Hastings Law Journal

Volume 17 | Issue 3 Article 3

1-1966

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Moral Preemption Part I: The Case for the Disobedient

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ACTIVITIES connected with the civil rights movement and the movement in protest of Government policy in Viet Nam have forcefully presented to the public this question: *When, if ever, is an individual, in a democracy, justified in disobeying the law of the state?* The correlative question raised is this: *Is a person ever under obligation to disobey the state?* (I am glad the *Hastings Law Journal* framed these questions in terms of disobedience to laws *of the state* and not merely in terms of disobedience to law. In the generic sense "law" carries a presumption of moral legitimacy.)

There has been a recent series of articles critical of "civil disobedience,"[1] the term itself being a prejudging and foreshadowing of the conclusion. Because many of these articles are examples of Gertrude Stein logic—a law is a law, is a law, is a law—I welcome this opportunity to set the problem in somewhat wider perspective. First, we should recognize that the civil rights and anti-war movements are probably the two strongest socio-political forces taking place in America since the Granger-Progressive-Labor movements laid the foundations of the New Deal. Second, these movements, rather than being anarchic or totalitarian, follow the democratic tradition of relying on courts to hear pleas and render just judgement—even against the state. Third, three-fourths of all non-violent challenges to state

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[1] Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEXAS L. REV. 492 (1965); Freund, *Civil Rights and the Limits of Law*, 14 BUFFALO L. REV. 199 (1964); Keaton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965); Leibman, *Civil Disobedience: A Threat to Our Law Society*, 51 A.B.A.J. 645 (1965); MacGuigan, *Civil Disobedience and Natural Law*, 11 CATHOLIC LAW. 118 (1965); Tweed, Segal & Packer, *Civil Rights and Disobedience to Law: A Lawyer's View*, 36 N.Y.S.B.J. 290 (1964); Waldman, *Civil Rights—Yes; Civil Disobedience—No*, 37 N.Y.S.B.J. 331 (1965); Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A.L. REV. 780 (1963); *Civil Disobedience and the Law: A Symposium*, 3 AMERICAN CRIM. L.Q. 11 (1964); Note, *Civil Disobedience in the Civil Rights Movement: To What Extent Protected and Sanctioned?*, 16 W. RES. L. REV. 711 (1965).

action or policy are totally obedient and admittedly legal—distribution of pamphlets on Viet Nam or segregation, programs of voter registration, teach-ins, and parades and picketing. (The leader of the second Oakland march termed that activity "massive civil obedience.") Fourth, these movements claim to be in accordance with the "true spirit of the law" even though they violate a specific law in their challenge of what they judge to be anti-legal forces or orders. Fifth, none of the refusals to obey state orders have been violent or irresponsible; they have been anti-injustice, anti-war, equalitarian and non-violent. Sixth, many of these challenges have been examples of the education community attempting to play its proper role within an emerging and developing Constitution.

Since we are considering non-violent disobedience to state commands, a brief note on non-violence is appropriate.[2] The disobedience we are studying has at least these characteristics: (1) It is against the state or *civitas*, (2) it is an intentional act, (3) but does not embody criminal intent, (4) it is non-violent in origin, (5) it is used for an external purpose, (6) most frequently as a form of communication within first amendment theory, (7) it claims justification is some "higher law" doctrine—whether that be "natural law," "Nuremberg," "federal supremacy," or "conscience."

The Plan of This Article

I do not intend to deal extensively with the philosophy of disobedience or with the doctrine of "natural law," nor do I speak in the positivist tradition (the latter two approaches are taken by others in this symposium). I intend to make the following brief points:

(1) Disobedience to state commands may be required by the *Nuremberg Principles*, if they have the binding force of a treaty of the United States.

[2] Participants in non-violent civil disobedience are varyingly motivated. Some use this type of activity to object dramatically to state or private action because they believe that there is no other effective means of objection available. This may be called "necessitous non-violence." A second use is "non-violent coercion." Here the objective is to modify the conduct of others, even against their will. A third use of non-violent civil disobedience is in the Gandhian tradition, and it may be called "Gandhian direct action," or "satyagraha." The literal translation of "satyagraha" is "truthfirmness," and the liberal meaning of the word is best stated in the phrase "through voluntary suffering speaking truth to power." A fourth use might be called "active pacifism." Here the motivation is based on acceptance, as a way of life, of a pacifism involving affirmative acts of good will and reconciliation as a counterforce to the abuse of power. The assumption is that power tends to be irresponsible and exploitive, but it can be overcome by trusting, daring, challenging love. Thoreau's concept would seem to be that civil disobedience should be directed primarily, if not only, at the state; this concept might be considered a fifth use.

(2) Disobedience to state commands has always been recognized as an appropriate (and perhaps the only) *procedure* for challenging law or policy and obtaining court determination of the validity of the command disobeyed.

(3) Theories of jurisprudence other than "natural law" recognize the propriety of non-violent challenge to the state.

(4) The obligation to obey the law is not absolute, but relative, and must allow for some forms of disobedience.

(5) In the theory of an "emergent" and "living" Constitution the first amendment is increasingly being read "positively" to permit non-violent forms of what has traditionally been considered disobedience to the state.

(6) Obedience to "conscience" is the mark of man's maturity and challenging the state in conscience may be the only way to insure that the state acts in conscience and consequently becomes mature.

Nuremburg Principles and the Nuremberg Rule

This paper is not an adequate vehicle for the development of the whole argument that a citizen may be obligated under international law (and particularly those portions made part of the national public law) to refuse to obey state orders which are violative of international law. This principle might be called the Nuremberg Rule, but it is based upon much additional law.[3] In this article I shall merely sketch the argument.

During the Korean War attempts to validate refusals to pay taxes which would finance war, on the basis of Nuremberg, were rejected by the courts on several grounds: a taxpayer had no standing;[4] the Korean War did not violate Nuremberg;[5] the taxpayer was too remote from any possible illegality to be prosecutable. There appear to be no cases of potential soldiers challenging the Korean War. But the case as to Viet Nam is quite different; in *United States v. Mitchell*[6] the Second Circuit Court of Appeals reversed the conviction of a draftee who defended on the basis of Nuremberg. Although the major ground for

[3] For a discussion of the Nuremberg trials in relation to international law and world peace see WOETZEL, THE NUREMBERG TRIALS IN INTERNATIONAL LAW (rev. ed. 1962); Garcia-Mora, *Crimes Against Peace*, 34 FORDHAM L. REV. 1 (1965); Glueck, *The Nuernberg Trial and Aggressive War*, 59 HARV. L. REV. 396 (1946); Kranzbuhler, *Nuremberg Eighteen Years Afterwards*, 14 DE PAUL L. REV. 333 (1965); Comment, *The Legality of Nuremberg*, 4 DUQUESNE L. REV. 146 (1965).

[4] Farmer v. Rountree, 149 F. Supp. 327 (M.D. Tenn. 1956), *aff'd per curiam*, 252 F.2d 490 (6th Cir. 1958).

[5] *Ibid.*

[6] 354 F.2d 767 (2d Cir. 1966).

reversal was lack of adequate counsel, the court said it was "not a simple case"[7] and had serious constitutional issues.

In outline the argument based on Nuremberg is as follows: a) the trials at Nuremberg were conducted under an executive agreement which implemented a treaty signed by the United States;[8] b) the principles thereof are the supreme law of the land; c) these principles have also been made the law of the United Nations;[9] d) the agreement and the treaty which it implements—the Kellogg-Briand Pact—together condemn three types of activity, at least two of which may condemn all military action in Viet Nam; e) not only were Nazi leaders sentenced, but under subsidiary tribunals thousands of ordinary participants were tried and convicted;[10] f) *if* American action in Viet Nam is violative of the Nuremberg Principles, each American citizen who is aware of this violation bears an obligation to disobey orders which further the war effort, and to do so at the point where he is most free. The language in *United States v. Ohlendorf*[11] is clear:

> The subordinate is bound only to obey the lawful orders of his superior and if he accepts a criminal order and executes it with a malice of his own, he may not plead superior orders in mitigation of his offence . . . . If one claims duress in the execution of an illegal order it must be shown that the harm caused by obeying the illegal order is not disproportionally greater than the harm which would result from not obeying the illegal order. It would not be an adequate excuse, for example, if a subordinate under orders killed a

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[7] *Id.* at 769.

[8] Agreement With the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, E.A.S. No. 472 [hereinafter cited as Charter of London]. The Charter of London is an executive agreement, but it can be construed as implementing the Treaty With Other Powers Providing for the Renunciation of War as an Instrument of National Power, Aug. 27, 1928, art. I, 46 Stat. 2343, T.S. No. 796, popularly known as the Kellogg-Briand Pact. Article 6 of the Charter of London provides for the punishment of crimes against peace, while the Kellogg-Briand Pact denounces war as an instrument of national policy. See generally WILSON, THE INTERNATIONAL LAW STANDARD IN TREATIES OF THE UNITED STATES 25-34 (1953).

Although executive agreements are not made "the supreme Law of the Land," as are treaties by U.S. CONST. art. VI, § 2, for some purposes, at least, executive agreements have been held equal in dignity to treaties. United States v. Pink, 315 U.S. 203 (1942); United States v. Belmont, 301 U.S. 224 (1937).

[9] U.N. GEN. ASS. OFF. REC. 1st Sess., Plenary 1144 (A/236) (1946).

[10] For a discussion of some of these subsequent trials see WOETZEL, *op. cit. supra* note 3, at 218-44.

[11] 4 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS 1 (1949).

> person known to be innocent, because by not obeying it he himself would risk a few days of confinement. Nor if one acts under duress, may he, without culpability, commit the illegal act once the duress ceases.[12]

The three types of activity condemned by agreement and treaty, and punished at Nuremberg, are: 1) crimes against peace, *i.e.*, waging wars of aggression, 2) war crimes, *i.e.*, violations of the laws and customs of war, 3) crimes against humanity, including torture, the killing of civilians, deportations, and forced labor.[13] It is argued by critics of United States involvement in the Viet Nam war that this involvement violates the Geneva Accords of 1954, and such agreements made by the United States as the SEATO Treaty, and the United Nations Charter. It is also argued that the "pacification" and "strategic hamlets" programs as well as bombing, scorched earth, destruction of food supplies, and alleged torture and refusal to take prisoners violate the laws of war and constitute crimes against humanity; it is asserted that the Senate Hearings on Viet Nam bear this out.[14]

Disobedience as Procedure and Remedy

In the study of law we recognize that a right (interest) without a procedure and remedy to protect it is no right at all. Virtually the only effective and expeditious way for a person to challenge criminal law is to disobey the law; it is, in general, difficult to enjoin prosecution or to get a declaratory judgment concerning the validity of a criminal statute. What we need to recall is that "disobedience" is one of the best accepted legal procedures.

The Internal Revenue Code requires one to report fairly his income and pay his taxes—the taxes assessed against him. 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 (which in a sense can be considered civil disobedience actually encouraged by statute) and go into the deficiency procedure in the Tax Court, or he may pay (comply) and sue for a refund in the Court of Claims or District Court.[15] Similarly, the 1964 Civil Rights Act[16] provides

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[12] *Id.* at 470-71.

[13] Charter of the International Military Tribunal, sec. II, art. 6, in Charter of London.

[14] It is not the purpose of this writer to try these allegations or pass judgment upon the arguments. But since knowledgeable lawyers and Congressmen raise the question of these arguments the moral-legal preemption issue arises.

[15] INT. REV. CODE of 1954, § 6213(a).

[16] 78 Stat. 241 (1964) (codified in scattered sections of 28, 42 U.S.C.).

protection against punishment for attempts, which do not involve the use of force, to gain admission to establishments covered by the Act.[17]

Further, in a sense violation of a contract, which violation involves litigation challenging the validity of some requirement of the law of contracts, violation of the anti-trust laws in challenge to some part of those laws, and open and defiant violation of a rule or order of the FCC or any other administrative agency all constitute civil disobedience as a procedure for testing the legality of the state-established rule that is considered unacceptable.

The Supreme Court has gone so far as to protect a person from criminal prosecution when he advocates violating a criminal law in order to test its validity in court.[18] This is not unlike the issue which many of the Viet Nam and draft demonstrators raise in asserting that the Vietnamese war violates international law, as embodied in the *Nuremberg Principles*, and that consequently orders directing them to take part in that war are invalid, in accordance with the Nuremberg Rule, because they conflict with international law.

It does not seem to this writer that it is valid to suggest that once the highest court holds a law constitutional the right of disobedience ceases. This might tend to freeze into permanent law such cases as *Dred Scott v. Sanford*,[19] *Plessey v. Ferguson*,[20] *United States v. Macintosh*,[21] and other obnoxious decisions, which have since been reversed.[22] I have not heard anyone suggest that southern officials who attempt again and again to test the meaning of *Brown v. Board of Educ.*,[23] or *Baker v. Carr*,[24] or *NAACP v. Alabama*[25] are to be punished for what is ultimately found to be "disobedience" by them.[26]

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[17] Hamm v. City of Rock Hill, 379 U.S. 306, 311 (1964).

[18] Keegan v. United States, 325 U.S. 478 (1945); *accord*, Okamoto v. United States, 152 F.2d 905 (10th Cir. 1945).

[19] 60 U.S. (19 How.) 393 (1857).

[20] 163 U.S. 537 (1896).

[21] 283 U.S. 605 (1931); *accord*, United States v. Bland, 283 U.S. 636 (1931); United States v. Schwimmer, 279 U.S. 644 (1929).

[22] Justice Douglas has stated to this writer his belief in the minority of one in this regard. See generally DOUGLAS, THE ANATOMY OF LIBERTY (1963); DOUGLAS, A LIVING BILL OF RIGHTS (1961); KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE (1957); Lewis, *The Sit-In Cases: Great Expectations*, 1963 SUPREME COURT REV. 101; Rice, *Sit-Ins: Proceed With Caution*, 29 Mo. L. REV. 39 (1964).

[23] 349 U.S. 294 (1955) *modifying* 347 U.S. 483 (1954).

[24] 369 U.S. 186 (1962).

[25] 357 U.S. 449 (1958).

[26] For recent discussions of evasions of Brown v. Board of Educ., 349 U.S. 294 (1955) *modifying* 347 U.S. 483 (1954), see Calhoun v. Latimer, 321 F.2d 302 (5th Cir. 1963), *vacated per curiam*, 377 U.S. 263 (1964); Griffin v. School Bd. of Prince Edward County 377 U.S. 218 (1964); Stell v. Savannah-Chatham County Bd. of Educ., 333 F.2d

Jurisprudential Theory

There are two theories here—one a very ancient one, and the other a recent one in whose formulation I have been involved, 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 holds that rulers rule "under the law." This theory, which has met political crisis, has founded itself in *logos*, or divine law, and has allowed man to challenge the validity of positive law. When Antigone insisted upon burying her brother despite the King's edict that the body be cast to the dogs, when Christians refused to pay homage to Caesar's image with incense and wine, when Aquinas insisted that unjust human laws do not bind a man in conscience, and if they conflict with divine law the conflicting human law should not be obeyed,[27] when the American colonies declared their independence of England because "all men are created equal . . . endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," when the Supreme Court recognized that "in the domain of conscience there is a moral power higher than the State"[28]—they all relied upon a higher law, a natural justice, a code of man's fundamental rights which no political power can eliminate. And this is the American tradition. Since another portion of this symposium deals with this theory, I shall not discuss it further.

The essence of the second theory is that *non-violent revolution is within the positive law*. From the late 1940s on, I have urged this position in briefs before the Supreme Court and in articles.[29] It seems to me that the Supreme Court was trying to commit itself to this theory

55 (5th Cir. 1964), *cert. denied*, 379 U.S. 933 (1964); Monaghan, *Law and the Negro Revolution: Ten Years Later*, 44 B.U.L. Rev. 467, 471-75 (1964). For recent cases concerned with reapportionment problems since Baker v. Carr, 369 U.S. 186 (1962), see Fortson v. Dorsey, 379 U.S. 433 (1965); Wesberry v. Sanders, 376 U.S. 1 (1964); Buckley v. Hoff, 234 F. Supp. 191 (D. Vt. 1964), *modified per stipulation and aff'd per curiam, sub nom.* Parsons v. Buckley, 379 U.S. 359 (1965); Toombs v. Fortson, 205 F. Supp. 248 (N.D. Ga. 1962), *vacated in part and aff'd per curiam*, 379 U.S. 621 (1965). For discussion of violation of the right of association defined in NAACP v. Alabama, 357 U.S. 449 (1958), see Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539 (1963); NAACP v. Button, 371 U.S. 415 (1963).

[27] Aquinas, The Summa Theologiae I-II, question 96, art. 4,c (Ottawa ed. 1941).

[28] Girouard v. United States, 328 U.S. 61, 68 (1946); see Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 Harv. L. Rev. 149 (1928); Freeman, *Exemptions from Civil Responsibilities*, 20 Ohio St. L.J. 437 (1959); Freeman, *A Remonstrance for Conscience*, 106 U. Pa. L. Rev. 806 (1958); Freeman, *Civil Liberties —Acid Test of Democracy*, 43 Minn. L. Rev. 511 (1959).

[29] See articles cited note 28 *supra*.

when in the cases of *Dennis v. United States*[30] and *Yates v. United States*[31] it affirmed the proposition that it is the basic premise of our political system that change is to be brought about by non-violent constitutional process and that our Constitution sought to leave no excuse for violent attack on the status quo by providing a legal alternative—attack by ballot. The constitutional right to influence the electorate by press, speech, and assembly includes even freedom to advocate transition to communism by means of ballot box, but it does not include the practice of or incitement to violence.

The Obligation to Obey the Law Is Relative—Not Absolute

The Obligation to Obey the Law is often stated in absolute terms. It is sometimes stated as a prima facie self-evident truth. I would conclude, on the contrary, that duty to obey the law must actually be presented in relativist terms.

The positive criminal law itself clearly recognizes distinctions between degrees and character of motivation (*e.g.*, insanity, and premeditation). The cases mentioned above recognize some relative right of civil disobedience.

Let us examine the duty to obey the law of the state on logical-ethical grounds:

It is often argued that whatever is illegal is also immoral. Illegality = immorality. Law governs morality. But when some law is enacted which denounces conduct previously legal, this argument presents us with conflict of two moralities. That which was moral, prior to the law, is suddenly immoral, faced with the new moral that "what is legal is moral." When two morals conflict it is generally recognized that whichever is the higher morality must control. This returns us to the relativist view taken by the disobedient.

A variant of the above argument, requiring obedience to state law without exception, would be that obedience to law is just a matter of law (the consideration of morals is omitted). What is illegal is illegal. The law creates its own duty. This view is essentially totalitarian. The argument takes no account of higher moral or "higher law" obligations. Consequently this argument leaves the citizen with a hierarchy of *obligations* question. But in examining both this and the former argument it should be remembered that the Supreme Court has recognized that conscience contains "a moral power higher than the State."[32]

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[30] 341 U.S. 494 (1951).

[31] 354 U.S. 298 (1957).

[32] Girouard v. United States, 321 U.S. 61, 68 (1946).

In order to state all of the logical alternatives corollary to the arguments just reviewed, one would have to recognize the proposition that no act which is moral can be illegal (or the obverse: No act which is immoral can be legal). Morality = legality. Morality, therefore, 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.

Another position would be that each case is unique, that until the applicability of the law to each person has been decided, he has the option to obey or refuse to obey and have the issue tried out. Even if he has to go to jail eventually, democracy gives him at least this choice.

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

It must also be recognized that many laws are disobeyed in another sense; they just are "not complied with," without this disregard producing any active concern on the part of the state. For example, the law says that a will must be executed before two witnesses, that an affidavit must be made before a notary, etc. The effect of non-compliance is that the law doesn't protect you. There are also times when a law may be disobeyed but no sanction is provided for disobedience; such a law is *brutum fulmen.* There are also times when what seems illegal is not really illegal (*e.g.*, conflicting laws which have not been tested). The civil rights sit-in participants argue that their actions are only apparently illegal—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.

Finally, we may very briefly examine two of the most frequently made arguments against civil disobedience (each needs much more extensive treatment; here there is room for only an outline). The first argument is this: *It would be disastrous if everyone disobeyed the law.* This is a typically illogical argument from specific to general. The civil disobedient is not urging disobedience of all laws. He is, however,

willing that anyone disobey *this* immoral kind of law. He would never argue that one disobedience justified all disobedience. Nor is there proof that others are caused to violate other moral laws by this disobedience or that an ordinary law violator cares a whit about this violation.

The other argument is: *He who takes the benefits of society must bear the obligations of society.* To some degree this phrasing can be turned into a justification for civil disobedience (as it was by the American colonies: "No taxation without representation"). What of the young, the poor, the disenfranchised, the dispossessed? Aren't many of them legitimately 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 to me no rights? Sir, this is a two way street. You ask me to assume duties without rights; I demand rights and only then can I be expected freely to acknowledge my duties. Isn't the "benefits" argument an immoral and illogical one to the extent that there is failure to fulfill these needs? Isn't it even a case of bad conscience?

The First Amendment May Authorize Some Disobedience

Recently, under the emerging concept of the "Living Constitution,"[33] there has been a growing emphasis on reading the first amendment positively rather than negatively, in order to guarantee the open public forum which is necessary for the preservation of democratic dialogue.[34] What is being said here is that the first amendment does not merely protect private rights but is an affirmative public obligation of the government to keep the public forum unencumbered and effective so that the sovereign people may call their government to account. The true meaning and primary value in the democratic process lies in the effective accountability of the government to the people. In earlier writings I have suggested that this proposition is the only logical theoretical basis for the first amendment decisions in the

[33] See generally Miller, *Notes on the Concept of the "Living" Constitution*, 31 GEO. WASH. L. REV. 881 (1963).

[34] New York Times v. Sullivan, 376 U.S. 254 (1964); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1965); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963); Kalven, *The Concept of the Public Forum*, 1965 SUPREME COURT REV. 1; Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUPREME COURT REV. 191; Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUPREME COURT REV. 245.

Supreme Court; I have synthesized statements from seven of the cases into a kind of American creed and theory of government.[35]

The Supreme Court has never in the past worked out a full theory as to disobedience and the first amendment. It has formulated and reformulated the "clear and present danger" test, the "redeeming social value" and "balancing" tests.[36] Even though the Court may not have fixed the affirmative limits of right or duty to disobey, it has been clear as to the negative limits of restraint.

In *Musser v. Utah*,[37] (decided on grounds of vagueness of the challenged statute) the dissenting justices would have reached the question of the advocacy of lawbreaking, which they considered 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.*[38]

If recruiting members for the Communist Party (*Herndon v. Lowry*[39]), if playing anti-Catholic records in streets where ninety per cent of the people were Catholic (*Cantwell v. Connecticut*[40]), if condemning the war and draft and distributing literature to this effect to parents of draftees during the war (*Taylor v. Mississippi*[41]), if refusal to salute the flag during the war when great national solidarity was sought (*West Virginia State Bd. of Educ. v. Barnette*[42]), do not show an overriding societal danger,[43] how can the activity of demonstrators

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[35] See Freeman, *Civil Liberties—Acid Test of Democracy*, 43 MINN. L. REV. 511 (1959); Freeman, *Civil Liberties and You—The 1959 Test of American Democracy*, 10 SYRACUSE L. REV. 1 (1958); Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806 (1958).

[36] For a recent discussion of this formulation and reformulation see Brennan, *supra* note 34.

[37] 333 U.S. 95 (1948).

[38] *Id.* at 102 (dissenting opinion). (Emphasis added.)

[39] 301 U.S. 242 (1937).

[40] 310 U.S. 296 (1940).

[41] 319 U.S. 583 (1943).

[42] 319 U.S. 624 (1943).

[43] See also Terminiello v. Chicago, 377 U.S. 1 (1949); United States v. CIO, 335 U.S. 106 (1948); Winters v. New York, 333 U.S. 507 (1947); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Bridges v. California, 314 U.S. 252 (1941).

for civil rights, Viet Nam policy, free speech, etc., present that threat to the nation, permitting state intervention even to prevent disobedience to the state? The concept is moved one step further in the literature distribution permit,[44] use of parks and streets,[45] sit-in and mass demonstration cases, particularly the recent Supreme Court decisions.[46] The Court has also stated that there is a distinction between violation of law where a third person is injured and a violation which merely discommodes the authorities, and the Court has required the state to adjust itself to the citizen's conscience and first amendment interests.[47] The Court's opinions have referred to the fact that disobedience, by Quakers and others, was what produced first amendment freedoms.

Conscience and the State

Closely related to the "living" and "positive" concept of the first amendment, referred to above, is a realization, growing throughout modern society, of the importance of "conscience." It may be that originally the right of free conscience, which was embraced in freedom of religion in the first amendment, was viewed as individual and negative in the sense that it only exempted individuals from adherence to certain doctrines. But the modern psychological view is becoming accepted: The immature man is he who requires inflexible rules and external control, while the mature man is he who accepts and governs

[44] Martin v. Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Schneider v. State, 308 U.S. 147 (1939); Lovell v. City of Griffin, 303 U.S. 444 (1938).

[45] Fowler v. Rhode Island, 345 U.S. 67 (1953); Niemotko v. Maryland, 340 U.S. 268 (1951); Saia v. New York, 334 U.S. 558 (1948); Hague v. CIO, 307 U.S. 496 (1939). *But see* Feiner v. New York, 340 U.S. 315 (1951); Kovacs v. Cooper, 336 U.S. 77 (1949); Annot., 10 A.L.R.2d 627 (1950).

[46] Cox v. Louisiana, 379 U.S. 559 (1965); Cox v. Louisiana, 379 U.S. 536 (1965); Hamm v. City of Rock Hill, 379 U.S. 306 (1964).

[47] "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individuals . . . . [T]he 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." West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943).

"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 victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State. Throughout the ages, men have suffered death rather than subordinate their allegiance to God to the authority of the State. Freedom of religion guaranteed by the First Amendment is the product of that struggle." Girouard v. United States, 328 U.S. 61, 68 (1946).

himself by standards which are set by a rational conscience; and a mature society must likewise develop a conscience. We may use the words of Erich Fromm as typical of this thesis:

> The mentally healthy person is the productive and unalienated person; the person who relates himself to the world lovingly, and who uses his reason to grasp reality objectively; who experiences himself as a unique individual entity, and at the same time feels one with his fellow man; who is not subject to irrational authority, and accepts willingly the rational authority of conscience and reason; who is in the process of being born as long as he is alive and considers the gift of life the most precious chance he has . . . . A sane society is one . . . where acting according to one's conscience is looked upon as a fundamental and necessary quality . . . .[48]

I have traced origin and development of the right of free conscience in "A Remonstrance for Conscience,"[49] and shall not repeat it here. I believe, with Lord Morley, that the immediate cause of the decline of a society is a decline in the quality of its conscience.[50] I believe in the classical Quaker statement, "we serve our county best by remaining true to our higher loyalty to conscience." I believe as a lawyer that law is ultimately grounded in conscience, "that moral sense in man that dictates to him right and wrong," and without keen conscience law will fail. I believe with Laski that "the secret of liberty is always, in the end, the courage to resist,[51] and with Holmes and Brandeis, that a vital democracy is composed of "courageous, self-reliant men [who do] not exalt order at the cost of liberty."[52] The nature of conscience is sometimes to obey and sometimes to disobey. If society is going to exist in dependence upon man's moral nature, on his ability to choose the right course from the wrong—on his conscience—then society is also going to have to recognize man's right and duty to follow his conscience even if this leads to civil disobedience. In my judgment it is precisely "conscience" which can properly be used by state law as the test for the legitimacy of civil disobedience—it is already the test ("conscientiously opposed") used in determining whether an objector must be drafted into the Army.[53]

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[48] FROMM, THE SANE SOCIETY 275-76 (1955).

[49] 106 U. PA. L. REV. 806 (1958).

[50] See MORLEY, ON COMPROMISE (1874).

[51] See LASKI, LIBERTY IN THE MODERN STATE (1930).

[52] Whitney v. California, 274 U.S. 357, 377 (1927) (concurring opinion).

[53] 62 Stat. 604 (1948), as amended, 50 U.S.C. APP. § 456(j) (1964).