Montana Law Review

Volume 32
Issue 2 *Summer 1971*

Article 2

7-1-1971

The Right to Dissent in a Free Society

Brent R. Cromley

THE RIGHT TO DISSENT IN A FREE SOCIETY

Brent R. Cromley*

Observation: In the meaning which the expression has for most of us, a "free society" suggests the incorporation of a right to dissent from the viewpoint of the majority. Yet, if the free society is organized upon a system of laws as the foundation, there cannot exist a "right" to disobey the law: a toleration of a general right to disobey would obviously undermine the legal foundation.

The initiation of a discussion of the right to dissent was a reference to disobedience of the law is not an inherent necessity, nor even a logical step. Today, however, our society is so involved with examination and definition of the right to dissent and the "non-right" to dissent, that one cannot consider with any significance the former without considering the latter. The latter is generally called civil disobedience.

This article examines, first and primarily, the *right* to dissent in a free society. When dissent extends beyond that right and involves a violation of law, the dissent is *at least* civil disobedience, if not treason, civil rebellion, or revolution. It is advantageous to here set out a workable definition of "civil disobedience". It will be useful first in considering civil disobedience as the limitation of the right to dissent. Later, the definition will be referred to when this article cites justifications which writers have urged for civil disobedience. These justifications, in effect, attempt to embrace various forms of civil disobedience within the right to dissent.

"Civil disobedience is the deliberate breaking of law in order to secure a change in the legal system."[1]

The foregoing definition by Conrad Lynn, a leading advocate of Black Power and civil disobedience, is a remarkably simple one when one considers that many writers have written entire articles examining only definitions of civil disobedience. But until we come back to discuss civil disobedience itself and to determine (or at least raise the question) whether there can be moral authorization to disobey the law, Lynn's definition will suffice to distinguish civil disobedience from the legal "right" to dissent.

Prior to the current wave of literature on political and social dissent, most lawyers would naturally associate the word "dissent" with the type of action taken so many time by the late Supreme Court Justice Oliver Wendell Holmes, so-called the "great dissenter". The association is a good one, because the right of a justice or appellate judge to articulate his opinions contrary to the majority of justices or judges is one of the

*Member of the Montana Bar. A.B., Dartmouth College, 1963; J.D., University of Montana, 1968

[1]Lynn, *We Must Disobey!* 43 N.Y.U.L. REV. 648, 649 (1968).

oldest and most valuable rights of dissent.[2] The dissenting opinions of several Supreme Court Justices, notably those of Justice Holmes, have eventually been applied to frame a majority Supreme Court opinion. An act of Congress, on its face unconstitutional, has recently been passed on the presumption that the four dissenting justices in *Miranda v. Arizona* will ultimately be joined by other justices with a similar conviction.[3]

While the right to dissent is necessarily limited by our laws, the right is guaranteed to the members of this free society by the Constitution of the United States. That document does not mention "dissent" by name, but the declaration there is strikingly similar to the concept of dissent which is in vogue today:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievences.[4]

An historian could probably statistically prove to us that at no time in history have so many people on earth enjoyed the right to publicly express opinions as do the same three billion persons living on it today. But the fact is, that in many areas of the globe the thought expressed in the First Amendment would still seem so radical as to be almost comical.

Obviously, if "freedom" is interpreted as meaning an unlimited right, the First Amendment does not mean what it says. No one will contend that the authors of the Constitution intended that there could never be a law against falsely shouting "fire" in a crowded theatre.[5] The dilemma is that the Constitution grants the apparently unlimited freedoms while we as a society of many millions could not survive if all had these unlimited freedoms. The resolution of the dilemma comes in limiting the freedoms granted in the First Amendment to the point at which exercise of a freedom interferes with another's exercise of his freedom.

Lawrence W. O'Brien expressed this limitation on constitutional freedoms with regard to dissent very succinctly:

> Dissent in our society is a right which we all enjoy. If you dissent by writing or speaking, there must be no penalties—as long as the laws of libel and slander are not broken.
>
> If you dissent by action, such as picketing or marching, there must be no penalties, as long as you do not injure my right to move about freely.
>
> If you dissent by breaking the law, then you must expect to pay the consequences.[6]

[2] *Georgia v. Brailsford*, 2 U.S. 402 (1792), was apparently the first opinion of substantive law issued by the Supreme Court of the United States. Justices William Cushing and Thomas Johnson dissented.

[3] *See* S. REP. No. 1097 (Omnibus Crime Control and Safe Streets Act of 1968), 90th Cong., 2d Sess. (1968), as set out in 2 U.S.C. CONG. & AD. NEWS (1968) 2112, 2138.

[4] U.S. CONST. amend. I.

[5] Schenck v. United States, 249 U.S. 47, 52 (1919).

[6] O'Brien, *The Dissenter: The Purpose of the Polls*, 34 VITAL SPEECHES OF THE DAY, 231, 233 (1968).

In 99.9 per cent of the occasions in which the right to dissent is exercised, no one gets very upset. We dissent by shopping at a store other that the one in which we have had poor service. We dissent by being cool toward an acquaintance who has done a thing we consider wrong. This is not the type of dissent with which we are now concerned. This is not the dissent to which Professor Daniel Boorstin of the University of Chicago refers when he says that dissent is "the great problem of America today".[7]

But when a substantial body of aroused citizens—albeit a minority of the public as a whole—parades and sings through a courthouse yard, or sits-in at a Selective Service induction center, or carries placards and banners through Main Street on the occasion of a visit by a public dignitary, people do get upset, and are moved.

There are several reasons why such activity causes such a great impact on public thought. First, is the gravity of the thought being expressed by the dissenters. If a group of university students were to congregate to protest the quality of food served at their institution, the only reaction from most members of the public would probably be amusement. Even a picket line of employees parading past a restaurant to protest low wages does not evoke much concern, though many people may avoid eating at the restaurant because of the picket line. But when an organization is formed to protest America's involvement in Southeast Asia, it still rates front page coverage locally, and perhaps nationally. People talk about such a protest, and carefully observe.

A second reason why some occasions of dissent stand out from most trivial examples of dissent is sheer quantity of people. One person booing a speech by a public official can be ignored or escorted quietly out of the hall; a thousand persons cannot be. A third reason is that the dissent with which the nation is concerned today is not the type of dissent which is merely printed and distributed for us to read or lay aside at our leisure. The dissent which is making the news and causing people to reconsider the extent to which freedom of dissent should be permitted is the dissent which "comes on like gangbusters". Even the very least aware persons do not ignore an assembly of hundreds marching peaceable through the streets to declare that, no matter what their color, all persons are deserving of equal rights.

Besides the gravity of the subject, the quantity of the people, and the physical impact of the expression, there may be other reasons why some dissent has a greater influence. The logic of the expression, the status of the dissenters, and the publicity given the dissent may contribute to, or subtract from, the ultimate effect upon people's opinions.

Before attempting to describe limits or definitions for the right to dissent as it exists in this society, which may prove to be an impossible

[7]Boorstin, *Making Democracy Work*, CURRENT, Jan., 1968, at 27.

task, it is at least interesting, if not helpful, to speculate on the causes of contemporary dissent. In other words, why does it seem that so many groups of people are now more carefully scrutinizing this world and their place in it and protesting their conclusions?

Foremost among causes is the fact that this country has a great tradition of dissent. Dissent from the English rule was the basis for the Declaration of Independence in 1776. It was only natural, therefore, that the right to dissent—the right "to petition the Government for a redress of grievances"—should be written into the Constitution. Since that document was executed, countless individuals have distinguished or discredited themselves by dissenting from the majority for what those individuals believed to be valid reasons.

It has been suggested, however, that contemporary dissent, involving the multitudes as it does, is rooted specifically in the conditions which industrialism has imposed on our culture. There is a tendency in industrialism to substitute impersonal relations for personal ones.

> The human being needs organization and technology, to be sure; but both tend to become ends in themselves, to be idols which men, for a time, worship. When this tendency is pushed beyond a certain point, however, human personality can accept it no longer: there is a rejection of idolatry and an effort to overcome alienation.[8]

Less profound, but perhaps another valid observation is the following:

> We are an affluent society. For the first time in our national history we are not preoccupied with the striving for bread and a roof over our heads. Horatio Alger morality has vanished like smoke in a high wind because there is no more need for people to discipline their lives in order to avoid misery and poverty. The welfare state has removed the necessity. Not having to concern ourselves with our own future, we can afford time to worry about other things, like the busy mother who postponed her nervous breakdown until all the children left home because up to that moment she had had no time for it.[9]

Whatever the source of modern dissent, it is certain that limits must be imposed. These limits must not unduly hamper free expression, but must protect the rights of the non-dissenters, that is, the majority. In our society we have entrusted the courts with the job of striking the balance between the government's right to protect its citizens and itself, and the individual's right to dissent. Neither right is absolute. Both rights have their source in the Constitution.

The Supreme Court of the United States is the body which ultimately interprets the Constitution, so the most accurate, if not complete, exposition of the rights of the government versus the rights of the individual can be found in the opinions of that Court.

Initially, we begin with the fundamental principle that all persons

[8]Sibley, *Anonymity, Dissent, and Individual Integrity in America*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE, July, 1968, at 45, 48.

[9]Dumke, *Social Dissent: It Can Be Poison*, 34 VITAL SPEECHES OF THE DAY 525 (1968).

are beneficiaries of the constitutional right to express their opinions, even though their opinions clash with the opinions of those around them. The grant of this freedom to dissent was a fundamental motive for the inclusion of the freedom of speech clause in the Bill of Rights. Indeed, free speech may best serve its purpose when it induces conditions of unrest, creates dissatisfaction with existing conditions, or even stirs people to anger.[10] This "free trade of ideas", which is encouraged in our free society, includes the opportunity to persuade to action, and is not limited to merely describing facts.[11]

But an individual speaking out against the masses is a voice crying in the wilderness and may lack significance as an instrument of change. Consequently, the right to dissent must and does extend to associations of individuals through the constitutional freedom to assemble. The result is that peaceful expression by peaceful assembly cannot generally be barred.[12]

At the opposite end of the spectrum from the individuals and associations of individuals with their right to dissent, is the government or state with its purpose of insuring order and cohesion among this collection of individuals without unduly discriminating in its treatment of any. This purpose, which amounts to a duty, to insure order comes from the fact that governments like ours were formed to substitute the rule of law for the rule of lawlessness and force.[13] In all the areas in which we have permitted or demanded that the state assume a function, there arises a legitimate concern on the part of the state that execution of this function not be disrupted or prevented by the dissident and disenchanted. As an elementary example, when mass demonstrations, by themselves peaceful, obstruct the free passage of traffic, the state has a legitimate public concern in regulating such demonstrations because it has been given the duty to regulate traffic.[14] Similarly, the principle of freedom of speech does not sanction incitement to riot, the classic example being Justice Holmes' observation that the First Amendment does not justify a false cry of "fire" in a crowded theatre.[15]

Not surprisingly, the state has at times been too enthusiastic in its attempts to protect the bulk of the population. In most cases this overzealousness can be excused as honest misinterpretation of its roll as a sovereign. In a few cases it must undoubtedly be attributed to an intentional perpetration of oppressive action against some individual or minority group.[16] As a safeguard from infringement on constitutional freedoms by state action, the Supreme Court has, in the course of history, created

[10]Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949).
[11]Thomas v. Collins, 323 U.S. 516, 537 (1945).
[12]Edwards v. South Carolinia, 372 U.S. 229 (1963).
[13]Brown v. Louisiana, 383 U.S. 131 (1966) (dissenting opinion of J. Black).
[14]Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 152 (1969).
[15]Schenck, *supra* note 5.
[16]Zwicker v. Boll, 391 U.S. 353, 354 (1967) (dissenting opinion of J. Douglas).

and developed certain "standards" with which state regulation must comply.

"Vague" is a term which the Court has applied to many attempts of the state to regulate conduct when the standard of regulation is unduly obscure and "men of common intelligence must necessarily guess at its meaning and differ as to its application".[17] A related term used by the Court to describe improper state regulation is the "overbreadth" of any particular statute or rule. Overbreadth refers to the principle that "a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the areas of protected freedoms".[18] The danger to constitutional freedoms from such vague or overbroad controls is due to the unfettered discretion which they place in the hands of local officials.[19] It is, after all, at the local level where the immediate regulation of specific instances of dissent occurs.

The hostility and apprehension toward vagueness is so great that a statute or rule may be found void and a conviction reversed, if the statute or rule is found vague, even though the particular course of conduct could have been prevented under a more reasonable statute.[20]

Whatever the activity to be regulated, the solution is for the state to supply precise standards in the laws and rules it uses for regulation. "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order".[21] Not only is fair notice given of what conduct is forbidden, but local officials are also in a position to know whether particular behavior is lawful or not. Exactly what conduct can be regulated is determined largely by tradition and social necessity, but the state may not suppress free communication of opinion under the guise of preserving merely "desirable conditions".[22]

Particularly subject to suspicion is any state regulation on expression which takes the form of a prior restraint.[23] This is so because broad prophylactic restraints on expression cut at the very foundation of any system of freedom of expression. Elimination of such restraints was a "leading purpose" for the adoption of the First Amendment.[24] The Supreme Court has never, however, gone so far as to hold prior restraint on expression to be *per se* unconstitutional, and any suggestion of such a

[17]Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).
[18]Zwickler v. Koota, 389 U.S. 241, 250 (1967).
[19]Cox v. Louisiana, 379 U.S. 536, 557 (1965).
[20]N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963).
[21]Carroll v. Presidents & Comm'rs of Princess Anne, 393 U.S. 175, 183 (1968).
[22]Cantwell v. Connecticut, 310 U.S. 296, 308 (1940).
[23]Carroll, *supra* note 21 at 181.
[24]Schenck, *supra* note 5.

concept arouses uncharitable opposition In *Edwards v. South Carolina*,[25] the Court reversed the convictions of 187 demonstrators who had marched to protest "the present condition of discrimnatory actions against Negroes" in Columbia, South Carolina. The demonstrators had been convicted of the common-law crime of breach of the peace, but the majority of the Court felt that there was not even a "clear and present danger" that the peace would be breached. Former Justice Clark, however, relying on evidence that the group had been aroused to a "fever pitch", felt that the police were correct in curtailing the demonstration.

> [T]o say that the police may not intervene until the riot has occurred is like keeping out the doctor until the patient dies. I cannot subscribe to such a doctrine.[26]

Clearly, the manner in which regulation by the state is applied may mean the difference between constitutional and unconstitutional—permissible and impermissible—regulation. The manner in which dissent is expressed is also a critical factor in the extent to which dissent can be permitted. Dissent in the form of "pure" speech must be more carefully protected than dissent which involves "nonspeech" elements. The more closely protest takes the form of "pure" speech, therefore, the more comprehensive the protection under the First Amendment.[27] Even "pure" speech does not receive absolute protection, however, and, as indicated earlier, no one would be justified in yelling "fire" in a crowded auditorium,[28] even if the cry was intended as an objection to the program or speaker within the auditorium. The Supreme Court has never challenged the principle that there are special, though limited, circumstances in which even pure speech is "so interlaced with burgeoning violence" that it does not and cannot enjoy protection under the guise of being an exercise of the right to free speech.[29] As in most areas of constitutional law, pure speech is not a "black and white" concept, but is a matter of degree. The fact that words are intended to provoke others to fight may be relevant,[30] but the mere fact that critics of those dissenting may react with disorder or violence against the dissenters is not sufficient to deny the exercise of freedom of opinion.[31]

"Symbolic" speech is apt to be subject to closer scrutiny than pure speech. Marching on public thoroughfares, chanting or singing in public places, and the wearing of armbands are forms of symbolic speech. The distribution of pamphlets and handbills may be another form, but this type of activity is so near to being pure speech and so historic a weapon

[25]Edwards, *supra* note 12.
[26]*Id.* at 244 (disenting opinion of J. Clark).
[27]Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 505 (1969).
[28]Schenck, *supra* note 5.
[29]Carroll, *supra* note 21 at 180.
[30]*See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).
[31]Brown v. Louisiana, *supra* note 13 at 133, n. 1.

in the expression of opinion that it is guarded almost as closely as pure speech itself.[32]

The wearing of black armbands in Des Moines, Iowa schools caused quite a sensation on December 16, 1965. At least three students wearing the bands, now a common symbol to protest this nation's involvement in Vietnam, were suspended from school until they would return without their armbands A complaint was filed by the students, through their fathers, in United States District Court praying for an injunction against the disciplinary action. Dismissal of the complaint by the District Court was affirmed by the equally divided Eighth Circuit Court of Appeals sitting *en banc*.[33]

Although the controversy had only minor immediate consequence because the students did not intend to, and did not, wear the armbands after January 1, 1966, the Supreme Court granted certiorari and issued one of its most recent and more enlightening opinions on the permissible restraints on symbolic speech. The District Court's dismissal of the complaint was reversed by a seven to two majority.[34]

The method in which the Court examined and ruled on the alleged intrusion on constitutional freedoms was a "two-step" method which the Court has now used many times.[35] First, the Court determined whether or not the wearing of armbands was within the sphere of protection afforded by the First Amendment free speech clause. In fact, the Court found that the wearing of armbands in a manner entirely divorced from actual or potential disruptive conduct, was "closely akin to 'pure speech' ".

Second, having determined that the activity was included within the meaning of "free speech", the Court considered the extent to which the state could regulate such activity and whether the state had overextended its regulatory function. It had.

Besides being an excellent example of the application of First Amendment freedoms to individual expression, the case, significantly, called attention to the fact that students are to be considered "persons" under the Constitution's grants of freedom of opinion. "They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[36]

Justices Black and Harlan dissented. Justice Black did not deny that the wearing of armbands for the purpose of conveying political ideas is protected by the First Amendment, but did believe that the record showed that the students' armbands "took the students' minds off their classwork

[32]Talley v. California, 362 U.S. 60 (1960).

[33]Tinker v. Des Moines Independent Community School District, S.D. Iowa, 258 F. Supp. 971 (1966), aff'd, 383 F.2d 988 (8 Cir. 1967).

[34]Tinker, *supra* note 27.

[35]*See, e.g.*, N.A.A.C.P. v. Button, *supra* note 20; Bates v. Little Rock, 361 U.S. 516 (1960).

[36]Edwards, *supra* note 12 at 511.

and diverted them to thoughts about the highly emotional subject of the Vietnam War". Justice Harlan was further from the majority's view when he stated that he believed school officials should be accorded the "widest authority" in maintaining discipline in the schools. He found nothing in the record which impugned the good faith of the school officials in promulgating the armband regulation.[37]

Through the years the Supreme Court as well as all other courts in the United States has provided guidelines for state regulation and individual freedom of expression. But regardless of the extent to which dissent is permitted under the law, there are persons and groups who are not content to stay within that legal framework and who commit acts of civil disobedience. Unlawful dissent is not a neat little entity which can be condemned or label hostile to the nation's interests. It is a form of dissent which deserves the study and the examination which is being given it today. The following comment of Joseph J. Casper, Assistant Director of the F.B.I., summarizes the feeling of too many millions of Americans today, and is painfully lacking in a real attempt to comprehend what is occurring in our society today:

> The safety of our nation is threatened. Our society is jeopardized by unlawful conduct bordering on rebellion and anarchy—conduct which is a direct outgrowth of an absurd theory called civil disobedience.[38]

There is no doubt that many of the episodes of violent protest which rate newspaper headlines and television specials justifiably create alarm in most people. Dissent which causes damage to person or property can hardly be acceptable in this society no matter what the program urged by the dissenters. We have available to us too wide a range of channels for communication of opinion and for persuasion to permit violence as an additional means. But it may be that some type of recognition of what is involved in nonviolent civil disobedience is necessary; at least we may be a better society for at least having considered it as an alternative to passive submission.

The definition of civil disobedience by Conrad Lynn, quoted earlier, is a simple one. Commonly, such qualifications are added as the "open

[37]To be distinguished from *Tinker*, is the decision of District Judge Charles Luedke in Brogan v. Collins, Cause No. 55589, Thirteenth District Court in and for the County of Yellowstone, Montana, contained in his Opinion and Memoranda filed August 27, 1970. In that case, a Billings high school student wore an "Earth Day" armband to school, violating an established school district dress code prohibiting non-school insignia. Judge Luedke, at page 10, contrasted the Billings dress code with the non-armband rule established in the Des Moines school only two days before the armbands were planned to be worn: "There is a big difference between a situation where a regulation violated is one adopted upon the spur of the moment to face a crisis and oppose a particular view, and one developed over the years as a product of a multitude of experiences and calculated to create and maintain a school environment most favorable to the functioning of teacher and student alike.

"The first is a reaction, while the second is a regulation."

[38]Casper, *Call Crime to a Screeching Halt*, TRIAL, Oct.-Nov. 1968, at 14.

willful breaking of a law'',[39] the ''nonviolent violation of a law'',[40] and the violation ''by persons actively prepared to take consequences''.[41] Henry David Thoreau is the modern source of the term.[42] The Supreme Court has apparently never considered civil disobedience as a doctrine, much less as a right.[43]

More and more frequently, writers are suggesting that we have a positive obligation to disobey unjust laws or laws which are morally wrong. Such suggestions, if they truly influence people, may do as great a disservice as those who advocate wholesale condemnation of civil disobedience. It is conceded that everyone has a moral duty to participate in the social and political arenas; too often people merely observe without enunciating their ideas. As former Secretary of Health, Education and Welfare John W. Gardner paraphrased from Camelot: ''Meanwhile, what do the reasonable people do? Very little, I'm afraid.''[44]

But encouraging persons to violate those laws which they personally feel are not acceptable to themselves can only be an incitement to chaos. Persons unjustly aggrieved by rules and laws, especially in our society today, are generally able to provoke the sympathy of others and thereby enlist aid to their cause. And responsible citizens should never be dissuaded from working for the rights of persons so aggrieved. It is not necessary, however, to go so far as to encourage persons to feel aggrieved.

Condoning any form of civil disobedience involves a number of dangers of which everyone should be aware. First and foremost of these is that civil disobedience ''tends to encourage a general disrespect for law and order, particularly among the young''.[45] Dissent by disobedience suggests that each citizen has a right to determine for himself which laws should be obeyed. A second danger is the tendency of civil disobedience to escalate, incite to mob rule and result in violence. Efforts to persuade then become efforts to coerce. Third, the concept of civil disobedience is not susceptible to principles of general application. Everyone has his own ideas on which laws are just and which are not.[46] All of these dangers are related, and they each point out further why it is so necessary that civil disobedience be studied.

In a few carefully selected instances, civil disobedience may be an only alternative. From the moment of its conception, our nation has never enjoyed a period during which some individuals and minority groups

[39]Morris, *American Society and the Rebirth of Civil Obedience*, 54 A.B.A.J. 653 (1968).
[40]McKay, *Civil Disobediences: A New Credo?*, 2 GA. L. REV. 16, 19 (1967).
[41]Puner, *Civil Disobediences: An Analysis and Rationale*, 43 N.Y.U.L. REV. 651 (1968).
[42]Rostow, *The Consent of the Governed*, 44 VA. Q. REV. 513, 524 (1968).
[43]*A Lawyer Looks at Civil Disobedience*, address by Lewis F. Powell, Jr., Tucker Lecture, Wash. & Lee U., Apr. 16, 1966.
[44]Gardner, *A Nation Is Never Finished*, 53 A.B.A.J. 1009 (1967).
[45]*Civil Disobedience and the Right of Dissent*, address by The Honorable William J. Jameson before Billings, Mont., service clubs, Dec., 1968-Jan., 1969.
[46]*See* Van Dusen, *Civil Disobedience: Destroyer of Democracy*, 55 A.B.A.J. 123 (1969).

have not existed under conditions so oppressive that the only hope for cure lay in extra-legal conduct. It may be possible to judicially establish some limited recognition of civil disobedience as a doctrine. Any such recognition would have to be defined with, at least initially, rigid and clear limits. Following is a minimal enumeration of considerations for determining whether particular acts of civil disobedience can be justified.[47]

(1) There should be no reasonable alternative to the act of disobedience. Alternatives may include other, more reasonable, acts of civil disobedience.

(2) There should not be violence, nor injury to property or person.

(3) The conduct should be motivated not by an intent to disobey the law, but by a desire to demonstrate its unconstitutionality.

(4) There should be unconditional submission to arrest and other legal penalties of disobedience.

(5) There should be a legitimate doubt as to the constitutionality of the law which is disobeyed.

(6) The conduct should be "direct" civil disobedience. That is, the law violated should be the law which oppresses. "Indirect" civil disobedience, the breaking of one law to protest another, can less often be justified.

Such considerations as those numbered above, and undoubtedly there are many others, will not be in the mind of the person who is about to dissent by disobeying the law. But with these considerations society should judge the conduct, and perhaps accordingly mitigate the punishment. Whatever the best solution may be, it is too premature and too simple to say that civil disobedience should not be acknowledged.

One possible solution is a liberalization of the law in the area of declaratory judgments. As the law is now, a federal court cannot determine the constitutionality of a statute unless there is before the court an actual "case or controversy", and not merely an abstract legal question.[48] The highest court in the land has confirmed that the difference is one of degree and that it would be difficult, if not impossible, to fashion a precise test to distinguish a "controversy" from an "abstract question".[49] The court itself has suggested that liberalization of the "controversy" definition may be proper where there are "weighty countervailing poli-

[47]*See generally,* Brown, *Civil Disobedience,* 58 J. PHILOSOPHY 669, 676 (1961); A FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 33-38 (Signet Pub. 1968); Hughes, *Civil Disobedience and the Political Question Doctrine,* 43 N.Y.U.L. REV. 1, 5 (1968). For a recent example of the failure of a declaratory judgment action, *see Golden v. Zwickler,* 394 U.S. (1969). There, Zwickler was challenging a New York statute making it a crime to distribute anonymous literature. The Court rules that there was no immediate controversy when the particular congressional candidate involved had taken an office as a state Supreme Court Justice.

[48]Baker v. Carr, 369 U.S. 187 (1962).

[49]Evers v. Dwyer, 358 U.S. 202 (1958).

cies''.[50] An increased tendency in this direction may eventually supply a partial substitute for civil disobedience.

We are fortunate to be living in a society in which protest and dissent have traditionally been used for progressive social change. It is natural for a rapidly changing society to be accompanied by more vocal dissent. A nation which desires to have the benefit of the most rapid and profitable change, and the most constructive use of dissent, needs to spend some time examining both. When people resort to violence as a means of expressing opinion, something is wrong, either with those resorting to violence or with those who establish the limits for lawful dissent. The expression by dissenters must be responsible expression. The reaction by the majority to dissent must be something deeper than cynicism—there must also be concern. The answer to ''What do the reasonable people do?'' must be ''Care''.

[50]United States v. Raines, 362 U.S. 17 (1960).

MONTANA LAW REVIEW

Member, National Conference of Law Reviews

Volume 32 Summer 1971 Number 2

Published semi-annually, Winter and Summer, by students of the School of Law, University of Montana, Missoula, Montana 59801.