

the peace and stability of our society. Even a bad law is better than no law at all. Even tyranny is preferable to anarchy. The worst tyranny of all is the indiscriminate tyranny of the vigilante society.

No group has a greater stake in lawful behavior and public devotion to law and order than a minority. No group has greater need for the rule of law than a minority. Law is the minority's assurance of protection from the tyranny of the majority. Whenever a minority takes any action in defiance of law it is sowing the seeds of its own destruction, since the evasion of any law weakens the authority of all law. The United States Supreme Court gave impressive expression to this thought in its opinion affirming contempt convictions and jail sentences for distinguished demonstrators who had violated court injunctions against a street demonstration:

One may sympathize with petitioners' impatient commitment to their cause. But respect for judicial process is a small price to pay for the civilizing hand of law, which alone can give abiding meaning to constitutional freedom.²⁷

If it is true that a minority is obligated by duty and self-interest to give obedience and respect to law, it is no less true that the majority is responsible to provide the rule of law. When public officers ignore the law, their conduct is a reproach upon the majority to whom they are answerable. If the majority demands that a minority give obedience to law, then the majority must spare no effort to assure that all men — public officers as well as private citizens — subordinate personal desires and yield obedience and allegiance to the rule of law.

²⁷Walker v. City of Birmingham, 338 U.S. 307, 321 (1967).

THE RULE OF LAW AND THE DILEMMA OF MINORITIES

I. Daniel Stewart

Civil disturbances are rarely born of frivolous causes. Human beings are more inclined to suffer grievances than to pit themselves in what usually appears to be a hopeless battle against the authority and power of the state. As symptoms of deeply felt injustice by members of the body politic, civil dis-

orders require careful analysis of their causes, the failure of the political system to deal adequately with them, and remedies which are consistent with the principles for which this country stands.

The past half decade has witnessed civil disorder and dissension within the country that has been unprecedented since the civil war. Racism, poverty, and anti-Vietnam war sentiment have in large measure been the causes of numerous mass protests and civil disturbances — some violent and some nonviolent, and some within constitutional protections and some without. Although the challenges posed by the various kinds of civil disobedience to the legal and political systems are in some respects similar, it is the racial problem (as aggravated by poverty) that continues to dominate the scene, and it is primarily to the issue of civil disobedience in that context, specifically as highlighted by the other Roundtable articles by Royal Shipp and Dallin Oaks, that these comments are addressed.

The articles by Shipp and Oaks detail in part the gross injustices which have given rise to the Black protest movement, and it is against this background that Oaks asserts two basic propositions which elicit challenge. First he argues that: "Law is the minority's assurance of protection from the tyranny of the majority. Whenever a minority takes any action in defiance of law it is sowing the seeds of its own destruction, since the evasion of any law weakens the authority of all." The second position is that law should be "the invariable norm of personal conduct" and if it is not "we will have relinquished the peace and stability of our society." "[E]xcept for limited test-case purposes, civil disobedience is not acceptable social behavior."

TYRANNY OF THE MAJORITY

No Black American would accept Oaks's unqualified position that law is a minority's assurance against exploitation by the majority. Segregation, discrimination, disenfranchisement, lack of physical security, denial of justice in the courts, and economic exploitation found legal sanction for many decades in this country. It was not until 1954, almost one hundred years after the Emancipation Proclamation, when the Supreme Court decided *Brown v. Board of Education*, declaring separate but equal facilities in schoolrooms unconstitutional, that the nation really began to reverse its pervasive racist policies of the past.

The inability of Negroes to escape the shackles imposed by racism arose from a basic dilemma that not infrequently confronts minority groups in a democracy. Majority rule is a means of exercising power. Nothing inheres in the principle to assure that its operation will be based on justice and morality. It only assures that those who constitute a majority will be free from government by a few, but the minority has no assurance against an unjust exercise of power. Its protection lies primarily in the prudence and decency of the majority. In homogeneous and egalitarian societies, majorities and minorities tend to be transient since they are not rigidly established on arbitrary bases, such as social or racial status of citizens. The possi-

bility that members of a majority may later be in a minority acts as a self-imposed restraint on the exercise of power and thereby tends towards fairness in the conduct of political business. But when a part of the community succeeds in establishing itself as a permanent majority, that restraint disappears.

The dilemma of the minority was stated by John Stuart Mill in his famous essay, "On Liberty":

It was now perceived that such phrases as "self-government," and the power of the people over themselves," do not express the true state of the case. The "people" who exercise the power are not always the same people with those over whom it is exercised; and the "self-government" spoken of is not the government of each by himself, but of each by all the rest. The will of the people, moreover, practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority; the people, consequently *may* desire to oppress a part of their number; and precautions are as much needed against this as against any other abuse of power.

The difficulty was a matter of great concern to the founders of the Republic. An important, but only partial, solution was the constitutionally imposed limitations on the powers of government. The doctrines of separation of powers and delegated powers and certain prohibitions against specific kinds of arbitrary action, such as prohibitions against bills of attainder, ex post facto laws and suspension of the writ of habeas corpus except during rebellion or invasion, established important limitations upon majoritarian rule. The Bill of Rights and other amendments established still further limitations, the most important of all being the First Amendment rights of free speech. The efficacy of these rights rests upon the assumption that man is basically rational and morally sensitive and that society will respond to appeals for a redress of injustice. Free speech may, therefore, be a means of changing the balance of power or at least effectuating a change in an oppressive policy.

However, depth psychology, with the insights it has provided into subconscious motivations, as well as historical events since the eighteenth century, have tarnished the rationalistic concept of man on which the concept of free speech relies so heavily. As diligent as the courts may be in protecting the right to speak, there is no power in the courts or any other institution of the body politic to compel an unwilling majority to listen to the grievances of a minority, no matter how rational the suasion or how clear the moral principles. Inertness, racialism, greed lacquered with righteous slogans, and rigid devotion to ideological concepts have been responsible for society's refusal to acknowledge merit in the plea of a minority. Cultural and individual pathology magnify the difficulty of appealing to the rational sense of the community at large. Subconscious defense mechanisms may distort reality and obscure the real reasons for society's intransigence. For example, the conflict between a deep-seated racialism and a Christian self-concept have been resolved by adopting grotesque myths of Negro racial inferiority, thereby permitting a sense of equanimity that accommodates both. Obviously, appeals

to the consciences of persons who recognize no inconsistency between their immoral acts and their consciously held moral standards are not susceptible to persuasion.

John Stuart Mill's observations concerning the tyranny of the majority in a democratic society are directly pertinent to the history of this country's racial problems.

[Society's] means of tyrannising are not restricted to the acts which it may do by the hands of its political functionaries. Society can and does execute its own mandates: and if it issues wrong mandates instead of right . . . it practices a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself.

The unjust treatment of the Negro both before and after emancipation needs no lengthy documentation. Society has pressed its policy on all fronts by using the organs of government as well as business, religious, and social organizations. Public institutions and officers have supported or condoned slavery, lynch law, denial of justice in the courts, refusal of voting rights, police brutality, lack of education, intentional disruption of the family structure (overtly during slavery, and since then through welfare and other laws) and various measures resulting in widespread poverty with all its attendant evils.

Such state action does not begin to describe the truly pervasive dimensions of the oppression, the extent to which, as Mill said, "the soul itself" has been enslaved. One knows his enemy when the state is the oppressor, and the individual may find dignity in the courage of his opposition. When, however, private institutions and private attitudes are mobilized to inculcate a belief of inferiority and lack of worthiness as a human being in the oppressed, then is the most terrible damage done. For many decades (indeed centuries) no avenue of escape for the Negro was left open by society. On all fronts private institutions and attitudes conspired with state action. Racist humor, textbooks that have ignored or suppressed Negro culture and Negro contributions to the history of the United States, the refusal of newspapers and other media of communication to treat the Negro community as part of the Nation by not reporting newsworthy events in the Black communities (except crime), the use of given names in addressing Black people, private discrimination in employment and housing, the required stepping off sidewalks to let Whites pass, and advertising that glamorizes only White people, have been a few of the demeaning, unofficial means which have pronounced society's judgment of the inferiority of Black people.

James Baldwin poignantly described the impact on one Black man in his "letter to My Nephew on the One Hundredth Anniversary of the Emancipation" in his book, *The Fire Next Time*:

Now, my dear namesake, these innocent and well-meaning people, your countrymen, have caused you to be born under conditions not

very far removed from those described for us by Charles Dickens in the London of more than a hundred years ago.

. . . .
This innocent country set you down in a ghetto in which, in fact, it intended that you should perish. Let me spell out precisely what I mean by that, for the heart of the matter is here, and the root of my dispute with my country. You were born where you were born and faced the future that you faced because you were black and for *no other reason*. The limits of your ambition were, thus, expected to be set forever. You were born into a society which spelled out with brutal clarity, and in as many ways as possible, that you were a worthless human being. You were not expected to aspire to excellence: you were expected to make peace with mediocrity. Wherever you have turned, James, in your short time on this earth, you have been told where you could go and what you could do (and *how* you could do it) and where you could live and whom you could marry. . . . The details and symbols of your life have been deliberately constructed to make you believe what white people say about you. Please try to remember that what they believe, as well as what they do and cause you to endure, does not testify to your inferiority but to their inhumanity and fear.

The devastation of the human spirit described by Baldwin must be beyond the empathy of those who have not experienced it; however, no knowledgeable person can now fail to understand the truly explosive anger, frustration, and bitterness of people who have seen their parents' and their own lives devastated by poverty and racialism and who now demand that at least their children be released from the yoke of injustice.

Historically it simply has not been true for Negroes that there have been, as Oaks says, "almost unlimited opportunities for free speech, lawful protest, and peaceful efforts to adjust grievances and change legal rules by democratic means." Indeed, it was the absence of such means that gave rise to the Black protest movement which initially took the form of nonviolent disobedience under the leadership of Martin Luther King. Patterned after the Gandhian tradition in which the viability of the movement depends upon the moral strength behind it, the participants in the movement openly defied laws thought to be unjust or unconstitutional and acquiesced in the penalties assessed to dramatize the injustice of the law and thereby appeal to the moral sense of the community at large to change the law. The objective was not the overthrow of the established legal order by revolution, but rather reform. King's nonviolent demonstrations, freedom rides, and sit-ins in violation of state and local law were directed against specific discriminatory state laws and policies that were thought unjust and unconstitutional, but in large measure these acts were not in fact civil disobedience, for many of the prosecutions brought against the participants were ultimately held by the courts to constitute unlawful invasions of First Amendment free speech or were based on unconstitutional state segregation laws and policies.

However, it was not until the vicious dogs of "Bull" Connor and the brutal conduct of other state officials become a means of communicating with and reaching the conscience of White America that the hideousness of

the racial problem became apparent to many citizens. But lethargy, disinterestedness and the racist tradition continued for the most part to prevail in the White community, and the rationality and discipline of the nonviolent movement was displaced by fierce, irrational emotion that erupted in the lawless rioting in city after city, beginning with Watts in 1965. These rebellions were not the handiwork of organized anarchists or communists, as some claimed, but were the spontaneous and generally unpremeditated acts of a large number of citizens whose frustration and sense of hopelessness exploded into frightening acts of violence that severely strained the seams of society. Yet, even rioting can be a means of communication — perhaps a last resort means — but nonetheless, a statement that accumulated injustices have driven men to the breaking point and that other forms of communication have proven unavailable.

The country has taken significant steps away from the racist policies of the past, as evidenced in part by the Civil Rights Acts of 1964, 1967, and 1968, various aspects of the poverty program, and numerous court decisions striking down various forms of discrimination. Even though some of these measures have not been and are not now being fully implemented, there has been an important reversal of official policy, despite the lack of whole-hearted public support. Likewise, the appearance of Black persons in national advertising, the cinema, and television evidences some important changes in the policies of some private institutions (in part the product of antidiscrimination laws). Whether the necessary continued effort will be made on a scale adequate to dampen the explosive attitude in the ghettos, to open the channels of communication, and to render social justice, is a question yet to be answered. Certainly, it is not likely that what progress has been made heralds the end of all urban and racial disorders. Although political and legal remedies are becoming available to the Black community, there is still much despair, anger and frustration that will be difficult to confine within legal limits.

The essential point, however, is not that violence should be condoned because of past injustices, but rather that recognition of injustice and the breakdown of the political system as causes of violent behavior is necessary to formulation of effective measures to deal with the basic problems. If the political institutions judge the Black protest movement — violent or non-violent — in the same framework as malevolent criminal behavior, then the already deep and serious wounds will be exacerbated. In the end, the stability of society rests upon *just* laws and policy, and therein lies the minority's assurance of protection from the tyranny of the majority.

LAW AS THE NORM OF PERSONAL CONDUCT

Oaks's argument that no act of civil disobedience is morally justifiable, except for test cases based upon a reasonable constitutional claim (which is civil disobedience only if one guesses wrong), has its corollary in the proposition that the law, even though unjust, should be "the invariable norm of personal conduct." The only exception to this principle is when "the legal

command in question runs counter to the common consensus of humanity, such as murder or genocide.”

The implication of the proposition, with the one narrow exception, is either that all laws embody moral principles or that obedience to law, regardless of the moral content of the law, is man’s highest moral duty. The latter position assigns a higher value to order and stability than justice and human progress if there is a conflict between the latter and the law. Either interpretation presents grave difficulties. With respect to the first, it is simply not true that all laws are morally defensible, at least if judged on a humanistic basis. As to the second proposition, few would agree that order and stability should in all instances be preferred over individual moral commitments. Such a Hobbesian position has provided a philosophical foundation for many totalitarian states, and is doctrine that many Americans have rejected since the foundations of the Republic were laid.

Men are both moral agents and political beings who owe allegiance to the state. Obviously, no democratic society can maintain domestic order and function as a body politic unless its members give high priority to the moral obligation of rendering obedience to the law. The general necessity of relinquishing one’s own moral autonomy and of abiding by the laws of the state in most instances is suggested by Judge Learned Hand’s aphorism that the spirit of liberty is the spirit that is not too sure it’s right. Despite the necessary presumption in favor of obedience to the law, occasions do arise when deeply held moral convictions compel disobedience if one’s moral integrity is to be maintained. The dilemma entailed in having to make such a choice is recognized but not resolved in the scriptural statement: “Render therefor unto Caesar the things which are Caesar’s; and unto God the things that are God’s.” (Matthew 22:21)

The history of the nation is studded with instances of civil disobedience arising out of a conflict between the obligations of a law and moral commitments. The nineteenth century witnessed widespread disobedience of the law by those who opposed slavery and the Fugitive Slave Act of 1850. Mormons chose to obey ecclesiastical law rather than the law of the land. In 1862, Congress passed the Edmunds–Tucker Act prohibiting the practice of polygamy in the territories of the United States. Believing the law to be unconstitutional, the Mormons declined to obey it and fought their battle through the courts until 1879 when the Supreme Court held the act constitutional. They continued civil disobedience for many years thereafter. The twentieth century has likewise seen in this country civil disobedience based upon moral principle. Opposition to the draft in the First World War, Negro resistance to segregation laws, Amish opposition to school laws, and conscientious objection to military service in the Vietnam war are but examples.

Supposed moral justification is not, however, legal justification. By definition, the law provides its own standard of the right and wrong of human conduct. Acts contrary to law which are motivated by personal moral views are not legally excused. Of course, motivation may be relevant to the judicial process in sentencing and in many other ways, but one essential feature of

law is its binding effect regardless of personal agreement. Nevertheless, those who are willing to stand the penalties of the law rather than yield a deeply held moral conviction may provide a voice of conscience that might not otherwise be heard. And even though on occasion an asserted moral position may have little or no substance to it, perhaps free institutions are safer when citizens are courageous enough to risk much for their convictions.

Clearly the stability of the country depends upon the justness of its laws and institutions and the obedience of its citizens to these laws. Despite the riskiness of the position, and I submit that the contrary position would be even more risky, recognition of the moral justification, or even moral duty, of civil disobedience in certain circumstances poses less of a risk to the stability of this country and its quest for justice than undeviating, docile obedience.

BLACK IMAGES AND WHITE IMAGES: THE COMBUSTIBILITY OF COMMON MISCONCEPTIONS

Royal Shipp

America's worth to the world will be measured not by the solutions she seeks to impose on others, but by the degree to which she achieves her own ideals at home. That is a fitting measure, and an arduous test, of America's greatness.

Ronald Steel in PAX AMERICANA

The problem of the American Negro is first and foremost a problem in the American mind. On this subject the American mind as a whole — both white and black — is a shambles.

McGeorge Bundy in THE STRENGTH OF GOVERNMENT

As is true for most Americans, I am frightened by what is rhetorically (and often demagogically) called the breakdown of law and order in my country. As is also true for most, no member of my family has suffered physical harm, loss of income or property, and only a very little inconvenience. But I am frightened. Negro riots alarm me because I live and work close enough to potential trouble spots that we conceivably could be harmed (people I know have been); student riots, and now the "police riots" of Chicago, frighten me because of their implications for the survival of my country in a form which continues to guarantee freedoms I consider essential for my happiness and progress. I am convinced this survival will depend on the number of