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The Legitimacy of Civil Disobedience as a Legal Concept

Cover Page Footnote

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THE LEGITIMACY OF CIVIL DISOBEDIENCE AS A LEGAL CONCEPT

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Nothing useful can be said or learnt about non-violent action unless its essentially coercive and potentially subversive content is recognised at the outset. It is at the opposite extreme from "passivism." It is an alternative, if embryonic, source of power.¹

I. INTRODUCTION

THE use of civil disobedience as a social tactic has developed dramatically within the past several years. What was once confined to Indian nonviolent protest has grown to encompass moral and political demonstrations of various forms taking place in numerous geographical areas.² The technique of the act itself has become extremely sophisticated, the rationale for its use has been defined in contradictory terms, and the resultant legal implications have become increasingly vague. The mass media have been indiscriminate in their application of the phrase "civil disobedience" and have applied it to a wide variety of acts both violent and nonviolent, legal and illegal. This popular usage of the term has resulted in confusion, both as to its precise legal content, and as to its significance when used as a criterion to determine legally permissible action. The problem becomes one of developing a restricted definition of civil disobedience that endows it with reasonably precise content coupled

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1. C. Driver, *The Disarmers: A Study in Protest*, 243 (1964).

2. For example, anti-war demonstrations involving over 100,000 people took place in Washington, Paris, Berlin, Copenhagen, Ottawa, and Sidney over the weekend of Oct. 21, 1967. *The Times* (London), Oct. 23, 1967, at 1, col. 6. In London, on that same weekend 47 arrests were made, as a result of demonstrations in front of the American Embassy, and members of the Committee of 100 sat down in the road near the shipyard where Britain's latest Polaris submarine was to be launched. *The Sunday Times* (London), Nov. 5, 1967, at 5, col. 4. In Oakland, California, over 4,000 people formed barricades in the streets to halt buses carrying recruits to the Army conscription center. *The Times* (London), Oct. 21, 1967, at 1, col. 5. In San Francisco, California, nine arrests were made when demonstrators protested the trial of an American serviceman who would not go to Viet Nam. *The Times* (London), Nov. 14, 1967, at 5, col. 3. In Tokyo, demonstrators protesting against their Prime Minister's tour of South Viet Nam attempted to block his car at the airport and a number of arrests were made. *The Times* (London), Oct. 9, 1967, at 5, col. 1. In South Viet Nam Buddhist nuns burned themselves to death in individual protests against their government's interference in the affairs of the Buddhist Church. *The Times* (London), Oct. 20, 1967, at 1, col. 7.

with the flexibility necessary to allow for its application to a variety of forms of public protest.

It is the purpose of this article to examine the idea of civil disobedience, the conditions under which it can be resorted to as a form of social protest, the various attempts made to arrive at a satisfactory definition, and the nature of the act itself seen in the context of the relationship between law and morality. While aspects of this problem are philosophical in nature requiring ethical and moral judgments, these concerns are basic to judicial development in that they set the social prerequisites for effective judicial decision-making. This, in itself, is a debatable suggestion since there is a body of opinion that finds these matters of only limited concern: "[M]ost jurists and teachers of law, in this country [the United States] at least, under the influence of "legal realism" find philosophical issues not to their taste and anyway irrelevant to the Science of Law. . . . The question, of course, is whether this is or is not a desirable state of affairs."⁸ It is not a desirable state of affairs when, as is the case with civil disobedience, the philosophical issues provide the base from which any further study into the definition and scope of permissible action must proceed. The lawyer should not be absolved from considering the larger moral issues simply because they do not correspond to "legal science," but rather there should be a rapprochement between the philosopher and the lawyer resulting in mutual advantage. The present gap in the literature consists not of the application of the term civil disobedience to particular factual events, but rather of any consideration of the term itself and the justification for its application. The ambiguity found in the literature pertaining to civil disobedience is capable of causing confusion and misunderstanding on the part of lay people, judges and other professional people who attempt to apply the concept within one context or another. While a certain degree of ambiguity is desirable, an excess of it is dangerous in the sense that those who do not take the time to linger over the initial definitional problem may retard the struggle for racial equality and basic human rights by attempting to fit diverse and sometimes mutually contradictory actions under the veil of a socially tolerable exercise.

II. THE CONTEXT OF CIVIL DISOBEDIENCE

There are a variety of value positions from which civil disobedience may be examined. From the time of the Socratic dialogues which called for men to examine the premises of their personal morality and civic obligation, and from the early theater which presented the dilemma of

3. Carnes, *Why Should I Obey the Law?* 71 *Ethics* 14, 24 (1960-62).

Antigone deciding whether she should bury her brother, given the dictates of the state, thereby committing an act of civil disobedience, there has always been the necessity for personal choice. In one sense, this situation of ethical choice does not affect the law and can be studied in a detached manner. The result of the individual choice will not have any noticeable effect on society. However, when the decision to do a civilly disobedient act involves the possibility of a large scale political change—and the act itself becomes an effective technique of social protest—then the extent of protection to be given by the state to those who make this decision must be carefully evaluated. Illustrations of this type of politically-charged situation include the Gandhian protests, the Algerian War, the Nuremberg and Eichmann trials, Negro civil rights protests and antiwar demonstrations.

When is civil disobedience justified? When can the individual decide whether he will or will not obey a law? "There are chiefly two issues before us. The first is the question of whether organized mass disobedience can ever have the same ethical justification which belongs to the individual's conscientious act. The second is whether these ethical justifications extend to disobedience whose primary motive is political rather than moral, and is employed as a means to influence or change policy."⁴ There are ethical justifications for the individual's choice to disobey a law if he is willing to pay the price of disobedience, but can these apply to situations or organized mass disobedience? Is the fact that the implications of the act are multiplied by the number of people making the same decision sufficient to change the essential nature of the act and subject it to different evaluation criteria? What relative measure of size can be developed that could serve as a guide for differing circumstances? It is arguably not acceptable to circumscribe the right of civil disobedience with a number quota unless it can be shown that the substance of the act changes when engaged in by a given number of people simultaneously. On the other hand, if the freedom to elect to act in a civilly disobedient manner is predicated upon the fact that there will be no appreciable change in the political structure of the nation involved, then mass civil disobedience must be classified separately. This approach would take into consideration whether the primary motive of the act was moral or political; the moral decision having no effect on political policy, while political protest would be intended to influence or change it. Put another way, so long as the protest was ineffective, it could be tolerated, but when it be-

4. Dunbar, Sources of Political Rights: A Paper for the Southern Political Science Association (Nov. 13, 1964). Dunbar is the Executive Director of the Southern Regional Council, an American Civil Rights organization.

came a possible source of change then it must be controlled. While it is possible that a large scale moral change in a community might eventually affect political and legal norms, this change would not be as direct as that where the political order was challenged directly.

The absolutist position in relation to all of the above questions is that civil disobedience to the law can never be justified whatever the circumstances.⁵ The necessary premises here are that every law is just, and that a greater wrong always results when a law is broken than if it were to be followed. While one does not have to accept both of these premises to arrive at the above conclusion, it is likely that some variant of them will appear in any thoughtful rationalization. The goals of stability and security are achieved at the expense of any allowance for a disturbance of the status quo. Freedom to dissent through positive action is forbidden and the supremacy of the law is held to be absolute and infallible. In theory, there is also a denial of any ethical justification for the individual moral protest that would violate the law as well as a restriction against mass disobedience. Defense of this position requires empirical evidence that security and stability result from absolute obedience, and this evidence is not readily available.⁶ Further, since the law changes with time and adjusts to new social and economic conditions, it is unlikely that absolute obedience would provide the necessary indications of the need for change.

Alternatively, civil disobedience may be justified under a despotic regime, but not in a democracy where there are legal instruments available for the redress of grievances. The substitutes for civil disobedience in a democracy include the court system, and at another level, the legislature. As nondemocratic political structures do not allow for access to these bodies, civil disobedience is justified. The fact of voluntary participation in a democracy precludes the right to protest against the system through disobedience to a law.⁷ The assumption here is that there is some-

5. Frankel, *Is It Ever Right to Break the Law?* N.Y. Times, Jan. 12, 1964, § 6 (Magazine) at 17.

6. Wasserstrom, *The Obligation to Obey the Law*, 10 U.C.L.A.L. Rev. 780, 796 (1963). Wasserstrom argues that a person will take into account whether his action is more desirable than any other conduct and that therefore the absolutist position is difficult to defend. He further argues that any obligation to the law can be overridden by conflicting obligations. In fact, obedience is usually obligatory and that disobedience often turns out to be unjustified. *Id.*

7. *Id.* at 800. The counter-argument is that even in a democracy there is no guarantee that an unjust law will not be passed. The difficulty with majority rule is that, if it is accepted as final, then the option of civil disobedience does not exist and in the Negro situation in the South their position would not have been changed.

Further: When can one say that alternative remedies have ceased to be available? A

thing inherently undemocratic with a morally-prompted disobedience of the law, the motive for which may only be a betterment of the system. One fallacy is that the ideals and aims of democracy in a general sense are confused with "the inevitably less than perfect accomplishments of democracy at any given moment."⁸ For example, in the struggle for civil rights for American Negroes in the South there have been instances of rigged elections, biased courts and most seriously inadequate or non-existent remedies for legal rights. Under these or even other less critical circumstances, what harm can be done to democratic principles by allowing civil disobedience? Put another way, what evidence of harm must be produced to justify the control or elimination of this right?

Assuming that civil disobedience can be an appropriate means of protest in a democracy, under what particular circumstances can it be said to be acceptable? If the purpose of the civil disobedience is to alter the law, then its form must be developed to create an awareness on the part of the courts of inequitable law. One of the most direct ways of accomplishing this is to demonstrate, through disobedience to that law, its ineffectiveness. If the target is the legislature, then the same act, when reported in the mass media, may result in an increased public awareness that will lead to new legislation. Reinforcement for this position is found in a subsidiary "time factor" argument. While one can say that in a democracy there exist the means for peaceful, legal change, this is not to say that this change will occur within any given time. In fact, an injury being done to large numbers of citizens may go unnoticed for a long period of time, or the system could be too inflexible to change to accommodate new circumstances, thus doing irreparable damage to those concerned. Where basic human rights are concerned, the major objective should be the change in the law rather than the sacredness of the principle. In sum, it would appear baseless to assume that obedience to the law is always conducive to strengthening a democratic system, and that, indeed, there may be times when civil disobedience will be able to jolt the democratic processes into greater awareness and immediate action. However, there are also limitations to temper the acceptance of civil disobedience as a social-change technique and to limit its application.

If, for example, civil disobedience is used to create a test case to challenge the legality of a state or local ordinance, the result may be a sub-

Declaration of the Executive Committee of the New York State Bar Association stated that camping in government or business offices, blocking traffic or like wilful obstructions are antithetical to equal rights for all. They are unnecessary in New York where no obstacles to peaceful protest exist. Brownell, *Civil Disobedience—the Lawyers Challenge* 3 Am. Crim. L.Q. 27, 31-32 (1964).

8. Frankel, *supra* note 5, at 36, col. 4.

stantiation of the validity of the statute with its prescribed penalty or the statute may be overturned. If the protesting act is not illegal, then there is no civil disobedience and if the act is illegal then there is, since "[i]t [the law] logically cannot take the position that in the course of a public protest the breach of a valid law is no breach."⁹ There can never be a legally-permitted case of law-breaking. If the law is broken, the penalty must be accepted, since if the act can be justified, then the law ought to permit it. "The supposition that anyone who believes a law to be bad is legally absolved from obedience to it is inconsistent with the notion of law and incompatible with the application of it."¹⁰ However, while there is no legal right to justify an act of civil disobedience, there may be a moral right.

Within a democracy, even the moral right to civil disobedience is hedged with numerous qualifications. First, there is the standard of just and fair behavior. There must be an apparent and socially significant reason for the action taken and it must relate in some way to the law that is to be disregarded. Could one legitimately protest the placement of a traffic light by sitting-in at the intersection and halting all traffic on the road? What forms of protest would be consistent with a protest against the color that park benches are being painted? There must be some proportion between the end desired and the means employed to accomplish it. The extent to which society is disturbed should be commensurate with the alleged evil of the regulation. The severity of the behavior involved should illustrate the wrong to be remedied, but it should not give way to general lawlessness or create a greater wrong in its accomplishment. There must be a relationship between the civilly disobedient act and the alleged evil. One cannot justifiably sit-in at a fire station and render it ineffectual in order to protest the racial discrimination in a school system.

The risk that others will act in a similar manner to one who is being civilly disobedient creates another limitation: "We cannot devise a neutral rationalization assigning to ourselves such powers of judgment (as to which laws are just) without at the same time granting them to our fellow citizens, whose views as to justice and injustice may not be the same as ours."¹¹ It is obvious that chaos would follow if everyone would decide to disobey any law that he found he did not agree with. As a matter of fact, it is highly unlikely that everyone, or even a large number of people, will begin to act in a disobedient manner, but the possibility does exist. The person who acts in a civilly disobedient manner asks the rest of us to

9. Brown, *Civil Disobedience*, 58 *J. Philosophy* 669, 672 (1961).

10. *Id.* at 673.

11. MacGuigan, *Civil Disobedience and Natural Law*, 11 *Catholic Lawyer* 118 (1965).

trust him and suggests that we go along with him. "[H]e dramatizes the fascinating and fearful possibility that those who obey the law might do the same."¹² This restriction creates difficulty inasmuch as any act of civil disobedience, if participated in by a majority of people would lead to chaos, and hence lose any characterization as a ritual act of civil disobedience. On the other hand, it would also demonstrate overwhelming public support for the change being suggested. A problem of control would be created, since the law would, of necessity, have to be enforced until the processes of change could function to alter it by legislative means. There is arguably an implied limitation to the effect that the person engaging in a civilly disobedient act will not encourage others to join in his act, but rather will clearly indicate that the purpose of his act is to stimulate the legally constituted bodies to take action and hence there is no need for mass action. It is less clear whether this limitation would hold after an individual protest had failed to accomplish its objective.

These, then, are the general arguments relating to civil disobedience within a democracy and the conditions under which the act may be justified. They can be analysed further through a consideration of the various definitions that have been suggested for civil disobedience.

III. THE DEFINITIONAL PROBLEM

"Anyone commits an act of civil disobedience if and only if he acts illegally, publicly, nonviolently, and conscientiously with the intent to frustrate (one of) the laws, policies, or decisions of his government."¹³

One approach to the problem of what constitutes a civilly disobedient act is to consider definitions found in the literature and examine their provisions. The above definition pertains to the individual and not to group action of any sort. It prescribes the characteristics of the act comprehensively (if and only if), and attempts to specify the intent of the actor. In considering the nature of the act, it first requires illegality, for without it there would be no disobedience. There is disagreement within the United States civil rights movement as to whether illegality in terms of the explicit law of the land is a requirement. On one hand, it is argued that a violator who appeals "not simply to moral law, but to positive, articulated law such as the Constitution of the United States"¹⁴ is not, in fact, engaged in civil disobedience as generally defined. The counter-

12. Frankel, *supra* note 5, at 41, col. 2.

13. Bedau, *On Civil Disobedience*, 58 *J. Philosophy* 653, 661 (1961).

14. William T. Taylor, "Some Observations on the Strategies of Protest" (paper read before the National Civil Liberties Clearing House, 16th Annual Conference, Mar. 20, 1964, found in Dunbar *supra* note 4, at 9).

argument is that "they [the demonstrators] have thought of themselves as civilly disobedient, they have violated state and local laws, regulations, and injunctions whose Constitutional validity was generally accepted throughout the nation, and they have been punished."¹⁶ It is problematical whether the fact that the demonstrators consider themselves as civilly disobedient makes any objective difference, or whether the fact that they have been punished is significant. Any consideration of the moral base of their actions appears to be missing, and it is questionable whether the fact that the act is conscientious remedies this situation. Further, the illegal act must have for its purpose the frustration of a government policy, law or decision. What if the act is done with the intention of creating a public disturbance? Does this have the effect of frustration of policy, or is it simply a public act designed to draw attention to the alleged wrong through the arrest of the participants who identify themselves with a particular cause?

The public nature of the act of civil disobedience also raises numerous problems. What is to be considered a public act? If reference is to the immediate character of the act, the concern would be with the size of the crowd that witnessed the act. However, the presence of the mass media could negate the need for any physical presence, and in fact make almost any private act into a public one for these purposes. Another interpretation would be that "publicly" meant that the public interest must be affected, and therefore reference was to the result of the act no matter what its immediate character. It is thus possible that the harrassment of a public official in his place of business or even at his home could be considered a public act even if the immediate effect of the act were only on the person involved. This would only hold true, however, if the official were directly concerned with the law or policy that was being disputed.

An even more difficult task is to give the term "nonviolently" any precise content. A particular activity may be nonviolent and coercive, or nonviolent and destructive in a nonphysical sense. At what point does the act cease to be one with an object of frustrating an official policy and become one of coercion? Could not the threat of a repeated civilly disobedient act over a long period of time or in other critical circumstances become coercion? May not a nonviolent act, if carried on in circumstances where large numbers of people are involved simply by size of numbers do violence to some other activity? For example, a sit-in in a public official's office may suspend his activities for the day, or the disruption of traffic on a major highway could hinder the passage of emergency or police vehicles. Further, there may be nonviolent acts that,

15. Dunbar, *supra* note 4, at 11.

because of particular circumstances, might cause violence on the part of observers. An example of this would be the violence done by white on-lookers after a Negro demonstration.¹⁶ From this it might be argued that there is a freedom to perform a civilly disobedient act only so long as the rights of others are not directly affected in ways that are not connected with the policy or law under protest.

Finally, how can it be objectively determined whether an act was done conscientiously or not? Can this be determined in any other way than by asking the individual involved? It is doubtful that any external observation can be made that will be meaningful. Is the conscientiousness to be related to the need felt by the individual for participating in a civilly disobedient act, or in the desire to aid in the frustration of a government policy? Is there a qualitative difference between an individual's conscientious act and a group conscientious act? In any event how could the measure of a group conscientiousness be taken? While the argument is made that there cannot be a conscientiously performed act when there is a specific intent to disobey the law,¹⁷ there is also the position that such an act must be conscientious since the individual realizes the legitimacy of the law and "proposes to justify his disobedience by an appeal to the incompatibility between his political circumstances and his moral convictions."¹⁸ To the person in this latter case, it is worse to obey the law than to disobey it,¹⁹ and this belief provides the standard for conscientiousness.

One source for the right of the individual to disobey a morally iniquitous law, which is "affirmed by western ethics and need not be further debated,"²⁰ is to be found in religious pronouncements. These are, by nature, nonrational, but may be extremely powerful. They provide the individual with a source of authority that is not subject to compromise.

16. In *Garner v. Louisiana*, 368 U.S. 157 (1961), which involved a peaceful demonstration at a lunch counter for the purpose of protesting against racial discrimination, the court found that there was no evidence that petitioners had disturbed the peace either by outwardly boisterous conduct, or by passive conduct likely to cause a public disturbance even though there was some white violence. *Id.* at 174.

17. Morris Liebman argues that righteous civil disobedience is a semantic trap and that the act cannot be conscientious when there is specific intent to disobey the law. He states that at times we let our sympathies interfere with our judgment and that, since our legal system allows for change, righteous civil disobedience is incompatible with our system. Liebman, *Civil Disobedience—A Threat to Our Law Society*, 3 *Am. Crim. L.Q.* 21, 25 (1964).

18. Bedau, *supra* note 13, at 659.

19. "About the only moral convictions, therefore, we can assume in advance that a civil disobedient must have are that it is better to suffer violence than to inflict it and that law and order are not lightly to be disturbed." Bedau, *supra* note 13, at 660-61.

20. Dunbar, *supra* note 4, at 15.

In essence, they locate the position of Man and place him in relation to a deity, in which the will of the deity is the guiding force for the disobedience and cannot be ignored by the faithful. As Gandhi said, "When neglect of the call means a denial of God, civil disobedience becomes a preemptory duty."²¹ However, Gandhi also pointed out that the concept of "God" in question can be liberally interpreted. "A Satyagrahi has no other stay but God. . . . Your belief in God must be your ultimate mainstay. It may be some Supreme Power or some Being even undefinable, but belief in it is indispensable."²² The whole idea of satyagraha (satya: love, agraha: violence) was that moral strength is greater than bodily strength and can prevail in any adverse situation. One major distinction between satyagraha and traditional civil disobedience is that in the former there must be an attempt to seek the conversion of the enemy while in the latter only the frustration of official policies or the embarrassment of officials are sought after. In America the individual has received limited approval from Church bodies to participate in civil disobedience. On a general level: "In some instances, where legal recourse is unavailable or inadequate for redress of grievances from laws or their application that, on their face, are unjust or immoral, the Christian conscience will obey God rather than man."²³ It is left to the individual to decide, not only when legal recourse is unavailable or inadequate, but also what the Christian conscience will consider appropriate action. A more specific mandate is provided by the Episcopal Church: "If and when the means of legal recourse have been exhausted or are demonstrably inadequate, the Church recognizes the right of all persons . . . of informed conscience to disobey such laws, so long as such persons: a) accept the just penalty for their action; b) carry out their protest in a nonviolent manner; c) exercise severe restraint in using this privilege of conscience, because of the danger of lawlessness attendant thereto."²⁴ Each of the above statements is worded in such a manner as to allow for varied personal interpretation and serve primarily as guides which illustrate the position of the Christian Church as moderate and in no sense militant in support of civil disobedience.

It is possible to infer from the various justifications given for individual civil disobedience a rationale for mass action. This is most easily done when the socio-ethical base is used rather than the religious base. For example, if all of our rights and values come from the need to main-

21. M. K. Gandhi, *Satyagraha (Non-Violent Resistance)* 171 (1951).

22. *Id.* at 364. See also G. Ashe, *Gandhi: A Study in Revolution* (1968); L. Fischer (ed.), *The Essential Gandhi* (1963).

23. Brownell, *supra* note 7, at 30.

24. Smith, *Meanwhile, in Mississippi*, 82 *Commonweal* 41 (1965).

tain a civilized order and live within it and not from any transcendent source, then it becomes easy to posit a socially tolerated right of mass civil disobedience. "In a universe where no absolute can be known, no values certainly defined, and no penetration made beyond except through intuition, all we can do is to act on the authority of our own social intelligence. On society we all depend for moral instructions."²⁵ Or is it the other way around? Do we, through our individual consciences and moral values, create a moral tone for society? Is it not society that derives its social consciousness from the individual? The counter argument to this is that society lies in another dimension of being from the individual and that the moral laws valid for the latter can be applied to the former only in an indirect fashion and with essential qualifications.²⁶ It would follow that society or group relations can never be predicated on the same ethical base as those of the individual since "the mind, which places a restraint upon impulses in individual life, exists only in a very inchoate form in the nation."²⁷ Further, the goals of the individual and society are not the same; the goal of the individual is unselfishness, while the goal of society is justice. Thus we are not depending on society for moral instruction, but rather taking our individual morality and attempting to manifest it in the actions of society in an imperfect manner. One method by which this is done is through the use of political philosophies which are in essence sets of recommendations on how men should conduct politics and human interrelationships.²⁸ In any event, since both views suggest that the creative purpose of our rights is to help us combat irrationality and "no efficacious means in their defense or enlargement is illegitimate,"²⁹ these difficulties could be resolved once a course of action was agreed upon.

It is also possible to consider civil disobedience in terms of its effect on some segment of society. In this sense, it could be seen as the performing of certain acts which will compel a response by a dominant group in society.³⁰ The acts may be legal or illegal, and the actor may be an individual, or alternatively, there may be group action. The only necessity is that there is a response by a dominant societal group (which does not necessarily have to be the legal branch of government). There remains the

25. Dunbar, *supra* note 4, at 16.

26. Address by Paul Tillich, John Nuveen Professor of Theology, University of Chicago, *Pacem in Terris* Convocation, New York, Feb. 18, 1965. Also see P. Tillich, *Love, Power and Justice* (1954) for an argument against the personification of the group.

27. R. Niebuhr, *Moral Man and Immoral Society* 87-88 (1932).

28. T. Thorson, *The Logic of Democracy* 68 (1962).

29. Dunbar, *supra* note 4, at 20.

30. MacGuigan, *supra* note 11, at 126.

task of subjectively determining what constitutes a "response" and what is meant by "dominant group," and also the question might be raised as to whether the response of the dominant group, however defined, must be set against the person or group that initiated the disobedience, or whether it is sufficient that some undefined activity be altered or changed.

Emphasis could be placed on the "frustration" of the law in the civilly disobedient act, and such an act could be interpreted as "an effort to change the law by making it impossible to enforce the law or by making the price of such enforcement extremely high."³¹ Here the importance of the individual's moral act is minimized since it is likely to be ineffective, and the primary concern is with the actual processes by which the law is changed. The ambiguity of this approach could be lessened somewhat by constructing a definition which provided that civil disobedience is a course of legally unauthorized conduct engaged in by relatively homogeneous groups for the redress of grievances outside of the system provided by established society.³² The use of the phrase "legally unauthorized conduct" does not make it mandatory that an arrest be made and charges brought; the conduct may be such that it is ignored by the law enforcement officials so long as it has not been specifically authorized. The need for effectiveness is emphasized by the use of "relatively homogeneous groups" as the actors, which excludes consideration of the individual conscientious objector who makes no attempt to interest others in his cause. In fact, the difficult quality of conscientiousness is eliminated altogether as is the requirement that the act be public in nature.

While the above do not exhaust the possible definitional approaches to civil disobedience, they do illustrate the point that, even though precise definition is impossible because of the dynamic nature of the word, guidelines can be drawn within which certain activities can be classified. While specific circumstances will continue to alter the content of any definition, eventually a common usage will arise that will limit the scope of permissible action and the alternative courses of action to a manageable number. Within these guidelines different phrases will be used to describe specifically what is meant by a particular act, the accuracy and credibility of which will depend on the knowledge of the concept itself as generally understood.

IV. THE NATURE OF THE ACT OF CIVIL DISOBEDIENCE

Without attempting to define precisely the characteristics of civil disobedience, it is still possible to consider the nature of the act from several

31. Frankel, *supra* note 5, at 41, col. 1.

32. Riehm, *Civil Disobedience—A Definition*, in "Civil Disobedience and the Law: A Symposium," 3 *Am. Crim. L.Q.* 11, 14 (1964).

analytical viewpoints. These could serve as workpoints for further attempts at definition of the phrase. Gandhi recognized two types of social pressure:

Aggressive: non-violent, willful disobedience of laws of the State whose breach does not involve moral turpitude and which is undertaken as a symbol of revolt against the State.³³

Defensive: involuntary or reluctant non-violent disobedience of such laws as are in themselves bad and obedience to which would be inconsistent with one's self-respect or human dignity.³⁴

Truth was the soul or spirit that excluded violence or "body-force" in favor of "soul-force," since man was not capable of knowing absolute truth and was therefore not competent to punish others. In America, the aggressive form of nonviolent willful disobedience, described above, is not practiced since the end sought is not revolution but rather limited change. The most common American form is that of the defensive disobedience of those laws which are thought in themselves to be bad. The moral overtones of Gandhian civil disobedience evidenced in commands to the demonstrator to be prepared to suffer "till the end" for his cause, to require the issue to be a true and substantial one, and to forbid hatred against the opponent, are lacking in some American demonstrations. It is true that the issue of civil rights for the Negroes is a true and substantial issue, but the line between the civil riots and nonviolent disobedience has been crossed a number of times, most notably in Watts and Detroit, and hence the individual conscience has been ignored in favor of the test of political effectiveness.

In regard to violence as a coordinate feature of nonviolent resistance, it is important that "the agent does not try to accomplish his aim either by initiating or by threatening violence, that he does not respond with violence or violent resistance during the course of his disobedience, regardless of the provocation he may have, and thus that he is prepared to suffer without defense the indignities and brutalities that often greet his act."³⁵ However, there is some confusion whether direct resistance allows for limited acts of violence in order to establish credibility. "[A]n act often allows of no more than a remote connection to the objectionable law, with the result that it appears ineffective and absurd. Hence, the preference among dissenters of cool head and stout heart for direct resistance."³⁶ One way of looking at direct resistance is to assume that it

33. Gandhi, *supra* note 21, at 175.

34. *Id.* at 176. Bertrand Russell specifies two types of conscientious civil disobedience: (1) Aggressive—general disobedience to laws to attempt to change policy; (2) Defensive—disobedience to an unjust law which specifically requires action.

35. Bedau, *supra* note 13, at 656.

36. *Id.* at 657.

consists of doing something positive that is forbidden by the law as opposed to not doing something prescribed by law.³⁷ A negative act is easier to defend in terms of classic civil disobedience, but it may appear ineffectual and remote. Nonattendance at a segregated sports event or meeting may register disapproval of a policy, while sitting-in at a public place, though still indirect, may more effectively make a particular point. However, as long as there is no obstruction of a legally justified activity, it is not clearly direct resistance. Examples of nonviolent obstruction would include forms of physical coercion such as climbing on a construction project or hindering the activities of a public official. The next step is to the practice of nonviolent interjection, which is the placing of the demonstrator's body in the way of an activity³⁸ such as blocking the entrance to a public meeting or blocking traffic on a major highway. In all of these examples one test of their legitimacy is whether there is privity between the action undertaken and the result desired. In the American labor movement, the use of the strike set a pattern of immediacy regarding the demonstration and the evil to be remedied.³⁹ While this was not always the case, it set the pattern for the early civil rights demonstrations that have subsequently been altered to place the emphasis on the rationale that "it is sufficient if the conscience of the majority is stirred."⁴⁰ This could be a dangerous trend in that any result-oriented test will favor action that, while effective, might fall beyond the ordinarily accepted forms of nonviolent action.

A further alteration that has appeared in American civil disobedience practices has been the acceptance of the right of the demonstrator to object against the punishment meted out for his act. The actor claims, not only that he is justified in breaking the law, but also in attempting to resist attempts to enforce it. In the early anti-atomic weapon demonstrations no attempt was made to justify the action and when the *Golden Rule* sailed into the area of the high seas reserved for United States nuclear bomb testing, this was justified as an expression of the people's conscience through the means of an act harmless and peaceful in itself, and that arrest and imprisonment were expected.⁴¹ Later examples of antiwar demonstrations, such as the march on the Pentagon in Washington D.C. and demonstrations against Dow Chemical Company which

37. A. Ewing, *The Individual, the State, and World Government* 69 (1947).

38. Bedau, *supra* note 13, at 657.

39. Ernst, *Free Speech and Civil Disobedience in, "Civil Disobedience and the Law: A Symposium,"* 3 *Am. Crim. L.Q.* 15, 19 (1964).

40. MacGuigan, *supra* note 11, at 127.

41. A. Bigelow, *Voyage of the Golden Rule* (1959).

makes napalm for Viet Nam resulted in attempts to escape from the punishment imposed for disturbing the peace and the breaking of other municipal statutes.

The emphasis on result-oriented civil disobedience has obscured the test of conscientiousness to a great extent. In fact, a person may have a number of motivations for participating in an act which appears to have but one goal. Should it make a difference to a court of law whether the motive for a person's action is acceptable to society? One could participate in an act of civil disobedience as part of a larger plan to topple the government or destroy its effectiveness, or the motive might simply be to modify or change the law involved. A person may want to stop a particular law from applying to himself, or he may want to stop it from applying to a group or to the entirety of society. In any event, the question can be raised of whether the qualitative differences in motive should affect a judicial decision or whether certain acts of civil disobedience should be given preferential treatment over others because of the motives of those involved. A person may obey a law but agitate for its repeal within the context of a political pressure group that uses civil disobedience. He may disobey a particular law, until arrested, and then, having made his point, obey the law at all future times. Alternatively, he may disobey the law personally, but make no attempt to persuade others to do so, or he may disobey the law and encourage others to similar action. He may attempt to force or coerce others to break the law. In each of these circumstances, the real or apparent threat to the stability of society may be different depending on the value judgments of the observer.

For example, James Farmer, speaking of the goals of the activities of the Congress on Racial Equality (CORE) indicated that their motives were:

1. To change the law; to speed up the process of change.
2. To educate the public to the evil of the law itself.
3. To shame the supporters of the law and appeal to their consciences.
4. To make the law inoperative.⁴²

The education of the public and the appeal to their consciences do not involve questions of the motivations of the demonstrators, nor for that matter do attempts to speed up the process of change where iniquitous laws are involved, but attempts to make the law inoperative creates additional questions. No distinction is made between just laws and unjust ones, since in cases such as that involving the spreading of garbage over the Triborough Bridge in New York the justification by CORE was that

42. Brownell, *supra* note 7, at 27-28.

"[w]e are disobeying a law with which we agree and we are disobeying it for another reason: to spotlight an injustice."⁴³ The question then becomes one of determining how far a community can allow its laws to be broken to spotlight other injustices, no matter how legitimate.

It is obvious that large-scale rioting and general rebellion cannot be tolerated even if done in the name of racial justice. While the causes that lead to rioting must be examined and corrected where possible, the legal system must determine at what point on the continuum of social actions lawbreaking cannot be tolerated in the name of a moral good. One approach to this problem is to say that democracy should allow that "degree of civil disobedience which will balance the need for its own institutional preservation with its ultimate values, especially the provision for maximum free play for the individual conscience."⁴⁴ It would follow that the use of violence could never be in keeping with the need for democratic institutional preservation, and the fact that it was being used in a good cause would make no difference. When violence occurs one moves from civil disobedience to civil rebellion which cannot be tolerated. The tests that have been developed to describe the limits of civil disobedience include prerequisites such as: 1) [P]ersons may not be harmed, and property may not be destroyed; 2) [T]here must be unconditional submission to arrest and to the legal penalties for the breaches; and 3) [T]he protests [where breaches occur] must be directed at constitutional defects exposing either all the people or some class . . . to legally avoidable forms of harm and exploitation.⁴⁵

The balancing process will take place in reference to each individual act of civil disobedience, and providing that the above criteria are met, it is probable that most forms will be found acceptable.

A further feature of nonviolent civil disobedience is that it has generally been thought of as formalized dissent. There has been a ritualized character to it that distinguishes it from ordinary lawbreaking. In this ritual, lawbreaking is minimal and for the most part formal,⁴⁶ and the act is usually highly publicized beforehand with no attempt being made to escape arrest. The whole idea that the act is a symbol for something else—whether a political or moral philosophy—is important to the nature of the act. If this were to be lost, then the concept itself would have to be redefined in terms of the necessity of maintaining internal order and

43. *Id.* at 28.

44. Spitz, *Democracy and the Problem of Civil Disobedience*, 48 *Am. Pol. Sci. Rev.* 386-394 (1954).

45. Brown, *supra* note 9, at 676-77.

46. *Id.* at 680.

stability balanced against the occurrence of ordinary outbreaks of disobedience to statute law. It would thus appear important that the actor carefully establish the formal, ritualized character of his proposed act, if he is to claim it as an example of civil disobedience. The courts will examine the act for evidence of formalization where it would not do so in ordinary cases, and rule accordingly.

Finally, there is the question of whether the demonstrator can be expected, by the court, to have any empirical knowledge of the circumstances surrounding the cause for which he is demonstrating. Should it make a difference in terms of gauging the legitimacy of the act? Ordinarily it will be assumed that the person had access to all of the facts that are necessary for him to decide whether to take a particular action or not, but does this hold true in cases of civil disobedience? Is the demonstrator to be held to a sophisticated standard of awareness about his immediate circumstance and the necessity for his act of protest? "Neither good will without thought, nor intuition, nor inductive generalization, nor reasoning is by itself adequate for ethical and political practice, but each requires the help of the other three . . ." ⁴⁷ Or is it sufficient that the person simply is of the opinion that he is doing the right thing? Should it make a difference if the act is futile or the remedy sought has already taken effect? If the demonstrator is to be held to a high degree of knowledge about the circumstances of his act, it is possible that civil protest will be hindered because of fears centered around a lack of knowledge about the justness and social desirability of a particular cause. Should the moral romantic be held to a lower standard of prior knowledge of the effect of his act of disobedience than the ordinary citizen? Is it desirable to draw such distinctions? On another level of analysis, should there be different sets of legal criteria for resolving situations concerning civil rights protests as opposed to situations concerning demonstrations by groups such as the American Nazi Party? It is possible that the moral, social and political factors surrounding a particular cause will result in divergent standards based on the desirability of the cause, but is this to be desired or made an explicit part of the content of civil disobedience definitions?

V. CIVIL DISOBEDIENCE AND CIVIL RIGHTS

When one specifically considers the American race problem in the context of the numerous acts of civil disobedience that have taken place in support of various value positions, the fact immediately becomes apparent that there is no basic agreement as to the justification of these

47. A. Ewing, *supra* note 37, at 7.

acts. The wide variety of views on the legitimacy of various acts has led to contradictory approaches to determining their efficacy and legality.

The sit-in is a form of civil rights protest based on nonviolence and direct action.⁴⁸ There are two major variations of this technique, the first where protection is being sought for an existing right, and the second where a change in the law is desired. In the first case, the defense given by those who participate in a demonstration is that the perpetuation of segregation is illegal and the sit-in is an attempt to invoke judicial and executive protection of legal and constitutional rights. In the second case, the desired goal of equality is held to be of more importance than obedience to a city ordinance, and attention must be focused on the law to be changed. If the circumstances are such that the sit-in is both moral and legal there is no question of the validity of the act of alleged civil disobedience, and in fact "[w]ere it evident that sit-ins were truly illegal many might hold a different view about the rightness of sitting-in as a means to bring about integrated facilities."⁴⁹ The question of the generalization of conduct—can I expect that others will act as I do—usually does not arise in relation to the sit-in since the ritualized form of the demonstration assumes that numerous repetitions will not be necessary. The determination of the precise chances that others will take similar action is a subject for empirical research which could not be held as a prerequisite to the act itself.⁵⁰

The rightness of the cause itself has been suggested as a criteria for judging the validity of the civilly disobedient act. The sit-in, it is argued, is undertaken in good faith, based on specific moral and social principles, with the understanding that "the challenger runs the risk of going to jail if his challenge is not ultimately upheld by the courts."⁵¹ On the other hand, those who oppose the civil rights movement are alleged to be acting in bad faith with the end of delaying court action and denying to others basic constitutional rights. Does the validity of the act depend on the legitimacy of the cause, or does this factor make no difference to

48. Southern Regional Council, *The Student Protest Movement: A Recapitulation* 2 (Sept. 1961).

49. Wasserstrom, *supra* note 6, at 787. There are the same distinctions to be made regarding the freedom ride. "One primary claim for the rightness of freedom rides [is] that these are not instances of disobeying the law. They [are] instead attempts to invoke judicial and executive protection of legal, indeed constitutional, rights." *Id.* *Contra*, "Freedom rides . . . have raised the question of whether the immorality of segregation may justify disobeying the law." *Id.* at 780.

50. *Id.* at 796.

51. Tweed, Segal & Packer, *Civil Rights and Disobedience To Law: A Lawyers' View*, 36 N.Y. St. B.J. 290, 291 (1964).

judicial decision-makers? While one sit-in was sufficient to provide a test case of the statutes providing for segregated eating facilities, subsequent demonstrations were justified as measures to dramatize the situation and focus public attention by bringing pressure to bear on the white community.⁵²

The requirement that the demonstrator be willing to accept the punishment for his act⁵³ has developed an unusual interpretation in the civil rights field. It has been suggested that there is a feeling of latent hostility and aggression toward whites by Negroes and that therefore there is a strong psychological appeal for a program of nonviolence leading to arrest and imprisonment. "Most people . . . want at some time to have the jail experience—it's become such an important part of the movement."⁵⁴ Instead of passive resistance, participation in a sit-in or similar demonstration is more clearly defined as "passive aggression" where the "[p]revailing guilt feelings caused by aggressive and hostile impulses seek satisfaction in the need for punishment."⁵⁵ Put another way: "In an age of ambivalence, of moral ambiguity, the Negro Movement gave us at last a choice, as clear-cut as a sit-in, between good and evil. It let us have the cake of certainty and eat it too, by frosting it with forgiveness, non-violence, love."⁵⁶ The time in prison can be seen as the sacrifice required if the movement is to have eventual success.⁵⁷ Just as the Gandhian movement had put forward the tenet that things of value could only be purchased with suffering and not secured through reason alone, so too in the civil rights movement the penalty for a civilly disobedient act provides for the prisoner a: 1) personal feeling of self-esteem; 2) sense

52. *Id.* at 292.

53. "The right of civil disobedience is not a legal right, nor can anyone invoking that right expect to be exempt from normal penalties for violation of the law." *On Civil Disobedience and the Algerian War*, 50 *Yale L.J.* 467 (1960) (emphasis omitted).

54. Mayer, *CORE: The Shock Troops of the Negro Revolt*, *Sat. Eve. Post*, Nov. 21, 1964, at 79, 82. "Members [of CORE] are pleased when national director James Farmer is invited to the White House; they are also pleased when he goes to jail." He continues by saying that the acceptance of imprisonment "permits CORE members to hoot at the NAACP as the 'Black Bourgeoisie.'" *Id.* at 80.

55. Vander Zanden, *The Non-Violent Resistance Movement Against Segregation*, 68 *Am. J. Sociology* 544, 547-48 (1963).

56. S. Watters, *Encounter with the Future* (1965).

57. In reporting the story of the arrest of Martin Luther King and Reverend Abernathy, Howard Zinn says: "According to Chief Pritchett's report, an unidentified, well-dressed Negro man showed up at City Hall, paid the fines, and the two ministers, who were anxious to stay in jail as a sign of the sacrifice required of those in the struggle, reluctantly left." H. Zinn, *Albany* 10 (1962).

of nobility; 3) moral and spiritual sense of being "better;" 4) a hope of final triumph; 5) a feeling of being part of a larger whole.⁵⁸

Whether this psychological interpretation of the value of civil disobedience in the civil rights movement (which minimizes the group and social implications of the act) does provide the gratification suggested or not, it does emphasize the role of the individual conscience. Even if the psychological benefits that are supposed to accrue to the demonstrator following imprisonment really flow from the hoped-for or actual consequences of the social act itself, it is still important to isolate the personal feelings involved and relate them to the rightness of the cause.

The courts have been concerned with the relationship of the civilly disobedient act and the claim of redress that was being made by the demonstrators. Limitations have been placed on the techniques that may be resorted to to protest racial discrimination. "When valid laws are broken simply to create sympathy for the civil rights position or, even less defensibly, simply to dramatize the contentions of the demonstrators, it seems clear that important values are being unjustifiably sacrificed."⁵⁹ It appears that the variations in form that the sit-in or other civil rights demonstration may take are important in determining the acceptability of the act, and therefore, whether or not one should disobey the law "cannot be answered in abstraction from the question as to what forms of disobedience will be employed should resistance be resolved upon."⁶⁰ Objections have been raised to the location and immediate objective of several forms of sit-in; such as the sit-in in Governor Rockefeller's office in New York, the sit-in which caused a blockade of the Jones Beach access road, and the sit-in which halted construction of the Downtown Medical Center in Brooklyn, New York.⁶¹ There are many other examples of situations which have been considered to be beyond justification in the civil rights movement,⁶² and most of them have been concerned with the motive-result factor rather than any deep analysis of personal motiva-

58. Vander Zanden, *supra* note 55, at 549.

59. Tweed, Segal & Packer, *supra* note 51, at 295.

60. MacGuigan, *supra* note 11, at 129.

61. Tweed, Segal & Packer, *supra* note 51, at 295.

62. See MacGuigan, *supra* note 11, at 129. The following are other acts of civil disobedience considered to be beyond justification in the civil rights movement:

San Francisco: Loading grocery carts and then dumping them by check-out counters.

St. Louis: Blocking entrance to a bank which refused to hire Negroes.

Cleveland: Human barricade in front of bulldozer at construction site. One killed when bulldozer backed up.

New York: Dumping garbage on a major bridge during the rush hour to block traffic. Chaining themselves to construction cranes so that work couldn't continue. Jamming stairs

tions. In one case⁶³ the court, in upholding a conviction for disorderly conduct involving a sit-in in a private business office, said:

[A] man's private business office . . . is hardly an appropriate forum in which to stage a "sit-in" demonstration to remonstrate against what the defendants considered odious housing legislation. It is true that the conduct of the defendants was nonabusive, nonviolent and nonboisterous. What they did do was to create an annoying and offensive condition in private offices . . . which could not, and did not, serve any legitimate purpose of theirs.⁶⁴

The court's concern with the actual effect of the act rather than either the avowed purpose or the fact that it was nonabusive, nonviolent, and nonboisterous indicates a practical approach to civil disobedience. The emphasis on "private business office" could also indicate that the requirement that the act be public, and the assertion that the act in question could not serve any legitimate purpose of the demonstrators indicated that any sense of immediacy or relevancy was lacking.

Similarly, when civil rights demonstrators blocked a driveway at a construction site, thereby stopping work on the project, the court, in upholding a conviction for disorderly conduct,⁶⁵ stated that "[s]uch conduct was not justified by the social objectives of the defendants."⁶⁶ In a case where a group of parents, protesting racial imbalance, refused to leave a school board meeting, the court, in affirming the conviction for disorderly conduct,⁶⁷ indicated that there is a qualitative distinction between the peaceful expression of unpopular views and actions which constituted disorderly conduct. Here the court was concerned with the objective of the demonstrators in determining the consequences of their conduct. In a case involving a demonstration in a City Manager's office where the demonstrators made repeated reference to education, the court⁶⁸ pointed out that the protest was not directed to the school board and that "[p]lainly, however, they primarily wanted more of their number employed by the City of Danville . . . and they wanted representation upon every board and commission of the City of Danville."⁶⁹ The court appeared to be

to a union office to keep members from going in or out. Attempting to halt World's Fair traffic. Attempting to barricade the doors to both national political conventions. Mayer, *supra* note 54, at 79-80.

63. *State v. Petty*, 24 Conn. Supp. 337, 190 A.2d 502 (App. Div. Cir. Ct. 1962)

64. *Id.* at 343-44, 190 A.2d at 506.

65. *People v. Galamison*, 43 Misc. 2d 72, 250 N.Y.S.2d 325 (Sup. Ct. 1964).

66. *Id.* at 80, 250 N.Y.S.2d at 334.

67. *People v. Martin*, 43 Misc. 2d 355, 251 N.Y.S.2d 66 (Sup. Ct. App. T. 1964), *aff'd*, 15 N.Y.2d 933, 207 N.E.2d 197, 259 N.Y.S.2d 152, cert. denied, 382 U.S. 828 (1965).

68. *Baines v. City of Danville*, 337 F.2d 579 (4th Cir. 1964).

69. *Id.* at 586.

applying a good faith test to the objectives of the demonstrators by distinguishing their avowed purpose from what it determined to be their real purpose and then related this to the relevancy of the protest. The pragmatism that is indicated by these cases points out the importance of the short-term objective of the civilly disobedient act while minimizing the moral judgments that are made. While the "rule-of-law" theory of government does not allow each person to determine for himself, based on moral principles, which laws he will obey, some concession must be made to allow for the encouragement of change and development.

One difficulty that the courts face with cases of civil disobedience is that the techniques are constantly changing because of the necessity of attracting public attention and notice. The "news" content of the event and its adaptability to television or magazine coverage have become important criteria for determining the nature of civilly disobedient acts. It can be argued that the most undesirable forms of civil disobedience have developed as a result of the irresponsibility of our mass media.⁷⁰ However, the alternative course of action, which would be to prescribe some form of news management, seems equally undesirable. News suppression would not be viable in any event since the news media are able to "color" an event simply by their use, non-use or placement of a particular article.⁷¹ While it is possible to assert that the mass media manufacture pseudo-events by overdramatizing incidents involving civil disobedience, and it may be that some racial problems have been accentuated because of uncritical and "sensational" news coverage,⁷² it is also true that the frustration of nonviolent demonstrations by denying them press coverage may have the effect of precipitating violent demonstrations.

The emotional effect of the newspaper, since it reports events that have occurred in the past in a formal manner that people have come to expect, is minimal compared to live television coverage which many times searches for the most dramatic (and possibly most unrepresentative)

70. Ernst, *supra* note 39, at 17. For example, even before the racial disturbance in St. Augustine, "between 150 and 175 newsmen, TV crews and cameramen began arriving in St. Augustine from all over the United States presaging that some 'big news' would soon break." Report, Racial and Civil Disorders in St. Augustine Legislative Investigation Committee 34 (Feb. 1965). A conference held at the Columbia Graduate School of Journalism in October, 1967 to consider the problems of the mass media and crisis coverage considered a U.S. Justice Department preliminary report on the 1967 summer riots which concluded that the media was the single most important factor in helping to create tension in some communities. The defense offered by the media was that the events were "newsworthy" in addition to which moderate leaders and events also got coverage.

71. M. McLuhan, *Understanding Media* 183 (1964).

72. D. Boorstin, *The Image* 39-40 (1962).

incidents that make for interesting visual imagery at the expense of balanced coverage. If obtaining publicity is one of the major inducements to acts of civil disobedience, and violent demonstrations receive more coverage than nonviolent ones, it is probable that the frequency of the latter form of demonstration will increase. Further, the easy designation of every protest movement as an act of nonviolent civil disobedience by the mass media without any concern for particular factors such as the public nature of the act, its illegality, or its conscientious nature may lead to the creation of a false public impression of the permissible limits of civil disobedience and one that is at variance with that found in the courts. The community standards that result may create difficulties in law enforcement that would not result if these standards accurately reflected a more sophisticated concept of what constituted civil disobedience. As each act of so-called civil disobedience witnessed on the mass media is struck down by the courts, people will begin to lose faith in the legitimacy of civil disobedience as a socially tolerable form of protest.

Since the courts often consider the actions of a reasonable man relative to a precise standard of obedience in determining acceptable conduct, if the rule of conduct is not clearly defined there may be some hesitancy in enforcing its provisions.⁷³ Could the person arrested for an act of civil disobedience have determined whether or not his activity was banned?⁷⁴ This issue is made particularly complicated by the question of whether a double standard is to be used in justifying civil disobedience in support of racial equality as opposed to its use in other less worthy causes. Finally, the courts must decide whether they are going to accept the position that an immoral law cannot be law and thus need not be obeyed, or whether the law itself is to be considered valid—having been enacted in the proper form, with a clear meaning and in conformity with all of the acknowledged criteria of validity of the system—but morally iniquitous and hence vulnerable to disobedience.⁷⁵ An acceptance of the latter posi-

73. *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927). The court stated: "[I]t will not do to hold an average man to the peril of an indictment for the unwise exercise of his . . . knowledge involving so many factors of varying effect that neither the person to decide in advance nor the jury to try him after the fact can safely and certainly judge the result." *Id.* at 465.

For a contrary view, see *Nash v. United States*, 229 U.S. 373 (1913). "[T]he law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment . . . he may incur the penalty of death." *Id.* at 377.

74. Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 *Vand. L. Rev.* 531, 543 (1950).

75. H. Hart, *The Concept of Law* 203 (1961).

tion appears more rational since it allows the observer to separate the rules which are valid by the formal tests of a system of primary and secondary rules and their moral content, and preserves the sense that "the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be submitted to a moral scrutiny."⁷⁶ If nonviolent action is considered to be essentially coercive with potentially subversive content that is practiced as an alternative form of power within a political system, then the task of attempting to formulate the outside limits of its acceptability and the legal limits of its justifiable use are of prime importance and should be the object of continuing examination by the legal profession.

76. *Id.* at 206.