Should Civil Disobedience Be Legalized - Reflections on Coercive Protest and the Democratic Regime of Law

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SHOULD CIVIL DISOBEDIENCE BE LEGALIZED? REFLECTIONS ON COERCIVE PROTEST AND THE DEMOCRATIC REGIME OF LAW

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THE ensuing discourse is divided into three parts. The first part adumbrates the status of civil disobedience under existing law and discusses the issue of whether the legalization of civil disobedience is consistent with the letter and spirit of reigning legal principles. The second part describes possible methods of legalizing civil disobedience, their deficiencies as legal instrumentalities and their practical disadvantages. The third and last part seeks to show that the excessive use of civil disobedience or its legalization, whatever the form of legalization, is incompatible with democratic theory; that is, it is inconsistent with the various philosophic bases and social prerequisites of the free society and is objectionable on policy grounds because it hinders rather than assists the effective operation of democratic institutions.

I. ACTIVIST DISSENT AND THE LEGAL FRAMEWORK

The law of free expression in the United States has been a continual exercise in change. Like other branches of the law, it has responded, although with an imperfect sensitivity, to modifications in underlying social circumstances. It has accommodated itself to innovations in the tactics of expression through creative advance in the realm of legal doctrine. In delineating the limits of free speech and free press at given stages in our societal career, the law of free expression has reflected differing conceptions of the proper dividing line between liberty and authority.

When public opinion has been sharply articulated in the expression of an outlook strongly and widely held, the law has often recognized and enforced dominant civic intuitions of policy and the established consensus regarding an appropriate balance between the values of freedom and security. In those eras of our history when legal development has been less impressed with the shaping force of the popular will or judicially perceived exigencies of public policy, the boundaries of protected utterance sometimes have been drawn by constitutional courts in accordance with their own conceptions of the nature of the free speech, free press, and free assembly guarantees of the United States Constitution's first amendment[1] and the liberty protected by

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1. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." As may be seen, this amendment functions as a limitation only upon federal governmental actions.

the fourteenth amendment's due process clause[2] (which has been held by the United States Supreme Court to forbid suppression by state governments of these same guarantees)[3] and analogous state constitutional safeguards or the supposedly necessary conditions of an effective regime of free thought and discussion. Thus, the jurisprudence of free expression has exhibited cycles of progression and retrogression, periods of indulgence and restrictiveness, as it has emerged within the ongoing life of the nation.

In the contemporary era some observers have sought to launch the law of free expression on a new phase of liberality, a phase which would carry it to a radically new doctrinal level totally discontinuous with prior stages of development. These observers press for a metamorphosis in our fundamental law which would add a new expressionary instrument to the armament of first amendment freedoms by legalizing civil disobedience. If these legitimizing proposals were effectuated, our scheme of individual rights would be placed in peril and our constitutional system would lapse into a crisis arising out of its own inner contradictions.

A novel problem confronting the law of free expression in our time is that raised by certain tactics of protest and dissent employed by political dissidents, civil rights activists, and campus militants.[4] Where these tactics do not entail violation of a constitutionally valid law, they do not present a challenge to our legal system. The selective focus of this discussion is protest activities which offend against valid law or university regulations in order to publicize some alleged deficiency in existing policy or in the current state of things, that is, activities which are civilly disobedient.

As used in this analysis, the term "civil disobedience" means deliberate, illegal public conduct or conduct violative of university or school regulations, which is done with intent to protest publicly, on moral or policy grounds, against the law or policy of governing authority, against some fancied wrong, governmental or non-governmental, or to bring about some change in human society. As used here, civil disobedience does not include acts of law-breaking protest which are later excused by the courts on the ground that the law violated was unconstitutional or invalid. This is so even though most of these law breakers were not certain that their constitutional claims or attacks on the validity of the laws under which they were prosecuted would be vindicated, and many authentic civil disobedients assert a constitutional defense to criminal proceedings against them.

Civil disobedience usually is viewed as accepting and operating within the prevailing form of government and is thus regarded as distinguishable from revolutionary activity. For the purposes of this discussion, however, it will be defined to include all disobedient protest whether its motivation is ameliorative or revolutionary. As understood in this Article, civil disobedience is a form of direct action although not all direct action is civil disobedience since some direct action, *e.g.*, legal demonstrations, is not disobedient

2. *Id.* amend. XIV: "Nor shall any state deprive any person of life, liberty or property without due process of law."

3. *See* note 36 *infra.*

4. That such tactics are not mere curiosities of the last decade may be seen from their continued use by groups such as those opposed to the building of nuclear reactors.

to law. Except where peculiar usage suggests a different meaning, the phrase "direct action" refers in this Article to coercive forms of civil disobedience performed either with or without expressed or implied threat of violence but without actual violence to the person of another. Some of the coercive forms of direct action will be described at subsequent points in this inquiry.

First, we must examine the relevant case law to ascertain what forms of protest come within the shelter of constitutional guarantees. In protest situations what is involved is often not pure speech, but rather speech mixed with action. Here, the Supreme Court has a well developed tradition to guide it. For example, the Court has consistently held that picketing, being an activity of information dissemination, is entitled to the protection of the first amendment so long as it is peaceful; yet it may be inhibited by government when it is coercive or enmeshed with violence or when it obstructs ingress and egress to and from public buildings.[5] The Court has also held that free expression may be curtailed when it is of such a character as to incite others to illegal action or when it tends to create a breach of the peace.[6]

This breach of the peace doctrine has evolved in a direction which is protective of the prerogatives of free expression. In *Feiner v. New York*[7] the Court upheld the breach of the peace conviction of a petitioner who had made an inflammatory speech to a mixed crowd of white and black people on a city street. The speech included insulting remarks about President Truman, the American Legion and local public officials, one of whom was called a champagne sipping bum, and urged blacks to take up arms and fight for equal rights. The Court said that while the police cannot suppress unpopular views, when "the speaker passes the bounds of argument or persuasion and undertakes incitement to riot" the police may arrest him to prevent a breach of the peace.[8]

Nevertheless, it should not be inferred from *Feiner* that coercive direct action tactics designed to silence those voicing opposing beliefs can limit the free speech rights of others. In *Feiner* the Court expressly based its affirmance of the conviction on the inciting aspects of the defendant's conduct. The Court's holding declared that in the absence of such incitement, the "objections of a hostile audience cannot be allowed to silence a speaker."[9] During the period in which *Feiner* was decided the Supreme Court was conservatively oriented and thus was quicker to find incitement than it would have been if its membership had been more liberal in outlook.[10]

5. *See* Cameron v. Johnson, 390 U.S. 611 (1968) (picketing obstructing ingress to and egress from a courthouse); Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941) (picketing enmeshed with violence).

6. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Feiner v. New York, 340 U.S. 315 (1951); *cf.* Cantwell v. Connecticut, 310 U.S. 296 (1940) (conviction of petitioner for breach of the peace reversed where solicitation for religious purposes involved no assault, threats, or personal abuse).

7. 340 U.S. 315 (1951).

8. *Id.* at 320-21.

9. *Id.* at 320.

10. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963), reversing the breach of peace convictions of 187 black student demonstrators. Although the majority opinion was careful to distinguish *Feiner* Justice Clark's dissent noted that the situation in *Feiner* was "no more dangerous than that found here." *Id.* at 243.

Opinions since *Feiner* have, however, left no doubt that the prospect of a hostile audience erupting in disorder or violence does not in itself justify governmental action restraining the articulation of unpopular views provided the speaker has uttered them in a peaceful manner and without employing a mode of rhetoric which amounts to incitement.[11] Indeed, the Court has implied that law enforcement owes a duty to protect the expression of such views[12] and that a conviction for breach of the peace cannot stand when views peaceably expressed by the defendant are sufficiently contrary to community sentiment to cause a crowd to collect and require police protection.

As noted, the area of protected speech reaches its limits when speech is publicly presented in such a manner as to be meshed with coercive behavior or violence on the part of the speaker or where it is explicitly calculated to incite listeners to illegal conduct. This limitation is necessary in order to enable government to prosecute those who counsel or procure others to commit crimes. Thus, speech is protected until it creates some danger of coercive or illegal action; only then is it suppressible.[13]

In recent years the Supreme Court generally has tended to validate all those legitimate tactics of dissent and protest employed by the civil rights movement to achieve its objectives. Its decisions have established that peaceful demonstrations, including those involving large numbers of people, are protected by the first amendment.[14] It is plain from a reading of the Court's opinions, however, that when demonstrators indulge in violent tactics or attempt to promote a general condition of physical violence and disorder, the law may suppress their activities.[15]

In addition, the Court has ruled that certain places, like courthouses, jailhouses, and schools may be shielded by law enforcement from those distracting activities of protest which would be permitted in public streets and parks.[16] Further, in *United States v. O'Brien*[17] the Court indicated in its decision affirming the federal conviction of a draft card burner that while

11. *See* Cox v. Louisiana, 379 U.S. 536 (1965). In *Cox* the Court, quoting from a prior case, Watson v. Memphis, 373 U.S. 526, 535 (1963), pointed out that "constitutional rights may not be denied simply because of hostility to their assertion or exercise." 379 U.S. at 551. *Accord,* Brown v. Louisiana, 383 U.S. 131, 133 n.1 (1966) (the Court stated that "participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence . . ."); Wright v. Georgia, 373 U.S. 284, 293 (1963) (the Court said that the "possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right . . . to be present"); White People's Party v. Ringers, 473 F.2d 1010, 1014 n.4 (4th Cir. 1973); Dr. Martin Luther King, Jr. Movement, Inc. v. City of Chicago, 419 F. Supp. 667, 674-75 (N.D. Ill. 1976); Allen v. District of Columbia, 187 A.2d 888 (D.C. 1963); Note, *Student Expression on Campus and Interference with the "Rights of Others,"* 51 DENVER L.J. 417, 426 n.47 (1974).

12. Edwards v. South Carolina, 372 U.S. 229, 237-38 (1963).

13. An obvious exception to this general rule is obscene speech, which is beyond the scope of this Article.

14. Grayned v. Rockford, 408 U.S. 104 (1972); Cox v. Louisiana, 379 U.S. 536 (1965) (involving 1500 demonstrators); Edwards v. South Carolina, 372 U.S. 229 (1963).

15. *See, e.g.*, Tinker v. Des Moines Independent School Dist., 393 U.S. 503 (1969); Cox v. Louisiana, 379 U.S. 559 (1965).

16. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104, 118-20 (1972) (school); Adderley v. Florida, 385 U.S. 39 (1966) (jailhouse); Cox v. Louisiana, 379 U.S. 559, 562-64 (1965) (courthouse).

17. 391 U.S. 367 (1968).

certain acts may be considered symbolic speech and, therefore, entitled to first amendment protection, such symbolic speech is much more subject to suppression and regulation than actual speech when it infringes on governmental policies designed to protect legitimate national interests.[18]

In light of this historical background it is not surprising that practitioners of disruptive confrontation tactics have been convicted of breach of the peace. Despite allegations that the tactics in question were protected under the first and and fourteenth amendments, state[19] and federal[20] courts have rejected the claims of campus militants, and other types of demonstrators,[21] that their coercive or disruptive activities were constitutionally protected. A common theme in these cases is the judicial insistence that the first amendment does not guarantee the dissemination of ideas when it is done in such a way as to interfere with the rights of others.[22]

18. Particularly interesting in this regard is the decision in Le Clair v. O'Neill, 307 F. Supp. 621 (D. Mass. 1969), *aff'd mem.*, 401 U.S. 984 (1971). In that case a three-judge federal district court dismissed a complaint attacking the constitutionality of Massachusetts' breach of the peace statute. The district court had held that the petitioners, defendants in a state prosecution for disturbing the peace arising out of their refusal to remove a folding table that they had erected in a city welfare office waiting room in order to circulate literature and organize welfare recipients, had no standing to attack the statute because their first amendment rights had not been unduly restricted.

19. *See, e.g.*, State v. Greenwald, 6 Conn. Cir. 85, 265 A.2d 720 (App. Div. 1969) (defendants forced their way through gate to area on university campus where employment interviews were taking place in an attempt to disrupt the interviews); O'Leary v. Commonwealth, 441 S.W.2d 150 (Ky. 1969) (affirming convictions of college student protestors who blocked entrance to interviewing rooms in university building where the Defense Intelligence Agency was recruiting employees).

20. *See, e.g.*, Jenkins v. Louisiana State Bd. of Educ., 506 F.2d 992 (5th Cir. 1975) (student demonstrators went about a college campus shouting and chanting "organize," "unite," and "student power," thus disrupting the college's learning atmosphere); Blanton v. State Univ., 489 F.2d 377 (2d Cir. 1973) (student sleep-in in lounge); Esteban v. Central Mo. State College, 415 F.2d 1077 (8th Cir. 1969) (demonstrations of 350 and 600 students on public street next to college campus during which there was $600 in property damage, eggs were thrown, traffic halted, cars rocked, and their occupants ordered out onto the street); Rhyne v. Childs, 359 F. Supp. 1085 (N.D. Fla. 1973), *aff'd*, 507 F.2d 675 (5th Cir. 1975) (disruption of classes by black students attempting to enlist the support of black students); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va.), *aff'd*, 399 F.22 638 (4th Cir.), *cert. denied*, 394 U.S. 905 (1968) (student demonstrators entered grandstand at football game in a harassing and menacing manner, prevented the college's president and his guests from seeing the game by holding a demonstration placard in front of their faces, eventually forced the president to leave the stadium, threw rocks and bottles at him and his police escort, struck two police officers with rocks and one with fists, blocked the president's auto, beating on it and rocking it); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968) (student demonstrators, protesting recruitment on campus by the CIA, blocked entrance to the building where recruitment interviews were to be conducted for various firms, denying access); Board of Higher Educ. v. Rubain, 62 Misc. 2d 978, 310 N.Y.S.2d 625 (Sup. Ct. Bronx County 1970); Board of Higher Educ. v. S.D.S., 60 Misc. 2d 114, 300 N.Y.S.2d 983 (Sup. Ct. Queens County 1969).

21. *See, e.g.*, Herzbrun v. Milwaukee County, 504 F.2d 1189 (7th Cir. 1974) (employees disrupted telephonic communications at a welfare center); United States v. Moylan, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970) (Vietnam War protesters used napalm to destroy Selective Service files; the court rejected the claim that the acts charged were protected civil disobedience under the law, 417 F.2d at 1009, and the argument that defendants were entitled in the trial court to a judge's instruction to the jury that the jury had the power to acquit even if the defendants were guilty); Baines v. City of Danville, 337 F.2d 579, 586 (4th Cir. 1964); Pritchard v. Downie, 326 F.2d 323, 325 (8th Cir. 1964); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968), *aff'd sub nom.* United States v. Eberhardt, 417 F.2d 1009 (4th Cir. 1969), *cert. denied*, 397 U.S. 909 (1970); State v. Petty, 24 Conn. Supp. 337, 190 A.2d 502 (Cir. Ct. 1962); People v. Martin, 43 Misc. 2d 355, 251 N.Y.S.2d 66 (App. Term 1964), *aff'd*, 15 N.Y.2d 933, 207 N.E.2d 197, 259 N.Y.S. 152, *cert. denied*, 382 U.S. 828 (1965); People v. Galamison, 43 Misc. 2d 72, 250 N.Y.S.2d 325 (Sup. Ct. 1964); City of Cleveland v. Mechanic, 26 Ohio App. 2d 138, 270 N.E. 353 (1971) (attempt at coercive distribution of literature by stuffing pockets of unreceptive passersby on public sidewalk).

22. *See* Note, *Student Expression on Campus and Interference with the "Rights of Others,"* 51 DENVER L.J. 417 (1974).

Various observers have urged that the unruly tactics of protest, dissent and confrontation employed in the last fifteen years by political and academic activists be given approval under our system of law. Some have argued that the campus activists who disturbed academic repose with loud discussion or shouted slogans, or who prevented those of opposing views from speaking, menaced or imprisoned college officials, or blocked entry to the college library or classrooms were exercising constitutionally guaranteed rights[23] or should be shielded from prosecution by statute or judicial lawmaking. A similar standpoint has been enunciated by persons recommending legal protection for like acts of obstruction occurring outside of the academic setting.[24]

One theory expounded by some who urge a place for confrontation tactics within the constitutional fold is that such tactics provide a more dynamic and effective way of communicating ideas than more genteel forms of expression; therefore, they should be accorded the same constitutional status as those moderate modes of utterance and assembly which have long received shelter within our legal order. These theorists assert that the public mind tends to be complacent and indifferent to matters not obviously implicating its narrow economic interests, especially the moral dimension in public questions. Consequently, argue the proponents of this view, it is necessary to give legal sanction to more forceful types of idea dissemination. Such forceful idea dissemination is desirable to ensure that the free society's trade in ideas is vigorous enough to produce a thought life conducive to creativity in the dominion of policy, an enlightened and politically enterprising citizenry, and an unremitting popular control of the teleological and programmatic elements of governmental action.

The author's philosophic and practical objections to this approach will be articulated later in this Article. Nonetheless, it is pertinent to observe that if the activist theory of the first amendment wins its way to acceptance, it will create the problem of how to impose principled limitations on the disruptiveness of the expressionary strategies invoked to arrest public attention, how to formulate *a priori* guidelines to identify the boundaries of tolerance.

Our federal and state constitutions are based upon the seventeenth century natural rights philosophy of John Locke which conceives of government as guaranteeing the natural rights of each citizen.[25] According to that philosophy, when the political community was formed, the freedom of each member to enforce his rights to life, liberty, and property was deposited with the community. To protect these rights was the mission assigned to government, the agent of the political community. Nevertheless, govern-

23. *See, e.g.*, the claims of the plaintiffs, unruly college student demonstrators, in Grossner v. Trustees of Columbia Univ., 287 F. Supp. 535 (S.D.N.Y. 1968). They advised the court that the rule of law must not be overrated and that it should be subordinated to more fundamental principles of revolutionary action. Thus, they insisted that non-violent occupation of university buildings was necessary in that case to breathe life into the first amendment. *Id.* at 545.

24. Some examples of such acts are: pouring blood on or otherwise interfering with draft boards files; conducting disruptive sit-ins or indulging in obstructive activity in the offices of public officials which prevent the use of those offices by the public; silencing opposing speakers in public parks; and similar interference.

25. J. LOCKE, TWO TREATISES OF GOVERNMENT (1690).

ment, as trustee of civil society, was given only that degree of power to regulate liberty necessary to fulfill government's role as protector of individual liberty against the encroachments of those private persons who would infringe and diminish the liberty of their fellow citizens.

On this theory, state governments, as protectors of the liberties of law abiding citizens against invasion by aggressors, have enacted criminal laws contrived to accord to each citizen an equal ambit of autonomy and to prevent trespass upon this sector of prerogative by contrary interests or antisocial forces. Thus, the criminal law prohibits kidnapping and similar private activity which narrows the freedom of action of the individual citizen. This ideology shaped the thinking of the authors of the Constitution, who conceived of government as being, among other things, the institutional means by which private persons were to be constrained from interfering with the freedom of their fellow citizens.

Our constitutions, federal and state, in both their historic inception and indwelling purpose, are also designed to protect the rights of each individual within the sway of their jurisdictions. It is in this frame of reference that we should evaluate suggestions that our Constitution and our legal system must recognize and protect the right of direct action and other disruptive devices of confrontation politics whereby groups of private demonstrators or protesting activists suppress or interfere with the rights of other persons or groups.

It is clear that protection by statute or legal decision for these presently extralegal activities would be incompatible with the principles approved by the Supreme Court in its first and fourteenth amendment decisions[26] appraising such extremist acts and would not be in harmony with the philosophical underpinnings of our constitutional tradition. Moreover, other grounds exist for rejecting the proposal that the outlawed forms of action employed by student dissidents and radical political activists should be granted hospitality within our legal system even where those forms of action do not carry civil disorder to the level of insurrection.

The Constitution's provisions have been regarded by the Supreme Court not only as restraining the activities of state and federal government but also, in the case of the fourteenth amendment, as containing potential limitations on the activities of private persons. Judicial or legislative approval of such tactics as denying some citizens freedom of access to public buildings, denying persons with opposing views freedom of movement, or denying them freedom to express their convictions or opinions runs counter to this aspect and certain other aspects of our public law presently discussed.

In support of this contention, it is pertinent to take note of *United States v. Guest*.[27] In *Guest* a six-Justice majority stated[28] that Congress's power under section 5 of the fourteenth amendment[29] to enact legislation enforcing

26. *See* note 6 *supra* and accompanying text.
27. 383 U.S. 745 (1966).
28. Justice Stewart's opinion for the Court, however, did not so hold.
29. U.S. CONST. amend. XIV, § 5 provides: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article."

the right to the equal protection of the laws,[30] guaranteed against denial by the states in section 1 of the fourteenth amendment, is not confined to the federal enactment of prohibitions against state governmental action infringing such right, although the fourteenth amendment mentions only the states as the objects of its prohibition against unequal protection; on the contrary, the power of Congress under section 5 includes the competence to pass laws requiring that individuals avoid conspiratorial actions interfering with this right to equal protection.[31]

A unanimous Supreme Court has more recently expressed an outlook in accord with that of the *Guest* majority.[32] It seems a reasonable inference from the language of the separate opinions of Mr. Justice Clark[33] and Mr. Justice Brennan,[34] each joined by two additional Justices, in *Guest* that

30. The particular equal protection right addressed in *Guest* was the right of equal access to public facilities—a right the defendants were charged with conspiring to infringe.

31. 383 U.S. at 762 (Clark, J., concurring, joined by Black and Fortas, JJ.) (dictum); *id.* at 778-86 (Brennan, J., concurring in part and dissenting in part, joined by Warren, C.J., and Douglas, J.). Mr Justice Brennan's opinion states that:

> A majority of the members of the Court expresses the view today that § 5 empowers Congress to enact laws punishing all conspiracies to interfere with the exercise of Fourteenth Amendment rights, whether or not state officers . . . are implicated in the conspiracy . . . Congress is thus fully empowered to determine that punishment of private conspiracies interfering with the exercise of such a right is necessary to its full protection.

Id. at 782.

Some authorities view the Clark and Brennan opinions' statements on this point as dictum. *See, e.g.*, Griffin v. Breckenridge, 410 F.2d 817, 820 (5th Cir. 1969); Nicholson, *Campaign Financing And Equal Protection*, 26 STAN. L. REV. 815, 839 (1974). With respect to the Brennan opinion, however, this view seems mistaken. It is apparently based on the erroneous belief that Mr. Justice Brennan agreed with the opinion for the Court that the indictment successfully pleaded state involvement in the conspiracy and, therefore, his statement that the statute on which the prosecution was founded constitutionally could and did reach private conspiracies was dictum. But Mr. Justice Brennan did *not* express agreement with this interpretation of the indictment. 383 U.S. at 776 n.1. Thus, Brennan's opinion does not rest on this point but, on the contrary, is grounded on his assertion that the statute regulates private conspiracies and that this feature of the statute is within the enforcing power granted to Congress under § 5 of the fourteenth amendment. *See* 383 U.S. at 781-82. Therefore, although concededly the Brennan opinion is not an opinion for the Court, the portion of it concerning the power of Congress under section 5 to exercise legislative dominion over private conspiracies constitutes the holding of the Brennan opinion.

Nor can this holding be described accurately as a dissent from the opinion of the Court. The dissenting portion of the Brennan opinion was that segment which insisted that, contrary to the holding of the opinion for the Court, the statute in question, 18 U.S.C. § 241 (1970), did comprehend private conspiracies. It is true that once having registered this dissenting view that the statute did govern private action, it was necessary for the Brennan opinion to show that Congress was given the power in § 5 to enact such a statute. Nevertheless, its holding on this issue as to the extent of the legislative authority conferred by § 5 is not in dissent from the opinion for the Court because that opinion does not reach that issue.

32. *See* District of Columbia v. Carter, 409 U.S. 418, 424 n.8 (1973) (dictum). After noting that the fourteenth amendment addresses its prohibition only to the states and not to private persons, the Court remarked: "This is not to say, of course, that Congress may not proscribe purely private conduct under § 5 of the Fourteenth Amendment." *Id.*

It has been convincingly argued that this latitudinarian exegesis of the fourteenth amendment's enforcement clause accords with the understanding of its enactors. Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353 (1964).

Lower federal courts have also found in § 5 congressional competence to proscribe private conspiracies. *See, e.g.*, Action v. Gannon, 450 F.2d 1227, 1235 (8th Cir. 1971) (en banc); Pennsylvania v. Local 542, Int'l Union of Operating Eng'rs, 347 F. Supp. 268, 295-97 (E.D. Pa. 1972). *Contra*, Murphy v. Mt. Carmel High School, 543 F.2d 1189, 1194 (7th Cir. 1976).

33. 383 U.S. at 762.

34. *Id.* at 780, 782-83.

Congress has the same power with regard to the rights guaranteed in the due process clause of the fourteenth amendment.[35]

Moreover, it has been held by the Supreme Court that this due process clause enforces as limitations upon the activities of state governments first amendment rights,[36] as well as many rights enshrined in other parts of the first eight amendments in the Federal Bill of Rights[37] which are preserved inviolate against abridgement by the national government by these portions of the Bill of Rights.

Logically, therefore, states are barred from such state action as enacting laws or state constitutional amendments curtailing the civil and political rights of any sector of the citizenry which are guaranteed by these provisions of the Federal Bill of Rights; this limitation on state action would seem operable whether such state action is in the form of special dispensations for the practitioners of repressive confrontation tactics interfering with the rights of others or in any other form. Such state action would also appear to be objectionable as violative of the fourteenth amendment's equal protection clause for denying equal protection to those citizens whose rights are suppressed by direct actionists pursuant to the state's permission.

It is true that section 5's highly general authorization of legislation to implement the rights guaranteed in the fourteenth amendment says nothing specifically barring or allowing legislative regulation of private activity impinging on fourteenth amendment rights. However, the legal position of the Clark opinion in *Guest*, representing the views of three Justices, is based

35. *See* Comment, *Fourteenth Amendment Enforcement and Congressional Power to Abolish the States*, 55 CALIF. L. REV. 293, 304-05 (1967). *See also* United States v. Price, 383 U.S. 787, 789 (1966), stating that Congress has the power to pass legislation enforcing the rights protected by the due process clause of the fourteenth amendment and indicating that § 5 of that amendment is the source of this power. *Id.* at 789-90 n.2. The Court's actual holding merely construed 18 U.S.C. § 241 (1970) as reaching conspiracies to infringe due process rights since the constitutional issue concerning congressional enforcement power was not raised. Thus, the Court's statement respecting that power was dictum. Nevertheless there is nothing in the statement to suggest that Congress's enforcement power with regard to the due process clause of the fourteenth amendment is more limited than its power to enforce the equal protection clause of that same amendment.

It might seem that Action v. Gannon, 450 F.2d 1227 (8th Cir. 1971), supports the proposition that Congress is granted broad power in § 5 to enforce the rights within the ambit of the fourteenth amendment's due process clause. In *Gannon* it was held that the delegation of enforcement power under § 5 enables Congress to enact a statute, namely 42 U.S.C. § 1985(3) (1970), prohibiting interference by private conspirators with the first amendment freedoms of free assembly and free worship since the Supreme Court has held that such freedoms are incorporated in the fourteenth amendment. Although the court in *Gannon* did not specifically discuss the point, it recognized by implication that these freedoms are incorporated in the due process clause of the fourteenth amendment. 450 F.2d at 1234 n.9. The statute involved in *Gannon*, however, provides an action for damages against conspirators depriving persons "of the equal protection of the laws, or of equal privileges and immunities under the law." 42 U.S.C. § 1985(3) (1970). This language indicates that the statute enforces the equal protection clause of the fourteenth amendment and not that amendment's due process clause. The court's opinion in *Gannon* does not discuss this question, so it is not clear whether *Gannon* holds that § 1985(3) implements the due process clause or instead gives effect to the equal protection clause and that the conspiracy complained of offends the equal protection requirement of § 1985(3) by depriving the plaintiffs of those due process rights of freedom of assembly and worship which other persons enjoy under the law.

36. Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Bridges v. California, 314 U.S. 252, 277 (1941); DeJonge v. Oregon, 299 U.S. 353, 364 (1937); Near v. Minnesota, 283 U.S. 697, 707 (1931); Fiske v. Kansas, 274 U.S. 380 (1927); Gitlow v. New York, 268 U.S. 652 (1925); E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 269 (13th ed. 1973).

37. *See* E. CORWIN, *supra* note 36, at 251-52, 391-99.

upon the belief that Congress may so restrain private conspiratorial action because such restraining power is reflective of the specific language of section 5.[38] The thrust of the Brennan opinion in *Guest* is that Congress is capable of reaching private conspiracies because the affirmation of such a capability gives effect to the enacting intent underlying section 5.[39]

These two opinions speak of the federal legislative power to reach private "conspiracies," a natural locution in light of the fact that the indictment in *Guest* alleged a conspiracy offensive to the provision in 18 U.S.C. § 241 proscribing certain conspiracies. There is no intimation in either opinion, however, that the power of Congress would not extend to private action not conspiratorial in nature and logic would suggest that if Congress may outlaw the one type of conduct, it may deal in like manner with the other.

Both the Clark and Brennan opinions indicate that section 5 gives Congress the power to pass laws penalizing private conspiracies that interfere with any of the rights safeguarded by the fourteenth amendment's equal protection clause. In *Guest* the equal protection right involved was the right to equal utilization of public facilities. In the legalized civil disobedience context, the equal protection right invaded would be the right not to be subjected by state law to the unequal treatment and inferior status of having one's expressionary and other rights subject to suppression by legally protected and favored civil disobedients.

It follows from the foregoing analysis that the letter, spirit, and immanent purpose of the fourteenth amendment are set at naught where private citizens employing disruptive or coercive protest tactics act under the putative permission of a state law, statutory, constitutional, or judicial, purporting to legitimize such tactics so as to interfere with the first amendment or equal protection rights of other citizens. Some of the rights which would be interfered with are: the right to assemble peaceably; the right to give voice to one's views; and the right of all sectors of opinion to equal protection and equally favorable treatment under the law, including the right to have government refrain from unequally protecting some persons by authorizing activist protesters to suppress their rights.

Such repressive private conduct would be incompatible with the values implicit in the fourteenth amendment, which is the source of the precious civil rights recognized by the Supreme Court in the last twenty years. Thus, a regime in fundamental disharmony with our legal traditions would arise if we were to accede to requests of those who demand that the activist devices of confrontation politics be given protective recognition in the corpus of state law.

Moreover, if the federal government sought to pass such a legitimizing ordinance, what constitutional basis could it cite as the source of its authority? There would seem to be none. The only conceivably relevant provision, the fourteenth amendment's enforcement clause set out in section 5, appears to require that Congress, if it takes any action, safeguard the

38. *See* United States v. Guest, 383 U.S. 745, 762 (1966) (Clark, J., concurring).

39. *See id.* at 783 (Brennan, J., concurring in part and dissenting in part), interpreting the legislative history as evidence of such intent.

rights of all rather than enact special privileges for disruptive and coercive activists. Such special privileges would, in effect, authorize suppression of the rights of those who are the targets of such activists.

In *Action v. Gannon*[40] it was held that the first amendment freedoms of peaceable assembly and worship are incorporated in the fourteenth amendment which Congress, exercising its section 5 power to enforce that amendment, could and did protect against suppression by private conspiracies in 42 U.S.C. § 1985(3). In *Gannon* an aggregation of black demonstrators disrupted white Catholic religious services to express their demand that the church give aid to blacks in that area.

If we accept the reasoning of the direct actionists, it could be argued by an extension of this reasoning that constitutional protection for direct action should legitimate the same type of disruptive acts by white private conspirators against black civil rights advocates seeking peaceably to assemble and exchange ideas as were condemned when used by black activists against peaceably assembled whites in *Gannon.* Of course, in the present state of the law, racially discriminatory suppression by private persons of attempts by blacks to better their lot through the exercise of constitutionally guaranteed liberties would seem contrary to the dictates of the thirteenth amendment to the United States Constitution.[41] Consequently, courts construing the language of a new constitutional amendment protecting direct action tactics might limit its immunization of coercive direct action tactics in light of the thirteenth amendment's policy unless the draftsmanship of the direct action amendment precluded such a limiting construction, or unless it was felt that the equal protection clause would prevent courts[42] from giving blacks a special exemption from the impact of the constitutional authorization of direct action techniques.[43]

In any case, if *Gannon* is correct in holding that direct action by private conspirators interfering with the right of others peaceably to assemble is violative of 42 U.S.C. § 1985(3), any state law purporting to legitimize such direct action would conflict with the federal statute and thus would be invalid under the mandate of the supremacy clause.[44]

The Supreme Court has also held that state governments have an obligation not only to refrain from infringing on protected rights, but also to act *affirmatively* to guarantee traditional rights presently recognized in our

40. 450 F.2d 1227 (8th Cir. 1971).

41. Griffin v. Breckenridge, 403 U.S. 88 (1971), indicates that the thirteenth amendment banishes the badges of slavery and the enforced inferior status ultimately traceable to it, not merely state laws contributing to the preservation of that status. In accord with *Griffin*'s view that the thirteenth amendment is not simply a prohibition against state action is Bellamy v. Mason's Stores, Inc., 508 F.2d 504, 506 n.3 (4th Cir. 1974).

42. The fifth amendment's due process clause has been held to require the federal government to accord equal protection. Johnson v. Robison, 415 U.S. 361, 364-65 n.4 (1974); Bolling v. Sharpe, 347 U.S. 497 (1954). *See also* Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541 (1977).

43. Federal judges are bound by the fifth amendment's due process clause. *See* Hovey v. Elliott, 167 U.S. 409, 417-18 (1897). States judges are bound by the fourteenth amendment's equal protection clause. *See* Virginia v. Rives, 100 U.S. 313, 318-19 (1879).

44. U.S. CONST. art. 6, cl. 2. This clause provides in part: "This Constitution and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding."

Constitution. For example, in *Griffin v. County School Board*[45] the Supreme Court ruled that the federal district court could require the County Board of Supervisors of Prince Edward County in the state of Virginia to tax inhabitants of that particular county in Virginia and to use the money so obtained to provide unsegregated schools. Furthermore, in the reapportionment cases the Court has interpreted the fourteenth amendment's equal protection clause to require that states reapportion their legislatures in accordance with the "one person, one vote" principle so as to secure equal protection of the law to each voter. Similarly, in the right to counsel cases, the Court has interpreted the fourteenth amendment's due process clause to require states to provide counsel for each indigent felony defendant.[46] State laws permitting some groups to override the rights of others would work against the rationale of these decisions since such laws would constitute affirmative state action rendering the rights of some insecure.

From the foregoing discussion it may be seen that the existing framework of law, constitutional, legislative, and judicial, operates as a direct obstacle to state constitutional, legislative, or judicial approbation of the presently extralegal tactics of civil and political protest. As we have seen, some people argue that the United States Constitution should be amended so as to give constitutional protection to political and social activists who seek to justify their infringements on the traditional constitutional and legal rights of others by appeal to supposedly paramount social interests or allegedly higher moral principles. In answer to this proposition, it may be observed that such a constitutional instrument not only would be afflicted with an inconsistency which would make its interpretation difficult in the myriad individual instances of its application, but, more, that it would contain the seeds of its own destruction.

In the light of the foregoing analysis, it is clear that persons urging legal immunity for disruptive protest tactics as valuable means of social improvement are proposing a regime which is totally inconsistent with existing principles and are in reality making a demand for fundamental change in our system.

II. TECHNIQUES OF LEGALIZATION AND THEIR DEFICIENCIES

Let us assume that the decision is made by the authoritative organs of the common life to legitimize direct action. Let us also assume that direct action is to be given only a qualified legal privilege, depending on the strength of the justification for it in each individual case rather than a dangerous generalized a priori approval. The question then arises as to whether it is possible to include in the legitimizing provision a standard affording a principled basis for determining when direct action is too unruly, disruptive, or coercive to receive legal protection. Some may reply that the courts or juries reviewing instances of direct action in cases where it prima facie violated some law could simply employ the same ad hoc balancing approach

45. 377 U.S. 218, 233 (1964).
46. *See* Comment, *supra* note 35, at 305-06.

that has been used sometimes by constitutional courts to delineate the outer limits of lawful forms of expression.[47]

Such a procedure is subject to the objection that most juries probably could not perform adequately a judgmental task requiring social vision and sophisticated policy insight rather than a mere decision as to whether the proven facts come within a legal category.[48] Moreover, the suggested solution overlooks the fact that the first amendment adjudicatory technique has a principle to guide it. Whether such technique uses the clear and present danger standard, the distinction between advocacy and incitement, or the interference with the rights of others as a touchstone to decide whether a given act of expression or demonstration transgresses the frontiers of constitutional tolerance, it is relying essentially upon the same principle—that which condemns expressionary conduct promoting physical disorder, or interfering with the rights of others or with those educational or social processes by which the common life proceeds.

Although the adjudicating tribunal's legalistic pronouncement invoking an approving or disapproving rule of decision in a given case (*e.g.*, clear and present danger, absent or present) may be the outcome of overt interest balancing or may constitute a screen for unavowed interest balancing, its weighing of interests can nonetheless go forward under the directive of principle, under the canalizing effect of the law's preference for physical order over disorder and its disfavor of interference with the rights of others. Even the most liberal judge would not be likely to extend first amendment protection to a verbal act which is clearly inciting and has the immediate effect of causing a riot.

But let us suppose that legalization of direct action is confined to the sort of action which does not produce violence, riot, or breach of the peace. Then existing law would be changed to the extent of protecting direct action when it goes no further than posing the threat of physical disorder but not when it goes beyond the threat to the actuality of such disorder. The operation of such a legitimizing standard seems calculated to result in much coercive protest which oversteps the limits of its authorization and degenerates into violence or disorder in the heat of the moment. Law enforcement officials could not abort such a degenerative tendency in its incipient phase because under the legalizing ordinance just hypothesized, unlike present legal mandates, direct action which creates an imminent danger of communal tumult but not the actual turmoil itself is beyond the regulatory competence of the organized state. Furthermore, the just described limitation does not give notice as to what type, degree, and duration of interference with the

47. *See, e.g.*, United States v. Dennis, 341 U.S. 494 (1951), for an instance of balancing in the first amendment setting. First amendment ad hoc balancing in constitutional adjudication has been criticized. *See* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962). It has also been defended. *See* Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75, 79-81.

48. It has been proposed that the jury be empowered to acquit civil disobedients despite their guilt where it is proved to the jury's satisfaction that the moral reasons for disobedience to law outweigh the value of obedience in the individual case. *See* Hall, *Legal Toleration of Civil Disobedience*, 81 ETHICS 128, 135-41 (1971).

rights of others will be protected when such interference is not accompanied by physical force or eruptive social turbulence.

To legalize direct action, however, would be to grant permission to create such interference; otherwise the legalization would be meaningless and the law would remain as it is. Therefore, the question persists as to how a constitutional amendment immunizing disruptive activity could set such limits to its immunization as would advise courts and juries concerning the boundaries of protected behavior and clearly inform prospective direct actionists that they were not granted an open ended license to perpetrate mischief.

The legalizing instrument would have to be a constitutional amendment rather than judicial construction of the first amendment because that amendment grants rights of expression, petition, and peaceable assembly to all, and, therefore, could not be interpreted as protecting direct action deprivative of the rights of others even where the protection was limited to exclude deprivations effected by the direct actionist's unpeaceable assembly. And such judicial policy making would seem foreclosed as much by canons of judicial restraint deducible from the separation of powers principle inherent in the structure of the Constitution as by first amendment wording. However, some authorities might argue that a constitutional amendment legalizing coercive protest should be held unconstitutional by courts using structural analysis as a methodology of judicial review on the theory that such an amendment is incongruent with the rights-protecting thrust of the Constitution as a whole.[49]

One commentator has attempted to provide a rationale for judging when protest activity is protected under the first amendment. He has propounded a test which would be used by judges in individual criminal cases to determine whether a defendant charged with violating the law in the course of a protest is entitled to protection under the first amendment from criminal penalization. His test is in two parts.[50] The first part would be used to ascertain whether the conduct was speech. If it was peaceful expressive behavior and related to the issue inspiring the protest, it would be adjudged speech. The surrender of a draft card in violation of law to protest a war would be speech, in the author's view, because it is a non-violent act and it is related to the war, that is, a relevant method of protesting the war. The author also regards lying down in front of railroad tracks to prevent a train from moving as speech, when it is a relevant way of protesting some governmental action, because it is non-violent.[51] Presumably, he would also regard a sit-in in a convention hall which prevented its use for a speech or political debate by the legislator who sponsored the law being protested as speech since it is non-violent and related to the issue which animated the protest. Even if such conduct were not considered relevant enough by the

49. For an appreciation of structural analysis as an instrument of constitutional decision, see C. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); Levine, *The Proposed Federal Criminal Code: A Constitutional and Jurisdictional Analysis*, 39 BROOKLYN L. REV. 1, 34 (1972).

50. *See* Velvel, *Protecting Civil Disobedience Under the First Amendment*, 37 GEO. WASH. L. REV. 464, 466-69 (1969).

51. *Id.* at 469.

author, and his statement of the "related" test is too vague to require such a conclusion, it seems that non-violent coercive conduct which interferes with the first amendment rights of others could be considered speech under this test if it satisfies the demands of relevancy.[52] Certainly non-violent expressive conduct which encroaches upon rights other than first amendment rights would be speech under this definition.

Once the protesting activity is adjudged to be speech, the second part of the test comes into play. This second part is employed to determine whether the speech can be prohibited. Under its provisions, protest activity cannot be penalized except where it poses a substantial danger to or constitutes a substantial interference with a compelling public interest. Applying this test, the author states that the government could not punish the surrender of draft cards to protest the war because the carrying of draft cards is useful but not necessary to the efficient operation of the selective service system and, thus, does not prejudice the government's compelling interest in maintaining an efficient system. On the other hand, the author states that the conduct of a stall-in by blacks on a city freeway during rush hour to protest the exclusion of blacks from the work force constructing city freeways would not be protected because it substantially interferes with the state's compelling interest in keeping main traffic conduits open during the rush hour.

Let us assume that the evidence adduced in a particular case, or possibly the fact pattern charged in the indictment or information if they are pleaded in sufficient detail, demonstrates that the defendant's prosecuted conduct is protected under the two-part test. Then presumably the judge could dismiss the case against him prior to the stage where it would be submitted to the jury although the author does not discuss such procedural mechanics. However, if there was an issue of fact as to whether the conduct was engaged in for purposes of protest, whether it was peaceful, or whether the government's interest was compelling, then such an issue or issues would have to be submitted to the jury. The jury would then be required to render a special verdict thereon provided it found the defendant guilty of the charge brought against him. Probably the defendant should be given the opportunity under such a system to prove the necessary facts by way of defense.

This type of procedure could impose added burdens and costs on our already overtaxed judicial system because the jury or court would be required to hear evidence on the case in chief and also on the defense of first amendment protection. It is true that the defendant could not take the stand and deny guilt altogether without prejudicing his defense that he engaged in the conduct complained of for purposes of protest. He could, however, stand mute and force the prosecutor to put in his proof related to the charge; then, if he felt the case had been proved, he could offer his own evidence relevant to the defense. Arguably, he could even permit his attorney to cross-examine fully all the prosecution witnesses on the case in chief with-

52. Examples of non-related protest would be the mass turning on of water taps in a city to proselytize for increased employment opportunities for blacks and the surrender of automobile operator's licenses to voice objection to a war; the turning off of water taps has no relevance to the employment opportunities issue, and the requirement of carrying an operator's license is not related to war.

out fatally compromising the credibility of this defense in the jury's eyes if he had clear proof that his conduct was undertaken for protest purposes. He might wish to follow this course even if the protest motive were provable, if he feared that the justification for it might not convince the jury. And trial court decisions denying protection would often be appealed along with the judgment of guilt, thus burdening already overburdened appeals courts with additional work.

The only way of obviating this double judicial burden would be to enact legislation providing that such a defense may be presented only under a plea in avoidance in which the allegations of the indictment, other than those going to the defense, are conceded. Of course, such legislation, and the judicial policy establishing this two-part test, would probably be held unconstitutional if they were viewed as ordaining a procedure which permitted direct actionists to impinge on the rights of others.

There are further objections as well to this proposal for protecting protest activity. First, it is unlikely that this complicated two-part test would be understood by most laymen; even with legal advice, they could not be sure what conduct it protects and does not protect. It would take some time, perhaps years, before the case law construing the relevancy and compelling interest elements of the two-part test could give them sufficient specificity to advise prospective protesters just how far they could go in the extremism of their tactics. This indeterminate legal situation would probably encourage much direct action of a type ultimately held not to be entitled to protection. Consequently, such vagueness would seriously weaken the deterrent effect of the criminal law provisions violated by civil disobedients and increase the costs which prosecutory agencies would incur in enforcing such provisions in order to preserve to them some semblance of deterrent force. Indeed, any system of legal protection for direct action might encourage self-interested persons and organized criminals to use direct action as an economic weapon to force tribute from business firms.

Even when the emerging corpus of legal precedent had brought some degree of clarity out of uncertainty, many direct actionists might not be mindful of the limits it had established or dissuaded from excess by those limits; they might continue to indulge in protest so ill-related to its goals, so excessive in comparison with the urgency of the goals, and so frequent in its incidence that the public temper would grow increasingly hostile to direct action and inhospitable to its message. If direct action is *not* legalized, it will be employed more sparingly and thus will not dissipate whatever impact its optimum use is capable of achieving.

The rule permitting the defendant to prove by way of defense that his conduct was motivated by an intent to protest probably would engender a notable expansion in the use of law-violating direct action as many direct actionists availed themselves of the opportunity of airing their views in a judicial forum. Therefore, the courts would become political forrums to some extent and when they vindicated direct actionists with acquittals, they might arouse popular antagonism even if their decisions were sound applications of the law.

This public disenchantment, coupled with the example of lawlessness as well as law-sanctioned illegality and coercive irresponsibility continuously inflicted upon public attention by the practitioners of direct action, would ultimately subvert the rule of law if it attenuated the average citizen's respect for the legal order and rendered him less inclined to accept its injunctions as obligatory constraints on his own conduct. If legalized direct action were to breed a general contempt for law or a cavalier attitude toward its pretensions, it would succeed in undermining our system of government and destroying the foundations of public order where alien ideologies have failed. It is difficult to see how public disaffection can be obviated and how attrition in the habit of law observance can be avoided when the ordinary person perceives the law itself excusing violations of law—especially where the people exempted from law compliance are often the sort of ideological militants disliked and distrusted by the public at large.

It is sometimes claimed that direct action would function as a safety valve by furnishing a better method for airing grievances than traditional forms of expression and thus would, on balance, act as a preventive of violence and ordinary forms of crime rather than a promoter of them.[53] However, traditional means of protest, including legal mass demonstrations, do not seem such a markedly inferior way of venting discontent that foreclosing the use of the illegal direct action remedy as a supplement to them will result in widespread violence. Such violence as does accrue from the legal unavailability of disruptive direct action, if any, can certainly be handled by the forces of law and order. But if the man in the street is impelled by a cynical disdain for our legal system to question the binding character of law and to break the habit of compliance with law, there will not be enough police in the country to save our society from disintegration.

Furthermore, it should not be thought that the confinement of protection to conduct not *substantially* infringing a compelling public interest will save society from suffering substantial disadvantage as a result of the operation of the proposed system of protection for protest activity. Let us suppose, as seems likely, that the proposed system's protection of protest activity insubstantially interfering with a compelling public interest or substantially interfering with a public interest which is not compelling encourages a large amount of direct action in each of these two categories. The sum total of such interference may add up to considerable social inconvenience and invasion of the rights of others—enough to constitute a substantial infringement of compelling public interests.

In proposing this scheme of protection, the author states that his compelling interest test is justified by decisional law. This view seems mistaken.

53. There are studies which indicate that the quantity of violent crime decreases in black areas where the inhabitants participate in direct action. *See* Solomon, Walker, O'Connor, & Fishman, *Civil Rights Activity and Reduction in Crime Among Negroes*, 12 ARCHIVES GENERAL PSYCH. 227, 236 (1965). Assuming, as the studies suggest, that direct action offers an emotional outlet which reduces the aggression level, there is no apparent reason why such an outlet could not be provided by legal direct action in the form of non-coercive marches and demonstrations. Even a commentator favorably inclined toward civil disobedience believes that its use in Birmingham was partly responsible for the riots in Rochester and Philadelphia. *See* Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507, 510 (1965).

The compelling interest doctrine developed by the Supreme Court bars government from imposing indirect restraints on legal first amendment activity unless the official action in question serves a compelling state interest. The compelling interest test proposed as a protection for protest activity would prevent government from penalizing such activity *even where it is illegal,* if it does not present a substantial danger to a compelling public interest.

It should be realized that if such a scheme for the protection of illegal protest activity were put into effect, the consequent growth in lawlessness and illegal direct action required to be evaluated by processing through the criminal justice system would impose a substantial financial load on the taxpayers. It would also preempt public resources needed elsewhere and cause the diversion of police personnel from other law enforcement tasks concerned with the control of organized crime and violent street crime. Indeed, enemies of reigning political forces or of our democratic form of government might take advantage of direct action's legalization to inflict financial ruin on the public treasury by magnifying the amount of coercive mass protest, thus necessitating astronomical governmental expenditures for crowd control (an expensive process) and for funnelling masses of arrested direct actionists through the legal machinery for determining whether each actionist's conduct should receive legal protection.

Such an ulterior motivation for civil disobedience might operate even in the absence of its legalization, but the number of prospective disobedients willing to undergo arrest in mass coercive protests probably would increase greatly where the legal system held out the promise of ultimate amnesty and the immediate opportunity of a forum in which to give utterance to fervent convictions. If the number increased greatly enough, the criminal justice system might break down under the workload occasioned by an enormous volume of extra-legal direct action or might be so heavily occupied with civil disobedience cases that court calendars involving serious criminal offenses would become impossibly congested. Such congestion might result in a situation in which crime outstrips government's efforts to suppress it and, thus, might render our system of crime control totally incapable of deterring dangerous lawlessness.

III. Philosophic and Policy Objections to Disruptive and Coercive Extralegal Forms of Protest and to Their Legalization

A. Private intimidation and pressure tactics which prevent free expression are objectionable in contemplation of democratic theory. That unofficial restraints may be as injurious to freedom of thought and expression as official abridgement of intellectual freedom has often been remarked upon by libertarian thinkers. Any practice which restricts the circulation and criticism of ideas is injurious to democracy.

B. Coercive modes of protest, such as silencing or shouting down those of opposing viewpoints, abort the free exchange of ideas and thus interfere with the attainment of truth—truth being tentative, emergent, and developing rather than immediately and finally known. The process of discussion

must heed the irreducible rules of logic and submit itself to those minimum disciplines which are the necessary preconditions to effective public discourse if government by discussion is to attain a refinement of imaginative insight proportioned to the complexity of the policy areas on which social judgment must act.

The devices of political activism may serve a useful purpose in the realm of ultimate values when their practitioners accept the restraints of law. However, when these same devices are used to mobilize communal opinion concerning issues of instrumental means, the devices by which ultimate values are realized, their serviceability is less certain. Clamorous protest tactics tend to simplify the complex, to theologize public questions so as to obscure their technical component and to force their solution through the compulsion of an ideologizing vision. Such a vision ignores the factual imperatives that form the limiting context within which policy insight must function.

When political proselytization passes the bounds of vigorous expression and assumes the aspect of coercive protest, it becomes an even more virulent agency of unreason. In these circumstances, public understanding is impaired rather than clarified and the achievement of an enlightened public opinion as a check on official action in the area of instrumental means is made more difficult.

Moreover, public ineptitude in the realm of methodology subtly distorts political judgment as to ends because such value choices must be subject to continuous review and revision in light of advancing awareness as to the costs and benefits of given programs of means designed to implement the reigning scheme of values. Such developing knowledge will reveal the extent of these costs and benefits and suggest the necessity for change in the hierarchy of value priorities lest the realization of some values be prejudiced by the resource claims of other values. If the citizenry does not attain to a state of knowledgeability and analytical precision on this topic, democratic control over the goals of the common life will not be realized.

The exponential growth of governmental regulation in the 1970s and the peculiarly technical and pervasive character of this contemporary regulatroy process[54] places novel judgmental burdens on the popular mind. The harsh simplicities of direct action militate against the emergence of the needed technical sophistication.

C. The dictatorial tactics of coercive direct action may prevent protesting minorities from persuading the majority by alienating those members of the majority who might be susceptible to a reasoned appeal but are repelled by extralegal behavior. Conversely, such tactics may, by subduing contrary opinion, force the adoption of policies a majority do not favor. Laws thus imposed through the suppression of free discussion lack legitimacy when

54. *See* Lilley & Miller, *The New "Social Regulation,"* 47 THE PUBLIC INTEREST 49 (1977). The authors show how inefficient and costly governmental regulation wastes resources. It seems to this writer that if an educated community sentiment forced an improvement in regulatory performance, the funds thus saved could be used to implement new values. In this way, as well, a populace accomplished in the sector of means may induce change in the structure of communal ends.

tested against the moral imperatives of democratic theory. They are as objectionable as the dictates of authoritarian rulers.

D. Confrontation protest activity suppressing the free speech of others is inconsistent with the rationale of civil disobedience, which seeks to persuade others of injustice through the educative force of principled symbolic conduct. The education thus imparted is deeper and more substantial when those intended to be educated are able to discuss freely the issues involved. Indeed, this process of education in the setting of free discussion may operate in multi-directional form where it subjects the partial views of the civilly disobedient to the corrective effect of more cosmopolitan outlooks. Such discussion cannot occur when free speech is stifled by the tactics of repression.

When the democratic citizen is compelled by coercion to accept ideas which his disinterested reason would reject under calmer conditions of discourse, his integrity of personality is compromised and he is deprived of that means of self-realization in which the free mind labors toward truth. When a minority, acting in a town meeting, legislative chamber, or elsewhere, inflicts by the pressure of direct action techniques a policy which could not win its way to acceptance by rational discussion, it violates libertarian democracy's essence by rendering superfluous individual human thought and responsibility and converting the free citizen, the characterizing feature of the free society, into an imitative engine or an assenting automaton rendering mindless obeisance to a dominating force with no respect for his individuality. In a democratic social order, this is the ultimate indignity. For those delicate mechanisms by which human insight attains to truth are the very means to that condition of moral growth which is the distinctive potentiality of freedom.

In contemplation of democratic theory, public opinion is not a mere reflex of authority but rather the uncoerced expression of autochthonous insights welling up from the depths of the popular consciousness. When the prevailing structure of political thought is a mere epiphenomenon reflecting the preconceptions of a dominant opinion clique imposing its dominion by psychic power rather than a spontaneous coalescence of individual intellectual initiatives, democracy is traduced in its foundations.

Where the communal mind is the inert receptacle of received doctrine rather than the self-activating source of originative impulses, where the process of public discussion is perverted into an agency of repression enforcing the narrow content of sectarian belief rather than a vehicle for that creative interplay of competing standpoints which transforms limited perspectives into transcendant vision, the social preconditions of democracy no longer exist. In such a situation, public discourse is not a useful device for revealing the ever-changing disposition of social interests which underlies the formal apparatus of the organized state and which it is the function of democratic government to identify and harmonize.

E. Such disruptive activities prevent or short circuit the careful and patient bargaining which leads to compromise. Thus, they are not conducive to the gradual evolution of consensus in public sentiment and in the legisla-

tive halls through the democratic procedure of discussion and reconciliation of differences which otherwise might occur when the protestants are proceeding from a strong moral or practical position.

F. While more traditional-minded advocates of similar proselytizing standpoints may still seek compromises, their efforts will be handicapped by the counter-productive activities of extremists. These extremists must either win the day by force of will or run the risk of having their goals compromised by the counteractive response of an alienated majority or a stronger minority. If their strength is not sufficient to achieve success by coercion, they are likely to end with a net loss.

G. It is sometimes alleged that coercive types of direct action are necessary means of asserting the will of the people against unresponsive governmental institutions. According to this theory, elections are imperfect vehicles for registering with precision nuances of electoral opinion or rendering with exactitude the alignments of public sentiment on given issues.[55] Some would infer that from this insight the conclusion follows that when a civil disobedient's protest violates the law in order to protest that law, or some other law or policy, it cannot be assumed that he does not represent the majority view or that the law broken or protested enjoys the support of the majority.

But, although concededly imperfect, the election device is not as inept a means of integrating public opinion into public policy as is sometimes claimed. The legislative candidate who emerges triumphant from an election will usually be able to ascertain through pre-election and post-election contacts with voters, civic organizations, and political leaders and by scientific polling what the majority sentiment is in his constituency on most of the prominent issues of the day. And usually he is not inclined to vote against the majority sentiment. Moreover, decisions of the Supreme Court have forced reapportionment of malapportioned congressional, state, and local legislative districts. Therefore, where the legislative representatives from a majority of legislative districts vote the majority view in their districts, the resulting enactment is likely to reflect the majority view in the total legislative constituency, when opinion has solidified to the point where there is a majority view.

Furthermore, the electoral mechanism is not the only way of ensuring representativeness. It functions as an adjunct to other channels of communication between the citizen and his representative and as a guarantor of the effectiveness of such channels, since the threat of electoral rejection serves to ensure that the representative pays heed to the prompting of vox populi revealed to him through these channels.

Among the devices for communicating strongly held public convictions to legislative representatives are: legal demonstrations at the legislative buildings; mail and telephone campaigns; group and individual visits to legislators' offices; mass meetings and conventions attended by legislators; official statements by organizations with large memberships; etc. Even the

55. *See, e.g.*, A. BICKEL, THE MORALITY OF CONSENT 16-18 (1975), *reviewed in* Levy, Book Review, 31 Sw. L.J. 615 (1977).

nonelective independent regulatory agencies are not indifferent to outpourings of popular feeling asserted through like means. In addition, the commissioners of such agencies face the ordeal of periodic appointment, and, in the interim, rely on the executive and the legislature for operating funds; thus, they are not disposed to be unresponsive when the people ardently desire a particular policy approach and communicate their desire to the agency in question and to the legislature and the executive as well. Furthermore, when such agencies are guilty of administrative arbitrariness, their decisions are reviewable in the courts.

It is not clear why it should be thought that coercive direct action, which is usually undertaken by dissenting groups championing views held by minor segments of the populace, is a more accurate barometer of majority opinion than the traditional forms of communication and sources of information just described. Nor is it clear why it is needed as a supplement to the threat of electoral rejection to force legislators to act in accordance with majority viewpoints when these are known to them. The legislator indifferent to popular disfavor is not likely to be dissuaded from his course by direct action protests. Indeed, when we reach the stage where legislators can be brought to respect the clearly defined majority will only by such coercion, democracy really will be in extremis.

More often than not, legislative unresponsiveness to a particular proselytizing initiative is attributable to the fact that the proposal put forward does not command majority support or even substantial support within the electorate, or that its supporters have not fully exploited the traditional avenues of persuasion. It is true that where public opinion has not crystallized into a firm, publicly assertive majority on a particular issue, special interest groups, which are not confined to economic interest groups, may exert an undue sway on public policy relevant to that issue. But legal demonstrations and other legal means of legislative contact and political action give countervailing viewpoints ample scope to expose and oppose the influence of narrowly motivated or self-seeking interests. If such exposure and successful opposition does not occur, it is not because traditional expressionary devices cannot be employed effectively in this context, but merely because they have not been pursued vigorously in the individual case.

Nor is it probable that legalized coercive protest would be significantly more, if any more, effective in crystallizing majorities on important issues than traditional forms of proselytization. If used repeatedly, it might well irritate rather than inspire the public mind. And where it was effective, it might lead the public in the wrong direction or degrade the quality of public opinion by lowering the tone of public discourse in the manner described elsewhere in this discussion.

Certainly any added dimension of expressionary effect likely to be provided in such a situation by coercive protest would not be sufficient to justify the evils which it would be reasonable to expect if such protest were legalized. Indeed, if such legalization were to become a reality, the pressure of direct action might be exercised as often in behalf of partial views as in support of worthy causes and, for all its apparent openness and visibility,

direct action might be just as useful in advancing the fortunes of special interests or restricted outlooks as legislative lobbying (a perfectly legal mode of political activity often invoked by high minded civic groups) and other familiar methods of influencing governmental action.

When a dissenting group seeks to impose its moral convictions in the absence of majority assent through the agency of coercive civil disobedience to law, its actions constitute an attempt to enthrone government by minority and to compel the majority to reject the dictates of its conscience and to be ruled by the conscience of the minority. Such a regime of compulsion is wholly inconsistent with the principle of respect for human conscience on which the theory of civil disobedience is based and on which the minority purports to act.

It is also incompatible with the democratic principle that government should rest on the freely given consent of the governed as manifested at any given time by a consenting majority. It can never be justified morally within the framework of democratic theory (if the legislative policy is considered unconstitutional, further non-coercive dialogue of persuasion or invocation of judicial relief is the proper corrective) although some would say that it may be validated by a higher law beyond the realm of government where the majority's position in effect approves of injustice or inhuman treatment so extreme as to be intolerable under civilized standards or grants rights whose exercise is oppressive to others.

Although the theoreticians of direct action argue that their methods will enhance the democratic representativeness of government, it is more likely that a system legalizing direct action tactics will be one in which vocal and aggressive minorities disrupt the democratic process of discussion and adjustment of views by which majority opinion crystallizes and is made known in public forums. Thus, such a system may frustrate the will of the people, not implement it more effectively.

The progress made in the last twenty years on the legislative and juridical fronts in securing for underprivileged racial and nationality groups rights and benefits previously denied them[56] attests to the fact that the democratic system is not closed to such groups. It demonstrates that a strongly motivated numerical minority may work effectively through their representatives within the system by forging legislative majorities on issues important to them through temporary and shifting legislative coalitions with other interest groups. Indeed, it is the essence of our legislative system that every issue majority is an opportune coalescence of discrete interests and that the rule of the majority is in truth the sovereignty of fortuitously conjoined minorities.

The preceding reflections are not meant to suggest that the raw approximations of political practice have or ever can approach that ideal of perfection which democratic utopians in every age have held up as a model for mundane endeavors. The frequent failure of popular control in some of our great urban centers is no secret to knowledgeable observers. The way in

56. For example, civil rights legislation and the establishment of poverty funds.

which state and local legislators beholden to political machines for electoral support have voted against the public interest for the benefit of special interests rendering financial obeisance to these machines is a familiar feature of American political history.

But only one naively sanguine about the efficacy of civil disobedience would suppose that entrenched arrangements of this kind could be rooted out by coercive direct action protest where vigorous use of mass demonstrations and other legal forms of expression could not eliminate them. The only feasible method of exorcising them, if any, is through effective organization and unflagging political pressure in behalf of the public interest, assisted, perhaps, by judiciously contrived control of campaign contributions and of monetary benefactions to political machines by persons or firms doing business with state or local government or subject to regulation by those governments. Improvement is not likely to occur unless those elements of the community with the political intelligence and social power to generate an impetus toward change are moved to action in the cause of reform, and illegal coercive direct action is not the form of communication best calculated to influence such people.

H. The defenders of coercive direct action point to the imperfections in existing institutions of government and complain about what they regard as the excessively slow pace at which such institutions inaugurate salutary change. However, if coercive direct action is to be given legal protection whenever democracy's system of representation does not work perfectly, then society will be in a constant state of disorder because no democratic system will ever be ideally representative—even assuming that one could be designed to embody majority intuitions of policy more satisfactorily.[57]

I. The rule of law has prevailed because a state of things in which each man is a law unto himself is intolerable. Where a person reserves the right to invade the freedom of his fellows, he prepares the way for retaliatory invasion of his own freedom. A system in which each individual decides what law he will obey and whether he will disrupt the life course of others in effect institutes the state of anarchy, and such a situation is a retrogression from that social control of disruptive conduct which is the hallmark of civilization.

The proposals to give constitutional sanction to disruptive and coercive forms of protest infringing the legal prerogatives of others in effect mean that, as to the persons subjected to the coercive force of direct action, the Constitution would grant them rights of free expression while simultaneously granting to others a roving commission to suppress those rights by extremist tactics. Obviously such a duality would afflict the Constitution with an internal contradiction of the most fundamental kind—fundamental because the process of discussion is the central process of democracy.

57. For some possible democratizing reforms see Dahl, *On Removing Certain Impediments to Democracy in the United States*, 92 POL. SCI. Q. 1, 17 (1977). The terms in which Dahl discusses ways of ameliorating government by majority suggest that coercive direct action is not what is needed.

Such a regime would give coercive activists the right to decide which laws to obey and when and would make the caprice of individual choice rather than the considered will of society articulated in law as the determinant of behavioral propriety. Thus, law would not enforce the comprehensive long-range interests of society in the realms of expression and political action. Instead it would conduce to a social condition which was the product of the accidental conjunction of a multiplicity of uncontrolled and narrowly conceived individual initiatives. Many of these initiatives would be the result of parochial motivations unleavened by any sense of the larger social interest or an awareness of how the long-term stability of society requires the tempering of extremist demands in deference to the objective of compromise so that governmental policy may reflect the parallelogram of social forces and embody that balance of social interests which is the prerequisite of social harmony.

The noisy and coercive extremism of unrestrained, legalized activism would tend to dominate public discourse and intimidate some public officials, thus forcing the adoption of some narrow and unbalanced policies. In a system which safeguards the expressionary rights of all shades of opinion, such unhealthy captivation of official attention is less likely to occur and governmental policy will remain a distillate of diverging standpoints, the outcome of a process in which the clash of interests is transmuted into a composite, reflective of the broad array of outlooks which compete for recognition.

J. It is occasionally asserted by proponents of legalized direct action that their opponents are so deluded by a doctrinaire devotion to abstract principles such as the rule of law that they refuse to consider whether a mix of traditional and activist political techniques will not in fact produce a more responsive and efficacious system of government than the present one. But the case against legalizing direct action set forth in this discussion is not based on a conceptual analysis of political obligation or a manipulation of legalistic abstractions or a blind adherence to the dogmas of legal positivism. Rather, it is founded on the pragmatic ground that where the full range of direct action behavior, not merely non-coercive civil disobedience, is given constitutional protection, systemic disorder is threatened.

Even if the constitutional protection were ordained by judicial decision, which can be abrogated more quickly than a constitutional amendment, it might take some time before the habits of coercion generated by such a judicial decision could be extirpated even if it were later disapproved. In the meantime, the constructive processes of society would be disturbed by all manner of activist disruptions. More, once such a regime of coercion is initiated, it may be impossible to abolish completely, and an unacceptable degree of valueless disorder might become endemic.

K. Let us assume, for the sake of argument, that passive, non-coercive civil disobedience is compatible with the preservation of an adequately functioning free society, where it is not so widespread and prolonged as to paralyze society's crucial processes of survival. Nonetheless, *active* disobedience to law which effects a suppression of opposing interests and

viewpoints is a more pernicious order of disobedience. Once this type of action starts, it may snowball to the point where the foundations of social order are threatened.

At the inception of such an activist regime, one can never predict what its end product will be. It may result in a minor and perhaps tolerable degree of social disruption followed by significant new gains in social justice and social improvement. Instead, it may produce a conservative reaction against political novelty or, even worse, a social decline into anarchy followed by countervailing forms of redress which cancel existing gains and institutionalize programs of repression that compromise and narrow our traditional freedoms.

It must be remembered that any minority which refuses to abide by the arbitrament of democratic procedure invites other minorities to adopt a similar posture of intransigence concerning their own special objectives. This burgeoning obstructionism will prevent the attainment of an atmosphere in which these traditional democratic strategies of accommodation may operate; it may also lead to actual physical warfare among minorities or between a minority and the majority. Once overbearing forms of protest are legitimized, more and more important social disagreements will be transacted on the level of force. Therefore, the inauguration of such a social trend would be a dangerous course for any dissenting minority which cannot muster a preponderance of physical force, since its failure to enforce its aims by such means may result in the violent suppression of its legitimate aspirations.

L. Proponents of direct action tactics concede that the tactics may cause some inconvenience to the community but insist that the inconvenience is overbalanced by the social gains which will result from the supplementation of existing media of expression. The answer to this contention is that when such tactics are given legal protection there is no way of knowing exactly how much "inconvenience" will ensue, but it almost certainly will be considerable as each opinion clique reacts to the opposition's disruptive forays against it with disruptive counteraction of its own. Consequently, civic life may become a continuous exercise in reciprocal obstruction in which the harshness of the means employed intensifies progressively into a perpetual state of riotous violence and mob excess just as the peaceful protests of the civil rights movement were succeeded by the enormously destructive riots in some of our large cities.

If such a state of affairs develops, it is bound to change the character of American life fundamentally. It may give rise to the sort of widespread and malignant social hatreds which impede the cooperation necessary for the preservation of an adequately functioning society. It may engender the kind of venomous and unremitting inter-group conflict that has often disfigured the complexion of European and Asian politics.

Moreover, once direct action is welcomed by legalization, it will probably be invoked with accelerating frequency. Increase in the incidence of its use will confer upon it an enhanced familiarity which dispels its aura of eccentricity and gives it the aspect of an acceptable remedy. This augmented

respectability may enable it largely to replace all other forms of expression and political action as the social norm as men prefer the easy availability and instantaneous impact of coercive styles of protest and policy advocacy to the difficult challenges of rational persuasion and the slower-paced and disciplined procedures of parliamentary government.

Soon, the slightest political or social difficulty may prompt immediate recourse to the streets and once this tendency hardens into habit, the complex rituals of traditional politics may be disdained almost universally as old fashioned and ineffectual.[58] Thus will the essential nature of the free society be altered if a system of democratic legislative institutions loses its vitality as the central focus of government by discussion and surrenders its primacy to an unstructured state of mutually coercive interest group interaction whose locale is the streets.

A legalized regime of direct action may spawn a seemingly infinite regress of clashing, mutually suppressive confrontations when those whose rights of expression are infringed by disruptive activists protected by law seek to respond to such infringement by enforcing their views and suppressing opposing views with the same coercive tactics. Thus, a legal approach designed to legitimize extraordinary tactics for use in exceptional cases ends by making these tactics usual rather than exceptional. And once they seem usual, they are largely deprived of any capacity they had for functioning as creative catalysts. When disruptive tactics become staple elements of political discourse they lose the flavor of novelty and with it their potency as instruments for dramatizing issues.

M. Some theorists of extralegal direct action argue that disobedience to law is warranted when one's rights are violated by the law. On this reasoning many citizens would be freed from an obligation to obey the law in situations where the law authorizes extralegal direct action because such tactics—breeding like countertactics—might well become universal, thus subjecting most citizens to such deprivations of their rights as would justify their disobedience.

If direct action were given legally privileged status, probably many of the people availing themselves of the privilege would be extremists with no real solutions to our common problems or with solutions incompatible with free institutions. Legalization of coercive protest would be likely to promote a substantial enlargement in the number of extremist groups and in the membership of groups of this type now in existence; this, in turn, would lead to a geometric growth in overweening activism.

The disruptiveness and disorder attendant upon such legalization probably would expand so widely that the consequent interference with the rights and opportunities of others to free expression and the resulting net loss to the free exchange and careful analysis of ideas and the creativity of our thought life would more than counterbalance the alleged enhanced expressiveness and enriched policy input reasonably to be anticipated from such activism.

58. A similar trend toward proliferating and indiscriminate use occurred in India during the period of Ghandian passive resistance. *See* Allen, *Civil Disobedience and the Legal Order*, 36 U. CIN. L. REV. 1, 35 (1967).

Indeed, coercive direct action may not contribute a significant increment of expressionary competence beyond that provided by presently legal forms of communication such as marches, conventions, speeches, and demonstrations covered by the mass media. Certainly this would be true if direct action were used with such annoying frequency that the public was alienated thereby. The violent and repetitive oversimplifications of direct action vocalisms are not conducive to a balanced and thorough understanding of intricate issues.

Some may argue that direct action is a better vehicle for revealing intensity of grievance. However, the strident and forceful rhetoric and the punctuating affirmation of crowd response which are typical features of legal demonstrations attest to the dynamism inherent in currently legal modes of expression and indicate that one need not interfere with the rights of others in order to display intensity of feeling. Those who commend direct action as a more efficient reflector of intensity really mean that it supplies an element of coercion in situations where opinion cliques cannot get their views accepted as determinants of policy by mere persuasion alone.

N. Once easy and universal resort to the shrill and coercive simplicities of direct action creates a general social atmosphere in which the public at large is conditioned to respond emotionally rather than with careful rational analysis, the psychological conditions of the democratic society's destruction are at hand. The free polity, which, through the facile surrender to bad intellectual habits, has lost the capacity for calm, disciplined, and deliberate thought, and apt and discriminating social judgment, cannot hope to meet the heavy intellectual demands which are imposed upon the democratic citizenry by the complex and massive social problems of our times. The development of a habit of irrationality cannot be confined to the context of its genesis; it will ramify pervasively so as to adulterate every sector of social concern.

In such a setting of widespread social unrest and lawlessness, reason becomes irrelevant, traditional restraints are weakened, and there is no way to prophesy the resultant which will be engendered by the play of social forces that is thus stimulated. A condition of semi-anarchy inaugurated by those motivated by laudable objectives may encourage the emergence of elements inspired by more questionable intentions and may prepare the way for the ascendancy of dark and evil forces dedicated to the destruction of all human values. For those who, out of a misplaced humanism, launch society on an uncertain career of anarchy may not preside over it when the seeds of disorder have borne their bitter fruit.

O. Scholars of democracy have often remarked that its fundamental assumptions envisage the existence of certain basic social conventions which constitute the indispensable social core of a democratic political system. One of these conventions is the devotion, whether by habit or conviction, to the free society's rules of the game, that is, an innate inclination to give the central processes of democracy precedence over any particular social or economic interest. It is only when the bulk of democracy's citizenry is loyal to democracy's ultimate values of discussion and compromise that the bases of democracy are secured.

When special interest groups confront each other in a posture of irreconcilability, when they are willing to press their selfish demands to the limit rather than to submit to their adjustment through the democratic machinery of policy formation, then the free society is in mortal danger of disintegration.

In a time of social flux, when radical attacks on moral and social norms are the common currency of public discourse, disaffected groups are emboldened to extremes in their attempts to realize their ends or to enlarge their power as a prelude to the attainment of those ends. Such groups would do well to ponder the dangers which may accrue to those who stand insurgent against the status quo out of a facile belief that it will be inevitably and implacably resistant to reasonable demands for change. The philosopher William James once remarked that the inner mystery of democracy included a sense of outrage at those who broke the public peace. Groups who contravene this dictum by heedless action are inviting not only freedom's demise, but the defeat, as well, of those particular interests which they have charged democracy with ignoring.

It is short sighted to despair of democracy's capacity to renew itself by transforming conflict into a creative synthesis which carries political life to new levels and to reconstruct itself from within by the employment of its characteristic processes for managing clashes of interest. Persons who deny the ability of democratic institutions to relate the free society effectively to changing conditions underestimate the power of thought in a free setting and the dramatic legal and governmental changes which, in the last twenty years, have made American political institutions more responsive to the needs and value changes in the underlying social milieu.

P. Some dissenting activists have tried to justify illegal coercive practices by an appeal to alleged higher moral principles. But, in the opinion of this writer, political morals cannot claim the warrant of objective underpinnings because values are ultimately subjective. While instrumental values may be grounded in practical reason, the primary values which they serve are not referrable to any objective standard beyond them. This author does not accept the assumptions of natural law theorists on the ground that natural law theory lacks semantic meaning for want of empirical reference. It seems to him that there is no convincing answer to the relativist analysis of political ethics. Even thinkers who accept the view that natural law is a supreme ordinance to which all positive law must conform disagree as to the content of natural law principles or about how they should be applied in given instances.

In the political cosmos there is no absolute moral truth or authenticated moral dogma or supreme moral position whose sovereignty over all others is established by verifiable standards. Many shades of opinion may make absolutist claims for their favored principles. If each were to employ disruptive tactics in behalf of such principles, anarchy would result. The characterizing ethic of democracy is that it has no ethos beyond the justification of its essential processes. Democracy is based on the belief that no one gradation of outlook has a monopoly on truth or virtue and that value and interest

conflicts should be resolved by democracy's machinery for adjusting differences of viewpoint, procedures by which competing partial views are combined into syntheses which embody more comprehensive and qualitatively superior truth.

A political system in which an opinion coterie uses coercion and psychic aggression to prevent contrary views from winning the adherents they might attract if allowed a fair hearing and thus succeeds in enthroning its own preferred values as the governing tenets of the common life is not a democracy; it is government by naked power when such coercive tactics cannot claim legal sanction and government by the method of authority when they can.

Q. Christian Bay has insisted that civil disobedience is an indispensable aid to the growth of democracy because direct action counteracts government's tendency to become less democratic.[59] Even if this contention is correct, it does not necessitate the conclusion that presently illegal forms of direct action should be granted legal protection. In order to contribute to democratic growth, direct action must operate effectively and if legalization results in its being used injudiciously or to excess, its usefulness as a social instrument will be impaired.

Although the theoreticians of civil disobedience believe that the human being in a political society has the moral right to disobey the civil authority under certain conditions, most interpose the caveat that this moral right is not absolute or automatic but on the contrary is restricted in its exercise to appropriate circumstances. Appropriate circumstances would be those in which there is a weighty reason for disobedience and a sound basis for believing that disobedience will have salutary social effects outweighing any social costs it entails. A mere claim that one has a moral objection to a particular law or policy does not justify civil disobedience. Some thinkers also believe that civil disobedience is never warranted when the disobedient objects to governmental action or inaction on policy grounds rather than moral grounds.

The advocates of civil disobedience agree that it is not properly employed unless there is an adequate nexus, in the form of a sufficiently close relationship, between the disobedient act and the evil protested and unless the degree of disobedience is not excessive in relation to the goal sought. It is usually agreed also that civil disobedience cannot be validated in general but only through a moral evaluation of particular acts of disobedience in accordance with sound principles.[60] Thus, a blanket a priori legalization of direct action in general would seem uncalled for even if some form of legalization were appropriate.

Moreover, the moral necessity that each act of civil disobedience be morally justifiable would appear to impose considerable burdens of moral

59. Bay, *Civil Disobedience: Prerequisite for Democracy in Mass Society*, in POLITICAL THEORY AND SOCIAL CHANGE 134-35 (D. Spitz ed. 1967), *cited in* Hall, *Legal Toleration of Civil Disobedience*, 81 ETHICS 128, 129 (1971).

60. *See* Cohen, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1, 9-10, 12-16 (1966); Keeton, *The Morality of Civil Disobedience*, 43 TEXAS L. REV. 507 (1965); MacGuigan, *Civil Disobedience and Natural Law*, 11 CATH. LAW. 118 (1965).

judgment on each prospective disobedient. Where relatively few acts of disobedience are performed by persons of superior insight or political sophistication, this requirement may be met. But when presently illegal direct action is given some form of legal protection, the frequency of civil disobedience is likely to attain such an order of magnitude and to involve so many disobedients of questionable judgment and indifferent intellectual and moral capacities that it is doubtful the stern moral prerequisites of such disobedience will be satisfied in any more than a small minority of cases. Habits of cautious moral analysis and self-restraint are not notable features of militants.

Even if the prospective civil disobedient is intellectually and morally responsible, the difficulty of gaining sufficient precise knowledge of the factors relevant to an informed decision as to the justifiability of a particular contemplated act of civil disobedience and of weighing these factors so as to arrive at a balanced judgment would be great. Relatively few of the many disobedients likely to take advantage of a legally protected regime of civil disobedience would be equal to the task. Once there is established in favor of the direct actionist an immunity from punishment for his illegality, even a qualified immunity in which the disobedient act is subject to judicial appraisal, the amount of morally unwarranted direct action probably will be great.

It should also be understood that even when particular disobedient mass protests have been rationalized carefully in advance as to their justification on the basis of planned tactical limits, the probability that such limits will be observed scrupulously in the heat of coercive confrontations in the streets is not high. Mass demonstrations always have the potentiality of degenerating into violent and riotous disorder. But when the law encourages protest to assume a coercive aspect, the danger of extremist behavior is multiplied as the passions generated by the coercive interaction of opposing groups override previously envisaged limitations.

R. It should also be recognized that the civil disobedient's cause and his belief in it can only be dramatized properly and brought home to the public if he is in danger of being punished and is seen to be willing to suffer the punishment for the cause he has espoused. Thus, relieving him from such punishment through the device of legal protection works against the effective use of the civil disobedience vehicle. Indeed, the philosopher Sidney Hook maintains that the civil disobedient's act is defensible in the context of the democratic society only if he voluntarily accepts the penalty provided by the law for his transgression.[61]

S. Champions of civil disobedience argue that it has been a constructive force at various times in our national life. Even if this claim is true, it can be argued that the use of civil disobedience was more appropriate earlier in our history. In that earlier time, malapportioned state and national legislatures had not yet been reapportioned in accordance with the Supreme Court's "one person, one vote" requirement, and the Supreme Court had not yet broadened the official interpretation of the first amendment so as to protect

61. S. HOOK. THE PARADOXES OF FREEDOM 117 (1962).

peaceful mass public demonstration and so as to assimilate symbolic conduct, with some qualification, to the category of protected speech.

Furthermore, that American society was able to tolerate and profit from civil disobedience in the framework of legal prohibitions that mitigated against its excessive use is not a persuasive reason for removing those prohibitions. The better course would be to rely upon the discretion of the sentencing judge to extend leniency to the prosecuted disobedient where the special circumstances of the particular case suggest the social value and high purpose of his disobedience and the special justification for judicial forbearance.

IV. CONCLUSION

The widespread and continuous use of extralegal direct action poses a danger to constitutional democracy. Where such genera of protest are given constitutional legitimacy, they constitute an infinitely greater danger. This is especially so in the case of groups, such as militant anarchists, that seek to destroy the democratic state, rather than merely to use the irregular devices of confrontation politics to change its policies more quickly than they normally could be changed by traditional democratic procedures. If such tactics are given constitutional protection, these fundamentally disloyal groups may use them to achieve their avowed purpose of smashing our democratic institutional framework and of bending the free society to the contours of their own inner visions.

Those who are so impatient for change that they are willing to sacrifice democratic forms for instant fulfillment would do well to remember that immediate achievement of every fancied goal is not a prerequisite to a tolerable existence but the conditions of public order and social stability are the indispensable bases of long term social advance.

To postpone the attainment of favored civic objectives will not undermine the foundations of civilization; a lapse into systemic disorder will do so. Such a lapse will prepare the way for the progressive emergence of those atomizing forces that disturb the social equilibrium in which persisting patterns of endeavor are possible and will dispel that minimum state of tranquillity where human creativity gives rise to cultural development and there are activated those rationally controlled mechanisms of policy formation by which a free society makes apt response to its looming challenges.