .".²⁸ The law is not hospitable to any non-legal claims of right.

The orthodoxy is well illustrated by several Canadian cases. In the British Columbia case of *Reg. v. Neale et al.* the Court of Appeal of that province felt impelled to write:²⁹

Injunctions are not granted by the Courts to favour either management or labour but to restrain unlawful conduct by a party whether that party be a representative of labour or management. . . .

Whether the law . . . which permits of restraining orders being granted by the Courts is good or bad is no concern of the Courts. It is the duty of the Courts and Judges to administer the law as it is enacted by Parliament or the Legislature. It is for one of the latter branches of Government, *i.e.*, Parliament or the Legislature, to determine whether or not a change in the law is required. That is not the responsibility nor does it fall within the jurisdiction of the Courts or Judges. But so long as the law stands management and labour must obey it and it is the duty of Courts and Judges to see that they do.

The case was one involving open violation of an injunction restraining picketing and related conduct, and was an appeal against sentences of imprisonment (six months for two appellants, four for another, and three for the fourth) imposed for criminal contempt arising out of the injunction violation. The Court of Appeal upheld the sentences, proceeding on the ground that:³⁰

The punishment of one who deliberately violates an order of the Court and so is guilty of contempt has for its primary purpose the deterrence of unlawful conduct of a like character by the offender and by others in the future. The imposition of a fine on an individual is unlikely to be either a deterrent to him or a deterrent to others if, as was indicated at the hearing of these appeals, the fine will be paid by a labour union or other labour body and not by the individual himself.

It was a material fact that non-jail sentences imposed in a similar

²⁸ Cardozo, *The Growth of the Law* (1927), p. 140.

²⁹ (1966), 60 D.L.R. (2d) 619, at pp. 621-623.

³⁰ *Ibid.*, at p. 629.

case decided immediately previously had apparently not acted as a deterrent.

Five months earlier in Ontario Chief Justice Gale had been called upon to adjudicate a similar case, *Re Tilco Plastics Ltd. v. Skuriat et al.*³¹ The injunction limiting picketing was originally obtained on consent of the parties, had not been appealed, and was observed for two months until an anti-injunction campaign was launched by labor. The court found that the violation of the injunction was "ostentatious"³² and that "it is doubtful whether there has ever been another instance of contempt attended with so much publicity deliberately sought".³³ Because of the public nature of the defiance of the court order and because of the large numbers of strikers involved (twenty-seven who could be identified were charged), the contempt was criminal rather than civil. The court averred that "the imposition of a fine would not reflect properly the gravity of the offence, nor would it emphasize the element of deterrence".³⁴

Citizens must be cautioned against all forms of defiance of the law, even if inspired by allegedly legitimate goals. The respondents obviously sought to publicize their contempt for the Court's order. It is incumbent upon the Court now to publicize its legitimate and vital authority.³⁵

In the result, the five leaders were sentenced to three months in jail, and the other respondents were convicted to fifteen days' imprisonment. It should be noted that the court did not object to the purpose of the protest, but only to the manner of carrying it out:

[I]t would have been one thing to have paraded at Queen's Park or to have held a rally at the Peterborough Arena for the same purpose [the promotion of changes in the law], but quite another to have formed a closely knit line of hundreds of persons around a strike-bound plant where the number of pickets had been limited by the Court to twelve.

... The means employed to attain a certain end must be as lawful and justified as the end itself.³⁶

A recent American case with some similarity to this Ontario decision is *Walker v. Birmingham*, decided by the United States Supreme Court.³⁷ After Martin Luther King and the seven other petitioners (all Negro ministers) in this case had been denied a permit to hold peaceful protest demonstrations in Birmingham, Alabama on Good Friday and Easter Sunday, 1963, the city

³¹ (1966), 57 D.L.R. (2d) 596.

³² *Ibid.*, at p. 627.

³³ *Ibid.*, at p. 628.

³⁴ *Ibid.*, at p. 629.

³⁵ *Ibid.*

³⁶ *Ibid.*, at p. 615.

³⁷ (1967), 388 U.S. 307.

obtained a temporary *ex parte* injunction from a state circuit court which enjoined the petitioners from holding any such demonstrations without a municipal permit. The petitioners made no further requests for a permit, and did not attempt to dissolve the injunction, but did encourage and participate in civil rights marches. They were subsequently convicted of criminal contempt.

Stewart J., speaking for the majority of the court, held that the demonstrators "could not by-pass orderly judicial review of the injunction before disobeying it"³⁸—they were not "constitutionally free to ignore all the procedures of the law and carry their battle to the streets".³⁹ The case would have been different if they had challenged the injunction in the Alabama courts and had been met with delay or frustration of their constitutional claims; there was even an interim of two days between the issuance of the injunction and the Good Friday march.

The four dissenting judges expressed the view that since both the city ordinance and the court injunction were unconstitutional (as prior restraints on First Amendment freedoms), the petitioners were justified in flouting both. All of the dissenters but Douglas J. also took the point that any other holding would allow constitutional rights to be nullified "by the simple process of incorporating its unconstitutional criminal statutes into judicial decrees".⁴⁰ Warren C.J. took a swipe in passing at the *ex parte* injunction: "The *ex parte* temporary injunction has a long and odious history in this country. . . . The labor injunction fell into disrepute largely because it was abused in precisely the same way that the injunctive power was abused in this case."⁴¹

The position of the demonstrators was legally much stronger in the *Walker* case than in the *Tilco* case, even though the result was the same. The *Tilco* injunction was obtained on consent, and had been observed for some two months. It might also be remarked that whereas Dr. King and his companions accepted and served their sentences without protest, labor leaders in Ontario roundly denounced Gale C.J.H.C. (as he then was) for the sentence imposed in the *Tilco* case.

An instructive contrast with the *Walker* case is provided by *Shuttlesworth v. City of Birmingham*,⁴² which arose from the same events and involved one of the same petitioners, the only difference being that the criminal prosecution initiated by the city in this case was for violation of the city ordinance, rather than for contempt of the court order which forbade that violation. In *Shuttlesworth* the United States Supreme Court unanimously re-

³⁸ *Ibid.*, at p. 320.

³⁹ *Ibid.*, at p. 321.

⁴⁰ *Ibid.*, at p. 334, per Warren C.J.

⁴¹ *Ibid.*, at p. 330.

⁴² (1969), 394 U.S. 147.

versed the petitioner's conviction, holding that the city ordinance was unconstitutional on its face as a prior restraint on the exercise of First Amendment freedoms "without narrow, objective and definite standards to guide the licensing authority".⁴³ The court had no difficulty in distinguishing the *Walker* case, viewing it as an illustration of the failure of demonstrators to follow the proper procedure.⁴⁴ One can only agree with the commentator who observed that "in these two cases as in virtually all other instances of defiance of unlawful authority, the Court went about deciding on the permissibility of the defiance in a formalistic manner".⁴⁵

2. *The lawyer and civil disobedience.*

The problem of the legality of civil disobedience is at its most acute for a lawyer, in relation to his personal conduct. Because of his oaths of office and the Canons of Legal Ethics, he does not have the freedom of other men in aiding, counselling or assisting in acts of civil disobedience, and still less in participating himself in any act of civil disobedience. A recent editorial in the *Law Society Gazette*, the official journal of the Law Society of Upper Canada, states the orthodox position that a lawyer, like a policeman, cannot govern his actions by justice rather than legality: "The lawyer . . . must confine himself to advocating and using legal means to repeal unjust laws. He cannot, without being subject to discipline, take any part in Civil Disobedience."⁴⁶ Before resorting to civil disobedience "he must first publicly renounce his oaths of office and the Canons of Legal Ethics and accept the consequences of such, in addition to those which undoubtedly will flow from his Civil Disobedience".⁴⁷

A considerably more liberal position is enunciated by Rep. (then Dean) Robert F. Drinan, S.J., with respect to the obligations of American lawyers:

There is a widespread misconception in America that lawyers are bound to urge their clients and the public to observe all laws until they are repealed by the legislature or nullified by the courts. This common supposition rests on the contention that otherwise everyone would be his own moral theologian, that Pandora's box would be opened and that chaos could come to society.

The Canons of Professional Ethics of the American Bar Association appear, however, to give a good deal more liberty to attorneys with regard to the counsel which they may give to their clients. Canon 32 of the ABA's Code of Professional Ethics reads as follows:

"... he [the lawyer] advances the honor of his profession and the best

⁴³ *Ibid.*, at pp. 150-151.

⁴⁴ *Ibid.*, at p. 158.

⁴⁵ Note: Defiance of Unlawful Authority (1970), 83 Harv. L. Rev. 626, at pp. 627-628.

⁴⁶ Civil Disobedience and the Lawyer (1967), 1 Law Society Gazette 5, at p. 7.

⁴⁷ *Ibid.*, at p. 5.

interests of his client when he renders service or gives advice tending to impress upon the client his undertaking exact compliance with the strictest principles of the moral law."

It is heartening to note that this forthright endorsement of the existence and majesty of the moral law is placed in the Canons of Professional Ethics immediately prior to the following directive: "He must also observe and advise his client to observe the statute law though until a statute shall have been construed and interpreted by competent adjudication, he is free and is entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent."

Construing these two provisions of Canon 32 together, it appears to be reasonably clear that a lawyer can and indeed sometimes would be required to counsel his client not to obey a particular statute because the lawyer "conscientiously" doubted its "validity" and because, moreover, compliance with such a statute might be contrary to the "strictest principles of the moral law".

It is clear, on the other hand, that Canon 32 along with other ethical directives of the legal profession do not spell out in any specific detail the lawyer's obligations regarding civil disobedience. At the same time the Canons are not inconsistent with Thoreau's adage that "we should be men first and subjects afterwards".⁴⁸

It is instructive to note the difference between the English and the American practice with regard to the barrister's right to decline employment. In England the rule is that a barrister is bound to accept any brief in the court in which he practises, and he may refuse to do so only if he is not offered a proper fee or under special circumstances of conflict of interest, embarrassment, or the like.⁴⁹ The American practice is succinctly compared with the English by Dean Rostow of Yale:

The code of ethics of the American Bar has never accepted the British rule in its full majesty, even in criminal cases. Canon 31 of the Canons of Professional Ethics adopted by the American Bar Association declares that "no lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment". . . . It should be added, however, that the lawyer's oath, recommended by the American Bar Association, and widely used, contains these words: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed". At least one authority has said that "where the English rule is obligation to accept except under special circumstances, the American rule is obligation not to refuse where special circumstances exist".⁵⁰

Canon 5(4) of the Canons of Legal Ethics adopted by the Canadian Bar Association repeats verbatim Canon 31 of the American Bar Association. However, since the Canadian Bar

⁴⁸ Drinan, *Changing Role of the Lawyer in an Era of Non-Violent Action* (1964), 1 *Law in Trans.* Q. 123, at pp. 125-126.

⁴⁹ Rostow, *The Lawyer and His Client* (1962), 48 *A.B.A.J.* 25, at p. 29. See also Orkin, *Legal Ethics, A Study of Professional Conduct* (1957), p. 87.

⁵⁰ Rostow, *op. cit.*, footnote 49, at pp. 29-30. The authority referred to in the quotation is Cox-Sinclair, *The Right to Retain an Advocate* (1904), 29 *Law Mag. and Rev.* 406, at p. 411.

Association's Canons are of no legal effect and merely hortatory, the position of a Canadian barrister would seem to be established rather by his Barrister's Oath, which, as worded in Ontario, incorporates the English view: "You shall not refuse causes of complaint reasonably founded. . . ."

In point of fact, however, almost all Ontario lawyers are solicitors as well as barristers, and solicitors have always had the right to accept or refuse employment. Orkin comments that: "As a barrister he would be duty bound by his oath to accept any reasonable retainer; as a solicitor he would have the right to refuse."⁵¹ Ludwig argues that this is not the rule in Ontario, and that every Ontario lawyer "is at liberty to refuse . . . employment for cause or without assigning any reason", except perhaps in criminal cases.⁵²

The most apt general principle of ethics is laid down in Canon 1(1) of the Canons of the Canadian Bar Association: "He owes a duty to the State, to maintain its integrity and its law and not to aid, counsel, or assist any man to act in any way contrary to those laws." The cases in this area are for the most part concerned with situations where the lawyer actually assisted in the violation of the law. Orkin's list of conduct by lawyers that has been judicially disapproved of provides no precedents: making a false recital in a deed; subornation of perjury in a witness; attempted subornation of a jury; assisting a client to obtain a fraudulent discharge in insolvency; permitting a client to make a false affidavit; accepting a transfer of property in fraud of transferor's creditors; advising how improperly to defeat a garnishee order; assisting a criminal to escape from the country; obtain the release of a prisoner by a bribe.⁵³

In addition to penalties which may be imposed by the courts, disbarment by the organized bar is a possible sanction. Typically a law society has the power to disbar for "professional misconduct",⁵⁴ which has been defined as "conduct which would reasonably be regarded as disgraceful or dishonorable by solicitors of good repute and competency"⁵⁵ Of course, there is an added gravity to a situation where a lawyer might himself organize and actively participate in an illegal activity rather than merely counsel it. But since it has been stated by the Ontario Court of Appeal that disbarable misconduct "must be either criminal or fraudulent",⁵⁶ it would seem that not even a breach of a statute by a

⁵¹ Orkin, *op. cit.*, footnote 49, at p. 90.

⁵² Ludwig, *Practical Ethics of the Lawyer* (1909), 29 Can. L.T. 253, at p. 262.

⁵³ Orkin, *op. cit.*, footnote 49, at p. 22.

⁵⁴ Law Society Act, S.O., 1970, c. 19, s. 34.

⁵⁵ *Myers v. Elman*, [1904] A.C. 282, at pp. 288-289, per Viscount Maugham.

⁵⁶ *Re Solicitor* (1916), 37 O.L.R. 310, at p. 316, per Garrow J.A.

lawyer would lead necessarily to disbarment, and especially that a breach of a merely regulatory statute (such a municipal by-law limiting assembly) would probably not be followed by disciplinary action.

3. *The challenge to orthodoxy.*

The classical natural-law tradition would take sharp issue with the orthodox legal approach on the question of what constitutes legality. For the natural lawyer a legislative enactment which is contrary to natural law and natural morality is not truly law at all. St. Thomas Aquinas defines irrational legislative will as "lawlessness rather than law".⁵⁷ Mortimer Adler says of the following text in Aquinas that "it says everything that has to be said on the subject of civil disobedience":⁵⁸

Laws framed by man are either just or unjust. If they are just they have the power of binding in conscience, from the eternal law from which they are derived, according to Pro 8. 15: By Me kings reign, and law-givers decree just things. Now laws are said to be just both from the end, when, that is, they are ordered to the common good; and from their author, that is to say, when the law that is made does not exceed the power of the law-giver; and from their form, when that is, burdens are laid on the subject according to an equality of proportion and with a view to the common good. For, since one man is a part of the community, each man, in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole. Thus also nature inflicts a loss on the part in order to save the whole, so that on this account such laws as these, which impose proportionate burdens, are just and binding in conscience, and are legal laws.

On the other hand laws may be unjust in two ways. First, by being contrary to human good, through being opposed to the things mentioned above: either in respect of the end, as when an authority imposes on his subjects burdensome laws, conducive not to the common good but rather to his own cupidity or vainglory; or in respect of the author, as when a man makes a law that goes beyond the power committed to him; or in respect of the form, as when burdens are imposed unequally on the community, although with a view to the common good. The like are acts of violence rather than laws, because, as Augustine says (*De Lib. Arb.* i, 5), "a law that is not just seems to be no law at all". Therefore such laws do not bind in conscience, except perhaps in order to avoid scandal or disturbance, for which cause a man should even yield his right, according to Matt 5.40,41: If a man . . . take away thy coat, let go thy cloak also unto him; and whosoever will force thee one mile, go with him other two.

Secondly, laws may be unjust, through being opposed to the Divine good. Such are the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law; and laws of this kind must in no way be observed, because, as stated in Acts 5.29, we ought to obey God rather than men.⁵⁹

⁵⁷ Aquinas, *Summa Theologiae*, I-II, q. 90, a. 1, ad 3.

⁵⁸ Adler, *Is There a Jurisprudence of Civil Disobedience* (1966), 5 *Ill. Cont. Leg. Ed.* 71, at p. 87.

⁵⁹ Aquinas, *op. cit.*, footnote 57, q. 96, a. 4c.

This text from Aquinas has had considerable impact on the thought of Martin Luther King.⁶⁰

It is evident, therefore, that what I have called the orthodox legal position is nothing other than the legal expression of the philosophical doctrine of legal positivism, and only as valid as that philosophical position itself. However, I would offer three reasons why the question of the legality of civil disobedience cannot simply be reduced to part of the age-old controversy between positivism and natural law.

First, very often the law which is disobeyed by way of civil protest is not itself the law alleged to be unjust. Indirect disobedience is, if anything, more common today than direct disobedience, and its validity will depend in large part on the appropriateness of the relationship between the disobedient act and the injustice alleged.

Second, except in the very rare case where the law would directly command a clear violation of divine law by a particular individual (normally it would at most permit or encourage it) traditional natural law theory makes no recommendation about whether or not to resist an unjust law. Aquinas indicates in the passage above that even though unjust laws do not of themselves bind in conscience, they may still be morally obligatory "in order to avoid scandal or disturbance". Obviously, then, the judgment that a law is unjust does not necessarily imply a judgment that the law must be disobeyed. The latter is an independent judgment, arrived at by considering such factors as the kind and degree of injustice of the law, the effectiveness of resistance, and the danger that resistance might break down respect for law (this is what St. Thomas means by "scandal").

Third, some contemporary natural lawyers are prepared to admit that a law can be unjust and still be a law—putting it another way, that the term "law" denotes a mere formality of legislative enactment and in no way connotes moral obligations.⁶¹ Such natural lawyers would be prepared to concede that the determination of legality is distinct from the determination of morality.

Even without challenging the orthodox legal position on the basis of a natural-law approach, one must still bring into play certain distinctions which would modify it considerably. The first distinction may be put in the words of Professor Morris D. Forkosch: "A judicially undetermined law is not automatically

⁶⁰ See, e.g., the reference to Aquinas in King's Letter from Birmingham City Jail, which is reproduced in MacGuigan, *Jurisprudence: Readings and Cases* (1966), p. 241.

⁶¹ O'Meara, *Natural Law and Everyday Law*, [1960] *Natural L.F.* 83, at p. 84.

entitled to the same level of respect as is a judicially determined one insofar as one has a 'right' to challenge the former if not the latter."⁶² Of course, a challenge to a statute does not in every case presuppose its breach, but clearly if the only method of resolving a constitutional question is through an antecedent breach, then the disobedience may assume the character of legal necessity, for otherwise a possibly unconstitutional statute might never be challenged.

The second important distinction is that between violent and nonviolent disobedience to law. While some legal authorities take the position that the fact that disobedience is nonviolent rather than violent is of no legal significance,⁶³ others maintain that nonviolent disobedience is of an entirely different legal character from violent resistance. Professor Harrop A. Freeman urges, in fact, that "non-violent revolution is within the law",⁶⁴ and that only the attempt to secure redress of grievances by violence is outside the law. He argues that the Supreme Court of the United States has affirmed in several cases the proposition that "it is the basic premise of our political system that change is to be brought about by non-violent constitutional process".⁶⁵

Dean Francis A. Allen has noted (without providing an answer):⁶⁶

[C]ivil disobedience may raise a plethora of issues relating to the exercise of discretionary sentencing powers in cases of conscientious law violation. What forms of punishment or modes of treatment are best calculated to protect relevant social interests including the interest of minimizing the alienation of the conscientious law violator from the legitimate institutions of the community?

For Freeman (as expressed in one text) "punishment for civil disobedience should at most be nominal"⁶⁷ or (as expressed in another text) "the courts should . . . weigh the motivation of civil disobedience as justification, and free the person from punishment".⁶⁸ Professor Carl Cohen disagrees:⁶⁹

It is unjust to discriminate either in favour of the civil disobedient or against him simply because his act was done knowingly and deliberately. He should be treated like anyone else who breaks the law he broke.

The very openness of the violation of the law, however, with its

⁶² Forkosch, *Attacks on the Constitution, Violence, and the Necessity for Disobedience* (1966), 35 *Fordham L. Rev.* 71, at p. 102.

⁶³ See *supra*, footnote 4.

⁶⁴ Freeman, *The Right of Protest and Civil Disobedience* (1966), 41 *Ind. L.J.* 288, at p. 238.

⁶⁵ Freeman, *Moral Preemption Part I: The Case for the Disobedient* (1966), 17 *Hastings L.J.* 425, at p. 432.

⁶⁶ Allen, *Civil Disobedience and the Legal Order* (1967), 36 *U. Cinc. L. Rev.* 1 and 175, at p. 3.

⁶⁷ Freeman, *op. cit.*, footnote 64, at p. 246.

⁶⁸ Freeman, *op. cit.*, footnote 5, at p. 27.

⁶⁹ Cohen, *op. cit.*, footnote 6, at p. 7.

appearance of defiance, makes it more likely that courts will react as the Canadian courts have done recently rather than to treat the civil disobeyer either like everyone else or as someone undeserving of punishment.

The Freeman thesis that disobedience is legal if it is nonviolent focusses attention on the means through which resistance to law is expressed. In fact, the means become crucial. If the means are good (nonviolent), the disobedience is (legally) good regardless of its objective. If the means are bad (violent), the disobedience is illegal even if conducted for the noblest cause and with the highest motive. Freeman thus takes issue with the Jeffersonian view that even violent revolution can be legal for the right cause.

This discussion of the legality of civil disobedience is incomplete. It cannot be completed without an understanding of the philosophical principles of civil disobedience or in the absence of a grasp of the psychology of civil disobedience.

III. *Nonviolence.*

1. *The development of nonviolence.*

Although there are instances of civil disobedience in early times, nonviolent response to deemed injustice is a distinctively modern development. In medieval political theory,⁷⁰ for instance, the main issue relating to conformity to law was that of tyrannicide, and a generally held theory was that it was permissible to slay a usuper, but not a legitimate ruler who had merely turned out badly. It was not until the later Middle Ages that the right of resistance became an established part of political theory, and it was only with the Renaissance and the wars of religion that it became a practical political issue. The immediate effect of the Protestant Revolution was to strengthen the hands of authority, but its longer run effect was to lead to an acceptance of active resistance to tyrants by both Catholics and Protestants.

The development of the theory and practice of nonviolence seems to have been the special contribution of religious dissenters or non-conformists.⁷¹ On the Continent the Catharists (or Albigensians) and the Mennonites and in England Wyclif, the Diggers, and the Quakers were all exponents of nonviolence as a matter of principle. The American tradition of nonviolent response to injustice dates from the arrival of the Quakers in the middle of the seventeenth century. Daniel O'Connell used non-violent protest with great skill in his victorious campaign for Catholic rights in Ireland,⁷² but the theoretical development of the

⁷⁰ See Jaszi and Lewis, *Against the Tyrant: The Tradition and Theory of Tyrannicide* (1957), pp. 17-34.

⁷¹ See Woodcock, *Civil Disobedience* (1966), pp. 20-30.

⁷² See Shannon, *The American Irish* (1963), pp. 1-26.

concept came only with Thoreau and Tolstoy later in the nineteenth century and with Gandhi and King in the twentieth century.

Thoreau and Tolstoy were both anarchists, though in his essay "Civil Disobedience", published in 1849, Thoreau argues for government limited by conscience: "It is not desirable to cultivate a respect for the law, so much as for the right."⁷³ Tolstoy's inspiration,⁷⁴ like Gandhi's later, sprang from the Sermon on the Mount, which led him to the conclusion that Christianity forbids the use of force. A religious revolution, the only genuine kind, could therefore be brought about by the refusal to obey existing governments, which are necessarily based upon force. Although Tolstoy and his many Russian disciples tried to put his vision into practice in land-working communities, and his disciples refused military services, taxes, and jury duty, all of the communities failed and the movement failed to win the support of the masses.

Gandhi's philosophy involved much more than is connoted by the English words "civil disobedience". Its principal concept, and the key to the whole of Gandhi's thought, is *satyagraha*, a word coined by Gandhi himself in his South African campaign. The word comes from two Sanskrit nouns, *satya*, meaning "truth" and *agraha*, "firm grasping", and is best translated into English as "truth-force".⁷⁵

Respect for truth was the focal point of Gandhi's thought, but it was a relative rather than an absolute truth, and nonviolence (*ahimsa*) was a necessary consequence of the very relativity of truth, for otherwise contending truths would rend the body politic asunder. Moreover, since nonviolent action often provokes an initially violent response from the authorities, a further element is needed to complete the definition of *satyagraha*, that is, *tapasya* or self-suffering.

At the practical level of technique, the procedure in a *satyagraha* campaign might be as follows:

- (1) *Negotiation and arbitration.* *Satyagrahis* must be satisfied that they have exhausted all possibilities of redress of grievances through compromise before they proceed to a further stage.
- (2) *Preparation for direct action.* The preparation necessary is preparation of the group itself through examination of motives, by exercises in self-discipline, and with full analysis of the issues, the action proposed, and its likely

⁷³ Thoreau, *Walden and Other Writings of Henry David Thoreau* (ed. Atkinson, 1937), p. 637.

⁷⁴ See Burns, *The Principles of Revolution* (1920), pp. 89-108.

⁷⁵ Bondurant, *Conquest of Violence. The Gandhian Philosophy of Conflict* (rev. ed., 1965), pp. 11-12, footnote.

effect in the circumstances. This stage often includes purificatory fasting.

- (3) *Agitation*. This is the stage of an active propaganda campaign, utilizing mass meetings, parades, and other demonstrations.
- (4) *Issuing of an ultimatum*. The ultimatum to the opposing force should not only explain what further steps will be taken, but should also allow face-saving compromise to the opponents.
- (5) *Economic boycott and forms of strike*. At this stage the techniques are demonstrations, picketing, sitting *dharna* (a form of sit-down strike), nonviolent labor strikes, and attempts to organize a general strike.
- (6) *Non-co-operation*. Non-co-operation is the refusal to co-operate with laws or the men responsible for them. It would include strikes, hartal (voluntary closing of shops and businesses, usually for a twenty-four hour period), resignation of offices and titles, non-payment of taxes, boycott of schools and other public institutions, ostracism, and even voluntary exile.
- (7) *Civil disobedience*. Civil disobedience is the direct contravention of specific laws, with an actual inviting of the sanction provided by the law for its disobedience. The laws to be disobeyed should be carefully selected, being either central to the grievance, or symbolic.
- (8) *Usurping of the functions of government*. This has been called "assertive satyagraha".
- (9) *Parallel government*. This is the most serious step possible within the limits of satyagraha.⁷⁶

But the mere forms do not constitute satyagraha, and many of the hunger-strikes, boycotts, and so on which have taken place in India deserve to be classed as *duragraha* rather than as satyagraha. *Duragraha* is an Indian word translated as "stubborn persistence", and designates techniques which aim at the harassment rather than the conversion of opponents. It might be said to be a symbolic violence rather than nonviolence, and is extremely dangerous to democratic institutions. Dr. Joan Bondurant cautions that: "If civil disobedience is carried out in the style of *duragraha*, and not within the framework of satyagraha, it will lead to widespread indifference to legality and lend itself to those who would use illegal tactics to undermine faith in democratic processes."⁷⁷

It may be difficult to determine of any individual action whether it is satyagraha or *duragraha*.⁷⁸ The only certain criterion

⁷⁶ *Ibid.*, pp. 40-41.

⁷⁷ *Ibid.*, p. ix.

⁷⁸ *Ibid.*, pp. 42-43.

is to examine the whole programme of action of which it is a part, testing the extent to which available channels for settling the dispute have been exhausted, and especially the efforts which have been made to achieve agreement without the humiliation of the opponent. Other indications of genuine satyagraha are: full publicity regarding the intentions of the satyagrahis, efforts to minimize hardship for the opponent, a constructive program to provide services to the public, readiness to accept the penalties provided by the law, and unwillingness to resort to legal defence.

Gandhi⁷⁹ organized his first nationwide satyagraha campaign in India in 1919, and it gained its political objectives, though Gandhi considered it a failure in satyagraha terms because the Indian protesters responded to government brutality with violence of their own. His next campaign in 1930 was aimed at the gaining of Dominion status for India, and the focal point of the civil disobedience was to be open defiance of the salt tax, an oppressive tax falling most heavily on the poor, and Gandhi dramatized it by a three-week march to the sea, where he broke the salt law by picking up some salt left by the waves. Indians took this as the signal to produce salt illegally, or to disobey other laws where natural conditions prevented its manufacture. 60,000 arrests and considerable government brutality did not suffice to quell the disobedience, and the Viceroy eventually had no choice but to enter into the Gandhi-Irwin Agreement, which recognized many of the Indian demands. A new Viceroy broke the Agreement, and civil disobedience was resumed, though after July 12th, 1933, mass civil disobedience was abandoned and the campaign was continued through individual civil disobedience. A complete break occurred between the Indian Congress Party and the British in August of 1942, and the Government had to imprison about 150,000 people to maintain control. However, the election of a Labor Government in Britain made possible the final achievement of Indian independence in 1947. Gandhi's work had been crowned with success, though he came to regard it as his greatest failure because of the Hindu-Moslem strife which accompanied it. He was assassinated by a Hindu extremist on January 30th, 1948.

Dr. Martin Luther King, Jr. had become fascinated with Gandhi and satyagraha some years before he became the leading figure in the civil rights movement, which may be dated from December, 1955, when the Montgomery bus boycott arose. Total victory for the year-long boycott in Montgomery led to the founding of the Southern Christian Leadership Conference with King

⁷⁹ See Gregg, *The Power of Non-Violence* (1960), pp. 3-5; Sibley (ed.), *The Quiet Battle: Writings on the Theory and Practice of Non-violent Resistance* (1963), pp. 30-45; and Diwakar, *Satyagraha: The Power of Truth* (1948), pp. 71-85.

as the first president. Subsequently the invention of the sit-in on February 1st, 1960, by four black college freshmen in Greensboro, North Carolina marked what Waskow has called "the emergence of creative disorder".⁸⁰ Sit-ins soon spread across the South organized by King and by the newly formed Student Nonviolent Coordinating Committee (SNCC). By September 1961 restaurants in 108 southern and border cities had ended racial segregation as a result of the sit-ins. 1961 also saw the beginning of the Freedom Rides by the Congress of Racial Equality (CORE) in which racially mixed groups were sent riding on interstate buses in the South, but by 1962 all of these organizations had begun to concentrate on voter registration, and used mass public marches to mobilize black strength. The March on Washington on August 28th, 1963, which involved a quarter of a million people under A. Philip Randolph, is generally considered to be the high point of the civil rights movement. Such events helped to pressure the United States Congress into the Civil Rights Acts of 1957, 1960, and 1964.

Other methods used by civil rights demonstrators in this period were as follows (with the year noted in which the methods were first used):⁸¹ economic boycotts against companies that discriminated in hiring (1962); school boycotts (that is, truancy) in protest against segregation of schools (1963); rent strikes, that is, refusing to pay rent where the landlord failed to remedy substandard conditions (1963); job blockades or demonstrations to block the entrance of white workmen to segregated plants or businesses (1963); disruption of government operation through demonstrations at state capitals and through nuisance telephone calls (1963); stall-ins and particularly the attempted disruption of traffic at the opening of the New York Fair (April 22nd, 1964). Some of these forms of creative disorder amounted to the tactic of social disruption.

2: *King's theory of nonviolence.*

The theoretician of the civil rights movement as well as its leading figure, King, took the position that, of the three possible ways in which oppressed people can react to oppression, two, that is, acquiescence and violence, are morally unacceptable. Passive acceptance of an unjust system is co-operation with it, and "non-co-operation with evil is as much a moral obligation as is co-operation with good";⁸² acquiescence is in fact the way of the coward, for it is a failure to disturb the conscience of the oppressor. Violence is both impractical and immoral:

⁸⁰ Waskow, *From Race Riot to Sit-In, 1919 and the 1960's. A Study in the Connections between Conflict and Violence* (1966), p. 225.

⁸¹ *Ibid.*, pp. 238-246.

⁸² King, *Stride Toward Freedom, The Montgomery Story* (1958), p. 212.

It is impractical because it is a descending spiral ending in destruction for all. The old law of an eye for an eye leaves everybody blind. It is immoral because it seeks to annihilate rather than to convert. Violence is immoral because it thrives on hatred rather than love.⁸³

The third way to freedom is that of nonviolent resistance. On the one hand, it ensures that evil will be resisted, and on the other it denies any role to physical aggression. It combines resistance with love, and as a result is "the ultimate form of persuasion".⁸⁴

King believed that nonviolent resistance has at least six positive attributes.⁸⁵

First, it is not a method for cowards, but is actually the way of the strong man. It is passive only in the sense that it is not physically aggressive. The nonviolent resistor's mind and emotions are always active, and he is constantly trying to persuade his opponent he is wrong.

Second, it does not seek to defeat and humiliate the opponent but to win his sympathy, understanding and friendship. The expressions of protest through non-co-operation or boycotts are not ends in themselves but merely means to awaken a sense of moral shame in the opponent. The end is redemption and reconciliation. Whereas the aftermath of violence is tragic bitterness, the aftermath of nonviolence is the creation of the beloved community.

Third, the attack is not directed against the persons who happen to be doing the evil, who are merely victimized by evil, but rather against the forces of evil. The basic tension is not between races but between justice and injustice. Victory, when it comes, will not be one of Negroes but one of justice.

Fourth, the nonviolent resistor must be willing to accept suffering without retaliation. Undeserved suffering is redemptive, having tremendous educational and transforming possibilities. King believed with Gandhi that things of fundamental importance to people are not secured by reason alone but have to be purchased with their suffering.

Fifth, nonviolent resistance avoids not only external physical violence but even internal violence of spirit, for love is the essence of nonviolence. The nonviolent resistor believes that to retaliate in kind will do nothing but intensify the existence of hate in the universe. The chain of hate can be cut by projecting the ethic of love to the center of life.

The type of love necessary is that described by the *agape* of the New Testament: understanding; redemptive good will; a spontaneous, overflowing, disinterested love, "unmotivated, groundless and creative".⁸⁶ It is the love of God operating in the human heart,

⁸³ *Ibid.*, p. 213.

⁸⁴ *Ibid.*, p. 216.

⁸⁵ *Ibid.*, pp. 102-107.

⁸⁶ *Ibid.*, p. 104.

a love in which the individual seeks not his own good but the good of his neighbor. *Agape* does not begin by discriminating between worthy and unworthy people, but by loving others for their own sakes. It is a "neighbor-regarding concern for others"⁸⁷ which discovers the neighbor in every man it meets, and makes no distinction between friend and enemy. Moreover, since *agape* springs from the need of the other person, it is community-directed: "In the final analysis, *agape* means a recognition that all life is interrelated."⁸⁸

Sixth, nonviolent resistance is based on the conviction that the universe is on the side of justice; this is another reason why the resistor can accept suffering without retaliation, since he will have cosmic companionship in his struggle for justice. For some this will entail a belief in a personal God, for others in an impersonal creative force in the universe.

3. *The psychology of nonviolence.*

The theory of nonviolence perhaps conveys the nobility of the movement more clearly than its effectiveness as a means of solving social conflict. Nevertheless the history of nonviolent resistance in the twentieth century reveals considerable success in the attainment of practical objectives. There are numerous instances in which nonviolent resistance broke the will to fight of policemen and soldiers who were charged with controlling it, and in some cases the representatives of civil authority actually became converted to nonviolence themselves.⁸⁹ There are even more instances in which bystanders (present either physically or through communications media) have been favorably affected either through conversion to the cause of the disobeyers (this is the less likely result) or through disgust with the measures of repression taken by the authorities. A "Bull" Connor with police dogs, firehoses, and truncheons helps the cause of civil disobeyers perhaps more than does anything which they could themselves do.

The key to the success of civil disobedience as a tactic is its psychology. Gregg describes nonviolent resistance as a sort of moral jiu-jitsu. He writes:⁹⁰

The nonviolence and good will of the victim act in the same way that the lack of physical opposition by the user of physical jiu-jitsu, does, causing the attacker to lose his moral balance. He suddenly and unexpectedly loses the moral support which the usual violent resistance of most victims would render him. He plunges forward, as it were, into a new world of values. He feels insecure because of the novelty of the situation and his ignorance of how to handle it. He loses his poise and self-confidence. The victim not only lets the attacker come, but, as it

⁸⁷ *Ibid.*, pp. 104-105.

⁸⁸ *Ibid.*, p. 106.

⁸⁹ Seifert, *Conquest by Suffering. The Process and Prospects of Non-violent Resistance* (1965), pp. 53-55.

⁹⁰ Gregg, *op. cit.*, footnote 79, pp. 41-42.

were, pulls him forward by kindness, generosity and voluntary suffering, so that the attacker loses his moral balance. The user of nonviolent resistance, knowing what he is doing and having a more creative purpose, keeps his moral balance. He uses the leverage of a superior wisdom to subdue the rough direct force of his opponent.

Another way to state it is that between two persons in physically violent combat there may appear to be complete disagreement, but in reality they conduct their fight on the basis of a strong fundamental agreement that violence is a sound mode of procedure. Hence, if one of the parties eliminates that basic agreement, announcing by his actions that he has abandoned the method used by his ancestors almost as early as the beginning of animal life, it is no wonder that the other is startled and uncertain. His instincts no longer tell him instantly what to do. He feels that he has plunged into a new world.

Just as in jiu-jitsu, violence itself helps to overthrow its user.

This description suggests why civil disobedience is called not only "nonviolent" but also "resistance". It is a technique of conflict, as well as *for the resolution* of conflict, even though it is not a violent technique but on a different plane. There can be no doubt that nonviolent action has, and is intended to have, a coercive in addition to a persuasive aspect. The hippie's giving of a flower to a policeman is a tactic of conflict as well as a symbol of love. Gregg admits that nonviolent resistance is partly analogous to war: "War seeks to demoralize the opponent, to break his will, to destroy his confidence, enthusiasm and hope. Non-violent resistance demoralizes the opponent. . . ."⁹¹

The demoralization of the opponent, when it occurs, does so because of the conflict stirred up within himself. His emotions may become divided between the more decent and the more aggressive. A psychiatrist, Dr. Jerome D. Frank, puts it this way:⁹²

The fundamental thrust of the nonviolent fighter is probably at the symbolic level. He refuses to let his opponent dehumanize him. By his candor, courage, sense of responsibility, personal dignity, and by demonstrating the highest moral principles, he continually reminds both himself and his adversary that he is not only human, but a better specimen of humanity than his opponent. The nonviolent fighter tries to win by turning the opponent's values against his—by morally embarrassing him.

If there are onlookers, the opponent is all the more likely to begin to feel excessive, undignified, and brutal, with a consequent loss of inner assurance and self-respect. The effect of surprise at the disobeyer's fortitude under attack may also be such as to leave the moral initiative with the disobeyer.

Obviously the acceptance of physical blows and the refusal to strike back on the part of the disobeyers requires courage of a high degree, a courage which the practitioners of civil dis-

⁹¹ *Ibid.*, p. 76.

⁹² Frank, *The Psychology of Non-Violence*, Ramparts, January-February, 1965, p. 48, at p. 49.

obedience believe cannot be sustained without a profound love such as that described by Martin Luther King. One of the serious difficulties inherent in the development of mass civil disobedience is whether nonviolence can be genuinely accepted by anyone unsupported by a theology of the ultimate supremacy of love and the redemptive power of suffering. Experience has not yet demonstrated that other value systems can sustain the same weight.

A number of other limitations on the general applicability of nonviolence are raised by Dr. Frank.⁹³ In his view a group probably cannot commit itself to nonviolent methods as long as it believes it might win by violent ones. Moreover, so far nonviolent methods have been possible only where the contestants have been in continual face-to-face conflict. To the extent that nonviolence is idealized as the solution to the problem of global violence it is not easy to see how it can succeed. More immediately important is the ability of nonviolent fighters to remain nonviolent under prolonged exposure to severe threats and violence. Dr. Frank cautions:⁹⁴

Psychiatrists believe from clinical experience that emotions blocked from direct expression tend to manifest themselves obliquely. Repressed anger may appear as a headache or high blood pressure, or the person may turn it on himself and become depressed. Groups that have high suicide rates have low homicide rates and vice versa, as if anger that cannot be directed outward may turn inward. One cannot help wondering whether the terrible massacres that accompanied the partition of India might have represented in part an explosive release of the anger that the Hindus had suppressed for years in the service of satyagraha. The ability of nonviolent fighters to control their impulses depends in part on the strength of their leadership, ideology, and group standards. The use of nonviolent methods purely as tactics in the absence of strong group discipline and a powerful ideology would therefore appear to be risky, since the temptation to abandon them if they did not succeed promptly would be very great.

Finally, there is what Dr. Frank calls "the element of brinkmanship".⁹⁵ In all campaigns so far in which they have succeeded civil disobeyers have always had the advantage of a context of violence in which a failure to grant at least moderate concessions by the authorities might well have led to violence and bloodshed. This is not, of course, related to the coercion intrinsic to civil disobedience to which I have already referred, but is violence which might arise in spite of the disobedience movement, not because of it. It would seem that it need not be taken account of in an analysis of the validity of civil disobedience, unless brinkmanship is practised by the leaders of the resistance, in which case they would be in constant danger of losing control of their fol-

⁹³ *Ibid.*, at p. 50.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

lowers. Gandhi and King both resolutely set their faces against such demagoguery, and Gandhi employed penitential fasts to impress upon his followers the necessity of absolute devotion to nonviolence. It may be that, absent the possibility of violence, the efficacy of a particular strategy of civil disobedience would be in question; however, considering the difficulties in the way of a pure philosophy of nonviolence, it is probably not likely that the threat of violence will ever be absent in any situation serious enough to arouse social emotion on a large scale.

Even if social disruption is no more likely to lead to violence than are other forms of creative disorder, it is worth noting its more extreme character as coercion. As Waskow has observed:⁹⁶

It is certainly a considerable "escalation" of disorder without violence. For what disruption essentially does is challenge the entire society as a racially discriminatory *system*. The other forms of disorder challenge only a particular incident or institution that is segregated or discriminatory. In a sense, the sit-in, the rent strike, and the school boycott are in the politics of disorder equivalent to a riot in the politics of violence. . . . Disruption, however, is equivalent in the politics of disorder to insurrection in the politics of violence, . . . an act likely to arouse much more hostility than carrying on a "riot" without violence, as those who attempted disruption for the sake of racial equality found to be the case during 1964.

Obviously, tactics aimed at social disruption pose a special problem for a theory of civil disobedience in a democratic context.

IV. *Civil Disobedience and Law.*

1. *Classification.*

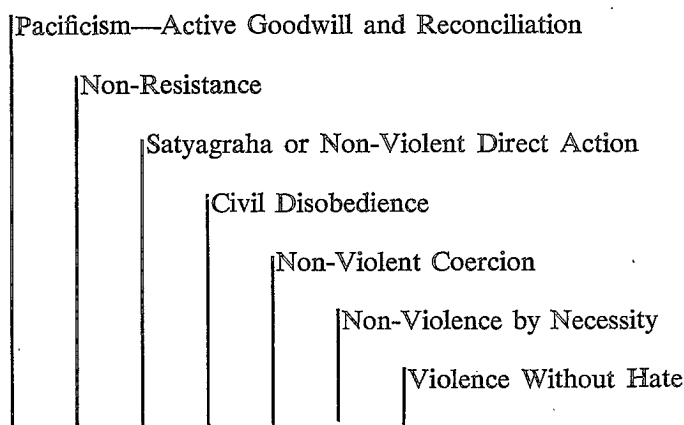
Because of the number of types of nonviolent action, it is vital to attempt some classification of the data: one catalogue of nonviolent action lists, for example, some sixty-four different methods which have been used historically.⁹⁷

At the outset of this study, I stated that civil disobedience is only one of the forms which civil disaffection may take, and that in a disaffection scale, it would be located about midway between disagreement and revolution. The most comprehensive disaffection scale has been developed by Professor Harrop Freeman, who terms it "the spectrum of non-violence", and diagrams it as follows:⁹⁸

⁹⁶ Waskow, *op. cit.*, footnote 80, p. 246.

⁹⁷ Oppenheimer and Lakey, *A Manual for Direct Action* (1964), p. 61, footnote.

⁹⁸ Freeman, *op. cit.*, footnote 64, at p. 229.



In this spectrum from violence without hate at one extreme to active goodwill and reconciliation (pacifism) at the other, civil disobedience falls close to the median. Professor Freeman therefore chooses to use the term "civil disobedience" as characteristic of the total spectrum for two reasons: (1) because it is the median term, and (2) because in the word "disobedience" is found the problem hardest for society to accept—the challenge to law.⁹⁹

Despite the generally accurate gradation of the Freeman spectrum, it cannot be treated as a definitive division of the disaffection scale, both because some of the distinctions are overly fine and because it somewhat indiscriminately mixes three things which are on a different footing—theories, methods, and facts. Pacifism and satyagraha (as ethics, not technique) are theories, whereas the other units of the scale are not, and even though certain practical consequences in the realm of action flow from the theories, these consequences are not clearly distinguishable from some of the other forms of nonviolence. In sum, the Freeman spectrum is overly subtle at the practical level¹⁰⁰ and confusing at the theoretical level.

Another proposed division of the types of nonviolent direct action, in ascending order of coercion, is as follows:¹⁰¹

(1) demonstrations—marches and parades, picketing and vigiling, fraternization (deliberate friendliness with opponents—employed in Norway during the Nazi occupation), haunting (accompanying opponents everywhere in silent reminder of the immorality of their behavior), leafleting (to provide accurate information and to expose the public to personal contact with

⁹⁹ *Ibid.*, at p. 230.

¹⁰⁰ Freeman himself admits that "The shadings here between non-violent direct action, non-resistance and pacifism become quite hazy", *ibid.*, at p. 233.

¹⁰¹ Oppenheimer and Lakey, *op. cit.*, footnote 97, pp. 61-76.

the campaigners), renouncing honors;

(2) non-co-operation—the strike (including the “token strike” of short duration), hartal (staying at home, leaving the streets entirely empty), the consumers’ boycott,¹⁰² the renters’ boycott or rent strike (first used by Irish peasants against English landlords in the nineteenth century), the school boycott, tax refusal (partial or complete);

(3) intervention or physical confrontation—the sit-in, the fast, the reverse strike or work-in (employed by Danilo Dolci in Sicily to dramatize unemployment), and nonviolent interjection and obstruction, which involves placing one’s body (often by lying down) between another person and the objective of his work.

This classification is more practical in character than the Freeman one, and hence does not raise the problem of confusing attitudes and methods. However, it too, in my opinion, is guilty of overrefinement in distinctions. Thus, while demonstrations are undeniably less coercive than forms of non-co-operation, the strike, which is in the latter category, is invariably accompanied by picketing, which is in the former. Moreover, because of its limited scope, this scheme of classification is probably more useful as a sub-classification, after a more general division of the genus is arrived at.

In my view behavioral attitudes towards civil disaffection must first be sharply distinguished from methods of disobedience. There appear to be several philosophies or theories of civil disaffection: pacifism and satyagraha, each of which may differ considerably depending upon whether it is under secular or religious inspiration. It would seem that the methods of disaffection are best divided simply into those which are violent and those which are nonviolent, with the latter in turn being divided into civil disobedience and non-resistance. I would reserve the term “non-resistance” for a purely passive acceptance of evil (or what appears to those affected to be evil)—for example, the general acceptance by European Jews, without active resistance, of prospective Nazi violence to themselves. The term “civil disobedience” would, then, describe any disobedience short of violence in which there was some element of active opposition; obviously civil disobedience might be either less or more coercive, as it approached more closely to non-resistance on the one extreme or to violence on the other.

Correlating this usage with the Freeman classification, his categories of pacifism and non-resistance would be included under mine of non-resistance, and my category of civil disobedience would embrace his groupings of satyagraha, civil disobedience, nonviolent coercion, and nonviolence by necessity. His remaining

¹⁰² The word “boycott” is derived from Irish opposition in 1880 to Captain Boycott, a landlord’s agent.

category of violence without hate would fall under the general heading of violence. In relation to the other system of classification, demonstrations, non-co-operation and intervention would all be subdivisions of civil disobedience, indicating the lesser or greater degree of coercion possible.

There should be little difficulty in distinguishing non-resistance from civil disobedience, since the latter requires a public and (usually, at least) a collective display of opposition to the regime. The borderline between the most coercive forms of civil disobedience and violent opposition to the government is somewhat less clear. I would limit "violence" to situations in which force was directed against persons, or in which, where property was involved, there was damage to the property and not mere interference with it. In other words, a mere trespass on land, without damage to it (and absent force directed against the landowners), would not qualify as violence.

The Boston Tea Party of Revolutionary War fame is a somewhat ambiguous episode. As described by Professors Nevins and Commager, "on the night of December 16, 1773, a party of about fifty men disguised as Indians, led by Sam Adams himself, boarded the ships [in Boston Harbor], burst open 343 chests of tea, and emptied them into the harbor."¹⁰³ Although "no town official attempted to prevent the destruction of property" and there was no fighting, the authors describe the incident as an "act of violence."¹⁰⁴ So it was in a technical sense, since the tea was owned by the East India Company. But the patriots arranged events so as to avoid bloodshed, and intended the act as a symbolic act in defiance of the hated tea duty, not as an act of wanton destruction. Moreover, the tea was largely valueless because of the mass refusal of the American public to buy it. However, since the incident presaged—and perhaps even precipitated—the American Revolution, it is probably best regarded as an act of violence. Obviously violence, like nonviolence, is a matter of degree.

As I use it, then, violence is restricted to physical force, and, as George A. Coe rightly pointed out, "as long as violence and nonviolence are conceived in physical or mechanical terms, the distinction between them carries no ethical meaning whatever."¹⁰⁵ I accept this consequence: some violence will be morally justifiable and some nonviolence will lack moral justification. The moral quality of an act will not depend exclusively on its nonviolence (though this will be a relevant criterion). In my usage, the words "coercion" and "compulsion" will include non-physical force, but "violence" will not.¹⁰⁶

¹⁰³ Nevins and Commager, *The Pocket History of the United States* (1956), p. 83.

¹⁰⁴ *Ibid.*

¹⁰⁵ Sibley (ed.), *op. cit.*, footnote 79, p. 51.

¹⁰⁶ This usage concurs with Freeman's, *op. cit.*, footnote 64, at p. 229.

Moreover, violence will be considered to be primarily physical force which is directed against persons. It will encompass physical force directed against things only when it is wanton in character or substantial rather than merely nominal in quantity and value.

2. *Definition.*

Having thus generally located civil disobedience on the disaffection scale, it now becomes necessary to define it.

The working definition adopted at the outset was as follows: "Civil disobedience is a nonviolent act of public protest which is either actually illegal or of contested legality." It was also suggested at that point that the three primary elements in civil disobedience were nonviolence, publicity and illegality, and that of the three the only controversial one was the third. An act of civil disobedience must break a law before it can actually be disobedience. It must be public because its aim is to effect some change in the legal system, through a combination of persuasion and coercion. It must be nonviolent, or degenerate into uncivil disobedience.

As a consequence of the other requirements, there must also be a willingness, if not necessarily a positive desire, to accept the legal penalty for the disobedience. The civil disobeyer performs his act of public defiance with the expectation of receiving the full penalty of the law. If it does not happen to be imposed, this is from his viewpoint a gratuity—and one which may not even be welcome if it does not signify a weakening of resolve on the part of the opponent. (This is not to say, however, that from the viewpoint of the judge sentencing him he ought not perhaps to receive a lighter sentence than the ordinary criminal.)

There is, moreover, an overall requirement of purpose. An act of civil disobedience must not only be an act of protest but an expression of a sense of justice which transcends the letter of the law. In Professor Freeman's phrase, "it claims justification in some 'higher law' doctrine—whether that be 'natural law', 'Nuremberg', 'federal supremacy', or 'conscience' ".¹⁰⁷ It must, in fine, be performed for a moral purpose, even though there is no denying that the moral judgment it expresses may be a highly subjective one and one which in the judgment of history may appear to be erroneous.

Returning to the constituent of illegality, we find a stubborn controversy in the writings dealing with its significance in a federal state. Thus William L. Taylor, General Counsel for the United States Commission on Civil Rights, took the position in 1964 that:¹⁰⁸

¹⁰⁷ Freeman, *op. cit.*, footnote 65, at p. 426.

¹⁰⁸ Taylor, *Civil Disobedience: Observations on the Strategies of Protest*, in *Legal Aspects of the Civil Rights Movement* (ed. King and Quick, 1965), p. 227.

If a violation [of law] is committed under a claim of legal right with the intention of seeking redress in the courts, it can hardly be termed civil disobedience. In fact, under our judicial system, it is frequently necessary to violate the law to vindicate one's legal rights. If the person challenging a law as unconstitutional cannot show that he has violated it, the courts may say that the case is a hypothetical one which is not ripe for decision.

By this test, sit-ins in places of public accommodation, the most popular and effective means of direct community action, are not acts of civil disobedience. . . .

Thus, almost all of the major forms of direct community action—sit-ins, freedom rides, demonstrations, picketing and rent strikes—in my judgment are properly understood as actions well within the framework of our legal system, rather than as civil disobedience.

Freeman concedes that "probably 80 percent of all non-violent challenges to law or state policy are totally 'obedient' ",¹⁰⁹ and admits that these "represent the real core of the civil rights-antiwar movement".¹¹⁰

Freeman seems to incline to a subjective test of illegality (though, of course, he also maintains the position that civil disobedience is really within the law):¹¹¹

I would not accept . . . [a] definition of civil disobedience as involving only those cases where it is ultimately determined you are outside of the law. The question to me is a matter of intent or of the frame of mind of the person who is involved in the disobedience, and if he feels that he is and has to violate a law or challenge a law, that to me is civil disobedience even though ultimately it will be determined that the law which he has challenged must fall under some principle which is higher than that law.

The Freeman view appeals to me because it deals with the realities of the situation—until the moment of his hypothetical subsequent acquittal the civil disobeyer has been in exactly the same position as any other lawbreaker, except for his subjective intention to challenge the law and his hope that the law will be found unconstitutional. It is in my opinion unrealistic retroactively to remove all the character of disobedience from an act which is performed as an act of law-violation and is treated as one, because such an approach would concentrate on the law-in-books, and fail to take adequate account of the law-in-action. Professor Keeton puts the point this way:¹¹²

To restrict civil disobedience by definition to violations of *valid* law would have the advantage of stressing the difference between clearly legal acts and acts with no claim to legality. This claim, however, is generally in dispute at the time of decision to act, and an adequate

¹⁰⁹ Freeman, *op. cit.*, footnote 64, at p. 234.

¹¹⁰ *Ibid.*, at p. 235.

¹¹¹ Freeman, *Is There a Jurisprudence of Civil Disobedience* (1966), 5 Ill. Cont. Leg. Ed. 71, at p. 83.

¹¹² Keeton, *The Morality of Civil Disobedience* (1965), 43 Texas L. Rev. 507, at pp. 510-511.

ethical policy will use terms that provide as efficient guidance as possible over the entire range of choices to be served.

However, I should like to establish the test of illegality on a less subjective footing, by turning it from a question of the disobeyer's intent to one of its likely reception. The question would therefore be: what is the probable reaction of the governmental authorities to this act? If the probable reaction is that the act will be treated as an illegal act, then it should be considered to be an act of civil disobedience *in the first instance*.

I would therefore define civil disobedience as follows: *a public, nonviolent act which is either actually illegal or likely to be treated as illegal by the governmental authorities, performed for a moral purpose, with a willingness to accept the legal penalty attached to the breach of the law.*

Because of the complexity of the relationship of civil disobedience to the law, the definition requires completion through a fuller study of the notion of legality and illegality.

3. *Legality, illegality and paralegality.*

A preliminary problem with respect to the legal order is the use of the word "civil" in the phrase "civil disobedience". Freeman explains this usage as follows: "'civil' is not used in contradistinction to 'criminal' (for some civil disobedience is indicted as criminal . . .), but it is used as 'against the state', 'the civil, the civitas' ".¹¹³ Professor Woodcock justifies the usage in more detail:¹¹⁴

The essence of its [civil disobedience's] meaning, which distinguishes this type of disobedience from mere lawlessness, is contained in the word *civil*—a word of many and varied connotations. First of all, *civil* is an adjective relating to the responsibilities of the citizen, and the whole justification for Civil Disobedience lies in the idea that the man who practices it fulfils his responsibilities by demonstrating in action his disapproval of an evil law or social situation which ordinary democratic procedures will not eliminate. Secondly, we think of *civil* as being opposed to *military*, in other words as opposed to physical force, and it is basic to the whole philosophy of Civil Disobedience that it be carried out without any recourse to violent methods. The man who disobeys is willing to suffer for his own defiance of the law; he is not willing to make others suffer. Finally, the word *civil* also suggests all the nuances of the meaning clustering around the ideas of courtesy and civilized behavior; and the advocates of Civil Disobedience enjoin their followers to behave with impeccable courtesy, and to follow in all ways the advice of St. Paul: "Recompense to no man evil for evil. Provide things honest in the sight of all men."

This predominant usage has been challenged by several authors with negative attitudes towards civil disobedience. Raymond Mom-

¹¹³ Freeman, *Civil Disobedience, Law and Democracy* (1966), 3 *Law in Trans. Q.* 13, at p. 26.

¹¹⁴ Woodcock, *op. cit.*, footnote 71, pp. 3-4.

boisse, the Deputy Attorney General of California, has written that "the term *civil* is highly inappropriate. Criminal disobedience would be far more accurate".¹¹⁵ Morris Leibman puts the same position more forcefully.¹¹⁶

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 premeditated, "righteous" civil disobedience.

These views are not, however, acceptable as a matter of usage, not so much because they are minority opinions, but principally because they reveal a lack of awareness of the usual meaning and the reasons for it. No one seriously contends that an act of civil disobedience may not be a criminal act; the point is that it may be criminal and still be an act of civil disobedience, for "civil" in this context does not signify a contrast with "criminal". Opponents of civil disobedience may wish to term it "criminal" in order to discredit it, but this is a matter of political rhetoric.

Dr. Mortimer Adler champions a slightly different use of the phrase "criminal disobedience".¹¹⁷

Breaking laws for the sake of making public demonstrations against general injustice in society—against segregation or an unjust war—is criminal, not civil disobedience. The fact that the aim of the action is to protest against an injustice in no way justifies disobedience to a law that is not itself unjust. Those who act in this way cannot claim any of the protection that is and should be accorded to civil disobedience.

In Adler's case it is not really the terminological question that is important, but his use of it to denounce indirect civil disobedience, wherein the law that is disobeyed is itself regarded as just by the disobeyer.

Adler's position would obviate the possibility of symbolic means of resistance. Gandhi, for example, distilled salt from the sea, thereby violating a specific law, in order to show, not the injustice of that law, but of the whole British rule of India.¹¹⁸ Gandhi justified such indirect civil disobedience where the breach of law "does not involve moral turpitude and is undertaken as a symbol of revolt against the State".¹¹⁹ Taylor points out that Gandhi thought such resistance justified only in a corrupt or tyrannical state,¹²⁰ but this is probably indicative only of the fact that this

¹¹⁵ Momboisse, *Riots, Revolts and Insurrections* (1967), p. 309.

¹¹⁶ Leibman, *Civil Disobedience—A Threat to Our Law Society* (1964), 3 Am. Crim. L.Q. 21, at p. 24.

¹¹⁷ Adler, *op. cit.*, footnote 58, at p. 86.

¹¹⁸ Freeman makes this point against Adler, *op. cit.*, footnote 111, at p. 96.

¹¹⁹ Gandhi, *Non-Violent Resistance* (1961), p. 175.

¹²⁰ Taylor, *op. cit.*, footnote 108, p. 231.

was the kind of regime against which Gandhi was struggling, since he was neither a systematic nor an abstract philosopher.

The more general problem with respect to the legal order is as to the status of civil disobedience in that order. Dean Francis A. Allen of Michigan Law School expressed the negative viewpoint this way: "Surely one indulges in self-contradiction and obfuscation if he suggests that there can be a legal justification for law violation."¹²¹ Put in criminal law terms, the same point of view is enunciated by Professor Van Den Haag: "Civil disobedience, since it is disobedience to law with *mens rea*, is *ipso facto* unlawful—one cannot lawfully violate the law."¹²²

In one sense, there can be no objection at all to this view. Clearly, when a particular law is disobeyed, there is nothing in that law which can justify, from the legal viewpoint, the disobedience. But we must not fail to take into account the difference between a particular piece of legislation and the whole legal system, between *a* law and *the* law (or, more simply, law).

Even in this context, there does not immediately appear to be any legal justification for violation of law. Revolution, for example, is not generally considered to be capable of legal justification under the legal order it rises against, but only under the new legal order which it may establish. This was the burden of Sir John Harington's epigram:

Treason doth never prosper; what's the reason? Why if it prosper none dare call it treason.

But there is more to a legal system than immediately meets the eye. As Dean Allen acknowledges:¹²³

In any progressive society, the law is not simply a goal already achieved, but is a process of becoming. This being true, the concerns of a legal order can never be exhausted by the problems of applying and enforcing already existing rules of law, but must also encompass the development of new law and the sloughing off of the old.

A legal order, in fact, is directed, not towards law, but towards justice.

Now civil disobedience, too, is directed towards justice, and is not oriented so much against law as beyond the letter of the law. Indeed, the open violation of a law in civil disobedience, the use of nonviolent means rather than the violent methods of the typical lawbreaking, and the attitude of willing acceptance of penalties are all deeply respectful of the legal system. Professor Keeton portrays it this way:¹²⁴

Civil disobedience . . . is not aimed toward overthrow of law and order.

¹²¹ Allen, *op. cit.*, footnote 66, at pp. 2-3.

¹²² Van Den Haag, *Civil Disobedience and the Law* (1966), 21 Rutgers L. Rev. 27, at p. 28.

¹²³ Allen, *op. cit.*, footnote 66, at p. 3.

¹²⁴ Keeton, *op. cit.*, footnote 112, at p. 509.

On the contrary, it works within the framework of the legal system to rectify specific wrongs. Where the wrongs pertain to the processes of that system itself, the civil disobedient intends not to render the over-all system inoperative with respect to his own act. He may, in fact, want by his act to render their absurdity and injustice more patent.

Civil disobedience is protective of the system of law even while objecting to a particular law.

Lawyers naturally hesitate to describe the legal system in terms of its purpose rather than in the light of actually existing laws, since the latter are certain and the former may appear to be nebulous. Nevertheless, a great Canadian jurist, the Honorable J. C. McRuer, has dared to say that:¹²⁵

Order, like law, to be respected must deserve respect. Disrespect for an order that does not deserve respect ought not to be condemned as degeneration but commended as healthy regeneration. . . .

I am prepared to admit that there is a decline in respect for many laws. I am not prepared to admit that there is decline in respect for law.

Law and justice cannot be dissociated, and the state which attempts to separate them does so at its own peril.

I agree with Professor Freeman that "the theory of action [of civil disobedience] is not anti-law, but within the law; and the total pattern is distinctly democratic rather than anarchic or totalitarian".¹²⁶ Nevertheless, I cannot accept the theory which he has urged for some twenty years that nonviolent revolution is within the law. The principles on which he rests this theory¹²⁷ are either outright moral principles or principles of contested legality (depending on which philosophy of law is adopted).

It seems to me that civil disobedience is neither fully legal (as Freeman maintains) nor completely illegal (as most others argue). Legality and illegality are not contradictories but contraries. In fact, it might be helpful to think of degrees of legality (or, conversely, of illegality). In this sense, an act of civil disobedience is a benign illegality marked by a respect for the whole legal system and inspired by a desire to bring it more fully into accord with the exigencies of justice. It might also be said to be a mere illegality, a technical but not a substantial illegality, infringing only regulatory legislation (where it is an act of indirect disobedience).

I should like to express this in-between state of legality-illegality by recognizing a new realm of *paralegality* (employing the Greek prefix, *para*, meaning "beside" or "near").¹²⁸ The paralegal is something less than the fully legal but something more

¹²⁵ McRuer, *Law Calls for Justice* (1966), pp. 6-7.

¹²⁶ Freeman, *op. cit.*, footnote 113, at p. 13.

¹²⁷ Freeman, *op. cit.*, footnote 65, at pp. 426-427.

¹²⁸ This term has already been used by O'Connell, *Is Civil Disobedience to be Regarded as a Paralegal Right*, *Trial*, December-January, 1965, p. 11.

than the clearly illegal, for it partakes of the character of both legality and illegality. Civil disobedience, then, would be within the realm of the paralegal. Consequently, while the civil disobeyer would not be entitled to acquittal (because his action is to that extent illegal), he would have a claim to a lighter than usual sentence (because his action is to that extent legal).

Of course, this analysis is correct only in a formal sense, and, for completeness, it is necessary to turn to a content analysis. Such a move from a consideration of what civil disobedience is to when civil disobedience is justifiable inevitably involves a recourse to moral criteria. As paralegal, civil disobedience approaches both law and morality.

V. *Civil Disobedience and Morality.*

1. *The obligation to obey the law.*

One of the earliest arguments for obedience to the law was advanced by Socrates in the *Crito* and this is often considered the *locus classicus* of the defence of absolute obedience to the law. But as Keeton has shrewdly noted,¹²⁹ Socrates is not making an argument against civil disobedience, since he has already expressed his approbation of it by indulging in it, but is making an argument for accepting the penalty of the law when it has been imposed. Nevertheless, the four arguments advanced by Socrates against flight have subsequently often been used as reasons against civil disobedience.

Of Socrates' four arguments, two do not stand up in the light of modern political theory; that there is an implied contract to obey the laws and that there is a debt due the state that can be met only by obedience. A third reason is more properly left until the next section, where the problem of civil disobedience is considered in the context of a democratic state: namely, that if the state offers opportunity to be convinced of its wrong and one fails to convince it, he must remain obedient. The final reason, disobedience undermines public order, is one which has remained relevant and continues to be the heart of the case against civil disobedience.

One of the most absolute statements in recent years of the necessity of obeying the law was that of the late President Kennedy in an address to the people of the United States on September 30th, 1962:¹³⁰

[O]ur nation is founded on the principle that observance of the law is the eternal safeguard of liberty and defiance of the law is the surest road to tyranny. . . .

Americans are free . . . to disagree with the law, but not to disobey it. For in a government of laws and not of men, no man, however

¹²⁹ Keeton, *op. cit.*, footnote 112, at p. 512.

¹³⁰ New York Times, October 1st, 1962, p. 22, col. 6.

prominent or powerful, and no mob, however unruly or boisterous, is entitled to defy a court of law.

Since President Kennedy was speaking during a potential crisis of order in the United States' South, it cannot, however, be asserted with any assurance that he intended to make a philosophic statement adopting an absolutist view of obedience.

Professor Richard A. Wasserstrom states that there are at least three different positions which might be taken concerning the stringency of the obligation to obey the law:¹³¹

- (1) One has an absolute obligation to obey the law; disobedience is never justified.
- (2) One has an obligation to obey the law but this obligation can be overridden by conflicting obligations; disobedience can be justified, but only by the presence of outweighing circumstances.
- (3) One does not have a special obligation to obey the law, but it is in fact usually obligatory, on other grounds, to do so; disobedience to the law often does turn out to be unjustified.

The theory of absolute obligation has had few adherents since Hobbes and almost no foundation in the tradition of Western thought. As has been made clear by Professor H. L. A. Hart, even legal positivism (the jurisprudential school most disposed to glorify law) does not subordinate justice to law in the moral sphere (but only in the legal sphere), and Professor Hart has himself argued that positivism makes possible a more acute moral criticism of law than does any other jurisprudential theory.¹³² Natural-law and sociological theories, of course, subordinate law to justice, and judge law according to the extent to which it attains justice.

On the other hand, law which is just will normally be considered to be binding in conscience and any deviation from it to be sin. The prevalent theory of obligation, then, may be said to be one of qualified or conditional obligation rather than of absolute obligation. A law is obligatory or binding in conscience only on the condition that it is just.

It is reasonable to add to this principle of conditional obligation a principle of the *prima facie* morality of law, at least in a democracy. Obviously a citizen cannot give detailed consideration to the morality of every law that may affect him, and unless he can do so it would be quite wrong for him to act on the assumption that a law is immoral unless he finds it to be moral. Given the elemental justice of the system of government, there must be a *prima facie* presumption that the acts of the government are just, or stable government will be impossible and anarchy will result.¹³³

¹³¹ Wasserstrom, *The Obligation to Obey the Law* (1963), 10 U.C.L.A. L. Rev. 780, at pp. 784-785.

¹³² Hart, *Positivism and the Separation of Law and Morals* (1958), 71 Harv. L. Rev. 593, at p. 620.

¹³³ See MacGuigan, *Civil Disobedience and Natural Law* (1964), 52 Ky. L.J. 346, at p. 355; (1965), 11 Catholic Law. 118, at p. 124.

Of course, such a presumption was abused by German churchmen in the Second World War, but this revealed a defect in its application (and indeed a too positivistic attitude towards law generally).¹³⁴

While the judgment that a law is just implies the conclusion that it should be obeyed (except, perhaps, in the context of indirect civil disobedience, to which I shall refer subsequently), the judgment that it is unjust does not necessarily imply the conclusion that it should be disobeyed, because a consideration of means as well as of ends is relevant to a judgment of disobedience, and because even in the realm of ends, a lesser end may sometimes be sacrificed to preserve or attain a greater one. Such a decision can be made only at a more practical level of reflection than we have here canvassed.

2. *The morality of civil disobedience.*

It appears that the judgment governing civil disobedience is one of individual conscience and may therefore differ from person to person. Despite the fact that Dr. Martin Luther King described the law violation of Southerners as "uncivil disobedience" and "lawlessness",¹³⁵ their views and actions may be equally instances of the working conscience. Senator Eastland is quoted as asking: "Is not the segregated way of life a better life? Is not that way the law of nature?"¹³⁶ Marshall is, therefore, justified in raising the question:

If the decision to break the law really turns on individual conscience, it is hard to see in law how Dr. King is any better off than former Governor Ross Barnett, who also believed deeply in his cause and was willing to go to jail.¹³⁷

One difficulty, of course, with the Southern reaction is that it is hard to believe that it is genuinely based on conscience, especially since it is espoused not so much by religious and ethical leaders as by often demagogic politicians who have had a great deal to gain personally by arousing feeling over the issue of race.

The other difficulty with the Southern reaction is that it has often not been nonviolent but rather violent, sometimes in the extreme, as in the murders of many civil rights workers. It may be impossible to judge conscience objectively, but the fruits of conscience—or its lack—are usually plain.

One of the most serious arguments against civil disobedience is that it is wrong because it cannot be generalized, that is, that if

¹³⁴ See Zahn, *German Catholics and Hitler's Wars* (1963) and Lewy, *The Catholic Church and Nazi Germany* (1965).

¹³⁵ Quoted by Powell, *A Lawyer Looks at Civil Disobedience* (1966), 23 Wash. L. Rev. 205, at p. 210, footnote 12.

¹³⁶ Quoted by Powell, *ibid.*, at p. 209.

¹³⁷ Marshall, *The Protest Movement and the Law* (1965), 51 Va. L. Rev. 785, at p. 800.

everyone were to disobey the law the result would be chaos and anarchy. But as Dr. Richard Lichtman has aptly remarked: "The civil disobedient . . . is not required to answer the question of what would happen if everyone pursued his own conscience, for that is not what he is proposing. He is only responsible for considering what would happen if everyone were to follow his conscience in the specific manner that the theory of civil disobedience requires."¹³⁸ The specific manner of disobedience, of course, is limited to nonviolent public resistance.

This limitation does not entirely remove the problem, for it is at least conceivable that a very large number of citizens might choose to embark on genuine civil disobedience campaigns, perhaps each for a different cause. The answer in such a case has to be found in a weighing of the proportion between the good probably to be attained by civil disobedience and the evil that will probably result from it. Needless to say, the answer is not capable of mathematical certitude, involving as it does an analytical judgment in evaluating the terms of the proportion as well as a value judgment in the comparison of them.

Dr. James Luther Adams, of the Harvard Divinity School, has suggested that the norms of civil disobedience are analogous to the norms of a just war.¹³⁹ As first laid down some centuries ago by St. Thomas Aquinas, the norms of a just war are as follows:¹⁴⁰

There are three conditions of a just war. First, the authority of the sovereign by whose command the war is to be waged. For it is not the business of the private individual to declare or to summon the nation. The second condition is that hostilities should begin because of some crime on the part of the enemy. Wherefore Augustine observes that a just war is wont to be described as one that avenges wrongs, when a nation or state has to be punished for refusing to make amends for the injuries done by its people or to restore what has been seized unjustly. The third condition is a rightful intention, the advancement of good or the avoidance of evil. It may happen that a war declared by legitimate authority for a just cause may yet be rendered unlawful through a wicked intention. Hence Augustine declares that the passion of inflicting harm, the cruel thirst for vengeance, a plundering and implacable spirit, the fever of turmoil, the lust of power and suchlike, all these are justly condemned in war.

The first of these norms, the initiation by lawful authority, appears not to be transferable to civil disobedience, though a principle of collective action (such as Dr. Adams' view that civil disobedience

¹³⁸ Lichtman, in *Civil Disobedience* (ed. Center for Study of Democratic Institutions, 1966), p. 13, at p. 16.

¹³⁹ Adams, *Civil Disobedience: Its Occasions and Limits*, in *Political and Legal Obligation* (ed. Pennock and Chapman, 1970), p. 293, at p. 302 *et seq.*

¹⁴⁰ Aquinas, *op. cit.*, footnote 57, II-II, q. 40, a. 1. The translation is taken from Aquinas, *Philosophical Texts* (ed. and trans. Gilby, 1951), p. 348.

is a group phenomenon, growing out of and eliciting an emerging consensus) might possibly be based on it by an extended interpretation. The principles of just cause and rightful intention, however, are just as applicable to disobedience as to war. Dr. Adams adds four further norms, which he regards as accretions to the early conception of a just war: war must be the last resort; there must be a reasonable hope of victory; there must be due proportion between the good probably to be accomplished and the probable evil effects; and the war must be rightly conducted through the use of just means. He would apply all of these norms to civil disobedience, and I would accept his argument, though I would place the chief emphasis on the principles of right means and proportion.

It is also necessary to consider whether the disobedience in question is direct or indirect. Professor Rudolph H. Weingartner offers the following advice:¹⁴¹

One is more readily justified . . . in breaking a law that is thought to be wrong than in breaking some other law to protest against a law thought to be wrong. The reason is not complicated. Both direct and indirect civil disobedience have as their motive the desire to protest (and effect a change in) a law or measure thought to be wrong. In the case of direct civil disobedience, however, there is an additional motive, namely, the desire not to obey a law that is wrong, that is to say, the desire to refrain from doing what is wrong and to do what is right. There is a still greater burden on the practitioner of indirect civil disobedience to believe the law protested against to be very wrong.

It would seem that the case of indirect civil disobedience does not require a special norm, but that each of the norms already stated would be applied somewhat more stringently when there is a question of indirect disobedience.

VI. *Civil Disobedience and Democracy.*

1. *The social consequences of civil disobedience.*

Many people, especially in the middle class, are seriously concerned about the possible deleterious consequences of civil disobedience for law and order. One of the most extreme critics of civil disobedience, Lewis F. Powell, the President of the American Bar Association in 1964-65, has described it as "a heresy which could weaken the foundations of our system of government, and make impossible the existence of the human freedoms it strives to protect".¹⁴² He has in detail charged:

The typical street demonstration is usually a civic disorder in fact, whatever it may be in law. . . .

Moreover, even the nonviolent demonstrations frequently exact a

¹⁴¹ Weingartner, *Justifying Civil Disobedience*, Colum. Univ. Forum, Spring 1966, p. 38, at p. 42.

¹⁴² Powell, *op. cit.*, footnote 135, at p. 205.

high price from the public generally. They disrupt traffic, create discordant noises, litter the streets, and deny the streets and sidewalks to other citizens. They also impose heavy responsibilities upon police and are burdensome to the public treasury. . . .

Possibly the most serious aspect of the expanding use of protest methods in the name of civil disobedience is the resulting incitement to mob violence. 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. Yet few objective observers would deny that the contribution has been significant.¹⁴³

Among the "objective observers" cited by Powell¹⁴⁴ are Arthur Krock, the well-known conservative columnist, and John A. McCone, the former director of the Central Intelligence Agency.

O. W. Wilson, the Superintendent of Police in Chicago, has written that he believes it was the intention of the civil rights activists in Chicago in the summer of 1966 to provoke violence against themselves by marching into areas in which a majority of the residents were unsympathetic.¹⁴⁵ The violence which occurs in such a case is then their bargaining wedge, their hope being to obtain concessions from the city administration in return for the cessation of the marches which caused the violence. As evidence he records the fact that usually the march leaders either did not notify the police of the march in advance so that protection could be provided for the marchers, or held several marches simultaneously so that they could weaken the police forces.

The available evidence in the United States would not substantiate Powell's charge that there is a direct connection between civil disobedience and the riots in American cities. In a study done by four psychiatrists in 1965 the data showed a substantial reduction in crimes of violence by blacks in three cities during periods of organized protests for civil rights in these cities.¹⁴⁶ These data led them to hypothesize the blacks "release long dammed-up resentment of segregation by asserting themselves (directly or vicariously) in direct action for civil rights. Such emotional expression, when it occurs in a framework of community organization may reduce the need for aggressive outbursts of a violent sort, thus reducing the incidence of such crimes".¹⁴⁷ If anything, the outburst of Floyd McKissick, the national director of CORE, after the assassination of Dr. Martin Luther King on April 4th, 1968, indicates the moderating effect which King's

¹⁴³ *Ibid.*, at pp. 225-226.

¹⁴⁴ *Ibid.*, at p. 226, footnote 72.

¹⁴⁵ Wilson, *Civil Disturbance and the Rule of Law* (1967), 58 J. Crim. L. 155, at p. 159.

¹⁴⁶ Solomon, Walker, O'Connor and Fishman, *Civil Rights Activity and Reduction in Crime Among Negroes* (1965), 12 Arch. Gen. Psychiat. 227.

¹⁴⁷ *Ibid.*, at p. 236.

philosophy of nonviolence had on the black community. McKissick said:¹⁴⁸

The philosophy of non-violence dies with Dr. Martin Luther King, the last prince of non-violence, the symbol of non-violence, the epitome of non-violence. . . . No other man in the country is capable of carrying on the philosophy of non-violence. It was not black people who killed the symbol; it was white racists.

The Kerner Commission *Report* agreed with McKissick in putting the blame essentially on white racism for "the explosive mixture which has been accumulating in our cities since the end of World War II".¹⁴⁹ The *Report* specified that:¹⁵⁰

A climate that tends toward the approval and encouragement of violence as a form of protest has been created by white terrorism directed against nonviolent protest, including instances of abuse and even murder of some civil rights workers in the South; by the open defiance of law and federal authority by state and local officials resisting desegregation; and by some protest groups engaging in civil disobedience who turn their backs on non-violence, go beyond the Constitutionally protected rights of petition and free assembly, and resort to violence to attempt to compel alteration of laws and policies with which they disagree.

While the last example might be considered to apply to disciples of civil disobedience, it actually refers only to those who have abandoned it.

A more moderate (for instance, than Powell's) questioning of the social effects of civil disobedience is provided by Dean Allen, who states:¹⁵¹

The serious issue that is raised (or many people believe is raised) by the modern protest movements is whether even our imperfect dedication to the rule of law can survive a widespread acceptance of the belief that the individual is morally licensed to withdraw his compliance from laws offensive to his own moral scruples, and (what is perhaps more important) the practical application of this belief by significantly large numbers of individuals and organized groups.

Allen does not himself take a position, but does give some indication of his feelings:¹⁵²

It is not inconceivable that a widespread campaign of civil disobedience and the reactions produced by it could create conditions incompatible with the proper functioning of the legal order and prove destructive of basic democratic procedures. Even if such drastic and dramatic consequences are avoided, the loss of civility in the conduct of public controversies may, and already has, taken a serious toll. Civility is not simply a matter of etiquette; it is part of the essential strategy of the democratic way of life.

¹⁴⁸ Toronto Daily Star, April 5th, 1968, p. 8.

¹⁴⁹ Report of the National Advisory Committee on Civil Disorders (1968), p. 203.

¹⁵⁰ *Ibid.*, pp. 204-205.

¹⁵¹ Allen, *op. cit.*, footnote 66, at p. 24.

¹⁵² *Ibid.*, at p. 37.

This comment by Dean Allen raises the problem of whether, whatever its suitability in other kinds of regimes, civil disobedience can have any role in a democracy, where the law is made by the people themselves, through their elected representatives.

2. *Democracy.*

Because of the indispensable function of law as a means of social order, there must be an obligation to obey the law in any society. In a democratic society that obligation is an especially heavy one because of the fact that a democracy confers upon its members the right to participate in the formation of the government in the formulation of the laws by which they are governed. Democracy requires that the minority yield to the majority both in the formation of the government and in the formulation of the laws. However, it is not only a matter of majority rule, for it requires the protection of minority rights as well as the implementation of the will of the majority.

Since these two ends cannot always be attained at the same time without contradiction, there is an inevitable tension in a democracy between law and the interests of minority groups (or perhaps one might more accurately describe the whole process as one of conflict between the interests of various groups), which is alleviated only in part by the fact that even the losing minority has a share in the government in the sense that it participates in the process by which it loses. There is, moreover, the factor of time. Especially if the matter which distresses a minority group appears to it to be serious, it is no solution to suggest the possibility of reform of the law at some millenium.

Then, too, there are the obvious imperfections in most systems of democracy, particularly the failure to democratize the process of decision-making. As Dr. Richard Lichtman points out:¹⁵³ "It is one thing to oppose the foreign policy that a community has arrived at through full and open discourse; it is quite another to violate the decisions that a coterie of men have privately fashioned and publicly defended through the mass media of propaganda."

In a recent analysis of democracies in terms of their basic values Seymour Martin Lipsett has found considerable differences even among the four English-speaking Western democracies in terms of four pattern-variables:¹⁵⁴ the elitist-equalitarian distinction (according to which people are given respect either because they are human beings or because of their elite positions), the ascription-achievement distinction (according to which individuals are judged either on ascribed or inherited qualities or on individual

¹⁵³ Lichtman, *op. cit.*, footnote 138, at p. 17.

¹⁵⁴ Lipsett, *Democracy and the Social System*, in *Internal War. Problems and Approaches* (ed. Eckstein, 1964), p. 267 *et seq.*

ability or performance), the particularism-universalism distinction (according to which people should all be treated either according to the same standard or according to their particular class, group or personal qualities), and the diffuseness-specificity criterion (according to which individuals should be treated either as total individuals or in terms of the specific positions which they happen to occupy). On the basis of these four criteria Lipsett comes up with the following tentative results (with rankings according to the first term in the polarity):¹⁵⁵

	Great Britain	Canada	Australia	United States
Elitism-Equalitarianism	1	2	4	3
Ascription-Achievement	1	2.5	2.5	4
Particularism-Universalism	1	3	2	4
Diffuseness-Specificity	1	2.5	2.5	4

The empirical generalization he draws from this analysis is that similarities in basic values have made Australia and the United States more like each other than either is to Canada or to Britain.

If countries which are universally regarded as democracies can differ so greatly in their fundamental values without thereby ceasing to be democracies, one must be extremely careful in defining democracy. For Lipsett the essential element of a sociologically meaningful definition of a democratic system is the formation of a political elite in a competitive struggle for votes. However, this conception itself results from the view that "‘democracy’ means a system in which those outside the formal authority-structure are able to influence significantly the basic direction of policy".¹⁵⁶ In other words, the citizenry as a whole must have access to the decision-making processes, and in the long-run the power over key societal decisions.

The formal existence of a system of democratic government is not an absolute guarantee of either democracy or social justice, and to the extent that ostensible democracy fails to recognize and heed the interests of powerless and even voiceless groups of citizens it ensures the emergence of social strife, including disrespect for the law as the dispossessed gather voice and determination. Thus the Honorable J. C. McRuer recently observed:¹⁵⁷

It may well be that what is interpreted as disrespect for the law, in fact, may only be the manifestation of a burning desire for justice. . . . [L]awyers and judges too often regard "order" as a shield for the protection of privilege through laws that have prevailed in another society and procedures that become incompatible with modern-day living.

Waskow has pointed out that "the politics of disorder . . . is generally invented by people who are 'outside' a particular system of political order"¹⁵⁸ in order to get in. Such "outside" groups use

¹⁵⁵ *Ibid.*, p. 305.

¹⁵⁶ *Ibid.*, p. 270.

¹⁵⁷ McRuer, *op. cit.*, footnote 125, pp. 5-6.

¹⁵⁸ Waskow, *op. cit.*, footnote 80, pp. 278-279.

techniques which are meaningful to them but appear improper to those inside the system. The urban middle classes in the eighteenth century used the device of political pamphleteering and the working classes in the nineteenth century resorted to collective bargaining and the strike to further their causes. Waskow concludes:¹⁵⁹

In both these cases, using the politics of disorder not only got the users accepted into the political order and got their immediate grievances looked after, but also got the new techniques accepted into the array of authorized and approved political methods. In short, the system of "order" was itself changed. Thus the "criminal libel" of political pamphleteering was enshrined as freedom of the press, and the "criminal conspiracy" of striking was enshrined in the system of free labor unions. One century's disorder became the next century's liberty under ordered law.

Thus the experience of history, as well as the voice of reason, indicates that total compliance with the law cannot be expected where the legal system is unjust, and the greater its injustice the greater will be the negative reaction towards the law. Dean Allen rightly concludes that "modern experience with civil disobedience has again demonstrated that the justice of a legal order is not simply a desirable embellishment. It is, on the contrary, an indispensable prerequisite to the performance of its important functions".¹⁶⁰

Democracy indeed has a substantive as well as a procedural connotation, for it implies equality not only in the choice of a government or in the determination of policies but also as an economic, social, cultural and moral goal. It is because all men are fundamentally equal in their humanity that democracy is the most fully human form of government. It is because they are unequal in their natural endowments and social circumstances that democracy has always to be attained. To my mind democracy as procedure is not a final end, but must be directed to the attainment of genuine equality. It is this proper blend of arithmetical equality and proportional equality, according to a theory of distributive justice, which constitutes the distant ideal of the just society.¹⁶¹

Nevertheless, even if democracy (in the procedural sense), like the freedom which constitutes it, is an end which serves another end, it is still the fundamental consideration. As Lipsett has shown, justice is not actually achieved to the same degree in different democratic societies, but theoretically the just society cannot be attained at all in the absence of procedural democracy, for the

¹⁵⁹ *Ibid.*, p. 279.

¹⁶⁰ Allen, *op. cit.*, footnote 66, at p. 194.

¹⁶¹ See MacGuigan, *Liberalism, in Liberalism and Socialism* (Exchange for Political Ideas in Canada, 1964), p. 1 *et seq.*; *Validation: A Moral Concept* (1968), 5 *Archives for Philosophy of Law and Social Philosophy* 143, at pp. 149-151.

content of equality (even if it could be separately conceived) would be meaningless apart from its spirit. In other words, if political decisions are not arrived at in a democratic manner, then democracy is not realized whatever the content of the decisions. Thus the power to make political decisions must be diffused in such a way they can genuinely be said to be the decisions of the people as a whole. Because of the difficulty of assessing the distribution of power in the complexity of contemporary government, the proximate test of *access to the decision-making processes* must needs assume principal importance. The degree of access to the people should provide an approximate estimate of the degree of democracy in the procedural sense.

The new emphasis on participatory politics indicates the spreading awareness of the importance of access and of power diffusion. The most influential definition of participatory democracy has perhaps been that contained in the Port Huron Statement, the founding document of the Students for a Democratic Society (SDS):¹⁶²

As a social system we seek the establishment of a democracy of individual participation governed by two central aims: that the individual share in those social decisions determining the quality and direction of his life; that society be organized to encourage independence in men and provide the media for their participation.

As a manifesto of government by direct democracy such a position would obviously be either senseless or a call for mob rule, fascist-style. But as a suggested ideal it is fully in accord with traditional democratic theory.

The movement towards participatory politics has in common with the movement of violent resistance to authority a communal reaction to social alienation. One may speculate that it is the search for a community, in reaction to alienation from the existing community, that is the underlying drive behind both participatory politics and violence. Certainly participatory movements give a new meaning to existence for activists. As Saul Alinsky has described it:¹⁶³

The kind of participation that comes out of a People's Organization in planning, getting together and fighting together completely changes what had previously been to John Smith, assembly-line American, a dull gray, monotonous road of existence that stretched out interminably into a brilliantly lit highly exciting avenue of hope, drama, conflict with, at the end of the street, the most brilliant ending known to the mind of man—the future of mankind.

However, in the case of organization for violence it appears that the goal of community can be realized only during the revolution

¹⁶² Quoted by Benello, *Participatory Democracy and the Dilemma of Change, in The New Left* (ed. Long, 1969), p. 404.

¹⁶³ Alinsky, *Reveille for Radicals* (1946), p. 73.

and not at its conclusion (and, of course, to stage a successful revolution the democracy that has motivated it must be effectively removed from the organization). Perhaps Abbie Hoffman's "Revolution for the Hell of It"¹⁶⁴ is completely honest in its recognition of the fact that violent demonstrations are self-actualizing in their actual goals. Thus the community one establishes during the revolution—which stands on "liberated" territory and lives the revolution—is the real goal.

The important question seems to be not whether there is to be disobedience but what manner of disobedience there is to be, for it is on the answer to this question that the social consequences of disobedience will depend. In this respect there is a problem even in relation to civil disobedience, though it is by definition nonviolent. In Allen's words:¹⁶⁵

The difficult question seems to be what lesson is being taught to the wider community by the precept and example of civil disobedience? Is it tutelage in nonviolence or in defiance of authority, in rational confrontation of social ills or in undisciplined activism?

Of course, whether there is to be disobedience and what kind depends not only on the answers of the disobeyers but also on those of society.

3. *Persuasion versus coercion in civil disobedience.*

There are in our society a number of nonviolent methods used for the attainment of social goals. In addition to civil disobedience, these might be enumerated as publicity, negotiation, political action, and economic pressure. With the exception of the publicizing of objectives through the communications media and public forums, all of the other forms of nonviolent action have both a persuasive and a coercive aspect. This is true also of civil disobedience.

Violence is a form of coercion; indeed it is the most extreme form. But coercion is a broader concept than violence, and may include many kinds of nonviolent coercion. The essential difference between persuasion and coercion is indicated by the reaction of the opponent. If the opponent is induced to act favorably because he has become convinced by the disobeyer's case, he has been persuaded, but if he acts favorably only in order to avoid trouble while continuing to hold a contrary position to the disobeyer, he has been coerced rather than persuaded. Coercion, then, even when nonviolent, is analogous to violence; it involves force, though it is of the non-physical variety. Obviously only persuasion recognizes the opponent as a person, for coercion manipulates him somewhat as an object. Terror, the most extreme form of coercion, treats one man only as the means to another.

¹⁶⁴ Hoffman, *Revolution For the Hell of It* (1970).

¹⁶⁵ Allen, *op. cit.*, footnote 66, at p. 30.

In democracy, the society of the dialogue, persuasion is the preferable technique, since it makes an appeal to reason and to love. To the extent that civil disobedience is more persuasive, it is more fully in accord with democracy; to the extent that it is more coercive, it is less appropriate to democracy. In that sense, Allen is right in maintaining that "in the long run, a commitment to non-violence appears to be dependent upon, and inseparable from, a commitment to rationality".¹⁶⁶ This means a fundamental commitment to persuasion as the prime way of civil disobedience. Speaking as a Christian pacifist, Thomas Merton stresses that "the basic principle of nonviolence is respect for the personal conscience of the opponent. Nonviolent action is a way of insisting on one's just rights without violating the rights of anyone else".¹⁶⁷ For this reason he believes that "if it is properly practised, it resists evil more effectively than violence ever could" and that "it is, *per se* and ideally, the only really effective resistance to injustice and evil".¹⁶⁸ Despite the link of persuasion to rationality, however, it is not wholly limited to rational considerations, since people are persuaded as well by non-rational considerations like symbolism and inspiration.¹⁶⁹

There is one situation in which it may appear that persuasion is not relevant, that is, where a man feels impelled by conscience to perform an act of disobedience in circumstances where he can have no realistic hope of changing the government or the law. Such an act might be described as one of defiance rather than of persuasion. Lichtman notes that the very "act by which one protects one's own moral autonomy—for example, the refusal to accept military service—may very well be the act that alienates a large group of individuals who might well be convinced by further argument of the validity of the dissenter's principles".¹⁷⁰ This failure in persuasion might be of great concern with respect to the performance of an act of indirect disobedience which involved a considerable degree of coercion. But typically an act of defiance would be an intensely personal act which would affect no one other than the actor. It is still, however, not an act which is in itself even non-persuasive, let alone coercive. Because of the disposition of the opponents and of the public it may be unlikely that it will be effective in persuasion, but to the extent that it is a conscientious act directed against injustice it has potentiality of persuading any who look at it with unprejudiced eyes. It might perhaps be called "expressive" or "pre-persuasive" civil disobedience.

¹⁶⁶ *Ibid.*, at p. 13.

¹⁶⁷ Merton, Preface, in Regamey, *Non-violence and the Christian Conscience* (1966), p. 7, at p. 12.

¹⁶⁸ *Ibid.*, p. 14.

¹⁶⁹ Greenberg, *Is There a Jurisprudence of Civil Disobedience* (1966), 5 Ill. Cont. Leg. Ed. 71, at p. 101 makes this point against Adler.

¹⁷⁰ Lichtman, *op. cit.*, footnote 138, p. 17.

Judge Charles E. Wyzanski, Jr., United States District Judge for Massachusetts, makes a case for such disobedience, terming it "delayed civil disobedience"¹⁷¹ and recommending it on the authority of Thomas More:¹⁷²

For men of conscience there remains a less risky but not less worthy moral choice. Each of us may bide his time until he personally is faced with an order requiring him as an individual to do a wrongful act. Such patience, fortitude, and resolution find illustration in the career of Sir Thomas More. . . . In present circumstances the parallel to not resisting the Act of Supremacy before it has been personally applied is to await at the very least an induction order before resisting. Indeed, since, when inducted, one does not know if he will be sent to Vietnam, or if sent, will be called upon directly to do what he regards as an immoral act, it may well be that resistance at the moment of induction is premature.

This is a course, however, which is more akin to non-resistance than to civil disobedience and cannot commend itself to anyone who feels keenly that his cause is of a public character. While it could hardly be said to be morally wrong for a man to choose to act in this way, it cannot, on the other hand, be taken as a general moral imperative, for it does not fulfil the social obligations of conscience, that is, to give moral leadership, where possible, to others.

Now the agreement which is sought from others in the exercise of moral leadership through persuasion is somewhat different from the usual notion of compromise. Dr. Bondurant describes the difference in the context of Gandhi's thought:¹⁷³

Agreement, in the Gandhian philosophy, . . . is of a quite different character from compromise in the usual sense of that word. . . . What results from the dialectical process of conflict of opposite positions as acted upon by satyagraha, is a synthesis, not a compromise. . . . There is no sacrificing of position, no concession to the opponent with the idea of buying him over. Non-violent resistance must continue until persuasion has carried the conflict into mutually agreeable adjustment. Such adjustment will be a synthesis of the two positions and will be an adjustment satisfactory to both parties in the conflict.

It is evident from Gandhi's *modus operandi* that the synthesis did not have to extend to the whole problem; in fact, Gandhi carefully set limited objectives for each satyagraha campaign, and refrained from asking for the complete liberation of India from colonial status at one stroke.

Persuasion which demands the attainment of such complete conviction, even in a limited matter, is no easy task. It is especially difficult in the case of indirect civil disobedience, where the danger of undue coercion is the greatest.

¹⁷¹ Wyzanski, On Civil Disobedience, Atlantic, February, 1968, p. 58, at p. 60.

¹⁷² *Ibid.*

¹⁷³ Bondurant, *op. cit.*, footnote 75, p. 197.

4. *Indirect civil disobedience.*

Indirect civil disobedience is necessary if only because there may often be no way in which a law or government policy to which disobedience would be justified can be disobeyed directly. For example, there may be no way in which a person who is not in the armed forces can violate a war policy directly.

Indirect civil disobedience may often appear to be more of a challenge to social order than it actually is, and when police treat peaceful disobedience as a riot, they are more likely to find real riots occurring. Generally speaking, neither the national nor the local media of communication are open to the disadvantaged groups in society, and their only means of protest are public demonstrations. Some governmental authorities have, therefore, recognized the advisability of encouraging such ventures by minorities. Momboisse, for one, urges that: "Rather than looking on a peaceful or lawful demonstration with fear and horror, it should be considered as a safety valve serving to prevent a riot. He who makes peaceful demonstration impossible makes violent revolution inevitable."¹⁷⁴ The United States Riot Commission *Report* had a similar warning: "In our concern over civil disorder we must not mistake lawful protest for illegal activities."¹⁷⁵

But even if all law enforcement authorities were so enlightened as to protect and foster nonviolent demonstrations even when they were for controversial causes, many minority groups will be tempted to use violent methods if they are not heard and conditions not remedied as a result of nonviolent protests. It is, therefore, a discouraging fact in the United States that nearly half of the Afro-Americans in areas where riots have taken place appear to feel that the disturbances helped their chances for equality in jobs, schools and housing, and that less than a quarter of the sample surveyed thought that the riots had hurt.¹⁷⁶ This fact was recognized by the Kerner Commission, which declared:¹⁷⁷

Negroes, like people in poverty everywhere, in fact lack the channels of communication, influence and appeal that traditionally have been available to ethnic minorities within the city and which enabled them—unburdened by color—to scale the walls of the white ghettos in an earlier era. The frustrations of powerlessness have led some to the conviction that there is no effective alternative to violence as a means of

¹⁷⁴ Momboisse, *op. cit.*, footnote 115, pp. 308-309.

¹⁷⁵ *Op. cit.*, footnote 149, p. 323.

¹⁷⁶ The London Guardian, September 3rd, 1967, p. 7, reports a survey to this effect by two American sociologists, Murphy and Watson.

¹⁷⁷ *Op. cit.*, footnote 149, p. 205. It is worth noting that a recent Gallup Poll (Detroit Free Press, January 21st, 1971, p. 16-A) revealed that 40% of all college students in the United States believe that change in that country during the next 25 years is more likely to occur through a revolution than through relatively peaceful means, and that 44% feel that violence is sometimes justified to bring about change in American society. According to the Poll, only 14% of adults feel that violence is sometimes justified.

expression and redress, as a way of "moving the system".

The law disobeyed in indirect disobedience must have either a real or a symbolic relationship to the law or policy protested; if the connection is merely arbitrary, it will have neither persuasive effect nor moral justification. A symbolic relation may take its significance from its location (an appropriate government office) or its time (for instance, an anniversary of some event) or its nature or purpose (for instance, a draft card). The more remote the relationship, the less the moral justification of the act of civil disobedience. A civil rights manual poses the following questions to help evaluate a new tactic: (1) is it clearly related to the issue? (2) are the people it will inconvenience really the people heavily involved in the injustice? (3) is there a chance of direct confrontation between the campaigners and the opponent? (4) does the tactic put a major part of the suffering which is inevitable in social change upon the protesters' shoulders rather than upon innocent bystanders? Only if the answer to all questions is in the affirmative is the tactic recommended.¹⁷⁸

An example of a nonviolent tactic which appears to be unduly coercive is the following: a large number of protesters go into a supermarket and each fills a shopping basket or cart with a maximum amount of groceries and then refuses to buy the groceries when he gets to the cashier.¹⁷⁹ Such shop-ins were apparently conducted to correct alleged injustices in hiring policies and not in service policies,¹⁸⁰ and were therefore unduly coercive. Disruptive tactics such as the attempted New York Fair stall-in or the Triborough Bridge stall-in are also generally considered to be invalid forms of civil disobedience.

Father Joseph J. Farraher, S.J. gives four other examples of what he considers unduly coercive activity:¹⁸¹ (1) where demonstrators in Chicago tied up traffic by lying down in busy streets in order to pressure the public into doing something about removing an allegedly unjustly inactive superintendent of public construction; (2) Vietnam train blocking; (3) draft-card burning; (4) self-burning. In my view Father Farraher is entirely wrong with respect to draft-card burning, since this is not an activity which causes serious inconvenience to anyone else. Father Farraher's statement that "the state is within its rights in demanding registration of available manpower, and has the right to insist on substitute forms of service for those who have sincere conscientious

¹⁷⁸ See Oppenheimer and Lakey, *op. cit.*, footnote 97, pp. 76-77.

¹⁷⁹ This example is presented by Berkeley Police Chief Fording, *Is There a Jurisprudence of Civil Disobedience* (1966), 5 Ill. Cont. Leg. Ed. 71, at p. 103.

¹⁸⁰ Farraher, *Moral Preemption Part II: The Natural Law and Conscience-Based Claims in Relation to Legitimate State Expectations* (1966), 17 *Hastings L.J.* 439, at p. 449.

¹⁸¹ *Ibid.*, at pp. 450-451.

objections against bearing arms"¹⁸² is entirely beside the point, and merely establishes that the disobedience is indirect.

His position on Vietnam train blocking is also questionable, resting on the premise that the soldiers and railway personnel have as much right to follow their consciences as the protesters have to follow theirs. Such an argument obviously cuts both ways. A more helpful consideration is whether the train which is blocked is exclusively or principally a troop train. If it is, then non-involved members of the public are not inconvenienced (as they are, for example, in a stall-in), and the tactic may be an excellent one to bring home to the soldiers the dimensions of their choice and an excellent way to attract public interest.

The tactics of civil disobedience are almost infinitely variable, and the only judgmental principle which can be laid down is that the tactic is morally acceptable in a democratic society as long as the persuasive element remains the primary one. As I have indicated above in distinguishing satyagraha from duragraha, this may be a difficult judgment to make in concrete circumstances. In the final subsection I shall indicate some practical guides relevant to direct as well as to indirect civil disobedience.

Conclusion

The spirit of individual self-determination which is abroad in the latter part of the twentieth century and is manifested in such movements as nihilism, activism, and the new morality is bound to wreak considerable havoc upon received opinions and existing institutions and to create great problems for authority in every area, and especially in the state. Perhaps no more striking indication of this fact can be given than the considered words of a distinguished Christian theologian respecting the political order that "*the most radical and urgent task of our time is to prepare men for eventual refusals to obey*".¹⁸³ It is especially likely that disobedience will result where injustice is being done by the laws. Law and order can prevail only in conditions of social justice.

Granted the accuracy of this analysis of contemporary society, the important question becomes one of means: what means will be employed to bring social change? will they be violent or non-violent? Dr. Joan Bondurant may well be right in maintaining that "Satyagraha may . . . be the only possibility open to an oppressed people in this age of highly technical means of oppression",¹⁸⁴ but in democratic states recourse to violence remains an open option even for the most oppressed groups, as recent events in the United States have made clear.

¹⁸² *Ibid.*, at p. 450.

¹⁸³ Regamey, *op. cit.*, footnote 167, p. 225.

¹⁸⁴ Bondurant, *op. cit.*, footnote 75, p. 227.

Even nonviolence undoubtedly brings with it risks of violence or of undue coercion, but it is well to keep in mind the admonition of Keeton that: "The privileged are prone, in judging the resort of others to civil disobedience, to emphasize the risks of harm rather than the possibilities of newly created benefit."¹⁸⁵ As a matter of fact, the development of movements of nonviolent civil protest might be of great benefit in rejuvenating democracy, quite apart from the advantages to be gained by the achievement of a particular goal. Protest activities involve large numbers of people in political and social causes who would in most instances never be touched by the ordinary democratic process. To the extent that it is nonviolent and to the extent that more coercive forms of nonviolence do not get the upper hand civil disobedience *may be* wholly in accord with democracy.

It is impossible to lay down a single general principle which will decisively determine in advance whether every particular act of civil disobedience *will be* moral and therefore beneficial to democracy. Professor Keeton has, however, outlined a number of practical tests which cumulatively can provide a moral guide for practical disobedience.¹⁸⁶ He suggests the following eight guidelines in the form of questions:

- (1) Are the protesters willing for their opponents to employ the same types of civil disobedience to their odious purpose?
- (2) Have the civil disobedients given advance notice of their plans to the authorities in so far as that notice is compatible with the intended effectiveness of their action?
- (3) Is the protest directed toward a specific need or wrong, clearly identified among the protesters; and has care been exercised to communicate its nature to bystanders and opponents?
- (4) Are the means of protest used relevant to, and among the more effective ways of securing, the specific end being sought?
- (5) Can the protesters remain nonviolent through their procedure; and are they exercising due care not to elicit violence on the part of others or, where that is impossible, not to elicit such violence as will work a greater harm than their act remedies?
- (6) Are the civil disobedients sincere in the intent to protest for the principle enunciated as the reason for the action?
- (7) In the decision to engage in civil disobedience, have less costly and hazardous means with reasonable prospect of success in removing the grievance been tried and found ineffectual?
- (8) Have the participants in civil disobedience used reason-

¹⁸⁵ Keeton, *op. cit.*, footnote 112, at p. 520.

¹⁸⁶ *Ibid.*, at pp. 514-519.

able care in both foreseeing the consequences their actions incur as opportunities and risks, and in evaluating those consequences? (The test is the net worth of the anticipated benefit over its probable cost.)

A further question contained in a similar list by Bayard Rustin ought to be added: Am I prepared cheerfully to accept the legal punishment for my acts?¹⁸⁷ I would, however, disagree with Father Farraher that the principle of acceptance of punishment implies that the protesters must co-operate completely with arresting police officers, and that there is therefore no justification for forcing the police to carry them into patrol wagons.¹⁸⁸ There is no sound reason why disobedience should not extend to pacific non-co-operation with the police, and indeed this is a standard tactic of protesters.

Rustin suggests also the question: have you engaged in the democratic process and exercised the constitutional means that are available before engaging in breaking the law? As far as Blacks are concerned, he provides the general answer, "Yes, we have not only used but exhausted every possibility under the law to establish justice."¹⁸⁹ For the youth of today he suggests a variation of the question: "Is what you conceive so monstrous that you do not believe there is time for dealing with it by constitutional means?"¹⁹⁰ My own view is that such a question is already covered by questions (4), (7) and (8) and that to raise it directly probably too lightly assumes the justice of the democratic process in actual administration. Democracy works slowly, and the purpose of civil disobedience is to speed up its operation in some respect or other.

In sum, civil disobedience, when it is true to its nature, is paralegal, moral, and a contribution to democratic society. When it becomes unduly coercive or engenders violence, it is destructive of democracy. It is, then, a method with a potential for danger but with a more ready potential for good. The choice today for democratic societies in conflict areas seems not to be between obedience and civil disobedience. It appears rather to be an option between civil and uncivil disobedience. In such a situation how many will say "nay" to civil disobedience!

Civil disobedience does not, however, need to rely for its justification on "scare psychology". As a genuine example of the principle of persuasion, it is a variant and acceptable form of the political process which is the heart of democracy. Democracy can ask no more than that its citizens, when for reasons of conscience

¹⁸⁷ Rustin, in *Civil Disobedience* (ed. Center for Study of Democratic Institutions, 1966), p. 11.

¹⁸⁸ Farraher, *op. cit.*, footnote 180, at p. 450.

¹⁸⁹ Rustin, *op. cit.*, footnote 187, p. 11.

¹⁹⁰ *Ibid.*

they cannot obey a law, dissent respectfully and peacefully. If they also do so dramatically and persuasively, democracy is so much the richer.
