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Ronald Patrick Stake

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COMMENTS

A PHENOMENOLOGY OF JUSTICE AND THE CASE FOR CIVIL DISOBEDIENCE

INTRODUCTION

The exposition of an idea entails the placing of the idea within a horizon of meaning. While the nature of the exposition may require little, if any, specific location, more often a writer will find it necessary to explicitly present the foundational horizon in order to minimize misunderstanding. This is particularly true of philosophical ideas, and, consequently, the first problem encountered by this Comment. Because the problem of civil disobedience will ultimately be treated in relation to the jury's power of nullification¹ and because such a treatment, while practical in application, makes little sense apart from the ethical and historical considerations, there must be an initial concern for the ideas of justice and law themselves. In the presentation of these ideas the following introductory remarks should serve as a guide.

A. *Phenomenology*²

The domain of phenomenology can encompass every aspect of human reasoning and speculation. Edmund Husserl, who is considered the founder of the phenomenological movement, wrote the following for the 1927 edition of the *Encyclopaedia Britannica*:

1. When considering the remarks of the final pages of this Comment concerning the rights and powers of the jury in criminal cases it should be noted that the right to trial by jury contained in the sixth amendment to the Constitution of the United States has only been applicable to the states since the last decade, *Duncan v. Louisiana*, 391 U.S. 145 (1968). Since its incorporation, however, the right to jury trial has been diluted by the Supreme Court's decisions sanctioning the use of less than twelve person juries, *Williams v. Florida*, 399 U.S. 78 (1970), and allowing the jury to convict with non-unanimous verdicts, *Apodaca v. Oregon*, 406 U.S. 404 (1972).

2. It is impossible to give a definition of phenomenology without misleading those who will receive it, for it is not so much a type, much less a branch, of philosophy as it is a movement which encompasses and characterizes a certain perspective towards philosophical inquiry. Husserl himself encountered difficulties in presenting his concept of phenomenology to the extent that he found it necessary to introduce its basic concepts in several separate and distinct works. See E. HUSSERL, *IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY* (Gibson transl. 1931); E. HUSSERL, *CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY* (Cairns

In phenomenology all rational problems have their place, and thus also those that traditionally are in some special sense or other philosophically significant. . . . In short, the metaphysically teleological, the ethical, and the problems of philosophy of history, no less than, obviously, the problems of judging reason, lie within its boundary, no differently from all significant

transl. 1960); E. HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY: AN INTRODUCTION TO PHENOMENOLOGICAL PHILOSOPHY* (Carr transl. 1970). Husserl's earlier works manifest the intent to avoid history by turning the focus toward "the things themselves" (*zu den Sachen selbst!*). Carr, *Translator's Introduction* to E. HUSSERL, *THE CRISIS OF EUROPEAN SCIENCES* xxx (1970). The *Crisis*, however, offers his more mature approach to the problem, one which indicates a strong respect for the horizontal significance of history and the concept of the "life-world."

[L]et us recall the fact we have emphasized, namely, that science is a human spiritual accomplishment which presupposes as its point of departure, both historically and for each new student, the intuitive surrounding world of life, pregiven for all in common. Furthermore, it is an accomplishment which, in being practiced and carried forward, continues to presuppose this surrounding world *as it is given in its particularity* to the scientist.

Id. at 121 (emphasis added).

Husserl's student, Heidegger abandoned his master's search for a "pure science of phenomenology," but continued to employ the methodological insights which Husserl's work had developed, applying them to his own "ontology":

With the question of the meaning of Being, our investigation comes up against the fundamental question of philosophy. This is one that must be treated *phenomenologically*. Thus our treatise does not subscribe to a 'standpoint' or represent any special 'direction'; for phenomenology is nothing of either sort, nor can it become so as long as it understands itself. The expression phenomenology signifies primarily a *methodological conception*. This expression does not characterize the what of the objects of philosophical research as subject-matter, but rather the *how* of that research.

M. HEIDEGGER, *BEING AND TIME* 50 (Macquarrie & Robinson transl. 1962) [hereinafter cited as HEIDEGGER]. For further discussion of Heidegger's view of phenomenology see, e.g., *id.* at 58-63; W. RICHARDSON, *HEIDEGGER: THROUGH PHENOMENOLOGY TO THOUGHT* 46-47 (1967).

Sartre too makes uses of the phenomenology of Husserl for its methodological insights; however, unlike Heidegger, Sartre's work is also of immediate psychological significance, showing an influence of Freud's psychoanalytic theory, albeit in existential terms. See generally J. SARTRE, *BEING AND NOTHINGNESS* (Barnes transl. 1956).

Luijpen, whose work provided the impetus for this Comment, views the phenomenological movement as having merged with the existentialist movement begun in the last century by Søren Kierkegaard. He sees this merger manifest in Heidegger's *Being and Time*, continuing to the present under the name of existential phenomenology. W. LUIJPEN, *EXISTENTIAL PHENOMENOLOGY* 34 (rev. ed., Koren transl. 1969) [hereinafter cited as *EXISTENTIAL PHENOMENOLOGY*].

The use of the expression "phenomenology" in this Comment, therefore, is within the context of a broad movement known as existential phenomenology or phenomenological existentialism; it indicates primarily a descriptive methodology illuminating that which appears. For example, a box appears before a subject, and while it is immediately known to be a box, it only is so known due to the context within which the box is situated. For it presents itself only one side at a time, yet the subject intends the other five sides as well in describing the box as a box. It also appears on the table, near or far, light or dark within the horizon now present; this horizon

problems whatever, and all [of them] in their inmost synthetic unity and order as [being] of transcendental spirit-quality [*Geistigkeit*, spirituality, intellectuality].³

The idea of justice, therefore, presents itself as a phenomenological problem of the first order; the idea appears before the consciousness to be methodologically disclosed as that which "can, even though it shows itself unthematically, be brought thematically to show itself. . . ."⁴

B. *Natural Law*⁵

The basic commitments of legal philosophy can be viewed from one of two perspectives: natural law theory or legal positivism.⁶ The natural lawyer subscribes to the existence of a metaphysical principle or extralegal standard which sets the norms of justice and morality; whereas, the legal positivist rejects the commitment of natural law by either passively equating morality with de facto legality or explicitly refusing to deal with the question of morality.⁷ The presentation of justice which follows implies an integral relationship between the positive law and the concept of the moral law, a relationship which is perceived in a normative fashion. While a "pure theory of law" may be incapable of dealing with the prob-

also includes the factor of time, and thus history. The object is a box, not in itself, but in its horizon of time and space. While the example is quite simplified, it demonstrates the fundamental concept of the phenomenological method, the establishment of objectivity as a mental accomplishment. In the translation of the method to non-material objects, like justice, law, and truth, the same fundamental concept applies.

For further insight to the relationship of phenomenology to non-material social concepts or ideas, see generally A. SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (Walsh & Lehnert transl. 1967); H. SPIEGELBERG, *PHENOMENOLOGY IN PSYCHOLOGY AND PSYCHIATRY: AN HISTORICAL INTRODUCTION* (1972).

3. "Phenomenology" Edmund Husserl's Article for the *Encyclopaedia Britannica* (1927): *New Complete Translation* by Richard E. Palmer, 2 J. BRIT. SOC'Y PHENOMENOLOGY, May 1971, at 77, 88-89.

4. HEIDEGGER, *supra* note 2, at 55.

5. For a concise historical introduction to natural law philosophy, see F. ETEROVICH, *APPROACHES TO NATURAL LAW: FROM PLATO TO KANT* (1972).

6. Those associated with natural law history include the following: Plato, Aristotle, Cicero, St. Thomas Aquinas, Francisco de Vitoria, Francisco Suarez, Hugo Grotius, John Locke, Benedict de Spinoza, Immanuel Kant, G.W.F. Hegel, John Courtney Murray, S.J., Heinrich Rommen, and Mr. Justice Douglas. Clearly included amongst the positivists are John Austin, Hans Kelsen, Oliver Wendell Holmes, Jr. (see Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897)), and H.L.A. Hart. Nazi Germany has been seen as the ultimate product of a legal system supported by legal positivistic theory. See, e.g., *EXISTENTIAL PHENOMENOLOGY*, *supra* note 2, 327-33.

7. See, e.g., Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); contra, Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

lem of justice, it does not therefore follow that any meaningful treatment is impossible.⁸

I. JUSTICE: THE "OUGHT"⁹ OF COEXISTENCE

A. *Freedom and Its Limits*

An analysis of the problem of justice places before the receptive investigator the issue of human freedom, a primordial concept of philosophical anthropology. Freedom in this context means that each person is fundamentally an individual subject, a unique and independent locus through whom all things and the world itself are manifest.¹⁰ A subject is opposed to being placed within scientific classifications and denies that human existence is the mere result of natural processes. Yet, one is neither absolutely free nor alone—there are some obstacles and some patterns of conduct, some standards for truth and for judgment. Indeed, "meaning is not left to the subject's arbitrariness. As a 'natural light,' the subject is the 'letting be' of reality, and as such he is bound to objectivity."¹¹ The autonomy of the individual is limited by both the world itself and other

8. Issue must be taken with those of the "pure theory" school of jurisprudence who subscribe to the following position:

Justice is an irrational ideal. However indispensable it may be for the willing and acting of human beings it is not viable by reason. Only positive law is known, or more correctly revealed, to reason.

Kelsen, *The Pure Theory of Law*, 50 L.Q. REV. 474, 482 (1934). See also W. LUIJPEN, PHENOMENOLOGY OF NATURAL LAW 31 *et seq.* (Koren transl. 1967) [hereinafter cited as PHENOMENOLOGY OF NATURAL LAW].

9. See EXISTENTIAL PHENOMENOLOGY, *supra* note 2, at 333-34:

Within the framework of a constituted legal order the statement that man ought to be *just* means that he ought to obey the rules of law. In this context, then, justice must be described as the willingness to conform to the demands of the legal order. This willingness presupposes man as a *subject*, and the "ought" ascribed to justice implies that this willingness is not something left to the subject's own arbitrary decision, not something to which he can remain, without prejudice, sensitive or insensitive, but an attitude which is *obligatory*. If, then, the subject *himself* is not obliged, better even, if being-a-subject *itself* does not imply a certain obligation, then it remains fundamentally unexplained that the legal order has an obligatory character. If the subject *himself* cannot be explicitated as an "obligation," one can endlessly repeat that the legal order has an obligatory character, but this repeated assertion does not really mean anything. A certain "ought" must be inherent, not to the legal order, but to the subject: he *ought* to be just.

10. "Subject" is used here as opposed to "object" or thing. Human beings are "no things" ("*nothingness*"). See generally J. SARTRE, EXISTENTIALISM AND HUMANISM (Mairet transl. 1948) and J. SARTRE, BEING AND NOTHINGNESS (Barnes transl. 1956).

11. EXISTENTIAL PHENOMENOLOGY, *supra* note 2, at 191.

persons, persons who demand from each other certain responses—responses which cannot be accounted for by the coerciveness of the positive law alone.

Nevertheless, people have not and, perhaps, cannot rely upon the willingness of each individual subject to provide the expected responses. It is naive to think that hatred and violence can be stopped by some eventual common agreement in and of itself.¹² But this does not mean that the primordial condition of human nature is that described by thinkers like Thomas Hobbes, a war of all against all.¹³ Rather, it describes a condition in which the positive law plays an important function in guaranteeing a community's minimum demands.¹⁴

B. *Justice and Truth*

Beyond the ordinary manifestations which are presented to and interpreted by the individual subject, there are residues which remain hidden from full view, yet vaguely present along the foggy edge of each object's horizontal structure. Ordinarily justice presents itself through the everyday encounters with one's compliance with already established norms of conduct; many of these norms are spelled out in the various rules promulgated as positive law. On the periphery, however, these norms must necessarily be grounded in some understanding of the idea of justice itself.

Professor William A. Luijpen presents the concept of justice as an anthropological form of coexistence, the struggle against inhumanity, and the minimum demand of love.¹⁵ Such an understanding of justice links the

12. See PHENOMENOLOGY OF NATURAL LAW, *supra* note 8, at 221: "[T]estimonies of love' do not suffice to tame 'wolves,' and there is no form of 'communion' that does not have its moments of weakness. At such moments only positive law can save a minimum of humanity."

13. See generally T. HOBBS, *LEVIATHAN* (Collier ed. 1962).

14. See PHENOMENOLOGY OF NATURAL LAW, *supra* note 8, at 17-18:

As soon as man manages to reach the level of authentic existence, it becomes obvious to him that even the most elementary level of authenticity is impossible unless existence is co-existence. To be man is to be a fellow-man. But even the most simple and most elementary level of co-existence calls for rules and regulations to make this co-existence possible and to preserve it when it has been achieved.

15. See *id.* at 180:

The minimum of the demand of love, the demand which human existence as co-existence itself is, can thus be formulated as the most fundamental right of the other. The other's right is the minimum of my 'yes' to his subjectivity, a 'yes' called for by my existence as a 'having to be for the other,' as an 'ought' on the level of co-existence. And this 'call' is not something coming from without but is I myself. Thus the other's right is a 'natural right,' better still, an 'essential right,' for it is implied in the 'nature,' the 'essence,' of co-existence.

natural law tradition with the existential phenomenological movement and enables the restatement of this tradition in terms which do not require a total abandonment of the subject to the purely objectivistic concepts usually associated with natural law philosophy. Within this phenomenology of justice, truth is ascertained only by and through the subject who is the locus of all meaning.

Truth is not, however, a purely subjectivistic opinion which is open to disputation by anyone seeing it differently. Rather, the proper understanding of the truth requires comprehension of the meaning of the Greek word *aletheia*. Ordinarily rendered by the English "truth," the meaning is much broader in scope. Martin Heidegger has demonstrated that a more proper translation would be "uncoveredness" or "unconcealment."¹⁶ As "uncoveredness" truth is never merely that which a subject has opined, but a discovery of Being within a particular context of conscious illumination. While truth can only exist for the subject, it cannot be said that the subject creates the truth.¹⁷

Furthermore, because no one can stand in the place of another and claim to uncover the other's truth, it might seem that there are as many truths as there are individuals. On the contrary, once one has uncovered the truth and has fully disclosed its significance, no one may rightfully deny its validity.¹⁸ The uncovering of truth "on behalf of all,"¹⁹ while accomplished by different subjects, in different places, and at different

16. See HEIDEGGER, *supra* note 2, at 262-69.

17. See PHENOMENOLOGY OF NATURAL LAW, *supra* note 8, at 192:

The 'true' is 'independent' of the subject, for the subject does not create it and therefore cannot speak arbitrarily of it. However, as independent, the 'true' cannot be isolated from existence as 'encounter with the independent' and made an 'in itself,' for the existent subject-as-*cogito* 'accomplishes' the independence of the independent, by 'letting it be.' The 'true,' then as the unconcealed is historical, for it presupposes the historical moment of the emergence of the subject as 'affirmation of being.'

18. See *id.* at 202:

In principle, no subject has the right to deny any unconcealedness whatsoever, but *in practice* subjects very frequently contradict one another. However, no subject can be satisfied with this state of affairs, for in any real affirmation every subject, as it were, epitomizes all real and possible subjects who would want to speak of the same unconcealedness and 'on behalf of all' he makes his affirmation; hence he cannot agree with those who deny the unconcealedness which he affirms.

19. *Id.* This concept is not equivalent to Kant's "categorical imperative:" "[a]ct only on that maxim through which you can at the same time will that it should become a universal law." I. KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 88 (Paton transl. 1964). Kant's statement is one which involves motive, will and anticipation, while our point is concerned with the present being of truth.

times remains an activity which, though distinctly personal, always manifests, from the objective side, a single and unified whole.

Truth is likewise, an historical phenomenon. Its history coincides with that of Being itself and expands within the realm of knowledge through a continuing dialogue among the world and its inhabitants. It is due to its historical character that truth can also be said to be eternal:

[I]n the historical dialogue of the existent subject-as-*cogito* with reality the 'already' of unconcealedness is taken up into the 'now.' The truth of the 'now' does not destroy the truth of the past but makes it more profound and integrates it. In this sense every truth is immutable.

. . . .

Every truth is eternal in the sense that whatever in any phase of man's common history has ever forced the subject to *affirm* it on the basis of its unconcealedness will demand the same affirmation in every subsequent phase of history; hence no subject can ever be justified in *denying* the same unconcealedness.²⁰

C. The Legal Order

Luijpen states, "The legal order is normative because it participates in, and is the embodiment of, the minimum of the 'having to be for the other' which existence as co-existence is."²¹ A legal order can only claim to bind its subjects, therefore, if it partakes in the binding force which the nature of a common humanity demands. Coexistence requires "being for the other." The alternative would be Hobbes' war of all against all. Unable to accept this alternative Luijpen claims,

no one can say that the inhumanity of barbarism is the final word with respect to human relations. At a given moment in the history of a society, through the intermediary of an 'ethical genius,' there arises a 'vision' of man's essence which, *as a matter of principle*, breaks through barbarism or inhumanity. . . .

No 'ethical genius' is needed to see that a social contract sometimes *de facto* establishes humanity. But a break through inhumanity is secured *as a matter of principle* when an 'ethical genius' at a given moment of history 'sees' man's essence as destined for the other, a destiny which brings to execution by his 'yes' to a 'certain real and practical bond between freedoms' which belong to the essence of existence as co-existence.²²

As elsewhere, discovery in the legal sphere requires the co-presence of a subject and the object of discovery. The seeing of an obligation implied by the nature of human existence as coexistence is *an event* which be-

20. PHENOMENOLOGY OF NATURAL LAW, *supra* note 8, at 201-02.

21. *Id.* at 181.

22. *Id.* at 179.

gins the history of concern for the philosophy of justice and for particular aspects of positive law as well. This is an event which is occasioned by the life of an unique person, one who would risk everything else in order to point to the truth of the demands of justice—an event in the lives of the *best members* of a society.²³

What is seen by the best is the basis for any consideration of natural right, and from the commitment demanded by this perception one finds certain necessary responses and attitudes which are prerequisites to sustained communal life. However,

it should be obvious that there is no natural law which as an 'in itself,' of either a real of [sic] an ideal nature, is immutable, eternal and valid for all. The objectivity of the natural law must be 'brought about' by an historical act in the co-existence of the 'ethical genius'. This genius, however, 'brings about' the truth of co-existence on behalf of all those who call themselves human beings, he 'brings about' a truth that is in principle intersubjective.²⁴

This intersubjectivity is, nevertheless, the proper understanding of an objective positing of the ground of all positive law. In recognizing that the natural law emanates from the demands of coexistence, one perceives only the first step toward the establishment of a truly human society. Because "only a legal order permanently *establishes* humanity, conceived as the minimum of man's 'yes' to his fellow-man."²⁵

The ever present remnants of hatred and divisiveness require more than a primordial recognition of that which is just. The human condition demands a formalized and continuing emphasis upon the original recognition; for the society at large, a putting forth of the minimum requirements of justice is necessary. This task is performed by the promulgation of positive law.²⁶ Freedom means that no one can be compelled to do more

23. See *id.* at 196. Luijpen's insistence that the legal order is the result of the labors and foresight of the best members of a society or, as he puts it, the "ethical genius," is not without anticipation of the charge of being an elitist. Nevertheless, [t]he subject for whom the rights and demands of justice are objective is, at first, the best of a society and, after them, all those who, thanks to them, are able to "see" what they "saw." We grant that there are many difficulties in this view but, in spite of them, it seems to us that this standpoint is irrefutable.

EXISTENTIAL PHENOMENOLOGY, *supra* note 2, at 341. This view allows for the recognition of personal accomplishment and accounts beautifully for the careers of such people as Moses, the prophets, Buddha, Jesus, Mohammed, the suffragettes, and many individual judges of common law and constitutional courts.

24. PHENOMENOLOGY OF NATURAL LAW, *supra* note 8, at 203.

25. *Id.* at 199.

26. *Id.* at 206:

The demands of justice become a *ruling* humanity when a positive rule of

than act out a commitment to the legal order. Hatred and injustice do reign at times and people refuse to see that which the "ethical genius" has revealed. For the sake of the security of the community, therefore, the legal order imposes itself upon all the members of the state—it cannot pretend to acquire a total subjective assent.²⁷ The coerciveness of the law allows some individuals to live at "a relatively human level, a level which they would not reach if they *themselves* had to be just."²⁸ While there is a normative relationship between justice and legality, there is a distinction between what it means to be just and what it means to obey the positive law. The latter is not always a manifestation of the former. Those who allow themselves to merely exist within a "quasi-process" of merely obeying the law through fear of punitive measures have not grasped the significance of why, and how, they ought to live in community. At the opposite pole are those who realize the present demands of justice and who augment the minimum requirements of the law by the practice of love.²⁹

The task of today's legal profession must be, in part, the understanding of the legal system as an historical phenomenon composed of many inventions and discoveries, each, however, serving for only a time in the totality of the human pursuit after justice. To attempt to formulate an everlasting code of law is not only a step toward the impossible, but also a step toward foolishness and, perhaps, injustice itself.³⁰

law, imposed with coercive force and thus embodied in the existing relationships, is formulated as that which imposes itself as a demand of humanity encountered in man's 'yes' to his fellow-man with its actually existing conditions and relations.

27. *Id.* at 219-20:

When . . . humanity is imposed in and through a legal order and begins to rule a society, it cannot be conceived as a subjective ethical sentiment. Such a sentiment can never be imposed from without, for by its very nature it is constituted in and through acts of the subject-as-freedom. The humanity that begins to rule in and through a legal order consists in nothing other than this: certain *external* actions are done or omitted, *even without the sentiment that animated the 'ethical genius'*.

28. *Id.* at 223.

29. *See id.* at 229-30. *See also* EXISTENTIAL PHENOMENOLOGY, *supra* note 2, at 341.

30. *See* PHENOMENOLOGY OF NATURAL LAW, *supra* note 8, at 229:

As soon as an 'invention' is made in the realm of the demands imposed by intersubjectivity, the legal order becomes antiquated, at least in a certain sense. That order then embodies only a phase of humanity's history which has already been passed in the life of the best of a society. If the legal order would not be changed then, this very order would become an obstacle for the authentic life of co-existing men.

II. CIVIL DISOBEDIENCE: A SPECIAL CASE OF THE "OUGHT" OF COEXISTENCE

A survey of the literature of civil disobedience demonstrates the need to isolate this problem and not confuse it with other related issues. Therefore, before proceeding to the philosophical defense of civil disobedience, it is necessary to define the scope of this problem in both an exclusive and an inclusive manner.

A. *What Civil Disobedience Is Not*

1. *Conscientious Objection*

Conscientious objection (CO) can be distinguished from civil disobedience by one defining factor, the element of legality. Conscientious objection is clearly used within the positive law to signify an exemption from the ordinary requirements of a legal duty for those who have demonstrated a priori that the law is repugnant to their moral, religious or even philosophical values.³¹ Because of its recognized status under the law, conscientious objection is not civil disobedience; however, one who does not, or cannot, acquire government recognition of a claim for CO classification might be committing civil disobedience if legal obligations are still refused.

2. *Civil Riot*

Within the recent past rioting has sometimes been the result of the lack of concern on the part of government to focus upon the needs and aspirations of people to become a voice in the decisions controlling their destinies. Seemingly some persons have neither the capacity nor the time to act and wait while the channels of governmental bureaucracy decide upon a course of action which may or may not alleviate the injustices faced in day-to-day existence.³² Like civil disobedience, rioting is violation of the

31. Military Selective Service Act of 1967, as amended, § 6(j), 50 U.S.C. App. § 456(j) (1970). See also the governing regulations of the Selective Service System concerning alternate service for conscientious objectors, 32 C.F.R. §§ 1622.11, 1622.14, 1622.16, 1660 (1974).

Professor Carl Cohen describes conscientious objection as follows:

This device usually takes the form of a clause in certain legislation that makes it possible for those who find the acts that law requires morally intolerable to comply with the law in some alternative (and to them morally unobjectionable) way.

C. COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 42 (1971) [hereinafter cited as COHEN].

32. See *id.* at 48-49:

The riot is one way—violent, destructive, and irrational, but for many concrete and satisfying—of reacting against a set of social injustices for which

law, but unlike civil disobedience and conscientious objection, riot does not follow from motives of considered moral obligation. It is a passionate response to existing circumstances by those who would ignore the legal order and its obligations in frustration and frenzied opportunity. The intent of rioting is destructive, and while the act is often understandable, it is never justified.

3. *Revolution*

The goals of the revolutionary are much broader than the limited objectives of the civil disobedient. "Revolution seeks the overthrow of constituted governmental authority, or at least repudiates that authority in some sphere; civil disobedience does neither."³³ Furthermore, the means of the revolutionary are not restricted: any method at hand is permitted if the cause is furthered, including the employment of arms and the use of terrorism.³⁴ And while the "civil disobedient acts deliberately within the framework of established political authority; the revolutionary seeks to demolish that framework, or to capture it."³⁵

we seem to have no foreseeable effective remedy and no rational problem-solving system that promises remedy.

33. *Id.* at 42.

34. *See id.* at 44:

Civil disobedience is another matter entirely. It does not result in death or misery and rarely entails significant loss of property. It does not seek to unseat an existing government and does not destroy the order or stability of national or community life.

35. *Id.* at 45. It is easy to mistake a revolutionary course of action for civil disobedience; Cohen sees such confusion with respect to the proper labeling of Thoreau or Gandhi. Concerning Thoreau he writes:

His conduct—deliberate violation of the law and submission to arrest without resistance—is typical of civil disobedience. His essay makes it very clear, however, that what he intended was not merely protest but the complete repudiation of governmental authority. He wished the government to "treat him as a neighbor," to recognize him as a "higher and independent power." . . . Thoreau's act may have been a noble one, but in placing himself above the law and denying its jurisdiction over him, he became a rebel [better still, an anarchist]. Although his essay probably introduced the expression into common speech, Thoreau himself did not, in the strict sense defend civil disobedience.

Id. at 45-46. Of Gandhi Cohen says:

It is therefore quite misleading to treat Gandhi as a civil disobedient exclusively. To do so is to err on both sides, missing first the fundamental nature of his aims and achievements, and supposing that civil disobedience typically seeks the overthrow of established authority.

Id. at 47. Rather than seeking the overthrow or the repudiation of existing state power and law, the civil disobedient seeks to better the government and to build it up. The person who has most clearly stood for this position in our time is the late

B. *What Civil Disobedience Is*

Civil disobedience can be defined as "an act of protest, deliberately unlawful, conscientiously and publicly performed."³⁶ This short description is consistent with the more detailed definition found in the *International Encyclopedia of the Social Sciences*:

'Civil disobedience' will here refer to any act or process of *public defiance* of the law or policy enforced by established governmental authorities, insofar as the action is *premeditated*, understood by the actor(s) to be *illegal or of contested legality*, carried out and persisted in for *limited public ends* and by way of *carefully chosen and limited means*.³⁷

It can also be said that civil disobedience, for most of its practitioners, will be in principle a non-violent act.³⁸

C. *A Philosophical Justification of Civil Disobedience*

Because civil disobedience is law violation it would be impossible to justify it within a framework of legal positivism; its moral sanction can only follow from a position of natural law theory. Traditionally the proponents of the natural law have defended and justified the practice of civil disobedience as a response to a positive rule of law which conflicts with the duties demanded by justice. The following will be an attempt to reformulate these defenses within the confines of the phenomenology of justice which was presented earlier; that is, a view of civil disobedience as a special case of the demands required by the fact of human coexistence.

Viewing the legal order as the *sine qua non* of an authentic human society it seems contradictory to assault that view by seeking to defend the idea of civil disobedience. This contradiction is overcome by taking another look at the meaning and function of the legal order as an historical and ever changing phenomenon. As indicated above, the demands of jus-

Martin Luther King, Jr. See, e.g., Dr. King's *Letter from Birmingham Jail*, in M. KING, *WHY WE CAN'T WAIT* 82 (Signet ed. 1964).

36. COHEN, *supra* note 31, at 39.

37. Bay, *Civil Disobedience*, in 2 *INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL SCIENCES* 473 (1968) (emphasis added).

38. See *id.* at 474:

For a variety of historical and psychological reasons, it appears that many believers in civil disobedience see themselves as wholly committed to non-violent means, even in self defense or in the defense of others against murderous assault.

See also John Rawls' definition of civil disobedience:

I shall begin by defining civil disobedience as a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.

J. RAWLS, *A THEORY OF JUSTICE* 364 (1971).

tice are only minimal when compared to the unlimited opportunities of love; nevertheless, these demands are themselves constantly expanding. In the face of these growing obligations, discernible at first only by the best of a society ("ethical genius"), the process of embodying their dictates through change in the positive law itself is not only slow, but often resisted by many.

Once established, it is clearly the case that any legal proposition tends to begin living a life all its own,³⁹ and the efforts of those who see the need for new propositions in particular circumstances are either ignored or fought by the powers that be. While both the system and its officials ought to be working within a climate of continuous renewal, the legal order instead becomes torpid and oppressive. Those who hold back progress in the legal sphere not only prevent a societal life of justice, but are the conditioning agents for a climate ripe for civil disobedient activity.

The problem of civil disobedience is transformed into a duty of creativity for those who comprehend a state of stagnation within the positive legal order. One becomes faced with the moral choice between authentic and inauthentic existence.⁴⁰ Fundamentally, to live an authentic existence is to be true to one's nature as a human person, but the inauthentic life which characterizes much of human endeavor is a life of the anonymous and collective "they."⁴¹ The concept of authenticity aids in the description of the type of law violation which stems from the vision and moral consciousness of an "ethical genius," that is, from one who sees and responds to a duty presently demanded by justice.

The act of civil disobedience, therefore, is the act of authenticity seeking to re-establish the justice of the legal system by calling to the moral attention of the society the injustice of the object of protest. Ordinary and usually inauthentic life will never be the subject of an act of civil disobedience, for the response of inauthenticity before the law is either strict obedience to the letter of the law or, as in the case of common criminals, total contempt and disregard. The inauthentic person does not recognize in the law the profound insights of those authentic moments which have given birth to the legal order; for them obedience follows only because

39. See EXISTENTIAL PHENOMENOLOGY, *supra* note 2, at 349.

40. See HEIDEGGER, *supra* note 2, at 149-68. While the concepts of "authenticity" and "inauthenticity" have special ontological significance for Heidegger, as do all of the concepts found in *Being and Time*, the illumination of them, while not concerned with anthropology or psychology per se, shed light upon the ontic concerns as well, *i.e.*, the concerns of the person involved in day-to-day living.

41. *Id.* at 167: "The Self of everyday Dasein is the *they-self*, which we distinguish from the *authentic Self*—that is, from the Self which has been taken hold of in its own way [*eigens ergriffenen*]."

"they" obey and because "they" determine their obedience with the threat of punishment. On the other hand, the authentic person is one who exhibits a profound individualism which recognizes the truth of justice in co-existence, and the individual whose sense of moral obligation takes priority over any duty of obedience to positive law.

It cannot be said that the authentic person will always, or even often, find it necessary to resort to conscientious law violation as a means of establishing justice. Civil disobedience should come only after all available legal channels have been considered, for the civil disobedient, as "ethical genius," is the same type of individual for whom the establishment of the legal order itself is an act of moral discovery. Even when chosen, civil disobedience is not always *apparently* justified in its own time, but when a true act of "ethical genius" has occurred its justification precedes it. Finally, the act of civil disobedience is not merely a personal moral obligation carried forth, it also appeals to the sense of justice of the society as a whole, seeking a political base from which to instruct those who control the legal order. For this reason, the question of civil disobedience as a legal problem must now be addressed.

III. CIVIL DISOBEDIENCE: LEGAL TOLERATION?

However evident the moral justification might appear, the question of justifying this practice within the legal order itself presents further moral dilemma. Various positions and approaches to the problem are offered in this section. The first approach represents what is probably a majority view among the legal profession; the middle two represent a practical and constitutional approach respectively; the last approach is an historical and societal position which could serve for all cases and is consistent with the aims of justice and law demonstrated above.

A. *Civil Disobedience is Not a Legal Question*

While it is doubtful that a crime of civil disobedience will ever be codified as such within the positive criminal law, it is ridiculous to say that the legal sciences have not given a good deal of attention to the issue, usually against its being a truly legal problem. A good example of the attitude of the legal community was summed up in these words:

While one may have empathy for the views which prompt an illegal act, the action, by definition, must bring forth the arm of the law. On this basis, it can be argued, quite simply, that civil disobedience is *not* a legal problem.⁴²

42. Groll, *Clash of Forces*, in *THE LAW OF DISSENT AND RIOTS* 109, 111 (M. Bassiouni ed. 1971).

Those who subscribe to this position hold that because the legal order must call to its defense the absolute integrity of the *corpus juris*, no intentional violation of the law may be tolerated. Not only should the system refuse to acknowledge a defense of civil disobedience, it must also refuse to allow the notion that there is an offense which can be characterized as civil disobedience and, therefore, treated differently from others. The argument is that civil disobedience is obsolete where government provides for orderly and legal methods of change and protest. Here "[t]he underlying assumption is that it is possible to focus society's attention (including, obviously, the attention of elected officials) upon a [sic] issue through lawful means."⁴³ Given the history of the United States, this is the only assumption which is justified, they say. If it appears that this assumption is failing in any particular circumstance, the response is, "If the issue is thus presented and no action results, it is more probably than less probable that the majority of society desires no action (i.e., they are unsympathetic to the cause)."⁴⁴ At this juncture, they say, the protest should be dropped.

It has been said that the practice of civil disobedience violates the very bases upon which the people are united as a nation. It has even been suggested that civil disobedience poses a greater threat to the state than the injuries which an admittedly unjust law makes possible.⁴⁵ With these ideas in mind, former Supreme Court Justice Abe Fortas concluded, after careful consideration, that there can be no defense before the law for those who would choose to commit civil disobedience: "The motive of civil disobedience, whatever its type, does not confer immunity for law violation."⁴⁶

While most lawyers would not support a general theory which justifies civil disobedience within the law, many would support the moral justifications of this practice offered by philosophers or theologians, preferring to leave the entire problem to be solved outside the law. However, the problem cannot be solved apart from the practical and historical input of people faced with criminal trial and defense responsibilities for the commission of civil disobedience. For the law to ignore this problem is to betray, not only those conscientious men and women who must be de-

43. *Id.* at 115.

44. *Id.*

45. See, e.g., Allen, *Civil Disobedience and the Legal Order*, in *THE LAW OF DISSENT AND RIOTS* 121, 141 (M. Bassiouni ed. 1971): "Accordingly, it is better that even unjust laws be obeyed than violated, for the havoc resulting from disobedience produces evils more profound than any arising from compliance."

46. A. FORTAS, *CONCERNING DISSENT AND CIVIL DISOBEDIENCE* 32 (1968) [hereinafter cited as FORTAS]. See also *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970), wherein Judge Sobeloff writing for the

fended, but also, the idea of justice itself. Even Justice Fortas recognized that the lawyer must at least be willing to have a moral position on the question for he or she is the one most directly confronted with the message raised in the commission of conscientious law violation. Moreover, on the legal side, the question presents an awesome constitutional paradox in the balancing of freedom with responsibilities.⁴⁷

B. *A Question of Discretion*

Some people believe that the law should deal with the question of civil disobedience through the mechanisms of police and prosecutorial discretion.⁴⁸ Undoubtedly the decision to forego full criminal process is recognized as desirable in some cases, but for reasons which go beyond the scope of the civil disobedience problem. For example, discretion may be invoked as a means of conserving time in the administration of justice or as a means of preventing the psychological and sociological effects which arrest or trial may have upon those who might be better served through alternative disposition such as treatment, counsel or guidance.⁴⁹ On the other hand, the use of official discretion has not gone without criticism, even apart from the question of its use in cases of civil disobedience.⁵⁰

Adding to the charged criminal conduct the elements of civil disobedience, there is even more reason to view the use of discretion not to prose-

court says, "[I]t is commonly conceded that the exercise of a moral judgment based upon individual standards does not carry with it legal justification or immunity from punishment for breach of the law." 417 F.2d at 1008.

47. See FORTAS, *supra* note 46, at 17:

[T]he Constitution seeks to accommodate two conflicting values, each of which is fundamental: the need for freedom to speak freely, to protest effectively, to organize and to demonstrate; and the necessity of maintaining order so that other people's rights, and the peace and security of the state, will not be impaired.

Cf. Sweigert, *Moral Preemption: Part III: Claims of "Right" Under the Positive Law*, 17 HASTINGS L.J. 453 (1966).

48. See Hall, *Legal Toleration of Civil Disobedience*, 81 ETHICS 128, 132-35 (1971) [hereinafter cited as HALL].

49. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 5 (1967): "It is not in the interest of the community to treat all offenders as hardened criminals; nor does the law require that the courts do so."

50. *Id.* at 4:

The main dangers in the present system of nontrial dispositions lie in the fact that it is so informal and invisible that it gives rise to fears that it does not operate fairly or that it does not accurately identify those who should be prosecuted and what disposition should be made in their cases. Often important decisions are made without adequate information, without sound policy guidance or rules, and without basic procedural protections for the defendant, such as counsel or judicial consideration of the issues.

cute with doubts. The likelihood of either police or prosecutors making use of their grace is greatly diminished when the criminal conduct is public and pursued concurrently and long afterward by news coverage. Aside from issues of extreme urgency and immediate favorable public support, the community pressures will require a full panoply of criminal process.⁵¹ Recent reaction to the use of executive clemency demonstrates the degree to which the population is unwilling to bypass the normal judicial administration of justice in well known cases.

Furthermore, the usual reasons for the use of discretion are absent from civil disobedience cases. More importantly, the conscientious law violator would probably resist any attempt to settle short of the judicial arena, for, in the final analysis, the civil disobedient intends the message of protest to reach the government as well as the community. This can best be accomplished through confrontation with the government in a court of law. Any useful employment of official discretion in these cases will probably come after trial in the form of sentence mitigation. While such judicial mercy alleviates the suffering of the person convicted, and to this degree it instructs the public regarding the beliefs and attitudes of the sentencing judge, it does not affect the central point in any meaningful way: it does not adjudicate the correctness of the act nor the justice of the law or policy which is the target of protest.

Moreover, vigilant prosecution of all law violators, even those who claim to be civil disobedients, is one way of changing the law. Nothing might be more effective in removing unpopular laws than the strict enforcement of those laws, resulting in their removal in the most radical way, through legislative repeal. Such action is by far more welcome than the wishful reliance upon the discretion of officials whose job it is to arrest and to prosecute.

C. *A Constitutional Question: Conflicts and Uncertainty*

1. *Direct Constitutional Challenge*

Within the past century numerous defendants have sought to challenge the validity of their prosecutions under penal laws considered by them to

51. See, e.g., HALL, *supra* note 48, at 134-35:

American society is extremely legal-minded at present; enforcement of the law simply because it is the law is highly valued as the only means to law and order. While one can hope that the use of discretion by public officials may be more respected in the future than it is at present, and that officials may therefore be encouraged to act upon their own judgment when faced with cases of civil disobedience, this seems unlikely in such a law-centered society. To leave the problem of response to civil disobedience entirely to

be repugnant to the Constitution of the United States.⁵² Because the criminal justice system often requires that one break a law in order to gain the standing required to challenge the validity of that law, many men and women find themselves criminals in the name of the Constitution. Although the definition of civil disobedience was narrowly drawn in the preceding pages, it is not so narrow that it must exclude constitutional challenges, or higher positive law challenges, to seemingly unjust law.⁵³

Law itself, therefore, provides a mechanism by which criminal violation can be ultimately sanctioned. Many have succeeded in having their convictions overturned and the laws under which they were prosecuted declared either invalid *per se* or invalid as applied.⁵⁴ With these cases in mind, it is possible to say that, to a certain extent, "*non-violent revolution is within the positive law.*"⁵⁵

Civil disobedience has sometimes been vindicated as "symbolic speech" within the protection of the first amendment;⁵⁶ however,

the First Amendment can hardly be given an interpretation broad enough to cover most acts of civil disobedience. An act cannot be classified as sym-

the goodwill of government officials would amount to counting upon the least likely element of society to produce a solution.

52. This discussion, of course, also holds true for those cases which challenge the constitutionality of a law or policy under provisions of state constitutions.

53. Not all would agree, however, that court confrontation upon constitutional grounds is a proper response for one claiming the status of a civil disobedient. Some have suggested that the true civil disobedient ought to merely submit passively to the government without resort to moral or psychological force in the public forum. *See, e.g.*, the discussion of this position as it arose among the pacifistic Catholic Worker Movement in the 1950's and 1960's under the leadership of Dorothy Day in J. & R. BANNAN, *LAW MORALITY AND VIETNAM: THE PEACE MILITANTS AND THE COURTS* 6-9 (1974) [hereinafter cited as BANNAN].

54. *See, e.g.*, *Welsh v. United States*, 398 U.S. 333 (1970) (reversed conviction for draft resistance by constitutionally expanding class of those eligible for conscientious objector status); *Cox v. Louisiana*, 379 U.S. 536 (1965) (reversed conviction for obstruction of public passage by civil rights demonstrators); *Peterson v. Greenville*, 373 U.S. 244 (1963) (reversed convictions of 10 black lunch counter sitters—decided under the equal protection clause); *Watkins v. United States*, 354 U.S. 178 (1957) (reversed conviction for contempt of Congress for refusing to answer questions regarding others' associations with Communist Party); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (reversed conviction for holding meeting under auspices of Communist Party in violation of the Criminal Syndicalism Act of Oregon).

55. Freeman, *Moral Preemption Part I: The Case for the Disobedient*, 17 *HASTINGS L.J.* 425, 431 (1966).

56. *See, e.g.*, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *Tinker* the Court struck down a school board prohibition of the wearing of armbands in protest against the Vietnam War; the conduct was considered as "symbolic speech" and within the protection of the first and fourteenth amendments.

bolic speech merely because the agent says that it is an attempt to communicate some message.⁵⁷

Thus, while one might envision the Constitution as encompassing in part the values of the natural law,⁵⁸ the bounds of constitutional review and nullification, unlike the bounds of love which know no law, cannot be said to encompass every, or even most cases of civil disobedience. Even under the broad penumbra of fourteenth amendment jurisprudence, constitutional challenge is only a possibility, and it is clearly not the solution to the problem at hand.

2. *Uncertainty Provided by the Political Question Doctrine*

Recent challenges to the defense policies of the United States concerning the prosecution of the war in Southeast Asia were raised within the context of criminal trials for the mutilation of government records,⁵⁹ interference with the operations of the Selective Service System,⁶⁰ and other related offenses.⁶¹ While these cases also presented first and fourteenth amendment claims, they often concentrated on the question of the legality of the Vietnam War under existing principles of international law to which the United States had assented.⁶² Asserting the supremacy of these principles over the military policies being pursued by the President with the passive "consent" of Congress,⁶³ the defendants soon found that the courts were unwilling to address the issues of international law and instead would rely upon the judicially created "political question" doctrine.⁶⁴

57. HALL, *supra* note 48, at 132. See also *United States v. O'Brien*, 391 U.S. 367 (1968), which unsuccessfully presented the claim that the destruction of one's draft card in protest against the Vietnam War and in violation of Section 12(b)(3) of the Universal Military Training and Service Act, 62 Stat. 604, *as amended*, 50 U.S.C. App. § 462(b)(3) (1970), was "speech" within the meaning of the first amendment.

58. Mr. Justice Douglas wrote in one opinion of the Supreme Court, "The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State." *Girouard v. United States*, 328 U.S. 61, 68 (1946).

59. See 18 U.S.C. § 1362 (1970) and § 2071(a) (1970).

60. See 50 U.S.C. App. § 462(a) (1970).

61. For examples of cases presenting these types of prosecutions see note 63 *infra*.

62. See, e.g., London Agreement, August 8, 1945, 59 Stat. 1544 (1945), E.A.S. No. 472; U.N. CHARTER art. 2, para. 4, June 26, 1945, 59 Stat. 1031 (1945), T.S. No. 993; Kellogg-Briand Pact, August 27, 1928, 46 Stat. 2343 (1928), T.S. No. 796.

63. See, e.g., *United States v. Sisson*, 294 F. Supp. 511, 294 F. Supp. 515, 294 F. Supp. 520 (D. Mass. 1968); *Luftig v. McNamara*, 252 F. Supp. 819 (D.D.C. 1966), *aff'd*, 373 F.2d 664 (D.C. Cir. 1967), *cert. denied sub nom.*, *Mora v. McNamara*, 389 U.S. 934 (1967).

64. See *Baker v. Carr*, 369 U.S. 186 (1962); *Colegrove v. Green*, 328 U.S. 549

The argument has been made that an affirmative defense, analogous to a mistake of law defense,⁶⁵ be available for those who, in good faith, violate the law for the purposes of testing its constitutionality or in reliance on a reasonable belief that the law is unconstitutional.⁶⁶ Referring to those cases which challenged the national policy with respect to the war in Vietnam, Professor Graham Hughes asks, "Is a decision that a matter involves a political question equivalent to a decision that the challenged actions of the executive are legal?"⁶⁷ Distinguishing de facto power from the ultimate question of constitutionality, Hughes agrees with the late Alexander Bickel that the issue is left in abeyance and thereby creates confusion and uncertainty throughout the law profession.⁶⁸ This being the case, one might be justified in relying upon the principled legal opinion that does exist, or which can be inferred therefrom in good faith.⁶⁹

This political question defense, however, does not address itself to all, or even a significant number, of the possible cases of conscientious law violation. The minimal requirements⁷⁰ which Hughes outlines indicate that the issue would arise as an affirmative defense, after a preliminary showing, and would be dealt with by the jury as an issue of fact. All this

(1946); *Coleman v. Miller*, 307 U.S. 433 (1939); *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849).

65. See, e.g., Illinois' ignorance or mistake of law defense provision, ILL. REV. STAT. ch. 38, § 4-8 (1973).

66. Hughes, *Civil Disobedience and the Political Question Doctrine*, 43 N.Y.U.L. REV. 1 (1968) [hereinafter cited as Hughes].

67. *Id.* at 15.

68. *Id.* at 17:

It seems to me that some of those who oppose the actions of the executive with respect to the military operations in Vietnam believe that the courts have somehow abdicated their decision-making functions and so have left open the question of the legality of the acts of the executive to private determination by each citizen in his own legal conscience.

69. Cf., e.g., Douglas, *The Rule of Law in World Affairs*, in *A WORLD WITHOUT WAR* 145 (Washington Square Press ed. 1961); see also Mr. Justice Douglas' dissent in *Mora v. McNamara*, 389 U.S. 934, 935 (1967), arguing that certiorari should not be denied.

70. Hughes outlined the following minimal requirements to plead the "political question" defense:

1. That the defendant had the purpose, not of disobeying the law, but of demonstrating its unconstitutional character.
2. That there was legitimate doubt about the constitutionality of the law as perhaps evidenced by expert testimony about the state of professional opinion.
3. That there was no way short of disobedience by which the defendant could have obtained a determination of the validity of the law.
4. That the disobedience was non-violent.

Hughes, *supra* note 66, at 5.

would only arise, however, upon a final determination rejecting the defendant's constitutional position or a final abstention from deciding it again. The prospects for administering such a scheme seem to be rather poor, and in the final analysis, one would be left in no better position than reliance upon judicial mercy at sentencing time. Under this procedure, if successful, an individual defendant might be excused, but only once; the act itself, however, is never justified at law.

D. *A Question for the Jury: The Power of Nullification*

The history of the Anglo-American jury is at once both mystifying and obvious—mystifying in its numerological problems, yet obvious in its role as a buffer between an accused and the government.⁷¹ A complete historical analysis of the criminal jury is beyond the scope of this Comment, yet even a cursory reading of the literature on juries will reveal that the role of the jury in the trial of a criminal case involving civil disobedience can assume an extraordinary importance, but an importance which the courts would prefer not to be discovered.⁷²

At least from the Middle Ages the right of the English jury under the common law to return general verdicts in criminal cases has been an undoubted prerogative. While this prerogative once meant that the jury was to be the judge of *both* facts and law, an idea which is now all but forgotten, it is still the accepted meaning of trial by jury in criminal cases.⁷³

71. See the historical discussion concerning the role of the criminal jury in *Duncan v. Louisiana*, 391 U.S. 145, 151-54 (1968); see also the descriptive defense of the criminal jury offered by Wigmore nearly a half-century ago:

The jury, in the privacy of its retirement, adjust the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.

Wigmore, *A Program for the Trial of Jury Trial*, 12 J. AM. JUDICATURE SOC'Y 166, 170 (1929).

72. See, e.g., Kunstler, *Jury Nullification in Conscience Cases*, 10 VA. J. INT'L L. 71 (1969). This article reviews the history of jury powers and demonstrates the legality of nullification in both English and American precedents. See also J. ALEXANDER, *A BRIEF NARRATIVE OF THE CASE AND TRIAL OF JOHN PETER ZENGER* (2d Katz. ed. 1972), for the detailed account of a colonial case wherein the jury was moved to assert its power of nullification through the instrumentality of defense counsel, Andrew Hamilton. But see G. WORTHINGTON, *AN INQUIRY INTO THE POWER OF JURIES TO DECIDE INCIDENTALLY ON QUESTIONS OF LAW* (13 The Law Library, New Series, Wharton ed. 1840), which argues that the jury has not the right to decide questions of law and supports a strict application of the maxim *ad questionem facti non respondent iudices, ad questionem legis non respondent juratores* (judges should not decide questions of fact, jurors should not decide questions of law) [author's translation]. Nevertheless, even Worthington recognized that the general verdict could legally cover up findings of law adverse to the instructions of the court.

73. The legal history of England reveals that the jury was originally a body invested with the right and power to judge both the law and the facts of the cases be-

Because the general verdict encompasses the jurors' findings of fact and application of facts to law in the single pronouncement of guilt or innocence and because the court may not question the basis which a jury has for an acquittal, the power of deciding law, as well as facts, remains for

fore them. As early as the thirteenth century this right had been codified, but not without some means of preventing abuse:

And also It is Ordained, That Justices assigned to take Assises shall not compel the Jurors to say precisely whether it be Disseisin or not, so that they do shew the Truth of the Deed, and require Aid of the Justices; but if they of their own head will say that it is [or is not] Disseisin, their Verdict shall be admitted at their own Peril.

Statute of Westminster 2d, 13 Edw. 1, c. 30 (1285). The peril spoken of refers to not only the threat of hell for one's perjured verdict, but also the attaint upon the verdict which was accomplished by a plea to a second, and larger jury. If a verdict was attained, civil and criminal penalties could befall the jurors. Thus, through these threats the courts sought to insure that juries would defer to the wisdom of the judges as to the law of each case. See also Act, 11 Hen. 7, c. 24 (1494).

Several trials for seditious libel resulted in conflicting positions as to the rights and powers of the English jury. See, e.g., Case of the Seven Bishops, 3 Mod. 212, 87 Eng. Rep. 136 (K.B. 1688) (this case is cited in Sparf and Hansen v. United States, 156 U.S. 51, 124 (1895)); Rex v. Shipley (Dean of St. Asaph), 4 Dougl. 73, 99 Eng. Rep. 774 (K.B. 1784). However, in 1792 Parliament passed the famous "Fox Libel Act" which restored to the jury its function to decide the whole issue of a criminal case:

[O]n every such Trial, the Jury sworn to try the Issue may give a General Verdict of Guilty or Not Guilty upon the whole Matter put in Issue upon such Indictment or Information; and shall not be required or directed by the Court or Judge before whom such Indictment or Information shall be tried, to find the Defendant or Defendants Guilty, merely on the Proof of the Publication by such Defendant or Defendants of the Paper charged to be a Libel, and of the Sense ascribed to the same in such Indictment or Information.

32 Geo. 3, c. 60 (1792).

The leading United States case on the authority of juries to decide the law as well as facts is *Georgia v. Brailsford*, 3 U.S. (3 Dall.) 1 (1794). Significant state cases include the Vermont decision in *State v. Croteau*, 23 Vt. 14 (1849), and three Illinois cases which interpreted the statutory grant of power to juries to decide law and facts in criminal cases: *Spies v. People*, 122 Ill. 1 (1887); *Mullinix v. People*, 76 Ill. 211 (1875); *Fisher v. People*, 23 Ill. 218 (1859). The Illinois provision granting this power was Criminal Code, REV. CODE OF LAWS OF ILL., § 176 (1827). Both the Vermont courts and the Illinois courts later reversed these decisions, holding jury power to decide law to be either contrary to the common law or unconstitutional. *State v. Burpee*, 65 Vt. 1 (1892); *People v. Bruner*, 343 Ill. 146, 175 N.E. 400 (1931). Section 176 of the Illinois Criminal Code was ultimately repealed by the General Assembly and replaced with a provision dividing the law and fact decisions between the court and the jury respectively. ILL. REV. STAT. ch. 38, § 115-4 (1973). The authority of *Brailsford* was undermined by the case *Sparf and Hansen v. United States*, 156 U.S. 51 (1895), which held that the Constitution did not require that juries be allowed to decide the law as well as the facts.

Today Maryland seems to be the only jurisdiction which explicitly adheres to the ancient formula for jury trial in criminal cases. The constitution of this state provides that "the Jury shall be the judges of Law, as well as of fact. . . ." MD. CONST.

the jury to grasp at any time. However, the problem of letting the jurors know of their latent authority of nullification seems almost insurmountable in the face of a court's instructions to the contrary.

While the courts, in theory, recognize the legitimacy of the jury's power to nullify the law applicable to any set of facts and evidence, they are unwilling to admit such power in the presence of jurors or allow counsel to argue this issue to jurors. In the case *United States v. Moylan*,⁷⁴ for example, which involved the prosecution of the "Catonsville Nine"⁷⁵ for the destruction of government property, mutilation of government records, and interference with the Selective Service System, the United States Court of Appeals for the Fourth Circuit affirmed the defendants' convictions by denying to them the right to have the jury hear an instruction on their power of nullification; however, the opinion of the court admitted that the jury had such power.⁷⁶ Similarly, the District of Columbia Circuit has recently held that while the power of nullification exists in the criminal jury's inherent right to return an unquestioned verdict of not guilty, the court has no obligation to instruct the jurors as to this power; moreover, it

art. XV, § 5; see also MD. ANN. CODE art. 27, § 593 (1971), which implements the constitutional provision. In contrast to the Vermont and Illinois decisions which held such schemes unconstitutional, the Maryland procedure has been upheld against constitutional attack. *Giles v. State*, 229 Md. 370, 183 A.2d 359 (1961), *appeal dismissed*, 372 U.S. 767 (1963); *Boswell v. State*, 5 Md. App. 571, 249 A.2d 490 (1968). *But cf.* *Brady v. Maryland*, 373 U.S. 83 (1963), wherein the Court says, "Maryland's constitutional provision making the jury in criminal cases 'the Judges of Law' does not mean precisely what it seems to say." *Id.* at 89. See also *Dennis, Maryland's Antique Constitutional Thorn*, 92 U. PA. L. REV. 34 (1943).

74. 417 F.2d 1002 (4th Cir. 1969), *cert. denied*, 397 U.S. 910 (1970).

75. *I.e.*, Mary Moylan, Daniel and Philip Berrigan, Thomas and Marjorie Melville, Thomas Lewis, George J. Mische, John Hogan, and James Darst, nine Roman Catholic war resisters.

76. See 417 F.2d at 1006:

We recognize, as appellants urge, the undisputed power of the jury to acquit, even if its verdict is contrary to the law as given by the judge and contrary to the evidence. This is a power that must exist as long as we adhere to the general verdict in criminal cases, for the courts cannot search the minds of the jurors to find the basis upon which they judge. If the jury feels that the law under which the defendant is accused is unjust, or that exigent circumstances justified the actions of the accused, or for any reason which appeals to their logic or passion, the jury has the power to acquit, and the courts must abide by that decision.

But compare this position with that of a judge who wished to remain anonymous: "I do not think a juror has the right to vote his conscience, so to speak, in reference to his attitude toward the law. And when he is sworn in as a juror he affirms, or makes such oath at the time, to follow the instructions of the judge." BANNAN, *supra* note 53, at 199.

appears that the court should do all in its power to instruct to the contrary.⁷⁷

The attitude of the bench, therefore, with few exceptions,⁷⁸ is to continue to allow the *possibility* of nullification as long as the right to jury trial remains a meaningful part of constitutional liberty. Nevertheless, the possibility is to be minimized by refusing to allow its concept into the court room dialogue. While the feeling of those who would allow open court discussion of nullification is that it would be better for jurors to exercise this power within the framework of proper instruction rather than from improper prejudice or television influence,⁷⁹ one does not expect much change of mind within any foreseeable future on the part of judges. Indeed, the very future of trial by jury seems questionable at this point in history.⁸⁰

While other methods of coping with the problem of civil disobedience within the legal order are either inappropriate or too narrow in scope, the vehicle of jury nullification seems to be designed for this very problem. Nullification recognizes that the civil disobedient must be dealt with not

77. See *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). In this case the court's opinion said, *inter alia*, "This so-called right of jury nullification is put forward in the name of liberty and democracy, but its explicit avowal risks the ultimate logic of anarchy." *Id.* at 1133. Furthermore, the court attempts to justify the hiding of this power from the jury by stating,

it is not inappropriate to add that a juror called upon for an involuntary public service is entitled to the protection . . . that he can fairly put it to friends and neighbors that he was merely following the instructions of the court.

Id. at 1136.

78. See, e.g., the dissenting opinion of Chief Judge Bazelon in the *Dougherty* case:

Nullification is not a "defense" recognized by law, but rather a mechanism that permits a jury, as community conscience, to disregard the strict requirements of the law where it finds that those requirements cannot justly be applied in a particular case.

417 F.2d at 1140. Judge Bazelon favors allowing this mechanism to operate either through the court's instruction to the jury regarding its powers or through counsel's appeal to the jury to exercise its powers.

Consider also the instructions which were given by Judge George Phillips of the Superior Court of Alameda County (California) in the trial of the "Oakland Seven Conspiracy" in 1969. BANNAN, *supra* note 53, at 117-23. Judge Phillips' instructions develop an insight concerning the relationship between motive and criminal intent which allowed the jurors to consider evidence of the defendants' moral commitments in arriving at their verdicts. (The seven were acquitted.)

79. See, e.g., Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, 57 YALE REV. 481 (1968). See also the report of Professor Freund's position, N.Y. Times, Sept. 19, 1968, at 4, col. 4.

80. See cases cited in note 1 *supra*.

only as one who challenges the legal system to a certain degree, but also as one who hopes that the law is broad enough to encompass the demands which justice presents within a particular context.⁸¹ Rather than weakening the state with the risk of anarchy, nullification allows the rule of law to expand when it appears evident that the obligation of coexistence transcends its present expression in the positive legal order. Nullification is a means of incorporating the real and present demands of justice into the administration of the law; and, therefore, the assumption by a jury of the power to nullify the law in a case of conscientious law violation suggests that society, as represented by the jury, has come to see that the insights of the civil disobedient require some reflection in the actual rule of law which the state has established.

CONCLUSION

Shortly after the end of World War II Karl Jaspers gave a series of lectures concerning the role of the average German citizen in the responsibility for the Holocaust.⁸² The question of duty to one's country and duty to obey the law was found to be at the root of any response to his general inquiry concerning the question of guilt. During one of the lectures Jaspers confessed,

. . . our duty to the fatherland goes far beneath blind obedience to its rulers of the day. The fatherland ceases to be a fatherland when its soul is destroyed. The power of the state is not an end in itself; rather, it is pernicious if this state destroys the German character. Therefore, duty to the fatherland did not by any means lead consistently to obedience to Hitler and to the assumption that even as a Hitler state Germany must, of course, win the war at all costs. Herein lies the false conscience. It is no simple guilt. It is at the same time a tragic confusion, notably of a large part of our unwitting youth. To do one's duty to the fatherland means to commit one's whole person to the highest demands made on us by the best of our ancestors, not by the idols of a false tradition.⁸³

Although the recent experience which the United States has encountered throughout the Vietnam-Watergate era reveals a situation in which morality, and justice as expressed in the rule of law, are abandoned in favor of power and security, a national spirit surfaced among the American people which prevented things from going completely according to the plans which emanated from Washington. Accordingly, while a gov-

81. Dean Roscoe Pound wrote some years ago: "Jury lawlessness is the great corrective of law in its actual administration." Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910).

82. K. JASPERS, *THE QUESTION OF GERMAN GUILT* (Ashton transl. 1961).

83. *Id.* at 65.

ernment might seek to flounder in a sea of decadence, a nation need not surrender to the whims of those with power. Unlike Germany in the 1930's and 1940's, America in the 1960's and 1970's demonstrates that blind obedience need not be the only path along which patriotic men and women walk. True to the "demands made on us by the best of our ancestors," the American people, if not their government, will surely preserve the soul and character of their country long beyond our Bicentennial Era. Part of that soul and that character has been expressed in the acts of those who would commit civil disobedience in order to preserve the justice of law; this being the case, civil disobedience will become an even greater problem the day its possibility ceases to exist.

Ronald Patrick Stake