Civil Disobedience in a Constitutional Democracy

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In traditional democratic theory revolution provides the only alternative to normal politics. If conditions do not justify overthrowing the government a dissenter must confine himself to protesting against them. He may protest by speaking against the government, or by voting against it, but this meager list exhausts the possibilities. Due to the very great originality of Gandhi we can now envisage, and many people have in fact begun to practice, a third type of protest – civil disobedience. If it does not qualify as normal politics it is not a kind of revolutionary activity, either.

Unfortunately, the term “civil disobedience,” which always suffered from a certain ambiguity, has now been utterly debased in the vulgar national debate on “law and order.” It has been used to describe everything from bringing a test-case in the federal courts to taking aim at a federal official. Indeed, for Vice President Agnew it has become a code-word describing the activities of muggers, arsonists, draft evaders, campaign hecklers, campus militants, anti-war demonstrators, juvenile delinquents and political assassins. Anyone who wishes to defend the practice of civil disobedience must therefore explain just what it is that he wishes to defend. And in doing so I shall not hesitate to free Gandhi’s conception from its religious bias and from those political emphases peculiarly appropriate to the fundamentally undemocratic circumstances in which he worked. Only then will it be possible to reject Ambassador Kennan’s confident assertion that civil disobedience “has no place” in a democratic society, or Justice Fortas’ apparently more liberal view that “indirect” disobedience, at least has no such place.

The civil disobedient is often described as a man who defies the law out of conscience or moral belief. But this description is imprecise, and it fails to distinguish him from the moral innovator on the one hand, or the conscientious refuser on the other. Unlike the moral innovator, the civil disobedient does not invoke the standards of a higher morality or of a special religious dispensation. He is no Zarathustra proposing a transvaluation of all values, and he does not ask the public to act on principles that it plainly rejects. If he acts out of conscience it is important to remember that he appeals to it as well, and the principles he invokes are principles that he takes to be generally acknowledged. It is to protest the...
CIVIL DISOBEEDIENCE IN A CONSTITUTIONAL DEMOCRACY

fact that the majority has violated these principles that the disobedient undertakes his disobedience, and it is this element of protest that distinguishes his actions from those of the conscientious refuser. For the doctor who performs a clandestine abortion, or the youth who surreptitiously evades the draft, may be acting out of moral motives — the doctor to fulfill his obligations to a patient, the youth to avoid complicity in an evil undertaking — but they are not defying the law in order to protest the course of public conduct. They can achieve their purposes in private, and their defiance of the law need never come to light. The civil disobedient's actions are political by their very nature, however, and it is essential that they be performed in public, or called to the public's attention.

It is for this reason that the civil disobedient characteristically notifies government officials of the time and place of his actions and attempts to make clear the point of his protest. Obviously, one of the problems of a modern democracy is that many immoral actions taken in the people's name are only dimly known to them, if they are known at all. In such cases, the main difficulty in touching the public's conscience may well be the difficulty in making the public conscious. The civil disobedient may therefore find that in addition to making his actions public it is necessary to gain for them a wide publicity as well. Indeed, Bertrand Russell has suggested that making propaganda, and bringing the facts of political life to the attention of an ignorant, and often bemused, electorate constitutes the main function of disobedience at the present time. It is certainly true that nothing attracts the attention of the masses, and of the mass media, like flamboyant violations of the law, and it would be unrealistic of those who have political grievances not to exploit this fact. But it is important — especially in this connection — to recall Gandhi's warning that the technique of law violation ought to be used sparingly — like the surgeon's knife. For, in the end, the public will lose its will, and indeed its ability, to distinguish between those who employ these techniques whenever they wish to advertise their political opinions and those, the true dissenters, who use them only to protest deep violations of political principle. The techniques will then be of little use to anybody.

After openly breaking the law, the traditional disobedient willingly pays the penalty. This is one of the characteristics that serve to distinguish him from the typical criminal (his appeal to conscience is another) and it helps to establish the seriousness of his views and the depth of his commitment as well. Unfortunately, paying the penalty will not always demonstrate that his actions are in fact disinterested. For the youth protesting the draft, or the welfare recipient protesting poverty, has an obvious and substantial interest in the success of his cause. If the majority suspects that these interests color the disobedient's percep-

100
tion of the issues involved, its suspicions may prove fatal to his ultimate success. This is one reason why the practice of civil disobedience should not be limited to those who are directly injured by the government’s immoral or lawless course (as Judge Wyzanski and others have suggested). A show of support by those who have no substantial interest in the matter may carry special weight with a confused, and even with an active sceptical, majority. The majority simply cannot dismiss those over thirty-five as draft-dodgers or those who earn over $35,000 a year as boondogglers. It may therefore consider the issues at stake, and this is the first objective of the civil disobedient.

It is in misinterpreting the role of punishment in the theory of civil disobedience that Ambassador Kennan makes one of his most conspicuous errors. For the theory of civil disobedience does not suggest (although such exponents as James Farmer and Harris Wofford have sometimes argued) that the disobedient’s actions are justified by his willingness to pay the penalty that the law prescribes. The idea that paying the penalty justifies breaking the law derives, not from Gandhi and the tradition of civil disobedience, but from Oliver Wendell Holmes and the tradition of legal realism. According to Holmes and the legal realists the law characteristically presents us with an option — either to obey, or to suffer the consequences that attach to disobedience. This doctrine is indefensible even in the area of contract law where it arose, and where it has a fragile plausibility, but it is plainly absurd to suppose that the citizen has such an option in the area of criminal law. Criminal punishments are not a simple tax on criminal misconduct, and the citizen is not given the option of engaging in such conduct on the condition that he pay the tax. It is mindless to suppose that murder, rape or arson would be justified if only one were willing to pay the penalty, and the civil disobedient is committed to no such mindlessness. Holmes was looking at the law from the point of view of a bad man for whom paying the penalty is always an option and often a source of advantage. Gandhi considered it from the point of view of a good man for whom paying the penalty is often a necessity and always a source of pain. Accepting punishment does not justify the act of civil disobedience, but it helps to establish the disobedient’s seriousness and his fidelity to law in the eyes of the majority whose actions have, in his opinion, justified it.

The disobedient’s willingness to suffer punishment has another purpose as well. It is meant to weaken the will of the transgressors and to dissuade them from a course of action that the dissenters consider immoral. For, if the transgressors do not draw back, they may be forced to punish some of the most scrupulous and dedicated members of the community. The fact that this is so will often persuade those who heedlessly supported the original measures, not to mention those who supported them
CIVIL DISOBEIDENCE IN A CONSTITUTIONAL DEMOCRACY

with a dim sense of their injustice, to withdraw their support or even to join the opposition. Forcing others to suffer for their moral beliefs is a high price to pay for pursuing a questionable course of conduct and many will prefer not to pay it.

The disobedient's willingness to face suffering and punishment may be seen, then, as a useful way of reinforcing the effects of his protest and appeal. It constitutes a use of pressure, to be sure, but this pressure does not amount to coercion. If the majority remains unconvinced, it will consider itself free to act as it wishes and to impose legal sanctions if these should be required. On occasion, however, the dissenters may actually attempt to coerce the majority. They may attempt to create a situation in which the majority cannot pursue its purposes unless it acts in ways that it believes to be morally impermissible. The actions of the captain and the crew of The Golden Rule provide a case in point. For, when they sailed into the government's nuclear testing grounds in the Central Pacific these men were not simply registering a protest against its testing program and hoping that their arrest would give the public painful second thoughts. Rather, they were telling the government that it would have to incinerate them if it wished to proceed as planned and this, they hoped, the government would find it impossible to do. In cases like this the dissenters cross the line that separates civil disobedience from those forms of political action that actually attempt to paralyze the majority's will or the government's operations. As such, they may be compared to public strikes and acts of sabotage (although such acts normally employ quite different methods) and they constitute a form of incipient rebellion. Certainly, they issue a more radical challenge to governmental authority than the civil disobedient wishes to pose.

The disobedient's interest in establishing that his actions are neither rebellious nor revolutionary provides him with a final reason for accepting punishment. For, by accepting the punishment prescribed by law the disobedient is able to emphasize his commitment to law, and it is especially important for him to do so in a democratic society. The values that the disobedient wishes to defend are, after all, precisely the values that are best served by a democracy under law, if only these laws remain within bounds. Should it come to a choice, the disobedient's ultimate commitment is certainly to justice, and not to the will of the majority. But his present purpose is to persuade the majority not to force this choice upon him and his present intention is to make the established system viable. It must not be supposed, incidentally, that the civil disobedient's position implies that he will never submit to the requirements of an unjust law. In fact, the citizen in a democracy often has a moral obligation to do just that. But there are limits to the injustice he will endure as there are limits to
the injustice he will perpetuate. It is the civil disobedient's conviction that these limits have been reached.

Of course, it does not follow from the fact that the disobedient is willing to pay the penalty that the government ought to exact it. The disobedient has been placed in an acute moral dilemma and he may have acted with good will toward the community. Certainly, his punishment may cause profound ruptures in the community. All these facts, and others, ought to be considered by the government in deciding whether to prosecute, and by the judiciary in deciding the terms of sentence. It will often be in the government's and, indeed, in the community's best interests to act with flexibility and discretion in these matters and it is a particularly barbarous fallacy to suppose that the government owes the disobedient his just portion of punishment. That it may owe him a day in court when he wishes to raise constitutional issues, perhaps even a day free from the threat of punishment, is another, insufficiently canvassed question, that cannot be pursued here.

The dissenter may commit illegal action, but in the view of Gandhi and of Martin Luther King such actions ought to be non-violent in nature. Gandhi and King were, of course, committed to non-violence quite generally and as a matter of religious principle. Their views in this matter are therefore unconvincing to those who are willing to contemplate the use of violence in certain circumstances. Thoreau, for one, was not opposed to its occasional use. In the famous essay that gave currency to the very term "civil disobedience" he remarked that when conscience is wounded a little blood is shed. and the suggestion that on occasion a little blood ought to be shed in return was no; far to seek. In later life Thoreau did, in fact, endorse the violence of John Brown and his associates without scruple. It is possible to share Thoreau's general attitudes rather than Gandhi's or King's, and to hold, nevertheless, that violence, or at least certain forms of it, are incompatible with the distinctive purposes of civil disobedience. Thus, John Rawls, to whom these remarks are very much indebted, argues that violent actions are incompatible with the nature of civil disobedience because they will be understood as threats, not as appeals. And it is possible to add that the fear of violence (or of sudden death) puts men beyond the reach of rational and moral persuasion. There is a time for violence in human affairs, but, when it arrives, civil disobedience is no longer an appropriate form of political activity.

Rawls' suggestion is persuasive and especially so when it restricts the prohibition on violence against other persons. It is less convincing when violence against property is in question. For the violation of symbolically important public property may be a dramatic, and not very dangerous, way of lodging effective protests, and the razing of the slums has been understood as a cry of despair as often as it has been perceived as
CIVIL DISOBEDIENCE IN A CONSTITUTIONAL DEMOCRACY

A declaration of war. The argument against violence is at its weakest in the case of violence against the self. A sacrifice like Norman Morrison's, far from frustrating the purposes of civil disobedience, realized them in a peculiarly impressive and moving way. If it inspired fear it was not the fear of sudden death but the fear of eternal wrath, and that is a fear that often brings men to their moral senses.

Civil disobedience is, then, an appeal to the public to alter certain laws or policies that the minority takes to be incompatible with the fundamental principles of morality, principles to which it believes the majority is committed. If the minority is mistaken and the majority is not in fact committed to them civil disobedience will undoubtedly prove a pointless form of political activity, but it will not, for that reason, be an unjustifiable one. The moral duty to obey particular laws derives from the moral duty to support constitutional arrangements on which others have relied, so long as it is reasonable to believe that these arrangements are intended to implement, and are capable of implementing, the principles of freedom and justice. But one's moral obligation to obey particular laws lapses when one solemnly believes that such laws constitute deep violations of those arrangements, or of the principles on which they rest. (It goes without saying that discharging one's moral duty is not the only legitimate ground for obeying the law.) These principles of political morality normally find expression in the public morality of the state and, given the circumstances of the modern democracies, they guarantee to citizens the basic freedoms (including freedom to participate in the political life) and also a minimum of justice (by which I understand not only the disinterested administration of justice, but also a fair share of the benefits of the common life). In addition, they prohibit inflicting pain and suffering on innocent persons and they require fidelity to the idea of justice between nations. These principles are adumbrated, and often find remarkably full expression, in the constitutions of modern states, although the constitution, especially the constitution as interpreted by the courts, may be an imperfect expression of them. Thus, our own public morality, as articulated in the Constitution, makes very broad guarantees of freedom and justice in the First, the Fifth, and the Fourteenth Amendments, and Article VI makes treaties part of the supreme law of the land. The treaties to which we are in fact a party define the rights of foreign peoples in considerable detail and they enumerate the legitimate grounds, and acceptable methods, of war.

I have little doubt that, at the present time, the government of the United States is violating these principles of political morality and providing dissenters with legitimate grounds for civil disobedience. It is important to recall, however, that the public morality of our society, especially as it is articulated in the federal constitution, gives voice to these
very principles, and we must now examine the consequences of this fact for the traditional theory of civil disobedience. For, on the traditional view, a man who commits civil disobedience believes that he is, in fact, violating a legally valid (if morally unsupportable) law or order. But in a constitutional democracy like our own those who are asked to conform to laws that they think immoral will typically be in a position to claim, and if they are legally well-advised they will claim, that the laws in question are unconstitutional nullities, not laws at all.¹

The altered position I have described was, of course, the position of Martin Luther King and his disciples in the civil rights movement. As one would expect, they rarely, if ever, pleaded guilty to violating the laws under which they were charged. Rather, they argued that the laws were themselves in violation of the federal constitution and that they were, in consequence, invalid and without legal effect. In a remarkable number of cases (when federal legislation had not already rendered the issues moot) the courts agreed with them.

Despite the fact that they did not believe themselves to be violating the law, Martin Luther King and his followers continued to refer to themselves as civil disobedients. Justice Fortas has fallen in with their usage and this fact has, I believe, contributed to his wholly undeserved reputation for having a liberal, and even a concessive position on the issue of civil disobedience. For it is one thing to endorse "civil disobedience" of the type practiced by King and quite another thing to endorse civil disobedience in the stricter, traditional and more serious sense. Certainly, Justice Fortas has not endorsed civil disobedience in this more traditional sense. In fact, his liberalism comes to nothing more than this: the dissenter is granted a moral right to test, or to try to test, the validity of a law that he considers immoral and believes to be unconstitutional. It finds its consummation in a proposition that Vice-President Agnew would hardly contest: if the courts agree that the law is invalid, the dissenter was within his legal rights in refusing to obey it.

The fact that Justice Fortas has not endorsed anything like the classical conception of civil disobedience becomes apparent when we consider his attitude toward the "disobedient" who does not win, but who loses in the courts. For on Justice Fortas' view the man who loses in court is under a moral, as well as a legal obligation to refrain from any further disobedience (he has had his day in court) and he is morally, as well as legally, obliged to suffer the punishment prescribed by law (that is the way we play the game). Surely, this is a rigid and untenable view; indeed, Justice Fortas implies on occasion that even he does not really accept it. If Congress passed a law requiring Negroes to observe a discriminatory curfew, to confine themselves to certain restricted geographical areas (as

¹
CIVIL DISOBEEDIENCE IN A CONSTITUTIONAL DEMOCRACY

Ambassador Kennan has now hinted might be a good idea) and go naked through the streets if they wished to apply for welfare few would suppose that they had a moral obligation to do so. The fact that the courts ultimately sustained such a law would not alter the situation in any serious way. But it is hardly necessary to seek examples that may seem fantastic or purely theoretical. After all, the Court on which Judge Fortas sat once decided the Dred Scott case and it is hard to believe that Justice Fortas, or anyone else, is going to say (at least at this late date) that in the period following the Fugitive Slave Law and the Dred Scott decision abolitionists had a moral obligation to return slaves to their owners or that slaves had an obligation to return of their own free will.

Even if we were to assume that the Court's interpretation of the Constitution in the Dred Scott case was a defensible one it would not follow that one had a moral obligation to acquiesce in its decision. For the Constitution itself would then have been in violation of the fundamental principles of political morality and one simply does not have a moral obligation to abide by such a constitution. Of course, there is very good reason to doubt that the constitution did in fact mean what the Court said it meant and it is important, now, to challenge the view that the constitution, or that the law, is inevitably what the courts say it is. For the doctrine gives a false view of the nature of law and of what it means to obey it.

The English school of Hobbes and Austin held that the law is to be identified with the command of the sovereign and, insofar as he delegates authority to them, with the decisions and orders of his courts. The American legal realists have associated the law and the courts even more closely. For Holmes the law is "nothing more pretentious" than a prophecy of what the courts will do; for Fortas "the rule of law" requires nothing more ignoble than acquiescing in whatever they may have commanded. The objections to such views are powerful indeed, and a far more persuasive and commonsense tradition holds that the law is to be identified, not with the holdings of courts, but with the authorized rules and principles that the courts interpret and apply. Of course, the interpretations and holdings of courts must be considered in determining the state of the law (the doctrine of precedent has an important place in our jurisprudence), but these interpretations and decisions must not be identified with the law. For one thing, the courts can misinterpret the law, and their decisions are often mistaken. When this is so it would be foolish and harmful to identify these dubious interpretations and questionable decisions with the law itself. Certainly the courts do not do so. It may have taken the Union Armies to "reverse" the Dred Scott case, but the courts often admit that they have been in error and agree to reverse themselves. Indeed, the Supreme Court has reversed itself in such momentous cases as Erie R.R.
This fact is of importance to the dissenter for a number of reasons. In the first place, it may strengthen the case for disobedience on purely moral grounds. For, as Ronald Dworkin has observed, it is one thing for a man to sacrifice his principles (or to violate his conscience) when it is plain that the law requires him to do so. But it is quite another thing for him to do so when the law, or the court's view of it, is of questionable validity. In addition to making a moral difference the fact that the courts may be wrong makes a practical difference as well. One of the disobedient's aims is to change the existing law and the most effective way of doing so in a constitutional democracy will often be to persuade the courts that the obnoxious legislation is unconstitutional. Continued defiance of the law may be the only practical way for the dissenter to obtain a rehearing of the questions at issue and even when other methods are available the disobedient's willingness to face criminal punishment in defense of his beliefs may help the court to see that it had misjudged the strength, and perhaps even the nature, of his interests in the first place.

For this reason it is possible to agree with Dworkin's claim that the Jehovah's Witnesses behaved properly in refusing to observe Justice Fortas' canons of correct behavior after the Court found against them in the first "flag-salute" case. As they saw it, the law denied them a basic religious freedom and they were being asked to violate their fundamental religious convictions on the basis of dubious constitutional doctrine. Continued defiance did not require them to injure the interests, or abridge the rights, of others in any serious way and, in the end, it probably helped to convince the Court that its original decision had been mistaken. In any event, the Court did reverse itself in the well-known case of West Virginia State Board of Education v. Barnette only a few years later. As it now viewed the matter the intransigent Witnesses had only been exercising their constitutional rights all along. The moral is plain. It is often those who insist on their legal rights, rather than those who acquiesce in the fallible (and occasionally supine and even corrupt) opinions of courts, who strengthen the "rule of law" that Justice Fortas is so anxious to defend.

If the argument for civil disobedience is strengthened when there is reason to believe that the courts are in error it is strengthened still more when there is reason to believe that the courts will refuse to adjudicate the issues at all. This is, of course, precisely what they have refused to do in the crucial cases arising out of the war in Vietnam. In the "Spock" case the trial court invoked the "political question" doctrine and denied its jurisdiction to hear any issues concerning the legality of the war or of
its conduct. And in the cases of David Mitchell (who refused to report for induction) and of the "Fort Hood" three (who refused to report for service in Vietnam) the Supreme Court simply denied certiorari. It has been suggested that when the courts invoke the "political question" doctrine and refuse to adjudicate the issues the disobedient wishes to raise, their action is tantamount to finding that the executive is legally free to perform these very actions. But it is far more plausible to argue that when they invoke this doctrine they assume a wholly agnostic position on the issues involved and simply enforce as law the determinations of the "political" branches. In the case of the "Fort Hood" three this agnostic attitude is assumed toward questions that Justice Stewart and Justice Douglas consider, and that plainly are, "of great magnitude." In his dissent to the Court's decision denying certiorari in the case of the "Fort Hood" three Justice Stewart indicates that these questions include, among others, these:

1. Is the present United States military activity in Vietnam a "war" within the meaning of Article I, Section 8, Clause 11 of the Constitution?

11. If so, may the Executive constitutionally order the petitioners to participate in that military activity, when no war has been declared by the Congress?

111. Of what relevance to Question II are the present treaty obligations of the United States?

IV. Of what relevance to Question II is the joint Congressional ("Tonkin Bay") Resolution of August 10, 1964?

(a) Do present United States military operations fall within the terms of the Joint Resolution?

(b) If the Joint Resolution purports to give the Chief Executive authority to commit United States forces to armed conflict limited in scope only by his own absolute discretion, is the Resolution a constitutionally impermissible delegation of all or part of Congress' power to declare war?

"These are," he continues, "large and deeply troubling questions. Whether the Court would ultimately reach them depends, of course, upon the resolution of serious preliminary issues of justiciability. We cannot make these problems go away simply by refusing to hear the case of three obscure Army privates. I intimate not even tentative views upon any of these matters, but I think the Court should squarely face them by granting certiorari and setting this case for oral argument."

In turn, I do not wish to intimate any views on the "political question" doctrine or on the Court's unwillingness to review the actions of the executive and legislative branches in these sensitive areas. But it is
important to recognize that the Court's refusal to consider these matters can only increase the weight that the three obscure Army privates, and others like them, must give to their own appraisal of the issues. Certainly, a very formidable body of opinion supports the view that the government's behavior is in many particulars both illegal and unconstitutional. And there is little doubt, I believe, that it has frequently violated the principles of international law and morality. The case for disobedience in these circumstances is very strong.

The discussion has focused, so far, on what Gandhi called "defensive," and others have called "direct," disobedience. In cases of this type the law the dissenter violates is the very law that he regards as immoral. It will be worth commenting, briefly and in conclusion, on what Gandhi called "offensive." and others have called "indirect," disobedience. For in this type of disobedience the dissenter violates laws (usually traffic laws or the laws of trespass) that he finds unobjectionable in themselves in order to protest still other laws, policies or orders that he thinks immoral and even wicked. While Justice Fortas displays some sympathy for those who engage in "direct" disobedience (the courts may, after all, vindicate them) his hostility to those who practice indirect disobedience is unmitting (there is no doubt that they are disobedients in the strict sense). In his view their behavior is unnecessary and unjustifiable: it is, in fact, nothing less than a form of "warfare" against society.

I would argue, to the contrary, that "indirect" disobedience is both justifiable and necessary. It is justified, as all civil disobedience is justified, as a solemn protest at a comparable level of depth. In particular, it must not be supposed that whenever the government violates the principles of political morality it does so by enacting a positively wicked law that the dissenters can protest "directly." For instance, the object of protest may well be the government's failure to pass a law, or to enforce one. Thus, Ralph Abernathy's violation of the law of trespass was meant to protest the government's failure to enact an adequate poverty program, and the obstruction of segregated construction sites is a familiar technique for protesting the government's failure to enforce fair employment practices statutes that have long been part of the law. Then, too, the object of protest may be a governmental policy or order, rather than a law, strictly speaking. It makes no sense to speak of violating the government's policy or intervening in the affairs of foreign states and the ordinary citizen is in no position to defy orders issued to military personnel. It is for this reason that such "indirect" methods of protest as sit-ins at draft boards and demonstrations at the Pentagon have been employed to protest the government's violent intervention in Vietnam, and

109
CIVIL DISOBEDIENCE IN A CONSTITUTIONAL DEMOCRACY

this is why men have even endured self-immolation to protest the military's use of fire-bombs against a defenseless civilian population. It is unfortunate that these are the acts of "warfare" that Justice Fortas finds it most important to protest. In fact, the government's various failures and transgressions constitute a far greater threat to "the rule of law" that he is so concerned to defend. It is one of the great merits of those who practice civil disobedience to have seen this and to have acted on their painful knowledge.

1. Irving Kristol is, therefore either being obtuse or supercilious when he writes that "those who are morally committed to civil disobedience can properly claim that the law which arrests them, or the law that punishes them is so perverse as to be without authority. What they may not do in good conscience is to practice civil disobedience and then hire a clever lawyer to argue that it wasn't a violation of the law at all, but rather the exercise of a right."


4. Professor Michael Katz has objected to this contention as it was formulated in the Massachusetts Review version of this essay and I have replied to his objection in that journal, Vol. XI, No. 1, Winter 1970, pp. 172-175.

5. It is worth noting the view of the present Solicitor General (and former Dean of the Harvard Law School) on a related point. Pp. Griswold writes that he "cannot distinguish in principle the legal quality of the determination ... to block a workman from entering a segregated job site from the determination to fire shots into a civil rights leader's home to protest integration." If all Mr. Griswold means by his fine parenthetical phrase ("cannot distinguish in principle the legal quality") is that both actions are illegal few will dispute his point. If he means anything else — perhaps that they are equally serious violations of the law — it is to his credit that he couldn't quite bring himself to say so.