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THE RIGHT OF PROTEST AND CIVIL DISOBEDIENCE †

Harrop A. Freeman ‡

For the past ten years lawyers and society generally have become aware of a technique of challenging government action or policy. Various styled as sit-ins, wade-ins, teach-ins, preach-ins, protest marches, all use the bodies of individuals to call attention to an issue and work for legal change. It is important that we understand these methods and try to orient them into our system of law. The Negro rights and the student anti-war movements (which in most respects is 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-20th 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.

Many of the popular assumptions surrounding our title are misconceptions. The protest action is often not civil disobedience but in fact “obedience” (the leader of the second Oakland march 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 pattern as a means of effectuating change within the law when law’s normal procedures were inadequate or held captive by anti-legal forces, thus bringing about necessary change in a democratic, consensual, non-violent way.

In any discussion of challenge to the State, its laws and its policies,

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† An original paper on Civil Disobedience was presented by Professor Freeman at the Center for the Study of Democratic Institutions, Santa Barbara, California, and this was made the basis of a week-long symposium, November 5-12, 1965. The results of that paper and symposium are being published by the Center in its regular series.

‡ The author is Professor of Law at Cornell University Law School, Ithaca, New York, and was on leave to the Center for the Study of Democratic Institutions for the fall term, 1965.
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 coercion, (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 we may define as physical power to effect change in the material or immaterial world.¹ 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 willful 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. That is the way most people conversant in the area use the terms.²

CIVIL DISOBEDIENCE ON THE SPECTRUM OF NON-VIOLENCE

Because I believe that 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, I deem it essential that we understand the total non-violent pattern. If we could plot a spectrum from violence without hate at one extreme to active goodwill and reconcilia-

1. I, personally, enjoy Simone Weil's beautiful little book, THE Iliad, OR, THE Poem OF Force, wherein she says:

... The center of the Iliad is force. Force employed by man, force that enslaves man, force before which man's flesh shrinks away. In this work, at times, the human spirit is shown as modified by its relations with force, as swept away, blinded, by the very force it imagined it could handle, as deformed by the weight of the force it submits to.

To define force—it is that x that turns anybody who is subjected to it into a thing. Exercised to the limit, it turns man into a thing in the most literal sense: it makes a corpse out of him. Somebody was here, and the next minute there is nobody here at all; this is a spectacle the Iliad never wearyes of showing us:

... the horses
Rattled the empty chariots through the files of battle,
Longing for their noble drivers. But they on the ground
Lay, dearer to the vulture than to their wives.

2. PAULIN, INTRODUCTION TO NON-VIOLENCE (1943).
tion (pacifism) at the other, civil disobedience would fall close to the median:

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It is very likely that in different situations those primarily falling in one category will use other means, particularly means lower on the scale.

It would seem that we use the term “civil disobedience” in our present discussion as characteristic of the total spectrum for two reasons: (1) because it is the median term, and (2) because in the word “disobedience” is found the problem hardest for society to accept—the challenge to law. Let us briefly examine the spectrum.

Violence Without Hate. Almost everyone recognizes that on occasion a man who genuinely abhors violence confronts an almost insufferable evil, and yet he may feel that the only means of opposing that evil 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 (defensive) rather than positive. Much Negro activity over the past 100 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. Or note the five or six major Chinese

3. NIEBUHR, MORAL MAN AND IMMORAL SOCIETY (1932).
boycotts between 1906 and 1919.\(^5\)

**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 excellent example (the "sit-in" so effectively used by the civil and Negro rights movements originated in the 1936-37 "sit down strike" in which the worker refused to leave his workbench). Strikes have often had extensive and profound political significance.\(^6\)

**Civil Disobedience.** This has much the same purpose as non-violent coercion, relies on some of the same techniques, is grounded in much the same theory as 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 act of the State having the effect of law, which is disobeyed; and the law is that of the state having jurisdiction of the protestor. In a very real sense, therefore, civil disobedience is civil non-violent resistance or coercion just as we speak of "civil" war.

Let us examine a few 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 "in-

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6. In 1920 British transport workers refused to handle goods to be used against the socialist regime in Russia; the British general strike of 1926 was called off because of its tremendous revolutionary implications; in 1920 a German general strike defeated the Kapp Putsch, an attempt of the militarists to seize control of the State; in 1924, when the French army invaded the Ruhr, the non-cooperation of the miners led to the famous expression, "You can't mine coal with bayonets." The list could be extended indefinitely. See, also, Nettels, THE ROOTS OF AMERICAN CIVILIZATION 630-35 (1938); The American colonies opposed the Stamp Act of 1765 and the Townshend Duties of 1767 by "non-importation agreements." This boycott compelled the repeal of the Stamp Act of 1766 and the Townshend Duties in 1770. The "Continental Association" formed by the Continental Congress in 1774 was to continue this non-violent revolution. The "Boston Tea Party" was typical non-violent action, but the radicals gathered arms and produced Lexington and Concord.
tentional" 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 is a form of communication and asserts that it is within the theory of the first amendment. (6) It is used by those who are in fact barred from otherwise exerting power. (7) It may be legal or illegal. Civil disobedience may have a religious philosophy. When it does have a religious philosophy, it borders on pacifism. There is adequate religious justification, in addition to theories of natural law, for those who want to use it.7

Satyagraha or Non-Violent Direct Action. Gandhi has recorded for us both the empirical and the theoretical bases of Satyagraha.8 Gandhi, the young lawyer, 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.9

The term "Satyagraha" was coined by Gandhi in about 1906 to avoid the connotation of weakness. He combined the Gujarati words Sat or truth with Agraha meaning firmness, to give us "truth force" or "soul force." Gandhi was influenced by the Hindu philosophy of ahimsa (the idea that the most effective sacrifice was self-sacrifice and suffering while refusing to injure others), by the Sermon on the Mount, and by the writings of Tolstoy and Thoreau. Shridharani treats Satyagraha rather like "moral jujitsu," listing thirteen steps in a Satyagraha campaign.10

8. See, GANDHI, NON-VIOLENT RESISTANCE (1951); SHRIDHARANI, WAR WITHOUT VIOLENCE (1939); BONDURANT, CONQUEST OF VIOLENCE (1958).
9. Ibid. The climax of the struggle came in 1913 when 2,000 Indians marched into the Transvaal; the treatment they received and the forbearance they showed swung public opinion, a commission was appointed and most of the discriminatory laws were repealed. In 1914 on return to India, Gandhi led a mill workers' strike in Ahmedabad. He had long believed that "Swaraj" or self-rule was due for India and he undertook to lead this political movement along non-violent lines. The history of this movement, giving rise to Indian independence in 1947, is well known and will not be repeated. In one of his first Indian strikes Gandhi used fasting to "purify himself and the strikers;" the efficacy of the fast was proved by obtaining desired results in three days; he used fasts in 1919, 1924, 1932, 1933, 1939, 1943, 1945, 1946-47.
10. SHRIDHARANI, op. cit. supra note 8. The first step is negotiation and arbitration; the second is "agitation" to educate the people on the issues and gain solidarity for later stages. If "moral suasion . . . proved ineffective the Satyagrahis do not hesitate to shift their technique to compulsive force." Later steps thus include mass demonstrations, strikes, boycotts, non-cooperation, civil disobedience, setting up parallel govern-
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 become quite hazy.

Pacifism—Active Goodwill, 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, the non-initiate. It may be called revolutionary secular pacifism. It has a political philosophy of five tenets:11

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 total life, from which opposition to war and activity in politics are by-products.12

Let me try to make the philosophy more exact and more personal. All great religions seek to lay down two great commandments (and I would add that these are good modern psychology): (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 himself 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—warm understanding, kindly, trusting, daring—(and if necessary suffering) is the “power” which moves non-exploitatively; 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, I am a pacifist. All fall short of the ideal, yet the ideal remains.

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

Civil Disobedience and the Law

Probably 80 percent of all non-violent challenges to law or state policy are totally “obedient”—distributing pamphlets on Vietnam or seg-

13. The following classical minutes of Quakers may be taken as partial statements of this philosophy:

... The ideal Quaker method would seem to be patient waiting for enlightenment on the underlying principle, which when seen is so absolutely clear and convincing that no outer difficulties or suffering can affect it: its full implications gradually appear, and its ultimate triumph can never be doubted. Any advance towards it, may be accepted as a stepping stone, although only methods consistent with Quaker ideals may be used to gain the desired end. Doing anything tinged with evil, that good may come, is entirely contrary to their ideas.

Ruth Fry, as quoted in Introduction to Non-Violence 50, Pacifist Research Bureau,

... Our reliance is not upon the power which dominates and coerces a man but on spiritual forces—the irresistible power of goodness, and redemptive power of suffering. We must trust the divine element in all men to accept our faith in them and to respond in kind. We willingly assume the costs to ourselves involved. For us the way of life must be not the sword, but the cross.

Five Years Meeting Minute, quoted by Ruth Freeman in Quakers and Peace 51, Pacifist Research Bureau.

Albert Bigelow who sailed the “Golden Rule” into the Pacific nuclear test area in protest said:

I am going in the hope of helping change the hearts and minds of men in government. If necessary I am willing to give my life to help change a policy of fear, force, and destruction to one of trust, kindness, and help. I am going because I have to—if I am to call myself a human being.


The basic argument of pacificism was made long ago by Spinoza (Ethics), thus: Hatred is increased by being reciprocated, and can on the other hand be destroyed by love. Hatred which is completely vanquished by love, passes into love; and love is thereupon greater, than if hatred had not preceded it.
regation, programs of voter registration, teach-ins, parades and picketing under permits or where no permits are required, et cetera. The present section of this paper does not deal with these cases, even though they represent the real core of the civil rights-antiwar movement, because these do not raise legal issues. When, however, a person challenges state law or policy by violating a specific law, then we have a case of civil disobedience, which 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 wish to 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 such 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 cause the punishment to be nominal (certainly not more severe).

(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:

Our 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.¹⁴

Further, in a very real sense every person who violates a contract and litigates its meaning and legality, every business that suppresses competition and determines the issue in an anti-trust suit, every individual

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who continues to use a right-of-way his neighbor would close, every unauthorized user of a trade-mark 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 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 (alleged to be invalid for discrimination). This is not unlike the issue which 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 and violation of Nuremberg law. In *Keegan v. United States*, a member of the German-American Bund counselled evasion (refusal) of military service on the theory that when section 308(i) of 50 U.S.C. took away the rights of Bund members to 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*, as requested, 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. United States*. There, Japanese-Americans who had been evacuated from the west 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 protestors and draft demonstrators who insist that when Selective Service begins classifying them 1-A because they protest foreign policy this is a discriminatory application and therefore unconstitutional so they are entitled to disobey. One hundred and one law professors have sanctioned this argument in a letter to President Johnson. In conscientious objector and other draft cases

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15. 325 U.S. 487 (1945).
16. *Id.* at 493-94.
17. 152 F.2d 905 (1945).
18. N.Y. Times, Dec. 16, 1965. See also, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). It involved an ordinance of the City and County of San Francisco making it unlawful to operate a laundry without the consent of the board of supervisors unless it
the Supreme Court has explicitly required the draftee who considers he has illegally been 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).18

Nor does it seem to this writer to be 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,20 Plessy,21 Macintosh,22 and countless other decisions, which have since been reversed. I have not heard anyone suggest that southern officials who attempt to test again and again the meaning of Brown v. Board of Education,23 or Baker v. Carr,24 or NAACP v. Alabama,25 or the Civil Rights cases of 188326 are to be punished for what is ultimately found to be "civil disobedience" by them.27

(2) Jurisprudence or Legal Theory. There are two theories here—one a very ancient one, and the other a recent one in whose formulation I have led and 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 they conflict] human law should not be obeyed;” when the American colonies declared their independence of England because “all men are created equal, [that they are] endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness;” when the Supreme Court recognizes in conscience a “duty to a power higher than the State”—they relied upon a higher law, a natural justice, a code of man’s fundamental rights which no political power can eliminate. And this is in the American tradition.28

The second theory is that non-violent revolution is within the law. From the late 1940’s on, I have urged this position in briefs before the Supreme Court and in articles.29 In 1961, in my book Dear Mr. Presi-


THOREAU, WALDEN AND CIVIL DISOBEDIENCE (1960) nicely formulated the problem:

Unjust laws exist. Shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once?

His answer was:

If this injustice is part of the necessary friction of the machine of government, let it go, let it go; perchance it will wear smooth . . . but if it is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law. Let your life be a counter friction to stop the machine.

BUCHANAN, REDISCOVERING NATURAL LAW (1962) has added another dimension:

Laws are questions asked by God, history, nature, or society to be answered by men individually and collectively. This formulation penetrates the heart of human freedom. It says that no law, not even divine law, cancels out human freedom; the answer can be Yes or No or something else. It also tactitly warns of consequences of the answer. But primarily it forces the human being to think about ends, or purposes.

See specifically Civil Disobedience: M. R. MacGuigan, Civil Disobedience and Natural Law, 11 CATR. LAW 118 (1965); M. Keeton, Morality of Civil Disobedience, 43 TEX. L. REV. 507 (1965); Harris Wofford, The Law and Civil Disobedience, 142 PRESBYTERIAN OUTLOOK #34.

29. See note 28, supra. My formulation in DEAR MR. PRESIDENT (1961) is as follows:

More and more legal theoreticians and courts are recognizing that violence is necessarily outside the law, violative of law and order, destructive of community. Thomas Jefferson to the contrary notwithstanding, there is no right (judicially approved) of violent revolution. Violence has become so threatening and destructive that it can no longer be a tool of bargaining, or a tool of social change. But, it would be an immoral society in which no method existed by which change could be produced, by which the status quo could be made to respond to revolutionary demands. But non-violence is within the law, builds community and seeks to persuade and gain acceptance by democratic methods similar to free speech. If armaments and violence can no longer be tolerated
dent, an Open Letter on Foreign Policy, I pointed out 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." Recently, at the Pacem in Terris World Convocation, Arnold Toynbee and Senator Fulbright, in discussing the right of emergent peoples 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.30

It seems to me that the Supreme Court was trying to commit itself to this theory when in Dennis v. United States it stated:

The obvious purpose of the statute [Smith Act] is to protect existing Government, not from change by peaceful, lawful and constitutional means, but from change by violence, revolution and terrorism.31

(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. I would conclude that duty to obey the law must actually be presented in relativist terms.32 The law clearly recognizes

30. FULBRIGHT, PACEM IN TERRIS 206 (1965)

The status quo cannot be frozen, and we ought not to try to freeze it. . . . What we have to do is not to try to stop change, but to try to carry out the inevitable changes without violence and bloodshed. . . . We are now in the atomic age, and so we cannot survive if we continue to carry out our changes by the old senseless and barbarous method of resorting to force.

TOYNBEE, Id. at 219-20:

Gandhi . . . was the prophet of the atomic age. Life is change, and now change is going to be faster and more furious than ever. But we have to have it without violence. Gandhi showed that it was possible. . . .


distinctions in motivation, or lack of motivation (insanity, in the course of a felony, premeditated). The cases we have examined above are only a few recognizing some relative right of civil disobedience.

Let us examine civil disobedience and the duty/non-duty of obeying the law on logical-ethical grounds:

a) It is often argued that whatever is illegal is also immoral. Illegality equals immorality. Law governs morality. But this argument presents us with 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 moralities conflict it is generally recognized that the higher morality must control. This puts us back again to the relativist view of civil disobedience.

b) A second argument would be that obedience to law is just a matter of law (omits morals). What is illegal is illegal. The law creates its own duty. This view is essentially totalitarian. This argument takes no account of morals or “higher law” obligations. Here we have a hierarchy of obligations question. And on both this and the former point 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 equals legality. Morality governs law. This need not be labored. It is the “higher law” and Aquinas’ argument. It is clearly relativist and puts morality in the driver’s seat.

d) A fourth position would be Scott Buchanan’s 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 (lawyers would find this group small). With the two above 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 act should be prohibited—and they will not disobey the law. They may feel that this law, relating it to all laws, is unclear; and they may obey or disobey the law as a procedure to test the law or get a new interpretation, the new interpretation thus becoming “law,” so that they have in fact complied. Or a person may decide to disobey the law, as a democratic technique, an appeal to his peers. This may be inside or outside of legal

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procedures. He is saying: if “they” (the public, the district attorney, the court) agree with me, I am justified; if they disagree with me I am 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 percent or majority enacted, 49 percent 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 consideration 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 ask for reconsideration. A rule that disobedience is never justified would deaden both moral and democratic sensitivity and prevent legal change.

f) It must also be recognized that many laws are disobeyed in another sense: that 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 does not protect you. There are also times when a law may be disobeyed but no sanction is provided; it is brutum fulmen. There are times when what seems illegal is not really illegal (for example, conflicting laws). This latter 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 law violation.

g) Finally, we may very briefly examine two of the most frequently made arguments against civil disobedience (each needs much more extensive treatment, here we can make only an outline). The first argument is: It would be disastrous if everyone disobeyed law. This is a typically illogical argument from specific to general. The civil disobedient is not urging disobedience of all laws. I regularly prove in civil disobedience cases that this client obeys laws—has never violated another. He is willing that anyone disobey this particular law he believes to be immoral. He would never argue that one disobedience justified all disobedience. Nor is there the slightest proof that others are caused to violate law by this disobedience or that any ordinary law violator cares a whit about this violation. In fact, conscientious objectors in prison have found the contrary. 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

34. SIBLEY & JACOBS, CONSCRIPTION OF CONSCIENCE (1952).
American colonies: "no taxation without representation"). What of the young, the poor, the disenfranchised, the dispossessed? In effect they are 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 which consistently protects me no rights? Sir, 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. Is not the "benefits" argument an immoral and illogical one to the extent of our failure to fulfill these needs? Is it not a case of bad conscience?

(4) First Amendment Rights as Protecting Civil Disobedience. This article offers neither the time nor space to discuss fully the concept of the first amendment as an affirmative doctrine of truth in the marketplace 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. United States (1919) to the latest statement in Cox v. Louisiana and Garrison v. Louisiana (1965) the Supreme Court has issued a ringing affirmation of truth in the marketplace as the philosophy and core of democracy and first amendment protection. The following shortened version, taken from seven Supreme Court decisions, could be enlarged to over twenty pages from as many decisions:

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

THE RIGHT OF PROTEST

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 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 lawbreaking, 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 lawbreaking, 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.\textsuperscript{40}

This is merely one application of the “clear and present danger” and “fighting words” rule of the Supreme Court.\textsuperscript{41} If recruiting members for the Communist Party (\textit{Herndon v. Lowry}), if publicly advocating polygamy (\textit{Musser v. Utah}), if playing anti-Catholic records in streets where 90 percent of the people were Catholic (\textit{Cantwell v. Connecticut}), if condemning the war and draft and distributing literature to this effect to parents of draftees during the war (\textit{Taylor v. Mississippi}), if refusal to salute the flag during the war when great national solidarity was sought (\textit{West Virginia v. Barnette}) do not show a clear and present danger, how can the activity of demonstrators for civil rights, Vietnam policy, and free speech present a threat of clear and present danger to the nation? The clear and present danger test has been summarized thus:

What finally emerges from the “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 furthermost constitutional boundaries of protected expression, nor do we here. \textit{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.” \textit{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.}\textsuperscript{42} (Emphasis supplied.)

The Supreme Court in \textit{Thomas v. Collins}, in upholding demonstrations, strikes and like action the Court said:

\ldots 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

\textsuperscript{40} 333 U.S. 95 (1948).
\textsuperscript{42} \textit{Bridges v. California}, 314 U.S. 252, 263 (1941).
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.43

This rule moved one further step in the cases as to parade permits,
use of parks and streets. The net effect of a whole series of cases is that,
if the 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 put on the use of a public park or street. Nor can conditions to the
use of public places be attached that are in effect a denial of their use.
Permits to use public parks or places must be granted without discrimina-
tion. The normal methods of use are allowed (including loud speakers),
subject to regulation to prevent undue disturbance.44 Within the past
year the Supreme Court has clearly recognized sit-ins and mass demon-
strations for Negro and civil rights and protected those engaged.45

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 has required the State to adjust
itself to the citizens' conscience and first amendment interests.46 Their
opinions have referred to the fact that disobedience by Quakers and

43. 323 U.S. 516, 537 (1944). See also, Herndon v. Lowry, supra note 41.
44. See, e.g., Flower v. Rhode Island, 345 U.S. 67 (1953); Feiner v. New York, 340
U.S. 315 (1951); Niemotko v. Maryland, 340 U.S. 268 (1951); Kovacs v. Cooper, 336
141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Snyder v. Milwaukee, 308
U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1933). See also, Annot., 10
45. See, Cox v. Louisiana, 379 U.S. 536, 559 (1965); Ham v. City of Rock Hill,
46. West Virginia v. Barnette, 319 U.S. 624 (1943). In 319 U.S. at 630 the United
States Supreme Court said:

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.

Also in Girouard v. United States, 328 U.S. 61 (1946), the United States Supreme Court
stated at 328 U.S. 68 that:

. . . 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 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.
others was what produced the first amendment freedoms. In the light of this, the famous 1948 "Declaration of Conscience" by Quakers against the Draft Act, must be kept in mind and compared to the present Students for Democratic Society stand. There are other writers beginning to approach this concept of the place of civil disobedience in the First Amendment.

There is thus a strong case for the protection of protests, demonstrations—of civil disobedience—under the first amendment.

Though I do not desire to press this too far I think it is worth noting that in three constitutions which the United States prepared after the war and in Socialist-Communist countries, where you might least expect to find it, provisions exist guaranteeing free discussion and communication including specifically the right of mass demonstration. Is our at-home democratic theory anything less?

(5) **Punishment for 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 of law, as 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 or as

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47. [We] support Young Friends and others who express their opposition to conscription either by non-registration, or by registration as conscientious objectors. We warmly approve civil disobedience under Divine compulsion as an honorable testimony fully in keeping with the history and practices of Friends.


49. I do not read Justice Black's dissent in Cox v. Louisiana, 379 U.S. 559 at 575 (1965) as contrary: (1) he was placing limits on and permitting regulation of picketing a courthouse in such a way as to prevent the fair administration of justice, (2) cautioning minorities of dangers to themselves from demonstrations, (3) recalling his own early experience with demonstrations against his appointment. Any other interpretation would be contrary to his familiar position. See, *Justice Black and the First Amendment 'Absolutes': a Public Interview*, 37 N.Y.U. L. Rev. 549 (1962).

50. Constitution of Japan (1946) art. 16; Constitution of Italy (1947) art. 21; Constitution of Germany (1949) art. 9.

part of normal criminal intent. Yet that is exactly 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.

**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 (*The Spirit of Liberty*, p. 71): “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 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 civil disobedience) because of the advantages accruing to society from free and open discussion. Here “tolerance” becomes “justified”—i.e. “juridified” on principle.

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.

**ADDENDUM**

*The New Movement(s) of Nonviolence and Civil Disobedience.* In a very real sense there is only one movement, yet there are enough differences in goals, leadership, and membership that to clarify our discussion it can be separated into two segments. One is the Negro-civil rights movement, which may be accurately described in terms of the organizational names which comprise it: CORE (Congress of Racial Equality); SCLS (Southern Christian Leadership Conference); SNCC (Student Nonviolent Coordinating Committee); NAACP (National As-

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52. See notes 21-27, *supra* and Sibley & Jacobs, note 41 *supra*.

53. The reader’s attention should be drawn to the possible implications of *Brown v. Louisiana*, 34 U.S.L. Week 4143 (U.S. Feb. 23, 1966) which was decided after Dr. Freeman’s article was written. Mr. Justice Fortas announcing the judgment of the Court stated at 34 U.S.L. Week 4146 that “... the statute [Louisiana breach of peace statute] was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution.” [Emphasis added] Articles Editor.
sociation for Advancement of Colored People); MFDP (Mississippi Freedom Democratic Party); COFO (SNCC, SCLC, CORE). The second is the Student-antiwar movement, which again may be characterized by the organizational names: SDS (Students for Democratic Society); VDC (Vietnam Day Committee); SNCC (Student Nonviolent Coordinating Committee); SPU (Student Peace Union); NSM (Northern Student Movement). There are peripheral organizations, some Marxist, some temporary, such as FSM (Free Speech Movement, Berkeley), May 2nd Movement and DuBois Clubs (Marxist), YSL and YSA (Young Socialists).

Outside both movements, but at times adding "oldsters" to the demonstrations, are old line peace and civil rights groups. The chief issues between this "outside" and the movement are: must the peace and betterment movements operate within the mainstream of American political life; must they make an alliance with older ages and with labor and liberals; must they accept or develop an ideology and organization structure?

Let us see whether we can place the movement in perspective. Immediately after the war the returning veterans began a great liberal tradition on the campuses: Amvets, Students for Peace, CORE, etc. This was destroyed by McCarthyism of the 1950's. Though CORE, NAACP, SCLC were earlier active in school desegregation, the New Movement actually began with SNCC sit-ins in 1960, passed through SPU ban-the-bomb marches of 1961, through voter registration and candidates for office in 1962 into the total Negro-civil rights and student-free speech-antiwar activities of 1963-65.

The 1960's abounded with issues calling forth protest: House Un-American Activities Committee hearings in San Francisco, atmospheric nuclear testing, four young North Carolina Negroes' demand for service at a public lunch counter, the Cuban revolution and counter-revolution, the murder of Evers and Moore and three SNCC workers and Mrs. Liuzzo and Rev. Reib and scores of others, Tuskaloosa and Selma, college desegregation at Alabama and Georgia and Ol' Miss, police brutality and riots from Harlem to Watts, the seating of delegates at the Democratic Convention and in Congress, the Dominican Republic and Vietnam. The Civil Rights portion of the movement has had remarkable success in obtaining official concessions—two civil rights bills, a poverty program—and thus the sting has been taken out of their struggle, which has gone into the courts and to some degree off the streets. The protest has therefore swung over to the peace issue (Vietnam) at the most crucial time, challenging the national administration at the very core of the existing order.
One can describe fairly completely the nature of the movement and its participants. The movement is politically existential, facing whatever problems currently confront it. It is participatory democracy, trying to count personally against the alienated, consensus, power elite, military-industrial politics of Dahl, Lipset, Bell, Mills, Rossiter, and Hacker. It is non-violent primarily as a matter of technique rather than theory. It is moralistic, seeing all problems in black and white, and trying to act morally. It takes a One World view and seeks a world conscience. It uses “umbrella” issues on which divergent views will cooperate (e.g., “end the war in Vietnam”). It works with anyone; it does not bother about a “united,” “common” or “popular” front; its policy is non-exclusion. It sees anti-communism as McCarthyism revived. It lacks continuity with progressive literature and art of the past; it creates its own. It adopts a new and simple language able to “gut” with people. It has a “style” in clothes and demeanor. It is a crusade for the unrepresented and dispossessed. It distrusts piecemeal solutions—“operations head-start,” “poverty programs,” “voting rights bills” as compromising the broad revolution. It demands of its members to prove themselves by laying their bodies on the line.

Who are these participants? They are young: believing that youth have common and unique problems, distrusting anyone over 30, seeing students as the educated vanguard—as yet unbought by the system. They come from the upper middle class; they are the brightest and most committed of their generation. They seek individualism, dignity, how to get control of their own lives. They reject the affluent society, though most are supported by it; they see the “poor” as least corrupted. They tend to be bohemian. They mistrust government and when police beat them, mayors refuse permits, and courts cheat them, they feel that their case is proved.

The Negro-Civil Rights Movement. Can best be separately considered by looking at CORE and SNCC. Both have become Negro organizations, with Negro staffs, Negro leadership, Negro local workers and pride in Negro identity. Both have become large, with perhaps 1,500 paid and unpaid full time workers, with budgets totalling two to three million dollars, with political power. Charismatic figures like Farmer and King play key roles. The participants come less from the upper middle class. They are founded in and their demands tend to come from the grass roots of the dispossessed. The leadership is doctrinaire pacifist (Rustin, Farmer, Randolph, King) and their cadres come from the town Negroes who have always practiced “necessitous” non-violence. It is easy for them to identify the “us” (colored) and the “they” (whites). The people asked to parade and picket can see themselves as personally
profiting from the sought change. They have not had to battle merely “issues” but have achieved direct confrontation in jails and lunchrooms, at the barricades and voter registration tables, before burning crosses and cattle prods, in the policy system and vigilante terror. They have been successful, like “an idea whose time has come.” And with success has come less purity: need for “establishment” money, bureaucratic organization, compromise in politics, unwillingness to take on the war-peace issue (e.g. CORE and NAACP—though King as an individual has).

Vann Woodward in the New York Times has remarked: “in judging the progress of a revolution, much depends on whether the bottle is seen as half full or half empty; whether one concentrates on what has been done or what remains to be done.” The Civil Rights Act of 1964, and the Voting Rights Act of 1965, have gone about as far as federal statutes can to make the Negro a citizen; school desegregation is moving slowly to make him educated; poverty programs are a start to reach him economically. But there is a rapid expansion of de facto segregation, a widening of the gap of unemployment between Negro and white, a deterioration of living conditions, a wiping out by automation of normally Negro jobs. And over it all hangs the American myth that when given the vote, the voter can cure his own ills. The Negro rights movement has a long road ahead; it may have diminishing public support; it may use increasing civil disobedience. I cannot help but remember that W.E.B. DuBois opened this century with the words: “The problem of the twentieth century is the color problem,” and that in 1942 was issued a pamphlet, “Civil Disobedience—is it the answer to Jim Crow?”

The Student Anti-war Movement. The best way to present this movement is to let it present itself—in its own words, in the famous 1962 Port Huron Founding Statement of SDS, and the very recent (October 20, 1965) Statement of Paul Booth, SDS National Secretary:

On Politics: The American political system . . . frustrates democracy by confusing the individual citizen, paralyzing policy discussion, and consolidating the irresponsible power of military and business interests.

On Society: We would replace power rooted in possession, privilege, or circumstance by power and uniqueness rooted in love, reflectiveness, reason and creativity.

On Communism: As democrates we are in basic opposition to the communist system. . . . [But] democracy, we are convinced, requires every effort to set in peaceful opposition the basic viewpoints of the day. . . .

On Foreign Policy: The world is in transformation. But America is not. . . . Fed by a bellicose press, manipulated by economic and political opponents of change, drifting in their own history, [the American people] grumble about "the foreign aid waste," or about "that beatnick down in Cuba," or how "things will get us by. . . ."

On the Economy: We hear glib references to the "welfare state," "free enterprise," and "shareholder's democracy" while military defense is the main item of "public" spending and obvious oligopoly and other forms of minority rule defy real individual initiative or popular control.

On Man: We regard man as infinitely precious and possessed of unfulfilled capacities for reason, freedom, and love. . . . We oppose the depersonalization that reduces human beings to the status of things—if anything, the brutalities of the twentieth century teach that means and ends are intimately related, that vague appeals to "posterity" cannot justify present mutilations.

Port Huron, 1962.

Students for a Democratic Society wishes to reiterate emphatically its intention to pursue its opposition to the war in Viet-Nam. . . .

We feel that the war is immoral at its root, that it is fought alongside a regime with no claim to represent its people, and that it is foreclosing the hope of making America a decent and truly Democratic Society.

The commitment of SDS, and of the whole generation we represent, is clear: we are anxious to build villages; we refuse to burn them. We are anxious to help and to change our country; we refuse to destroy someone else's country. We are anxious to advance the cause of democracy; we do not believe that cause can be advanced by torture and terror.

We are fully prepared to volunteer for service to our country and to democracy. . . . we propose to the President that all those Americans who seek so vigorously to build instead of burn be given their chance to do so . . . let us see what happens if service to democracy is made grounds for exemption from the military draft. I predict that almost every member of my generation would choose to build, not to burn; to teach, not to torture; to help, not to kill.

Our generation is not afraid of service for long years and low pay; SDS has been working for years in the slums of America at $10 a week to build a movement for democracy
there. We are not afraid to risk our lives; we have been risking our lives in Mississippi and Alabama, and some of us died there. But we will not bomb the people, the women and children of another country.

Until the President agrees to our proposal, we have only one choice: we do in conscience object, utterly and wholeheartedly, to this war; and we will encourage every member of our generation to object, and to file his objection through the Form 150 provided by the law for conscientious objection.

SDS, October 20, 1965.

This segment of the movement contains some different emphases from that of the Negro-civil rights segment. First, the student movement is less organized and less doctrinaire. It is not in face-to-face confrontation with an opponent, as the Negro is; it is facing issues. One of the student gripes and bases for action is that the universities isolate them from real situations and that they must break out of this and gain confrontation—the task is more difficult. This segment tackles bigger game, for no game is bigger than the Army, the President and Foreign Policy. It is difficult to gain step-by-step concrete results, and when some progress is not shown it is hard to maintain commitment. The ideals of the Negro-civil rights segment are old American ideals (equality, voting rights, etc.), but the ideals of the student movement are only now forming out of the action itself and are more difficult to grasp ("personal integrity," "participatory democracy," "intellectual responsibility," etc.). SDS works on the campuses, where they seek to make education responsible and to establish a community in which they feel citizenship, and through ERAP or community organization of the poor as "politics from the bottom up," a counter-community to the present power structure. SDS has had some success in changing universities for the better. It has had little success with its community organizations. This movement does not want to overturn democracy but to achieve it; it is strong on "participatory" democracy. This student movement is not "churchy" and definitely not puritan (as much of the Negro-civil rights group is); it is laughter and dance, and community and fraternity, and sex and spontaneity and love. It increasingly sees civil rights and poverty programs as palliatives—to too little and too late. It sees the liberals bought off by these and turned against the students to smother their revolutionary spirit and their method of demonstration. The students are painfully aware that going to jail is more damaging to them than to other Negro-civil rights protestors; that their case is not a great popular cause as civil rights has in some aspects turned out to be. The Draft and the Draft
card issue is only one way to find real confrontation, a situation touching both the individual and society deeply.

What Do I See For the Movement Ahead? For the first time we have in this country a mass non-violent movement. It has little faith in traditional political coalitions to accomplish revolutionary change or save us from nuclear annihilation. It is a new elite finding a broader popular support. The students and the younger faculty are welding themselves into the most intelligent criticism of government yet formed, and they have sufficient contacts through real sacrifice to draw on the Negro, middle city, white poor, lower middle class. The movement will increasingly attempt to reconstitute American university education and to utilize the university in launching new political-social action. Some members will go in and out of the Poverty Program, Peace Corps, Voter Registration; and some will refuse to serve in the armed forces—on conscience or other grounds.

Will the movement be able to furnish America with a conscience? Ralph Templin, in his book said: “democracy can be realized or destroyed only by its defense or its betrayal in its place of inner integrity: the conscience of man.”

Liberation called for the movement “to fill the jails and provide this nation with the slap of conscience it so desperately needs.”

In a 1959 law review article, I gave the history of protection of conscience as the means of furnishing the State with a conscience. I know the movement will try, but I do not know whether it can furnish America with a conscience.

James Wilson has outlined some of the requirements for successful protest—the protestant must feel strongly what he has to say, this must be shared widely in society, or it must be so dynamic as to educate the public to a new and unheld position, it must move in the general direction true to the society, the protest object must be clear, it must not use inappropriate methods. My own judgment is that the movement fairly well understands these problems.

The movement will have to face one of the most difficult issues in civil disobedience. There are those who argue that in a power centered society, non-violence by itself is rarely able to produce results—that it is the latent, incipient, potential violence which in fact makes the non-violent argument effective. In most moves for human betterment two revolutions are in fact preached—one of ends and one of means (e.g. non-violence). One of these may come through to a listening person

loud and clear for he is intellectually and emotionally tuned to the needed change (equality, jobs, school, public places, justice, votes). But he may not be equally attuned to the method. I think the student movement will remain non-violent in the face of awful provocation. I do not know whether the Negro movement can. On the one side of the balance is the long history of Negro non-violence and a strong pacifist leadership; on the negative side is the poverty, injustice, police and civilian brutality of the section in which the Negro is brought up. I hope for this great period of change to be achieved non-violently. But I cannot escape the very real chance of non-violence escalating into violence and the necessity of society being understanding and tolerant.
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