

Harrop A. Freeman, Bayard Rustin,
Richard Lichtman, Richard Wasserstrom,
Raghavan N. Iyer, Harry Kalven, Jr.,
and Scott Buchanan on

Civil Disobedience

AN OCCASIONAL PAPER ON THE FREE SOCIETY PUBLISHED BY THE CENTER FOR THE STUDY OF DEMOCRATIC INSTITUTIONS



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¶ “The right of protest,” “the challenge to law,” “non-violent demonstration,” “freedom march,” “civil disobedience” have become part of our everyday vocabulary in recent years. This Occasional Paper attempts an analysis of the subject in which several points of view are expressed and a number of aspects covered. The authors include lawyers, philosophers, and political scientists. The pamphlet is based on a series of discussions at the Center that began with a week-end meeting of Center staff and a group of thirty-five attorneys particularly concerned with the question, and continued throughout the following week among the staff itself. ¶ The introductory essay is based on a formal paper that Harrop A. Freeman wrote for the conference. The last essay, by Scott Buchanan, was prepared especially for this publication, an amplification of brief remarks that Mr. Buchanan had made on Martin Buber in the course of the discussions. The other contributions are edited versions of oral statements presented at the meetings. ¶ There are occasional overlappings and repetitions in these essays. They are purposeful, in that they help to show the variety of approaches and interpretations that are being used today toward the legal, social, and political questions arising from the practices and practitioners of protest—a matter now firmly in the American consciousness.

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Harrop A. Freeman

Mr. Freeman was in residence at the Center from September 1965 to February 1966, on leave from Cornell University Law School, where he has been professor of law since 1945 specializing in public law and jurisprudence. He continues with the Center as a Consultant. He is Quaker counselor to Cornell students and a practicing attorney with long experience in civil rights cases. Mr. Freeman has written many articles for legal journals; his books include *Peace Is the Victory*, *Road to Peace*, and a number of volumes for children (with his wife, Ruth Freeman).

During the past ten years society has become aware of a technique of challenging government action or policy. Various styles as sit-ins, wade-ins, teach-ins, preach-ins, protest marches, all use the bodies of individuals to call attention to an issue and to work for legal change. It is important to understand these and try to orient them into our system of law, for the Negro rights and the student anti-war movements (which in most respects are one movement) probably constitute the most important new moral-political force in America since the Granger-Progressive-Labor movements laid the foundations for the New Deal. The present movement evidences the yearnings of man at mid-twentieth century: it is anti-war, anti-injustice, equalitarian, non-violent. It is the young seeking to avoid political alienation and find a fulcrum for political leverage; it is the education community attempting to play its proper role in a developing society.

We may begin by remarking that many of the popular assumptions surrounding the phrase "civil disobedience" are misconceptions. The protest action

is often not civil disobedience but "obedience" (the leader of the second march of the Berkeley students to Oakland called it "massive civil obedience"). The total pattern is in the democratic tradition rather than anarchic or totalitarian (it claims to be an expression of free speech). The theory is not anti-law but within the law. As will be seen later, much of the technique goes back to Gandhi, who as a lawyer hammered out his program as a means of effectuating change within the law, when the normal procedures of law were inadequate or held captive by anti-legal forces, thus bringing about change in a democratic, consensual, non-violent way.

SOME DEFINITIONS

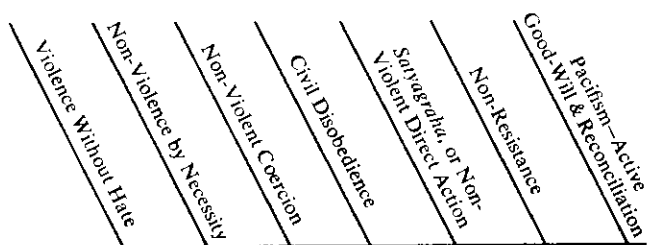
In any discussion of challenge to the State, its laws and its policies, we commonly hear such terms as the following: 1) non-resistance, 2) passive resistance, 3) non-violent resistance, 4) super-resistance, 5) non-violent non-cooperation, 6) non-violent direct action, 7) civil disobedience, 8) non-violent coer-

cion, 9) war or revolution without violence, 10) *Satyagraha* or soul force, 11) pacifism. I take item 1 to stand by itself; items 2, 3, 4, and 5 to stand together; items 6, 7, 8, and 9 to be in the same spirit; and items 10 and 11 to be essentially similar. An attempt will be made in the next section to discuss the characteristics of these various groupings.

There is another set of terms underlying the total discussion: Force, Coercion, Violence, Resistance. *Force* may be defined as physical power to effect change. *Coercion* is the use of either physical or intangible force to compel action contrary to the will of the individual or group subjected to the force. *Violence* is the wilful application of force in such a way that it is physically injurious to the person or group against which it is applied. *Resistance* is any opposition either physical or psychological to the will or action of another; it is the defensive counterpart of coercion.

CIVIL DISOBEDIENCE ON THE SPECTRUM OF NON-VIOLENCE

Because the current civil rights and anti-war protests involve persons whose acceptance and practice of non-violent protest is grounded in every shade of thought, it is essential to understand the total non-violent pattern. If we could plot a spectrum from violence without hate at one extreme to active good-will and reconciliation (pacifism) at the other, civil disobedience would fall close to the median:



It is very likely that those primarily classified in one category will use other of these means in certain situations, particularly means lower on the scale.

We use the term "civil disobedience" here as characteristic of the total spectrum for two reasons: 1) because it is the median term, and 2) because in the prefix "dis" is found the problem hardest for society to accept—the challenge to law.

VIOLENCE WITHOUT HATE: Almost everyone recognizes that on occasion a man who genuinely abhors violence confronts an insufferable evil and comes to feel that the only means of opposing it is by violence, which is itself evil. Abraham Lincoln may be taken as an example of this spirit in the use of violence.

NON-VIOLENCE BY NECESSITY: Persons or groups who would gladly use arms or violence against opponents often use non-violent means because they have none other available. Sometimes this may even be "hate without violence." The non-violence is expediency, not principle; it is negative or defensive rather than positive. Much Negro activity over the past hundred years in the South is of this type. The non-violent resistance of the occupied countries (Denmark, Norway, France, North Africa) to the Nazis is another.

NON-VIOLENT COERCION: Now we come to people having a choice, who use non-violence to modify the conduct of others to promote their own interests or ideals. The strike, boycott, or other acts of non-cooperation are the recognized weapons. These may seem to be non-coercive because they are mere abstentions. But they are coercive. Under modern conditions the "power structure" against which the resistance is directed must have the cooperation of the resisting group to survive. The non-cooperation compels power (which thought it had such absolute control as to prevent effective dissent) to make concessions, *even against its will*. The movement has a two-pronged attack: to touch the conscience of the "masters" and make them listen, and to recruit the support of disinterested onlookers for the "underdog." The labor strike, as conceived by Eugene Debs and used in the 1930's, is an example (the "sit-in" so effectively used by the civil and Negro rights movements originated in the 1936-7 labor "sit-down strike" in which the worker refused to leave his workbench). Strikes have often had extensive and profound political significance.

CIVIL DISOBEDIENCE: This has much the same purpose, relies on some of the same techniques, and is grounded in a theory similar to non-violent coercion (it is also allied to its other companions on the spectrum—*Satyagraha* or non-violent direct action and pacifism). It has one distinguishing characteristic: it is against a specific law, or an act of the State having

the effect of law; and the law is that of the State which has jurisdiction of the protester. In a very real way, therefore, *civil disobedience is civil non-violent resistance or coercion*, in the sense we speak of "civil" war.

There are other characteristics of civil disobedience used in its limited or proper sense: 1) "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*." 2) It is an intentional act, a chosen course, not occasioned by accident. 3) It is used for an external purpose (to call attention to injustice, to change conditions). 4) It is non-violent, at least in origin. 5) It does not have ordinary criminal intent. 6) It is a form of communication and asserts that it is within the theory of the First Amendment. 7) It is used by those who are in fact barred from otherwise exerting power. 8) It may be legal or illegal. 9) It can have a religious philosophy. It does not have to. When it does, it borders on pacifism. There is adequate religious justification, in addition to theories of natural law, for those who want to use it.

'SATYAGRAHA' OR NON-VIOLENT DIRECT ACTION: Gandhi has recorded both the empirical and the theoretical bases of *Satyagraha*. As a young lawyer he went to South Africa in 1893 to represent the Indian community, against which discrimination and discriminatory laws were rife. Unable to achieve his end in the courts, he established Tolstoy Farm and the Natal Indian Congress, which conducted boycotts, strikes, and other non-cooperative activity. Under assault and arrest he gradually developed theories of *ahimsa* and *Satyagraha* to explain his actual practice, as Mr. Iyer describes later in this pamphlet.

NON-RESISTANCE: The largest and most significant group of non-resistants are the Mennonites, who grew out of the Anabaptist movement, literally following the Sermon on the Mount, "resist not evil," and effectuating a complete separation of Church and State (in theory removing themselves from all State functions). The most famous non-resistant writers were Tolstoy (anarchist), Adam Ballou (New England Non-Resistance Society), and William Lloyd Garrison (abolitionist, reformer). The shadings here between non-violent direct action, non-resistance, and pacifism are hazy.

PACIFISM—ACTIVE GOOD-WILL, RECONCILIATION, A WAY OF LIFE: There is a sense in which "pacifism" is a political movement—the opposition to a war-power politics. This is the way in which the term is usually used by the outsider. It may be called revolutionary secular pacifism. It has a political philosophy of five tenets:

Violence hinders the achievement of a democratic and peaceful order.

Modern states are built on violence and only revolution can effect a pacifist order.

This revolution must develop and employ a technique embodying a non-violent ethic.

Decentralization in politics and the economic order is sought.

The ideology of non-violence has a direct relevance to politics.

Pacifism for most pacifists is much more than this—it is religious, a philosophy and way of life of which opposition to war and activity in politics are by-products. All great religions seek to lay down two great commandments: 1) To be a full man and in harmony with creation or the Creator one must live fully in body, mind, and psyche or spirit—there is no indication that one of these is greater than the other. 2) In order to do this one must learn to love one's self and only then can he similarly love all others or "neighbors." The presentment goes on: a) There is a piece of the Creator, creativity, uniqueness, in every individual; b) only as each fulfills his uniqueness is God or creativity living in the world; c) interrelations between persons must provide for the creativity of each to grow, mature, and express itself; d) any relationship which is exploitative — economically, sexually, intellectually, emotionally, politically—is wrong; e) power tends to be exploitative; f) love (and if necessary suffering) is the force that moves non-exploitably; g) the ultimate exploitation is killing a man, for you transform a creative human into a thing—no one can recreate him; h) the destruction of a man is therefore the killing of creativity, of God; i) therefore, one must be a pacifist. All fall short of the ideal, yet the ideal remains.

The pacifist will use appropriate means and seek ends in harmony with this philosophy. He will be highly eclectic.

CIVIL DISOBEDIENCE AND THE LAW

Probably 80 per cent of all non-violent challenges to law or State policy are totally "obedient"—distributing pamphlets on Vietnam or segregation, programs of voter registration, teach-ins, parades and picketing under permits or where no permits are required, etc. The present section of this paper does not deal with these cases, even though they represent the real core of the civil rights and anti-war movement, because they do not raise legal issues. When, however, a person challenges State law or policy by violating a specific law, this is a case of civil disobedience that presents certain legal problems.

There are those who tend to prejudge the whole issue of civil disobedience by restricting its meaning to intentional violation of a law already declared valid and controlling by the highest national authority. Such a definition cannot be accepted, for it is far more narrow than either the law or the practitioner of civil disobedience accepts.

In accepted legal terminology, I suggest 1) that civil disobedience is a recognized *procedure* for challenging law or policy and obtaining court determination of the validity thereof; 2) that theories of *jurisprudence* recognize the propriety of non-violent challenge to law or policy; 3) that the *obligation to obey the law* is not absolute but relative, and allows for some forms of non-violent challenge; 4) that protests and civil disobedience should receive *protection under the First Amendment*; 5) that even if the act of protest or disobedience is found to be a technical violation of law, the purpose of the disobedience should in some instances *cause the punishment to be nominal*.

1. *Procedure* is the body of rules for testing substantive rights. In law we recognize that a right (interest) without a procedure to protect it is no right at all. What we need to recall is that "civil disobedience" is one of the best accepted legal procedures. Let me illustrate:

The Tax Law requires one to report fairly his income and pay his taxes—all his taxes. But the law in this instance gives him a procedural choice to determine whether the State's command must be obeyed. He may either refuse to pay (civil disobedience actually encouraged by statute) and go into the deficiency

procedure and Tax Court, or he may pay (comply) and sue for a refund in the Court of Claims or District Court. A fairly similar procedural recognition is Title II of the 1964 Civil Rights Act.*

Further, in a very real sense every person who violates a contract and then litigates its meaning and legality, every business that suppresses competition and determines the issue in an anti-trust suit, every individual who continues to use a right-of-way his neighbor would close, every unauthorized user of a trademark or copyright or patent, every violator of a rule or order of the FCC or any other administrative agency, is engaged in civil disobedience as a procedure for testing the legality of a State action or rule that he finds unacceptable.

The Supreme Court has gone so far as to protect a person from criminal prosecution when he advocates violating a criminal law to test its validity (the law was alleged to be invalid because it discriminated). This is not unlike the issue that many of the Vietnam and draft demonstrators raise in asserting that the Vietnamese war is violative of international law and that they cannot be forced into war in violation of Nuremberg law. In *Keegan v. U.S.*, a member of the German-American Bund counseled evasion (refusal) of military service on the theory that when the Selective Service law barred Bund members from certain jobs this was unjust discrimination against American citizens rendering unconstitutional the application of Selective Service to them. The Bund wanted a test case. In holding that an acquittal should have been directed of one who counseled breaking the law, the Court in part said: ". . . One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the laws shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counseling, stealthily and by guile, to evade its command."

The same principle was applied and the *Keegan* case relied on in *Okamoto v. U.S.*, where Japanese-Americans who had been evacuated from the West

*Civil Rights Act (1964), Title II: No person shall "punish or attempt to punish any person for exercising or attempting to exercise any right" protected by the Act. The Supreme Court has said that "non-forceable attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution." *Hamm v. City of Rock Hill*, 379 U.S. 306, 311 (1964).

Coast into internment camps decided that they should not serve in the army under Selective Service, the theory being that while in custody of the government in these camps persons were not subject to Selective Service and that the law, if so applied, would be unconstitutional. This is similar to the argument of some protesters and draft demonstrators who insist that when Selective Service begins classifying them 1-A because they protest foreign policy this is a discriminatory application (*Yick Wo v. Hopkins*) and therefore unconstitutional, and so they are entitled to disobey. In conscientious objector and other draft cases the Supreme Court has explicitly required the draftee who considers he has been illegally classified to appear at the induction center and there disobey the law (refuse induction) as the procedure to challenge the classification as illegal (as a defense in his criminal prosecution to come).

There are other cases recognizing civil disobedience as a means or procedure for raising constitutional questions. Nor is it a valid position to suggest that once the highest court holds a law constitutional the right of disobedience ceases. This would freeze as permanent law the *Dred Scott*, *Plessy*, *Macintosh*, and countless other decisions that have since been reversed. I have not heard anyone suggest that Southern officials who attempt again and again to test the meaning of *Brown v. Board of Education*, or *Baker v. Carr*, or *NAACP v. Alabama*, or the civil rights cases of 1883 are to be punished for what is ultimately found to be "civil disobedience" by them.

2. *Jurisprudence or Legal Theory*: There are two theories here—one a very ancient one, and the other a recent one which I believe the United States Supreme Court is in the process of adopting. The first theory is that of *natural law* or *the higher law*. This theory has kept rulers "under the law," has met political crisis, has founded itself in *Logos* or divine law, and has allowed man to challenge the illegality of a law. When Antigone insisted upon burying her brother despite the king's edict that his body be cast to the dogs; when Christians refused to pay homage to Caesar's image with incense and wine; when Aquinas insisted that "human law does not bind a man in conscience . . . [and if it conflicts with the higher law] human law should not be obeyed"; when the American colonies declared their independence

of England because "all men are created equal . . . endowed by their Creator with certain inalienable Rights"; when the Supreme Court recognizes in conscience a "duty to a power higher than the State"—all of them relied upon a higher law, a natural justice, a code of man's fundamental rights no political power can eliminate. And this is the American tradition.

The second theory is that *non-violent revolution is within the law*. I have pointed out in the past that the world is being shaped by ten revolutions including "the non-violent revolution which is demonstrating that political change (India) and social change (Southern U.S.) can and must be achieved by non-violence." At the Center's 1965 convocation on the requirements of peace Arnold Toynbee and Senator Fulbright, in discussing the right of emergent people to revolutionary wars or "wars of liberation," stated that the twentieth century recognized the *right of revolution but not of violent revolution*; that wherever an order under law was established, the right of violence is lost and is replaced only with the right of non-violent change.

It seems that the Supreme Court was trying to commit itself to this theory when in the *Dennis*, *Yates*, and *Rowoldt* cases it affirmed "the basic premise of our political system — that change is to be brought about by non-violent constitutional process [and that] our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. To arm all men for ordinary change, the Constitution put in their hands a right to influence the electorate by press, speech, and assembly. This means freedom to advocate communism by means of the ballot box, but it does not include the practice or incitement of violence."

3. *The Obligation to Obey the Law* is often stated in absolute terms, but the above examples contradict this. It is sometimes stated in *prima facie* terms, but I believe it must be presented in relativist terms. The law clearly recognizes distinctions in motivation, or lack of motivation (insanity, in the course of a felony, premeditation). The cases we have examined above are only a few of those which recognize some relative right of civil disobedience. Let us examine civil disobedience and the duty or non-duty of obeying the law on logical-ethical grounds:

a) It is often argued that whatever is illegal is also immoral. Illegality = immorality. Law governs morality. But this argument presents us with a conflict of two moralities. That which was moral, prior the law, is faced with the new moral that "what is legal is moral." When two morals conflict, it is generally recognized the higher morality must control. Thus we are back to the relativist view of civil disobedience.

b) A second argument would be that obedience to law is just a matter of law (it omits morals). What is illegal is illegal. The law creates its own duty. This view is essentially totalitarian in taking no account of morals or of "higher law" obligations. On both this and the previous argument the Supreme Court has recognized some "duty to a power higher than the State."

c) In order to state all of the logical alternatives one would have to recognize the argument that no act which is moral can be illegal (or the obverse: no act which is immoral can be legal). Morality = legality. Morality governs law. This need not be labored. It is the "higher law" and Aquinas's argument. It is clearly relativist and puts morality in the driver's seat.

d) A fourth position would be Scott Buchanan's (as he outlines it later in this pamphlet), that a law is never really a command but only a question — "Shall you obey the law; will you obey the law?" Some, of course, answer—I'll hide my disobedience (speeding) and not get caught; others may try automatically to obey all laws, questioning none. With these two groups we are not now concerned, for we are saying here that civil disobedience is intentional action for ulterior reasons or goals. There are at least three positions for those who rationally weigh their response to a particular law. They may feel that everyone would agree that the action against it should be prohibited — and they will not disobey. Or they may feel that this law, relating it to all laws, is unclear and they may obey or disobey it as a procedure to test it or to get a new interpretation, the new interpretation thus becoming "law," so that they have in fact complied. Or they may decide to disobey the law as a democratic technique, an appeal to their peers. This may be inside or outside of legal procedures. This last group is saying: If "they" (the public, the district attorney, the court) agree with us, we are justified; if they disagree, we are ready to pay the penalty.

e) This "democracy" argument can be expanded into a fifth position. One side would argue that "whatever is democratically enacted must be obeyed" (51 per cent or majority-enacted, 49 per cent or minority-bound). The opposing side would argue that democracy is precisely the place where civil disobedience by a minority should be employed to ask for reconsideration of laws. Since ill-conceived or immoral laws do in fact get enacted, any minority (as Justice Douglas says, even the minority of one) has all the extended rights of free speech (picketing, sit-ins, demonstrations) to urge reconsideration. A rule that disobedience is never justified would deaden moral and democratic sensitivity and prevent legal change.

f) It must also be recognized that many laws are disobeyed in another sense: they are "not complied with," without any active concern by the State. The law says that a will must be executed before two witnesses, that an affidavit must be made before a notary, etc. The effect of non-compliance is that the law doesn't protect you. There are also times when a law may be disobeyed but no sanction is provided. There are times when what seems illegal is not really illegal (e.g., conflicting laws). The last is the argument of the sit-ins—there may have been a technical trespass under local law, but if the proper law (no discrimination) were applied, there would be no violation.

g) Finally, we may examine very briefly two of the most frequently made arguments against civil disobedience. The first is: *It would be disastrous if everyone disobeyed law.* This is an illogical argument from specific to general. The civil disobedient is not urging disobedience of all laws. He would never argue that one disobedience justified all disobedience. Nor is there the slightest evidence that others are caused to violate law by this disobedience or that an ordinary law violator cares a whit about it. In fact, conscientious objectors in prison have found the contrary among their fellow-inmates. The other argument is: *He who takes the benefits of society must bear the obligations of society.* To some degree this phrasing can be turned into a justification for civil disobedience (as it was by the American colonies: "No taxation without representation"). What of the young, the poor, the disenfranchised, the dispossessed? Aren't they saying: "You ask me to be drafted and fight a war when I have no place in the decision

process, to protect a system that provides me with no bread, to respect a legal system that consistently protects no rights for me? This is a two-way street. You ask me to obey duties without rights; I demand rights, and only then can I be expected to adhere freely to duties." Isn't the "benefits" argument an immoral and illogical one to the extent of our failure to fulfill these needs? Isn't it even a case of bad conscience?

4. *First Amendment Rights as Protecting Civil Disobedience.* This paper cannot discuss fully the concept of the First Amendment as an affirmative doctrine of "truth in the market-place" intended to challenge and change government action or policy. Alexander Meiklejohn and others have stated this view. I shall here give the merest outline of the case material. From the dissenting opinion in *Abram v. U.S.* (1919) to the latest statements in *Cox v. Louisiana* and *Garrison v. Louisiana* (1965) the Supreme Court has issued a ringing affirmation of truth in the market-place as the philosophy and core of democracy and First Amendment protection. The following excerpts, taken from seven Supreme Court decisions, could be greatly enlarged:

"Freedom of expression is the well-spring of our civilization. The basis of the First Amendment is the hypothesis that speech can rebut speech, propaganda will answer propaganda, free debate of ideas will result in the wisest governmental policies. Full and free discussion keeps a society from becoming stagnant and unprepared for the stresses and strains that work to tear all civilization apart.

"Full and free discussion has indeed been the first article of our faith. Its protection is essential to the very existence of a democracy. The right to speak freely and to promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes.

"The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute.

"Accordingly a function of free speech under our system of government is to invite dispute.

"Under the First Amendment the public has a right to every man's views and every man has the right to speak them.

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

"Finally, this freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

In *Musser v. Utah*, the Court squarely considered the right to advocate law-breaking, as follows: "In the abstract the problem could be solved in various ways. At one extreme it could be said that society can best protect itself by prohibiting only the substantive evil and relying on a completely free interchange of ideas as the best safeguard against demoralizing propaganda. Or we might permit advocacy of law-breaking, but only so long as the advocacy falls short of incitement. But *the other extreme position, that the state may prevent any conduct which induces people to violate the law, or any advocacy of unlawful activity, cannot be squared with the First Amendment.*" [Emphasis added.]

This is merely one application of the "clear and present danger" and "fighting words" rule of the Supreme Court. If recruiting members for the Communist Party (*Herndon v. Lowry*), if publicly advo-

cating polygamy (*Musser v. Utah*), if playing anti-Catholic records in streets where 90 per cent of the people were Catholic (*Cantwell v. Connecticut*), if condemning war and the draft and distributing literature to this effect to parents of draftees during wartime (*Taylor v. Mississippi*), if refusal to salute the flag during wartime when great national solidarity was sought (*West Virginia v. Barnette*), do not show a clear and present danger, how can the activity of demonstrators for civil rights, Vietnam policy, free speech, etc. present a threat to the nation? For the clear and present danger test has been summarized thus (in *Bridges v. California*): "What finally emerges from 'clear and present danger' cases is a working principle that the substantive evil must be *extremely serious* and the degree of imminence *extremely high* before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech, or of the press.' *It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.*" [Emphasis added.]

In *Herndon v. Lowry* and *Thomas v. Collins*, in upholding demonstrations, strikes, and like action, the Court said: "But the protection they sought was not solely for persons in intellectual pursuits. It extends to more than abstract discussion, unrelated to action. The First Amendment is a charter for government, not for an institution of learning. 'Free trade in ideas' means free trade in the opportunity to persuade to action, not merely to describe facts. . . . Indeed, the whole history of the problem shows it is to the end of preventing action that repression is primarily directed and to preserving the right to urge it that the protections are given."

This rule moved one further step in the cases regarding permits for parades and the use of parks and streets. The net effect of a whole series of these cases is that if parks or streets are used by others for similar purposes, no free speech group can be barred from like use. Thus no prior restraint may be exercised, nor can conditions on the use of public places be attached that are in effect a denial of their use. Permits

must be granted without discrimination. The normal methods of use are allowed (including loud-speakers), subject to regulation to prevent undue disturbance. Within the past year the Supreme Court has clearly recognized sit-ins and demonstrations for Negro and civil rights and protected those engaged.

The Court has also several times stated that there is a distinction between violation of law where a third person is injured and one where merely the State is incommoded, and it has required the State to adjust itself to the citizen's conscience and First Amendment interests.* The opinions of the Court have referred to the fact that disobedience by Quakers and others was what produced the First Amendment freedoms. There is thus a strong case for the protection of protests and demonstrations — of civil disobedience — under the First Amendment.

5. *Punishment for Conscientious Civil Disobedience Should at Most Be Nominal.* Gandhi insisted (because of his emphasis on "sacrifice") that a civil disobedient must be willing to pay the "penalty," and many civil disobedience theorists (particularly pacifists) have required this quality to assure keeping the motives "pure." For this purpose I understand the argument. But I cannot, as it relates to the theory of government and the courts. It is possible that society is afraid enough of full exercise of First Amendment rights, of civil disobedience, of challenge to law, to require that well-motivated disobedients be held technically to have violated the law. But I cannot see any reason for jail sentences, or sentences more severe than for those who challenge law for other reasons as part of normal criminal intent. Yet that is the general practice. It is usual to take motive into account in sentencing, and I believe the essentially "democratic" or "First Amendment" motive should incur nominal penalties at the most.

*"The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. . . . The refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual." (*W. Virginia v. Barnette*, 319 U.S. 624, 630)

" . . . The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The Bill of Rights recognized that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." (*Girouard v. U.S.*, 328 U.S. 61, 68)

IN CONCLUSION

There has always existed a problem of the exact frame of reference in which society recognizes any civil liberty such as civil disobedience.

The minimum would be tolerance, or forbearance without approval. This is reflected in Judge Learned Hand's words in *The Spirit of Liberty*: "Liberty is so much latitude as the powerful choose to accord the weak." A slightly greater recognition would be peaceful coexistence, which is stated in Kant's words (*Metaphysik der Sitten*): "Every action is right which, or according to the maxim of which, the freedom of will of each can coexist with the freedom of everyone

according to a general law." A third might phrase it as Christian charity: Love the person himself but disapprove of his errors or folly (and try to convert him); as Wordsworth said: "By discipline of time made wise, we learn to tolerate the infirmities and faults of others." Finally, society might take the position that the individual has a *right* of dissent (and of civil disobedience) because of the advantages accruing to society from free and open discussion. Here tolerance becomes justified — that is, juridified — on principle.

What I am saying is, let all at least tolerate civil disobedience; let those who can, grant it a legal right, for which this paper may be a partial brief. ■

Bayard Rustin

Mr. Rustin is now director of the A. Philip Randolph Institute in New York City after many years as director of the War Resisters League (of whose Board he remains a member). A Quaker and a long-time worker in pacifist and civil rights movements around the world, he was the organizer of the Freedom March on Washington in 1963.

Negroes have engaged in civil disobedience on a broad scale since Dr. King's Montgomery protest in 1955, but it was not until students poured into the streets about Vietnam that conferences began to be held to examine the question of non-violence. I think this is significant, because I don't believe this present conference is being held because people want to examine the problem of non-violence *per se* but because they are uncertain about non-violence being used in relation to a question about which they are profoundly confused. Therefore, I am led to say a few words, first of all, about the students.

I want to make it clear that I have not agreed with the strategy and tactics of these young people in a number of instances. I have noticed considerable puzzlement about their methods. I am concerned about their believing that you can educate people on the basis of simplistic slogans like "Get Out of Vietnam" rather than on the basis of a concrete program of concrete recommendations. But it is important for

all of us to recognize that we share what many of us criticize, because in our society today there is no clear adult voice raising the kinds of questions these students are trying to raise. I am convinced that their probing is their way of attempting to find some reality in their lives, some relevance to social problems.

In my terms, I see it as an effort to find a religious synthesis. This is an interpretation they would completely reject, but to me it is an effort to find a moral basis for living in a society in which they see the poor remaining poor and getting poorer; in which they see Negroes getting poorer and, despite all the laws that have been passed, still less employed than ten years ago, more of them in segregated schools than ten years ago, more Negro slums than ten years ago. The rebellion of these students is an effort to come to terms with the inconsistencies and injustices of our society. None of us, despite their mistakes, ought to denounce this genuine search for reality, for relevance, for democracy.

I have worked in civil disobedience movements on every continent, and although I would not say that every group that has engaged in civil disobedience has asked its members to deal with all of the questions I am now going to raise, there is a general acceptance of at least four to six of these seven questions. When a democratic society has willed through democratic processes to establish law, it is the duty of that society to insist that its members adhere to the law. Therefore, I do not believe that one ever has the *right* to civil disobedience. Rather, one has something much more profound, and that is the *duty* to be a civil disobedient with the objective of revealing inconsistencies in the society and of correcting them. The willingness of a civil disobedient to accept suffering cheerfully is one of the most important ways of getting other people to think about the wrongs of society. Therefore, those who have engaged in civil disobedience have asked their people most of the following questions and have expected a "yes" to each.

Number 1: Are you attempting to break a law or are you attempting, rather, to adhere conscientiously to a higher principle in the hope that the law you break will be changed and that new law will emerge on the basis of that higher principle?

Number 2: Have you engaged in the democratic process and exercised the constitutional means that are available before engaging in the breaking of law? One cannot possibly say that Negroes a hundred years after the Emancipation Proclamation have no right to engage in civil disobedience when every Negro leader for at least fifty years has been struggling to get some semblance of justice for his people, and until the last ten years struggling unsuccessfully. When Negroes engage in civil disobedience they can truthfully answer this question with, "Yes, we have not only used but exhausted every possibility under the law to establish justice."

For the young rebels today a variation of the question must be posed: Is what you conceive so monstrous that you do not believe there is time for dealing with it by constitutional means? Their answer to this question is "yes" because they say that they do not want to see American boys dying who do not understand what is happening in the Far East; they do not want to see American boys burning huts with women and children in them. I have said to these young peo-

ple that they make too much of American brutality. The Viet Cong is equally brutal. Whether one is among the battling Pakistanis and Indians, or in Watts, or in warfare anywhere, the law of violence is such that each side becomes equally vicious. To try to distinguish between which is more vicious is to fail to recognize the logic of war. It is war that is the evil, not the Viet Cong, not the United States.

Number 3: Have I removed ego as much as it is possible to do so? That is to say, am I on this march because I want to get my picture in the paper, or because I'm just mad at society, or because my mother doesn't want me to do this and I'll show her? Or am I here for impersonal, objective reasons?

Number 4: Do the people whom I ask to rebel feel there is a grievous wrong involved, and does my own rebellion help them to bring to the surface the inner feelings that they have but have not previously dared to express?

Number 5: Am I prepared cheerfully to accept the consequences of my acts? Throughout the civil rights struggle I myself have fought against lying in the streets and being carried off by the police. When the policeman taps me on the shoulder and says, "You are under arrest," I believe I strengthen my ability to educate the people in the South who disagree with me by answering, "Yes, officer, I have broken the law because I believe it is wrong. I am perfectly willing to go with you. I do not want you to carry me." And when I get to the judge I want to say to him, "I have done what society feels is wrong. I accept the punishment."

Number 6: Am I attempting to bring about a new social order by my rebellion, or a new law that is better than the one that now exists?

And the seventh and final question that one must ask springs from Kant's categorical imperative: Would the world be a better place if everybody, not just in my country and not just those who are black, but everyone in the world did likewise? Obviously, if everyone in the world were prepared to burn his draft card war would not be possible.

I have tried here to outline the bases on which I believe a person has the duty, which is higher than the right, to engage in law-breaking. I want to add

for clarification that I prefer the term "the breaking of an unjust law" to the term "civil disobedience," because I do not believe that Negroes, for example, have engaged in civil disobedience in the United States; it is the white Southerners who have been civil disobedient because their laws have been in disobedience to the Supreme Court decisions and the Constitution. What Negroes have engaged in is indeed law-breaking, but I doubt that by any academic definition it could be considered civil disobedience. However, I would like to suggest some of the great contributions to American life that have sprung from the use of civil disobedience—to continue to use the term—as a mass tactic on the part of people who answer "yes" to the questions I have raised.

First, I believe that the use of civil disobedience in a democratic society is sometimes the only instrument left to that society to dramatize the injustice that has been hidden and to bring it to the surface. Quakers who refused to turn back runaway slaves made millions of people in the United States recognize the horrors of slavery; in South Africa there was the establishment of conscience when women in the Black Sash Movement would not remain silent and permit apartheid to be accepted in that society.

Second, civil disobedience insures religious liberty and civil liberty as nothing else can do. Though Socrates was not fundamentally interested in free speech, he was the grandfather of free speech: "I love my city but I will not stop preaching that which I believe is true; you may kill me but I shall follow God rather than you." In the same way Antigone was the grandmother of religious liberty, for she was prepared to die in order to be able to bury her brother, and a society was touched deeply.

Third, civil disobedience can create and establish just law, when legislatures are not necessarily prepared to do it. When President Kennedy put before Congress the Civil Rights Bill, he said a curious thing: Gentlemen of the Congress, I had never intended to put forth a civil rights bill; I didn't think it would be necessary. But we cannot have social peace in the United States until we can get the Negroes out of the streets of Birmingham and other cities. He was saying, in essence, that the legislature must now make law in the interests of what these people were in the streets for. We would not have

had the Civil Rights Bill at all if it had not been for the breaking of the law in Selma.

Fourth, civil disobedience forces the implementation of law that is on the books, but which, for a number of reasons, is ignored. There is an illustration from American history, and Mr. Freeman has referred to it. Because of labor disorder in our country in the early Thirties the Wagner Act came into existence in 1935. But from 1935 to 1937, in almost every case that came before American judges, injunctions were issued to prevent labor from organizing. So, in 1937, Walter Reuther and others went into the streets and into the factories and sat down. As a result, by 1938, the courts had stopped the foolishness of not implementing the law that was on the books, and there has been relative labor peace ever since.

Fifth, I am convinced that no society is safe which does not attempt to curtail civil disobedience but in which there are not individuals who will engage in it. Even against fascism, against social pathology, this is true, to say nothing of democracy. I have two simple illustrations. It was not until the Dutch dock workers in Amsterdam refused to handle Nazi goods and were shot and beaten and jailed by the Nazis that the resistance movement began throughout Europe. And my other illustration is the teachers in Norway who refused to use Hitler's textbooks. All of them were threatened with deportation, many of them were thrown into concentration camps, but to a man they stood firm. As a result, they broke the back of Hitler in Norway; he never attained complete control there.

Sixth and last, civil disobedience often effects, and directs, court decisions; it creates the objective situation out of which new court decisions are seen to be necessary and inevitable.

In conclusion, I believe there are certain concepts that mass civil disobedience must hold clearly and truly in order to know what its job is. If the courts and the executive and legislative branches of government in a democracy are in balance to deal with the contradictions and the injustices of their society, there will not be mass civil disobedience. It is when the road is closed that people go into motion, with the objective of improving the State, of creating a

new and different consensus. It is the people who are unwilling to carry on business as usual, and who, above all, are prepared to take the consequences of their acts, who move and touch society. I submit that no society is alive without men who are prepared to engage in civil disobedience. The meaning of the Nuremberg Trials was precisely that: Gentlemen, you say you did these things because they were

the law. We chop off your head because you did not have moral stamina enough to engage in civil disobedience against Hitler. I believe that the Nuremberg Trial decision was the right one (even though I would not have chopped off their heads). But the analogy is right only if it is universalized. It is the *world* that needs civil disobedience whenever injustice cannot otherwise be eradicated. ■

Richard Lichtman

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One of the most serious and frequent criticisms voiced against acts of civil disobedience is that they are wrong because they cannot be generalized. It is held that if everyone were to disobey the law the results would be disastrous, and that, consequently, nobody has the right to disobey the law. For if one person claims the right, there seems no reason why others cannot claim it too, and the result would be the destruction of law and civilized society.

This is a significant argument, but it is ambiguous. It can be understood in a variety of ways, depending upon the ethical position with which one begins. I shall consider the argument from the perspective of three different ethical theories. These are not the only positions which have been defended by moral philosophers, but they have all been used as an ultimate justification for the generalization argument, and the ways in which they differ from each other may help us to see some of the complexities of the situation.

First, there are ethical theories that evaluate acts on the basis of their specific consequences. The only pertinent considerations for this theory are: 1) What will be the results of this act? and 2) Are those results good or bad, or perhaps better or worse than any other alternative?

In the case of civil disobedience, for example, the moral agent who contemplates breaking a law will ask himself how the act will help to educate others, or what its consequences will be for the respect for law in the community. If the generalization argument is put to a proponent of this theory, he will have to interpret it in the following way: If I commit an act of civil disobedience, how many others will *in fact* follow my example and commit similar acts, and how good or bad will this general result be? In short, for the ethical theory that stresses individual consequences, the *general* result of an act is the sum of particular, individual results and nothing more.

This theory is relatively clear and straightforward, but serious criticisms have been raised against it. Let us consider only one. The theory stresses individual agents and individual consequences. But men are similar to each other in many obvious ways, and they play social roles that grant rights, duties, and privileges to those roles themselves. Men are not only individuals but members of classes—citizens, fathers, friends, elected representatives, and so on. What may be a good act if performed by a single actor may be disastrous if performed by other similar agents. That is, the addition of a series of apparently good indi-

vidual acts may produce a very grave result. An individual lie may be beneficial, but what if the practice were generally followed? Again, an individual judge may advance justice by permitting the introduction in a particular case of evidence that is otherwise invalid. But what if judges were to act this way generally? And how can one individual judge be granted this right without extending it to others?

Because of limitations like these in theories that recognize only the individual consequences of acts, other theories stressing rules, principles, and general patterns of behavior have been constructed. But these theories take two radically different forms, and must be sharply distinguished from each other. The first stresses pure principle; the second relies on the hypothetical consequences of a general practice.

1. The theory of pure principle is best seen in the ethics of Kant and must be stated here as its author intended it. The supreme principle of morality for Kant—the categorical imperative—requires that men act only on that principle which they could will as a universal law; that is, upon which other men could also act. But this principle is *not* derived from the consequences of everyone's acting in a given way. It is derived, rather, from the inconsistency, from the violation, of the rational will of an agent who acts in a way in which he could not permit others to act. Kant is *not* saying, do not act in such a way that if others were to follow you the results would be bad. He is saying, rather, act only on that principle which you would permit others to act on too, without violating your rational will.

One of Kant's best examples is the instance of lying. It is not wrong to lie because the results of everyone's doing so will be evil, the production of general unhappiness. It is wrong because if lying were made a universal practice, the very characteristic upon which lying itself depends—confidence in the spoken word—would be destroyed. Lying is only possible because most men generally tell the truth. In lying, therefore, a man is violating his rational will by making a purely arbitrary exception of himself before a rule that he otherwise endorses.

The logical inconsistency of this sort of practice is very nicely put in *Through the Looking Glass*,

where the following exchange occurs between Alice and the Queen:

"Please would you tell me—" she began, looking timidly at the Red Queen.

"Speak when you're spoken to!" the Queen sharply interrupted her.

"But if everybody obeyed that rule," said Alice, who was always ready for a little argument, "and if you only spoke when you were spoken to, and the other person always waited for you to begin, you see nobody would ever say anything, so that—"

"Ridiculous!" cried the Queen. "Why, don't you see, child—" here she broke off with a frown, and after thinking for a minute, suddenly changed the topic of conversation.

This is an important argument. For it rests on the very powerful consideration that what is right for one individual must be right for any similar individual in similar circumstances. And this contention is at the very heart of the notion of law itself, and of the ideal of justice. That is why Kant identified this principle with rational morality, and why other philosophers have stressed the significance of similar arguments. But, however important the principle, there are certain difficulties with Kant's formulation. First, it is very difficult to show that there is any logical contradiction in willing a whole series of acts that are ordinarily regarded as evil, acts such as wanton cruelty, for example. There seems to be nothing logically inconsistent about a man who wills the act of cruelty and is willing to have others act cruelly toward him.

Secondly, even in the case of lying, which is perhaps Kant's strongest example, the theory fails, because if I will the act of deception as a means of weakening confidence in speech and for the very purpose of ending significant discourse, I do not as a matter of fact contradict myself. Deception that intends chaos *can* be universalized. It is only if one grants the prior value of communication that a contradiction arises between that value and the general practice of lying. The contradiction does not arise from within lying itself.

And then there is the most difficult problem of all, the one that is most important for our purposes in trying to appraise acts of civil disobedience: the problem of competing generalizations. Precisely how

does one characterize the act that is supposed to be universalized?

For the same act can be described in an almost infinite number of ways. One could describe what is ostensibly the same act as, one, an act of murder, or, two, as the act of murder of an evil tyrant, or, three, as the act of murder of a tyrant likely to be responsible for the death of millions of people, and so on.

One can make the description of the act infinitely detailed and concrete, and it is fairly obvious that one could universalize some of these descriptions and not necessarily be able to universalize others.

I might not be able to will the general rule that people may murder whom they choose, but I might perfectly well be willing to permit others the right to murder a tyrant responsible for the death of millions. How do we choose from among these descriptions? The same act might be characterized as an act of lying, or as an act of lying designed to save another's life. To which of the descriptions am I to apply the categorical imperative? Kant's theory is not helpful on this point, and the whole theory tends to be irrelevant, then, for the problem of civil disobedience. For the theory does not tell us how to characterize an act of civil disobedience. Is it best described as the decision to disobey the law, or as a specific sort of decision to disobey the law in a particular way? And if the latter, which particular formulation of the act of civil disobedience is most pertinent?

2. In view of these difficulties, a different sort of theory has been constructed, one that stresses the general consequence of everyone's following a given practice. There the emphasis is neither on the particular consequences of a given act, nor the internal consistency of a given principle, but on what the result would be if a given act were generally pursued, whether in fact it is pursued or not.

According to this argument an individual act must be regarded as an instance of a *type* of act, and what must be considered is the consequence that would follow from the adoption of the whole class of acts of which any one act is only an instance. On the rule-consequence theory, it is the result of the acceptance of a general rule, not a specific instance of that rule, which must be evaluated.

But if a rule cannot be pursued generally, it then cannot be pursued by any given individual unless he

can convince us that he is significantly different from others to whom the rule applies. The rule-consequence theory does not claim that everybody will follow a given practice. It claims only that *if* the results of everyone's following the practice *would be* bad, then nobody has the right to follow the practice. The argument is hypothetical and cannot be invalidated by pointing to the fact that the practice is not widespread.

How is the argument against civil disobedience to be understood in terms of the rule-consequence theory? Probably along such lines as these: that civilized society depends upon law, and law upon general respect for legitimate institutions and their particular requirements, and that if the practice of deciding to disobey a particular law were to be generally pursued the result would be inimical to the well-being of social man. In short, the general practice of disobedience would be intolerable. And so, no particular instance of the rule can be tolerated. For if one can make an exception of himself, others can similarly make exceptions of themselves, and then the general result would again be chaos.

But there are several considerations that weaken the power of this argument.

First, we are still plagued with the difficulty of competing descriptions. How are we to characterize the act of civil disobedience? We may say that the civil disobedient has chosen to violate the law, but doesn't this account omit what is most significant about civil disobedience—that it occur peacefully, in public, accepting the legal consequences of the violation, and in general respect for the legal institutions of the society? Civil disobedience does not favor sheer violation of the law, but violation of a very specific sort. And although it might prove catastrophic to permit men to violate the law whenever and however they choose, the results will be far different and much less severe if men are permitted to violate the law only in the specific manner proposed by the theory of civil disobedience. Therefore, the rule-consequence theory of ethics does not lead us to conclude that civil disobedience will produce chaos.

But the critic of civil disobedience may reply: It is all well and good to distinguish mere violation of law from the peaceful, principled violation proposed by civil disobedience. But this does not eliminate the

fact that the civil disobedient is appealing to his own conscience in violating the law. He may violate law in a specific way, but that is because his conscience requires that specific act of him. How can the civil disobedient, then, refuse other men the right to rely on their consciences, even if it leads them to a conclusion radically different from his own? In short, if the agency to which he appeals is his own conscience, and he has a right to appeal to it, how can others be denied the right of a similar appeal? If their moral reflection should demand violence, why will they not be justified in that act?

This is a disquieting objection. The following reflections may suggest a valid reply. It is first necessary to distinguish between 1) justifying a moral act, and 2) justifying a moral agent. A moral act is justified when the reason that supports it is valid; that is, when the argument used to defend it is in fact correct. But a moral agent is justified when he performs that act which conscientious moral reflection has convinced him is correct. His defense of his act may actually be mistaken, judged objectively, but if that is the argument which persuades him, he is morally bound to accept it. Such an individual is justified in his person in the sense that he is worthy of our moral respect, even if his act cannot be justified because it is, in fact, without adequate defense.

Now, the advocate of civil disobedience is not contending that one has the right to follow conscience *per se*. The only moral act he is concerned to defend is the act of civil disobedience, specifically defined. Good men may counsel obedience or violence, but that is not a fact for which the civil disobedient can be held accountable. He does not regard such *acts* as valid, however much he may esteem the agents of those acts. The civil disobedient, then, 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.

Of course, nothing so far maintained in these remarks frees the advocate of civil disobedience from the consideration that other men may employ the same principle to arrive at results he would find deplorable. It is the same general argument that sup-

ports the refusal to pay taxes because they support the war in Vietnam, and the parallel refusal to be taxed because the money goes for welfare services.

The civil disobedient can meet the argument that general civil disobedience would produce undesirable consequences only with the counter-argument that this prospective evil is less compelling than the gross brutality or injustice against which the act of disobedience protests. And so, in fact, all such dissenters have contended, from Socrates to Gandhi, that in view of the malignancy of the world their act of defiance is a necessary course.

In further examining the society against which protest is required, the specific manner in which law functions must be noted. For the obligation to obey the law is differently grounded in different communities. Since law contributes to any viable society, and through social institutions maintains and develops human life, there is some obligation to obey the law in any society, whether it is democratic or not. But the strength of the obligation varies with the general humanity of the society, and in instances of extreme evil this obligation may disappear before countervailing claims.

There is a special obligation to obey the law in a democratic society because of the right that such a society confers upon its members to participate in the formulation of the laws by which they are governed. Democracy requires that in those matters not specifically exempted by a bill of rights the minority abide by the laws of the majority. A democratic community is constituted by the principle of free discourse—of public rational autonomy—and this principle cannot be sustained if the minority will not abide by the conclusions that the communal conversation proposes.

In a democratic society, the function of law is perfected in two ways: intrinsically, because of the autonomy conferred upon men who govern themselves through their own reason, and extrinsically, because the consequences of such laws are likely to be superior to the consequences of laws imposed by one who is not responsible to the community. Therefore, in a democratic society, a special obligation exists to employ democratic methods of change whenever possible.

Conversely, however, the argument against civil

disobedience is considerably weakened when genuine democratic processes fail to function. For, in such cases, what is damaged in the law through disobedience is far less worthy of consideration than what would have suffered attack had the law followed significantly from the will of the people. 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.

A point that has arisen several times during our meetings concerns the validity of defining civil disobedience so that public education is an essential part of its nature. Is this an appropriate definition?

It would seem not, because civil disobedience may perform another, and independently valid, function. It is also the act of a man who will not permit himself to be corrupted. His defiance of society at a given point may be based on the obligation to respect his own conscience—his moral autonomy—and on a respect for truth in human relations which leads him to make this fact known to his oppressor. He may have little hope of altering the law or system of institutions he opposes, but he will not permit that law to alter him.

An example, which might be multiplied many times, is the statement Debs made at his trial in 1918: "I cannot take back a word I have said, I cannot repudiate a sentence I have uttered, I stand before you guilty of having made the speech. I do not know, I cannot tell what your verdict will be, nor does it matter much so far as I am concerned." It is better that others should be persuaded, but it cannot obviate one's own obligation to dissent if they are not.

From this fact a genuine dilemma may very well arise, because the 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. In other words, one may actually find himself in the very difficult situation in which the act by which he maintains his own integrity is the very act by which he destroys the possi-

bility of educating the larger public. This is a real dilemma that cannot be solved in principle.

If civil disobedience intends to support the general structure of law, while violating a specific law it regards as evil, it becomes irrelevant at the point at which the entire judicial and legislative system, or the institutions in which that system are embedded, have become corrupt. It may also become irrelevant even if the whole system is not corrupt but if the evil that infects the system is so great as to demand its abolition through massive forces. To alter the whole system either general obstruction or violent revolution may be required, depending on which is most likely to lead to change, with the least violent disruption and the greatest hope for a new social system.

The great advantage of non-coercion is that it appeals to what is superior in human beings—to their highest faculty, the capacity for rational self-determination. But men may be so corrupted at a given moment in history, whatever their ideal possibilities, that an appeal to their rational nature will only compound existing evil. This is the point of stark choice when it is no longer rational to rely on reason. The individual who believes that in principled dissent he can appeal either to the reason of his actual antagonist or to some future forum of mankind may derive a sense of hope or guarded cheerfulness that fundamental union with ultimate reason provides.

The individual who acts in revolution, though he may despair of the means forced upon him, may nevertheless derive the consolation that comes to one who believes he will ultimately be exonerated by future generations of men. But for the man who opposes his will to the system without expectation of contemporary or future vindication, the condition is one of total self-reliance, and the state of the dissenter that of anguished heroism.

Whether that anguish is fundamentally comic or tragic will depend upon one's vision; tragic, if one suffers concretely the tormented choice and consequent immolation that re-affirms the world's old order, but finally comic, perhaps, if what one ultimately grasps is that abstract principle of absurdity which decrees that the best of men will, through their own nobility, be the agents of their own destruction. ■

Richard Wasserstrom

Mr. Wasserstrom, a former member of the faculty of Stanford University Law School, is now dean of the College of Arts and Sciences at Tuskegee Institute. He was for a time a Department of Justice attorney in Selma, Alabama. He is the author of the book *Judicial Decision*.

What do we mean by "an act of civil disobedience"? What are the characteristics that differentiate it from other acts of protest and illegality? There are at least three features of importance.

First, an act of civil disobedience is an act of *disobedience* of the law, and this is where I disagree with Mr. Freeman. There can be no fudging of this fact. If an act is performed under a claim of ultimately legal, that is, constitutional, right, it is simply not an act of civil disobedience, although it may be a protest against a serious wrong and may be conducted in a fashion otherwise identical to that of an act of civil disobedience. The point is important because it makes every case of civil disobedience a hard case. It forces the proponent of civil disobedience to take account of the fact that the act is illegal, and that the burden of proof rests on him to show the justifiability of his action. It makes every proponent of civil disobedience confront the moral issues surrounding the contemplated action.

Second, any act of civil disobedience is an act of *civil* disobedience. The demands of civility require non-violence as a constituent aspect of the actor's conduct. The line between violence and non-violence is not always clear, but this does not weaken the basic point. Aggressive action which seeks to destroy through force the instruments of oppression or immorality or injustice is not civil disobedience, although I hasten to say that in some extreme circumstances it may be entirely justified conduct.

Third, an act of civil disobedience must be a public rather than a private act. A doctor, for example, who decides that it is right to violate the abortion law of California is not engaging in an act of civil disobedience, for not only will he perform the abortion in private but he will try to keep his actions secret. Acts of disobedience are not acts of civil disobedience unless they are deliberately and con-

sciously made public acts by the actor. To recognize this is to go a long way toward understanding the truly interesting thing about the nature of civil disobedience, namely, that its primary function is always an educative one, rather than simply the prevention of an unjust set of circumstances.

We may feel that we are right in disobeying some law or set of laws because the consequences of obeying them would, on the whole, be more deleterious than those of disobeying them. This is one kind of activity, the prevention of unnecessary harm, suffering, or injustice. But there is another related activity, that of seeking to educate the community-at-large about the injustices or harmful consequences of certain laws or policies, and one effective way of doing this is to engage in a public act of civil disobedience.

One way we can know about the pedagogical import of what we are doing is through history. We can learn a lot about the circumstances of civil disobedience by looking at situations in which it has been successful in the past. We can also try to ask the same kinds of questions that we would ask as teachers in a class. I would not teach my own children, who are very little, in the same way I teach my students at college. How receptive are they to learning through example? There have been civil rights demonstrations and acts of civil disobedience that have proved effective because there was a clear willingness on the part of the populace to be taught, to be reminded, for example, of the evil of racial segregation.

The public non-violent character of any act of civil disobedience has at least two not wholly consistent classical consequences. First, the fact that a person who engages in civil disobedience is willing to suffer the legal punishment of his illegal conduct helps to guarantee that motives of self-interest will not lead

him to make faulty calculations of the rightness of his actions. The risk of this very largely disappears if the actor makes no secret of his act of disobedience and invites the full application of the legal sanctions. This is particularly true when the legal sanctions are fairly severe. On the other hand, the fact that the act of disobedience is public carries with it the additional risk, which is not shared by private acts of disobedience, that a bad example will be set and that others will regard the actor's conduct as a claim that indiscriminate or general disobedience is right and proper.

The point can be made in more general terms. The fact that every act of civil disobedience is an attempt at civic education implies that the actor make certain before he acts that he has selected an effective pedagogical technique. The problem is not just that others may draw an improper lesson from his act of civil disobedience but that he must consider whether his act will be an effective teacher of whatever it is he wants his students—in this case, the populace—to learn. This is what makes Mr. Rustin such a good teacher of us all: he is a strategist. Strategic as well as moral considerations must therefore play a much larger role in the civil disobedient's deliberations than I suspect has often been the case. The sincerity of one's beliefs, for example, is not enough justification

in itself for concluding that civil disobedience is the best pedagogical device to get one's message across. In some contexts it may alienate just those persons whom the actor wishes to educate. A failure to attend properly to both strategic as well as moral dimensions can be disastrous to the cause.

One of the fascinating things about morality is that there is much greater agreement about what is moral conduct and what is not than we sometimes realize. I suspect that one reason why some movements are effective is that there is a substantial consensus on both sides—the teachers, as I would call them, and those whom they are endeavoring to educate—that something immoral is going on that must be corrected. There *are* criteria by which one can decide whether what he is doing is morally sound: the willingness to universalize the principle of action, the willingness to take into account the consequences in terms of harm, and so on. But there is no set of mechanical rules by which to determine when disobedience to the law, and particularly civil disobedience, is morally justified. There are some very special considerations that are relevant to civil disobedience, but there is no talisman for moral deliberation and assessment, any more than there is anywhere else in morality. ■

Raghavan N. Iyer on Gandhi

Mr. Iyer was a Fellow and Lecturer in Politics at St. Antony's College, Oxford University, from 1956 to 1964. During this period he was also a Visiting Professor in Political Science at the Universities of Oslo (1958), Chicago (1963), and Ghana (1964). He joined the Center in 1964. He is also a member of the political science faculty of the University of California at Santa Barbara. He was educated at the University of Bombay and at Oxford (Rhodes Scholar; D. Phil. in political philosophy). His book, *The Glass Curtain*, was published by Oxford University Press, which will also publish his exhaustive study of the political and social thought of Gandhi.

Gandhi presents us with a problem, for he had both a vision of the radical transformation of the existing social order and political system and, at the same time, a concern to evolve a revolutionary technique of political action and social change within the limits

of the prevailing conditions of politics and society. It is difficult to keep this distinction between the larger and the more immediate concerns of Gandhi in his own work. But what united both concerns was his constant belief that in regard to every single political

or social action or program one must ultimately seek for legitimation of that act or program in terms of *satya*, which is his doctrine of truth and integrity, and in terms of *ahimsa*, which is his very complicated theory of non-violence.

No external authority can claim higher status than *satya* in the religious or political sphere. No political or social sanction can be assigned a superior legitimacy to *ahimsa* or non-violence. The *Satyagraha* doctrine, then—the adoption of non-violent resistance in the broadest sense—was an attempt by Gandhi to raise the deliberate suffering of a man of outraged conscience to the status of a moral sanction that would compel respect and secure results.

In the light of these propositions, the State at no time can claim inalienable, unchallengeable authority for itself or its laws as long as it is an essentially coercive agency, even if it secures the tacit consent or acquiescence of most of its citizens or the active consent of a minority of elected representatives. The State is intrinsically coercive—and in their official capacities people will always tend to take legalized coercion for granted. As a result, there is always the danger in any State of the violation of individual integrity and dignity. In this view of the State, it is only the citizen who is a moral agent in a Kantian sense and who can, therefore, appeal to his own conception of moral integrity or truth against the authority of the State.

But this is so, said Gandhi, only as long as the means one employs are non-coercive. The moment he employs coercive means himself he puts himself on the same plane as the State. His superior moral position in relation to the State rests simply on the fact that he is a person and the State is no kind of entity. This belief is important to Gandhi's theory of political obligation.

One of our difficulties today is that most of our notions of law and morality are vitiated partly by legal positivism and partly by some form of historicism. The modern doctrine of sovereignty, which was originally evoked against a religious authority, has resulted in an emphasis upon the finality of a formal regulation of conduct by legalized force, without reference to its moral justification. Historicism as a doctrine originally arose as a reaction against the abstract doctrine of rational right, but by the nineteenth

century it had become a refusal to separate norm from fact in the realm of social reality. This is why, again and again in present-day discussions, we find that people somehow put the moral onus upon civil disobedience not because they are presupposing some explicit moral theory behind legal obligation or the morality of law but simply because they are influenced by a residual mixture of historicism and legal positivism, despite the repeated attacks on these doctrines by contemporary philosophers.

Gandhi's theory of political obligation is distinctive in that he sought to incorporate in it the demands of loyalty as well as the right to be disloyal. He said that the citizen's obligation is dependent upon the extent to which the laws of any State are just and its acts non-repressive. Submission to the State is a price paid for an individual's personal liberty, but it is always a conditional price. It is, therefore, not enough to distinguish between a democratic and an autocratic regime in order to establish the extent of the citizen's obligation. The misuse of power is an endemic danger, and the citizen can never afford to let his conscience go to sleep.

Gandhi held that every citizen is responsible for every act of his government. This is the most extreme doctrine of collective responsibility ever propounded. A truly just and democratic State deserves active loyalty, but the citizen always retains the right to disobey particular laws that he regards as unjust and repressive. The citizen cannot relinquish even a portion of his ever-present moral responsibility in the name of the social contract, or legal sovereignty, or tacit consent, or the rule of law. The citizen can always appeal against State authority: he must also accept the consequences as part of the same doctrine of responsibility.

It is increasingly recognized by contemporary moral philosophers that the very notion of authority (derived from the term *auctoritas*) implies that the individual is an author and is morally autonomous in some sense; otherwise, the concept of authority cannot be decisively distinguished from force or power. Any external authority presupposes that the individuals over whom it is exercised are moral persons, that they themselves are authorities in some sense that is logically prior, and, therefore, that they always retain the right to withhold, or continue to

render, allegiance to that authority. In the light of all this, it is easier to understand some of the complicated distinctions that Gandhi made between passive resistance, civil disobedience, and *Satyagraha*.

Gandhi recognized that passive resistance is as old as the human race. It is found in ancient Indian epics, among the ancient Greeks, in early Scandinavian law as well as in medieval German thought. But he believed that the doctrine of *Satyagraha* as he propounded it was rather new, although a development of a very old and universal conception. He laid explicit stress on non-violent means as an essential element in legitimating the right and doctrine of resistance but at the same time he conceded the importance of invoking "the public interest." The dictates of the individual conscience, if genuine, would arouse and appeal to the conscience of others. This was something that Gandhi was forced to presuppose, given his particular theory of human nature. In other words, one of the tests of the genuineness of one's own appeal to individual conscience is one's capacity to arouse the conscience of other men. At the same time he could not make the individual's duty to follow his conscience entirely dependent upon social recognition. A test of one's sincerity and genuineness may be the extent of social support, but the actual validity of one's appeal to one's conscience is wholly independent of social recognition.

This, I think, is what made it possible for Gandhi to evolve a theory of political obligation that is Socratic in essence. Is there a form of resistance compatible with respect for law and order? For Socrates, there was. It was possible to have a sincere, but not an idolatrous, respect for laws, and indeed one could argue that his way of submitting to the law was itself a form of resistance rather than that his way of resisting was a form of submission to the law. Very much the same is true in the Gandhian theory. That is why it is necessary to distinguish between a Socratic-Gandhian theory and the many other theories with which it may have affinities but which are essentially different.

How is Gandhi's theory actually developed? It was very important for Gandhi to distinguish *Satyagraha* in its most generic sense, which he said was like a tree

with many branches, from any one specific form of *Satyagraha*. Civil disobedience was one form of it; another was non-cooperation. Non-cooperation was a technique of social change. It was in principle universal and was not as difficult for large numbers of men to adopt as was civil disobedience, which was the assertion by a very special kind of individual in very special circumstances of the right of the citizen to resist particular laws and to reaffirm the autonomy of the human person.

Gandhi also wanted to distinguish both civil disobedience and non-cooperation from passive resistance. Passive resistance as practiced, say, early in the twentieth century by the feminists in England was for Gandhi essentially a way for certain people who were weak to draw attention to their own rights by undergoing some kind of personal inconvenience or actual suffering, though it did not preclude the infliction of harassment on the other party. Indeed, it was required that inconvenience had to be imposed upon other people in order for the right of a weak group to be given any attention at all. Civil disobedience, on the other hand, as Gandhi saw it, was the deliberate breach of immoral statutory enactments where one invokes the sanctions of the law and invites penalties and imprisonment. This can only be practiced as a last resort and by a select few, who have the moral stature to challenge the law and to accept the consequences.

Civil disobedience presupposes the habit of willing obedience; that is, if a man is not respected as a generally law-abiding citizen, then the authenticity of his invoking the sanctions of the law to declare his strong feeling about the injustice of a particular act is undermined. Therefore, Gandhi said, what is "civil" in civil disobedience influences the manner of resistance, its means of legitimation, and also the subsequent conduct and the personality of the resister, who must show the most willing obedience to the discipline of being jailed; in fact, Gandhi drew up a long list of rules for civil resisters, rather like the army rules that he encountered during the first World War.

Civil disobedience is despicable if it is a mere camouflage for some other goal or end, such as a cover for concealed violence. The moment this fraudulent element enters into civil disobedience, it ceases to be "civil"; it ceases to be genuine civil disobedi-

ence. The civil resister is not an anarchist. Gandhi had great sympathy for philosophical anarchism, but it is distinct from civil disobedience. The civil resister wishes his opponents no ill; he wants actually to "convert" as many of them as possible. Civil disobedience, if it is to be "pure," can never be followed by anarchy; if it is, then the civil resister must take some of the responsibility for that anarchy.

In a well-ordered State, civil disobedience would be very rare, although, of course, the right to it always remains inviolate as part of the moral autonomy of the individual citizen. Its occurrence is an index of the extent to which democratic procedures are working and the State is maintaining the minimal conditions of tolerance and civility. True civil disobedience is reluctant; it is defensive.

Gandhi sometimes tended to idealize the concept of "pure" civil disobedience to the point where it becomes extremely difficult to apply, but he would have argued that this always happens: we all tend to idealize something—democracy or some form of legal system, the "law-abiding citizen" or the supreme power-holders. This is indeed a feature of all human action, which is necessarily imperfect but is stimulated by some image of an ideal model. But the *right* to civil disobedience has nothing unreal about it—it is simply an essential part of being a man. Yet, in any particular situation, Gandhi would plead for caution, for deliberation, for delay. It is important that civil disobedience must appear "civil" to one's opponent. The mere feeling on the part of the resister or his followers or some other people in society that he has been "civil" is not enough; the whole point of civil disobedience is that it is an effort, however desperate, and in some cases futile, to convince one's opponent about the integrity of one's own intentions and acts.

Gandhi's view of civil disobedience actually combines two separate notions. One is the notion of "natural right"—the inviolable right of every man to act according to his conscience in opposition to any external authority. Secondly, there is the duty of the citizen to qualify by prior obedience to the laws of the State for the exercise on rare occasions of his obligation to violate an unjust law. In practice, only a few will have prepared themselves for "pure" civil

disobedience by a particular mode of self-purification and self-examination, which reinforces their fearlessness, their moral strength, and their recognizable authenticity as civil resisters. If civil disobedience were frequent and sufficiently widespread, Gandhi held that it would be tantamount to a peaceful revolution against an entire system. This would be meaningful only if the entire system were so corrupt that mass civil disobedience is required. But mass civil disobedience could be considered as selfish if it is adopted simply to relieve the pressures put upon those who engage in it. Pure mass civil disobedience cannot really be organized. If it were, it would mean the manipulation of large numbers of people by a few men. A committee cannot have a conscience, any more than society as a whole can have a conscience, and so a committee cannot engender genuine civil disobedience by large masses of men without some element of distortion or even fraud entering into it. Mass civil disobedience in the pure sense must be spontaneous.

This leads Gandhi to make the distinction he always maintained between civil disobedience and non-cooperation. Non-cooperation is a technique of social action, which can be used by all kinds of people—children, women, people without votes: it can be used to boycott specific social institutions: it can be used to boycott a whole range of State functions and functionaries. It is ultimately justified as a continuing, developing struggle against exploitation, coercion, inequality, and injustice. The moral force of non-cooperation lies in the fact that it is non-violent and non-punitive, without vindictiveness, malice, or hatred. The non-cooperator always preserves the distinction between the people with whom he non-cooperates and their acts. He makes an effort to demonstrate that it is only with the acts that he is non-cooperating, and that this is really a form of non-cooperation with the system, the structure of which is such that men in certain positions cannot help acting reprehensibly.

Thus, non-cooperation becomes an invitation to officialdom to come out of their offices, wake up to their own responsibilities as persons, and recognize that as long as they are where they are they will be the tools of an iniquitous system. The more non-cooperation remains truly non-violent and the more

consistently it preserves the distinction between acts and persons, the greater the chance of demoralizing the regime and of inducing more and more people who are part of the regime to "get out from under." Whether and how far this can happen depends on the moral health of society; the success or failure of truly non-violent non-cooperation is an index of the moral development of the members of a society. Gandhi believed that unless you try, you cannot know; and when you try, you must always assume that there are people among your opponents who might be won over, maybe not fully, maybe secretly, maybe only in the sense that some of their defenses break down, and that they begin to lose the initiative in influencing the course of events. Like civil disobedience, non-cooperation too must not be undertaken without the most careful preparation and a scrupulous moral concern about how one should deal with one's opponents.

The common factors in civil disobedience and non-cooperation are reliance upon conscience and reliance upon public opinion. Both are needed because an appeal to reason does not necessarily change settled convictions. Gandhi knew that human beings are not rationally induced to change long-standing prejudices. The appeal to reason is necessary but it is limited. One makes it, but then one must have another form of appeal, and for Gandhi this is the appeal to the heart, to the conscience, decency, and moral self-respect of other men. This appeal can be made only through inflicting suffering upon one's self and refusing to inflict suffering upon other men. Of course, this does not mean that any form of suffering necessarily moves the hearts of men, but this is possible (insofar as one's opponents are human) if the non-violent resister is a genuinely humble man, always willing to check his own authenticity by honest and fearless self-examination and also by an assessment of public opinion to determine whether he is carrying conviction even with a few men on the other side or among the hitherto apathetic and unaligned.

To say that the appeal to reason is inadequate or that the appeal to the heart will involve suffering is not the same as abdicating reason altogether or wholly abandoning concern for human happiness. However, it is true—and I think this is the sovereign difficulty in Gandhi's theory for a number of people who haven't understood his presuppositions or don't

share them—that Gandhi could not accept the over-rationalistic assumptions of the eighteenth century or the exclusive emphasis upon happiness of utilitarian doctrines in the nineteenth century and since. Indeed he could not because if the purpose of civil disobedience and non-cooperation is to "convert" and not merely to convince the opponents, it requires from the start an attitude of mind that leaves room for one's opponent to accept the reconciliation that is sought without loss of pride or "face."

This is a very important part of Gandhi's theory. It is why he laid down elaborate prerequisites for civil disobedience and non-cooperation—a concern for the justice of the cause, strict non-violence in thought, speech, and deed, the capacity and willingness to suffer, moral discipline, humility, and, above all, the willingness to engage in what he called a "constructive program" of social and philanthropic activities among the people on behalf of whom one is going to offer resistance or non-cooperation. In this way the resister shows by his conduct that he really belongs to these people, that he has fully empathized with them. If this is a "technique" that is to be evolved and applied, it can only be used effectively by people who will throw themselves selflessly into the amelioration of social conditions and will show themselves capable of the kind of courage and fearlessness and strength needed for authentic civil disobedience or non-violent non-cooperation.

Having set down all these requirements, Gandhi was nevertheless willing to recognize a very wide range of forms of civil disobedience and non-cooperation. Fasting, for example, is a very special device to be invoked only by a very, very few people in extreme circumstances; on the other hand, boycott can be used more widely. He elaborated on every one of these techniques and showed its limits and its possibilities. As he well realized, a campaign of any kind, its strategy and the choice of tactics, must be determined according to the exigencies of the situation.

This is not because of any crude or common notion of expediency. It is, rather, because there is no way to measure one's moral strength and authenticity except in relation to the factors present in a given situation, as well as by trial and error. These have to be explored as far as possible by prior inquiry: one has to find out how many people care and how much

they are prepared to do. Then one will be able to re-examine himself and if he finds he is willing to set himself higher standards than most men, he may say to himself, "I want to act despite the fact that so many people don't seem to care enough or at all. Even if I live under a system so corrupt and in a society so apathetic that most people have been demoralized, I must still act if only in order to live with myself." The logic of this extreme situation is the tragic and superogatory burden of martyrdom. (Martyrdom, however, Gandhi pointed out, arises much less often than one might imagine.)

Gandhi saw how difficult all this was from his own experience. As he said again and again at the end of his life, his whole experience in India was a tragic disappointment to him. The purest form of resistance that he ever engaged in, he felt, was in South Africa, because there he had dealt with illiterate workers, many of whom were utterly sincere, who recognized what was wrong and prepared themselves for heroic resistance and sacrifice. In India, however, the movement became fashionable and a lot of intellectuals in the cities moved in on it. This doesn't mean that Gandhi thought nothing had been gained in India, or that no *Satyagraha* had been offered, but among the Indians in South Africa he exulted again and again in the extraordinary heroism of individuals. In India, however, he was constantly admonishing and cautioning and chiding and chastising people who were full of emotional enthusiasm and who entered the movement in no spirit of cool, classical resolve, who were not willing to make a detailed study of specific problems, and who tended to be less concerned with injustice itself than with the success of their own act of resistance in overcoming a crippling sense of national humiliation.

Broadly speaking, Gandhi thought that there would be five stages in every movement: first, indifference; second, ridicule; third, abuse; fourth, repression; and, finally, respect. He said that if a movement does not survive the fourth stage, it has not even begun to count. It must survive indifference, it must survive ridicule, it must survive the most violent abuse: but, above all, it must survive repression. If, after repression, the movement breaks up, it means that it never was a genuine movement. So, unless one is prepared to endure through the fourth stage, one has no real

chance of securing respect. This is why the movement will take time and cannot secure dramatic results overnight. Indeed, he said, a "law of progression" applies to the movement, by which he meant that the movement, properly pursued, would grow from a preliminary battle for strictly limited objectives into a prolonged campaign with large and long-term goals.

In conclusion, I want to say that I have not attempted here to assess Gandhi's theory but rather to make it intelligible. He sometimes idealized certain conceptions, but some form of idealization, implicit or explicit, is to be found in every political doctrine and political system. It is inherent in the oldest traditions of political theory itself. Broadly, we might say that there are two familiar types of infuriating people. One is the moralist; the other is the legalist. The moralist is infuriating when he wants to raise every single issue, however local and specific, to the status of an eternal principle; the legalist is infuriating when he wants to reduce an important matter of moral principle involving basic human rights and human dignity to mere formalism or sheer expediency. The strength of Gandhi's theory lies in its avoidance of crude moralism by showing how important and how difficult are the conditions under which men may really successfully and consistently invoke eternal principles, and also in its rejection of the extremely shaky assumption of naive legalism that there is no moral justification called for and that the entire *onus probandi* rests always upon the citizen who dares to challenge *raison d'état* or upset public tranquility.

In essence, the doctrine of *Satyagraha* emphasizes that social and political conflicts can be handled best in an atmosphere in which the contestants respect the moral worth of each other, distinguish between measures and persons, conduct their battles in a spirit of self-criticism, and abstain from the cruder forms of coercion. When the coercive element is strong, it demoralizes the winner and humiliates the loser and leaves behind it a trail of continuing bitterness and resentment. Fear is always a bad counselor, and solutions appealing to fear are less lasting and satisfying than agreement achieved in the context of a consensus of growing good-will. Further, when a conflict takes place between unequal parties, it is tempting

for the stronger to regard itself as invulnerable, or to identify its own interests with the general good, or to think it can ignore with impunity the just claims of others. In such situations the appeal to force is useless for the weaker party, for it merely increases the complacency of the stronger. But the weaker can compel the attention of the stronger by showing reserves of moral and spiritual strength and by casting doubt on the self-assurance and moral complacency of the opponents.

Even if those who resort to *Satyagraha* fail to secure their ends, they always retain their self-respect, and they are morally enhanced even if they sometimes must willingly pay the price of political or phys-

ical martyrdom. *Satyagraha* can be easily abused, especially by those who expect too much from it, but at its best it is a vindication of the heroic possibilities of men in the face of evil. It is Gandhi's declaration of the dignity of suffering in a just cause.

Finally, to quote him: "If our country even in its present fallen state can exhibit this type of bravery, what a beacon light will it be for Europe with all its discipline, science, and organization! If Europe but realized that heroic as it undoubtedly is for a handful of people to offer armed resistance in the face of superior numbers it is far more heroic to stand up against overwhelming numbers without any arms at all, it would save itself and blaze a trail for the world."

Harry Kalven, Jr. on Thoreau

Mr. Kalven, a frequent visitor to the Center, is professor of law in the University of Chicago Law School. He is the author of *The Negro and the First Amendment*, a book based in part on a series of summer meetings which he directed at the Center, and of the forthcoming *Judge, Jury and the Criminal Case* (with H. Zeisel).

Thoreau and Gandhi are the two men we are all most likely to name as the major exponents of civil disobedience, and yet they are marvelously different. As Mr. Iyer described it, Gandhi tests his theory against a dialectic of experience time after time, revising it and writing endlessly about it. Thoreau spends one night in jail and writes about it in a great one-shot proposition that comes out of him full-blown, not a worked-out, systematically tested theory but one beautiful burst of insight that has had enormous impact.

Let me set up a somewhat arbitrary framework for discussing the points Thoreau makes in his essay, "On the Duty of Civil Disobedience."

The first issue is the calculus of the consequences. That is, when a man uses civil disobedience as his means of protest, his means of political action, is he obligated to weigh the consequences of his action? Thoreau's answer is both "yes" and "no." He pays lip-service to the idea that there is a calculus, that one

does not resist all injustice: "If the injustice is part of the necessary friction of the machine of government, let it go, let it go." It will wear itself out. On the other hand, there are times when the injustice is so great that the calculus is not required — no set of consequences outweighs the obligation to resist the injustice: "If I have unjustly wrested a plank from a drowning man, I must restore it to him though I drown myself. . . ." "When a sixth of the population of a nation which has undertaken to be the refuge of liberty are slaves, and a whole country is unjustly overrun and conquered by a foreign army, and subjected to military law, I think that it is not too soon for honest men to rebel and revolutionize. What makes this duty the more urgent is the fact that the country so overrun is not our own, but ours is the invading army." (This kind of surprise punch, incidentally, is part of Thoreau's style; he has turned things upside down for us: the case for rebelling is

much greater because we are the invaders and not the invaded.)

The fact is that the power of the essay comes from not recognizing the calculus. It comes from finding a very simple case in which nothing can be said for the other side.

We have talked a good deal in our meetings about my second point with regard to Thoreau: whether a civil disobedient acts with a desire to influence other people, or whether it is an act of private conscience. Is it a form of political action? Thoreau's situation is interesting because he is heavily committed to civil disobedience as political action and yet there never was a more privately written document than his essay. He was almost entirely concerned with himself; at the same time he has a shrewd and almost uncanny intuition that he has hold of a real political weapon. In addition, he has a real interest in having it make an impact on other people: "You do not resist cold and hunger, the winds and the waves, thus obstinately; you quietly submit to a thousand similar necessities. You do not put your head into the fire. But just in proportion as I regard this as not wholly a brute force, but partly a human force, and consider that I have relations to those millions as to so many millions of men, and not of mere brute or inanimate things, I see that appeal is possible, first and instantaneously, from them to the Maker of them, and, secondly, from them to themselves." This is a pure Gandhian idea—he is not simply butting his head against the wall; he hopes to have some consequences coming out of it. In going to jail, he is conscious of using a tactic, a means of communication, with some hope about its public effectiveness.

There is some irony in this view. He spent one night in jail and, as he accurately and rather poignantly describes it, it is very hard to believe that it could have made any difference to his fellow townspeople. In fact, one of his points is that they didn't seem to know about it. The actual experience must have been negligible. It is the essay that has the impact: it is the verbal message, not the symbolic message, that was successful.

The next point to note is Thoreau's feelings about what the quality of the moral obligation to obey law is, whether he recognizes an obligation, whether, in fact, there is any morality involved. His answer seems

to be pretty clearly "no." He doesn't understand the source of any sensible obligation to the State: "... we should be men first, and subjects afterward." He is proud to think that he does not rely very much on the protection of the State, and he would like not to rely on it at all. Undue respect for law is a great danger, he says: "A common and natural result of an undue respect for law is, that you may see a file of soldiers, colonel, captain, corporal, privates, powder-monkeys and all, marching in admirable order over hill and dale to the wars, against their wills, aye, against their common sense and consciences, which makes it very steep marching indeed, and produces a palpitation of the heart." (His capacity suddenly to present a homely metaphor like this is stunning.) He goes on, "Now, what are they? Men at all?" And the negative answer is clear: "The mass of men serve the State thus, not as men mainly, but as machines, with their bodies."

At this point, it would be interesting to ask Thoreau where, if his method of non-violence doesn't work, the logic of his position takes him. Does it take him to revolution? Can he stop where he stops, with an obligation primarily to conscience, and a view of society as a nuisance, but with nothing to indicate what he would do in the extreme situation, in which something more dramatic than non-violence is required? Isn't he well on the road to revolution in terms of his own logic? Yet you cannot be sure.

Then, there is the question of how one gets a chance to confront the established order. It is clear that for Thoreau the confrontation is always physical: "I meet this American government, or its representative the State government, directly and face-to-face, once a year, no more, in the person of its tax-gatherer." Tax-paying is his only handle to take a stand against the government, the only time the government has anything to do with him. All year he is looking for the government and finally it shows up on only one day in the form of the tax-gatherer! This is what Mr. Freeman has said more elegantly—there is a need for confronting the tax-gatherer, so to speak, in other contexts; you have to be creative about finding him, so that you can take your stand against him.

Then there is the question, should all remedies be exhausted before one moves to civil disobedience? Is there a problem of timing? Do you act right away, or

do you have to wait? To this Thoreau's answer isn't so thoughtful, but it is highly effective. He doesn't have time, he says; he is a busy man; he has other things he wants to do with his life: "As for adopting the ways which the State has provided for remedying the evil, I know not of such ways. They take too much time, and a man's life will be gone. I have other affairs to attend to. I came into this world, not chiefly to make this a good place to live in, but to live in it, be it good or bad. A man has not every thing to do, but something; and because he cannot do *every thing*, it is not necessary that he should do *something* wrong."

Thoreau says nothing about what some of us take as a special morality in civil disobedience—the need to accept the punishment. He goes to jail, but he goes because he cannot figure out any way of getting out of going. He offers no theory about the propriety of going or not going to jail; it just happens. It is difficult to attribute to him the kind of point the Gandhian theory includes or the Socratic position would have had originally, that there is something special about accepting the punishment and supporting the order in that way.

There is a marvelous passage in the essay, however, in which he delineates perfectly the uncanny *indifference*, so to speak, of people who are deliberately civil disobedient and go to jail: ". . . as I stood considering the walls of solid stone, two or three feet thick, and the iron grating which strained the light, I could not help being struck with the foolishness of that institution which treated me as if I were mere flesh and blood and bones, to be locked up. . . . I saw that, if there was a wall of stone between me and my townsmen, there was a still more difficult one to climb or break through, before they could get to be as free as I was. I did not for a moment feel confined . . . I felt as if I alone of all my townsmen had paid my tax. . . . I saw that the State was half-witted, that it was timid as a lone woman with her silver spoons, and that it did not know its friends from its foes, and I lost all my remaining respect for it, and pitied it."

Another serious point that Thoreau omits — I am sure deliberately — is the counter-value of order. He sees no real utility to the State. The State is not a

natural condition for human life; it does not have a decent, civilized purpose. To him jail becomes, metaphorically, a ground outside the State: to go to jail is a way of withdrawing from the State. The particular passage in the essay about this begins with the famous sentence, "Under a government which imprisons any unjustly, the true place for a just man is also a prison." But I think he is even better as he continues: "The proper place today, the only place which Massachusetts has provided for her freer and less despondent spirits, is in her prisons, to be put out and locked out of the State by her own act, as they have already put themselves out by their principles. It is there that the fugitive slave, and the Mexican prisoner on parole, and the Indian come to plead the wrongs of his race, should find them; on that separate, but more free and honorable ground, where the State places those who are not *with* her but *against* her."

As I see it, Thoreau is primarily interested in seceding from Massachusetts. He recognizes the collective responsibility for the injustice the State is committing. Again and again he says, you can't be neutral. He has other things he wants to do, like all people, but: "If I devote myself to other pursuits and contemplations, I must first see, at least, that I do not pursue them sitting on another man's shoulders. I must get off him first, that he may pursue his contemplations too." This is enormously powerful. He does not want to be the agent through the State of an injustice to another, or to pursue a neutral life that may not be contributing anything to the injustice but is nevertheless lending the State its support in some form.

This viewpoint produces, again, a question of internal logic. Is there some level at which collective responsibility must be said to evaporate, where one cannot feel strong guilt for something the State is doing? At what point does responsibility for the action of the State finally cease to be a source of personal anguish? The other question is whether it is *possible* to cease to support the State. Is there any physical way of opting out? Is there any activity a man can take that does not in fact involve him in some manner in the actions of the State? Further, if he is deeply serious about the improprieties of the State, is he not obligated to attempt to block it by overt obstruction? Is he not almost committed to

revolution if he takes his responsibility seriously?

Thoreau is obviously a man who does not see himself as belonging very intensely to the community in which he was raised. He tells about having been asked for a contribution for a minister whose preaching his father attended, and what he wrote about that, I think, is what he must have meant to write with respect to society as a whole: " 'Know all men by these presents, that I, Henry Thoreau, do not wish to be regarded as a member of any incorporated society which I have not joined.' " In other words, when did he ever join Massachusetts? Then he makes the rather charming remark, "If I had known how to name them, I should then have signed off in detail from all the societies which I never signed on to; but I did not know where to find a complete list."

There are three other things he adds in the way of novel emphases. He assumes that his case is perfectly clear on its merits and so he feels free to ask his fellows: Why are you sitting out there, why don't you go to jail too? And his answer is that they are not really men: they are so hobbled by their investment in the society that they are not free to do what they want to do. This is a recurring theme: "The American has dwindled into an Odd Fellow—one who may be known by the development of his organ of gregariousness, and a manifest lack of intellect and cheerful self-reliance; whose first and chief concern, on coming into the world, is to see that the almshouses are in good repair . . . who, in short, ventures to live only by the aid of the mutual insurance company, which has promised to bury him decently."

Second, there is a suggestion at the very beginning of the essay that perhaps there should be a constitutional limitation on the majority vote if any given vote is against the conscience of the individual. There are limitations on the majority vote, as we know, in our constitutional scheme, but Thoreau says that any action to which a man adheres as a matter of conscience should be constitutionally immune from the power of the majority. It would be impossible to state in any jurisprudential formulation that the power of the majority is bound by the power of one man's conscience, but Thoreau said that just as the State cannot tell a man what he can say or can't say, it cannot tell

him what he can do or can't do as long as he has a conscientious feeling about his act.

The third thing Thoreau contributes is his contempt for those who merely hold an opinion or merely vote: "Even voting *for the right* is doing nothing for it." "They hesitate, and they regret, and sometimes they petition; but they do nothing in earnest and with effect. They will wait, well disposed, for others to remedy the evil, that they may no longer have it to regret. At most, they give only a cheap vote, and a feeble countenance and a Godspeed, to the right, as it goes by them." Here Thoreau is almost a satirist and is extraordinarily effective, partly because it is not clear that anybody has said quite this kind of thing before and because of his talent for choosing the homely metaphor that is completely appropriate: "How can a man be satisfied to entertain an opinion merely, and enjoy *it*? Is there any enjoyment in it, if his opinion is that he is aggrieved? If you are cheated out of a single dollar by your neighbor, you do not rest satisfied with knowing that you are cheated or with saying that you are cheated, or even with petitioning him to pay you your due; but you take effectual steps at once to obtain the full amount, and see that you are never cheated again."

Now, in conclusion, let me please myself for one more moment and see if I can say why the essay strikes me as being great, in fact breathtakingly brilliant, writing, especially when, analytically, it leaves almost everything to be desired. Perhaps it is so effective just because it is so poor analytically. As Mr. Iyer has pointed out, Gandhi recognized that the power of civil disobedience was that it did not use entirely rational persuasion but a symbolic behavior, because this was a more immediate means of moving a person than simple rational argument. I suspect that the point holds for Thoreau too. The essay is effective partly because it is not a cold, analytical balancing of the considerations that would warrant disobeying the law but a burst of simple, spontaneous insight, rather loosely handled, done with a good deal of irony, and uncomplicated by any counter considerations at all. It is exhilarating, like civil disobedience itself. As rhetoric, it has the same force that civil disobedience has. ■

Scott Buchanan on Martin Buber

Mr. Buchanan, Consultant to the Center and in residence since the Center was established in Santa Barbara in 1959, was dean of St. John's College, Annapolis, from 1937 to 1947 and, with Stringfellow Barr as president, was responsible for the complete reorganization and reorientation of the curriculum of that college. He graduated from Amherst, was a Rhodes Scholar at Oxford, received his Ph.D. from Harvard, and taught philosophy at Harvard, the College of the City of New York, the University of Virginia, and Fisk. His books include *Poetry and Mathematics* (reissued in paper-back in 1964), *The Doctrine of Signatures*, and *Essay in Politics*.

There is a saying among lawyers that hard cases make bad laws. If this is true, we ought now to be seeing some bad laws in the making. But we may also expect to see some hard thinking, some critical thinking, that will make good jurisprudence. Some of this will be reported from court opinions, some in law journals, and some in politics leading to legislation. The individual citizen may feel all this in his personal affairs. He may be forced to face hard decisions. And all this may lead to the improvement of politics in general.

For anyone who reads a good newspaper, most of these motions in public affairs can be verified daily. Our own Supreme Court has been dealing with hard cases that have made laws or changes in laws that at least some think bad. There is heated controversy about these opinions of the Court, and there are moves to correct them by legislation. The citizens complain about a thing called alienation, which means that they are finding effective common decisions difficult. Some recognize the alienation and try to do something about it, and this means political action of some kind, although not yet necessarily good politics. And these developments are happening not only in this country but all over the world. In some places they have the appearance of rebellion and revolution.

And so we are hearing a rising controversy, the pleadings and debates, the briefs of the friends of the courts and the friends of the legislators, small and great debates, private and public, and finally the sit-ins and teach-ins. Part of this mutual persuasion goes to the aid of the individual who has to vote and suf-

fers the pain of indecision; part of it is concerned about the ancient question, What is Law? This is of course the central question of jurisprudence, or the philosophy of law. For many Americans it is a new question, unfamiliar because neither our lawyers nor our philosophers have paid attention to it before.

There have been exceptions to this academic default. We have lone figures who represent the European schools of jurisprudence. There are those who say with the positivists that law is the command of the sovereign enforced by the State, which holds a monopoly of force. There are those who say that law is the instrument of public policy which arises from conflicts of interest and power in society. The legislator, the judge, and the administrator are the decision-makers, and their decisions make law. Sometimes these decision-makers do more than react to pressures and interests; in the style of Rousseau's legislator, they see through the welter of conflict and divine the popular will, the general will. They persuade because they discover and show to the people what the people really will, rather than what they blindly think they will.

There are those who take seriously the theory that law-makers discover rather than make law, and find that genuine law is what the people ought to want. Their definition of law is that a law is a rule of reason directed to the common good and promulgated by the proper authority. In a democratic regime this means that the authority or authorities are the representatives of the people, elected or appointed to practice their deliberations for the explicit end of discovering the specific requirements of justice, peace,

freedom, and order in the current circumstances. The consent of the governed in this case is based on the capacity of the people to learn the real good that is hidden in the confusing apparent goods of their immediate experience.

Fragmentary echoes of these traditional schools of jurisprudence are heard in the current discussion. Because these echoes are thin splinters from the bodies of doctrine from which they come, they more often than not further confuse the discussion. Some of this confusion is moderated by the new style of the ordinary common man who has learned to talk again directly about justice. It is remarkable to hear this new voice circumventing the sophistication of the learned and professional schools which have found justice too abstract and empty for them to honor.

No doubt the mills of the schools will grind out extensions and new meanings of their doctrines, but they grind slowly and exceedingly fine. It therefore may be proper to strike a fresh note which is borrowed from a modern school of philosophy that has not yet paid attention to law. It comes from Martin Buber, who is known for penetrating insights rather than a system of thought. The insights come chiefly from his reading of the Bible and his experience of life in the last two generations. He has been one of several who have made the term "dialogue" a password between men of good-will.

Buber set out to show how the Old Testament, the Torah, could be read as a continuous and continuing dialogue between the people and God. It is through this dialogue that the Jews become the chosen people, a nation, a polity, the people of the law. But this is not to say that the theocratic principle was being imposed by a tyrannical God; the Jews always insisted on talking back to God, and the back-talk was not merely verbal. It was a dialogue between real persons, free persons, whose conduct involved their whole persons and whose learning involved defiance and submissiveness on one side and punishment and mercy on the other. It also involved patriarchs, judges, kings, and prophets as founders, leaders, spokesmen, and protagonists in a grand drama. Buber's primary interest is always religious; consequently there are commands issued with thunder and lightning, but there are often responses like earthquakes. It would be a comic reduction of Buber to

say that the Torah is a record of centuries of litigation, but it would not be far from accurate to say that the Torah is the demonstration in dramatic form of the doctrine that law is a teacher. This is, as a matter of fact, the fundamental meaning of the word Torah.

But the secret of this dialogical teaching by litigation is that by long habit with the Jews laws are not dogmas; they are questions to be pursued. They may be partial answers to previous questions, but they always bristle with new questions, questions asked of individual citizens or of groups of people, sometimes of the whole people. One of the high points in the Torah came on Mount Sinai, when Moses went up the mountain to talk with God, perhaps to negotiate with God about a covenant. The first time he came back with a Table of Commandments he found that the people had already repudiated the whole project, and he had to go back and re-negotiate. The later episode, when the people asked the judge Samuel for a king, resulted in a three-way negotiation in which God had to moderate Samuel's refusal to accede to the people's demands. Samuel's part in the negotiation was the dire prediction of what would happen to the people under kings, and when it came true, the prophets arose to talk back to the kings, as well as to God. And so when the Jews go into exile and finally into dispersion, the rabbis develop the endless dialogues of the Talmud and the Mishnah, all about the Law.

But what does it mean to say that laws are questions? In grammatical terms, laws are obviously imperative sentences; they are in positivistic terms commands issued by an authority to be obeyed by subjects on pain of punishment. But if the subjects are free persons who can object, talk back, and disobey, there is at least a moment when the law is a question, shall I kill, shall I steal, etc. If the moment is extended, there will be an argument with many more questions, questions about the jurisdiction of the law, about the meanings of killings, stealing, lying, and adultery, about the purpose of the law and the common good. These are familiar questions in the courts and, *mutatis mutandis*, for the legislature and the executive. In fact, whenever the law is in operation, it is itself a question and is up for questioning.

This insight, of course, is not wholly new in Buber. It is familiar in Plato's *Dialogues* where Socrates is its protagonist. It was fully lived out in Gandhi's career in law and politics. But it seems that Buber has given it its fullest development and range of application. The dialogue for him involves the full range of human action and it reaches to the depth of human freedom. Whenever it is introduced into the realm of jurisprudence it redefines law and gives it a significance that cuts across and enlivens all the conventional teachings of jurisprudence.

Even when the dialogue is not invoked as the proper context of law, it is necessary and proper to conceive a law as a question. It is a general or universal rule of reason formulated and authorized for the government of intelligent and free individual human beings. This means that it will necessarily have alternative interpretations in application; judgment and decision concerning the case will require definitions of terms, hypothetical middle terms, and observations of time, place, and circumstance. All these are commonplaces of the courts, but they are also tools that the citizen uses in his daily practical reasonings. They are the means or organs of his consent, and without this the law is arbitrary and blind.

Considerations such as these would seem to be the true premises for the positive as against the negative reading of the First Amendment. Free speech, press, assembly, and petition are more often than not thought to be privileges, rights that are claimed for and by the individual, immunities from public law. But important as these are for the individual, they are more important for public order and freedom. They are the routes by which the laws are learned and understood, by which they become imprinted in the habits and hearts of the citizenry. They are the means by which the laws are continually improved and adjusted to change. They provide the receptacle of deliberation within which the law lives. If the law asks questions of the people, the people respond by questioning the laws as well as their own hearts.

The current struggles for civil rights and for peace are heavily laden with questioning and questioned laws. Law-making, law-administration, and law-interpreting are extending the meaning of the rights of the First Amendment from literal speech and writing to the practical dialogue where action can speak

louder and more effectively than words. It is as if the elements of speech, press, assembly, and petition are being composed in living dramas, and these dramas are seeking legitimacy. Current history, as with the Greeks, is being written in tragic and comic styles. But this is not to say that all the world is a stage, but rather, as the saying goes, that politics has taken on dramatic form and moved to the streets. We are learning law by acting out justice and injustice in the streets, and the conflict of laws is reaching its full expression in living dramatic conflict. The authorities are saying that protests are justified, but not when they break the laws, and the answer is coming in terms of civil disobedience as the dramatic means of making laws, and making them just. We say that these legal-illegal dramas are the people waking up, and this gives rise to new politics, and, it can be added, this is the revival of law, not only the new laws that are being made, but the whole body of law achieving a new meaning and life.

But this brings us to the crucial paradox of this kind of jurisprudence. If all laws are questions, and generators of questions, is the doctrine not bringing all law into question? Is it not an invitation to anarchy? That could be the risk. Law as the command of the sovereign, be he king or people, law as the resolution of conflicts or the rational formulation of social policy, law as the rule of reason directed to the common good, civil law as the discovery of natural law—all of these traditional doctrines are brought into question. And it could be that each or all of them together have no answer to the question. If this is so, the whole political adventure of mankind is rendered futile. There are fringes of existential philosophy that are saying that this is the case, and they are pointing to the whole scene of a revolutionary world as evidence. The dialogical drama at this point becomes Job-like, as Buber does not hesitate to point out.

But this is to forget that most political orders and bodies of law have been cradled and born in revolutions, and that they are kept alive and responsible by the permanent possibility of revolution. Governments derive their just powers from the consent of the governed; it is often forgotten that the word consent contains within it the meanings of both assent and

dissent. When this is forgotten, law becomes the arbitrary, absurd machine that no man can either obey or tolerate. If the law loses its power to persuade reasonably, it is no law.

The power to persuade is correlative with the power to question, and so the law exists in the dialogue. This is the more adequate statement of the relation between the command of the sovereign and the obedience of free citizens. The command of the sovereign that is accompanied by overwhelming force is a kind of persuasion, but it achieves only the superficial appearance of obedience. It engages only a small part of a human being, and turns the rest of him into defiance or lethargy. It makes him a thing, and a heavy unmanageable thing such as we see eloquently dramatized when the police load bodies into paddy wagons or trucks in our current demonstrations. The command that allows itself to be examined and questioned while it is being formulated, that announces itself as reasonable and argues the case that falls under it, that continues due deliberation while it is being enforced, gains the whole human being and enlists him in the common search for justice. A good law not only is a question, but it keeps the big question, the question of justice, open. When justice is

sought, then the rest of the common good, peace, order, and freedom, are added to it.

Martin Buber states all this in a wider context. The dialogue of question and answer takes place only between persons who confront each other as I and Thou. These are preserved and maintained as whole human beings as long as the dialogue continues. When the dialogue stops, the I's and Thou's become Its, and they are subject to manipulation, coercion, and exploitation. The law itself becomes an instrument of such management. This is what happens when associations, corporations, political parties, and governments seek power and because they seek only power, necessarily fail. Those who are willing to sacrifice the dialogue for the greater good suffer the great disillusionment. They heroically surrender themselves to the collective cause, and by that very act become useless to themselves and to others. Furthermore, they lose the good of the intellect, truth is eclipsed. They enter the modern hell of ennui, anomie, alienation, and all the other fashionably named senses of unreality.

It may be pretentious to see the dialogue as a new doctrine of jurisprudence. Perhaps it is better to call it simply wisdom. ■

SOME READINGS ON CIVIL DISOBEDIENCE

(prepared by Harrop A. Freeman)

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