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Public Employees and the Right To Disobey

By Robert G. Vaughn

He whom the State appoints must be obeyed to the smallest matter, be it right — or wrong.

Sophocles, Antigone

Introduction

One employee is ordered to install an illegal wiretap, another improperly to award an architectural contract, another to release grant funds to an unqualified recipient, and another to lower occupational health and safety standards. Still another employee is ordered to circumvent Civil Service Commission rules in order to make a patronage appointment and to violate personnel regulations by obtaining resignations through harassment. These hypotheticals, suggested by the investigation of the Senate Select Committee on Presidential Campaign Activities,1 illustrate why the right of public employees to disobey illegal or unconstitutional orders is important. This Article examines the protections available to an employee who refuses to obey an order that the employee believes is illegal. It then evaluates arguments for and against judicial recognition of a right to disobey under those circumstances, explores the proper scope of the right if recognized, and analyzes the effects of recognition.

Current Status of the Public Employees' Right to Disobey Orders

Surprisingly few cases2 discuss the circumstances in which an employee who disobeys an order will be protected from disciplinary

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2. There are several explanations for the lack of cases on this fundamental question. First, employees often try to bring disobedience cases under an existing
action. In an early case, *Roller v. Stoecklein*, a police officer was dismissed for insubordination for refusing to obey a departmental order prohibiting on duty officers from parking their private cars in public spaces traditionally reserved by custom and policy for businessmen. In reversing the Civil Service Commission and reinstating the police officer, the Ohio Court of Common Pleas held that the officer was justified in disobeying the departmental order because "[t]he duties of a chief of police do not include the power to adopt regulations for the use of public streets."

The court began with the proposition that the police officer was subject to the lawful and reasonable orders of his superiors but found that the employee's refusal to obey the order was justified because the police chief's order was constitutionally infirm on two separate grounds. First, the court found that promulgating regulations respecting the use of public ways was legislative, not administrative, in character and subject to definite limitations. Even if an ordinance had attempted to delegate the power to issue the order to the police department, the court would have declared the assignment invalid as an improper delegation of power. Therefore, the officer was not required to obey the order because it was not within his superior's power to give. Second, the court believed the order violated the equal protection clauses of the state and federal constitutions by denying constitutional rights to a few citizens, including the police officer, and thereby conferring special benefits on others. Thus, the public employee was justified constitutional protection, such as free speech, rather than risk the uncertainty confronting a plaintiff who asserts a right to disobey. Slocum v. Fire & Police Comm'n, 8 Ill. App. 3d 465, 290 N.E.2d 28 (1972) (order to wear American flag on police uniform); Finot v. Pasadena City Bd. of Educ., 250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (school teacher ordered to shave beard). These cases closely resemble some right to disobey cases discussed in this Article. Second, given the psychological pressures upon persons working in large institutions, extraordinary personal resources are required to resist authority. See note 123 & accompanying text infra. Third, informal and nondisciplinary sanctions are extensively used by public officials to ensure compliance with their orders. See notes 116-26 & accompanying text infra.

3. "Whistle blowing" and public dissent cases are related to the right to disobey and many times in releasing information about agency conduct a public employee may be disobeying an order not to release the information. This Article, however, does not discuss the specific problems of release of information by public employees or public dissent by public employees. *See generally Whistle Blowing: The Report of the Conference on Professional Responsibility* (R. Nader, P. Petkas & K. Blackwell eds. 1972).


5. *Id.* at 455, 143 N.E.2d at 183.

6. *Id.*
in disobeying the order because it was an unreasonable and arbitrary abridgement of his rights as a citizen.\textsuperscript{7}

The court specifically rejected the defendant's argument that "it is unbecoming a police officer to refuse to obey any personal order issued by a superior under the color of his office, irrespective of the arbitrary, immoral, or unconstitutional nature of the order."\textsuperscript{8} The court recognized, however, that in certain situations the refusal to obey a direct and reasonable order, albeit one with possible legal infirmities, could be detrimental to the public interest. For example, in an emergency, unquestioning obedience to orders may be necessary.\textsuperscript{9} The court concluded that even then "it is possible to conceive of difficult situations in which moral and legal considerations prohibit obedience."\textsuperscript{10}

The case provides little specific insight into the moral or legal considerations that might justify a refusal to obey an order,\textsuperscript{11} but the opinion does suggest that the reasonableness of the employee's action

\textsuperscript{7} Id. The court relied on State \textit{ex rel.} Christian v. Barry, 123 Ohio St. 458, 175 N.E. 855 (1931), for the proposition that "[t]he fact that a citizen is employed as a police officer does not constitute a waiver of any privilege granted by the constitution." Roller v. Stoecklein, 75 Abs. at 456, 143 N.E.2d at 184. In \textit{Barry} the Cleveland Police Department issued a departmental order requiring every member of the force to obtain permission before settling any civil suit for damages to the personal automobiles of the officers. Although the order "was issued in a wise and certainly most commendable effort to eliminate the coercion of private citizens by police officers in damage cases," 123 Ohio St. at 463, 175 N.E.2d at 857, the court determined that dismissal of an officer for not consulting with his superior officer before instituting a suit in violation of the departmental order was improper because it deprived the officer of his resort to the courts, a right guaranteed by the state constitution. \textit{Id.}\textsuperscript{8} See Annot., 74 A.L.R. 500 (1931).

\textsuperscript{8} 75 Abs. at 456, 143 N.E.2d at 184.

\textsuperscript{9} The military may be a context in which to tolerate a refusal to obey a direct order would per se be detrimental to the public interest. See note 69 \textit{infra}.

\textsuperscript{10} 75 Abs. at 456, 143 N.E.2d at 184.

\textsuperscript{11} Discussing conditions that might justify a police officer's refusal to obey a superior's order, the court stated: "Should an officer, on orders, inhumanly treat a prisoner for the purpose of obtaining a confession in violation of the prisoner's constitutional rights? If a superior officer has such authority, supported by the right of suspension and removal, what other unlawful and unreasonable acts may be imposed upon a subordinate officer and what other classes of citizens may be similarly denied their fundamental rights? These are serious considerations of public concern which are indirectly involved in this case." \textit{Id.} As cases discussed in the text of this Article demonstrate, there is no question but that a public employee is justified in disobeying an order that, if carried out, would violate the constitutional rights of a third person. The more difficult question is under what circumstances moral or ethical considerations alone, without a clear legal violation, will justify refusal to obey an order.
must be judged in light of the circumstances of the particular case. For example, the Roller court notes that, unless time is of the essence in responding to an order, alternative methods to correct perceived infirmities in a directive should perhaps be explored, thereby avoiding immediate resort to disobedience. Unfortunately this language offers only an amorphous and elusive standard against which employees must gauge their conduct. The courts are presented with a dilemma in endeavoring to circumscribe the bounds of permissible reasonable disobedience.

The most illuminating discussion of the circumstances in which a public employee may rightfully disobey an order is found in a 1967 California Supreme Court opinion, Parrish v. Civil Service Commission. Parrish, a young social worker, was ordered to participate in a series of unscheduled visits to the homes of recipients of Aid to Needy Children (ANC) in order to confirm the claimed absence of the male parent or the presence of unauthorized males. After attending a briefing at which he and other social workers were told of the nature and objectives of the investigations, Parrish concluded that he could not in good conscience participate in the program. He discussed his doubts "in great detail" with his immediate superior, stating, according to his superior's testimony, that as a matter of principle he did not wish to go on the so-called random visits. After a week of discussions with his immediate superior failed to resolve the matter, Parrish submitted a written refusal to his division chief, stating that his unwillingness to participate was based on the premise "that [the visitations] were degrading, presumed the guilt of recipients, violated their rights of privacy, were not required under his job classification and were inconsistent with his training and the rehabilitative goals of the ANC program." Parrish was subsequently discharged for insubordination. The dismissal was ratified by his superiors, upheld after a hearing by the Civil Service Commission, and affirmed by the trial court on Parrish's petition in mandamus for reinstatement.

On appeal Parrish characterized the mass visitation as a general exploratory search without valid warrants and argued it violated the fourth and fourteenth amendments and the California Constitution.

12. 75 Abs. at 457, 143 N.E.2d at 184.
16. Id.
17. Id. at 594.
Finally, he claimed that his participation in this violation of constitutional rights might subject him to criminal penalties under the Federal Civil Rights Act.\(^\text{18}\) The appellate court rejected these arguments on the ground that the searches were consensual and therefore did not violate federal or state constitutional rights.\(^\text{19}\) In considering the "reasonableness and propriety" of the order, the court stated that the order was made in the exercise of the county's duty to determine the continuing eligibility of recipients and that, because all workers in Parrish's department were asked to participate in the operation, the request was not unreasonable as to him.\(^\text{20}\)

The California Supreme Court reversed, upholding Parrish's right to refuse to participate in the operation. As a threshold determination the court found that the visits were in fact an unconstitutional violation of the rights of third parties. The court declared the searches infirm on the ground that the county did not attempt to limit the searches to the homes of persons against whom the welfare authorities harbored any suspicion, reasonable or otherwise. The alleged consent was found to be defective, and the court determined that even if effective consent had been obtained, the county could not condition the continued receipt of welfare benefits upon the giving of such consent.

The court identified two additional elements crucial to its decision: "[t]he information known to plaintiff at the time he made his decision gave him reasonable grounds to believe that the operation would be unconstitutional [and] that he did so believe . . . ."\(^\text{21}\) Parrish had attended a briefing at which he was told about the objectives of the mass visitation, its timing and scope, and the strategy for carrying out the operation. Because he was well informed about the scope and objectives of the operation, he could reasonably have concluded that it would be unconstitutional. The requirement of reasonable belief is objective to the extent that an external standard is imposed notwithstanding the fact that subjective elements inhere as well.

The court noted additionally that Parrish "did so believe."\(^\text{22}\) In other words, plaintiff's belief that the operation would be unconstitutional was made in good faith.\(^\text{23}\) The requirement of good faith is

\(^{18}\) Id. at 596.
\(^{19}\) Id. at 594-96.
\(^{20}\) Id. at 596.
\(^{21}\) 66 Cal. 2d at 276, 425 P.2d at 234, 57 Cal. Rptr. at 634.
\(^{22}\) Id.
\(^{23}\) The actual belief language in Parrish, in effect, sets out a good faith standard because 1) it goes to the subjective state of mind of the individual employee as does
an essentially subjective standard, addressing the state of mind of the employee. The opinion suggests several factors in determining whether good faith existed. The plaintiff had discussed his objections with his immediate superior during the week prior to his dismissal. Unable to reach any agreement, he submitted a written statement declaring his unwillingness to participate in the mass visitations and setting forth the reasons for his decision. The record is noticeably void of any suggestion that the plaintiff's refusal to participate was grounded in a personal conflict with his superior or was tendered for any purpose other than to communicate clearly his intentions with regard to conduct he believed improper. This course of conduct evidenced the plaintiff's good faith in refusing to participate in the operation.

The court expressly declined to consider the effect of its decision had "any one of these elements been missing."24 By so doing the court deliberately left open a very important question — whether a public employee's right to disobey an order that he believes in good faith and based on reasonable grounds to be unconstitutional depends on a court's later determination that the order was in fact unconstitutional.

Parrish also justified his refusal to participate by raising his rights as a government employee. In responding, the court quoted from a 1924 opinion:25 "Insubordination can be rightfully predicated only

24. 66 Cal. 2d at 276, 425 P.2d at 234, 57 Cal. Rptr. at 634.
25. Garvin v. Chambers, 195 Cal. 212, 232 P. 696 (1924). In Garvin a police officer who had been indefinitely suspended from the force pending investigation of alleged violation of the National Prohibition Act refused to speak with the chief of police unless his attorney could accompany him. The court held that this act did not amount to insubordination. After formulating a test for insubordination (see note 26 & accompanying text infra) the court stated that although the order of indefinite suspension was in force, plaintiff's "status as a policeman was suspended to the extent that he could not be called upon to do police duty nor be held amenable for a failure to do such duty." 195 Cal. at 224, 232 P. at 701. Thus "he could not be held amenable for a refusal to comply with a command which concerned not the performance of police duty, but which . . . clearly contemplated 'putting him on the carpet' concerning the charge previously instituted against him and for which he was under suspension." Id.

The Parrish court cited two additional cases in support of the Garvin test for insubordination. One was Sheehan v. Board of Police Comm'rs, 197 Cal. 70, 239 P. 844 (1925). In Sheehan the San Francisco Board of Police Commissioners, who were also trustees of the police department's pension fund, determined that plaintiff's disability had ceased and ordered him to report to the chief of police for active duty. The court held that the board was without jurisdiction to determine whether plaintiff's incapacity had ceased and, citing the Garvin test for insubordination, held further that plaintiff could not be discharged for insubordination for refusal to report for active duty.
upon a refusal to obey some order which a superior officer is entitled
to give and entitled to have obeyed. The charge of insubordination
against Parrish could not be sustained because the order was not one
which plaintiff's superior officer was entitled to promulgate. The un-
constitutionality of the mass welfare searches in Parrish was the basis
upon which the court found that the order was not one that the welfare
director was entitled to give or one that required obedience. In the

The second case cited by the Parrish court in support of the Garvin test for in-
subordination was Forstner v. City & County of San Francisco, 243 Cal. App. 2d 625,
52 Cal. Rptr. 621 (1966). The issue in Forstner was whether refusal by a probation
officer to shave his beard on order from the chief probation officer constituted reason-
able cause for dismissal. After citing the Garvin test for insubordination, the court
stated that "such an order must be reasonably related to the duties of the subordinate
officer or employee." Id. at 632, 52 Cal. Rptr. at 625. The charge against the pro-
bation officer was that "your wearing a beard is inimical to your effectiveness as a
Probation Officer in that it tends to identify you with 'beatnikism' which stands for
attitudes incompatible with your assignment as a Probation Officer." Id. at 627, 52
Cal. Rptr. at 622. On appeal from a superior court writ of mandate restoring the
probation officer's position, the city argued that "they could not present evidence of
the lack of effectiveness of a bearded probation officer because no other probation
officer in San Francisco or elsewhere is known to wear a beard; and that they could
not take the chance of experimenting because of the seriousness of the work entrusted
to respondent." Id. at 633, 52 Cal. Rptr. at 626. Not finding "evidence of extra-
ordinary urgency" the court concluded that there was insufficient evidence to support
a charge of insubordination and that, if in fact persons had experienced unfavorable
results by reason of the probation officer's beard, evidence could have been gathered
Cal. Rptr. 520 (1967) (school teacher has liberty interest in wearing beard that is
protected by due process provisions of state and federal constitutions).

623, 626 (1967).

The Garvin test for insubordination appears to be generally accepted, Stephens
v. Department of State Police, 271 Or. 390, 394, 532 P.2d 788, 790 (1975); Cunning-
ham v. Civil Serv. Comm'n, 48 Haw. 278, 286, 398 P.2d 155, 159 (1964), and seems
comparable to the test for insubordination employed in Roller v. Stoecklein, 75 Abs.

27. As a practical matter a constitutional question as important as the one in
Parrish probably substantially increased the chances of the public employee's winning
a mandamus action for reinstatement or similar action after discharge for refusing to
obey an order. Thus, as a litigation strategy, the public employee is well advised
to frame his or her reasons for refusing to obey the order as presenting questions of
constitutional stature if at all possible. Compare Forstner v. City & County of San
Francisco, 243 Cal. App. 2d 625, 52 Cal. Rptr. 621 (1966) (public employee dis-
missed for refusal to obey order to shave beard argued that such refusal did not
constitute "reasonable cause" for "dismissal") with Finot v. Pasadena City Bd. of Educ.,
250 Cal. App. 2d 189, 58 Cal. Rptr. 520 (1967) (public employee contested assign-
cement to less desirable position for refusal to shave beard on ground that he had liberty
interest in wearing beard protected by federal and state constitutions). Similarly,
discussion of the general test for insubordination, Justice Tobriner cited three cases\textsuperscript{28} that involved orders that the superior officer did not have authority to give.\textsuperscript{29} One of the three cited cases presented the related but nevertheless distinct notion that to be lawful an order must "unquestionably . . . be reasonably related to the duties of the subordinate officer or employee."\textsuperscript{30} Justice Tobriner did not specifically mention the extent to which the directive was related to the supervisor's prescribed duties.

The court's analysis leaves open the question whether an employee is guilty of insubordination if he reasonably believed in good faith that an order was not valid but the order is eventually held to be one the superior officer was entitled to give. In a case construing the \textit{Parrish} decision, \textit{Belmont v. California State Personnel Board},\textsuperscript{31} an appellate court rejected the notion of affording protection to public employees who have refused to obey an order that a court eventually determines is constitutional and within the superior's authority. In \textit{Belmont}, two psychiatric social workers employed by the California Department of Social Welfare refused to obey a departmental order to furnish written information about the welfare recipients who were part of their respective caseloads so that it could be used for electronic data processing. The order was issued to give effect to an enactment of the California legislature\textsuperscript{32} that called upon the Department of Social Welfare "to simplify and reduce the cost of welfare administration by developing efficient, highly automated processes for determining eligibility in making aid payments."\textsuperscript{33} After refusing to comply with the order, the two social workers were suspended from their em-

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\textsuperscript{28} The test was formulated in \textit{Garvin v. Chambers}, 195 Cal. 212, 232 P. 696 (1924). The other two cases cited in support of the \textit{Garvin} test for insubordination were \textit{Sheehan v. Board of Police Comm'rs}, 197 Cal. 70, 239 P. 844 (1925) and \textit{Forstner v. City & County of San Francisco}, 243 Cal. App. 2d 625, 52 Cal. Rptr. 621 (1966).


\textsuperscript{33} \textit{Id.} at § 11026.
ployment for five days for "wilfull disobedience." Reviews by the State Personnel Board and superior court upheld the suspension order.

On appeal the two social workers argued that their refusal to comply with the departmental order was justified because the collection and storage by government of the type of data they were ordered to furnish constituted an invasion of the recipients' privacy contrary to the fourth amendment. They offered three other arguments in support of their refusal to obey the order. First, they argued that "a special professional relationship exists between themselves and their 'clients' entitling them to assume an adversary position toward their employer, the State of California, and defend the 'rights of their clients.'" Second, they contended that they owed a higher duty of allegiance to the social worker's "code of ethics," which was conceived to protect clients in their contacts with social workers, than to their employer, the State of California. Finally, they argued that the relationship between patient and psychiatric social worker was covered by the statutory psychotherapist-patient privilege, thereby rendering the requested information in this instance exempt from compelled disclosure.

The court summarily dismissed these three arguments, stating that the only issue was whether the department's order was lawful. Parrish, the court said, could be relied upon only as "authority for the proposition that a state employee may properly refuse to obey an unlawful order . . . ." Because the court found the order lawful, it affirmed the suspension of the two social workers for willful refusal to obey a lawful order. The court in Belmont relies heavily on the

34. 36 Cal. App. 3d at 521, 111 Cal. Rptr. at 608. That the employees in Belmont faced a five-day suspension rather than dismissal is one ground for distinguishing Belmont from Parrish. Substantively, this distinction should make no difference. Practically, a court may be less inclined to scrutinize the rationale for a five-day suspension than for a dismissal.


36. Id. at 523, 111 Cal. Rptr. at 610.

37. Id. at 522, 111 Cal. Rptr. at 609.

38. Id.

39. Id., see CAL. EVID. CODE § 1014 (West 1966).

40. Regarding the second argument presented by the two social workers, that compliance with the order conflicted with a social worker's code of ethics, the court said: "Assuming, arguendo, a conflict between appellants' allegiance to a code of ethics and their duties as employees of the state, they are legally bound to fulfill the duties of their employment, or suffer disciplinary action." 36 Cal. App. 3d at 522, 111 Cal. Rptr. at 609.

41. Id. at 524, 111 Cal. Rptr. at 610 (emphasis of the court).

42. Id. at 526, 111 Cal. Rptr. at 612.
premise that it is "essential to the public service that . . . employees obey all lawful orders given them in the course of their employment."

The court's opinion contains no discussion concerning the reasonableness of the belief of the two social workers that compliance with the order would violate the constitutionally protected interests of their clients. In addition, the good faith element is mentioned only briefly. The court said that "a public employee must not himself, in 'good faith' and without penalty, determine whether such a lawful order shall be obeyed, for nothing would seem better calculated to 'disrupt or impair the public service.'"44

Because the three-prong test in Parrish was not stated in the conjunctive and the court there expressly reserved the question of the legal consequences of the absence of any one of the factors, the Belmont court could have extended protection to a disobedient employee who reasonably and actually believed an ordered act would be illegal when there was in fact no illegality. The court in Parrish did not place a premium on actual illegality, thereby elevating it above the other two factors. The Belmont court's rigidity in viewing the legality of the order as a threshold issue is not required by the Parrish analysis.45

This rigid stance can perhaps be explained in part by the conspicuous absence of a factual basis for a finding of a reasonable and good faith belief. The opinion includes no description of any behavior by the employees from which reasonable, good faith belief could be inferred. The opinion merely states that the employees refused to follow the order.46 In contrast, in Parrish the social worker discussed at great length with his superiors his reluctance to obey and explained that his refusal was based on deep convictions. He also wrote a letter outlining in great detail the grounds for his decision not to participate in the random visits. This factual basis supported the court's finding of the employee's reasonable, good faith belief in the illegality of the action.

A subsequent case determined that a public employee's refusal

43. Id. at 523, 111 Cal. Rptr. at 609 (emphasis of the court).
44. Id.
45. The question remains an open one with the California Supreme Court. See Morrison v. State Bd. of Educ., 1 Cal. 3d 214, 233 n.37, 461 P.2d 375, 390, 82 Cal. Rptr. 175, 190 (1969): "An action taken in defiance of the express orders of school officials could not, of course, be defended on the ground that the disobedient party believed in good faith that his judgment surpassed that of his superiors. On the other hand, a teacher could not be disciplined for refusing to follow an express order subsequently held to be unconstitutional."[citation omitted].
46. 36 Cal. App. 3d at 521, 111 Cal. Rptr. at 608.
to obey an order can be predicated upon a violation of a statutory, not just constitutional, right. In Stephens v. Department of State Police, the Oregon Supreme Court invalidated the discharge of a public employee who had refused to obey an order to report for work, alleging that a state statute entitled him to a leave of absence. Stephens, a trooper in the Oregon State Police and a United States Army reserve officer, was accepted for a nine-week military training course at an army infantry school. His request for leave to attend the training course was denied by the superintendent of the Oregon State Police, who ordered him to report for regular police duty. Although Stephens apparently had contemplated resigning to take the Army training course, he consulted an attorney, who advised him that Oregon law entitled him to a leave of absence for military training. As a result, he did not report for his state police duties as ordered but left to attend the army infantry school. When Stephens completed his training three months later and reported for duty, he was told he had been dismissed. A formal disciplinary proceeding resulted in his removal, which was confirmed by an Oregon trial court.

The Oregon Court of Appeals affirmed the dismissal, determining that under Oregon law Stephens was entitled to a leave of absence for military training but that, nevertheless, under the circumstances he was guilty of insubordination. Although the court recognized that "the general rule appears to be that an officer is not insubordinate for refusing to obey an order that is not legally valid," the court found that the facts of the case presented an exception to the general rule.

The majority of the court believed that Stephens had had "ample time" to anticipate the order to report for police duty, which had accompanied the denial of his written request for a leave of absence, and determined that Stephen should have chosen another course of action. The opinion does not, however, suggest what that other course of action might have been.

The Oregon Supreme Court reversed, reinstating Stephens as a state trooper. The supreme court's brief opinion contains little analysis of the conditions that justified Stephens' refusal to obey but

47. 271 Ore. 390, 532 P.2d 788 (1975).
49. 19 Ore. App. at 121, 526 P.2d at 1044-45.
50. Id. at 127, 526 P.2d at 1047.
51. Id.
cites the test for insubordination set out in \textit{Parrish}.\textsuperscript{53} The court concluded that because Stephens was entitled by state statute to a leave of absence for military training, "he could not be insubordinate in taking the leave."\textsuperscript{54} \textit{Stephens} thus stands for the proposition that a public employee may not be discharged for exercising his or her statutory rights and that an employee is under no obligation to find a means of securing that right other than by disobeying an order. In the view of the Oregon Supreme Court, the holding in \textit{Parrish} extends beyond orders involving violations of constitutional rights of persons and it includes orders that would deny a person's statutory rights.\textsuperscript{55} Logically, it should further encompass orders transgressing properly issued agency regulations that secure the rights of the public employee or of a third person.\textsuperscript{56}

\textbf{A Proposed Standard}

Notwithstanding the unclear import of \textit{Belmont}, an evaluation of the competing interests of public employees, public employers, and the public supports the proposition that employees should be protected from disciplinary action if they in good faith refuse to obey an order with the reasonable belief that it is unconstitutional or illegal in that it abridges rights of the employee or a third party or in some other manner exceeds the superior's authority.

\textbf{The Interests of Public Employees}

A protective scheme would advance the personal interests of public employees. For example, a public employee possesses an interest in maintaining a sense of personal integrity. Complying with some order might affect the employee's self-esteem or reputation among colleagues or friends. The personal interests also include the desire to avoid administrative sanctions for disobedience or, in the alternative, possible legal sanctions, both civil and criminal, for obedience to an unlawful order. An employee who participates in an unlawful or unconstitutional act may be subjected to criminal liability. Parrish argued that participation in conduct violative of other person's constitu-

\textsuperscript{53} See text accompanying note 33 \textit{supra}.
\textsuperscript{54} 271 Ore. at 394, 532 P.2d at 790.
\textsuperscript{55} Cf. Cormier v. Louisiana State Penitentiary, 206 So. 2d 771 (La. Ct. of App. 1968) (employee discharged for refusal to transfer in accordance with an invalid letter of demotion held justified in failure to report as ordered).
\textsuperscript{56} Properly issued agency regulations in this context means those promulgated within the scope of a valid legislative or executive grant of authority.
tional rights would have subjected him to criminal penalties under the Federal Civil Rights Act.\textsuperscript{57} Without more, that an employee has acted under orders is not a defense to criminal liability,\textsuperscript{58} and whether acting upon a reasonable belief regarding the legality of an ordered act is a defense is unclear.\textsuperscript{59}

A public employee may also risk substantial civil liability.\textsuperscript{60} Some states provide redress against public employees for negligence as well as for intentional and wrongful acts.\textsuperscript{61} Under the Civil Rights Act of 1871, a state or local employee acting under color of state law may be personally liable in tort for deprivation of the constitutional rights of a third party.\textsuperscript{62} The United States Supreme Court in \textit{Wood v. Strickland}\textsuperscript{63} held that a public official will be liable for damages under section 1983 of the Civil Rights Act of 1871 for depriving a citizen of constitutional rights if the official acted maliciously or knew or should have known that such a deprivation would result.

The civil liability of federal officers for violation of constitutional rights does not rest only upon specific statutes but flows as well from the broad language of the Constitution.\textsuperscript{64} Accordingly, an employee given an order that reasonably can be believed to violate the constitutional rights of a third party faces the unpleasant option of risking personal liability or facing the perhaps more certain disciplinary action that may follow a refusal to obey. This dilemma is mitigated to some extent by the fact that federal employees are immune generally from liability if they have acted “in good faith and with a reasonable belief in the validity of the [action] and in the necessity for [it] . . . .”\textsuperscript{65}

\textsuperscript{57} Parrish v. Civil Serv. Comm’n, 51 Cal. Rptr. 589, 592, 594 (1966).
\textsuperscript{59} Id. The argument would be that the employee who reasonably believes an order to be legal and who acts upon that mistaken belief lacks the necessary intent for culpability, J. HALL, \textit{GENERAL PRINCIPLES OF CRIMINAL LAW}, 302-402 (2d ed. 1960).
\textsuperscript{61} See \textit{2 F. HARPER & F. JAMES, THE LAW OF TORTS} § 29.10 at 1638 (1956). Professor Davis believes that the liability of state officials exercising discretionary power usually rests upon the theory that the official acted in excess of his authority. 3 K. DAVIS, \textit{ADMINISTRATIVE LAW TREATISE} § 26.05 (1958).
\textsuperscript{63} 490 U.S. 308 (1975).
A reasonable belief in the unconstitutionality of an order may become the standard for imposing liability. The right to disobey may give rise to a duty to disobey, regardless of the disciplinary consequences. In this event, an employee has a substantial interest in the availability of a mechanism that affords protection from disciplinary action resulting from a good faith refusal based upon reasonable belief.

Other sanctions may be applicable to persons who obey orders that reasonably may be believed to be illegal or unconstitutional. For example, professionals, such as lawyers and doctors, could conceivably be subject to professional disciplinary action for following orders that they believe to be illegal or unconstitutional. In a government context, some possibility also exists that internal administrative sanctions, such as dismissal or suspension, may be applied, perhaps by new government agency management or by a new political administration. The interests of employees, therefore, weigh heavily in favor of recognition of their right to disobey orders that they reasonably and in good faith believe to be illegal because the orders invade their rights or the rights of others.

The Interests of Public Employers

Upon first examination, the interests of public employers support the requirement of unlawfulness in fact. The employer’s interests may be classified generally under the rubrics of efficiency and of harmony and loyalty. The California appellate court in *Belmont* stated in a summary manner that the unrestricted prerogative of an employee to disobey an order would “disrupt and impair” the public service. Because the opinion approves disobedience to an order in fact unlawful, the argument of the court seems to be that the additional refusals engendered by the abandonment of the requirement of unlawfulness in fact might impair or disrupt the service. This reluctance to provide for a broader standard, as is seen in the result in *Belmont*, appears reasonable on first impression because the proposed test based on reasonable actual belief arguably presents too permissive a standard.

66. To be subject to discipline, an attorney’s illegal conduct need not be related to his professional conduct if his or her offense involves moral turpitude affecting fitness for the practice of law. ABA Comm. on Professional Ethics, Opinions, No. 336 (1974). See Maryland State Bar Ass’n v. Agnew, 271 Md. 543, 318 A.2d 811 (1974). Therefore, an attorney/employee could face disciplinary action for involvement in an illegal activity unrelated to professional duties.

Efficiency

In some circumstances, particularly those created by an emergency, efficiency interests in immediate implementation of orders may outweigh other interests. Although an argument could be made as in the military service that the character of the public service requires unquestioning obedience in the interest of efficiency, the strength of this argument is doubtful. In a democratic society, efficiency is often sacrificed for other values. The actions and conduct of public officials are significantly limited and controlled by law. The values

69. In upholding the articles of the military code against a challenge of unconstitutional vagueness, Justice Rehnquist, writing for the majority, remarked, “The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it.” Parker v. Levy, 417 U.S. 733, 758 (1974).

The Supreme Court has also upheld against challenge for vagueness the standard for disciplinary action against federal employees, “such cause as will promote the efficiency of the service.” Arnett v. Kennedy, 416 U.S. 134, 158 (1974) (quoting 5 U.S.C. § 7501(a) (1970)). Language in two recent Supreme Court decisions discussing the rights of public employees is strikingly similar to Justice Rehnquist’s language in Levy. “Nor did any of those cases involve a public agency’s relationship with its own employees which, of course, may justify greater control than over the citizenry at large.” McCarthy v. Philadelphia Civil Serv., 424 U.S. 645, 646 n.6 (citing Pickering v. Board of Educ., 391 U.S. 563, 568 (1968)); United States Civil Service Comm’n v. National Ass’n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973). Kelley v. Johnson, 415 U.S. 601 (1973), upheld hair length requirements for policemen, noting that the method of organization of the police “gives weight to the overall need for discipline, esprit de corps, and uniformity” and that there is a “highly significant” difference between the due process protection provided to the public and to an employee of the police.

70. Clearly, substantial differences exist between public employment and military service including the character of service, the freedom to pursue other activities, and the traditional view of public service as another civilian occupation. The Supreme Court has recognized the unique nature of military service in upholding denial of educational benefits to persons who, as conscientious objectors, performed alternative civilian service. Johnson v. Robison, 415 U.S. 361 (1974).

The Levy decision, moreover, is not inconsistent with the right advocated in this Article. In Levy, both the military law judge and the Third Circuit Court of Appeals recognized that refusal to obey an order to commit a war crime is a recognized defense to a charge of insubordination. Levy v. Parker, 478 F.2d 772, 797 (3d Cir. 1973). As the court stated, Captain Levy simply “failed to demonstrate how the existence of war crimes committed by individuals other than those he was ordered to train was relevant to his failure to obey the order.” Id. Thus, the unique character of military service may support requiring a more rigorous standard in order to justify disobedience.

71. “With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law. . . . Such institutions may be destined to pass away. But it is the duty of the Court
upon which these legal restraints\textsuperscript{72} are based are in conflict with the interest in efficiency and cannot effectively be undercut by an efficiency argument alone.

The government has an additional interest, in fact an overriding interest — ensuring that governmental power is exercised within proper bounds. From this perspective the interest of persons exercising governmental power diverge from the interests of the government.\textsuperscript{73} The government seeks to bind itself to the law and the Constitution. In a democratic society the ability of government to govern does not rest upon governmental power alone but relies as well upon a concept of governmental authority, a concept grounded in the belief of citizens that governmental goals and policies are legitimate. Without this sort of authority, the foundations of democratic government may be endangered.\textsuperscript{74} From this premise, the conclusion may be drawn that

to be last, not first, to give them up.” Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 655 (1952) (footnote omitted).

“Checks and balances were established in order that this should be a ‘government of laws and not of men.’ The doctrine of separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power . . . .” Myers v. United States, 272 U.S. 52, 292-3 (1926) (Brandeis, J., dissenting).


The CARG Report includes only cases decided by Federal Courts of Appeals, the Court of Claims, and the Court of Customs and Patent Appeals. The report notes that a plaintiff who wins at this level must have a very strong case. \textit{Id.} at 5. The CARG Report concludes that “given the substantial expense and judicial hurdles to be overcome when a citizen sues the government of the United States, it is safe to assume that each case represents hundreds of other illegalities which went either undetected or unchallenged.” \textit{Id.} at 7.

73. Kenneth Culp Davis has stated: “Uncle Sam — the United States Government — is not a single individual, but is partly a Congress which fixes basic policies, partly administrators who are supposed to carry out congressional policies and who may abuse their discretion in the process, and partly a system of courts which must decide whether or not to check the administrative abuses. A court that might properly refuse to check the old gentleman in stars and stripes, if he were a single human being, might well check Uncle Sam’s agents when they depart from what Uncle Sam through Congress has directed them to do. A court that checks Uncle Sam’s agents \textit{is not limiting Uncle Sam’s will but is helping to carry out his will}. Indeed, experience proves that courts are needed to check administrative abuses, [and] that a court of judges is especially well qualified to do this kind of checking . . . .” K. DAVIS, DISCRETIONARY JUSTICE 177 (1969) (emphasis in original).

74. “Our government is the potent, the omnipresent, teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the govern-
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the citizenry will be more inclined to possess confidence in a govern-
ment whose employees are more than mere blindly obedient servants.

Government employees exercising independent judgment are more
likely to compel continuing reevaluation of government policies, there-
by contributing to the creation of a climate in which information re-
garding the wisdom of policies may reach and affect policy makers
within government. Objections to orders reasonably believed to be
unlawful may also serve to attach responsibility more clearly for actions
within a particular agency. When the interest of the government as
an employer in having orders efficiently carried out comes into conflict
with its interest in maintaining its own lawfulness, the latter must
prevail.

Loyalty and Harmony

Apart from efficiency, persuasive arguments have been made that
the government, like other institutions, requires for its continuing via-

ment becomes a law-breaker, it breeds contempt for law; it invites every man to
become a law unto himself; it invites anarchy.” Olmstead v. United States, 277 U.S.
438, 485 (1928) (Brandeis, J., dissenting).

75. A study of nine federal agencies conducted by Herbert Kaufman of The
Brookings Institute found that the failure to detect widespread patterns of noncom-
pliance within the agencies was not due to a breakdown of administrative feedback
processes but to a lack of incentive on the part of agency leaders. H. KAUFMAN, AD-
MINISTRATIVE FEEDBACK: MONITORING SUBORDINATES’ BEHAVIOR 62 (1973). Rec-
ognition of the right to disobey is consistent with Kaufman’s suggestion that leaders
be held responsible for their subordinates. Both are methods of insuring that information
regarding possible illegal action reaches agency officials and that responsibility
for such orders can be clearly determined. Kaufman’s study concludes: “One result
of shortcomings in the feedback process is that discrepancies between the intentions
of leaders and the behavior of subordinates are likely to increase with time because
each such discrepancy tends to engender and exculpate others. With large organiza-
tions playing ever larger roles in modern society, the cumulative impact of impercepti-
ble divergencies of this kind . . . . can shake the foundations of public administrative
structures and democratic principles.” Id. at 79.

The right to disobey is consistent with new concepts of managerial behavior that
suggest that public service would benefit from recognition of the right. Anthony
Downs concludes that in bureaus in which loyalty to a single leader becomes a dom-
inant force, the leader will tend to surround herself with second rate subordinates.
A. DOWNS, INSIDE BUREAUCRACY 71-74 (1967).

Warren Bennis has argued for a new philosophy of managerial behavior based
on collaboration, the concept of power based on collaboration and reason replacing
managerial philosophy based upon power and fear. W. BENNIS, BEYOND BUREAUCRACY
188 (1966). Bennis states that democracy in administration “becomes a functional
necessity whenever a social system is competing for survival under conditions of chronic
change.” An aristocratic structure cannot adapt rapidly enough to survive. Id. at
19-20.

Vincent Ostrum in discussing the basic propositions of democratic administration
bility the personal loyalty and harmony of its employees. The United States Supreme Court has recognized the promotion of personal loyalty and harmony to be a legitimate governmental objective, although not sufficiently compelling to contravene constitutional rights such as the first amendment right to free speech.76

A discussion of three kinds of public employees may be useful — those who perform only ministerial duties which may include minor policy-making, and those who work closely with primary decision-makers or who are “confidential” employees for a different reason.

Ministerial Employees

Justice William Rehnquist has observed that in “situations involving government employees less close to the final decision-making authority, [those] less responsible for carrying out those decisions, the government’s interest in governing becomes lesser in the scale, and


These modern theories of public management suggest that recognition of the right to disobey, rather than reducing efficiency, would create one of the necessary foundations for a modern and more efficient public service based on democratic ideals. Modern management theory clearly supports recognition of the right and rejects unsupported objections based on vague fears of “disrupting or impairing” the public service.

76. See Pickering v. Board of Educ., 391 U.S. 563, 570 (1968). In Pickering the Supreme Court held that the writing and publishing of a public school teacher’s letter sharply critical of the school board was protected by the first amendment. The school board contended that “the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district.” Id. Finding no evidence to support this allegation, the Court stated that the teacher’s employment relationships “with the Board, and to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.” Id.


Nevertheless, personality conflicts should not subject the employee to disciplinary action unless they produce results detrimental or prejudicial to the efficiency of the public service. Hamlett v. Division of Mental Health, 325 So. 2d 696, 700 (Ct. of App. 1976).
the employee's right as a citizen to speak his mind becomes greater." 77 Similarly, although a less responsible employee may be required to establish a policy to carry out a decision such that he or she is ordered to act in a ministerial capacity, the employee's distance from the decisionmaking process renders a refusal to obey less likely substantially to impair the harmony and loyalty interest. If that interest is balanced against a public employee's right to disobey, the apparent conflict between them may not be as substantial as might first appear. Disharmony at this level may be expected to have an impact on co-employees and the public to a lesser extent than would be the case at the decisionmaking level. What disruption there is will affect only the employee and his or her supervisor. Thus, Justice William Rehnquist's observation that the government's interest in promoting loyalty and harmony in working relationships decreases as the employee is removed from final decisionmaking authority seems consistent with recognition of a right of public employees to refuse to obey orders perceived to be illegal.

Policy-making and Decisionmaking Employees

For employees who exercise policy-making or decisionmaking authority, the government interest in loyalty and harmony is greater. Still, conflict with the government interest in loyalty and harmony may be limited. An objection directed to a superior regarding an order affecting the employee's job is less likely to disrupt the employment relationship than external public criticism. Recognition of the right to disobey may serve to reduce personal animosity created by an employee's refusal, because arguably a superior is less likely to take personal umbrage at the employee's conduct.

Even in recognition of the fact that the need for personal loyalty and harmony will conflict in some cases with the recognition of an employee's right to disobey in good faith an order reasonably believed to be illegal, significant governmental interests preponderate in favor of recognition of the right to disobey. If the Watergate hearings developed one overriding theme, it was that demanding of government employees blind and unwavering loyalty and obedience to their superiors is not only inappropriate but dangerous. Watergate amply demonstrated the danger that group pressure or demands of personal loyalty may overwhelm conscience, duty, and law. 78

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77. Rehnquist, Public Dissent and the Public Employee, 11 Civil Serv. J. 7, 10 (1971).
At present, both the law and general principles surrounding civil service administration recognize that personal loyalty and harmony must yield under some circumstances to other interests. The Code of Ethics for Government Service reads in part that "[a]ny person in government service should: put loyalty to the highest principles and to country above loyalty to persons, party, or government department [and] uphold the Constitution, laws and legal regulations of the United states and of all governments therein and never be a party to their evasion . . . ."9 Effective government service must be defined in terms of lawful public service.80

Federal Schedule C Appointees and Cabinet Officials

In contrast to the above discussion are the problems of confidential government employees. Recognition of the right of these employees to disobey may give rise to complexities peculiar to their positions. A brief examination of the application of the right to disobey to these groups supports rather than contradicts the theory herein presented, that the government interest in loyalty and harmony need not be defeated by the right to disobey. An examination of two categories of federal employees will illustrate this proposition.

Schedule C positions are limited in number and are characterized by their confidential nature.81 They are those positions said to be so closely tied to policy formulation and policy justification that an administration is entitled to have them filled by individuals who share the perspective of the administration or in whom the administration has particular confidence.82 The holder of a Schedule C position may

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80. O. STAHL, PUBLIC PERSONNEL ADMINISTRATION (6th ed. 1971). Stahl quotes Frank J. McGilly: "In any civilized way of looking at public service, ethics are a part of competence; if the public is not getting ethical service from its stewards, it is not getting effective service." Id. (quoting McGILLY, PRIVATE CONSCIENCE AND PUBLIC SERVICE — REFLECTIONS ON CODES OF ETHICS, HORIZONS FOR MODERN GOVERNMENTS 18 (1963)).


82. Of course, the vast majority of policy-making positions are not included within
be dismissed solely on the ground that the appropriate administration official has lost confidence in him or her.

By design Schedule C positions emphasize the governmental interest in loyalty and harmony among high-ranking subordinate officers. The question of loyalty obligations is nevertheless not entirely clear even in Schedule C situations. For example, because independent regulatory agencies have legislative, judicial, and executive powers, they must be independent of both the executive and legislative branches. In 1974 the issue of to whom Schedule C appointees owe their loyalty was raised dramatically. The Civil Service Commission refused to approve the appointment of individuals to Schedule C positions in the Consumer Products Safety Commission on the ground that the appointees were politically unacceptable to the President. When the Consumer Product Safety Commission asserted its right to appoint individuals regardless of their political acceptability to the President, the Civil Service Commission recharacterized the positions so as to place them outside of Schedule C, thereby removing the requirement of Presidential approval.83

Even if the loyalty of a Schedule C appointee may legitimately be required to exceed that of employees who do work as intimately with superiors, the right to disobey nevertheless need not be completely rejected. A balancing of the competing interests is desirable. Because Schedule C positions require by regulation the continuing confidence of the public employer, however, greater weight in this peculiar circumstance should be given to the governmental interest in loyalty and harmony. If the interest is given greater weight, there could be at least three different results: (1) rejection of any right to disobey, (2) imposition of the requirement that the order actually be found to be illegal, or (3) modification of the remedy afforded, providing some recourse short of reinstatement to employees wrongfully discharged.84 The first option gives absolute weight to the loyalty in-

Schedule C, and some positions included within Schedule C, such as chauffeurs and secretaries, are not policy-making positions. The effect of classification of positions as Schedule C is to allow an administration to fill the positions without complying with civil service examination and appointment requirements.

83. For a record of the exchange, see PROD. SAFETY & LAB. REP. (BNA) 405 (May 10, 1974), 77 (Feb. 1, 1974), 3 (Jan. 4, 1974).

84. Other methods of responding to the government interest in these peculiar cases also exist. For example, the right to disobey could be limited by granting the right only for certain types of wrong orders. The right could be limited only to orders that directed commission of a crime, of an unconstitutional act, or of violation of a statute.
terest. The second option gives some weight to loyalty interest but also protects against abuses of government power in those cases in which the employee believes that an order illegally infringed on someone's rights and the order is in fact illegal.\(^8\) The third option balances the interests in a novel fashion by providing compensation but denying reinstatement. This alternative remedy would furnish some incentive for disobedience on appropriate occasions but would ensure that the Schedule C position still serves to embody interests in loyalty and harmony because a government official would not be required to continue to work with a disobedient employee. The peculiar problems raised by Schedule C positions emphasize the point that loyalty and harmony are not the principal elements in defining the employment relationship with regard to most government positions and that if loyalty and harmony do predominate, the right to disobey should be modified to meet that peculiar circumstance.\(^8\)

The unique constitutional and legal status of cabinet officers, on the other hand, evidences a basic decision to establish a truly novel employment relationship between these persons and the President. The case of *Myers v. United States*\(^8\) established the broad outlines of this employment relationship. In *Myers*, the United States Supreme Court addressed the issue of whether the President, without the advice and consent of the Senate, could remove a postmaster who had been confirmed by the Senate. In upholding the authority of the President, the Court reasoned that the power to remove an existing cabinet officer is vested in "the governmental authority which has administrative control."\(^8\)

Under the *Myers* decision, a constitutionally protected employment relationship with the President would preclude judicial recognition of the right to disobey. Previous and subsequent developments demonstrate, however, that the employment relationship articulated in *Myers* is limited to a narrow group of high level officials. Two subse-

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85. This option is analogous to the requirement for disobedience to a military order to commit a war crime — the order in fact must be illegal. See note 70 supra.
86. The burden of establishing that a position is principally defined in terms of personal loyalty and harmony should rest upon the public employer. Cases of doubt should be resolved in favor of the employee. When an employee's rights are restricted based upon some government interest relying upon characterization of the employee's position, the public employer should bear the burden of proof. *Elrod v. Burns*, 427 U.S. 347, 368 (1976).
87. 272 U.S. 52 (1926).
88. *Id.* at 121.
quent cases, *Humphrey's Executor v. United States*[^89] and *Wiener v. United States*,[^90] have limited the scope of presidential power to remove employees. The opinions stress that officials who exercise independent, quasi-judicial, or legislative functions do not serve at the pleasure of the President. The relationship between these officials with independent grants of authority and the President is not the same as that between the President and cabinet officers, with whom the President is measurably more intimately aligned. For noncabinet officials, Congress may specify terms and conditions of employment;[^91] therefore, these positions do not involve a constitutionally protected employment relationship with the President.

In the federal government a decision has been made that, at least for top level political officers, trust and confidence define the employment relationship.[^92] Any controls that may exist to curb presidential abuse of the relationship are apparently largely political in nature; an imprudent President in this regard may be held accountable only at the ballot box or through the impeachment proceedings. The resignation of Elliot Richardson and the dismissal of William Ruckelshaus exemplify the profound political costs that may flow from the unjustified removal of a disobedient official.[^93]

A comparison of Schedule C officials and cabinet officers highlights those situations wherein the government interest in harmony and loyalty may override other considerations. At the same time, the fact that officials in both these categories are different from most public employees illustrates the soundness of the general postulate that the governmental interest in harmony and loyalty need not be an impediment to judicial recognition of the right of public employees to disobey illegal or unconstitutional orders.

[^89]: 295 U.S. 602 (1935).
[^91]: This power of legislative modification is the basis of the modern civil service. "The power of Congress thus to limit the President's otherwise plenary control over appointments and removals is clear." *Roth v. Brownell*, 215 F.2d 500, 502 (D.C. Cir. 1954).
[^92]: This basic decision in the federal government rests heavily upon the concept of separation of powers, a concept that is not necessarily applicable under state constitutions.
[^93]: The dismissal of Special Prosecutor Archibald Cox gave rise to Richardson's resignation and Ruckelshaus' firing. Cox was dismissed by Solicitor General Bork, acting under President Nixon's order. Cox's dismissal was held to be illegal because his tenure was protected by Department of Justice regulations. *Nader v. Bork*, 366 F. Supp. 104 (D.D.C. 1973).
Benefits of the Proposed Standard

The two broad standards that would give rise to a right to disobey — reasonable belief and good faith — do not necessarily deny the government its legitimate interest in efficiency and in personal loyalty and harmony. The requirement of reasonable belief is not satisfied by a mere difference of opinion with regard to a discretionary matter of judgment. A public employee would be required to have ample grounds for disobedience, subject to external scrutiny respecting the potential illegality of the order, before the right to disobey would attach. In Parrish, information known by the plaintiff at the time he made his decision gave him reasonable grounds to believe the proposed order was unconstitutional.94 In order to meet the reasonable belief requirement in other than simple situations, an employee may have an affirmative duty to acquire sufficient information to understand and to evaluate the context in which the order is given. The requirement of reasonable belief protects the legitimate governmental interests in efficiency and harmony.95

The second requirement of good faith would require more than the mere assertion of the employee about his or her belief. A court would review the circumstances surrounding the occasion of the disobedience of the order to determine whether the employee actually,

95. The requirement of reasonable belief is similar to standards generally accepted in personnel administration. "Where the morality of a prospective action is involved, [the public employee] must first of all decide for himself whether it is an isolated instance or whether it is a part of a total pattern of behavior. He must also think in terms of the larger good. Is the supervisor's different view justifiable in that light, even though he may continue to think of his own view as preferable in a more limited context? Is it possible that others will find as much rationality in the supervisor's judgment as in his own? In short, can he be certain that he is right and his supervisor wrong? . . . . Only when the employee has serious evidence of willful violation of the law, blatant corruption, or equally obnoxious misdeeds is he in a position to take his case outside the organization. Differences in point of view or interpretation are part of the normal grist of the bureaucratic mill. But the other issues do arise, and the potentiality of facing up to them should be part of every intelligent civil servant's fund of mental and emotional preparation." O. STAHL, PUBLIC PERSONNEL ADMINISTRATION 251-52 (6th ed. 1971). Modern public management theory similarly espouses the right to disobey.

"The public servant in a democratic society is not a neutral and obedient servant to his master's command. He will refuse to obey unlawful efforts to exploit the common wealth or to use the coercive capabilities of the state to impair the rights of persons, but he will use reason and peaceful persuasion in taking such stands. Each public servant in the American system of democratic administration bears first the burden of being a citizen in a constitutional republic; and citizenship in a constitutional republic depends upon a willingness to bear the costs for enforcing the rules
in good faith, believed the order to be illegal at the time or whether the asserted belief in illegality was retrospective justification.96

The Interests of the Public

The interests of the public support recognition of the right of an employee acting in good faith to disobey an order reasonably believed to be unlawful. Although the public shares the interests of the public employer in an effective public service on the one hand, the public also has an exceptionally strong interest in ensuring that government operates without abuse and within the law. This public interest coincides with that of the government itself. As government involvement in the private sector increases, the need to subject the government to law increases. The record of the Senate Select Committee on Presidential Campaign Activities suggests many ways in which the power of the government has been used illicitly to coerce desired political behavior from private citizens.97 In light of the substantial risks to the public resulting from the abuse of governmental power, the public has a particular interest in judicial acceptance of an obedience standard that will not only permit but also encourage resistance to illegal orders.


96. The opinions in Roller and Parrish stress that the attempts to resolve the issue with superiors prior to disobedience is an important consideration in judging an employee's conduct.

97. Responsiveness Hearings, supra note 78, at 8322 (Malek Exhibit No. 5); Executive Sess. Hearings, supra note 1, at 572-76.

Even in private employment, where an employee may be terminated at will, the courts have found that the public's interest in obedience to the law is sufficient grounds to restrict the power of an employer to remove an employee. For example, in Petermann v. International Bhd. of Teamsters, Local 396, 174 Cal. App. 2d 184, 344 P.2d 25 (1959), aff'd, 214 Cal. App. 2d 155, 157, 29 Cal. Rptr. 399, 400 (1963), the court in granting relief to a union business agent who had been fired for refusal to commit perjury before a legislative committee stated: “To hold that one's continued employment could be made contingent upon his commission of a felonious act at the instance of his employer would be to encourage criminal conduct upon the part of both the employee and employer and serve to contaminate the honest administration of public affairs.” Other cases have limited in the public interest the right of private employers to terminate employees at will. Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960) (dismissal of an employee for undertaking jury service); Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) (dismissal of female employee for refusal to go out with her foreman); Ness v. Hocks, 536 P.2d 512 (Ore. 1975) (dismissal of employee for jury service). See generally, A Common Law Action for the Abusively Discharged Employee, 25 Hastings L.J. 1435 (1975).
The essential inducement would result from recognition of a liberal standard — the right to disobey in good faith and upon reasonable belief notwithstanding an order's actual legality or illegality as determined later.

Weighing the interests of the public, public employees, and public employers focuses the arguments for and against the recognition of the right to disobey. A balancing of the interests strongly supports the argument that judicial protection from disciplinary action should be extended to public employees who act in good faith and upon reasonable belief. Recognition of the right would constitute a statement that, if the required standards are satisfied, the employee has committed no wrongful act for which discipline is appropriate. The right to disobey should be viewed as a justification rather than as an excuse.

**Effects of Judicial Recognition of a Right to Disobey**

Judicial acceptance of the right to disobey could be expected to raise at least two questions worthy of examination. First, should the right to disobey be extended to refusals based upon ethical considerations or concerns of conscience when no assertion is made, or can reasonably be made, that the required act is illegal or unconstitutional? Second, what is the likely effect of the judicial recognition of the right to disobey unlawful orders?

**Possible Extension of the Right**

Practically, under the good faith and reasonable belief standard, a court may seldom confront the question of whether ethical or moral grounds alone provide a legitimate basis for refusal. In many cases in which substantial ethical or moral considerations are involved, legal or constitutional violations are also likely to appear. This conjecture is supported by the notion that the Constitution embodies broad values widely shared as ethical values as well. Most cases will probably be argued with emphasis upon the legal or constitutional infirmities of an order, rather than upon any concomitant ethical frailties. The objections of the employees in both the *Parrish* and *Belmont* cases appear

As the Watergate hearings suggest, the public's interest in government's adherence to law is extremely strong and the need for judicial protection of that interest paramount. The cases regarding private employment, where the public interest is often less substantial and the private interest in freedom from interference greater, suggest that the courts should be willing to go quite far in protecting the public interest in government adherence to law.
to have rested heavily upon ethical concerns or general beliefs. On
appeal, however, the employees' objections were more precisely articu-
lated and were couched in terms directing the court's attention to
questions of illegality and unconstitutionality. In Belmont, however,
the employees asserted their ethical obligations to their clients as an
alternative ground in support of their alleged right to disobey, and the
court specifically held that when ethical obligations came into conflict
with employment obligations, the employment obligations prevail.98

In most cases, little will be lost by limiting the right to disobey to
grounds supported by claims of illegality, although in some cases such
a limitation might serve to obscure a substantial and perhaps quite
reasonable personal motive for an employee's act. Cases may arise
in which an order that appears clearly lawful or constitutional may be
objectionable to an employee on reasonable ethical grounds. For ex-
ample, a statute might require affirmative conduct by employees that
is apparently valid under existing constitutional standards but that
affects an individual's interest, such as having long hair or wearing
American flags on uniforms.99 The order might affect the interests
of third parties, such as a requirement that public employees collect
and analyze information concerning private citizens.100 The order
might involve military or diplomatic decisions that are legal but in
which the employee finds participation morally repugnant.101

An analysis of the interests underlying the recognition of the
right in good faith to disobey an order reasonably believed to be illegal
or unconstitutional suggests that recognition of the right to disobey
should not be extended to such cases. Public employees possess a
strong interest in the judicial recognition of a right to disobey based
on ethical or moral grounds. Important personal rights may be lost or
compromised pursuant to an order. An order that requires an em-
ployee to do that which is morally repugnant is likely to affect the
employee's self-image and psychological well-being. Although the em-
ployee's general reputation may not be affected, his or her reputation
among friends or associates who share similar values may be harmed.
Although the employee's interests supporting the right to disobey

99. E.g., Slocum v. Fire & Police Comm'n, 8 Ill. App. 3d 465, 290 N.E.2d 28
(1972).
100. E.g., Belmont v. California State Personnel Bd., 36 Cal. App. 3d 518, 111
101. For example, an order compelling the reduction of needed food shipments
for some tactical or political purpose.
based upon ethical grounds are arguably less substantial than those supporting disobedience on legal or constitutional grounds, the interests are worthy of protection.

The interests of the government would appear to demand rejection of the right to disobey on ethical or moral grounds. The government's concerns for efficiency and personal loyalty and harmony remain. The government might be expected to argue in this regard that extension of the right would expand to an unacceptable degree the universe of persons protected, thereby increasing the likelihood that the operations of government might be impaired.

Unlike objections based upon grounds of illegality, objections based upon ethical and moral grounds arguably do not promote the government's interest in lawfully restraining its own power. The government's stature in the eyes of its citizens and the world community and thereby its effectiveness may decline if its acts are generally perceived as immoral. The courts, however, should restrict their intervention to legal or constitutional dilemmas and not interfere. Therefore, the political process is the appropriate vehicle for resolution of moral or ethical quandaries.

Another argument against an extension of the right to disobey on ethical grounds is derived from the observation that the standards applied to evaluate whether an employee is justified in disobeying an order perceived to be unlawful are not directly applicable to refusals based on ethical grounds. A determination as to what constitutes a reasonable belief that an order is unethical or immoral may be expected to be a very difficult one. Although reasonable belief is an objective, external and reasonably discernible standard, there exists a myriad of ethical systems against which an individual's belief may be evaluated. Accordingly, judicial consideration of disobedience premised

102. In most instances, the employee is unlikely to risk criminal, civil, or administrative sanction by complying with the order.

103. Of course, this argument carries less weight when the employee is appealing to specific and articulated standards formally accepted by a group. An example might be professional ethical standards, although doubt exists as to whether those standards are precise enough to offer an employee guidance.

Proposals have been made to protect professionals who act to vindicate professional standards. A. Briloff, Unaccountable Accounting 335 (1972) (advocating a "Nuremberg Code" to which accountants should adhere in spite of superiors' orders or clients' directives); Note, A Remedy for the Discharge of Professional Employees Who Refuse to Perform Unethical or Illegal Acts: A Proposal in Aid of Professional Ethics, 28 Vand. L. Rev. 805 (1975) (advocating a right of recovery for professional employees, such as attorneys and accountants, who are discharged for discussing unethical activity that has occurred or has been solicited or for resisting superior orders that require unethical activity).
on individual morality would be difficult for courts ill-equipped to make such findings.

Minority ethical and moral positions do not receive substantial support when weighed against the interests of the public. If an order is lawful and constitutional, the public interest logically demands its implementation. Disobedience on moral or ethical grounds deserves protection but not at the expense of impeding what has legitimately been determined to be a valid government policy. Lawful action, as in Nazi Germany, may under certain circumstances be characterized as criminal, in which case individuals of conscience may be compelled to disobey at any cost. In such political society, however, the protections herein proposed, or in fact any protections provided by law or administrative rule, would be unlikely to help. Disobedience based upon conscience or principle, although not entitled to legal protection, may prove to be effective in altering public opinion and political attitudes. Humane administrative and personnel procedures might well consider an employee's ethical and moral concerns.

Practical Effects of Judicial Recognition

Judicial acceptance of the right to disobey in good faith and upon reasonable belief may be expected to have a limited, but crucial, effect.

104. L. FULLER, THE MORALITY OF LAW (1964). Fuller's thesis, that law has an internal morality of rules, questions that a regime, such as Nazi Germany, that did not believe itself to be bound by legal restrictions is a government operating under law.

105. E. WEISBAND & T. FRANCK, RESIGNATION IN PROTEST (1975). Weisband and Franck examined the resignation of 389 senior officials who resigned between 1900 and 1970 on matters of policy and found that only 34 (8.7%) resigned with public protest. These cases are analogous to disobedience based upon conscience, since Weisband and Franck suggest that public protest would violate the "rules of the game" and endanger the official's future government career. The failure to assert individual conscience impaired public knowledge and debate and, with the Vietnam War, created the impression of a monolithic government position that denied dissenters a moderate point of protest. Objections based on conscience can affect the course of policy. "An individual is ethically autonomous to the degree that he 'sticks to his guns' about what he thinks, hears, feels, or knows, even when to do so puts him in conflict with society's, or his team's, conventional wisdom and with such social values as conformity, loyalty, and institutional efficiency." Id. at 3-4. Accordingly, the "social importance of ethical autonomy lies not in what is asserted but in the act of asserting." Id. at 4.

106. Consideration might be given to the ethical and moral concerns of employees in a number of ways. For example, in disciplinary actions an employee's moral or ethical concerns could be treated as excuses for disobedience and used as factors in ameliorating disciplinary penalties. In addition, changes in job assignments and duties could be made to reduce interference with an employee's interest in maintaining personal integrity. Change in duties presently is used to remove an employee from conflict of interest situations. 5 C.F.R. § 735.107(b)(1),(4) (1977).
This acceptance would yield a modest impact on our institutions because traditional sanctions, express and otherwise, serve to discourage exercise of the right, and the scheme of judicial protection that might be devised predictably will have a narrow scope. On the other hand, judicial recognition would certainly be a crucial element in altering the character of public service and in creating structures and standards that reduce the likelihood of abuse of government power.

Acceptance of the proposed standard by which disobedience might be justified leaves substantial disincentives for principled employee action. Because due process does not require a hearing prior to termination from public employment, a public employee may be dismissed for a substantial period of time before a thorough review can be obtained. During this period, the employee may face substantial financial hardship. Such dislocation would not, except in rare cases, provide a basis for temporary injunctive relief. The employee, therefore, will bear the costs of any dislocation, many of which may not be adequately compensated by back pay. In addition, the employee will bear the not insignificant costs, including attorney's fees, resulting from prosecution of his or her administrative rights. The time, energy, and psychological pressures created by such a struggle constitute substantial burdens that must also be borne by the employee. Many of these costs would not be recoverable even if the employee eventually prevailed.

Several additional factors would limit the effect of judicial acceptance of the right to disobey. First, the disciplinary action taken against an employee may consciously be taken upon some contrived, independent ground, unrelated to a refusal to obey to which protection might attach. In the interest of avoiding a confrontation or the embarrassment of a court's finding that an order is illegal or unconstitutional, a public employer might literally probe an employee's record

109. To vindicate the rights of Ernest Fitzgerald, who was removed from his job as an analyst with the Air Force after testifying before Congress on cost overruns on the C-5A transport, the American Civil Liberties Union estimated that in pursuing his administrative appeal and attendant court action, costs of approximately $235,000 had been incurred. These costs included attorneys' fees, secretarial assistance, discovery costs, and printing. Hearings on S. 1210 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, 94th Cong., 1st Sess., 94, 95 (1975) (testimony of Florence B. Isbell, Executive Director of the American Civil Liberties Union of the national capitol area). The United States Civil Service Commission is not authorized to award attorneys' fees to Fitzgerald. Fitzgerald v. United States Civil Service Comm'n, 554 F.2d 1186 (D.C. Cir. 1977).
in search of an independent basis for disciplinary action. By utilizing the myriad personnel rules and regulations to which employees are subject, the agency may be able in a large number of cases to discover such an independent ground.\textsuperscript{110} In these cases the employee faces the nearly impossible burden of establishing that a separate independent ground for disciplinary action should be overturned because it was improperly motivated.

A second limitation arises from the requirement that administrative remedies be exhausted before judicial remedies can be pursued.\textsuperscript{111} The standard for judicial review of administrative decisions is generally limited in scope to a review based upon the administrative record. Depending upon the particular administrative structure involved, this administrative record may not be as thorough as that which an employee might be able to obtain in an independent judicial determination.

The standards of review, moreover, are likely to be narrow. Historically, courts have provided only minimal review of disciplinary actions against public employees.\textsuperscript{112} The tendency among state courts is narrowly to review administrative decisions dismissing an employee.\textsuperscript{113} A number of federal courts have adopted a standard of review requiring reversal either for a failure to comply with proper procedures or for arbitrary and capricious action.\textsuperscript{114} In addition, many courts insist that the administrative finding be supported only by "substantial evidence."\textsuperscript{115} A narrow standard of review, of course, limits the role that the judiciary may play in the application of the good faith and reasonable belief standards for disobedience in any individual case in which there has been an administrative finding on those issues.

Informal sanctions and controls available to agency managers constitute the final and perhaps most significant factor limiting the

\textsuperscript{110} For example, many agencies by regulation limit lunch hour periods for employees to thirty minutes. While many employees may routinely violate that rule, the agency's power to enforce selectively this and similar rules creates the likelihood that in a fair number of cases the agency may find an independent ground for disciplinary action.

\textsuperscript{111} \textsc{R. Vaughn, Principles of Civil Service Law § 5.4(2) (1976).} Exceptions, however, exist when administrative relief is impossible or unlikely and the employee potentially suffers substantial harm. \textsc{Fitzgerald v. Hampton, 467 F.2d 755, 769 (D.C. Cir. 1972).}

\textsuperscript{112} \textsc{R. Vaughn, supra note 111 at § 5.4(1).}

\textsuperscript{113} \textsc{2 F. Cooper, State Administrative Law 710-11 (1965).}

\textsuperscript{114} \textsc{Johnson & Stoll, Judicial Review of Federal Employee Dismissals and Other Adverse Actions, 57 Cornell L. Rev. 178, 179-83 (1972).}

\textsuperscript{115} \textit{Id.} at 183-84.
anticipated effect of judicial acceptance of the right to disobey. A recent study of a federal law enforcement agency found that informal group standards, enforced by mechanisms such as social pressure and ostracism, were more significant in establishing standards of behavior than official regulation.\textsuperscript{116} Agency managers possess a wide array of nondisciplinary sanctions, including transfers, details, job assignments, and control of the working atmosphere by which they may punish those employees who fail to meet the standards established by those managers.\textsuperscript{117} The plan of the Nixon White House to control and manipulate the civil service relied heavily upon the use of nondisciplinary sanctions of this nature.\textsuperscript{118} These nondisciplinary sanctions have been used extensively to penalize legitimate employee concern for agency conduct\textsuperscript{119} and to punish those employees who utilize administrative procedures seeking redress from race or sex discrimination.\textsuperscript{120} The combination of these unofficial curbs to employee freedom suggests the rationale of the oft-repeated admonition, "you get along by going along."\textsuperscript{121}

In light of this pessimistic analysis of the foreseeable effects of judicial recognition of a right to disobey, acceptance appears to constitute only a gesture. On the contrary, prompt judicial recognition of a right to disobey is crucial in several respects. Judicial acceptance

\textsuperscript{116} P. Blau, Bureaucracy in Modern Society 50 (1956).

\textsuperscript{117} For a description of these informal and non-disciplinary sanctions see R. Vaughn, The Spoiled System: A Call for Civil Service Reform 1-27 (1975).

\textsuperscript{118} "[T]he civil service system creates many hardships in trying to remove undesirable employees from their positions." Responsiveness Hearings, supra note 78, at 102. One technique outlined was the "traveling salesman" designed for the family man who did not enjoy traveling. He is assigned to a special evaluation project because of his special competence. "Along with his promotion and assignment your expert is given extensive travel orders criss-crossing him across the country to towns (hopefully with the worst accommodations possible) of a population of 20,000 or under. Until his wife threatens him with divorce unless he quits, you have him out of town and out of the way. When he finally asks for relief, you carefully reiterate the importance of the project and then state that he must continue to obey travel orders or resign. Failure to obey travel orders is grounds for immediate separation." Id. at 103-04.


\textsuperscript{121} "To preach technique before content . . . is a sterile concept . . . . People don't co-operate just to co-operate; they co-operate for substantive reasons, to achieve certain goals, and unless these are comprehended the little manipulations for morale, team spirit, and such are fruitless." W. Whyte, The Organization Man 396-97 (1956).
will provide protection to many competent and courageous employees who are willing to take substantial risks to protect the public authority with which they are entrusted. Most importantly, judicial acceptance of a right to disobey would reaffirm the personal responsibility that each public employee must in theory exercise. Personal responsibility, in the sense that one is accountable for one's own acts regardless of commands, offers a powerful concept for proper legal control of public administration. Judicial acceptance of the right to disobey may also be expected to impel agency managers to consider more carefully the legality of their orders.

Conclusion

The law not only commands; it instructs as well. Judicial standards articulate what society expects and what it will tolerate. The courts are powerful and influential voices regarding the role that public employees must play in the preservation of lawful government.

Bureaucracies are not rigid and static but dynamic. The behavior of employees is predicated in large measure upon the expectations created by their environment and the employees' perceptions of the conduct expected of them. Judicial acceptance of the right to disobey, in recognition of the concept of personal responsibility, can do much to affect the character of the public service and the tacit assumptions upon which it is based. Of course, legislative and administrative implementation is necessary to make the right a meaningful

122. "The task in fashioning a system of democratic administration is how to restrict the power of command to a minimum and substitute structures of economic, political, and judicial control rather than rely upon a single overreaching bureaucracy to coordinate all human efforts. Such controls should be devised so that public servants... are exposed to the necessity of taking account of the appropriate cost calculus, the preferences of their constituents, and the legal constraints of constitutional and public laws that bear upon the organization and conduct of collective enterprises. Such controls can sustain viable enterprises capable of substantial efficiency where public entrepreneurs are oriented toward serving their constituents rather than becoming political masters." V. Ostrom, The Intellectual Crisis in American Public Administration 129 (rev. ed. 1974).

123. Acceptance of the right to disobey may aid in overcoming the human reluctance to challenge institutional authority. The experiments of Stanley Milgram, a social psychologist at Yale University, illustrate the extreme willingness of adults to go to almost any lengths on the command of an authority. Milgram concludes that his experiments reveal "the capacity of man to abandon his humanity, indeed, the inevitability that he does so, as he merges his unique personality into larger institutional structures." S. Milgram, Obedience to Authority: An Experimental View 5, 188 (1974).
one, but the need for additional action in these respects is an argument for, rather than against, judicial acceptance of the right to disobey. Additionally, judicial recognition might provide the necessary impetus for subsequent modification of traditional administrative procedures in this regard and, initially, would provide the standards to be applied, the effectiveness of which would certainly be taken into account by the lawmakers.

Among possible legislative responses that may be necessary to protect the right to disobey and to implement the concept of personal responsibility are (1) structural changes in the administration of the civil service, (2) procedures that require administrative responses to properly raised concerns about the illegality of orders, and (3) application of personal sanctions against officials who harass or punish employees who in good faith and upon reasonable belief question the legality of orders.

Greater independence should be afforded to central civil service agencies or at least to those agencies exercising a review or regulatory function. An independent administrative agency with investigatory powers, with a mandate to protect public employees who comply with appropriate standards regarding disobedience, and with the ability to sanction officials for abuse of personnel authority would provide an effective means for protecting the right to disobey. If vested with broad investigatory powers, such an administrative agency might ultimately be able to develop more liberal standards for disobedience as well as administrative mechanisms whereby the legality of orders might be tested by means other than disobedience.

Personal responsibility embodies a fundamental tool for control of human conduct and behavior and, additionally, offers an important principle by which large institutions might be limited by law more effectively than has been the case in recent years. Congress and the courts have already adopted the concept of personal responsibility by

124. Many countries provide substantial independence to central civil services agencies regulating career advancement including recruitment, appointment, promotion, transfer and discipline. United Nations, The Central Organs of the Civil Service in the Developing Countries 30 (Department of Economics and Social Affairs) (1969).

125. For example, under the Swedish Freedom of the Press Act a mechanism is provided whereby an employee is required to consult higher authority for advice regarding the legality of a government decision. TF (Tryckfrihetsförordningen) 2:9. "[T]o a degree far beyond the generally accepted concepts of modern administration, a Swedish official is bound to apply statutory law as he alone believes it demands. If his belief differs from others', his is the one that counts." W. GELLHORN, OMBUDSMEN AND OTHERS: CITIZENS' PROTECTORS IN NINE COUNTRIES 197-98 (1966).
providing penalties for the wrongful acts of public employees.\textsuperscript{126} The courts now have the opportunity to vindicate the concept of personal responsibility by accepting the right of public employees to disobey under appropriate circumstances.
