ON CIVIL DISOBEDIENCE IN RECENT AMERICAN DEMOCRATIC THOUGHT*

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Theoretical discussions of civil disobedience on ethical and political grounds received special attention in this country during the Nuremberg trials, the security and loyalty controversies of the 1950's and the pre-arms control years of nuclear power. A fourth wave of interest formed after the early civil rights protests and a fifth is appearing to consider dissent from national policies on the Vietnam War. In this paper civil disobedience is viewed from a trough between the fourth and most recent wave. The phenomenon is interpreted with selected ideas from the study of political obligation[1] and unconventional dissent. The essay first assesses recent American analysis of civil disobedience to determine what the criteria should be to distinguish it from other forms of political action and to discover its political ethics. Secondly, there is an attempt to answer the question: Is there any appreciable service that carefully defined civil disobedience might perform in American democratic thought? The complete enterprise is provoked by a need to examine new strategies for democratic citizenship in a time when the deficiencies of American political life are becoming known to increasing numbers and varieties of people instead of remaining the preserve of enlightened elites.

I. CURRENTS OF THOUGHT

The rule-breaking aspect of "civil disobedience," a term usually credited to Thoreau, offers fewer difficulties for an examination of the topic than the "civil" feature. Typically, "disobedience" is breaking a legal norm that has authoritative sanction. The norm does not have to be a state law but might be a rule of a subsidiary group, such as the university. which in American constitutional theory and practice has the right to make and enforce internal regulations, subject to the state's writ and charter. Although this discussion has implications for disobedience within subsidiary groups, in the main it revolves around citizen resistance to the laws and policies of the state. "Civil" is open to several interpretations. These five meanings cover most possibilities:[2] 1) recognition of citizen obligations for the existing legal order; 2) the opposite of military; 3) civilized or moral; 4) public instead of private; and 5) affecting the political society. All of these, but especially 1), 3) and 5), are directly pertinent for the objectives of this paper. The meanings of both parts of the term become clarified when criteria are examined.

Many of the suggestions for the criteria of "responsible" civil disobedience can be identified with one or the other of two currents of thought and sometimes with both. One will be called "neo-conservative."[3] It views political obligation from a stress on the rule of law as the balance-wheel between majority will and minority rights. The rule of law includes the judicial development of civil liberties and the legislative protection of civil rights. The pattern has no internal agreement about rates and kinds of innovations

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[1] Prominent commentary on political obligation was offered by Thomas Aquinas, Locke, Rousseau, and notably T. H. Green who may have been the first to use the term. A study of Green's thought and environment is Melvin Richter, *The Politics of Conscience: T. H. Green and His Age* (Cambridge, Mass.: Harvard University Press, 1964). Reassessments include John R. Carnes, "Why Should I Obey The Law?," *Ethics,* 71 (1960), 14–26; Hanna Pitkin, "Obligation and Consent," This REVIEW, 59 (1965), 990–1000, and 60 (1966), 39–52; John Plamenatz, *Consent, Freedom and Political Obligation,* 2nd ed. (New York: Oxford University Press, 1968); T. C. Pocklington, "Protest, Resistance, and Political Obligation," a paper presented at the 1969 Annual Meeting of the American Political Science Association, New York, September 3–6, 1969; and Joseph Tussman, *Political Obligation and the Body Politic* (New York: Oxford University Press, 1960).

[2] Christian Bay, "Civil Disobedience," *International Encyclopedia of the Social Sciences,* Vol. II, pp. 473–486, at pp. 473–474.

[3] Representative statements are Francis A. Allen, "Civil Disobedience and the Legal Order," *University of Cincinnati Law Review,* 36 (1967), 1–38, 175–195; Abe Fortas, *Concerning Dissent and Civil Disobedience* (New York: The New American Library, 1968); Erwin N. Griswold, "Dissent—1968," *Tulane Law Review,* 42 (1968), 726–739; and Sidney Hook, "Social Protest and Civil Disobedience," *The Humanist,* 27 (Sept.-Dec., 1967), 157–159, 192–193.

required to strengthen democracy. Yet, it sets a premium on acceptance of the out-put of the historical constitutional system as the hallmark of the good citizen. Reflecting more than a trace of positivism, the neo-conservative tendency sharply distinguishes between private motives and legal behavior. The current is unlikely to give any significant aid to an interpretation of sovereignty whereby the citizen realizes his true morality through conformity to the state's determination of right in the tradition of Bosanquet. Lacking dedication to this notion, the neo-conservative current participates in discussions of the special conditions under which civil disobedience might take place without endangering a democratic system.[4] Its outlook, however, is often negative, aligning easily with the Kerner Report's finding that in the recent past "uncivil" disobedience shared with white terrorism and defiant officials the responsibility for creating a climate that encouraged and approved violent protest.[5]

The neo-conservative current sometimes approves or condones civil disobedience, especially to test the constitutionality of statutes, but it contrasts with a second current which welcomes the incorporation of responsible law-breaking into democratic theory as a beneficial, though rarely used, mechanism. This second alignment will be called "institutional libertarian" or simply "libertarian."[6] Ranging from the idioms of welfare capitalism to social democracy, it combines a defense of a legal democratic order with sponsorship of evolutionary changes in the distribution and uses of power to better meet human needs. Divided about a number of issues, the current has yet to show if its future lies with those concerned with perpetuating the due process tradition who attempt to define civil disobedience, such as Morris Keeton, or with "radical liberals" who are more interested in urging newer versions of democracy than in explaining how to achieve them.[7] The libertarian persuasion often serves as an infrequently acknowledged ally of black power and radical New Left groups in their "anti-oligarchy" struggles. The relationship is not one whereby these groups offer substantial analysis of civil disobedience. For the black power advocates this condition may stem from an emphasis within the early civil rights movement, and certainly from without, on its obligation to use non-violent means. The older stress invalidates discussion of civil disobedience for newer black leaders who believe, as academicians came to believe about the anti-communist provision of the National Defense Act, that a minority community had been affronted, and it would no longer tolerate the condition.[8] An explanation of why the radical New Left has not contributed to discussion of civil disobedience is that it tends to consider the phenomenon as little more than a mechanical strategy in the struggle against the alleged evils of the American and associated systems, causing a dearth of analysis according to values other than those of the crucible. The relative silence of the radical New Left about the philosophical significance of civil disobedience may be valid testimony that the subject is indeed worthless.[9]

[4] There are commentators whose alarm about civil disobedience suggests that there is a fully conservative category. See Morris I. Liebman, "Civil Disobedience—A Threat to Our Law Society," John W. Riehm, "Civil Disobedience—A Definition," *American Criminal Law Quarterly,* 3 (1964), 21–26, 11–15; and former Justice Whittaker's remarks in Charles E. Whittaker and William Sloane Coffin, Jr., *Law, Order and Civil Disobedience* (Washington: American Enterprise Institute for Public Policy Research, 1967), pp. 1–25. A majority of the National Commission on the Causes and Prevention of Violence held that civil disobedience, including non-violent action, is potential anarchy: *New York Times,* Dec. 9, 1969, pp. 1, 44.

[5] *Report of the National Advisory Commission on Civil Disorder* (Washington: Government Printing Office, 1968), p. 92.

[6] Internal agreements on justification, and means and ends of ethical resistance provide considerable diversity to the current. But consult Hugo A. Bedau, "On Civil Disobedience," *The Journal of Philosophy,* 58 (1961), 653–665; Harrop A. Freeman and Bayard Rustin in Harrop A. Freeman, ed., *Civil Disobedience* (Santa Barbara: Center for the Study of Democratic Institutions, 1966), pp. 2–10, 10–13; Morris Keeton, "The Morality of Civil Disobedience," *Texas Law Review,* 43 (1965), 507–525; and Michael Walzer, "The Obligation to Disobey," *Ethics,* 77 (1967), 163–175.

[7] Civil disobedience is one, undefined form among many "disorderly surrogates" for socially acceptable types of protest in the stockpile of the "politics of radical pressure," recommended in Arnold S. Kaufman, *The Radical Liberal* (New York: Atherton Press, 1968), pp. 56–75, at 70.

[8] The anti-patrician and self-determinist spirit is evident in Floyd B. Barbour (ed.), *The Black Power Revolt* (Boston: Sargent, 1968), and Nathan Wright, Jr., *Black Power and Urban Unrest* (New York: Hawthorn Books, 1967).

[9] It is true that Herbert Marcuse has referred to "uncivil" disobedience. See *An Essay on Liberation* (Boston: Beacon Press, 1969), pp. 68–69. But his view of the phenomenon is controlled by beliefs that capitalist "pseudo-democracy" eventually absorbs any kind of non-mass opposition and hypocritically distracts attention from its own brutality through discovery of "illegitimate" re-

But since this paper's presumption is that the topic deserves study, it will have to proceed. Because black power and the radical New Left are not substantively concerned with civil disobedience, non-conservatives and libertarians are challenged to demonstrate that it is significantly involved in those broad issues of defining and reaching a better political life that energize non-debaters as well as many discussants.

Without pausing here to identify the specific points where the neo-conservative and libertarian currents agree or differ on the standards for "responsible" civil disobedience, I find that together they suggest the following criteria: 1) The act must be performed openly—secrecy is prohibited. 2) It must be a deliberate, not an accidental step. 3) The action is clearly unlawful, i.e., not permissible under existing laws and court interpretations of civil rights and liberties. 4) The illegal act is voluntary, not induced by others. 5) The conduct proceeds from "conscientious" dissent, inspired by moral or religious beliefs. 6) The objective sought is a concrete, public reform. 7) Legal remedies must be exhausted before disobedience is undertaken. 8) The disobedient is obligated to use "non-violent" means. 9) Throughout his challenge he demonstrates concern for the rights of others. 10) A proximate relation exists between the rule under attack and the reasons for dissent. 11) The disobedient must submit to the legal consequences of his act. This is not an exhaustive list, but it is suggestive of numerous criteria.

One can immediately comment on 1), 2) and 3). Meant to exclude subversion or evasion of law, the public test is open to a claim of exemption for some who violated the Fugitive Slave Law of 1850, the 18th Amendment and current state laws on abortions. If clandestine infractions are acceptable, perhaps only retrospective sorting by disinterested or "winning" historians can judge the disobedients. Meanwhile, one can reasonably expect that generally the public test must be met. The criterion of deliberate infraction is troublesome when the public standard is forgiven, thus making proof difficult. To consider an act eligible for "responsible" civil disobedience in the absence of evidence of advertancy, one may have to assume, intending no entrapment, its deliberate commission. On the test of illegality, there would seem to be no great difficulty in accepting the standard. A problem is how to treat the opinion that civil disobedience is not involved when the breaking of a law is subsequently found to be no violation because the "law" was invalid under superior legislation or a constitutional ruling.[10] To accept this view narrowly limits "civil disobedience" to unsuccessful, legal challenges and denigrates political and ethical justification of disobedience. This is an inhibiting prospect for political philosophy.

II. THE ISSUE OF "CONSCIENTIOUS" OBJECTION

On the assumption that the disobedient act must be public, deliberate and illegal, this paper will examine four tests of civil disobedience which are crucial for distinguishing it from other kinds of political action and exploring its political ethics. They are the criteria of "conscientious" objection, willingness to accept the legal consequences of disobedience, "non-violent" means, and a proximate relation between the target and the grievance. To take the first, the stipulation that the infraction must be based on moral or religious conviction, i.e., the dictates of one's conscience, is found among both neo-conservatives and libertarians. Although definitions are seldom offered, both groups tend to consider "conscience" as a sacred and sovereign monitor, operating as if in the presence of God, rather than to imply Freud's super-ego, a product of fear and guilt. Moreover, they tend to think of conscience responding to significant, public challenges.[11] Neo-con-

sistance. *Ibid.*, pp. 64–65, 76–77. A radical New Left view of the national and world scene is Carl Oglesby's section in Carl Oglesby and Richard Schaull, *Containment and Change* (London: Collier-Macmillan, 1967), pp. 3–176. For a glimpse of strategy in Students for a Democratic Society targeting, see "The Rudd October Proposals," in Cox Commission Report, *Crisis At Columbia* (New York: Random House, 1968), Appendix B. The sources, ideas and literature of the New Left in Europe and the United States are reviewed in Rosemary Ruether, "The New Left: Revolutionaries After the Fall of the Revolution," *Soundings*, 51 (1969), 245–263.

[10] Legalists associated with federal civil rights activities have argued that civil disobedience is not present when rule-breakng is later held legal under existing Congressional legislation or Constitutional principles: William L. Taylor, "Civil Disobedience," in Donald B. King and Charles W. Quick (eds.), *Legal Aspects of the Civil Rights Movement* (Detroit: Wayne State University Press, 1965), pp. 227–235, at 228–229; and Burke Marshall, "The Protest Movement and the Law," *Virginia Law Review*, 51 (1965), 785–803, at 795–796. The focus of Taylor and Marshall is on the sit-ins in the early 1960's and the arrests that followed but never received Supreme Court approval.

[11] On the possibly quandary of the nuclear commander, see Guenter Lewy, "Superior Orders, Nuclear Warfare, and the Dictates of Conscience in the Atomic Age," this REVIEW, 55 (1961), pp. 2–23.

servatives and libertarians are not alike on exemplification. Libertarians pay tribute to such exemplars as Gandhi and Thomas More. These men, it is held, demonstrated the qualities of mind and spirit and the political ethics which all potential rule-breakers should emulate. The neo-conservatives do not take this tack usually. A representative outlook is that of Erwin N. Griswold who, instead of valuing famous disobedients, gives recognition to the "forum of conscience" described in Chief Justice Hughes' dissent in *U.S. v. MacIntosh* as an area where "duty to a moral power higher than the state has always been maintained."[12] Having done this and acknowledged a moral right to commit civil disobedience when there is a conflict of loyalties, Griswold stresses that the act is a rare event never to be cloaked with the legitimacy of civil liberties as construed by the Supreme Court and seldom to be tolerated by the majority's legislative will. Although this rendering does not rule out innovative rule-breaking, the outlook implies that conscientious disobedience has few contributions to offer democratic theory.

In contrast, institutional libertarians find civil disobedience a potential resource. Frequently they show the influence of liberal theology and resistance ideas indebted to Roger Williams, the *Vindiciae Contra Tyrannos* and John Knox. Of special interest, these commentators provide for individual civil disobedience which the elitism of Reformation traditions normally would have excluded. The method is to interpret St. Peter's "Obey God rather than men" dictum (Acts 5:29) to deny the state's absolutism and to permit citizen disobedience by divine authority without reference to human institutions.[13] The Petrine injunction has two weaknesses which are illuminated by Leslie W. Dunbar's criticism of natural law renditions for failing to require that the disobedient must always take the burden of justifying his act. He objects to a special defect:

> This comes about when the tradition asserts that the right of conscientious disobedience represents obedience to God rather than man; thus "God justifies." That this borders on blasphemy is a truth which at least two millennia have conspired in suppressing. It is of a piece with the other too numerous manifestations of western civilization's pathetic repudiation of its own responsibility for its moral values. When we take the step of civil disobedience no presumptuous claim that "God justifies me" must be on our lips; only a plea that he do so. It is not God rather than man that we obey, but God rather than man that we seek to please, and therein lies a tremendous difference. We cannot explore this matter here, other than to note that what one *offers* to God cannot be logically evaluated.[14]

While Dunbar's larger finding is that mass black protest in the South was genuine disobedience and that it was justified, not by conscience or natural law, but by its political ends and non-violent means, his unhappiness with God's "validation" is an instructive reminder that some "conscience" justifications of disobedience raise the issue of self-certification through rationally unreachable claims, and they manipulate theological ideas. The first problem complicates the task of determining constructive rebels from their opposites. Dunbar offers an appealing solution: After the mystical disobedient offers up his act, he must appeal to men for secular judgment. Thereby two courts will have the benefit of review. On manipulating theological notions, one could say that this condition is difficult to avoid in an age when inner direction is widely respected or tolerated and those who believe in extra-human causes are experiencing revolutions. A more critical response is to suggest that Dunbar's point about pleasing instead of appealing to God implies a significant part of the "Obey God rather than man" directive that is often omitted—the possibility of God's punishment if the disobedient is acting contrary to divine will and law.[15] In *Antigone* the heroine pitted her understanding of higher law against Creon's state command, but although she perished, in an ultimate sense the Gods vindicated her and punished him. Is it unfair to argue that when a disobedient invokes the Petrine doctrine, he ought to admit that he is in principle subject to the risk that God's penalties may be visited on him, not as testimony to state sovereignty,

[12] 283 U.S., 605, 633 (1931); Griswold, *op. cit.*, 728–738.

[13] A leading statement of this view which rests its certainty in Christ is John C. Bennett, "The Place of Civil Disobedience," *Christianity and Crisis*, 27 (Dec. 25, 1967), 299–302. Religious institutions, it has been urged, have a duty to speak and act corporately on the great issues of conscience and not limit themselves to urging individual members to speak and act: Robert McAfee Brown, *et al., Vietnam: Crisis of Conscience* (New York: Association Press, 1967), pp. 62–106, at 63.

[14] "Sources of Political Rights," paper read to Southern Political Science Association, Durham, N.C., November 13, 1964. Mimeo., p. 7. Italics in the original.

[15] There is also the possibility that the Devil rather than God is the source of inspiration. The perplexing implications of this option for actor and authorities were found at least as recently as John Brown of Harpers Ferry.

but because the law was more in tune with God's justice than his act? I think not. For without the corollary of God's justice, the "obey God rather than men" formula allows rule-breakers who invoke it to try to have the best of the subjective world in which they presumably believe. This is a questionable procedure in terms of limiting self-certification.[16]

A comment should be made here about recent developments in non-selective conscientious objection to compulsory military service which reveal a conflict between public policy and claimed moral impulse. Applying the protection of due process, but denying that Congress had violated the First Amendment by requiring belief in a Supreme Being, the Supreme Court in *U. S. v. Seeger* held that an objector, not an atheist, with sincere and meaningful beliefs parallel to the convictions of theists who is conscientiously opposed to participation in war in any form is qualified for exemption from combattant training and service.[17] In the 1967 Selective Service Act, Congress responded to *Seeger* by removing the Supreme Being test; but, intending to exclude Seeger-type beliefs, it retained religious training and belief as the origin of conscientious objection and kept a ban on exemption based on essentially political, sociological, or philosophical views, or a personal moral code. In 1968 the Selective Service introduced a form to review Seeger-type beliefs. *Seeger* and the changes are only slight adjustments in the government's effort to determine sincerity and uphold equity. Together with the premises of the Universal Military Training and Service Act, they do not contribute to a common understanding of "conscience," and they raise questions about the government's right to define and apply tests about highest convictions.[18]

Political obedience and the issue of conscience are joined especially in controversies about *selective* objection to military service, for which there is no statutory provision in the United States. For present purposes the importance of the controversies lies in their debate of the question: do convictions that a particular war is immoral and unjust meet the test of conscientious objection? The neo-conservative is likely to hold that selective objection is judgmental, i.e., "political," and should not be confused with traditional, i.e., "religious," conscientious objection which is a fundamental and rare phenomenon that government can and should legally tolerate. To this view sincere claims of selective objection to particular wars are worthy of respect. But they cannot be honored because they do not have the requisite "religious" quality and they clash with the idea that the government's will is paramount until changed by the representative machinery or public opinion.[19] The libertarian, however, is apt to be sympathetic to a temporal faith interpretation of conscientiousness and willing to consider selective objection as potentially legitimate and not an indefensible challenge to national defense or democratic theory.[20] The difference between the two currents on the issue of selective objection focuses attention on how far each will permit legal exemptions from the requirements of citizenship to be extended in the name of conviction. Essentially the neo-conservative will allow non-performance that does not injure the rights of others or public safety, as with the constitutional refusal of Jehovah Witnesses to salute the flag, or that does not seriously affect a public mission, as in the instance of traditional conscientious objection to bearing arms at any time. In contrast to the neo-conservative, the libertarian will take greater risks in exempting non-confor-

[16] An example of the self-protecting formula is found in William Sloane Coffin, Jr.'s comments in Whittaker and Coffin, *op. cit.*, pp. 29–41.

[17] 380 U.S., 163 (1965).

[18] See Christopher H. Clancy and Jonathan A. Weiss, "The Conscientious Objector Exemption: Problems in Conceptual Clarity and Constitutional Considerations," *Maine Law Review*, 17 (1963), 143–160. If upheld, the Federal District Court ruling in *U. S. v. Sisson* (297 F. Supp. 902, 1969), which found that the 1967 law unconstitutionally discriminates against non-theists, religious or not, with profound moral convictions, will move the C. O. issue closer, either to the opening of Pandora's box or the victory of the inner light, depending on one's view. Ending compulsory military service would retire the question, unless there is another major war.

[19] Fortas, *op. cit.*, pp. 51–52.

[20] On selective objection to military service, the American Civil Liberties Union has equated the genuine objector's belief with conscience that is entitled to First Amendment protection whether or not he claims to be "religious." Although no testing formula was suggested, it has held that administrative scrutiny of the objector will detect the unconscientious and discourage this means to avoid the draft. *Civil Liberties* (March, 1966). Without plebiscites, church elites have endorsed selective objection. A statement upholding conscientious resistance to military service in particular wars received the approval of most American delegates to the Fourth (1968) Assembly of the World Council of Churches. The selective objection issue is a new and ambivalent question for historical critics of all wars. See American Friends Service Committee, *The Draft?* (New York: A.F.S.C., 1968), esp. Chapter 3, "From Witness to Resistance: The New CO."

mists from public affirmation of national loyalty and performance of citizen duty. The former moves with court and legislative answers, the latter anticipates favorable responses from them, making their agreement on a conscience test of civil disobedience an unlikely prospect.

III. WHAT OBLIGATIONS DOES THE DISOBEDIENT ASSUME?

To leave the criterion of conscientious dissent suspended between two schools is not a happy condition. However, I will let it remain there until later to consider other evidence of good will, asking about civil disobedience what T. H. Green asked of the legal obligation to obey—what external things should be expected?[21] For this purpose two standards are useful—the disobedient's willing acceptance of legal penalties and his use of "non-violent" means. For the rule-breaker to voluntarily submit to the legal consequences of his act is held, especially by neo-conservatives, to be a central proof of one's good faith and lack of criminal or revolutionary intentions.[22] It is conceded that voluntary submission obliges the state to consider that the disobedient, not the rule, should be vindicated. For many neo-conservatives the test of full submission is for the disobedient to willingly plead guilty. Even though on moral and constitutional grounds he usually opposed his own formal guilt, the example of Martin Luther King, Jr. is valued by neo-conservatives because of his sacrificial style and testimony to the ideal of law expressed in this way: "And I submit that the individual who disobeys the law, whose conscience tells him it is unjust and who is willing to accept the penalty by staying in jail until that law is altered, is expressing at the moment the very highest respect for the law."[23]

[21] Thomas Hill Green, *Lectures on the Principles of Political Obligation* (London: Longmans, Green and Co., 1921), pp. 35–38.

[22] Sidney Hook, *The Paradoxes of Freedom* (Berkeley and Los Angeles, University of California Press, 1967), pp. 116–118; Allen, *op. cit.*, 10–11; Fortas, *op. cit.*, p. 34. See also "A Declaration of Confidence in Columbia's Future," signed by faculty members of the Columbia Law School, *New York Times*, May 17, 1968, p. 41. Neo-conservatives honor Socrates as the Responsible Disobedient, holding that he drank the hemlock to testify to the state's integrity and the rule of law even as he believed that he had been unjustly accused and convicted. A variation is that the Gadfly's submission proved that he would let others disobey laws if they would assume the risk he had assumed: Charles Fried, "Moral Causation," *Harvard Law Review*, 77 (1964), 1258–1270, at 1269.

[23] Martin Luther King, Jr., "Love, Law and Civil Disobedience," *New South*, 16 (1961), 3–11, at 8. It is less clear that King's adherence to the edifice of the law prevailed in his last few years when war policies and the maldistribution of wealth became his targets.

On the question of submission, libertarians are likely to refer to the varieties of legal situations under which civil disobedience might take place and to the possible weakening of protections for the accused through guilty pleas. The two patterns agree on minimum requirements that the disobedient should not become a fugitive from justice and after arrest should use conventional, legal means.

Protest circles have produced criticisms or rejections of the submission criterion, especially the neo-conservative version. Notable arguments hold that only obscurantist or craven men accept the requirement; by their courageous disobedience to reform democracy for philosophical reasons, a few men have prepaid society for any inconvenience they may have caused; acceptance of punishment encourages the state to keep and enforce the law or policy under attack; not to resist imprisonment or other penalty is to discredit the logic of disobedience; the law disobeyed is clearly unjust or unconstitutional so that acceptance of punishment is testimony to moral or legal falsehood. Howard Zinn's censure of neo-conservative submission covers some of these notions and adds others:

> If a specific act of civil disobedience is a morally justifiable act of protest, then the jailing of those engaged in that act is immoral and should be opposed, contested to the very end. The protestor need be no more willing to accept the rule of punishment than to accept the rule he broke. There may be many times when protestors *choose* to go to jail, as a way of continuing their protest, as a way of reminding their countrymen of injustice. But that is different than the notion that they *must* go to jail as part of a rule connected with civil disobedience. The key point is that the spirit of protest should be maintained all the way, whether it is done by remaining in jail, or by evading it. To accept jail penitently as an accession to "the rules" is to switch suddenly to a spirit of subservience, to demean the seriousness of the protest.[24]

A radicalization of protest idiom is clearly evident in many of these ideas. Conceivably they suggest an understanding of civil disobedience that calls into doubt the foundations of the democratic state, as known to date. But even

[24] Howard Zinn, *Disobedience and Disorder: Nine Fallacies on Law and Order* (New York: Vintage Books, 1968), pp. 120–121. Italics in the original.

granting the presence of revolutionary ideas, the disciplined observer should not be hasty to conclude that conspiracy is at work and the commonwealth is imperiled. On the grounds that civil disobedience is a relief valve for an uncertain mixture of insurgent thought and non-revolutionary opinion, some concessions to the criticisms of the submission test should be made. In particular, the neo-conservative insistence on a guilty plea should be eliminated. The result would be to make the submission criterion no more and no less than the requirement of a *legal* struggle *within* the state's jurisdiction. A search for "sanctuary" or flight to avoid prosecution would be evidence of something other than civil disobedience.

There is a close relationship between the submission test and the question of "non-violent" means. Christian Bay's encyclopedia article states that civil disobedience requires "carefully chosen and legitimate means," but holds that they do not have to be "non-violent."[25] Yet, neo-conservatives and institutional libertarians usually agree on the need for this criterion which is meant to certify the actor's acceptance of the legal structure and to help the act's efficacy by avoiding society's fear of violence and preventing counter-force. There are vexing problems of definition. Criteria-makers have come to no agreement as they face "non-violent" conduct ranging from Mennonite non-resistance through attempts to block a submarine launching to self-immolation. A main source of difficulty is the fact that efforts to expound on the moral or practical value of non-violence, efforts which have a permanent place in American social and intellectual history, have not completed the task of developing a theory of political institutions based on the norm.[26]

The problems of defining and institutionalizing "non-violence" imply a discussion of its opposite. The key question here is who may use violence legitimately? Drawing on traditional political obligation, the neo-conservative has answered with a moderate but explicit doctrine of state sovereignty. The libertarian is not greatly different, holding that the state alone has a legitimate monopoly over violence. While one could reasonably argue that the state has only a *de facto* and not a *de jure* monopoly over violence until the principle of consent is more fully realized, I see no viable alternative to retaining the neo-conservative, and by and large the libertarian insistence, that violence is rightly employed only by legal authorities who through legislative and judicial means determine what is and what is not anti-social behavior. In the crucible, public executives and their agents may equate illegality with violence and anarchism and act repressively on the confusion. The disobedient can help to prevent these defects by his peaceful conduct. More explicitly, the disobedient should be governed by the moral conviction that he is a witness to charity that he finds lacking in the state, obligating him to abstain from physical injury to persons and things. To hold that there ought to be a distinction between the lesser evil of violence to things and the greater evil of injury to persons is to invite a further debate about arson and theft, a process that will undermine the original ethic that was invoked.[27] "No contusions or breakage" may have little claim as a sophisticated rule for civil disobedience, but it is readily comprehensible and testifies to a prime democratic value, peaceful change.

A discussion of civil disobedience as potential revolution is suggested by the last criterion to be examined, a proximate relation between the violated rule and the cause for grievance. The neo-conservative tendency interprets the standard as insisting on a cause and effect bond. It is unsettled about any other understanding. Francis A. Allen writes:

> But dilemmas arise when the object of protest is a condition that does not result from the enforcement of any particular law or from the conduct of any readily identifiable person or group, but

[25] Bay, *op. cit.*, p. 474.

[26] Commenting from within the peace movement on the division between the non-violent ethic and politics, A. J. Muste observed: "And since, in itself pacifism does not provide criteria for political discrimination, these criteria must be found elsewhere. In their search for sound criteria not all pacifists mine the same political quarry." Quoted in James A. Finn, *Protest: Pacifism and Politics* (New York: Random House, 1968), p. 200. Pacifist and related writings from William Penn to Bayard Rustin are collected in Staughton Lynd (ed.), *Nonviolence in America* (Indianapolis: Bobbs Merrill, 1966). Gandhian resistance to reform the law is urged in Harris Wofford, Jr., "Non-Violence and The Law," *Journal of Religious Thought,* 15 (1957), 25–36. *Satyagraha* is appraised in my "Toward a Reassessment of Gandhi's Political Thought," *Western Political Quarterly,* 16 (1963), 99–108.

[27] Contrast Zinn, *op. cit.*, p. 46. For a dualistic thesis that when avenues for peaceful change have been closed, exhausted or found ineffective, violence is needed as much as peaceful civil disobedience as a mechanism to advance democratic values, subject to the government's enforcement of order and its removal of the causes of the outbursts, see Ralph W. Conant, "Rioting, Insurrection and Civil Disobedience," *The American Scholar,* 37 (1968), 420–433, at 433.

which, on the contrary is the consequence of a whole complex of social, cultural, and historical factors . . . Direct action that assumes the characteristics of a secondary or tertiary boycott is not well calculated to a call for the moral response from the larger community upon which the classic theory of civil disobedience largely relies. Moreover, such programs contain a large and unmistakable ingredient of irrationality . . . Such forms of protest, whatever the provocations that induced them, represent a retreat from reason and ultimately threaten the nonviolent character of the present movement.[28]

Although Allen's illustration of a non-proximate condition is Negro disobedience for the proclaimed goal of increased economic opportunities, his comment is representative of neo-conservative concern about civil disobedience launched recently against national military policies. The libertarian tendency, which is equally devoted to rationality and peaceful means, does not share the neo-conservative objections to secondary and thus "political" relationships. To this view, Thoreau's refusal to pay his poll tax to draw attention to his objections to the Mexican War and slavery had no logical defects. Similarly, it is unlikely to fault the logic of the 1967 March on the Pentagon to publicize and alter Vietnam policies, however the means and the grievance are themselves judged.[29] Unlike the neo-conservative pattern, the libertarian outlook construes broadly the relevancy of a disobedient act for the rule broken. Although not all libertarians may object to *U. S. v. O'Brien's* denial of immunity for acts of "symbolic speech" which protested the wisdom of distant governmental decisions by challenging their legal armor,[30] the tendency they represent is fundamentally tolerant about the secondary character of rule-breaking which aims at the Leviathan through one of its peripheral laws.

Civil disobedience should not have to meet the neo-conservative exclusion of a secondary relationship between the violated law and the basic grievance. The breaking of a marginal, innocuous statute to communicate protest about a legally distant wrong is either individual witnessing or interest group behavior that a self-confident democracy can withstand without serious injury, especially in view of the public obloquy visited by majority opinion on non-conformists. If civil disobedience is restricted to the testing of rules believed unjust or unconstitutional—as the neo-conservative test of proximate relation between object and complaint requiries—civil disobedience would be confined to an essentially quasi-legal function when it may have a legitimate, politicized role as a "Question Time" for the majority will transcribed through the existing representative system. Under the heading of proximate relationship, it would seem sufficient to ask and expect an affirmative answer to the question, "Is the protest directed toward a specific need or wrong, clearly identified among the protesters; and has care been exercised to communicate its nature to bystanders and opponents?"[31] An "immoral" war or "retrogressive" tax policy would seem to be sufficiently specific; "poverty" or "racism" would probably be too general to qualify.

It would be premature to conclude that the norms of concreteness and honest publicity are enough to convince those who ask for a proximate relationship between the infraction and the grievance that the prospect of revolution is thereby significantly lessened. Indeed, the question whether revolution is or is not immediately beyond the threshold of civil disobedience can be raised at several turns in the discussion of standards for acceptable rule-breaking. Opinion falls between two limits. One is identifiable with conservativism and holds that civil disobedience is incipient rebellion.[32] The other is on the outer frontier of institutional libertarianism and asks that civil disobedience as "non-violent revolution" should be given legal immunity.[33] Although the bulk of the commentators are willing to avoid bracketing civil disobedience with revolution, neo-conservatives are apt to entertain and answer forebodingly the question: "Is there an attack on the system?" This phenomenon implies their general misgiving about allowing any rule-breaking in an operating, if imperfect, pluralist democracy. Libertarians are less

[28] Allen, *op. cit.*, 12–13.

[29] The preparations and conduct of the October, 1967 demonstrations at the Pentagon had factors of interest to the student of civil disobedience. One participant-observer finds the criteria of advance notice, "non-violence," and appeal to the public conscience. He also suggests as the claim that the government was obliged to negotiate on how it would be disobeyed. See Norman Mailer, *The Armies of the Night* (New York: New American Library, 1968). A situational description of the Pentagon events as a mixture of Gandhian and insurgency tactics is reported in *Liberation,* 12 (November, 1967) 3–7 (David Dellinger), 26–28 (Arthur Waskow).

[30] *U. S. v. O'Brien,* 88 S. Ct. 1673 (1968).

[31] Keeton, *op. cit.*, 515. Italics of the original removed.

[32] Riehm, *op. cit.*, 14. See also Lewis H. Van Dusen, Jr., "Civil Disobedience: Destroyer of Democracy," *American Bar Association Journal,* 55 (Feb., 1969), 123–126.

[33] Freeman, *op. cit.*, pp. 5–6.

fearful about civil disobedience being or becoming an attempt to displace the current regime. They depend on the standards of disclosure and "non-violence" to build a wall around the disobedient to tell him from the insurgent.

The neo-conservative fear that rebellion is inherent in rule-breaking is especially troublesome for the task of establishing criteria for civil disobedience. If the concern becomes overriding there is a risk that under its weight other criteria will fall. To avoid this contingency the discerning student will have to do one of two things. Either he will try to work out his own set of answers to show that there is no insuperable logical difficulty in viewing civil disobedience as a non-revolutionary question.[34] The other option is for him to rely on a belief that in a democratic context "principled" lawbreaking is worthy of ethical examination regardless of the risk that it may produce, intentionally or otherwise, the reality of political violence. I would recommend the second alternative, and support it with the addition of two widely-proposed criteria—the exhaustion of legal remedies before disobeence is undertaken and demonstrated care for substantial rights of others, e.g., First Amendment rights. The former helps to maintain the validity of redress procedures, which if discredited by non-use, may not provide adequate justice for anyone. The latter requires the disobedient to show non-ideological evidence of the humanism which he has proclaimed as his *weltanschauung*.

Civil disobedience therefore emerges as rule-breaking which meets certain standards. Assuming the act to be deliberate, it should be an articulated, public deed, aimed at a specific wrong and conducted peacefully with concern for others inside the state's jurisdiction after completing legal, remedial action. Selective borrowing from neo-conservative and libertarian norms opens the way to a discussion of whether there are significant tasks in democratic theory which might be performed through civil disobedience. Before that enterprise is undertaken some settlement must be made of the test of conscientious dissent.[35]

IV. WHAT IS "CONSCIENTIOUSNESS"?

Because of the centrality of "conscientiousness" for many definitions of civil disobedience, it deserves the most careful evaluation as a possible source for justification of rule-breaking in a democratic context. The standard is open to two defective understandings. On the neo-conservative side there is the risk of sacrificing the possibly creative voice to the rule of law. Among libertarians there is the chance of the absolutism of individual conscience overcoming civic virtue and order. Even if a balance were struck between the tendencies, application would be a basic problem of the test. "There cannot be," Franz Neumann wrote, "a universally valid statement telling us when man's conscience may legitimately absolve him from obedience to the laws of the state."[36] Neumann may have been premature in closing the door on scientific determination of conscientiousness, but his comment recalls the near inscrutability of the inner light and the extreme difficulty of giving it consensual recognition. An amendment may be in order to require an affirmative response from the "conscience" of others as evidence of the disobedient's own credentials. The implications of this qualification include the transference of the testing process from the actor to his audience. This amendment has the drawbacks of opening the question of how significant followership or its absence is to judging the disobedient and recalling Rousseau's general will as a "conscience" for the whole community. The former leads to a discourse on effective leadership, not valid rule-breaking; and the latter leads to controversies about the meanings of the *Social Contract* that are unsettled two centuries after its publication. Because of these problems, the amendment does not offer a reliable way to determine the individual's merit.

Given the diversity of meanings and the many questions about recognition and application which spring up around "conscientiousness"

[34] For this position, see Richard Wasserstrom, "Disobeying the Law," *The Journal of Philosophy*, 58 (1961), 641–653.

[35] Appeals to Nuremberg principles to justify disobedience have a close affinity to conscientious dissent. The focus of the relevant passages of the 1945 London Agreement on moral choice in the face of immoral state orders tends to assign the principles to a category of inner judgment. [The Agreement is in *Journal of International Law*, 39 (1945), Supp., 257–264.] It is debatable whether that judgment is "only" *entitled* to decide for disobedience or is *obligated* to so decide. The latter interpretation has been influential in popular resistance ideas. See Benjamin Spock, "Vietnam and Civil Disobedience," *The Humanist*, 28 (1968), 3–7, at 6. This stand was also adopted by Capt. Howard B. Levy in his military trial. *United States v. Levy*, CM416463 (Army Bd. of Rev. Aug. 29, 1968), *et cetera*. His view was an interpretation of Army Field Mannual 27–10, *The Law of Land Warfare* (1965). Yet, this document, which outlines legal responsibility for war crimes, stipulates neither entitlement nor obligation to disobey.

[36] Franz L. Neuman, *The Democratic and the Authoritarian State* (Glencoe: The Free Press, 1957), p. 158.

as a guide to identifying disobedience which a more perfect democracy would permit, one is left with the choice of either eliminating the criterion from consideration as Sidney Hook has done in the name of secular humanism[37] or relying on an interdependency of the disobedient and the state that will salvage some acts of conscience from its power.[38] Recognizing significant problems in either direction that require further exploration, I would choose the second course, endorsing Professor Dworkin's thesis that the regime's discretionary authority not to prosecute is the least unsatisfactory device to recognize the existence and condone the public results of the dictates of private conscience.[39] Some will object that the solution leaves conscience the prisoner of state theory—any state theory. The complaint has reasonable grounds, but it overestimates the achievements of those who wish to realize the ideal in which no man is ever forced to act in a manner contrary to his conscience.[40] Another objection is that anti-populist favoritism is practiced through forgiveness of "principled" rule-breaking, an indulgence not to be extended to the "generality" of men—a term used by Judge Charles Wyzanski, Jr. when he accepted a man's refusal on non-theistic, conscientious grounds to be inducted for combat service in Vietnam.[41] The criticism is especially difficult to answer because it exposes the elitist character of civil disobedience to which so little attention has been paid.[42]

The main problem, however, is to avoid two extremes. To ignore individual conscience as a guide to state response to disobedience is an undesirable concession to legal positivism and philosophical relativism. To elevate conscience as a self-determined yardstick is an unwelcome step toward political atomism. A balance is possible when the non-prosecution option is accepted. It depends on the forbearing character of the American state. Less than optimal, the quality ought to be refined and strengthened; but its present condition is intrinsically valuable to help recognize and respect the dictates of private conscience.

V. CIVIL DISOBEDIENCE AND DEMOCRATIC GOVERNMENT

With the completion of the foregoing sketch of criteria for civil disobedience that reveals certain political ethics and distinguishes it from political revolution and conventional dissent, a provisional response can now be made to the question whether resistance of this kind contributes a service to American democratic thought. A subsidiary issue deals with the possible defects of the current. From the standpoint of American political obligation the area that is most pertinent is the Lockean dispensation. According to this theory, primordial consent established a political society out of which a state emerged, probably through a second contract, as Althusius had argued more clearly than Locke. In any event, original consent entitles the state to a basic loyalty. The citizens retain a portion of their pre-civil authority to self-government through the persistence of inviolable rights and a representative system operating through ma-

[37] Hook contends that "conscience" is a dangerous guide for principled action, which if accepted, opens the way for totalitarians along with peace workers. See especially *Paradoxes of Freedom*, Chapter 3. His thesis is overly dependent on viewing conscience as a basis for *political theory*, whereas many who claim its guidance are no more or less than moralists who may be correct or mistaken in their judgments but who seldom offer political theories. I agree with Hook's evaluation that individual conscience alone is an untrustworthy basis for consent to law. Contrast Harold J. Laski, *Authority in the Modern State* (New Haven: Yale University Press, 1927), pp. 32–47. Recent controversies have caused constitutional libertarians to attempt to combine political respect for and legal skepticism about disobedience based on highest principle: "The American Civil Liberties Union Statement on Civil Disobedience," February 1, 1969, mimeo.

[38] A third way is possible if one believes that the entire question of civil disobedience is based on what may be *owed to others* through shared values and associations. For this approach, which differs from mine, see Walzer, *op. cit., passim.*

[39] Ronald Dworkin, "On Not Prosecuting Civil Disobedience," *New York Review of Books*, 10 (1968), 14–21.

[40] The ideal has received notable support from the Roman Catholic Church in Vatican Council II's "Declaration on Religious Freedom." A state, even one that is democratic, can make a declaration of this kind only at its peril. No longer a state, but still a government, the Church faces numerous dilemmas in combining the "no-coercion-toward-conscience-even-when-wrong" ideal with Apostolic and Papal theories. As discussed in the Encyclical *Humane Vitae*, the birth control issue is one controversy in which the difficulties are revealed. For the American Catholic Bishop's 1968 statement on the issue in which on net balance conscience "as a law unto itself" is subordinated to the Church's teaching authority, see "Human Life in Our Day," *Catholic Mind*, 66 (1968), 1-28.

[41] *U. S. v. Sisson*, 297 F. Supp. 902 (1969).

[42] For the caution that in a democratic context civil disobedience is minority rule, see John H. Schaar, *Loyalty in America* (Berkeley: University of California Press, 1957), p. 52.

jority will. It is the delegational machinery which normally keeps the state accountable to its citizens who give a few men a fiduciary power to govern. *In extremo,* citizens may legitimately use violence to remake the state when it violates the terms of its mandate. Minority discontent is no proof that the mandate is broken. Only majority sanction can legitimize the claim. Private conscience is recognized by the Lockean tradition, but it is not the basis for a right to rule-breaking.[43]

The Lockean view of obedience and dissent has two main weaknesses. The fiction of voluntary membership in a political community is at best a literary metaphor or at worst a device for assuring the state consensualist value under the guise of a myth. For civil disobedience a result of the fault is to assign an awesome burden of moral justification for any illegal act to the disobedient, even when the law violated is patently inequitable. The civil disobedient learns what other law-breakers have found, that he faces not only the immediate legal network, but a surrogate to which presumably he had consented in a primeval cavern. Not all evidence of this problem in American political thought lies with Lockean theory, Hobbes' single contract and Leviathan having made themselves felt despite the stronger current of the former. Still, Lockean explanation about the genesis of political obligation gives the state an unearned title to expect and exact obedience even before the stuff of the second contract, the representative system, comes into focus.

The second weakness of Lockean theory lies in its anti-individualist and conformist bent that contrasts with Locke's natural rights and social ideas. The bias shows in his insistence that majority will is needed to begin the valid overthrow of unjust rulers and in the politically undernourished place given to conscience. The influence of these beliefs on any kind of dissent is especially revealed in a condition Robert A. Dahl calls a "J-Curve" situation where the bulk of the citizens agree on many political issues. Relating this condition to political philosophy, he writes:

> A vast number of questions that might be of abstract interest to philosophers, moralists, theologians, or others who specialize in posing difficult and troublesome questions are, in any stable political system, irrelevant to politics because nearly everyone is agreed and no one can stir up much of a controversy. If a controversy does arise because of the persistence of a tiny dissenting minority, in a republic the chances are overwhelming that it will soon be settled in a way that corresponds with the view of the preponderant majority.[44]

The condition described is precisely the kind where there *ought* to be an opportunity to ask troublesome questions and to demand answers from public authorities that are innovative. In an unstable system many voices are heard and the democratic state is apt to change its policies and laws. Sympathetic to Dahl's "others," I detect a need to keep open the possibility of challenges to laws and policies, regardless of the opinion of the "preponderant majority." That this can be allowed in terms of Lockean understandings of dissent is doubtful.

It would be unwise to conclude that because Lockean ideas about obedience and dissent have drawbacks their framework should be discarded. Not only are alternatives, e.g., Hobbesian or Marcusian theories, antithetical to such democratic values as privacy and self-fulfillment, but the Lockean tradition has developed intellectual commitments to civil liberties and participatory government that are crucial for the protection and advancement of human rights and regime accountability. What might be done profitably is to adopt an idea of "justice" to link, without confusing, the rulers and the governed. Skeptical of founding "justice" on the mythical soil of contract, I agree, nonetheless, that some understanding of the notion might overcome the weaknesses of Lockean theory.[45] Understood as a trans-political, moral ideal rooted in the nature and destiny of man, "justice" partakes of T. H. Green's "common good,"[46] despite the reservations that can be introduced about his statism and unclear teleology. For civil disobedience an eclectic conception of "justice" which is not mortgaged to primordial contract or state "ends" provides a shared field for presumptions about obedience to compete with disciplined challenges. The competition is on terms which do not preordain the outcome, although they unapologetically respect systemic legitimacy.

To proceed this far is to go beyond the mat-

[43] A similar understanding of Lockean obligation and dissent is Harry Prosch, "Toward An Ethics of Civil Disobedience," *Ethics,* 77 (1967), 176–191, at 178–179.

[44] Robert A. Dahl, *Pluralist Democracy in the United States: Conflict and Consent* (Chicago: Rand McNally and Co., 1967), pp. 272–273.

[45] Justice and contract are joined in John Rawls, "The Justification of Civil Disobedience," in *Civil Disobedience: Theory and Practice,* Hugo Adam Bedau, ed. (New York: Pegasus, 1969), pp. 240–255.

[46] On Green's "common good," suggesting that its social context is true but because of faulty use of words he failed to distinguish different goods, see Plamenatz, *op. cit.,* pp. 62–81.

ter of imperfections in the predominant stream of American democratic thought and to enter a discussion of whether civil disobedience is well qualified to guard and further democratic ideals. On this question, Bay is a prominent spokesman for the affirmative. He suggests that civil disobedience can be a new and vital way to realize human values no longer served by majoritarianism because of the inroads of modern knowledge and the distortion of the rule of law and representative machinery into ultimate goods. Visualizing a non-elitist polity with a reallocation of power that lessens poverty and violence and expands human rights, he wishes to substitute for the classic justification of democracy through political obligation an ethic of individual responsibility for the likely results of one's political conduct, including obedience to law.[47] This proposal is valuable to the degree that it reminds conservative and neo-conservatives of Bracton's dictum that the king is *sub deo et lege,* and how in our time the rule of law means that "the law itself is based on respect for the supreme value of human personality."[48] Bay's reliance on individual rectitude is more controversial, for although he denies that Thoreau is the model for civil disobedience, his ideas align with the New Englander's thesis that the free man defines his own responsibility.[49] The realization of Bay's goals, which others seek, requires limits. I contend that the limits mean that the free and responsible man operates *within* a community that develops his rectitude and the state's. Is this stand close to that of David Spitz who refers to the foundation of the problem of political obligation in the Aristotelian question about whether a good man can always be a good citizen? He argues that it is possible to be true to both through the loyalty of the citizen to the principles of democracy, despite the presence of unjust laws. In the last analysis, Spitz relies on the goodness and honesty of man operating from moral principles to judge rationally the likely results of his disobedience, and to bring his pressure to bear on the state to try to produce a greater benefit than what is apt to come from obedience.[50] As an amendment, I would suggest that, in addition to combining the good man's work for the development of the state, the state must be allowed to help him. This is not testimony to the sanctity of the state.[51] As in classical liberalism, he will control the moral balance, but there is or there ought to be a mutuality between man and the state.[52] For state power can help to liberate him from deprivations. Existentialism to the contrary, he cannot perform the task alone.

Applied to responsible civil disobedience, mutuality does not mean that legal immunity ought to be extended to it. This would be to legitimize and normalize civil protest into a formal, remedial institution that the democratic system already provides in other ways. Routinization would also destroy the logic and spontaneity of disobedience. Yet, civil disobedience can aid, as it has in the past, the selective incorporation into civil rights and liberties of public speech and behavior previously denied to citizens. While some attempts fail and may deserve to fail in such marshy areas of criminal law as conspiracy and trespass, disobedience of the law, as the neo-conservative admits, is sometimes a useful tool to expand the arena of liberty. Moreover, responsible civil disobedience can continue to aid social changes that are beyond the capacity or will of representative institutions. Although civil rights disobedience within individual states had their approval, this is a basic frontier neo-conservatives would rather not pass. They can be answered with the reply that civil rule-breaking can energize the political system to take additional steps to advance social progress, provided it is understood that the criteria suggested in this paper or similar tests

[47] Bay, *op. cit.,* pp. 484–485. The populism inherent in Bay's ideas is more apparent than real, for he would trade the elitism behind liberal democracy for a new elitism of radicals who would produce bold policies.

[48] International Commission of Jurists, *The Rule of Law In A Free Society: A Report on the International Congress of Jurists, New Delhi: 1959* (Geneva: International Commission of Jurists, 1960), p. 196. Bay criticizes the dogma of the rule of law in pluralist democratic theory in "Civil Disobedience: Prerequisite for Democracy in Mass Society," in *Political Theory and Social Change,* David Spitz, ed. (New York: Atherton Press, 1967), pp. 163–183.

[49] "The only obligation which I have a right to assume," Thoreau said, "is to do at any time what I think right." "Civil Disobedience," *The Works of Thoreau,* Henry S. Canby, ed. (Boston: Houghton Mifflin Co., 1937), 789–808, at 790–791.

[50] David Spitz, "Democracy and the Problem of Civil Disobedience," this REVIEW, 48 (1954), 386–403, at 401–403.

[51] On some dangers of civil religion, see Lewis Lipsitz, "If as Verba Says, the State Functions as a Religion, What are We To Do To Save Our Souls?", this REVIEW, 62 (1968), 527–535. A vineyard note is Barbara Deming, "Desanctifying Authority," *Liberation,* 12 (November, 1967), 32–33.

[52] "Mutuality" between citizen and state is explored in Robert J. Pranger, *Action, Symbolism, and Order: The Existential Dimensions of Politics in Modern Citizenship* (Nashville: Vanderbilt University Press, 1968), pp. 54–57.

are developed as insurance that principled disobedience is not a threat to the constitutional order, but an effort to retain it because of its demonstrated values.[53]

Those who believe that the representative model, operating fundamentally by "majority" will, coalition leadership and a developing system of rights and liberties, is the best arrangement to be expected in an imperfect world, are unlikely to invite civil disobedience into the house of Madison and Lincoln. Essentially, this is the neo-conservative current. Some, but perhaps not all, libertarians are open to the prospect of legitimizing civil disobedience as a genuinely democratic method. They believe, and I would agree, that civil disobedience can provide a theoretical service in a democracy through the reform of the delegational pyramid. For without contending that Rousseau's city-state ought to be the paradigm for democracy, I suggest that the representative structure which welfare democracy inherited from last century's liberalism and improved in this century has not been so administratively effective or so politically virtuous that it cannot be improved by new arrangements for combining obedience and consent. To experiment is a risk for democratic political obligation. But is there not an equally serious risk if stability is valued ahead of the expansion of accountability?[54] Distinguished from the use of force to impose decisions and from the existing regime of rights and liberties, disciplined civil disobedience is possibly a creative way to ask the citizens of the state if they are satisfied with other aspects of the delegational model that has served well but which may not have produced the most equitable and efficient allocation of power and resources to deal with emergent disaffection and unmet needs in the national polity.

But how *necessary* is civil disobedience, given the availability of many legal forms of political opposition and reform? To face this question is to appeal for empirical studies of the benefits or costs of civil disobedience undertaken in our time, measured against the reasonably well-known strengths and drawbacks of conventional forms of political opposition. Recent studies of violence in the United States are of no great value because they have proceeded almost without the aid of ethical distinctions about various kinds of disorder.[55] The distinctions, as I have tried to show, can be made. The task is to use some set to isolate *civil* disobedience from other forms of unconventional dissent and after empirical analysis to declare whether there is a *need* for this special form of opposition in terms other than the ones that are used frequently to justify it.

Meanwhile, three compelling reasons support the incorporation into American democratic philosophy of *civil* disobedience. As a buffer between civil liberties and rights, and direct action and Communardist ideas, having kinship with both, it provides a testing zone for challenges to representative democracy without complete submission to either established or new rules of the game. Civil disobedience takes soundings for the operative formulas of democracy, not the least of which is how to probe for a conception of justice held by dissidents and state alike. Finally, the phenomenon is an educational strategy to rethink persistent questions of political obligation. For all three reasons incentives are supplied, not only by intellectual curiosity, but also by the power, merits and inadequacies of discontent itself.

[53] For this point, see Wilson Carey McWilliams, "Civil Disobedience and Contemporary Constitutionalism: the American Case," *Comparative Politics*, I (1969) 211–227, at 221.

[54] Political obligation rests on a narrow interpretation of order and stability in Charles S. Hyneman with Charles E. Gilbert, *Popular Government in America: Foundations and Principles* (New York: Atherton Press, 1968), 274–275.

[55] A minority of the Eisenhower Commission on Violence cited ethical criteria in its dissent from the majority's faulting of civil disobedience: n. 4, *supra*.