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Some Reflections on Civil Disobedience

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I. DEFINITIONS

The term "civil disobedience" is used here in its conventional American sense: a refusal, especially by nonviolent collective behavior, to obey demands of government, as a means of forcing concessions from that government. It is not, like anarchism, a generalized opposition to the State with a view to sabotaging or destroying it, but a strategy of resisting (with varying degrees of firmness — ranging from mild to bellicose) a particular law or act of state. It sometimes loses its nonviolent character under provocation from others who employ violence as a countermeasure; and it is normally used only after recourse to other conventional remedies has been exhausted.

Civil disobedience in America earlier found its most characteristic expression in withdrawal of support from government, especially through nonpayment of taxes, and particularly to protest against unjust war (e.g., the Mexican War), or against public support for slave-owning (e.g., the Fugitive Slave Act of 1850), or against expenditures for the military establishment. There were, besides, such outbursts against public authority as the Boston Tea Party; the private expropriation of public lands by squatters, which eventually forced the enactment of the Homestead Law (1862) to regularize a practice that had grown too widespread to restrain; temperance agitation (which was anything but temperate) by well-meaning amazons whose pentecostal fervors led them to pray in the streets and then march, with axes swinging, into the saloons, two by two, like animals into the Ark. Even lynching (which, incidentally, in our earlier history was not a racial device, but claimed far more white victims than colored) was an extreme expression of the same propensity.

In recent years, civil disobedience as a tactic in the racial struggle has taken two principal forms. The first may be called primary action, in which the protesters refuse to comply with a specific law or publicly sanctioned usage (typically a segregation ordinance), whose validity is more or less clearly open to objection on constitutional or statutory grounds. Far more disquieting to public tranquillity has been the second form, which we may call secondary action — secondary only in the sense that it strikes at A in order to reach B. These secondary or indirect modes of attack on the color line have in common their reliance on various forms of obstructive, provocative, incitive, or inflammatory conduct to create an intolerable predicament which government can relieve by making a concession in the area of primary protest.

Much of the force of this latter maneuver derives from the circumstance that it seems to shift to government the responsibility for injuries that flow from private

intransigence, on the thesis that the evil (a suicide, to take an extreme example) could have been averted if the government had agreed to lift, say, a ban on interracial swimming in a public park. Secondary action ranges from innocuous, peaceful picketing or the distribution of leaflets, to more active demonstrations like sit-ins, wade-ins, pray-ins, and prayers on the capitol steps, and thence to graver expressions of social rebuke like hunger strikes, or the assembling of a mass meeting under the traffic lights at a busy intersection, or by bodily interposition, as when the protestants lie inert in a public place until dragged, unresisting but uncooperating, to jail, hopefully in such numbers that the prisons cannot contain them. In extreme form, such dramatic commitment of body as well as mind finds expression in throwing up human barriers to oncoming traffic, and even in the supreme horror of self-immolation by putting one's body to the torch.

It is, one senses, perhaps impossible to render a categorical judgment as to either the morality or the ultimate legality of civil disobedience. The gradations on the spectrum of forms that civil disobedience can take are so infinitely numerous that much depends upon the point on the spectrum to which one addresses his judgment. The precise point of legitimacy is, moreover, a moving one and eludes definition, for it shifts in every separate context, responding to the nature of the injustices (and their authors) which the tactic is calculated to cure. To the deaf one must shout very loud if one is to be heard; to others the stentorian tone would be an affront.

Civil *obedience* derives from man's need to live with his kind. By its nature, political authority must be ultimately lodged in a sovereign, and the obligation of every citizen in the community to defer to it — not merely when it suits him, but always — is a prerequisite of orderly society living under law. When man enters society he relinquishes the right to private decision in those aspects of his life with his fellows upon which the sovereign has chosen to pronounce. The authority of the sovereign does not, however, extend, even in the most unconfined autocracy, to every aspect of the lives of those living under its rule. In a constitutional state, the limits of power are more or less carefully defined; and, in addition, certain areas are marked out as being wholly outside the reach of public authority, while in other realms its power is more or less explicitly circumscribed.

In a democratic society the sovereign is the people themselves, expressing their will through freely chosen representatives operating through majority rule under directives imposed by a Constitution, which, in turn, derives in some fashion from the popular will. And, again, by its nature, the State possesses the ultimate monopoly of force, which it employs in order to render unnecessary the private resort to violence by individuals and associations in the resolution of disputes.

The whole issue of civil disobedience is steeped in paradox, for in its purest form it breaks laws that Law may prevail. What may appear (perhaps correctly) to be civil disobedience to some men, may to others (perhaps correctly) seem to be civil *obedience:* a compliance with law or laws which embody the popular consensus on matters of the highest import, but to which the State is itself disobedient. And sometimes civil disobedience comes not in the guise of resistance to bad laws but in insistence upon the faithful adherence to good laws already in the statutes. In such cases the strategy is

one of pressing the government to effectuate a law or a constitutional precept which it is for some reason failing to enforce. Dramatic, articulate disagreement with the State's delinquency is, of course, a form of quarrel with the State, possibly for the loftiest ends to which the State owes allegiance. The defeat of a *law* may be, and often is, at the same moment a victory for Law, so that it cannot be asserted as a general proposition that resistance to laws is on its face lawless.

II. CIVIL DISOBEDIENCE AND THE AMERICAN CONSTITUTIONAL ORDER

1

The American philosophy of the State is grounded, as Louis Hartz has emphasized in *The Liberal Tradition in America,* upon "liberal unanimity," an all but universally accepted thesis that has never called forth a serious opposition faith: a credo that the State is by God's allowance, an instrument made by and for man, for the promotion of human happiness; that it rests upon consent; that its central function is the safeguarding of the rights indispensable to individual felicity; and that a government which neglects this function forfeits its claim upon the people's allegiance and justifies their altering or abolishing it. This doctrine, which finds its classic expression in the Declaration of Independence, asserts also the "right of revolution," translated in modern terms as the right to overturn or reconstitute the regime through unhampered electoral choice. Free elections, in turn, presume full consultation between ruler and ruled, full disclosure of all the relevant data necessary to prudent choice, and equal accessibility of all to an uninfluenced and unintimidated ballot.

2

The American constitutional system posits the priority of the Constitution of the United States and all federal laws made pursuant thereto as the supreme law of the land, binding upon federal, state, and local government alike. Its great conservator is the Supreme Court of the United States, which, in historical retrospect, has shown itself capable, like all human institutions, of error and of infidelity to the trust it bears (cf. *Dred Scott v. Sanford,* 1857; the Civil Rights Cases, 1883; *Plessy v. Ferguson,* 1896). In their own sphere, state constitutions are also supreme law in the state, and state statutes or city ordinances in conflict with state constitutions are unconstitutional, no less than those in conflict with the Constitution of the United States. It is, moreover, a fixed principle of American polity that the majority is not absolute, but subject to constitutional constraints (especially as expressed in federal and state bills of rights). Nor are specific rights which are guaranteed by constitutions in fact absolute; the right of free speech does not include the right to shout "Fire!" in a crowded theater, for legitimate rights become illegitimate license when they are used to the injury of the commonwealth.

3

A self-governing society is one in which individuals both grant and withhold — and not infrequently withdraw — their consent. To assert that a citizen must not with-

hold or withdraw his consent to a particular law or policy until a majority of his fellows do so is, of course, to deny the existence of the right altogether. The process must be initiated by somebody, somewhere — conceivably by a solitary person who feels the moral imperative before his fellows sense it. Self-government, moreover, means government by the people, not by the people's ancestors; so that a self-governing society must keep its means and its purposes under continuous scrutiny and critical review.

4

A federal system like that of the United States is burdened with complexities from which a unitary state, like Britain or France, is exempt. The federal government is supreme; but in areas of authority reserved to the states, state governments are supreme, subject only to explicit restrictions imposed by the Constitution of the United States. The possibility of federal transgression against the constitutional distribution of powers between nation and states or against the explicit limitations upon federal powers, and of state violations of the limitations laid upon them by the Constitution of he United States, is always and everywhere present. When state and local ordinances are enacted contrary to federal constitutional or statutory provisions (or contrary to the state's constitution, for that matter), one cannot comply with one without violating the other. As a result, the citizen is sometimes thrust, even without will on his part, into automatic civil disobedience. In other cases, while the citizen may not be forced to choose between breaking federal or state law, he is confronted with the choice of either breaking an unconstitutional state law or waiting until the protracted processes of federal jurisdiction afford him relief. A dilemma of another sort arises if, after he has chosen the latter course, he finds the federal courts disinclined to apply the proper constitutional sanctions against state violation of, for example, the equal-protection clause of the Fourteenth Amendment. Yet another difficulty arises when legislatures and executive officers, national or state, refuse to transmute constitutional guarantees into effective statute. And in any case the courts cannot enter controversies of any kind — whether involving constitutional construction or the application of statutes — on their own initiative. There must be a bona fide litigant, with a bona fide dispute, confronting a bona fide antagonist.

5

It may be that we have reached, or are approaching, a stage in the evolution of the law of civil rights at which it can be said that the State and the law are now essentially on the Negro's side, so that the quarrel is, basically, no longer with the State. Yet it is the State that is besought, beleaguered, and badgered to force private and quasi-private groups and agencies to abandon discriminatory practices.

6

Selective pressures (as, e.g., boycotts of Woolworth Stores, or of other particular firms or industries) penalize segments of society for the iniquities of the whole society, merely because they happen to be more convenient targets than are other segments of

society which may in fact be even more guilty. Besides, the barber who refuses to cut a Negro's hair may be doing so in the certain knowledge that his clientele would otherwise desert him. Who is then the ultimate segregator, the barber or his public? Or perhaps the white customer who does *not* threaten to desert him if he does *not* cut the Negro's hair?

7

In a self-governing majoritarian society, inaction is in fact affirmative intervention in behalf of the status quo. Silence is complicity. The citizen who fails to use the resources available to him to avert or correct a wrong is by his silence an accomplice: he is, by his inaction, accessory to the fact, and morally guilty, just as surely as the bystander who elects not to deflect the arm of the assassin that drives the dagger is guilty of the victim's blood.

8

The machinery for repealing unjust laws or affording judicial relief from them is not self-propelled, nor are constitutional guaranties self-executing. They require articulate demands, challenge, litigation. Judicial review can become operative only when the "intransigence" of an aggrieved citizen (either the immediate victim of injustice, or his fellow citizen to whom the sight of injustice is insupportable and whose conscience forbids him to acquiesce in the injustice that exists by popular sufferance) sets the remedial process in motion. Even the Supreme Court does not and cannot render advisory or hypothetical opinions.

9

The agonizing task of the free, equalitarian society is the reconciliation of private rights, privileges, and immunities with the larger common good, which, in turn, is the climate in which alone private rights can prosper. And the freedom and security of the individual depend on the security of the State. To undermine the latter in the name of the former is, in the end, to undermine both. No individual right is absolute. The competing claims of private and societal rights perpetuate a dynamic tension in the democratic State that can never be more than momentarily relaxed. The point at which the two forces achieve a tolerable equilibrium is a constantly moving one, subject to continuous parley, negotiation, and accommodation. Changing social contexts compel legal and juridical adaptations to preserve the established national goals. In some circumstances, *not* to change is to change radically. The existing social apparatus and usages must be under perpetual scrutiny.

10

Lawlessness begets lawlessness. People are quick to take up a chant. They may join protest movements and spontaneous demonstrations for reasons that may be remote or wholly removed from the putative object of the protest. It may be only to acquire a TV set by plundering an appliance store in Watts, or to achieve personal catharsis by lashing out blindly at all whites or at their possessions. Civil disobedience, if unrestrained, attracts an alarming number of hitchhikers who come along only for the ride.

It can erode the structure of lawful society and involve the whole community in a common ruin, like the proverbial Dutch farmer who burned down his handsome barn to be rid of the rats that infested it. Liberty ends where it imperils liberty itself. My freedom to swing my fists stops precisely where my neighbor's nose begins.

11

Because recourse to modes of relief and to social leverage is not equally accessible to all, society must manifest a particular solicitude toward the defenseless and the weak, especially when society itself has created, or helped to create (whether by overt action or by tacit acquiescence) the disparities that produce disequilibrium in the making of public policy.

12

Civil disobedience can transfer the argument over justice and first-class citizenship for Negroes to argument over the issue of civil disobedience itself, with the result that in the end the protesters defeat their ends by removing the real issue or burying it under another. It can also, as we have seen in recent months, drive the friends of racial justice away from the movement.

13

There are so few exceptions, that it may be set down as a rule that every gain for democratic-libertarian-equalitarian advance has been precipitated by resistance to the status quo. Almost never is such a gain voluntarily given in obedience to abstract conviction that its time has come. To check the instinct for resistance to public wrong is to condemn a society to arrested development and perpetuation of any and every ill that besets it, every failure that contains the power to destroy it.