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NONVIOLENT CIVIL DISOBEDIENCE AND POLICE ENFORCEMENT POLICY

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The concepts of civil disobedience as a religious, political, and philosophical doctrine are virtually ageless. Authorities have traced them back as far as the sixth century B.C. Elements of these concepts are contained in the Christian teachings of our modern churches. In the process of establishing the United States as a new nation, its founders relied, in part, on the basic ideas of civil disobedience. Mahatma Gandhi made extensive use of the technique in India in the early part of this century. Martin Luther King, Jr., and others have, in this decade, adapted and perfected civil disobedience to the point of developing a highly effective means of coercive pressure for social change.

When examining "civil disobedience," one must immediately recognize that the formulation of a single all-encompassing definition of the term is extremely difficult, if not impossible. In reviewing the voluminous literature on the subject, the student of civil disobedience rapidly finds himself surrounded by a maze of semantical problems and grammatical niceties. Like Alice in Wonderland, he often finds that specific terminology has no more (or no less) meaning than the individual orator intends it to have.[1] To add further to this general confusion, a number of articles, purporting to examine civil disobedience, have recently been published in popular police journals. These articles have tended to combine *all* protest methods into this category, and without any form of distinction or definition, they denounce such actions as "disrespect for law and order." Such conclusions, without at least elementary analysis of the philosophies involved, tend to cloud and thoroughly distort the true issues.

For the purposes of police policy formulation, civil disobedience can perhaps be best defined as a course of illegal conduct undertaken by relatively homogeneous or like-minded groups for the purpose of obtaining redress of alleged grievances. It is activity conducted outside the framework of rules provided by the established governmental structure. The illegal activity is conducted publicly in the form of a demonstration whose intent is to illicit sympathetic public support. However, it is important that a clear-cut distinction between civil disobedience and other forms of demonstrations be recognized.

Public demonstrations can be divided into three distinct categories. The first category is the *lawful protest demonstration*, wherein the participants have peacefully joined together and are publicly protesting an alleged injustice by utilizing their constitutionally provided rights of speech, assembly, and petition.

The second category of demonstration is *nonviolent civil disobedience.* The participant in this form of demonstration may deliberately refuse to comply with laws he or his group considers unjust. He goes beyond his constitutional rights in dramatizing the injustice, but he does not use any form of physical violence. For the purposes of formulating police policy, noncooperation, nonresistance, nonviolence, passive resistance,

[1] In an excellent book, MILLER, NON-VIOLENCE, A CHRISTIAN INTERPRETATION (1966), the author devotes 127 pages to defining the concept and delineating its range of application.

positive action, nonviolent direct action, and similar varieties of nonviolent philosophies may be included in this classification.

The third category is *violent civil disobedience*, wherein physical force is utilized indiscriminately and in violation of law to accomplish the participants' goal. The ultimate form of this category is riot. Violent civil disobedience will not be examined in this paper.

Public Protest: A Method of Social Reform

With the full-scale implementation of the civil rights movement in the 1950's, an old method of social reform was given new life in the United States. Since that time this nation has seen mass demonstrations and public protests of a magnitude heretofore unknown. The freedoms to speak, assemble, and petition have been utilized in an elaborate fashion—probably well beyond the imagination of the framers of the First Amendment to the Federal Constitution.

These methods of voicing dissent were utilized in the 1950's primarily by racial groups to call public attention to alleged discriminatory practices and to demand their correction. As time progressed, the significant political coercive force of these means became recognized by other groups and organizations with causes. These groups, formal or informal, began adapting the tactics of the civil rights organizations to meet their individual purposes and needs. In recent months, in addition to protest against discriminatory racial practices, the public has seen organized mothers groups demanding pedestrian lights at school crossings and marching in "baby buggy brigades" against highway commissions; prospective draftees denouncing military conscription and United States foreign policy and picketing governmental agencies; deer hunters challenging the conservation commissions' directive allowing the killing of doe and carrying placards on the state house lawns; students demanding more academic freedom and less restrictive rules of conduct from universities; and a host of other diversified campaigns. We can no longer doubt that virtually any group of individuals advocating any change can adapt the technique of mass assembly and expect some degree of effective publicity and success. Thus, in little more than a decade the public protest has become the fashionable effective tool to which the public responds. Some authorities have speculated that these incidents will increase in number and in the number of participants involved.[2] There can be little doubt, on the basis of existing trends, that this prophesy will be correct.

The Police Dilemma

As a result of these activities local police administrators have found themselves placed in extremely sensitive positions. They are faced with decisions that involve the intricate and delicate balance of public order and safety on one hand and individual freedoms on the other. Most administrators recognize that absolute freedom will result in anarchy, but that absolute control will foster tyranny. A new dimension is added to this dilemma by the practice of civil disobedience—the philosophy that "unjust" laws should not be obeyed. Professor Fred Inbau, Northwestern University Law School, views this problem in even stronger terms:

> "With each passing summer it becomes more and more difficult to distinguish between legitimate social protest and flagrant violation of laws designed to protect persons and property. Puzzling and unpleasant though this choice may be for us all, for the police, who are professionally responsible for the maintenance of law and order, it is a cruel dilemma."[3]

The police administrator has very few specific guidelines to utilize in his decision-making process. Very little literature which directly relates to the philosophy of civil disobedience and the development of police enforcement policy exists. Concerning this dearth of material, George Eastman, a former Director of the National Institute on Police-Community Relations, commented: "Effective police handling of singular crisis incidents are numerous but isolated and unrecorded and there has been little pooling of experiences, good or bad, which would allow the development of sound police practices."[4]

It is the writer's intent to examine the various ramifications of nonviolent civil disobedience and to develop insights and guidelines for the use of the police administrator faced with such a confrontation. He does *not* intend to establish that civil disobedience should be acclaimed or denounced

[2] Brown, The Police and Community Conflict 11 (New York: National Conference of Christians and Jews, n.d.).

[3] Inbau, The Thin Blue Line: The Police/The Public 3-4 (Chicago: Kemper Insurance Company, 1966).

[4] Foreword to Curry, J. E. and King, Glen D., Race Tension and the Police (1963).

as a method of social reform, but only to clarify the issues involved in an effort to bring about a greater understanding to aid in the formulation of police policy.

The Right to Dissent

As one of its basic precepts, the American democratic system has maintained that if one does not agree he may verbalize his disagreement without fear of official sanction or vengeance. This right to dissent is legally protected by the Bill of Rights and similar state provisions, which embody prohibitions against interference with free speech, peaceful assembly, and petition for redress of grievances.

The freedom to speak and to debate all sides of an issue is a highly cherished and effective weapon of individual liberty. The right to assemble peacefully with other interested individuals is clearly necessary to promote a maximum exchange of ideas. The resultant petition for redress is the key to orderly change within the society. The existence and proper utilization of these tools is one of the primary distinctions between a democracy and a totalitarian state. Rather than suppressing a minority viewpoint, our government protects and promotes dispute and dissent, regardless of whether the issue is highly controversial or unpalatable to the majority. In *DeJonge* v. *Oregon*, the United States Supreme Court, speaking through Chief Justice Hughes, affirmed these principles: "It is only through free debate and free exchange of ideas that government remains responsive to the will of the people and peaceful change is effected. The right to speak freely and promote diversity of ideas and programs is therefore one of the chief distinctions that sets us apart from totalitarian regimes." [5]

However, one does not have *carte blanche* authority to utilize these freedoms indiscriminately. One does not have unlimited license to talk. Restrictions have been devised in an effort to balance the rights of the individual with the companion considerations of the public interest. *Speech, assembly, and petition, therefore, are subject to regulations.* They are rights which must be exercised in such a manner that their use will not substantially endanger public safety or grossly infringe upon the rights of others.

In this context, municipalities and states are permitted to establish licensing ordinances and statutes, to require parade permits, speech permits and similar authorizations, so long as the law contains clear-cut standards that eliminate the personal discretion of the licensing officer and preclude discriminatory abuse.[6]

Regardless of the nature of the topic, a speaker must refrain from certain types of conduct. He cannot attempt to incite the commission of a crime, such as riot, or advocate the violent overthrow of the government. He cannot utilize clearly obscene language in his presentation. He cannot employ insults in a way that might personally provoke a member of the audience to fight or to commit violence against him. The speaker thus must eliminate any man-to-man insults or common fighting words from his presentation.[7]

When exercising the freedoms of speech, assembly, or petition, the participants cannot commit a breach of the peace. Interference with the normal flow of vehicular traffic or pedestrians, and the blocking of fire lanes or the means of egress and ingress to a business would generally constitute such a breach.

However, the fact that public inconvenience may be involved or some unrest may be created is not sufficient to terminate the protest actions. This was clarified by the United States Supreme Court through Mr. Justice Douglas:

> ". . . A function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profund unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil that it rises far above public inconvenience, annoyance or unrest." [8]

A distinction must be made between nonviolent civil disobedience and the constitutionally protected rights of speech, assembly, and petition. Both are forms of dissent, methods of protest, and

[5] 299 U.S. 353, 365.

[6] Konigsberg v. State Bar of California, et al., 366 U.S. 36 (1961).

[7] Germann, Day & Gallati, Introduction to Law Enforcement 90 (4th Rev., 1966).

[8] Terminiello v. Chicago, 337 U.S. 1 (1949).

means of dramatizing alleged wrongs. Although the practices of nonviolent civil disobedience generally will contain elements of these rights, they serve primarily as a base. Exercise of these freedoms does not, however, constitute civil disobedience. Nonviolent civil disobedience occurs when the practitioner, utilizing the constitutionally protected freedoms as a base, extends his activities until they constitute a breach of the peace or the violation of a specific law.

The Case for Nonviolent Civil Disobedience

In the light of current events, the average American tends to utilize the activities of Martin Luther King, Jr., and his organization as the primary illustration of nonviolent civil disobedience in action. King's doctrines and teachings are based primarily on a distillation of the principles and practices of Henry David Thoreau and Mahatma Gandhi. King, like Gandhi, has added features and depths of "universal love" and converted the principles to a theological doctrine. King's approach will be used in this paper as a primary reference point.

The philosophy of nonviolent civil disobedience is based upon the conclusion that a government, its laws, the actions of its officials, or the socially legitimized practices of its citizens may be "evil." Accordingly, each individual has a right and a duty to evaluate each restriction imposed upon him and fellow citizens, whether by governmental action or by society's informal conduct, to determine its moral propriety. While formulating this judgment the individual may and should seek the counsel of others who exercise an influence on his thinking, but to be intellectually honest, his primary criterion must be his personal conscience. After his personal decision that an "evil" exists, the individual is morally obligated to resist not only the evil, but the instrumentality responsible for it.

Thoreau's position, ably stated in his essay, "Civil Disobedience," is that direct violation is morally sound without resorting to any other form of legal redress. Thoreau said:

> "Unjust laws exist: shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress them at once? Men generally under such a government as this, think that they ought to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil.
>
> .....
>
> "As for adopting the ways which the state has provided for remedying the evil, I know not of such ways. They take too much time, and a man's life will be gone. I have other affairs to attend to. I came into this world, not chiefly to make this a good place to live in, but to live in it, be it good or bad... .If (the law) is of such a nature that it requires you to be the agent of injustice to another, then, I say, break the law." [9]

Martin Luther King, Jr., has adopted Thoreau's general philosophy, but has disagreed with his position concerning the use of the remedies provided by the instrumentalities of government. King says:

> "Direct action is not a substitute for work in the courts and the halls of government. Bringing about the passage of a new and broad law by a city council, state legislature or the Congress, or pleading cases before the courts of the land, does not eliminate the necessity for bringing about the mass dramatization of injustice in front of a city hall. Indeed, direct action and legal action complement one another; when skillfully employed, each becomes more effective." [10]

King advocates a doctrine of nonviolent direct action by marches, demonstrations, sit-ins, and similar methods, which he tells "dramatize" the injustices and prick the consciences of the nation's citizenry. He feels that society must be confronted with the problem and that nothing will change in the social order without the exposure of tensions and prejudices.

King contends that when one disobeys "improper" laws he is in fact showing a respect tor the law. He states:

> "I think a law is just which squares with the moral law and I think a law is injust which is out of harmony with the moral laws of the universe. Any man who breaks the law that conscience tells him is unjust and willingly accepts the penalty by staying in jail to arouse the conscience of the community on the injustice

[9] THOREAU, in KRUTCH, THOREAU: WALDEN AND OTHER WRITINGS 92 (1963); Cf. THOREAU, A PLEA FOR CAPTAIN JOHN BROWN.

[10] KING, WHY WE CAN'T WAIT 42 (New York: New American Library of World Literature, Inc., 1964).

of the law is at that moment expressing the very highest respect for law." [11]

Nonviolent civil disobedients often justify their positions by reasoning that government derives its authority and power from the consent of the governed, and this places the responsibility for evaluating and criticizing the actions of the government upon the individual. Since the maintenance of a truly democratic society depends upon free expression of ideas as to what constitutes the "good of society", the governmental structure must be effectively appraised of the desires of its subjects so that it can maintain policies consistent with them. To the demonstrating group, nonviolent civil disobedience is regarded as the most expeditious method of communication, after other reasonable means have been exhausted or have little possibility of being effective.

King introduces the additional factor of the higher authority of God into the foregoing traditional argument, when he indicates that an unjust law is "out of harmony with the moral laws of the universe." Justification for this position can be found in the Nuremberg and Eichman trials. Many of the defendants in these trials, criminally charged with their acts of atrocity during the war, offered the defense that they owed an allegiance to the legally constituted Nazi government and in the performance of their acts they were executing direct orders of this government and thus could not be held individually accountable. This defense was adjudged unacceptable to the tribunals who indicated that the defendants were obligated to exercise their individual conscience and question the morality or immorality of the action. That they were following orders of a constituted government did not serve as a defense. According to the tribunals a man's first duties were to humanity, conscience, and God.

There can be little argument that resorting to conscience or the traditional higher authority of God is perfectly acceptable in matters of individual moral and religious behavior. Thus, the conscientious or ethical man is highly respected and honored as long as his conscience keeps him within the bounds of the law. A controversy arises when an individual or a minority group applies these personal criteria to the actions of the state or society in general, and implements their dissatisfactions through civil disobedience. The philosophy of nonviolent civil disobedience justifies the imposition of personal or group conscience on society by indicating that the practitioners must be willing to freely accept the consequences of their acts. They must violate the law openly, in the spotlight of publicity, and must not attempt or desire to avoid legal retribution for their offenses. In fact, the imposition of a penalty by the state adds to their religious veneration and self-sacrifice, and may be instrumental in rallying a sympathetic public to the cause. Theoretically, this willingness to accept governmental punitive action entailed by his defiance of the law, exonerates the nonviolent civil disobedient from the charge of being an anarchist.

The philosophy of nonviolent civil disobedience can be summarized by the following basic tenets:

1. Governmental laws and societal practices may be evil.
2. Every individual has the right and duty to evaluate laws and practices in order to establish their moral propriety.
3. After determining that laws or practices are evil or unjust, an individual is morally obligated to resist their imposition.
4. When the traditional legal remedies have been exhausted *or* are ineffective, the individual must employ disobedient behavior to dramatize the injustice before society.
5. The violation or disobedience must be public and nonviolent.
6. The individual must be willing to accept the legal penalities or social criticisms that follow as consequences of his acts.

There is little doubt that it requires a highly motivated and self-sacrificing individual to practice nonviolent civil disobedience under these conditions honestly. In all probability there are only a few individuals who have accepted and embraced by practice this theoretical, theological philosophy of nonviolence. In fact, King acknowledges this by saying:

> "The concept of nonviolence has spread on a mass scale in the United States as an instrument of change in the field of race relations. To date, only a relatively few practitioners of nonviolent direct action have been committed to its philosophy. The great mass have used it pragmatically as a tactical weapon without being ready to live it." [12]

[11] McKee, *King Defends Lawbreaking Tactics*, The State Journal, (Lansing, Michigan), June 20, 1965, page A-13.

[12] King, *op. cit. supra* note 10 at p. 152.

To explore the negative implications of the philosophy of nonviolent civil disobedience analytically, we must view it in a context much broader than the current civil rights movements. There is little doubt that those advocating the concept perceive it as an effective method of social reform to be extended to virtually every area of human endeavor.

Utilizing the precedents established by the civil rights demonstrations and the Viet Nam protests, a practitioner of nonviolence, using the criterion of personal conscience, could theoretically, unlawfully enter into Cape Kennedy and obstruct the firing of a spacecraft, block the launching of a Polaris submarine, obtain and publish military and governmental secrets, refuse to pay his income tax because of moral objections to the war on poverty, refuse to send his children to school, ignore a municipal trash burning ordinance, or similarly oppose virtually any law established by constituted authority.

Viewing the philosophy of nonviolent civil disobedience in this frame of reference, the opponents of the concept raise the following arguments.

Independent Action Results in Anarchy

In a true democracy, personal or minority group judgments are respected. An individual or a minority group has an inherent right to review governmental action and determine whether it is compatible with their personal or moral beliefs. However, upon finding a conflict with their beliefs, they should not unilaterally undertake to violate the law, but should resort to legally provided remedies.

According to its opponents, the philosophy's innate fallacy is that personal or minority group judgment is substituted for lawful determination. The philosophy must assume that each individual or group possesses a high degree of selfless integrity. It must assume that they are thoroughly familiar with all the facts and circumstances that necessitated the enactment of the particular law. It must assume that the group objectively evaluated all the complex factors bearing on the issues, without regard for selfish motives or desires. It must assume that they recognize that all laws are a form of compromise, that they are the result of extensive debate in the various committees of the legislature, serious consideration of chief executives and their staffs, and the scrutiny of a conscientious judicial system, all of whom brought their collective best judgments to the problem. It must assume that the group's judgment is at least comparable to the collective judgments of the governmental system. The opponent concludes that such individuals or groups are rare.

Charles E. Whittaker, retired Justice of the United States Supreme Court, indicated that the practice of obeying "good" laws and violating "bad" laws "simply advocates violation of the laws they [the disobedients] do not like, or in other words, the taking of the law into their own hands . . . No group of men can be permitted, in a government of laws, to take the law into its own hands. This is anarchy, which always results in chaos." [13]

Civil Disobedience Weakens the Foundations of Democracy

Throughout history there is no record of a society or group of men who have lived together any appreciable length of time without restrictions, regulations, or some form of law. Civilized man has found it necessary to establish and to impose sanctions on himself and his fellow man in order to provide personal security and to protect life, property, and civil rights. An elementary analysis of any legal system will readily disclose that, without law, effective law enforcement, and active public support, civil rights are virtually useless.

The opponents of nonviolent civil disobedience indicate that in human society the unrestrained expressions of personal or homogeneous group impulses cannot be tolerated. Every citizen must accept restrictions for the common good. They argue that, since in civilized societies, man, by necessity, had explicitly defined restrictions in a formal legal code and established both the machinery for enforcement and the procedures for orderly change, no person or group may be permitted to disregard or violate the law because such actions result not only in a deterioration of the respect and effectiveness of the legal system, but also in a threat to the foundation of the freedom of every citizen under the system. Whittaker believes that history clearly indicates that the first

[13] Whittaker, *The Dangers of Mass Disobedience*, The Readers Digest 121–124 (Dec., 1965).

evidence of each society's decay appeared in the toleration of disobedience of its laws.[14]

Justice Hugo Black of the United States Supreme Court expressed the following opinion concerning the practice:

> "It is an unhappy circumstance, in my judgment, that the group which more than any other has need of a government of equal laws and equal justice, is now encouraged to believe that the best way for it to advance its cause, which is a worthy one, is by taking the law into its own hands. . .".[15]

United States Senator Robert C. Byrd felt that civil disobedience could not be tolerated by society. He said, "Our country cannot stand firm upon laws that are manipulated like clay."[16]

J. Edgar Hoover, Director of the F.B.I., has generally agreed with these views. He commented:

> "Civil disobedience and the unwillingness of many to resolve their difference by established legal means will surely lead to the destruction of the institutions which protect their freedom. . . . It is folly to hold that a utopia of individual rights will rise from the destruction of respect for the law."[17]

Civil Disobedience Will Increase the Problem of Crime

Some authorities contend that an indirect residual effect of nonviolence is an increase in the crime problem in the country. This theory is given credance by the fact that nonviolent civil disobedience tends to applaud the violation of law and breeds a general disrespect for constituted authority. Hoover states:

> "To my mind there are two frightening aspects to civil disobedience. One, sowing contempt for law and order and promoting pride in law breaking among the nation's youth can only result in an acceleration of our serious crime problem . . . Secondly, where is the line to be drawn against the snowball effect of civil disobedience? Willfully disobeying misdemeanor statutes today and committing felonies tomorrow is a logical regression from a government of laws to an anarchist society."[18]

Many other leading police administrators agree with Director Hoover's views.[19]

Civil Disobedience Groups Are Susceptible to Subversive Infiltration

Another contention frequently raised as an important collateral issue is the possibility of infiltration of civil disobedience organizations by subversive groups whose purpose is converting the organization's "legitimate" goals to their own uses. There have been a number of direct accusations that communists are active in. civil rights organizations. Other commentators have indicated that there is a definite attempt to infiltrate the organizations. There can be little doubt that there is no definite assurance against such an event.[20]

Civil Disobedience Encroaches Upon the Rights of Others

Our system of administering justice is based on the principle of equitably balancing the rights and duties of the individuals involved in a controversy. The legal system does not permit a citizen to exercise "his rights" freely, when that exercise unduly interferes with the rights of others. When an impasse is reached between who has the greater right or to what degree each right may be exercised, an adjudication should be made by the courts to determine who has the overriding interest or where an equitable line of compromise might be drawn. Thus, in theory, the law does not permit an individual to abuse another's rights in the exercise of his own.

Opponents point out that the practices of nonviolence, in many instances, have amounted specifically to this abuse. Many sit-ins are planned so that they do economic damage to the proprietor. The major Birmingham, Alabama demonstrations were strategically timed to interfere with the Easter buying season and thus brought strong economic pressures on the businessmen of the community,[21] resulting in a loss of profits and an interference with their rights to engage in private enterprise. Accordingly, in a vast majority of

[14] *Ibid.*

[15] *Justice Black Dissents in Sit-In Case, Urges Examination*, The State Journal, (Lansing, Michigan), February 24, 1966, p. F-7.

[16] Byrd, *Police Brutality or Public Brutality*, The Police Chief 8–10 (Feb., 1966).

[17] Hoover, *Message From the Director*, F. B. I. Law Enforcement Bulletin 2 (Nov. 1965). Also see *Message From the Director*, F. B. I. Law Enforcement Bulletin 2–3 (May, 1965).

[18] *Ibid.*

[19] Cf. *Here's How Crime Problems Look To Enforcement Officials*, F. B. I. Law Enforcement Bulletin 18–29 (Dec. 1966).

[20] Skousen, *The Communists are Infiltrating the Civil Rights Movement*, Law and Order 10 (Feb. 1966).

[21] King, *op. cit. supra* note 10.

cases, the civil disobedient, through his illegal action, interferes at least to some degree with the legal rights of others.

Legal Remedies are an Adequate Alternative to Civil Disobedience

All discrimination, public or private, which violates the United States Constitution is redressable in the court system. Congress has enacted sweeping pieces of civil rights legislation. (Proponents of non-violence indicate this occurred as a result of their actions.) Intricate detailed procedures have been established to assure adequate enforcement of this law. Legal assistance, through the United States Attorny General's Office, is available on request. The legal system of the United States today is clearly in an excellent position to breathe life into Cicero's axiom of "where there is a wrong, there is a remedy."

There can be no doubt that the legal system is time consuming and that it cannot immediately correct social situations that have developed over a period of decades. But to many there is little question that its remedies are just and sure and serve as an adequate alternative to chaotic social effect engendered by civil disobedience.

Morris I. Leibman, an attorney and chairman of one of the American Bar Association's major committees, stated this position as follows:

> ". . . The concept of righteous civil disobedience is incompatible with the American legal system and society, which more than any other provides for orderly change. I cannot accept the right to disobey when the law is not static and effective channels for change are constantly available." [22]

The case against non-violent civil disobedience has been summarized in a statement made by Lewis F. Powell, former President of the American Bar Association:

> "However successful the techniques of disobedience and coercion may be in the short run and whatever the justification, they are self-defeating and imperil individual freedom in the long run. An ordered society cannot exist if every man may determine which laws he will obey and if techniques of coercion supplant due process." [23]

[22] Leibman, *Civil Disobedience: A Threat to Our Law Society*, A. B. A. J. 645 (1965).

[23] Powell, *The President's Annual Address: The State of the Legal Profession*, A. B. A. J. 821 (1965).

The Police Administrator and Non-Violent Civil Disobedience

The police administrator should have a thorough understanding of the concepts of civil disobedience and the general arguments for and against its practice. He should be able to discuss analytically the various components and issues involved. However, in his official capacity, the police administrator should not become involved in rendering moral judgments concerning the propriety of such actions. He should not be actively engaged in advancing or repressing the cause of the protest. The police philosophy in such matters should show an understanding of the social conflict, but should be concerned primarily with the maintenance of civil order and public safety, while at the same time assuring that maximum lawful expression of the individual is permitted.

In dealing with non-violent civil disobedience the police are confronted with a mass of humanity, who, for the most part, is not using force in their violation of the law, and who is not attempting to avoid the consequences of police action. Faced with this type of incident, the police administrator's first step would appear to be a re-evaluation of the traditional police role of "enforcing the law."

There is a common stereotype of police as ministerial officers who mechanically perform enforcement tasks which have been legislatively dictated. Their function is too often viewed as nothing more than the gathering of evidence concerning a criminal act and making an arrest whenever sufficient evidence exists. Police themselves tend to reinforce this conception by denying that they exercise discretion and by a general failure of police administrators to specify the criteria upon which their officers base their decisions to arrest, etc. Contrary to this belief, the police officer today has broad discretionary powers in deciding whether or not to arrest. In individual cases, decisions not to make an arrest are made routinely by officers because of the nature of the offense, the circumstances of its commission, or a multiplicity of other factors.[24] Generally, department policy *requires* the officer to arrest only in cases of serious misdemeanors or felony violations. In other cases, the police officer, utilizing his own personal judgment, may choose

[24] Cf. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society (1966); and LaFave, Arrest, The Decision to Take a Suspect into Custody (1965).

to (1) ignore the offense, (2) warn the violator verbally, (3) issue the violator a written warning, (4) issue the violator a summons which requires a court appearance or direct payment of fine, or (5) physically arrest the violator and confine him until a proper bond is posted.

No one can argue that police officers should exercise power outside the boundaries defined by the legislature, such as making an arrest for an act or omission not defined as a crime. The debatable point is whether police officers may exercise discretion within the boundaries, and thus not make an arrest for an act or omission that the legislature has defined as a crime. Opponents of the use of police discretion hold fast to the position that police functions are ministerial and that the rule of law requires a freedom from the exercise of any arbitrary power. They indicate that the discretion to forego an arrest and thus thwart punishment is just as arbitrary as exercising power against acts which the legislature has not deemed improper.

The acceptance of the philosophy that the police function is solely ministerial requires that one subscribe to a policy of complete enforcement of all criminal law. This complete enforcement implies that police are required to enforce all criminal laws and city ordinances at all times against all violators regardless of the circumstances. It devoids the officer of any authority to ignore violations or to warn offenders. It relegates the police officer to mechanically enforcing the law with the coldness of a computer. Such enforcement policy, aside from being impossible to execute because of limited resources, would be intolerable to the public and restrict the individual's activity at virtually every quarter. It must be recognized that the goals of the police may be accomplished by means other than the application of a strict enforcement policy. As Herman Goldstein, former executive assistant to the superintendent of the Chicago Police Department, points out:

> "Discretion is often exercised by the police in a sincere effort to accomplish a social good. This is a sort of humanitarian gesture in which the police achieve the desired objective without full imposition of the coldness and harshness of the criminal process." [25]

[25] GOLDSTEIN, *Full Enforcement vs. Police Discretion Not to Involve the Criminal Process*, Address before the Ninth Annual National Institute on Police and Community Relations, Michigan State University, May, 1963, Mimeographed, p. 5.

For the most part, police administrators throughout the country have stood fast with the view that they do not exercise discretion and that their responsibility is the enforcement of the law under conditions established by statute and ordinance. Commenting on this situation, Goldstein says:

> "What is the position of the average police administrator in these deliberations? He is most likely to support the view—somewhat hesitatingly—that he is committed to a policy of full enforcement. It is, after all, the policy most commonly enunciated by police agencies. In contrast, the mere suggestion that a police administrator exercises discretion in fulfilling his job may be taken as an affront—an attack upon the objective and sacrosanct nature of his job—that of enforcing the law without fear or favor. Here too, there is a little hesitation—an awareness that discretion must be and is exercised. But like planned parenthood, it may be something you practice; it is not something you admit or even discuss." [26]

Finding themselves in the dilemna that Goldstein aptly analyzed, most police administrators have reacted with the traditional policy statement of full law enforcement against non-violent civil disobedients. The police pattern most widely accepted and acclaimed is one of strict enforcement with all parties treated equally under the law. An example of this policy is the guidelines utilized by the New York City Police Department:

The Police Position on Preserving the Public Peace

1. The police are the representatives of the government of laws, not men.
2. The police have a sworn duty to enforce the laws—impartially, objectively, and equally.
3. The police are aware of the significance of the surge for equal rights. They recognize and respect the right of the people to express their views on matters of public concern.
4. The police will protect the rights of all to peacefully assemble and petition. They will brook no interference with these rights by anyone. Their impartial role is clear and set by law.
5. The police will also protect the rights of the people to pursue their lives and lawful occupations free from illegal interferences.
6. The police will take appropriate action under law when the rights of anyone are obstructed.
7. It must be clearly understood that sit-

[26] *Ibid.* p. 2.

downs or other acts which prohibit the safe and peaceful movements of persons and vehicles in the public streets, and prevent access to buildings are a violation of law and those who use these unlawful means to gain their ends are subject to arrest.

8. It must be clearly understood that police not only have the duty but the obligation to meet illegal action with legal action to the degree necessary to restore and maintain law and order.

9. It must be clearly understood that the police will not allow themselves to placed in the false position of 'aggressors'. The police are aware of—and trained to assume—their full responsibilities; they expect others to remember and recognize they also have responsibilities.

10. The police will serve the public peace by every legal means. They expect public cooperation, compliance, and understanding.[27]

Others have stated the full enforcement position in much stronger terms:

"The racial demonstrators on the move in the streets are seeking to go to jail.... To arrest them is the only honorable thing to do.... The policeman has a sworn duty to perform. When he is aware that a law is being violated, he must take the necessary action to stop it.... If the law is on the books, he is sworn to enforce it."[28]

The foregoing philosophy of strict enforcement, although perhaps somewhat idealistic and inflexible, is perfectly legal. Those administrators adopting this policy have acted well within the scope of non-violation of individual constitutional rights.

The majority of police administrators across the nation attempt to face these problems in a legally-oriented manner. However, others have increased the complexity of the situation through their own inappropriate action. The United States Commission on Civil Rights in a report to the President stated:

"... The Commission's investigation disclosed that local officials in a number of Southern communities suppressed constitutionally protected public protests by arrest and prosecution. ... Local officials in communities studied by the Commission in Mississippi, Alabama, Florida, and Georgia did not permit persons to exercise the right to assemble peaceably to make known their grievances. Civil Rights demonstrators were repeatedly arrested, dispersed or left unprotected before angry crowds, without regard for the right to public protest assured by the Constitution."[29]

That some police departments deprive individuals of their constitutional rights reflects upon the entire police profession. Reports of such actions are highly disturbing to the progressive chief of police who has conscientiously attempted to develop a legally constituted, community-oriented enforcement policy. He realizes that because of relatively isolated, but highly publicized acts in another city he and his men will share the brand of "gestapo" and receive at least the residual effects of charges of police brutality and suppression. A respect for law and law enforcement cannot exist in this type of atmosphere. It further alienates the protesting group from the police and in addition projects a bad general image of the police across the nation and a bad image of the nation around the world.

A relatively small group of police administrators has avoided both the illegal tactics referred to in the Civil Rights Commission's report and the rather inflexible strict enforcement policies of the traditional school. They have experimented to determine if free expression, public order, and "social good" can exist concurrently without repressive police action. These administrators have followed a policy of extreme tolerance, fully cooperating with lawful demonstrations and ignoring minor misdemeanor offenses committed by civil disobedients; they take specific arrest and enforcement actions only when public danger is involved.

The police administrators of the Metropolitan Police Department of St. Louis, Missouri, have utilized this approach with excellent success. Despite the fact that St. Louis has experienced approximately 170 demonstrations since 1963, very few arrests have been made. One of the demonstrations took place in the downtown area during the 5:00 p.m. rush hour. Instead of making mass arrests the police rerouted traffic. Their policy has been that unless there is serious difficulty no arrests will be made. The following statements appeared

[27] The New York Municipal Training Council Bulletin, July–August, 1965. The same policy statement was adopted by the Chester, Pennsylvania Police Department, see STAHL, SUSSMAN, AND BLOOMFIELD (Editors), THE COMMUNITY AND RACIAL TENSION 37 (1966).

[28] TOWLER, THE POLICE ROLE IN RACIAL CONFLICTS 3, 109–110 (1964).

[29] United States Commission on Civil Rights, *Law Enforcement: A Report on Equal Protection in the South*, Washington, D.C.: U.S. Government Printing Office, 1965, pp. 173–175.

in an unpublished administrative order of the St. Louis department:

> "It is the policy of the Department regarding racial demonstrations that no direct police actions will be taken in the absence of violence, orders of the court or emergency situations wherein life or property is endangered.... Generally in such instances the officers assigned to the scene will be plain clothes personnel.... In the absence of violence or emergency, no action will be taken unless warrants are issued. Under these conditions the officer shall only observe and report existing conditions." [30]

Such a policy does not imply an apathy or lack of preparations for an event that might occur. As long as the demonstration remained legal or in the nonviolent civil disobedience category and bystanders remained orderly, no uniformed officer appeared on the scene; to an uninformed observer it would appear that no police action was present. But if the demonstration went beyond these permissive stages or non-demonstrators became disorderly, a task force organization was available to take immediate action to meet whatever difficulty arose.

This philosophy was again practically demonstrated during the Republican Convention at the Cow Palace. Concerning the numerous "lie-ins" and traffic blockage by civil rights groups, Chief Joseph Kimble, San Carlos, California Police Department states:

> "We had decided to consider all this as similar to the conditions at a football game, where rooters are not necessarily arrested because they tear down the goal posts. We treated it the same way—no arrests. Finally as the ground got colder... the demonstrators arose and went home." [31]

There is a growing movement outside the police circle for an implementation of the practices used by the police in St. Louis and San Carlos. Allen Knight Chambers, President of the NAACP Legal Defense and Education Fund, Inc., indicated that in some instances the absolute right of the public to free passage in streets and other thoroughfares might be suspended if the results would permit an effective demonstration along peaceful lines.[32] J. Griffin Crump, Executive Director of the Indianapolis Human Rights Commission, approves the suspension or waiver of technical laws protecting the public's right to use sidewalks, streets, and other thoroughfares.[33] Eric M. Mann, Field Secretary of the Congress of Racial Equality, feels that police departments should evaluate the laws they are to enforce and at least give the protestors the benefit of the doubt.[34]

There appears to be growing legal precedent for such a police policy. Two Supreme court cases have indicated that "a non-forcible attempt to gain admittance or remain in a place of public accomodation in defiance of a policy of segregation is immune from prosecution by state authorities." [35]

Opponents of the foregoing philosophy will raise the argument that "passive law enforcement" in response to passive or non-violent demonstrations requires the police administrator to forsake his oath and cast aside the responsibility of the police to "enforce the law." It must be clearly recognized that enforcement is a prime police duty but there are other police goals of equal or overriding importance. One such goal is the maintainance of public safety. In a demonstration, as a practical matter, it must be recognized that feelings and perhaps tempers are relatively high. If the group is permitted to release its emotions through relatively harmless singing, chanting, and speeches during the course of the "lie-ins," "sit-ins," etc., the end result may be nothing more than public inconvenience. However, if the police take massive repressive action prior to the demonstration or extensive enforcement action during its tenure, they may well furnish the spark that may ignite a potentially volatile situation. When this occurs, enforcement and public inconvenience are no longer the primary issues. The administrator now may be responsible for controlling a major violent disturbance that endangers the public, not only during initial stages, but also one which leaves residual ill-will which may flare up again at any time. Faced with these alternatives, the responsible administrators should choose to establish a passive enforcement policy and permit a degree of public inconvenience, in order to prevent the public from being endangered through a hazardous incident stimulated by police activity.

Professor Frank Remington of the University of Wisconsin ably pointed out the fallacies of police

[30] Metropolitan Police Department, St. Louis, Missouri, *Supplement One to Administrative Order One* (Unpublished, 1963).

[31] KIMBLE, *Patience and Planning, The Key to Controlling Demonstrations*, LAW AND ORDER 72 (Sept. 1965).

[32] STAHL, SUSSMAN, AND BLOOMFIELD, *op. cit. supra* note 27 at p. 75.

[33] *Ibid.*

[34] *Ibid.* p. 203.

[35] Hamm v. City of Little Rock, Luper v. Arkansas, 379 U.S. 306, (1964).

adherance to the philosophy of strict enforcement in cases. He said:

> "Police insistence that their responsibility is to fully enforce the law is to perpetuate a myth which is impossible of achievement and would be undesirable if it could be achieved. At times this may be an understandable public relations position, but has seriously adverse consequences for police if they fail to recognize that theirs is a responsibility for the development of an adequate and fair law enforcement program within legal limits." [36]

[36] REMINGTON, *Social Changes, The Law, and The Common Good*, PAPERS PRESENTED AT THE TENTH ANNUAL INSTITUTE ON POLICE AND COMMUNITY RELATIONS, East Lansing, Michigan: Michigan State University, 1964, p. H-11, (Mimeographed).

Conclusion

The enforcement function is an extension of the executive branch of government and directly subjected to the supervision and control of the city manager, the city council, the town board, the commission, the alderman, or a similar executive authority. In such a position the police frequently find themselves enforcing the broad policies of the community administration and thus maintaining or attempting to maintain the status quo. The protesting group is rebelling against the status quo, and consequently protestors' interest and police interest come into direct conflict.

When this situation exists, the police quite frequently become one of the targets of the protestors' attack. Unwittingly, by reacting in a traditional manner, the police contribute more to the problem than to its solution. Although acts of non-violent civil disobedience may appear to be spontaneous or poorly organized, quite often they have been developed with the same care and skill a military general utilizes in planning and executing a major maneuver. Many non-violent campaigns include provisions for a transportation corp, legal opinions on the existing city codes, data on bail bond situations and financial assistance in reserve for necessary bail bond contingencies, workshops and training sessions for participants, meticulous surveys of main streets, march routes, means of egress and ingress of picketing sites, and complete layouts of business establishments, and selection of primary and secondary targets.[37]

Included in the strategy is a desire to be arrested. Mass arrests serve the general puposes of the movement and add to the amount of publicity for the cause, and often against the police. If the police are "brutal" in their action, their action serves to further martyr the "victim" and possibly invoke additional sympathy. For the disobedient, going to jail is no disgrace, but actually is considered a "badge of honor." [38] Concerning mass arrest policies, William Miller comments:

> "Officials who imagined that they were maintaining law and order may see themselves cast in the role of oppressors and find the image uncomfortable . . . Going to jail potentially raises the question whether the offense at issue is so vital to the existence of the opponent's way of life that its whole system of law enforcement must be made to hinge on it." [39]

Mahatma Gandhi pressed the point even stronger by indicating, "Civil disobedience then emphatically means our desire to surrender to a single unarmed policeman. Our triumph consists in thousands being led to the prisons like lambs to the slaughter house." [40]

Time Magazine in rather picturesque language, perhaps indicated the proper direction for law enforcement by the following analysis:

> "Whenever one of the Rev. Dr. Martin Luther King's non-violent civil rights drives is met by white non-violence, the result is something like driving a tack into a marshmallow: there is very little impact." [41]

Although traditionally the police have not been a revolutionary or innovating social force, the competent administrator, utilizing and adapting his discretionary authority and being a practicing social scientist, can take action to minimize the degrading repercussions of an ineptly policed demonstration where elements of non-violent civil disobedience are involved.

[37] KING, *op. cit. supra* note 10, at p. 55-56.

[38] *Ibid.* p. 30.

[39] MILLER, *op. cit. supra* note 1, at pp. 153-154.

[40] GANDHI, M. K., NON-VIOLENT RESISTANCE 172 (1961).

[41] *Civil Rights*, TIME MAGAZINE, February 19, 1965, p. 23.