

Civil Disobedience

As for adopting the ways which the State has provided for remedying the evil, I know no such ways. They take too much time and a man's life will be gone.

HENRY DAVID THOREAU

Over the past 2,500 years, no matter how the goals and tactics have changed, the principle of civil disobedience has remained much the same.¹ In Athens, approximately 500 years before the birth of Christ, men began for the first time to seriously consider the relationship between the judgment of the individual and the laws of society.

Within the relatively safe structure of an ancient myth, Aeschylus, early in the fifth century and Sophocles, several decades later, wrote of an established power defied in the name of a conflicting conception of justice. In "Prometheus Bound", Aeschylus presents the story of the Titan who defied the decision of Zeus, King of the Olympian Gods, to wipe out the human race. Zeus appears as the established and tyrannical authority while Prometheus stands as the prototype of the civil disobeyer who, because of his sense of justice, suffers for breaking established but unjust laws. Sophocles, in his play, has Antigone ordered by Creon, King of the Thebes, to leave the body of her brother unburied outside the city walls, to be eaten by vultures. As a loyal citizen, Antigone is required to yield her conscience to the law of the state. But Antigone answers in the name of the morality of her religion and defies the order. "I cannot share in hatred but in love", she says as she is brought to Creon, who sentences her to death.

During the Roman Empire the earliest recorded incidents of collective civil disobedience took place. Unarmed Jews gathered in the streets of Jerusalem to prevent the installation of pagan images in their holy temple, plebeians, who had no rights as citizens, refused to enroll in the legions of Rome and early Christians resisted Roman attempts to make them accept pagan worship.

¹ Civil disobedience is being taken to mean an act of deliberate and open violation of the law with the intent, within the existing framework of the prevailing form of government, to protest a morally unjust wrong or to initiate change for a vital social purpose.

Civil disobedience has appeared sporadically since those early days of the Roman Empire. During the reign of Queen Elizabeth I many religious rebels held to and suffered for their beliefs against the ruthlessness of the Tudor state. They dissented from legally organized religious practice and refused to conform to laws which severely penalized those who chose to defy the establishment. Disobedience occurred again when Charles I attempted to levy a tax, basing his stance on the Divine Right of kings, by forced laws when Parliament refused to vote him the money. In 1626, John Hampden, one of the parliamentary opposition to Charles and a number of others refused to pay and were imprisoned. The *Conventicle Acts* of 1664 and 1670 made illegal meetings, except in Anglican churches, of more than four people for religious purposes. The Quakers defiantly gathered in the streets when their meeting houses were closed and although thousands were arrested, they carried on their struggle. By 1689 new laws allowed freedom of worship for all dissenters.²

Sufficient evidence is available to show that concern for the problems of establishment laws which may contradict certain concepts of morality or justice is not a twentieth century phenomenon. Also, it is clear that in many instances a retrospective examination may lead to some rather startling conclusions. Those very persons who, in their time, were considered by the protectors of the *status quo* as rebels undermining the foundations of the state are today seen as men who were simply striving for dignity and freedom.

As a social tactic, civil disobedience has developed dramatically within the past decade. Yet, it has been defined in contradictory terms; the mass media have used the phrase indiscriminately and the conditions under which it can be resorted to as a form of protest have been clouded in ambiguities. Undoubtedly, a consideration of the concept raises profound problems of ethics and legal and political philosophy.

The first great difficulty one confronts when analyzing the notion of civil disobedience results from the vague nature of an appeal to the concept of "conscience" or "morality". The civil disobedient, in order to justify his conduct, generally holds that he is appealing to a law higher than any positive law and that it is one which imposes an obligation so compelling that no positive law can outweigh it. The criterion is that the "moral law" develops a standard of conduct which can be appealed to in support of delib-

² George Woodcock, *Civil Disobedience*, (Toronto, 1966), where much of this historical background can be found.

erate resistance to laws regarded as so unjust that they cannot be obeyed in good conscience. This morality provides a criterion for conduct but it is not in itself a law in the positive sense. In his letter from Birmingham City Jail, Martin Luther King referred to this:

A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas, an unjust law is a human law that is not rooted in eternal and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.³

O'Connell speaks of an act of civil disobedience as "an affirmation of a higher law of God or humanity"⁴ and in many respects this notion attempts to resurrect the jurisprudence of natural law.⁵ To Chomsky, "[w]hat justifies an act of civil disobedience is an intolerable evil . . . no person of conscience can believe that authority must always be obeyed."⁶ John Cogley, of the Center for the Study of Democratic Institutions, points out that this notion of disobedience in the name of a "higher law" has been legitimized.

Two decades ago, at Nuremberg, we established the principle that under some circumstances such disobedience is a moral duty. During the war-crime trials some were sentenced to death for not practicing it and others were given prison terms. We took these drastic steps not because the prisoners were patriotic Germans but because they obeyed inhumane, immoral and reprehensible orders.⁷

Yet, to many observers, the above criteria offer no answer. Some react without any pretense of respect for the reasoning of men who disobey the state. Their contempt of those who violate the positive law in the name of morality and their preconceived notions of both the "make-up" of the protester and his goals are stated clearly and without shame. The protester is simply brushed aside as being against the "American way of life", too stupid to understand the consequences of his acts or someone intent on violence

³ Martin Luther King, "Letter from a Birmingham Jail", *On Civil Disobedience*, ed. Robert A. Goldwin, (Chicago, 1969), at p. 66.

⁴ O'Connell, *Is Civil Disobedience to be Regarded as a Paralegal Right?*, Trial, (December/January: 1965), at p. 13.

⁵ "(Natural Law) has its roots deep in the history of Western thought — Cicero and Aquinas, Hooker and Grotius, Locke and Jefferson and a host of others who have sought to justify conduct by virtue of its harmony with some antecedently established, superhuman, moral law, usually divine," Carl Cohen, *The Essence and Ethics of Civil Disobedience*, The Nation, (March 16, 1964), at p. 260.

⁶ Goodman, *Civil Disobedience: Is it Justified?*, New York Times Magazine Section, (November 26, 1967).

⁷ *Ibid.*

for the sake of violence.⁸ For Waldman, the "glib generalizations" of Martin Luther King are

...as bad as they are illogical. For when literally applied by many of his followers, who do not have the sophistication and training of Dr. King, such shibboleths lead to an intellectual, religious and moral justification for doing illegal acts of which violence and lawlessness are but the extreme expression.⁹

No violation of a government decree can escape the vigilance of that segment of American society which chooses to consider any major grievance as part of an international Communist conspiracy.¹⁰ To a large number of these people, the rule of law in North America has an intrinsic value apart from any other consideration.

Legal positivism as expounded by Hobbes held that the law was supreme and men had to blindly obey regardless of personal belief. Austin, about a century later, defined law as the command of the state and agreed with Hobbes that the starting point for law could not be what was right or just. The positivist theory, however, has been modified somewhat and become more aware of the problem of fidelity to law. The writings of Hart have finally, according to Fuller, eliminated "the pretense of the ethical neutrality of positivism"¹¹ and while there are still those who hold that a man's duty

⁸"For those who still have need to justify their sallies against the social order, a rationale is provided by a renewed emphasis on individual conscience." Endres, *Civil Disobedience and Modern Democracy*, (1968), 43 Thought, at p. 500.

⁹Waldman, *Civil Rights — Yes; Civil Disobedience* — No. (1965), 37 New York State Bar Association Journal, at p. 333.

¹⁰"...we must identify certain current forces whose aim is to destroy the law society. The inexorable requirement of communism to exploit every difference between men is now or should be clearly understood. Communism constantly exploits mankind's troubles ideologically, philosophically and psychologically. ...Communists have long been instructed to change passive attitudes to 'activist' attitudes, to intensify the struggle at all levels at all times.... Those who reject our legal methods... play into the hands of the international Communist conspiracy". Liebman, "Civil Disobedience. A Threat to our Law Society", *Symposium Civil Disobedience and the Law*, (1964), 3 American Criminal Law Quarterly, at p. 23.

"The first task of the genuine social reformer would be to ensure that the demonstrations and organized groups be kept as free as humanly possible from infiltration... it seems apparent that most groups have not made the slightest attempt in this direction.... Until demonstrators have put their own house in order, they hardly are in a position to complain about the response with which the fraudulent rowdyism that results is met." *Civil Disobedience*, Editorial, (1968), 2 Criminal Law Quarterly, at p. 1.

¹¹Fuller, *Positivism and Fidelity to Law — A Reply to Professor Hart*, (1957-58), 71 Harvard L.R., at p. 672.

to the state is so sacred that it can never be breached, they are, like those who deny that man ever has a moral duty to obey the law, an extreme minority today.¹² As MacGuigan has stated: "[t]here are too many precedents on the other side for us to be consistent in denying all civil disobedience."¹³

Others who dismiss the possibility of an appeal to a "higher law" base their views on the impossibility of deciding which man-made laws are, in fact, just. To them, if civil disobedience is to include the concept of conscience and morality, members of the Ku Klux Klan who engage in violation of the law on the basis of what they believe must be included as civil disobeyers.¹⁴

The concept does not, however, in our highly complex society, rest solely on the conscience of each and every individual. Almost any kind of act can be given some sort of justification in terms of appeal to conscience. Numerous moral atrocities are committed in the name of conscience and one cannot equate an act which agrees with an individual's conscience with an act which is morally right. Bedeau is correct in stating:

It does not follow from the fact that a man cannot do more than what he conscientiously thinks he ought to do whatever he thinks he ought to do. The force of saying, *I ought to disobey the law* cannot be derived from *obeying the law is inconsistent with my moral convictions*.¹⁵

Senator Eastland has asked, "is not the segregated way of life a better life? Is not that way the law of nature?"¹⁶ The diversity, according to Powell, becomes chaotic when entering "the subjective realms of morality, God's law and natural law".¹⁷ Blackstone claims

¹² "One must avoid the anarchism of a Thoreau who supports civil disobedience whenever one's conscience is twinged by a law and the rigidity of a Hegel who completely absorbs the moral life of the individual into the State," Blackstone, *Civil Disobedience: Is it Justified*, (1969), 3 Georgia L.R., at p. 701.

¹³ MacGuigan, *Civil Disobedience and Natural Law*, (1965), 11 Catholic Lawyer, at p. 120.

¹⁴ "If the decision to break the law really turns on individual conscience, it is hard to see in law how Dr. King is any better off than former Governor Ross Barnett of Mississippi who also believed deeply in his cause and was willing to go to jail." Marshall, *The Protest Movement and the Law*, (1965), 51 Virginia L.R., at p. 800.

¹⁵ Bedeau, *On Civil Disobedience*, (1961), 58 Journal of Philosophy, at p. 663. (Emphasis added.)

¹⁶ Quoted in Wofford Jr., *The Law and Civil Disobedience*, Presbyterian Outlook, (September 26, 1960), at p. 5.

¹⁷ Powell, Jr., *A Lawyer Looks at Civil Disobedience*, (1966), 23 Washington and Lee L.R., at p. 209.

the need for a "morally neutral explication of the concept of conscience or moral reason" but says that attempts to do so have resulted in "substantive moral recommendations placed under the guise of a neutral metaethical analysis".¹⁸ To build into the concept a set of moral convictions is brushed aside as unacceptable as it fuses acts of civil disobedience with acts that are morally justified.

Martin Luther King has commented that there should be different rules for those whose concept of moral law he has branded as "uncivil disobedience".¹⁹ While Powell can glibly state that, "one man's natural law is all too often another man's poison",²⁰ it is clear that certain laws have been theoretically recognized as being morally just. The concept of civil disobedience no longer rests solely on the conscience of each and every individual but on the general, albeit perhaps ultimately undefinable notion of laws which "uplift human personality". It seems that to most men "[p]ractical needs and our vital psychic economy demand absolute (i.e. unqualified) answers, and make us cling to what sounds or seems to us simple."²¹ Fuller, however, who feels that a just ordering of society can only be attained by a discovery and recognition of a "common need", freely admits that this principle is not a simple mathematical calculation and that it involves discretion.

Because the common interest does not tell us everything, there is no reason to conclude that it tells us nothing. Those who reject the principle of the common need because it does not dot all the i's or cross all the t's should recall the saying of an ancient Chinese philosopher, Mencius: when a cobbler undertakes to make a pair of shoes without knowing the measure of the feet, he does not end up by making a bushel basket.²²

While it is clear that no simple formula can be devised which would provide an instant answer in a given situation this does not mean that the morality of particular laws or policies can never be challenged by defiance. As Blackstone has stated:

...there is a group of factual questions the answers to which constitute necessary premises from which one's conclusion or decision concerning any given cases of civil disobedience is derived; and concerning such factual matters, no man is an infallible judge and error is more than merely possible. This means that no moral slide rule can ever give us exact certainty concerning the justification of any given case of civil disobedience... Civil disobedience is justified on occasion but it is not possible, in advance of a given case or set of circumstances, to specify

¹⁸ Blackstone, *loc. cit.*, n. 12, at pp. 682-683.

¹⁹ Quoted from Powell, *loc. cit.*, n. 17, at footnote 12.

²⁰ *Ibid.*, p. 209.

²¹ Cohen, *Reason and Law*, (Chicago, 1950), at pp. 64-65.

²² Fuller, *The Problems of Jurisprudence*, (Brooklyn, 1949), at p. 696.

necessary and sufficient conditions for saying that civil disobedience is justified. Both the generality of moral principles, the need to decide to extend them in one way or another and the indeterminacy of the relevant empirical facts makes this so. Indeed this condition is part of what it means to be a human being and a moral agent.²³

Through the concept of civil disobedience men can and must challenge blind adherence to immoral laws. It is an intellectual hoax to claim that morality can in no way be defined. How then was judgement rendered at Nuremberg? Therefore, when governments take or condone actions that are inconsistent with certain important values on which the society and its political system are supposedly based, they are violating the basic assumption on which the government's legitimacy rests. It is at these moments that civil disobedience becomes not only a right but an obligation.

Gunner Myrdal has probed the inconsistency which underlies American race relations. The American people had traditionally accepted the equalitarian doctrine that "all men are created equal" but even after the abolition of slavery the nation maintained a caste-like system wherein the white race ruled and the black race was relegated to a separated and subordinated position. For most white Americans this intellectual difficulty did not present a serious problem. Myrdal observed that some were basically ignorant of the realities of the situation and that those who were aware of the contradiction and inconsistency in the treatment of black people found methods of rationalization which enabled them to maintain their position.²⁴ The same tactic is used in denying the validity of one man's morality over another's — rationalization to maintain the *status quo*. Myrdal points out that rationalization of moral issues is part and parcel of the American attitude. For example, in an "equalitarian and democratic" system the need to rationalize the biological inferiority of subordinate groups was a need for defense by Americans against their own "system" and against their most cherished ideals. Theories of biological inferiority were in this sense a function of equalitarianism — that is, biological inferiority was

²³ Blackstone, *loc. cit.*, n. 12, at pp. 702-703; the fact that problems of definition are insufficient cause to render the concept of civil disobedience illegitimate can be seen by the remarks of MacGuigan to the effect that, "[a]s theory, disobedience has been the subject of consideration by philosophers not so much from the viewpoint of whether it is legitimate at all, and if so when; ... (but) for the most part philosophers have developed theories of resistance and have attempted to say when it is justifiable and when it is not." See MacGuigan, *loc. cit.*, n. 13, at p. 120.

²⁴ Myrdal, *An American Dilemma*, (New York, 1944), *passim*.

a rationalized perversion of the latter concept.²⁵ In much the same manner, people continue to rationalize using philosophic and allegedly democratic arguments against the acceptance of the universal morality of the notions contained, for example, in the Declaration of Human Rights as worldwide recognition of "higher law". That this Declaration has been effectively rendered meaningless by the acts of various states only proves that governments everywhere treat this concretization of the "higher law" contemptuously as an unenforceable embarrassment to national policies. The inclusion of moral concepts into acts of civil disobedience does not confuse two separate theories but offers the very source of legitimacy to civil disobedience. As nation states seem to have lost all sense of morality, civil disobedience is a method whereby people, the forgotten instrument of the well-oiled political machine, can help revive the notion. Clearly, a normative ethic may be formulated and there does exist a set of moral principles which, when combined with the necessary factual knowledge, provides the required premises from which one can judge whether or not there is moral justification for a given case of civil disobedience.

Still, as mentioned earlier, the rule of law has to many an intrinsic value apart from any moral consideration. "Liberals" who hold this view, therefore, attempt to rationalize what they consider the legality of some forms of civil disobedience and speak in terms of the legal limits of the concept.²⁶ Acts of civil disobedience, it is argued, are justified if and only if they break no laws other than clearly unconstitutional ones. Therefore,

[d]emonstrators were not violating any court order but rather, laws which had not been tested.... Under our system a person is entitled to challenge the validity of a law being applied against him by resisting its enforcement *in court* on a plea of invalidity... the challenger runs the risk of going to jail if his challenge is not ultimately upheld by the courts. In the face of that danger, it is a courageous and commendable act for a man to defy a law in order to attack its validity through the processes of law.²⁷

²⁵ *Ibid.*, p. 89. Quoted in, Masotti, Hadden, Seminatore, and Corsi, *A Time to Burn?*, (Chicago, 1969), at p. 142.

²⁶ Professor Freeman is a glaring exception to this rule. In a fascinating article he too argues for a "legal" justification of civil disobedience but on a much broader scope than any other author of whom I am aware. Unfortunately, an analysis of his reasoning would require much greater study than is possible within the bounds of this note. Freeman, *Civil Disobedience, Law and Democracy*, (1966), 3 *Law in Transition Quarterly*, at p. 13.

²⁷ Tweed, Segal, and Packer, *Civil Rights and Disobedience to Law: A Lawyer's View*, (1964), 36 *New York State Bar Journal*, at p. 291. That the

But the argument goes beyond this point. In fact, apologists of civil disobedience are really claiming a legal justification for the protester and a denial that civil disobedience is really in issue. Taylor simply states that, "if a violation is committed under a claim of legal right with the intention of seeking redress in the courts, it can hardly be termed civil disobedience".²⁸ His essay leaves no doubt that to him this manner of protest, regardless of what name is given to it, is the only acceptable form. Burke Marshall speaks of the theory of civil disobedience as being "wholly inapplicable to the efforts of the protest movement to overturn the segregation laws and practices of the south". He concludes that, in the sit-in and demonstration cases which reached the Supreme Court, there was "nothing illegal in the ultimate sense" and that the conduct was "under colour of law — federal law — rather than in disobedience of it".²⁹ Variations of this notion have been forwarded by many observers unable or unwilling to explain the remarkable success of civil disobedience in changing "unchangeable" wrongs.³⁰ The reasoning is simple. By using this circular constitutional argu-

"right" or "justification" is given "sanctification" only in these very restricted circumstances is made clear later in their argument at page 295, where they say, "[w]hen valid laws are broken simply to create sympathy for the civil rights position or, even less defensibly, simply to dramatize the contentions of the demonstrators, it seems clear important values are being unjustly sacrificed".

²⁸ Taylor, "Civil Disobedience: Observation on the Strategies of Protest", *Legal Aspects of the Civil Rights Movement*, ed. D.B. King and C.W. Quick, (Detroit, 1965), at p. 228.

²⁹ Marshall, *The Protest Movement and the Law*, (1965), 51 Virginia L.R., at pp. 794-98. At page 796, referring to civil disobedience, he says: "Dr. King takes on an argument he need not take on, and defends a position he need not defend...".

³⁰ "Persons... who engage in activities that may be in violation of a particular ordinance or state statute are not necessarily civilly disobedient if that ordinance or statute in turn violates the constitution of the United States.... Even if the court should ultimately find that the statute which the defendant's conduct violated was valid where it was arguably unconstitutional and where the defendant acted in good faith for the purpose of testing its constitutionality, I would say that there has not been any civil disobedience", (1967), 5 Illinois Continuing Legal Education, at p. 74; Quoted in Morris, *American Society and the Rebirth of Civil Obedience*, (1968), 54 American Bar Association Journal, at p. 655.

Much the same argument is forwarded by Cohen, *loc. cit.*, n. 5, at pp. 259-260, who says regarding the constitutional question, "Appeal to such an argument, however, cannot justify an act of civil disobedience; its very employment is a denial that there has been any truly unlawful act. Where it succeeds, it shows the act in question *not* to have been one of civil disobedience".

ment those who hold the law as having intrinsic value in itself are able to rationalize acts with which the modern liberal must have sympathy. At the same time it removes from the concept of civil disobedience some of the legitimacy which it has achieved in certain areas. That is in areas where vindication is possible in the strict legal sense, since the acts often gained much public sympathy, it is claimed that this is not civil disobedience. Yet, plainly the ordinance or statute was legally on the books and, in fact, enforced by the state until it was declared unconstitutional. There was not in many instances a guarantee that the court would so declare. The paradoxical statement that one has a legal justification for an illegal act is only apparent given the *ex post facto* declaration of the illegality of the ordinance.³¹

As well, to seek legal justification for acts of civil disobedience and then to claim that the act is therefore something other than civil disobedience begs the question. While, for example, freedom riders were no doubt appealing to the constitution, it implies that had the court upheld the local segregation order, the riders would have desisted. This attitude shows a total lack of understanding of the motives of the protesters. Their appeal was to a "higher law" than the rules of the United States Supreme Court. To claim that this is the limit to which a man should disobey the law makes a mockery of the Nuremberg decisions. It is to suggest that one acquiesce the judgment of a court without further reflection, regardless of circumstance. The German Supreme Court, in the 1930's, enforced many unconscionable laws. The American Supreme Court, in the Dred Scott decision, declared that Negroes had no rights. Were the moral issues then settled? To claim that appeal to the constitution sets the limits beyond which man cannot be justified means simply that to the legal mind the rule of law is of greater importance than the immorality of any particular law and therefore in itself constitutes the highest value. It is not difficult to show the value of law as well as the need for it. Yet, the idea of obedience to law in general does not have such importance that the law must be held as sacred even where it violates certain moral values.³²

³¹ Blackstone, *loc. cit.*, n. 12, at p. 685. In a speech to the Association of the New York City Bar, April 21, 1965, Martin Luther King stated, "[c]ivil disobedience can never be legal. In fact, civil disobedience means that it is not legal".

³² The almost unanimous enactment by Congress of the law making the burning of draft cards a felony punishable by five years in prison or a \$10,000 fine or both, is typical of the "divine right" theory in American law. Since draft card burning does not help a youth avoid the draft, the felony

There are others to whom the law is so sacrosanct and in whom the fears of "anarchy" and "riot" are so deep that even the limited acceptance of violation of the law on constitutional grounds is totally unacceptable. For example, Earl Morris has said:

I speak as a lawyer, of course, not as a theologian. But after all the rhetoric and lofty quotations, the fact must be recognized and reaffirmed that the law is and must be the supreme factor in the orderly working of society and that order, without which religion, education and civil rights cannot live, can be maintained only by adherence to the law. In tolerating and often encouraging civil disobedience, we have wittingly walked a fine line between individual liberty and anarchy.³³

In a highly recommended article authorized for reprinting "in view of the importance and content" by the editors of the New York Bar Association Journal, Louis Waldman has stated in relation to Martin Luther King's campaign of civil disobedience:

It is time that the organized Bar is heard on this question. It is time we tell Dr. King and his devotees of civil disobedience that the rule of law will and must prevail, that violators of the law, however lofty their aims or positions in society, are not above the law. Correction of injustices by intimidation, by extra-legal means, or inspired by fear of violence cannot longer be continued.³⁴

The fear that civil disobedience will lead to a general breakdown in respect to law and order and/or that it is a stepping stone to violence is, in fact, a central issue in the minds of all those who oppose the concept. To some, "[t]he plain fact of human nature is that the organized disobedience of masses stirs up the primitive . . . Specific disobedience breeds disrespect and promotes general disobedience".³⁵ Powell speaks of the "myths" and "carefully nurtured impressions" that civil disobedience can be relatively peaceful and points out that:

[e]ven non-violent demonstrations frequently exact a high price from the public generally. They disrupt traffic, create discordant noises, litter the streets, and deny the streets and sidewalks to other citizens . . . Possibly the most serious aspect of the expanding use of protest methods in the name of civil disobedience is the resulting incitement to mob violence . . . few objective observers would deny that the contribution has been significant.³⁶

is apparently injury to the sacred sovereignty of law embodied in a piece of paper. See Goodman, "Reflections on Civil Disobedience and Lawlessness", ed. Robert A. Goldwin, *On Civil Disobedience*, (Chicago, 1969), at p. 123.

³³ Morris, *loc. cit.*, n. 30, at p. 656.

³⁴ Waldman, *loc. cit.*, n. 9, at p. 337.

³⁵ Leibman, *loc. cit.*, n. 10, at p. 125.

³⁶ Powell, *loc. cit.*, n. 17, at pp. 225-226.

In spite of these grave fears there is no evidence that violation of law in the spirit of civil disobedience leads to a general contempt of all laws. There is no indication that persons engaged in civil disobedience have become general law-breakers.³⁷ As well, the defenders of "law and order" seem to have forgotten that both civil disobedience and disorder in the United States have not been the cause but the result of the country's troubles. That is, civil disobedience does not create the evils but is a reaction to them. One's perception of peace must, to a large extent, form part of the reasoning behind a call to limit civil disobedience as a threat to domestic tranquility. The national state, which monopolizes power and information, reminds the people daily of the need for domestic tranquility in order to maintain the states' strength and glory and therefore, the need to blindly accept its authority. While wealth is distributed irrationally, the environment is being poisoned, certain groups are being condemned to subservient positions and the dignity of millions of citizens is being violated daily, the state asks the unaffected "silent majority" to help maintain the internal peace and stability which would ensure the perpetuation of the *status quo*. As long as the violence within the wronged individuals does not break out into "disobedience" or "disorder" the nation and those in positions of power remain undisturbed and satisfied.³⁸

It is interesting to compare the feelings of lawyers such as Powell and Morris regarding the relationship of civil disobedience to "anarchy" and violence with those of experts who specialize in the analysis of just these types of problems. Ralph Conant, associate director of the Lemberg Centre for the Study of Violence at Brandeis, states that, "While all riots stem from conflicts in society similar to those that inspire acts of civil disobedience, they ordinarily do not develop directly from specific acts of civil disobedience".³⁹ Conant explains that riots are generally directed against

³⁷ "It is often enough said that disobedience even of bad laws undermines the habit of law abidance and so endangers that fundamental order upon which civilized life depends. But I have never seen this argued with careful attention to some particular body of evidence"; Walzer, *The Obligation to Disobey*, (1967), 77 *Ethics*, footnote 19, at p. 175.

³⁸ "Law and order is keeping the status quo, keeping it in as pleasant and stereotyped fashion as you can. Law and order is preserving what, to the black man, is our intolerable and unjust system"; Kunstler, *Lawyers Look at Civil Disturbances*, (1967-68), 25 *New York County Lawyers Association*, at p. 121.

³⁹ Conant, *Rioting, Insurrection and Civil Disobedience*, (1968), 37 *American Scholar*, at p. 420.

those who are allegedly perpetrating injustice or misusing political power. They are not as a rule senseless outbursts but a result of "shared rage growing out of specific rage inducing experiences". He concludes by pointing out, "... violence is and always has been an important and sometimes indispensable instrument of social, economic and political change in our national history". Nieburg has said:

There is always a danger that the prevailing minority that holds power will use legality and force to deter all pluralistic politics and opposition. In the swiftly changing human and physical environments of modern technology and international relations, such a mood can quickly dislocate a nation, destroy legitimacy, escalate violence and endanger the peace of the world. A state system whose central and primary values become the negative and costly ones of internal security and repression is soon riddled by subversions, interventions, assassinations and extremist fits and seizures of all sorts.⁴⁰

To those who are satisfied with the *status quo*, the unfounded fear that civil disobedience will lead to anarchy is of more concern than the injustices which permeate much of American life. The reaction of the swelling contented middle class of Americans, for whom the system "works", is to look to traditional forms of politics in order to solve any problems. It is difficult for those who have "made it" to identify with the millions in society who have not. This, however, is blindness that will lead to disaster. Disobedience and civil disorder are already engulfing much of America. It is obvious that those who have long been buried under the nation's facade of equality, wealth and justice can no longer be kept hidden and divided. The theory of civil disobedience can help counteract and contain the rage of those who have long been suppressed. Civil disobedience draws the line in a society seeking to move by deliberation and choice rather than by accident and force. Successful examples of civil disobedience would serve to diminish the possibilities of anarchy or communism which the defenders of law and order seem to fear most. The danger of anarchy comes not from acts of civil disobedience but from the fatalism and hopelessness

⁴⁰ Nieburg, *Violence, Law and the Social Process*, (March, April, 1968), 2 *American Behavioural Scientist*, at p. 19; at page 17, Nieburg points to the uselessness of attempting to quell riots by simple repression rather than dealing with root problems, in stating "[n]ormal police security methods become counter productive; they merely solidify the capability and likelihood of disruption by a group which is increasingly polarized and alienated.... In the face of major political violence, the prevailing consensus of interest and power groups must choose between social-economic-political adjustments and the unpromising course of infinite escalation and counter-escalation of force".

of a wronged people to whom the possibilities of action are closed. It is only when people lose all hope of being able to determine their own destiny that law becomes an alien force and violence and anarchy appear as the only viable alternative.⁴¹ Conant has shown that violence will remain as an indispensable corrective ingredient in our society, "the sole qualification is that all other avenues of legitimate and peaceful change first be substantially closed, exhausted or ineffective". The "law and order" reaction of suppression to acts of civil disobedience does little more than close the last avenue of peaceful and legitimate change.⁴²

Civil disobedience acts within the frame of established authority, rather than outside of it. Charles Black, Jr., Professor of Jurisprudence at Yale has said:

Civil disobedience... is not aimed toward overthrow of law and order. On the contrary, it works within the framework of the legal system to rectify specific wrongs. Where the wrongs pertain to the processes of that system itself, the civil disobedient intends not to render the overall system inoperative with respect to his own act. He may, in fact, want by his act to render their absurdity and injustice more patent.⁴³

Except for those few for whom the very phrase civil disobedience locks the door to logic and reason, the enormous difference between

⁴¹ "When peoples' just expectations are satisfied, the law is accepted and respected, and a peaceful, orderly and harmonious society is possible. When these expectations are not fulfilled, when just grievances are not remedied, confidence in the law is diminished, people are alienated from law and society, and instability, unrest and even violence replace order. This has been the lesson of both ancient and contemporary history"; Goldberg, *Equal Justice for Rich and Poor*, Proceedings: National Conference on Law and Poverty, (Washington, 1965), at p. 145.

⁴² See generally Woffard Jr., "Law as a Question", *Civil Disobedience*, ed. Robert A. Goldwin, (Chicago, 1969), at pp. 79-93; the unwillingness of America to totally commit itself to the eradication of human misery coupled with its "law and order" reaction of repression against almost all dissenters has caused both the American concept of "law and order" and democracy to become the object of international scorn.

"The British people look with genuine horror at the American mess in Vietnam and at the picture of the wealthiest country in the world incapable of diverting enough wealth from the over-consumptive society to clean up the ghettos and eliminate poverty... law and order in the U.S. has progressively degenerated as it always will under a right-wing government because for a democratic society you will never cure violence by repression." Employment Minister Castle, *Montreal Star*, (June 8, 1970) pp. 1-2.

⁴³ Charles L. Black Jr., *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, (1965), 43 Texas L.R., at p. 509.

civil disobedience and rebellion seeking to overthrow or repudiate government is clear. Blackstone explains this fact by saying:

A civil disobedient is distinguished from those who advocate rebellion or revolution in that he advocates neither the complete overthrow of existing authority nor the violation or subsequent change of all laws but only of some. The complete collapse of a government and of the basic structure of law in a given society or in general is not his objective and this clearly distinguishes a civil disobedient from a revolutionary or a political anarchist who seeks the complete overthrow of all constituted authority Civil disobedience is much more than a mere act of protest or demonstration against a given law, for it is illegal activity. But it is much less than rebellion or the advocacy of anarchy.⁴⁴

The main reason, of course, that liberal Americans give for the restriction of civil disobedience within the strict frame of "constitutional protest" is not fear of anarchy but that the democratic structure of the nation is adequate to remedy the problems of society. They take for granted that the political system is successful and that the existing channels of dissent, the rights to protest, to speak, to publish, to assemble peacefully and to participate in the electoral process, are sufficient to remedy existing grievances.⁴⁵ Taylor concludes that the democratic system has shown that "conditions for justice can be established by all of the legitimate techniques available to a free people . . ." but does not discuss where justice has or has not prevailed.⁴⁶ Leibman's remarks are more revealing, however, of the narrow conceptual framework within which he views democracy.

This open or democratic republic is man's highest achievement — not only for what it has already accomplished, but more importantly because it affords the greatest opportunity for orderly change and the realization of man's self-renewing aspirations . . . unhampered dialogue makes possible the opportunity to continuously approximate, through our legal system, our moral and spiritual goals.

Although the dialogue is eloquent it is when he discusses the achievements of the system that his values become clear. "Never before have 190 million people enjoyed so many material goods, however imperfect their distribution"; he continues: in relation to dignity,

⁴⁴ Blackstone, *loc. cit.*, n. 12, at pp. 680-681; see also: Cohen, *loc. cit.*, n. 5, at p. 260; Jones, *Civil Disobedience*, (1967), 3 American Philosophical Society, at pp. 195-196.

⁴⁵ For an in-depth examination of the general problem of civil disobedience in a democratic society see Spitz, *Essays in the Liberal Ideas of Freedom*, (Tucson, 1964), at p. 63, and particularly pp. 63-77, where Spitz concludes that civil disobedience cannot be rejected on the simple basis of the essentially democratic nature of the government.

⁴⁶ Taylor, *op. cit.*, n. 28, at p. 235.

equality and freedom for all citizens, "[t]he cry for immediacy is a cry for impossibility".⁴⁷ This is the kind of reaction that caused Martin Luther King to say:

*I have almost reached the regrettable conclusion that the Negro's great stumbling block in his struggle toward freedom is not the white citizens' Councilor or the Ku Klux Klanner, but the white moderate, who is more devoted to "order" than to "justice"... who paternalistically believes he can set a timetable for another man's freedom.*⁴⁸

Waldman, also in his desire to "protect" democracy speaks of Negroes enjoying the same civil rights as other Americans as well as equal opportunity to a job, an education or to vote.⁴⁹ Powell speaks of "painfully slow" procedures of democracy as a more dependable and a less dangerous mode of correcting injustice and social problems. The danger to democracy is explained by pointing out that civil disobedience breeds abuse of drug laws and infiltration of Communists and leftists seeking radical changes in United States society, as well as the danger that individuals seeking personal gain will "synthetically create" mobs.⁵⁰

There is evidence to show that the American democratic system cannot solve the issues tearing at the nation by resorting to traditional modes of change alone. There are those, however, who see in any challenge to the operation of the system in which they have become so comfortable, a sinister plot to undermine the democratic form of government. Others, have simply not thought about or are incapable of grasping the failures of the American democratic system. All of these people either do not see the glaring areas of failure or attempt to gloss them over.

Many Americans speak of all that has been accomplished in the area of civil rights through "normal" channels of the democratic system. Yet the National Advisory Commission on Civil Disorders points out that, in fact, almost nothing has been done for black people aside from "showpieces".⁵¹ The tone of the Commission's

⁴⁷ Liebman, *loc. cit.*, n. 10, at pp. 21-26.

⁴⁸ King, *loc. cit.*, n. 3, at p. 68.

⁴⁹ Waldman, *loc. cit.*, n. 9, at p. 332.

⁵⁰ Powell, *loc. cit.*, n. 17, at pp. 228-231; See also: Endres, *loc. cit.*, n. 8, at p. 499.

⁵¹ The plight of black Americans is being used as an example as it offers the perfect case of the democratic system "in action" in order to achieve justice for an oppressed minority. Much time and emphasis has been placed in this area and so the results are of extreme importance in any assessment of the ability of the democratic system, as seen by those arguing for constitutional limits to civil disobedience, to solve grievous problems. In this respect it has recently been said: "In spite of all the successes we can point

report was strong and its conclusion, shocked many. "Our nation is moving toward two societies, one black, one white — separate but unequal."⁵² The saving grace of our democracy is that it is supposed to provide alternatives to civil disobedience. When applied to the facts, this generalization becomes a cruel hoax. This was recognized by Frankel, who has said that, "the basic fallacy in the proposition that in a democracy civil disobedience can never be justified is that it confused the *ideals* or *aims* of democracy with the inevitably less than perfect accomplishment of democracy at any given moment."⁵³ Taken at its simplest level this can result in problems to which no legal machinery is available for redress. Father Robert Drinan, Dean of the Boston College Law School spoke of this:

In hundreds of grievances there is no legal machinery to process the complaint, much less bring it to the stage of "the last resort". Some injustices, furthermore, place the victims in such pain, humiliation and moral peril that the minority group inflicted by them has not merely a right but conceivably a duty to bring them to public attention by some dramatic event or spectacular conduct.⁵⁴

As for the system itself, "the reality of the situation is that the democratic process offers less chance of success for the Negro both in terms of joining a coalition which can continue to produce legislation and in terms of gaining the willingness of a society to comply with any legislation which is passed".⁵⁵ Americans have long made a hypocritical distinction between the Negro's theoretical right to full participation in society and the practical or specific applications of those theoretical rights.

For those who speak of "time" it should be pointed out that Constitutional guarantees and the electoral process have existed

to, all of the activity of the past fifteen years has not significantly altered the life chances of the large majority of black Americans", Masotti, Hadden, Seminatore, Corsi, *op. cit.*, n. 25, at p. 11.

⁵² *National Advisory Commission on Civil Disorders Report*, Kerner Report, (Washington D.C., 1968).

⁵³ Frankel, *Is it Ever Right to Break the Law?*, New York Times Magazine Section, (January 12, 1964).

"The term 'democracy' has, like many other honorific terms, fallen victim to twentieth century doublespeak, which is a device used by the practical minded for the purpose of 'adjusting their ideals to reality' thereby obscuring the gap between the ideal and the real and substituting the name for the thing." Horowitz, "Toward the Democratic Class Struggle", *Agenda 1970*, Lloyd, McLeod, ed., (Toronto, 1968), at p. 241.

⁵⁴ Drinan, *Lawyers and Nonviolent Demonstrations*, (June, 1964), *The Catholic Worker*, at p. 7.

⁵⁵ Masotti, Hadden, Seminatore, Corsi, *op. cit.*, n. 25, at p. 159.

for many years and although there have been "gains" they have not been adequate for the times in which we live and the expectations that people have a right to hold.

The Kerner Report evoked no substantive action from the White House. Little or nothing has been done to implement its suggestions for remedial action, as the overwhelming majority of white Americans refuse to accept its judgment — one which implicates them and their democratic ideals.⁵⁶ The Poor Peoples' Campaign was organized to appeal to Congress to act on the Report. It was intended to utilize means of protest within the law. The ineffectiveness of the Campaign says much for traditional forms of dissent. Its effect on Congress was a poverty program which did not differ significantly from any other and also resulted in no action on the Kerner Report.

Americans, as we have noted, have an amazing ability to become quickly disturbed and then to become even more quickly complacent. Persons and agencies in control of the mechanisms in our society which satisfy the demands of its various competing groups are not much more moved than the general populace by disturbing situations until these situations become *crises* which continuously impinge upon their consciousness or, more likely, directly threaten their own well-being. For this reason, and for the reason that obedience to law is not a singularly prominent American trait, major social changes, as we have seen, do not occur in this nation without rancorous outbursts of hostility.⁵⁷

The situation of the Negro is that he has won *de jure* recognition in most areas but the objective reality of the Negro's situation in the United States has not significantly improved, even with the passage of civil rights legislation, reinforced by judicial decisions. The rhetoric of democracy, justice and equality requires that America produce a corresponding set of attitudes and policies. "Otherwise, the frustration of rising expectations, which undermines

⁵⁶ "What white Americans have never fully understood — but what the Negro can never forget — is that white society is deeply implicated in the ghetto. White institutions created it, white institutions maintain it and white society condones it." Kerner Commission, *op. cit.*, n. 52, at p. 2; "The present mood of this nation seems more intent on legislating against riots and uncovering organized conspiracy than on responding to real issues. The response, or lack of response of this nation to the report of the National Advisory Commission on Civil Disorders . . . gives reason to seriously question whether we as a nation are capable of coming to grips with the realities we face. In fact, it is not at all clear that we, as a nation, even understand what is happening to us." Masotti, Hadden, Seminatore, Corsi, *op. cit.*, n. 25, at p. xi.

⁵⁷ Masotti, Hadden, Seminatore, Corsi, *op. cit.*, n. 25, at p. 161, (Emphasis added).

legitimacy, can only promote the conditions for violence."⁵⁸ The "due process" of democracy has, in itself, not been able to afford major social change of the degree required. The authors of *A Time to Burn?* point out that only crisis can move the general populace. These distinguished scholars, from four different social sciences, make a point of explaining at the outset, "We are not 'bleeding heart' liberals. In traditional political rhetoric, we represent a spectrum from moderately liberal to moderately conservative". Yet, they clearly recognize the inability of the normal channels to foster some of the desperately needed change.⁵⁹ Martin Luther King recognized this as well. In his book, *Why We Can't Wait*, he said that the purpose of the direct action program is to create a situation so crisis packed that it will inevitably open the door to negotiation.

Those who believe that the normal channels of American society are the only ones which can be used seem to feel that the only alternative to these channels is uncontrolled violence and chaos. It is clear that change is needed — and that more and more people realizing that the normal channels have not and will not, by themselves, be sufficient have taken to the streets. Civil disobedience can offer an alternative more effective than traditional politics in creating a crisis situation sufficient to spur change and much less costly than both the spontaneous and premeditated violence which has already engulfed much of America and continues to escalate.

The violence on the streets of Chicago during the Democratic National Convention provides an example of the results of "law

⁵⁸ *Ibid.*, p. 177.

⁵⁹ *Ibid.*, at p. vii. The need for crisis or a profound shaking of the conscience of America has been recognized by many:

"Certain antagonism is the natural reaction of persons whose habitual apathy has been profoundly shaken. When persons are made to realize that they have inhaled the invisible, odorless but poisonous gas of prejudice and bias, their spontaneous reaction is to assert that they have not been poisoned as others allege.

This defensive reaction must revert rather quickly into continued apathy or yield to a more affirmative position. The cessation or even the diminution of direct protests by the Negro community, done out of deference to white antipathy may be precisely the wrong reaction at the wrong time and for the wrong reason." Drinan, *loc. cit.*, n. 54, at p. 12. Once the failures of the system and the needs of society are closely examined by an objective observer, perhaps the conclusion of Woffard Jr., a lover of both democracy and human dignity, to the effect that, "Perhaps the conclusion is that civil disobedience, as a form of protest, like democracy is a form of government (according to Winston Churchill) is the most inefficient way — except for all others," is unsuitable. Woffard Jr., "Law as a Question", *On Civil Disobedience*, ed. Robert A. Goldwin, (Chicago, 1969), at p. 92.

and order” and a refusal to tolerate any “non-legal” protest. Some protesters were clearly violating the law as they gathered in the streets but aside from causing monumental traffic jams and hurling abuse at police and passers-by, little physical damage was being done. As the latter acts alone were totally unacceptable to the proponents of “law and order” or “proper channels”, police were sent in not to control the crowds but to show that Chicago would never “... permit a violent, lawless group of terrorists to menace the lives of millions of people, destroy the purpose of the national political convention, and take over the streets of Chicago”.⁶⁰ The result was the infamous “Battle of Chicago” which pitted police and guardsmen against a coalition of anti-war protest groups. As millions watched on television, Chicago police savagely beat protest marchers, members of the press and innocent by-standers. The report of the National Commission on the Causes and Prevention of Violence concluded that, “Although Chicago police were targets of mounting provocation by word and act... the nature of the response was unrestrained and indiscriminate police violence...”.⁶¹

That violence was made all the more shocking by the fact that it was often inflicted upon persons who had broken no law, disobeyed no order, made no threat. These included peaceful demonstrators, onlookers, and large numbers of people who were simply passing through, or happened to live in the area where confrontations were occurring.⁶²

It is true that order was restored, the convention was not disrupted and not one life was lost. Still, thoughtful Americans may ask, “...but at what cost to ultimate domestic peace”.⁶³ The events in Chicago, seen in conjunction with other factors, lead to these conclusions. There are many in America who, for a variety of reasons, are dissatisfied with the *status quo*. The normal channels of communication are, in many instances, inadequate to serve the needs of these people. The events of the last decade prove the futility of hoping that these groups will disappear beneath the apparent affluence of the nation. If the possibility of civil disobedience is closed by the guardians of “law and order”, the only alternative left to the dissatisfied is the very violence, chaos and anarchy feared by those advocating “normal channels”. What is even more

⁶⁰ Mayor Richard Daley, *New York Times*, (August 30, 1968), at p. 1.

⁶¹ Walter, “Rights in Conflict (The Violent Confrontation of Demonstrators and Police in the Parks and Streets of Chicago During the Week of the Democratic National Convention of 1968)”, *A Report to the National Commission on the Causes and Prevention of Violence*, (November 18, 1968).

⁶² *Ibid.*, at p. 1.

⁶³ Masotti, Hadden, Seminatore, Corsi, *op. cit.*, n. 25, at p. 170.

disturbing is the mounting evidence, ignored by many, which points out that "law and order" may even turn civil disobedience into civil disorder and that once at the latter stage it can only result in a very "stop-gap" peace — as counter-escalation mounts.⁶⁴

It is baseless to assume that observance of the law is always conducive to strengthening the democratic system and that disobedience can never have a beneficial effect. The complacent acquiescence of the majority to unjust laws will eventually corrode the faith of the minority in the democratic system and yet, its viability and continuing strength is dependent on the minority's belief that it can rectify evil. There clearly do exist situations in which civil disobedience may jolt the democratic system into greater awareness and immediate action.

An appeal for the acceptance of civil disobedience as a legitimate alternative to lawful protest necessarily includes a rejection of many of the "limits" which have become, in the public eye, an integral part of the notion of disobedience. In many cases the application of these "limits" are sufficient to render the protest meaningless by severely hampering the ability of the demonstrators either to protest a certain evil or to create the "crisis situation" necessary if there is to be any hope for change.

The first of these "limitations" is the idea that civil disobedience must be directed only against those laws which are in themselves wrong. This attitude has been taken by several commentators, whose opinions include the reasoning behind their idea. Mortimer Adler has said in reference to the "basic error" generated by Thoreau, that

Thoreau disobeyed a tax law that he did not regard intrinsically unjust in order to use that act of disobedience as a protest against the injustices of slavery and what he deemed to be the injustices of our war with Mexico I think we should say that Thoreau was mixed-up and confused, and that his action was not civil disobedience Thoreau made a public nuisance of himself. Most of the civil rights agitators today, who follow in his footsteps, are making public nuisances of themselves — acting for a good cause, but using the wrong means to do so, because the means

⁶⁴ For example, sniping during riots has now been "replaced" by full-scale "shoot-outs" between Black Panthers, who have over the past several years become increasingly alienated from the mainstream of American life, and police. Conant explains the process which has lead Black Panthers to this "value re-adjustment" and stresses their inability to achieve "normative re-adjustment" through the proper channels. When civil disobedience is closed as a viable alternative, revolution remains as the only possibility. Conant, *loc. cit.*, n. 39, at pp. 420 *et seq.*

they use involve breaking laws that are not in themselves unjust and that they are totally without grounds in conscience for disobeying.⁶⁵

Delbert Smith examines court decisions involving this type of disobedience and concludes that the court's concern with the actual effect rather than the avowed purpose is a practical approach. But, when he speaks of "situations which have been beyond the justification of the civil rights movement", such as a work haltage at a construction site, he does not make clear whether he is speaking of legal, moral or both types of justification.⁶⁶ The implication, however, is clear. Smith sees justification only in terms of legality. In relation to the "lie-in" at the World's Fair in New York, which was, according to Bayard Rustin, an attempt to dramatize the contrast between the glittering world of fantasy and the real world of bigotry and poverty only miles away, Powell states that, "If valid breach of peace and trespass laws may be violated at will to protest these age old infirmities of mankind, rather than seeking to ameliorate them by lawful and democratic processes, there would soon be little left of law and order".⁶⁷

The perspective of Powell is clear. After all, poverty and bigotry are "age old infirmities" neither of which, no doubt, directly affect Mr. Powell. From this perspective "indirect coercion" may appear slightly more radical than it does to those who suffer from the scourge of these maladies which Powell can so easily brush aside.

This limitation is not supported only by those with little sympathy for any change in the *status quo*. Tweed, Segal and Packer argue vigorously for disobedience as an acceptable means of challenging the constitutionality of various laws but they can go no further. This legalistic approach leads to their concluding that, "When valid laws are broken simply to create sympathy for the civil rights' position or, even less defensibly, simply to dramatize the contention of the demonstrators, it seems clear that important values are being unjustifiably sacrificed".⁶⁸ For this reason, according to the above-noted authors, this activity merits "condemnation".

There is only a requirement for protest to be directed toward a need or against a wrong which has been clearly identified and

⁶⁵ Adler, *Is There a Jurisprudence of Civil Disobedience?*, (1967), 5 Illinois Continuing Legal Education, at p. 95. Quoted in, Morris, *loc. cit.*, n. 30, at footnote 4.

⁶⁶ Smith, *The Legitimacy of Civil Disobedience as a Legal Concept*, (1968), 36 Fordham L.R., at pp. 726-728.

⁶⁷ Powell, Jr., *loc. cit.*, n. 17, at p. 216.

⁶⁸ Tweed, Segal and Packer, *loc. cit.*, n. 27, at p. 295.

the only obligation that does exist in this area, is for the demonstrator to communicate the nature of the protest to the public.⁶⁹ Although Waldman directs his fury at protest not directed against a specific law, by stating that, "... instead of being condemned, it gets to be understood", there are many common sense "understandable" reasons why this type of protest is required.⁷⁰ Most of those who oppose this method invoke the rule of law. This is yet another example of what is moral becoming what is constitutional and therefore morality is reduced to law — to the current opinions of the Supreme Court.

If this position is accepted it would be impossible to "sit-in" at a restaurant where black people are not served due to the policy of the owner rather than a particular law. Here the wrong occurs not because of a bad law but because of the failure to enforce a good one. There is no law that can be violated to protest inaction. As well, some of the most serious problems in America are not represented by an identifiable law. For example, there is no specific "poverty law" which the poor can violate to protest their wretched condition. Although segregation laws have for the most part been repealed, it does not mean that racist attitudes and the more subtle forms of discrimination have suddenly ceased to exist. It is illogical to argue that while protest may be directed against racism supported by law it may not be directed against racism supported by attitude. To those who bear the brunt of this hatred the distinction must be very academic. By accepting this limitation one guarantees that many of the most fundamental problems of American society will remain beyond the reach of civil disobedience.

By invoking the names of King and Gandhi, it is argued by many that civil disobedience must be absolutely non-violent at all times. The definition of civil disobedience does not, however, in itself exclude violence as does "passive resistance" or "non-violent action". As civil disobedience is a device to promote change the question of means must be left open. That is, there must be a realistic assessment of the most effective method of achieving the ends of a civil disobedience campaign. There is a limitation. Proponents of civil disobedience must be guided by a moral stance which will "uplift human personality" and as such must advocate non-violence as one of their moral principles. However, in the "crisis periods" of civil disobedience it would be naive not to

⁶⁹ Keeton, *The Morality of Civil Disobedience*, (1965), 43 Texas L.R. at p. 515.

⁷⁰ Waldman, *loc. cit.*, n. 9, at p. 336.

recognize that a simple distinction between the two categories is not always possible.

Philosophers have long recognized the difficulty of defining the term "non-violent". Blackstone, while considering non-violence to be a necessity in the practice of civil disobedience and the factor which distinguishes it from rebellion, concedes that, "The point is that the very concept of violence is itself opaque and needs a great deal of analysis".⁷¹ Smith speaks of the difficulty in defining the term with any "precise content". He concludes that one may argue that, "... there is a freedom to perform a civilly disobedient act only so long as the rights of others are not directly affected in ways that are not connected with the policy or law under protest".⁷² It has been argued, in fact, that civil disobedience by its very nature cannot be non-violent and the implication is that it is, therefore, an unacceptable mode of protest. Referring to the civil disobeyer, Prosch has said:

But the trick is that you are asking them in such a way that they will have to reply. Do they believe in the rightness of these laws firmly enough to continue enforcing them upon people who keep coming back to be arrested or even beaten? They must either act or not act in the face of your challenge and so they must return an answer... since the employment of arguments — rational, emotional or some combination — is not involved at its point of action, your opponents are not likely to identify your effort as an attempt at moral persuasion. They must rather tend to regard it as a power move on your part. Therefore, even though your action is non-violent, its first consequence must be to place you and your opponents in a state of war. For your opponents now have only the same sort of choice that an army has; that of allowing you to continue occupying the heights you have moved on to, or of applying force — dynamic, active, violent force... In terms of its practical impact, therefore, your tactic is basically a military one rather than a morally persuasive one — or even a political one.⁷³

In fact, much of what Prosch has argued is true. The act of civil disobedience does demand and answer to a vital question. It may also be true that this puts the targets of civil disobeyers "in a state of war". But to argue that one should not demand an answer to a vital social issue because it may cause opponents

⁷¹ Blackstone, *loc. cit.*, n. 12, at p. 682.

⁷² To Smith, violence includes "coercion" by means of a "sit-in" in a public official's office to suspend activities. As well, he includes the violence which might occur if observers were to attack the demonstrators. It would seem, therefore, that non-violence is impossible and that civil disobedience cannot be justified; Smith, *loc. cit.*, n. 66, at pp. 714-715.

⁷³ Prosch, *Limits to the Moral Claim in Civil Disobedience*, (1965), 75 Ethics, at pp. 104-105.

to react negatively or to argue that one should never vigorously seek to create the crisis needed to shake the complacency of the populace is to oppose fundamental change no matter what the issue. To demand of civil disobeyers a guarantee that their opponents will react non-violently is an absurd proposition. What is arguable is that those engaged in civil disobedience take as much care as possible that they do not stir up violence. The problem of presenting an effective challenge to authority without eliciting violent response in others is a matter which must be considered but as pointed out by Keeton, "... some injustices are so grave as to warrant the risk. The point is rather that the risks should be realistically foreseen and found to be compatible, if incurred, with the objective of the long-run betterment of society".⁷⁴

This was clearly recognized by Martin Luther King and his followers. Their reaction, however, was that when one cheek of a demonstrator was slapped the other be turned. King asked that, no matter what the provocation, black men should reply with a fierce love. Yet, King clearly recognized the hopelessness of forcing a protest to end because of the violent reaction of on-lookers. Carl Cohen speaks of the need to meet violence with non-violence and to suffer the consequences which may range from assorted indignities to physical beatings.⁷⁵

Brown Jr. gives three reasons why non-violence, on the part of the demonstrator, is a necessary part of civil disobedience. The first is that violence, being evil in itself and being no less evil for being used in a good cause, can be morally justified only in circumstances where the alternative is an even greater evil. The second reason is that a clear distinction is needed between justified acts of civil disobedience and justified acts of civil rebellion. Finally, he speaks of the need to preserve civil disobedience as a tolerable and ritualized form of protest in which law breaking is kept to a minimum.⁷⁶ James Farmer, however, points out that, "Civil disobedience and non-violence are by no means synonymous... The reason for this is simple; a tactic — by definition pragmatic — survives when it works...".⁷⁷ Paul Goodman, an advocate of non-violence, has admitted, "Unfortunately, since the populace has been sluggish and complacent, occasional violence seems to be ad-

⁷⁴ Keeton, *loc. cit.*, n. 69, at p. 517.

⁷⁵ Cohen, *loc. cit.*, n. 5, at p. 258.

⁷⁶ S.M. Brown Jr., *Civil Disobedience*, (1961), 58 *Journal of Philosophy*, at pp. 679-680.

⁷⁷ James Farmer, "Civil Disobedience and Beyond", *On Civil Disobedience*, ed. Robert A. Goldwin, (Chicago, 1969), at p. 133.

vantageous to wake people up".⁷⁸ This is not a theory likely to be easily accepted.⁷⁹ However, there are instances where the use of violence may not be totally unacceptable.

There is a distinction, which is rarely made, between people and things. Violence is apparently seen as equally objectionable in both cases. The American devotion to "things" was carried to its logical extreme when, during the Chicago riot, the police were ordered to "shoot to kill arsonists and shoot to maim looters". The Chicago mayor apparently had great confidence in the marksmanship of the police as well as in their ability, during those confused and disorderly few days, to instantly differentiate between the thousands of citizens caught in the midst of the chaos and arsonists or looters. A line can and should be drawn between limited cases of property damage and justified civil rebellion. In order for civil disobedience to remain a tolerable alternative to those who participate, it must have a chance to succeed. For most, the violence of a Milwaukee priest who picks a lock and burns draft board records is apparently unacceptable but the violence of American troops in Vietnam is. The breaking of windows in the Pentagon horrifies the solid citizen and draws a reprimand from the proponent of non-violence. Seen in the light of 40,000 American dead and all the other grim "facts" of an undeclared war being fought for vague and undefined goals, this type of protest seems mild. Many of the sharpest critics of violence to windows in America can find reason to justify violence to people in Vietnam. Those who oppose violence at all times must remember that the oppressed and morally outraged cannot be forever expected to dam the anger induced by man's inhumanity to man.

This is not to suggest that violence is commendable or preferable. What is being suggested is that the unfortunate reality is that effective dissent may, in extreme cases, require some violence to "things". That violence to "things" must not and cannot be equated to violence to people. While accepting non-violence as morally correct and striving for its achievement at an international scale, it must be recognized that historically social change has always been accompanied by violence. America is not an exception but a prime example of that proposition. Indiscriminate violence must always be condemned no matter how great the cause but in lieu of "justified civil rebellion" some violence to "things" may prove to

⁷⁸ Goodman, *loc. cit.*, n. 6.

⁷⁹ "... [A]ny result-oriented test will favour action that, while effective, might fall beyond the ordinarily accepted forms of non-violent action." Smith, *loc. cit.*, n. 66, at p. 720.

be the only effective method of jolting a complacent nation. It may, unfortunately, be a classic example of where the end can justify the means.⁸⁰

One other issue, which to some extent is purely semantic, deserves consideration. Unlike the common criminal or the civil resister, the civil disobeyer does not try to evade the authority of the state or to act in a clandestine manner. That is, a public claim against the state is publicly acted out. The willingness to act in public and to offer explanation is indicative of the civil disobeyer's concern with the consequences of his acts and their effect on the people.⁸¹ As the civil disobeyer recognizes the basic validity of the structure within which he lives and acts openly and unashamedly, it is often accepted, as a matter of fact, that he must accept his punishment as right.

It is of the essence of the law that it is equally applied to all, that it binds all alike, irrespective of personal motive. For this reason, one who contemplates civil disobedience out of moral convictions should not be surprised and must not be bitter if a criminal conviction ensues. And he must accept the fact that organized society cannot endure on any other basis. His hope is that he may aid in getting the law changed. But if he does not succeed in that, he cannot complain if the law is applied to him.⁸²

There is no question that the state must punish lawbreakers. As Buckley has pointed out, "It is the individual's right to refuse to go along with his community, but the community, not the individual must specify the consequences".⁸³ This the civil disobeyer

⁸⁰ Gandhi, the greatest exponent of non-violence, himself recognized that sometimes the ends could justify the means and that many should be unable to utilize non-violence as courageously and effectively as he had. In *Doctrine of the Sword*, referring to those agitating for a just cause, he seems to imply that even violence to people may sometimes be justified.

"Where the only choice is between cowardice and violence, I advise violence. I cultivate the quiet courage of dying without killing. But to him who has not this courage, I advise killing and being killed rather than shameful flight." Quoted in Freeman, *Civil Disobedience, Law and Democracy*, (1966), 3 *Law in Transition Quarterly*, at p. 43.

⁸¹ For those who cannot accept any violation of the rule of law this "openness" in no way legitimizes the act.

"Disobedience to law is bad enough when done secretly but it is far worse when done openly, especially when accompanied by clothing such acts in the mantle of virtue and organizing well-advertised and financed plans to carry out such violations... the open violator, the agitating violator, acts shamelessly, in defiance of his neighbour's judgment and his fellow man's disapproval." Waldman, *loc. cit.*, n. 9, at p. 333.

⁸² Griswold, *Dissent - 1968*, (1967-68), 42 *Tulane L.R.*, at p. 726.

⁸³ William F. Buckley, *Civil Disobedience — Is it Justified?*, *New York Times Magazine Section*, (September 26, 1967).

accepts. But as the purpose of disobedience is to change unjust laws or conditions the protest cannot stop simply because judgment has been rendered by the courts. Whether legal or not, a morally justified protest remains just to the end. The protest must not, therefore, stop the moment the criticized government decides against it. The punishment for a morally justified act cannot logically be "right". While not surprised at the decision, the disobeyer may be "bitter" and must "complain". There are instances where a jail sentence is welcomed but the purpose is a pragmatic one — the need to dramatize the sincerity of the protester and the morality of his cause. But normally, the jail sentence is the price the civil disobeyer recognizes the government can exact from him. While recognizing its right to do so, he does not recognize the right as "right". To accept as "right" these decisions is to perpetuate the injustices being protested against. The sentencing of a civil disobeyer should result in continuing protests, so that the moral claim of the demonstrators is not ended by the government's act.

Unless one accepts the proposition that the entire moral life of the individual is absorbed into the state, the obligation to obey the law is only *prima facie* — and civil disobedience may be justified. For American democracy to survive and flourish, its people must not relinquish civil disobedience as a weapon against the overwhelming power of the state. Those in privileged positions are naturally prone to emphasize the risks of harm rather than the possibility of the potential benefits in the challenge to entrenched injustice. It is increasingly obvious that, "For white America, it has always been easier, faster and more desirable to pass such legislation as an anti-riot bill than to take constructive action that would eliminate the underlying causes of disorder".⁸⁴ But it is clear that we must construct a new society. To the oppressed, we must restore a sense of personal dignity and worth. The oppressor must be helped to cast off values and habits which degrade the morality of mankind. To those morally or physically outraged, the possibility of securing change by means compatible with the present framework of government may restore confidence in the possibility of lawful behaviour. Civil disobedience must offer an alternative to the increasing minority of morally outraged individuals who are becoming increasingly polarized and turning to civil resistance. Violence and destruction are already beginning to engulf the nation. Some search for reasons and try to understand, some criticize,

⁸⁴ Masotti, Hadden, Seminatore, Corsi, *loc. cit.*, n. 25, at p. 154.

some re-enforce long established hatreds — most hope that it will somehow end.

As a nation, America has been short-sighted about the future, choosing instead, to be concerned only with the present. The condition of the black man, the existence of poverty, the continued insanity of war, the destruction of our environment are problems which have not been solved by a reliance on the traditional methods. Mild, gradual, institutionalized steps, while comforting, will not bring about the needed change. The existing political institutions are simply incapable, at present, of initiating the type of action needed without the prodding of those who have not so easily accepted the paradoxes of American life.

It is difficult, in the comfortable surroundings of middle-class America to discard the notion that, with patience, everything will get better. Unfortunately, it is simply not so. There is a desperate need for the comfortable to transcend their own position and to somehow perceive the plight of the less fortunate. To those Americans who claim to sympathize with the oppressed, but do little to improve their lot, Martin Luther King has said, "He who passively accepts evil is as much involved in it as he who helps to perpetrate it. He who accepts evil without protesting against it is really cooperating with it".⁸⁵ The need to agitate is clear. "... [t]he question is not whether we will be extremists, but what kind of extremists we will be. Will we be extremists for hate or for love? Will we be extremists for the preservation of injustice or the extension of justice?"⁸⁶ There is no question that social change of a sweeping nature is needed and that such change has always been accompanied by violent tremors. Civil disobedience must be legitimized in the sense that it should be a legitimate factor to be weighed by the law in exercising the explicit or implicit discretion which it possesses. In this way alone can the law hope to help channel and control the agitation needed to shake the complacency of the nation.⁸⁷

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⁸⁵ Martin Luther King, *Stride Toward Freedom*, (New York: 1958), at p. 51.

⁸⁶ King, *loc. cit.*, n. 3, at p. 71.

⁸⁷ "The welfare of any society depends, in good part, on its ability to adjust its legal system to changes in the social, technological and economic climate. Unless its legal institutions respond to current needs, the system faces many dangers. Institutional rigidities can create such conflicts within a societal framework that they may spark a decline of the society, a phenomenon which has occurred several times in the course of man's history". Massel, *Legal Institutions in a Changing Society: The Need for Appraisal*, 21 *Journal of Legal Education*, p. 125.

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