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This article is based on a speech delivered by Judge Frank M. Johnson, Jr. to the faculty and students of the Vanderbilt Law School. Judge Johnson's thesis is that "civil disobedience" presents a special challenge to judges and lawyers. He feels that there are alternatives to "civil disobedience" for challenging and protesting the law and that lawyers have a duty to inform the public of these alternate methods. Only in extreme cases does Judge Johnson believe that "civil disobedience" is justified. He illustrates his thesis with a discussion of the events surrounding the Democratic Convention at Chicago.

The 1960's have witnessed the development of protest movements which may well give the decade its name. This nation has seen other periods of discontent, other outbursts of moral indignation, and more than occasional fits of violence, but the movements of the 1960's seem distinctive. One distinctive feature is the prominent role assumed, largely for the first time, by the American student. Another and increasingly disturbing feature of these movements has been the tendency toward "emotionalism"—that is, emotion divorced from reason. This emotionalism presents a special problem and a special challenge to lawyers and responsible citizens committed to the principle that the law is supreme and committed to the task of maintaining that principle as a working idea in this country.

We might respond initially to that challenge by noting the emotionalism surrounding the phrase "civil disobedience." I do not suggest that the phrase has a precise meaning, but it does seem clear that unrestrained and ill-considered advocacy of civil disobedience by its proponents has led to loss of public support for certain aspects of the protest movement that would otherwise be acceptable by American standards. Moreover, it has unfortunately led some well-intentioned participants into the wrong view that clearly illegal acts would be immune from punishment. On the other hand, sweeping condemnation of all protest as anarchy has tended to drown out *responsible* criticism of protest methods by those who sympathize with some of the goals of the protesters. The result has been increased intolerance and polarization of opinion—two great enemies of the rule of law.

As a preliminary matter, one should note that many of the issues

involved are not, strictly speaking, legal issues. For example, to the questions "When may I disobey the law?" or "When ought I to disobey the law?", the law has a clear and straightforward answer: "Never!" Mr. Justice White has made this point quite precisely:

> Whether persons or groups should engage in nonviolent disobedience to laws with which they disagree perhaps defies any categorical answer for the guidance of every individual in every circumstance. But whether a court should give it wholesale sanction is a wholly different question which calls for only one answer.[1]

As a United States District Judge, I have had occasion to make a similar statement:

> There is no immunity conferred by our Constitution and laws of the United States to those individuals who insist upon practicing civil disobedienee under the guise of demonstrating or protesting for 'civil rights.' The philosophy that a person may—if his cause is labeled 'civil rights' or 'states rights'—determine for himself what laws and court decisions are morally right or wrong and either obey or refuse to obey them according to his own determination, is a philosophy that is foreign to our 'rule-of-law' theory of government.[2]

Nevertheless, there are circumstances where it is clear that the moral duty to obey the law has ceased. Even lawyers were justified, if not morally obliged to counsel, and engage in, disobedience to the racial laws of the Third Reich. Similarly, the laws in the Stalinist Soviet Union ordering the genocide of the kulaks were devoid of any moral obligation that they be obeyed.[3]

It would be a mistake to conclude from what has been said, however, that disobedience of the law is justified if it is disobedience in the name of higher principles. Strong moral conviction is not all that is required to turn breaking the law into a service that benefits society. Civil disobedience is simply not like other acts in which men stand up courageously for their principles. Civil disobedience necessarily involves *violation of the law,* and the law can make no provision for its violation except to hold the offender liable for punishment. This fact accounts for the delicate ambivalence of President Kennedy's position at the time of the Negro demonstrations in Birmingham. He gave many signs that, as an individual, he was in sympathy with the goals of the demonstrators. As a political realist, he probably knew that these goals could not be obtained without dramatic actions across the line into illegality, but as Chief Executive he could give neither permission nor approval to such actions.

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1. Hamm v. City of Rock Hill, 379 U.S. 306, 328 (1964) (dissenting opinion).
2. Forman v. City of Montgomery, 245 F. Supp. 17, 24 (M.D. Ala. 1965).
3. *See, e.g.*, A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 9-10 (1968).

While I cannot propose a set of principles that will generate automatic answers to the question "When may I disobey the law?", I can offer some guidance toward an answer. At the outset we must distinguish lawful protest from disobedience of the law. The vast majority of the protest movement in this decade has been both legal and affirmatively protected by our constitutional guarantees of freedom of speech and freedom of assembly. Most protest has involved totally obedient, nonviolent challenges to law or state policy, such as distributing pamphlets on segregation or in opposition to the war in Viet Nam, conducting voter registration drives, and picketing under required permits. Since it was not held until the court approved the details of the planned demonstration, the Selma-Montgomery march is an example of a completely legal protest. This distinction is scarcely one that need be belabored to lawyers. Yet in the current emotional climate it has been a point obscured to the public and to the protesters. Lawyers should take every opportunity to point out clearly that in all but the rarest of circumstances there is an alternative to disobedience of law, that protesters should adopt this alternative, and that critics of protesters should respect it.

It is not always easy to decide what is protected speech or assembly and what is disobedience of law. In the early stages of the direct action cases, the Supreme Court frequently gave the demonstrators protection, but the decisions were not put squarely on first amendment grounds.[4] Later, as the protesters became more diffuse in their aims and careless in their methods, the Court became less willing to protect their activities.[5] It would seem that the Court's recent efforts are directed at elaborating the distinction between speech and action. The recent draft card burning case, *United States v. O'Brien*,[6] in which the issue of symbolic speech was raised, indicates that approach. But it must be remembered that a great deal turns on the precise circumstances of the protest. One important consideration, for example, is whether the protest is by an individual or by a large group. Where and when the protest is to be held will also be an important criterion. Justice Harlan suggested in *O'Brien* the familiar legal principle of availability of alternatives; conduct otherwise unprotected may be legal if it is the only available means of

4. *See* Greenberg, *The Supreme Court, Civil Rights and Civil Dissonance*, 77 YALE L.J. 1520 (1968).

5. *Compare* Cox v. Louisiana, 379 U.S. 536 (1965), *with* Adderly v. Florida, 385 U S. 39 (1966).

6. 391 U.S. 367 (1968).

communicating with a significant audience.[7] I would also suggest that the principle of proportionality has relevance here. In the Selma march I had occasion to state:

> There must be in cases like the one now presented, a 'constitutional boundary line' drawn between the competing interests of society. This Court has the duty and responsibility in this case of drawing the 'constitutional boundary line.' In doing so, it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against. In this case, the wrongs are enormous. The extent of the right to demonstrate against these wrongs should be determined accordingly.[8]

In addition to the distinction between lawful protest and illegal action, we should also be cognizant of our federal system and its effects on persons who disobey the law. I refer to the category of situations in which state laws are violated under claims of federal legal right. The early sit-in cases in which Negroes claimed that state segregation laws violated the equal protection clause of the Constitution are excellent examples. When such claims were proved correct, the Negroes were treated as if they had not violated the law. This situation is unique to a federal system with its hierarchical system of laws. The supremacy clause of article VI of the Constitution[9] means that the Federal Constitution and laws must prevail in their sphere and that state laws which conflict are null and void.

Some critics have viewed the federal system of laws as being responsible for a crisis in law enforcement and a deterioration of obedience to law. Those who first raised these issues, however, were opposed to any social and political change and had relied on the law itself to preserve ordered injustice instead of ordered liberty. These issues were advanced as justification for the authorities' failure to protect the student freedom riders from assaults by Klansmen. The argument was made that since the local law in Alabama at that time required segregation of the races, and since the students violated these local laws (as opposed to going to court to have them declared invalid), they were entitled to very little protection by local officials.[10]

The practice of testing the law is not unfamiliar. The law in

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7. *Id.* at 388-89.

8. Williams v. Wallace, 240 F. Supp. 100, 106 (M.D. Ala. 1965).

9. U.S. CONST. art. VI, § 2.

10. United States v. U.S. Klans, Knights of Ku Klux Klan, Inc., 194 F. Supp. 897 (M.D. Ala. 1961).

many areas is uncertain, governed only by broad principles—what the philosophers refer to as "open-textured." For example, lawyers sometimes advise making a questionable deduction from an income tax return in order to *find out* whether it is legal. Although there is occasionally a more orderly procedure available, *e.g.*, a ruling by the Commissioner of Internal Revenue, we generally do not view these people as lawbreakers if their actions are later proved illegal. It has been suggested that when persons appeal over the head of the state to the laws of the nation by asserting the Constitution, they are impliedly submitting to rather than defying the rule of law.[11] There is much to be said for that argument, especially if there is no violence, and the violation does not interfere with the rights of others.

The preceding distinctions illustrate lawful means for protesting and challenging the law. It is now appropriate to consider distinctions between unlawful conduct and civil disobedience. First, I would observe that civil disobedience does not necessarily involve violence. There is no legal or moral justification for the rioting, burning, looting, and killing that have occurred in the cities of Los Angeles, Detroit, Chicago, Newark, Kansas City, and Washington. Understandable, perhaps; justifiable, never. Similarly, all of us feel nothing but revulsion at the senseless and brutal killings of President Kennedy, his brother Robert, Dr. Martin Luther King, or of Medgar Evers, Schwerner, Cheney, and Goodman in Jackson and Neshoba Counties, Mississippi, or of Viola Liuzzo, the Rev. Mr. Daniel and the Rev. Mr. Reeb in Lowndes and Dallas Counties, Alabama. These acts are not an assertion of rights; nor are they justified under the guise of civil disobedience. They are nothing more than the infliction of gross wrongs upon innocent citizens; they are insurrections against government. Participants in such activities, and those who by their inflammatory and defiant statements possibly incite such activities, disregard utterly and completely the supremacy of any law other than the law of the jungle.

It is also appropriate to keep in mind that civil disobedience of the law and *evasion* of the law are usually to be distinguished.[12] There is really quite a startling tradition of disregard for the law in this country; most of it, however, has been of the evasive variety. Civil

11. *See* Black, *The Problem of the Compatibility of Civil Disobedience with American Institutions of Government*, 43 TEXAS L. REV. 492 (1965). *See also* Marshall, *The Protest Movement and the Law*, 51 VA. L. REV. 785 (1965).

12. For an article of general interest by a layman which makes this point, see Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965).

disobedience is usually thought of as open violation of the law under a banner of morality or justice accompanied by at least a theoretical willingness to accept the appropriate punishment. Those who make moonshine whisky in my part of the country are usually merely law violators trying to conceal their violations, even though some of them doubtless feel that it is unjust for the United States to prosecute them for such activity. Those who believe that the taxing of income is contrary to natural law and therefore surreptitiously refuse to record their income should not be put in the same category with Thoreau, who announced to all the world his refusal to pay what he considered an illegal and unjust tax and willingly went to jail for that refusal.

By the Aristotelian process of distinguishing away what it is not, we have now approached a useful notion of the concept of civil disobedience: an open, intentional violation of a law concededly valid, under a banner of morality or justice by one willing to accept punishment for the violation. To this definition might be added another refinement, one which distinguishes a civil disobedient from a revolutionary. A civil disobedient is one who generally obeys the law and usually recognizes its supremacy. In other words, civil disobedience is directed at changing the existing legal order. A revolutionary, on the other hand, directs his lawbreaking at the total eradication of the existing legal system.

It is this concept of civil disobedience, then, that I have indicated cannot be condoned by me in my capacity as a federal judge. The law cannot as a matter of law officially recognize a right of civil disobedience. It is also in this sense, I believe, that Justice Fortas suggested that as a moral man he hoped that he would have violated certain laws in extreme circumstances, an opinion in which I cautiously concur. It is this concept which was advocated by Thoreau, Gandhi, and, at least in the early years, Dr. Martin Luther King. Similarly, unless they were nothing more than fraudulent political demagogues, it appears to have been the belief of Governers Ross Barnett, John Patterson, and George Wallace. These latter three may be distinguished from the former group on the grounds that as government officials they had a sworn duty to obey the federal laws they were violating.

Having conceded as a *moral matter* that in certain extreme circumstances civil disobedience may be justified, I cannot distinguish my position *qualitatively* from the position reflected in the actions of those mentioned above. This may be one of those situations, however, where a *quantitative* difference becomes a difference in kind. I say that because I take the writings and the utterances of Thoreau, King,

and Wallace as attempts to redefine obligation to law as individual right, or perhaps individual duty, to determine whether a law is just or unjust, and to obey it if it is considered just, and to disobey it if it is not. The advocates of this position do not, as I understand them, offer any qualifying principles which limit the situations in which an individual has a right to disobey the law. With no qualifications, of course, George Wallace, to be consistent, must acknowledge that Dr. King had a right as an individual to violate what Dr. King considered to be unjust laws, and Dr. King should have acknowledged the same right to George Wallace. Moreover, the radical student who forcibly and illegally takes over college buildings cannot consistently criticize, in the name of the law, the administration's denial of due process (*e.g.*, without hearing and notice) in throwing him out of school.

Those of us who attempt to act and think consistently must have grave misgivings about an unqualified doctrine that an individual has the right to violate any law he determines to be unjust. This doctrine is morally unsound and practically foolish. While morality and law are not coextensive, the rule of law is a necessary condition for the exercise of individual morality in a social context. Embodied in the notion of the rule of law are basic principles of fair dealing among men, widely agreed upon, which govern the situations in which men's interests and ideals conflict. These principles protect individuals from the exercise of another man's morality and provide a degree of flexibility for the exercise of one's own morality free from the interference of other individuals or the state. Under the rule of law, these principles apply, prima facie, to *everyone*.

The unqualified doctrine that an individual has the right to disobey any law he determines to be unjust is simply a more sophisticated way of saying that a man is entitled to take the law into his own hands. It means government by force, not by law. It means might makes right. In short, while such an unqualified doctrine may find short-run justification in protesting or preventing a single injustice, it is actually extremely shortsighted because it destroys the condition for our full development as moral beings—the rule of law.

It is obvious that the unqualified doctrine is practically foolish for those who now advocate it, namely, minority groups such as militant blacks, radical students, and die-hard segregationists—all groups with unorthodox ideas and limited access to the levers of power. A society where each man decides which law to obey has really reverted to anarchy, to a state of nature. Hobbes described life

in the state of nature as "solitary, poor, nasty, brutish, and short."[13] He might have added as a corollary that it is historically nastiest and shortest for those of weak body and strong principle. It is only under the rule of law that moral heterogeneity can peacefully flourish.

If we must reject both the extreme that civil disobedience is never justified and the extreme that an individual has the right to disobey any law he determines to be unjust, how do we determine which are those rare circumstances in which civil disobedience may be morally justified? There are no panaceas; one can only point to a few benchmarks and suggest hard, honest thought. Thinking should begin with an almost irrebuttable presumption that civil disobedience is not justified. Proof beyond a reasonable doubt, proof to a moral certainty, is required before we take that serious step. This almost irrebuttable presumption finds its justification in American constitutional democracy. We might even define our system as one designed to provide alternatives to civil disobedience. Majority rule is a key feature of this system. Elaborate institutions have evolved to insure that majorities are indeed majorities. But there are definite limits on the substantive powers of the majority. Basic standards of due process and equal protection regulate the modes by which those powers may be exercised. Minorities in America are insured the fundamental political freedoms of speech, press, and assembly which make it possible for them to become tomorrow's majorities. Finally, one must observe that these principles of government are more than pious admonitions to the wielders of power. Enshrined in a living Constitution, these principles are given the force and majesty of law through the operation of our unique institution of judicial review.

These are the *ideals* of our constitutional democracy. In practice, in actual *accomplishment,* we may find considerable shortfall. Courts may be biased, elections rigged, legislators bought, or the police hostile. Our history does reflect all too frequent examples of such shortcomings. But with only the rarest of exceptions, the shortcomings of *individuals* have not created serious unresponsiveness in our *institutions* over long periods of time. I submit that a serious, extensive, and apparently enduring breakdown in the responsiveness of our institutions must be a necessary condition of justified civil disobedience. In the recent history of the United States, I could cite only the persistent and flagrant denial of the rights of our Negro citizens in certain parts of the South as an example of this kind of breakdown.

I would also suggest a pragmatic evaluation of the consequences

13. T. HOBBES, LEVIATHAN, pt. I, Ch. XIII (1651).

of particular acts of civil disobedience. One should consider the risk that a peaceful act of disobedience may erupt into violent confrontation. Violence is never justified in the name of civil disobedience. One should also consider whether the act of disobedience will foster disrespect for law in general. Civil disobedients often do not intend to foster disrespect, but their actions can have and have had that effect. This is particularly true when the provocation is obscure and the disobedience is general and unfocused. Pragmatically speaking, in justified civil disobedience basic principles must be at issue, the provocation must be extreme, and the evils likely to endure unless most vigorously combated.

These considerations suggest that in terms of moral justification we note the difference between the practice of civil disobedience by large dissident groups as a tactic of political protest and civil disobedience by an individual as a private assertion of personal conviction. In the latter situation, there is virtually no risk of violence and the effect on attitudes toward law is likely to be slight. Indeed, there is a tradition in this country of deferring to the mandates of the individual conscience. The free exercise clause of the first amendment and the provisions for conscientious objectors in the selective service laws are prime examples of this. It is in this sense that we inherit a tradition of civil disobedience from men of the moral stature of Socrates, Jesus Christ, and St. Thomas More.

Having discussed in broad, general principles the nature of civil disobedience and the justified occasions of its exercise, it is now useful to apply some of these principles to a concrete situation. Since the matter will not be litigated in the federal courts of Alabama or the Fifth Circuit, I have chosen the events surrounding the Democratic Convention in Chicago as an example.

The acrimonious debate since the Democratic Convention has focused on whether the police or the demonstrators should shoulder the bulk of the blame for the extreme violence which marked their confrontation. Less attention has been given to how the confrontation might have been softened or avoided. The following news analysis, written by J. Anthony Lukas for the New York Times shortly after the Convention, faced this unconsidered issue:

> When they demanded the right to sleep in Lincoln Park, with the cry 'the parks belong to the people,' the police drove them out with tear gas. When they requested permits for a protest march to the Amphitheatre, they were refused. And when they provoked the police by shouting 'pigs' and 'fascists,' the force took off all wraps, clubbing not only young people but newsmen and innocent bystanders as well.

> New Yorkers here this week speculated on how Mayor Lindsay would have handled the same situation. They concluded that he would have invited the demonstrators to sleep in the park (perhaps even going in to toast hot dogs with them) and then would have personally arranged a route of march for them to a demonstration spot near the Amphitheatre.
>
> This kind of stance would hardly have satisfied the young revolutionaries like Rennie Davis and Tom Hayden of the mobilization committee. Theirs is a strategy of confrontation. If they could not have got confrontation over the parks or parade routes, they would probably have got it over something else.
>
> But granting the protesters their right to demonstrate and showing some concern for them might have deprived the small revolutionary core of some of its more moderate supporters. It undoubtedly would have softened the impact on thousands of Americans who watched the police tactics on television.[14]

Discounting the journalistic license, there is considerable wisdom—the wisdom of the Constitution of the United States—in that analysis. It seems clear that a substantial number of the demonstrators were interested only in peaceful expression of their dissent.[15] In any event, even revolutionaries are entitled to speak until they create a clear and present danger of serious disorder. The issues raised by the demonstrators cannot be dismissed as frivolous. They were challenging the morality and legality of our participation in a war which has taken and continues to take a great many American and Vietnamese lives. They were also challenging the responsiveness of our basic political institutions. Whether or not their claims are ultimately meritorious, they are entitled to expression.

The Constitution protects that right of expression. While the right of assembly is subject to reasonable restrictions, especially when large crowds are involved, it seems apparent that the officials in control had determined that no large demonstrations were to be permitted, however restricted.[16] It is clear that some efforts were made by some groups to obtain permits and otherwise comply with the law.[17] The responsible officials apparently chose to ignore the distinction between legal protest and civil disobedience and were determined to meet the demonstrators with force.[18]

Let me make clear that I am not suggesting that the protesters had an unqualified right to demonstrate. They did not have a right to disrupt the Convention, to snarl the traffic along Lake Michigan, or to

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14. Lukas, *Outlook After Chicago Violence,* N.Y. Times, Aug. 31, 1968, at 11, col. 3.

15. D. WALKER, RIGHTS IN CONFLICT 4 (Grosset & Dunlap, Publishers 1968) (Walker Report to the National Commission on the Causes and Preventions of Violence).

16. *See generally id.*

17. *Id.* at 31-42.

18. This was the view, for example, of an article apparently written before the violence. NEWSWEEK, Sept. 2, 1968, at 26.

or to endanger the security of leading government officials and politicians attending the Convention. But they did have the right to demonstrate subject to reasonable restrictions designed to protect these other interests. If the official attitude was to ignore that right it was not only disrespectful of our constitutional heritage, but it may have partially caused or intensified the violent confrontation that followed.

It must also be noted that once the demonstrators were refused permits, much of what they did subsequently was in violation of the law. Some of these actions might fit in the category of testing local laws against the Constitution, but others went considerably beyond this and clearly constituted civil disobedience. I cannot justify the civil disobedience in these circumstances. While the refusal to grant permits may have been unjust, it hardly constituted a breakdown of seeming permanence in the responsiveness of our institutions. The response of the so-called "Establishment" in the form of the Walker Report[19] seems ample hindsight evidence of that.

The events in Chicago, some of which invaded our living rooms through television, seem directly traceable to the emotionalism which has become so prevalent in this country. Much of that spectacle could have been prevented had emotions divorced from reason not blurred the distinction between those who exercise the constitutional rights of free expression and those who resort to civil disobedience and violence. Much of the confrontation could have been avoided if this emotionalism had not generated the unqualified belief that an individual has the right to disobey any law he determines to be unjust and if it had not bred such intolerance of ideas that public opinion was nearly paralyzed by polarization.

Lawyers bear special responsibilities in any society built upon the rule of law. Perhaps nowhere are those responsibilities as great as they are in the United States. In this country, lawyers are not only legal technicians, but they are our principal social generalists. It is this tradition which has caused me to address the special responsibilities of lawyers concerning these problems which require for their solution political and moral wisdom rather than technical legal skill. In combating emotionalism and demagoguery, we lawyers have an educational function with respect to laymen. Lawyers must clarify and illumine the distinction between the constitutionally-protected rights of expression and violation of the law. They must make clear that the

19. D. WALKER, *supra* note 15.

law does not recognize a right of civil disobedience and that violators must expect to be punished.

Lawyers must also be vigilant in keeping our institutions responsive to claims of injustice and voices of dissent. If we succeed in this, the condition for justifiable civil disobedience will rarely exist. Finally, we must expend our energies in eliminating injustice through legal channels, lest the victims take to the streets. Chief Justice Warren recently counseled sagely:

> 'I am certain of only one thing . . . though the principles which have sustained us in preserving individual liberty will be as valid as ever—the techniques of yesterday cannot be the techniques of the future. The legal profession, like all professions, must move with the times and be part of our times.
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> 'Our Constitution and laws are, in the last analysis, only meaningful when lawyers have the courage and zeal to stand up in court and assert them. Unless one trained in the law and fearless in advocacy takes on the causes of justice, those causes are forgotten . . . .'[20]

I challenge lawyers only to fulfill the finest traditions of our profession: direct your efforts in this hour of emotionalism in support of the continuing struggle to maintain the rule of law.

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20. TRIAL, Oct.-Nov., 1968, at 40.