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A House Divided Against Itself:
The Threat of Contemporary Civil Disobedience
To The American Legal System

RICHARD R. MOLLEUR*

During the last ten years, Americans have witnessed, perhaps as never before, the boiling cauldron of racial unrest and a growing tide for complete implementation of civil rights and social justice. More recently there has emerged a by-product of this struggle—a new idealism seriously challenging not only our established social mores, but also many of the political and moral attitudes long accepted as the fabric of our democratic way of life.

All of this has not been spontaneous, however, and can be traced to those post-World War II years when the world, still reeling from the enormity of war's destruction, was shocked with the inconceivable horror of mass genocide in Nazi Germany. For us in the United States the shock was even greater, because our country was far removed from the ravages of total war and most of us were still unaware of the boundless barbarity of Nazi totalitarianism. Looking back on those years, it seems that the blow was so great that its full impact was at first blunted and our realization of the potential of man's inhumanity to man emerged only slowly in the succeeding decade. During these years, our position as a major world power involved us more directly than ever with the domestic problems of smaller and weaker nations, as well as the struggles of African and Asian peoples seeking to overthrow the yoke of nineteenth century colonialism.

Within this context it became increasingly difficult to continue ignoring our own social and racial problems, for in seeking to explain and administer our ideals of freedom, equality and justice abroad, we became painfully aware of the hypocrisy at home. Moreover, as we moved into a period of unprecedented prosperity, the mass communication media candidly revealed the appalling

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disparity between the living standards of the haves and those of the have-nots in a land regarded as the land of plenty. And for those Americans, primarily black Americans, historically the have-nots in our society, the need for change became more pressing. Thus while more white, affluent, established Americans began to view these problems with embarrassment and discomfort, more black, poor and disenfranchised Americans became restive, demanding full participation in the American dream.

This generally was the setting when in 1954 the Supreme Court of the United States vitiated the fifty-eight-year-old doctrine of separate but equal facilities for whites and blacks in the nation's public schools.1 With the highest court in the land thus officially recognizing the need for change, the dormant seeds of racial and social reform began to germinate.

The momentum was irreversible, but for some, realizing full well the slow process of the law and legal implementation, the pace had to be accelerated. So it was that contemporary civil disobedience began, with organized acts of protest designed to test the constitutionality of the state and local laws perpetuating segregation in the South.2 As these test cases matured to success before the Supreme Court, the tactic of organized disobedience of unjust laws gained favor as a catalyst of constitutional reform. Before long, however, it became apparent that many racial injustices could not be righted by the courts alone and that executive and legislative action would be needed. For this purpose, the tactic of civil disobedience now took on a larger meaning—the violation of admittedly just laws to demonstrate overall injustices fostered and perpetuated by the established order.3

Since then, this sense of civil disobedience has been embraced by the new idealists seeking to demonstrate a myriad of injustices which they perceive in many areas of American life. It is therefore important to note that contemporary civil disobedience has evolved to a point where laws are selectively violated in the name of morality and overall justice. No longer can we consider the question as confined solely to the moral obligation to disobey unjust laws; no longer can we ignore that its growing acceptance as a tactic to pressure government action poses a serious threat to the American legal system.

Firmly based on the rule of law, the fundamental concept of our govern-
ment is that law is the means and justice is the end. Contemporary civil disobedience strikes at the very heart of this principle and threatens to divide the pursuit of justice from the rule of law. Attorney General Ramsey Clark squarely framed the issue when he noted that a house divided against itself cannot stand—that to seek justice without law or to have law without justice achieves neither.4

There is much about civil disobedience which makes it appealing. The very idea of individual moral responsibility to continuously appraise the justness of man's laws is deeply rooted in our Christian heritage. Concern for the right and wrong of man-made law has always appealed in conscience to anyone seriously believing in a higher law, and the freedom to dissent and the right to advocate unpopular causes have long been accepted as basic to our liberty. In addition, because of its close association with the civil rights movement and more recently the war on poverty, civil disobedience has been submerged in the deep emotions engendered by those causes. Today, however, the trend toward increased resort to civil disobedience by many minority groups espousing a variety of causes is viewed with growing concern by lawyers, jurists and governmental officials,5 but the appealing philosophical and constitutional arguments cited in its support still mask its true dangers.

**Philosophical Concepts**

We can trace the basic idea that man has a right and even an obligation to disobey unjust laws to medieval Scholasticism. In his *Summa Theologica,* Thomas Aquinas carefully distinguished four interrelated types of law: Eternal Law, the direction of all things to their end by Divine Wisdom; natural law, man's participation in and perception of Eternal Law by the use of reason; human law or positive law, the body of particular determinations derived by human reason from natural law; and Divine Law, God's commandment to man as set forth in Holy Scripture.6 Maintaining that human law must be in accord with natural law and Eternal Law, Aquinas reasons that a human law may be unjust by being contrary to either natural law or Divine Law.7 And while he establishes unequivocally both a right and a duty to disobey laws which violate Divine Law or Scripture—obviously a restricted

6. 1 SUMMA THEOLOGICA 1-2 quests. 90, art. 4; 91, arts. 1-4; 93, art. 1 (The Fathers of the English Dominican Province transl. 1947).
7. Id. at quest. 96, art. 4.
category of laws—he qualifies the mandate to disobey laws violating natural law. Aquinas limits this category of laws to those not ordained to the common good and holds only that there is no obligation to obey such laws. Even so, he excepts from this category the situation where the act of disobedience would cause “scandal” or “disturbance” more harmful to the common good than the unjust law itself.

Although Martin Luther King, Jr. in his Letter Written from a Birmingham Jail10 cites Aquinas as supporting his position, contemporary civil disobedience does not conform to the Thomistic standard. Quite obviously, the present tactic of disobeying admittedly just laws for the express purpose of creating disorder to draw attention to “overall injustice” or unjust policies is a clear departure. Indeed, the mounting evidence of violence and disrespect for law resulting from widespread and unbridled use of this tactic11 would at best subject it to Aquinas’ injunction to yield the right to disobey in favor of the greater common good.

The only possible identification with Thomistic doctrine lies in the earlier civil disobedience tactics designed to test the constitutionality of discriminatory state and local laws. This is undoubtedly what King had in mind when he wrote Letter Written from a Birmingham Jail in 1963. But, in a real sense, this was not civil disobedience, since the purpose was to conform local laws to constitutional standards, which was accomplished through court action, a manner prescribed by law.12

During the post-Reformation evolution of European social and political thought, a great many philosophers sought to divorce theology from law and placed great emphasis on the “natural rights” of man.13 The writings of John Locke, the best known advocate of the inalienable rights of man, greatly influenced the thinking of the founders of the American Republic14 and are particularly relevant to what they envisioned as the extent of a citizen's freedom to resist unjust laws in a democratic society.

In Locke’s view of the combined natural and contractual origin of the state, men join together by mutual consent in a political society to avoid the difficulty and inconvenience involved for every man to judge and enforce
his own natural rights. Each person consents to become a part of society and to be bound by its laws when he holds and enjoys possessions under its dominion. The state thus derives its authority and powers from the people, or as Thomas Jefferson stated in the Declaration of Independence: "Governments...[derive] their just powers from the consent of the governed."

In forming society, Locke says that men do not submit to the state's arbitrary and unlimited power, for in nature, man did not have complete power over himself, but only the power to preserve his life and property. This is all the power he can transfer to the state. Therefore, government has only the right to act for the public good and cannot deprive man of his property or subject him to its arbitrary will. When government transgresses these limits, Locke holds emphatically that the people have a right to resist and overthrow the government.

However, Locke's right to resist oppressive governmental action gives little support to contemporary civil disobedience. The basic difficulty centers around the question of a minority's right to resist the unjust acts of government. In distinguishing the political society from its legislative or governmental body, Locke reasons that a society can only be dissolved by foreign conquest, while government can be dissolved by the action of the people removing the legislative powers delegated to it. Until this is accomplished, the legislative acts of the political society constitute the acts of the majority and are binding on all members of the society. Therefore, the only proper resistance to legislative acts must be the resistance of the majority, and can only be exercised by rejecting the government. Thus, Locke suggests that no one can selectively disobey individual laws enacted by the legislature.

While he does not address himself to the right of minorities within this context, it can be assumed that they would have no greater rights than those of the majority. This apparent gap is perhaps explained by Locke's basic assumption that the rule of the majority will not work to the detriment of minorities. This assumption predicates the fundamental value of society to achieve the orderly and feasible settlement of man's disputes. Since Locke bases his

16. Id. ch. VIII, §§ 119-20.
18. Id. ch. XI, § 137-38.
19. Id. ch. XIII, §§ 149, 155; ch. XVIII, §§ 203-09; ch. XIX, §§ 222, 231-32.
20. Id. ch. XIX, §§ 211-12.
21. Id. ch. VIII, §§ 96-97.
22. Locke does allow that people have a right to resist the acts of the executive when they are in conflict with legislative authority.
23. See note 15 supra.
concept of political society on the natural law rights of man, it follows that
the greater common good of society can be achieved only by restricting the
individual exercise of these rights. Placed in the context of today's civil dis-
obedience issue, this would suggest that even though the right to disobey
exists, the redress of a just grievance should be sought, if at all possible,
through the orderly processes of the law.

Drawing heavily on natural law philosophy and these fundamental theories
of government, Thomas Jefferson set forth in the Declaration of Independ-
eence his own concepts of individual liberties to the effect that all men
have the "inalienable right" to "life, liberty, and the pursuit of happiness,"
and concluded that "whenever any form of government becomes destructive
of these ends," the people may "alter or abolish" that government. While
this declaration appears to give some sanction to civil disobedience aimed at
political change, Jefferson was speaking of the right of the people as a whole
to change the government, not of the selective violations of its laws. Jefferson
recognized the necessity for limits on individual liberty within a democratic
society.24 "Rightful liberty is unobstructed action according to our will with-
in limits drawn around us by the equal rights of others."25 Earlier he had
written: "No man has a natural right to commit aggression on the equal
rights of another; and this is all from which the laws ought to restrain
him . . . ."26 Thomas Paine supported Jefferson in his view that liberty involves
the right to do only those things which do not interfere with the rights of
others.27 Indeed, it is generally established that the Founding Fathers premised
their ideas of the constitutional rights on these natural law doctrines.28
Clearly, when practitioners of contemporary civil disobedience continually
infringe upon the rights of others,29 they go beyond the limits envisioned by
the Founding Fathers.

We turn now to a brief examination of two men whose writings and ac-
tions have had considerable influence on modern civil disobedience. The
example of Mohandas Gandhi's non-violent revolt against British rule in
India is often cited to show the major results which can be achieved by large-
scale acts of civil disobedience.30 And Henry David Thoreau's philosophical

25. Letter from Thomas Jefferson to Isaac Tiffany, April 4, 1819, on file in the
26. Letter from Thomas Jefferson to Francis Gilmer, June 7, 1816 in 4 MEMOIR, COR-
RESPONDENCE, AND MISCELLANIES FROM THE PAPERS OF THOMAS JEFFERSON 278 (T.
Randolf ed. 1829).
27. 2 WRITINGS 558 (M.D. Conway ed. 1894-96).
29. E.g., the take-over of college buildings by student protesters.
30. See, e.g., remarks by William Sloane Coffin, Jr., LAW, ORDER AND CIVIL DISOBE-
DIENCE 46-47 (American Enterprise Institute for Public Policy Research 1967);
defense of his one-man protest against the foreign and domestic policies of
the American government provides a domestic theory of civil disobedience
from which today's dissenters seek to draw much justification.

Gandhi appears to have had a dual purpose in formulating his particular
philosophy: (1) the radical transformation of the existing social order and
political system, and (2) the evolution of a revolutionary technique of politi-
cal action and social change within the limits of prevailing conditions of
politics and society. These purposes are incorporated in his theory that no
external authority can claim a higher status than “satya,” his doctrine of truth
and integrity, and no political or social sanction can be assigned a superior
legitimacy to “ahimsa” or non-violence. Thus, “satyagraha,” his theory of
non-violent resistance, uses the deliberate suffering of its adherents as a
moral force to convert others to the cause.

“Satyagraha” may take different forms: civil disobedience, non-cooperation,
passive resistance, to name a few. Passive resistance is a method of drawing
attention to a cause by undergoing personal inconvenience or suffering.
On the other hand, civil disobedience, in Gandhi’s terms, is the deliberate
breach of immoral laws and the acceptance of society’s penalties. Because it
is so extreme, it can be practiced only as a last resort by a select few who
have the moral standing to challenge the law. Civil disobedience thus pre-
supposes the habit of willing obedience, since only law-abiding individuals
have the moral right to dispute a law, and it cannot be a disguise for some
other goal, such as concealed violence. If so, it ceases to be “civil” and
leads to anarchy, which is completely contrary to “satyagraha.” Hence,
Gandhi calls for deliberation and delay in the exercise of civil disobedience
so that the disobedient person appears “civil” to the adversary, for Gandhi’s
purpose is to convert his opponent to the acceptance of his position.

It seems that, in practice, only a few will have prepared themselves for
“pure” civil disobedience. Moreover, massive civil disobedience tantamount
to peaceful revolution against the entire system would be most unlikely,
since it would have to be spontaneous, for only individuals (as opposed to

Black, The Problem of the Compatibility of Civil Disobedience with American Institu-
tions of Government, 43 Texas L. Rev. 492, 499 (1965); Keyton, The Morality of Civil
Disobedience, 43 Texas L. Rev. 507, 514-15 (1965); See generally Civil Disobedience
(Center for the Study of Democratic Institutions 1966).

31. The bulk of this discussion of Gandhi is drawn from Raghaven N. Iyer on Gandhi
in Civil Disobedience, supra note 30, at 19-25.
32. Id. at 20.
33. Id. at 21.
34. Id. at 22.
35. Id. at 21-22.
groups or committees) can have the requisite conscience. The difficulty apparent in meeting these requirements led to the development of a middle-ground: non-cooperation. This technique of social action may involve boycotting specific social institutions or a whole range of state policies. It draws its moral force from the fact that it is non-violent and, like civil disobedience, is aimed at influencing public opinion. Its difference from civil disobedience lies in the fact that non-cooperation is more easily adapted to mass movements. Boycotts do not break the law and, therefore, do not require so great a moral force from their practitioners as does civil disobedience.

Contemporary civil disobedience tends to ignore a basic premise of Gandhi's theory—non-violence. While peaceful means are called for by many leaders, violence often results in practice. And these leaders are falling prey to the trend toward calling for more militancy and direct confrontation that will inevitably lead to conflict. Contemporary acts of civil disobedience also have long ceased to be directed at converting the adversary. The idea instead seems to be to force change through pressure tactics causing embarrassment and disorder.

Today's civil disobedients seem to conform more to Gandhi's theory of non-cooperation since most do not appear to have the moral standing necessary for "pure" civil disobedience, but even here, their tactics are not those of Gandhi's non-cooperation. The major difficulty with using Gandhi as a precedent lies in the fundamental difference in the conditions under which he practiced the theory and in the objectives he sought. Gandhi practiced non-cooperation in colonial India in order to protest the injustices of British rule. His goal of full independence for the Indian nation has no parallel in America today.

Thoreau is often considered the patron saint of modern American civil disobedience. His example of self-reliance and opposition to authority are continually cited to support disobedience of the law for protest purposes.

36. Ibid.  
37. Ibid.  
38. Id. at 23.  
40. A. Fortas, supra note 5, at 61. Indeed, Martin Luther King, Jr., was reportedly deeply disturbed by the violence which had erupted in Memphis, Tenn. a few days before his assassination.

41. MacGuigan, supra note 39.  
43. See generally M. Adler, participant in Symposium, Is There a Jurisprudence of Civil Disobedience? 5 Illinois Continuing Legal Education 95 (1967):

We can see that Thoreau's classic essay on the subject generates the basic error that has now become prevalent. . . . Thoreau disobeyed a tax law that he did not regard as intrinsically unjust in order to use that act of disobedience.
The extent of his personal disobedience was short indeed. Because he opposed the institutionalization of slavery by the federal government and the policy of war against Mexico, he refused to pay his state highway taxes and spent a night in jail. But the essay he wrote concerning his experience has continuing impact today. Yet, Thoreau's idea supports modern civil disobedience in spirit only, for he proclaims that the best form of government is that which "governs not at all." This is not the goal of contemporary civil disobedience. Assuming the sincerity of the stated purpose, instead the aim is positive government-action designed to correct alleged wrongs in the society.

First Amendment Rights

Generally, today's civil disobedients also seek justification for their acts in the first amendment freedoms—the right of dissent, protest, and free assembly, and the right to petition the government. Due to its long-standing concern for protecting dissemination of ideas and the individual's access to the "intellectual marketplace," the Supreme Court has encouraged and supported the individual's right to speak out by himself or as a member of a group against that which he considers unjust.

Because the exercise of these rights, however, often takes the form of actions associated with civil disobedience—sit-ins, marches, picketing, and other forms of demonstrations—Supreme Court decisions have been misread as sanctioning civil disobedience itself. Yet the American Founding Fathers conceived our constitutional form of government with a clear understanding of the natural law doctrine, which delimits liberty with those restraints necessary as a protest against the injustice of slavery and what he deemed to be the injustice of our war with Mexico. The fact that he willingly went to jail—for one night—does not make his act of disobedience a clear case of civil disobedience, since the law he infringed was not one that he was unable in conscience to obey. On the other hand, his disobedience was not clearly criminal either, since he did not try to escape punishment for his infraction of the law.

I think we should say that Thoreau was mixed up and confused, and that his action was not civil disobedience. . . . Thoreau made a public nuisance of himself. Most of the civil rights agitators today who follow in his footsteps are making public nuisances of themselves—acting for a good cause, but using the wrong means to do so, because the means they use involve breaking laws that are not in themselves unjust and that are totally without grounds in conscience for disobeying.

44. WALDEN AND OTHER WRITINGS OF HENRY DAVID THOREAU 635-59 (B. Atkinson ed. 1950).
45. Id. at 635.
46. Griswold, Dissent—1968, supra note 5.
47. See, e.g., Marek, Civil Disobedience in the Civil Rights Movement: To What Extent Protected and Sanctioned? 16 W. RES. L. REV. 711 (1965); Black, supra note 30; Keeton, supra note 30; CIVIL DISOBEDIENCE, supra note 30.
sary for the common good. Faithful to this, the Court has clearly indicated that the first amendment will not sanction every sort of activity defended as a free expression of nonconformity. The protections of the first amendment do not extend to activity violative of valid state or federal regulations clearly promulgated and applied for the common good. Chief Justice Charles Evans Hughes wrote that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means . . . is a fundamental principle of our constitutional system." The key ingredients of first amendment freedoms are contained in this declaration: (1) use of lawful means (2) to maintain responsive government and effect changes (3) through free political discussion.

The first amendment cases since 1931 have given content to these phrases, first through definition of "free political discussion," later by defining "lawful means." The free speech guarantee does not protect incitement to riot or conduct creating an imminent threat to public safety, nor does it sanction "fighting words," or words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Limits have also been placed on speech which is libelous, obscene, or which counsels active overthrow of the government. These cases all seem to reflect the early pronouncement of Justice Holmes enunciating the now famous "clear and present danger" test for determining the validity of state regulation of speech. This test has generally been the standard applied to cases where the state or federal regulation has been directed against the content of speech alone. Thus, words which fall under the proscription of the "clear and present

48. See discussion supra at 42; see also C. Antieau, supra note 24.
49. United States v. O'Brien, 88 Sup. Ct. 1673 (1968); see Griswold, Dissent—1968, supra note 5.
56. Schenck v. United States, 247 U.S. 47, 52 (1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."
57. Roth v. United States, supra note 54; Yates v. United States, 354 U.S. 298 (1957); Beauharnais v. Illinois, supra note 53; Dennis v. United States, supra note 55.
danger” test are so “danger-laden” as to deny their content as “free political discussion.”

Words accompanied by conduct and conduct as a form of expression are potentially more dangerous than pure speech. Consequently, conduct which has a bearing on expression, like picketing and demonstrating, may be more stringently controlled than pure speech. The principle applied in such situations reflects a balancing of interests between the individual’s or group’s freedom of expression and the rights of all other members of the society. Each citizen’s right to free political discussion and activity in producing reform must therefore be exercised with a view toward minimizing infringement of others’ rights. Of course, the interest of the state must be substantial to allow the limitation of individual freedoms. Since the public has a right to be protected from offending conduct, it may be regulated in the public interest even though the first amendment rights are infringed. This background is significant when examining the Supreme Court’s major pronouncements concerning the tactics normally associated with civil disobedience.

In the lunch counter sit-in cases, the Court reversed the convictions under state trespass laws as violative of the equal protection clause of the fourteenth amendment. It never dealt with the first amendment arguments presented and thus never expressly stated that sit-ins were protected under the amendment. However, in the breach of the peace cases involving demonstrations, the Court did deal with the first amendment. The Court found the statutes in question to be so vague that they could not be construed as falling within the proper bounds of state authority to maintain peace and order. Hence, their exercise of the rights of free speech and assembly occurred in a context which did not really amount to civil disobedience.

58. Stromberg v. California, supra note 50, at 369.
60. Mr. Justice Brandeis states this test most concisely in Whitney v. California, supra note 55, at 373 (concurring opinion):

[A]lthough the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.


61. Sweezy v. New Hampshire, 354 U.S. 234, 265 (1957): “For a citizen to be made to forego even a part of so basic a liberty as his political autonomy, the subordinating interest of the State must be compelling.” (Emphasis added.) See also Bridges v. California, 314 U.S. 252 (1941).


It is significant, however, that the Court now focused on the requirement that the means of expression be “lawful”—the antithesis of a sanction for civil disobedience. This requirement was further clarified in the 1965 decision of *Cox v. Louisiana*. Cox had led a group of demonstrators to the Baton Rouge courthouse to protest the arrest and imprisonment of students on the previous day. After exhorting the group to sit in at uptown lunch counters and refusing to leave on police order, he was arrested and convicted of disturbing the peace, obstructing public passages, and courthouse picketing.

The Court held that the conviction under the breach of peace statute deprived petitioner of free speech and freedom of assembly under the first and fourteenth amendments. It also found the statute unconstitutionally vague on the basis of *Edwards v. South Carolina*. Turning to the conviction for obstructing public passages, the Court found that the state can limit the time and place for assembly on public property because the first and fourteenth amendments do not grant the same kind of freedom to those who would communicate by marching and picketing as they do to those who communicate by pure speech. Although this particular statute was held unconstitutional as a prior restraint—giving police officials unbridled discretion on whether to allow a demonstration—the Court made it clear that regulation of conduct under a non-discretionary statute would be allowed.

A close reading of this case and the companion opinion indicates that while demonstrations are generally within the ambit of first amendment protections, they can nevertheless be subject to regulation by valid state laws.

*Brown v. Louisiana* appears at first reading to give some sanction to civil disobedience. There the petitioners, all Negroes, seeking to protest the denial of their constitutional right to equal treatment in a public facility, entered a public library reading room and requested a book. After being told it was not available and being requested to leave by the head librarian, they remained in the room for ten to fifteen minutes. They made no noise or other disturbance, but they were arrested and convicted under the Louisiana breach of the peace statute. In his “prevailing” opinion, Mr. Justice Fortas found no evidence to support application of the statute to petitioners since there was no showing of an intent by them to provoke a breach of the peace, and no circumstances to suggest a breach might result. Thus the petitioners violated no law.

The Court did recognize a right to peaceful and orderly protest under the first and fourteenth amendments which is not confined to speech in its pris-

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64. *Supra* note 63.
65. *Supra* note 63.
tine form, but extending to other types of expression, including "silent and reproachful presence, in a place where the protestant has every right to be . . . ." And even if the statute was applicable to petitioners' actions, the Court noted that their conduct could not be constitutionally prohibited. While this part of the opinion seems to sanction the demonstration method *per se*, albeit confined to the particular situation, a closer reading finds that the Court intended only to strike at the sham technique of using properly drawn statutes to mask a discriminatory practice.

Later, in *Adderley v. Florida*, the Court again affirmed its prior rulings that demonstrations, though legitimate forms of expression, may not be violative of valid state laws. The *Brown* decision is not cited in *Adderley*, but considering the special situation in the former case, the consistency of the Court's position on communicative freedom is apparent. This is confirmed by the Court's most recent statement on the tactics of civil disobedience in relation to the protections of the first amendment in *United States v. O'Brien*. Distinguishing most emphatically conduct from pure speech, the Court rejected the argument that the act of draft card burning was "protected symbolic speech" under the first amendment. In addition, it reiterated the constitutionality of limiting speech that is combined with conduct, subject to proper regulation. While the Court has continually ruled on infringements of the first amendment by state laws and policies which perpetuate discriminatory conditions, it has nowhere sanctioned deliberate violations of constitutionally valid regulations.

Some Popular Misconceptions

As we have seen, the philosophical foundations of the right and even the obligation to disobey laws of society are carefully conditioned upon the pursuit of justice and the delicate balance of the common good with the individual's exercise of his natural or God-given rights. Likewise a citizen's inalienable

68. *Id.* at 142.

69. *Ibid*:

Accordingly, even if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case. . . . The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution.

Mr. Justice Fortas' most recent pronouncements on civil disobedience indicate he intended no general sanction of this tactic. It is justified, he has stated, *only* to protest unjust and unconstitutional regulations. *Concerning Dissent and Civil Disobedience* 125 (1968).


71. *Supra* note 49.
rights guaranteed and protected by the Constitution are not without limitation. Set against this background, it is clear that today's advocates of civil disobedience have misinterpreted the only acceptable setting in which the violation of law in a free society can be justified.

One of the most popular misconceptions stems from the hypothesis that dissent to the point of civil disobedience is a part of our political tradition. Some accept this because they equate contemporary civil disobedience with the acts of protests which have occurred throughout our history. Yet this simplistic view cannot seriously be considered as justification for otherwise unjustifiable and deliberate violations of the law. Both critics and advocates look to the successes of sit-in campaigns waged by the civil rights movement and the "kind" treatment these demonstrators received in the Supreme Court as an example of constitutional sanction of all forms of civil disobedience. However, these demonstrators were, in fact, "obeying" or acting within the higher law of the Constitution, and the only act of disobedience involved was required under law to obtain the constitutional test. Far from sanctioning law violations, these cases affirmed the legal means for obtaining constitutional interpretation. Mr. Justice Fortas considers this process "a means, even an essential means, of testing the constitutionality of the law."

Undoubtedly, the success of the civil rights movement has had a great impact on contemporary civil disobedience tactics. And as a result of the confusion between true civil disobedience and those actions designed to test the constitutionality of local laws, there is a tendency to view with respect any deliberate violations of law to demonstrate some lofty cause. Although such actions are labelled as peaceful civil disobedience by the actors, they do violence to the legal order. Actual physical violence is the most obvious example of activity which denies the validity of the legal order. One of the reasons for an ordered society is to curb violence by channeling disputes into procedural avenues where they can be resolved peaceably. Resort to physical violence by an individual or a group represents an indirect denial of all order, no restraints being recognized. But those who resort to violation of just laws, no matter how peacefully, as a method of compelling redress of their grievances, cause direct violence upon this system and deny the legitimate rights of others. Mild examples of this form of violence can be found in the blocking of access to buildings, obstruction of traffic and the seizure of private and public property. The purpose of today's civil disobedience—gradual increase of pressure to force the government's hand—necessitates an

74. A. Fortas, supra note 69, at 62.
escalation of disorder until the goal is reached, and creates a climate of encouragement and approval of violence. While many civil disobedients profess nonviolence, they fail to recognize the possible consequences. It is probably the generally accepted view that "Most Americans share the conclusion that Government is not merely inevitable but highly desirable." Consequently, citizens should strive to preserve their government. If ours is truly a government of laws devoted to the common good, then such violence to the legal order cannot be tolerated.

One of the more difficult problems presented by the widespread acceptance of contemporary civil disobedience tactics relates to the reliance on individual conscience judgments of law. The traditional or classic concept of civil disobedience calls for the peaceful refusal to obey a law which one, in accord with his own conscience, considers immoral or unjust and therefore cannot obey. Indeed, our political tradition has long recognized that a man's obligation to his own moral judgment transcends his duty to the state, and this is reflected in the pride taken by Americans in our "personal independence and right to non-conformity." The practical difficulty with reliance on individual conscience, however, lies in the inevitable conflict between what different people consider to be moral or just. Obviously, a system relying completely on subjective moral judgments would be chaotic. As Chief Justice Warren has remarked: "None of us is so perfect as to be able to rely solely on his individual judgment in moral issues, especially those which involve his deepest emotions."

So we must recognize that there is a basic (and rebuttable) presumption that the law is just. When there is doubt, however, natural law doctrine allows a citizen to decide for himself. Even so, situations in which there is a clear duty to disobey are limited, as when the law commands an evil act. In all cases of doubt, the citizen cannot simply act on his own but is obliged to consult other knowledgeable parties to arrive at an informed judgment on the reasonableness of the law.

Unfortunately, many of today's civil disobedients are acting almost solely on emotional sincerity. This not only raises serious questions as to the correctness of their moral judgments but also underscores the fallacy of reliance on subjectively motivated conduct. In such cases civil disobedience cannot pos-

75. R.D. Abernathy, Solidarity Day Speech at the Lincoln Memorial, June 19, 1968.
76. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 92 (March 1, 1968).
78. Ibid.
80. See MacGuigan, supra note 39, at 124.
possibly be justified or accepted as a proper means of redressing grievances in our democratic system.

Perhaps the most fatalistic argument for contemporary civil disobedience is based on the assumption that no other means are available to obtain redress of minority grievances. Most likely those accepting this view today have done little to exhaust all possible legal avenues and resort to civil disobedience not so much out of conviction that there is no other way as the desire to obtain quicker results. It is difficult to swallow any claim that our free society is so bankrupt that no proper legal means exist for redressing grievances of minorities. If, however, we assume arguendo this to be the case, the logical course of action would be to overthrow the government and replace it with a system devoid of such defects. Would it not be better to establish a new and more acceptable system of government than to continue under a rule where violence and disorder are required to achieve justice? This may be too extreme for most advocates of civil disobedience but it seems to be the more logical course proceeding from the assumption that there is no other way.

The better answer lies first with the rejection of that basic premise of despair. Then there must be an unceasing search within our present system for the necessary means to obtain justice for all. If the means cannot be found, then we must proceed within orderly channels now available to create the means and, if necessary, fashion new channels. Though this may appear to some as a long and inefficient process, it is perhaps the best way yet devised by man for achieving the fullest liberty for all.

Conclusion

Civil disobedience as it is practiced in the United States today bears little resemblance to its philosophical antecedents and finds no sanction or justification in the first amendment freedoms. Its greatest danger lies in the fact that a growing acceptance of its use may lead to the collapse of our society's traditional mode of pursuing justice through law. Those who are quick to employ the tactics of civil disobedience bear a heavy responsibility to weigh the consequences. If they are sincerely committed to just causes, they must channel

81. Obviously this means for accelerating reform is a carry-over from the successful catalyst tactics of the civil rights movement. However, the contemporary application of these tactics to other causes has gone far beyond the lawful and peaceful civil rights demonstrations and cannot inherit the justifications for that movement. See Note, Contemporary Civil Disobedience: Selected Early and Modern Viewpoints, 41 Ind. L.J. 477, 479 (1966).

See also H. LASKI, THE STATE IN THEORY AND PRACTICE 65-76 (1935). Although Laski makes a case for the right to disobey, he does accept the "vital truth" that "it is impossible to condone the use of violence in politics except as a weapon of last resort; it must be shown that all alternative avenues of action have been exhausted before violence is resorted to." Id. at 71.
their full energies toward achieving them justly. Otherwise, their successful skirmishes will only result in the defeat of their ultimate purpose.

Yet the fact remains that frustrated minorities are daily confronted by laws and policies which are largely unresponsive to their needs, or, if responsive at all, seem hopelessly slow and inefficient. And there is the awareness that acts of civil disobedience have been effective in stimulating needed governmental action. To many this seems justification enough for the continued use of lawless conduct to coerce the redress of all types of grievances.

Lawyers must bear the burden of responsibility for this deteriorating situation. We have not only failed to delineate the delicate balance between the right to dissent and the duty to abide by the law of the land but also have allowed a whole generation of Americans to despair that justice through law is possible. Indeed, many of us openly advocate civil disobedience as the instrument of necessary social change, while others cling to the other extreme, opposing change in order to preserve legal purity. It is time that we cease abdicating our role as lawyers by counselling these quick and easy answers. It is for us to study the institutions for change now available, streamline their procedures, and propose new laws responsive to the valid social and economic demands of all our people.

In order to guard against further division of our legal system, we must continuously rethink and reshape the law so that it will always provide the best available means for achieving justice. We especially should know that our society cannot endure without law and without the respect for law by all citizens. Our mandate is to provide and maintain a legal order which will sustain that respect.

82. While great progress has been made under law—the Civil Rights Acts of 1960 and 1964, the Open Housing Act of 1968, the establishment of the Office of Economic Opportunity and its legal services projects, and the efforts of the Department of Health, Education and Welfare at school desegregation, for example—there is a tendency to disregard these developments as indicating that legal means are available and productive.

83. While a full discussion of possibilities in this area is outside the bounds of this article, a more available forum for the discussion and solution of social problems might be found if the existing rules concerning standing and declaratory judgments were liberalized and expanded. See Mr. Justice Fortas' discussion of Dombrowski v. Pfister, 380 U.S. 479 (1965) in his dissent to Cameron v. Johnson, 390 U.S. 611 (1968), where he speaks of the need for federal courts to hear cases wherein state statutes are attacked as abridging free expression on their face, or as discouraging protected activities through their application.

See also Witherspoon, Civil Rights Policy in the Federal System: Proposals for a Better Use of Administrative Process, 74 YALE L.J. 1171 (1965), for a discussion of possible redress of grievances through administrative procedures (e.g., human rights commissions and police review boards).
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