The Problem of the Compatibility of Civil Disobedience with American Institutions of Government

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Professor Black has presented a stirring discussion of "civil disobedience" and "nonviolence" as we think of those terms in the context of the civil rights movement. In examining the effect of federalism on the problem, he suggests that the civil disobedience that we have thus far seen, for the most part, is not really disobedience, but rather is an assertion of the national law against the state law. Another suggestion, a chilling one, is that when the power structure of a state is used to keep a race in oppression so that change by political means is hopeless, then massive and general disobedience is neither an improper response, nor one which the rest of the nation is obliged to aid in suppressing.

My own feelings about this occasion reach back some sixty years to find their origin. In 1906, my father came here from Hill County to study law. Before I was born, he and my mother came back to Austin to stay, and his professional life was for fifty years enriched, as I know he always so gratefully felt it to be, by continual association with the faculty and the students of this school. Leon Green, for example, is a name that for me goes all the way back to the beginning. To have been brought up in the Austin of the 'twenties and 'thirties is a possession of memory that never can be lost, that rises in worth from year to year; I can only express my thankfulness that this city, while growing so much, seems to have changed so little in its inner character. I attended this University and was led into the country of the mind by such teachers as W. J. Battle, Carl Swanson, Rudolph Willard, Harry J. Leon, and many others whom I recall with gratitude. My brother was trained in law at this school; I have many friends among its faculty and alumni. Though my connections in another part of the country are now what one must call considerable, involving a lady from Brooklyn and three little Connecticut Yankees, I stubbornly remain a Texan through and through, Austinian in my deepest heart. I leave you to imagine what I must feel this afternoon.

I am to speak on the compatibility of civil disobedience with American institutions of government. Now I am an American lawyer, a legal professional in one of the most legally-minded nations that ever existed. It will not surprise you to learn that my first raw reaction to this subject, several years ago, would have been that there is nothing in it at all. The incompatibility of civil
disobedience with American institutions of government might indeed have been the subject of a speech, pithy and brief. Civil disobedience, such a speech might have run, is the defiance of law by someone who conceives that he is defying law in a good cause. The American idea is that law is established by the people through constitutional processes; that the change of law, even in a good cause, is to be committed to those processes; and that the yielding, by all, of obedience to law until it is so changed, is an invariable obligation. Therefore, civil disobedience never can be compatible with our American conceptions of orderly government.

Such would be the hardshelled lawyer’s view, and it still seems to me to contain most of the truth. But when I see the civilized world united to honor those whom, on a first rough reading, this view might seem to condemn, and when I cannot deny my own feeling that it is the courage of these people that has been and is still the saving grace, not only of American life, but even of American legality, I am forced to examine this matter more closely, for what I may have missed.

And a deeper historical and cultural perspective reinforces this impulse. Passing the familiar examples of Socrates, Thoreau, and Gandhi, I think of a story of a young Pawnee brave, whose name comes back to me as Peshwataro. In his day the law of the Pawnee commanded that on the summer solstice there take place the sacrifice of the star maiden. A girl was each year captured from a neighboring tribe and bound to a stake. At dawn, the Pawnee braves would ride in a circle about her and shoot their arrows into her. This was not done for sport, but because, like so much that seems cruel in so many societies, it was thought to be a cruelty necessary to the maintenance of the moral and religious order. Many Pawnees, through what processes and influences I cannot say, came to disapprove of it and talked of doing away with it, but it was the law, and conservatism was too strong. Then one summer solstice at dawn this Peshwataro, a young man of high repute with the tribe, broke from the circle before an arrow was shot, rode furiously to the stake, freed the girl of that year, slung her in front of him, and escaped with her. He left her with her people and then rode back, much as Gandhi might have done, to submit himself to his fellows. As it happens, they did nothing. It was time, really, to stop this business; they had only needed an act of such courage to make that clear.

A case like that of Peshwataro forced me to conclude that the act of willful disobedience to law, while it never can be justified under law and, in that sense, never can be compatible with law, still may, though most infrequently, at the greatest crises exhibit a higher sort of compatibility
with law, in that it may, if I may borrow from Professor Fuller a phrase
which is both a philosophy of law and a poem about law, help the law in
quest of itself. The exceedingly rare occasions on which a man of conscience
and social responsibility could make this judgment are not, I think, sus-
ceptible of general definition. At least, many others have essayed such a
definition and admittedly failed to find it, and I will stand with them. Two
extreme and, to me, untenable positions ought to be mentioned.

The first is that a law need not be obeyed if it is unjust, that only
just laws need be obeyed. I cannot see what this can mean except that a
law carries no obligation of obedience if the individual thinks it unjust, since
the only communal standard that might be binding is _ex hypothesi_ rejected,
at least in a constitutional democracy, and in the absence of any overriding
ecclesiastic authority. This view, in modern times, seems to have found its
classic expression in Thoreau, though I confess that Thoreau is not wholly
consistent, and would, moreover, yield much obedience for the sake of
convenience, if not through a sense of obligation.

Now we common-law lawyers learn to control general expressions by re-
ference to the context in which they occur. Thoreau spoke in the context
of the operation of the Fugitive Slave Act in Massachusetts. A man was
captured there; it was said that he was a slave. The man who claimed
to be his master asked the aid of the federal power to return him to slavery.
Slaves could be whipped and branded without effective controls. They
could be sold away from their families. I think that my own serious thoughts
about racism in America began here in Austin, when I was about seven years
old, and listened to what at first I thought were the lover's sentimentalities of
the song "My Poor Nelly Gray," and then I suddenly realized—perhaps
by having it explained to me by someone who even then remembered—what
the song meant, so that the world shook a little around me at knowledge of
the horror that could disease the dealings of man with man.

If I had been alive then and had had the chance of saving a man from
slavery by disobeying the law, I like to hope that I would have done it. In
saying this, I necessarily confess my rejection of the second extreme posi-
tion, that all laws ought to be obeyed, however cruelly unjust they may
be. But I also think that Thoreau's general formula, that only the just
law imports the obligation of obedience, is to be controlled by the context
of readings in Frederick Law Olmsted, of routine plantation records of
sale, of advertisements for runaways with brandings specified for easier
identification.

Nor do I think that disobedience to the Fugitive Slave Law need have
been committed with any wish that the whole legal order of the United
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States be destroyed, any more than Peshwataro, in performing his rescue, need desire or contemplate that his deed would bring the Pawnee order to the ground. It is perhaps the greatest paradox of political nature that the country that was home to one of the worst slaveries the Western world ever knew was at the very same time the last best hope of earth. One would have to understand almost everything—perhaps even things altogether hidden from man—to grasp how this could be. I note only that, so far as I can make out, this was the truth and that there are at least some circumstances under which I, and others like me, would make the choice of deliberately breaking the law without thereby choosing the death of the legal order.

I would reject, then, as facile and misleading, as altogether destructive of legal order, the notion that no one is obligated to obey any law he thinks wrong. I think I have said enough to show my belief that there may be circumstances, going far beyond a simple conviction of injustice, in which such disobedience is both justified and compatible with the general continuance of the legal order. Beyond this, I could only suggest factors to go into judgment: the clarity and magnitude of the evil, the hopelessness of remedy within the law, the possibility of disobedience without harm to innocent people, the probable efficacy of the act, the purity (as best one can assess it) of one's own motives, and doubtless others. Against all these have to be weighed, it seems to me, the almost but not quite irrebuttable presumption that those who live under a system of law are to obey it even when they cannot square its commands with a private sense of justice. I doubt that the matter can be given much more clarity than this, unless one is prepared to accept one of the two very clear absolutist positions which to me seem untenable.

Up to now, I have been talking about the master-problem of civil disobedience as it is classically conceived, and I am afraid I have done little more than to exhibit that I think about this pretty much as the average man I am, and the far less-than-average philosopher. That the law is the law is an important thing indeed, and there is a mighty obligation of obedience. But this obligation, in the rarest of circumstances and after the gravest searching of soul, may have to give way to a mightier yet. What you will have observed is that all this presupposes, as most of the far more subtle philosophic discussions have presupposed, something called "the law," something called "the government"—a unitary and simple system, that is to say, of legal order and of legal obligation. And I am sure that what will have come into your mind is the thought that this is not our situation at all in the United States. Federalism exists elsewhere, but here it is the heart and soul of politics. We
lawyers have come to expect that the most delicate questions in all parts of
the law, from criminal justice to the labeling of food, from the racial dis-
crimination to the financing of urban redevelopment, will arise from the fact
that, over every person and over every square foot of our territory, except
for a few special enclaves, two systems of law, two generating sources of legal
obligation, exist—that of some state, and that of the nation. It would not be
surprising to find that questions about what is commonly called civil dis-
obedience are with us given a special cast by the existence of this federal
system of ours. For the rest of my time, I propose to present two principal
reflections concerning the effect of federalism on the problem of what is
ordinarily called civil disobedience.

The first reflection is one which you might think one could simply
make and pass on. As William Taylor and others have clearly pointed out,
much of what has lately been referred to, even by the actors, as “civil dis-
obedience” is really not that at all. There is some evidence, however, that
confusion still remains, and I would like to add a few words.

During the past few years, we have often heard the term “civil dis-
obedience” used to describe the actions of persons who actively disobey local
or state laws commanding racial segregation or who peacefully demonstrate
to make plain and public their disapproval of this or some other racial dis-
crimination. These people do, indeed, act in conscious violation of what is
asserted to be legal authority, and they do offer themselves for arrest by
the constituted authorities. But they do so in the belief, more or less clearly
held and more or less clearly warranted, that the law itself is on their side
and that the law's processes, in the end, will uphold them or will fail to
do so only through an error in law. They appeal, in our federal system, over
the head of the law and authority of the state, to the law and authority of
the nation.

A first instance may be the case of the Freedom Riders of the summer
of 1961. Most of these people were guilty of the offenses of riding un-
segregated on interstate journeys, of standing about together unsegregated
in waiting rooms, and of seeking unsegregated service in the station res-

taurants of interstate bus lines and railroads. There was a flavor of dis-
obedience to law about all this, both because state and local statutes and
ordinances forbade it and because local authorities—sometimes applying a

legal epithet, such as breach of the peace, that confused only if one desired to
be confused—sought to punish it by legal processes. But there was not the
faintest real doubt that the ordinances were void under federal law and that
punishment of conduct protected by federal law cannot be justified in law by
calling that conduct by some name that hopefully carries the inference of
punishability. By and large, the Freedom Rides were instances of conduct clearly lawful, and the defiance of law was all on the other side.

The sit-in cases in establishments not directly in the stream of inter-state commerce and not at the time subjected to federal statutory regulation present a different picture. Whether the federal constitution protects the right peaceably to remain on one's stool at a public lunch-counter after one has been refused service and asked to leave in obedience to a custom of segregation is a question of real difficulty. The point of law at issue, I remind you, is in that most storm-vexed field of law, the field of "state action." The guarantees of the fourteenth amendment, run only against actions of the states, and in the sit-in cases the immediate decision to discriminate was that of the proprietor. On the other hand, what the fourteenth amendment forbids a state to do is to "deny" equal protection of the laws, a form of words which surely imports some affirmative obligation, though its contours are not yet worked out. It can be contended that the custom of segregation to which the segregating proprietor conforms has for so many decades been supported by state law and policy that state power must be held a part of the causation behind individual acts taken in conformance to the custom. It would perhaps have surprised the sit-inners, in the total ambient, to learn that state power was to no significant extent involved in the segregation pattern to which they were being subjected; indeed, as a personal opinion, I am inclined to think it will surprise historians of the period to learn that this contention was so seriously urged and taken so seriously.

But the ultimate legal question is by all objective indices genuinely doubtful. The Supreme Court has split on it, three to three to three. The scholarly community is split on it. And we may never have an authoritative settlement from the Court because the Civil Rights Act of 1964 would seem now to furnish a complete statutory defense to the sit-inner and so to make moot the question of the impact of the fourteenth amendment considered alone.

The point, when we come to evaluate the act of the sit-inner, is that he usually acted under a claim of legal right, a claim not virtually certain of validity, as with the Freedom Riders, but tenable at the least and put forward in good faith. This is not to say that the children who marched into town to put their courage up against three centuries of prejudice did so while holding in their minds a clear legal theory, or several clear legal theories, on the "state action" problem; but they did, by and large, come in with the belief that they were in the right—in the legal as well as in the moral right.

The point may be made clear by a contrast between the respective
acts of John Hampden and Henry Thoreau. The disobedience of each consisted in a refusal to pay taxes, one of the most purely passive but at the same time one of the most radically subversive of civil disobediences. But Thoreau took his stand, not on the ground that under law the tax was not owing, but on the ground that as a matter of moral choice quite outside the realm of legality he preferred and indeed felt bound to withhold his support from a government that enforced slavery. Hampden, on the other hand, withheld payment on the ground that the shipmoney as a matter of law was not owing. The sit-inners, in the main, are with Hampden.

In all such cases, great or small, there is an element of claimed legal right and hence of an implied submission to rather than defiance of the order of law. There is, usually, a strong admixture of a moral in addition to a legal claim; the thing combatted, as in Montgomery, is felt to be wrong as well as unlawful. Nor is the legal claim always clear or even explicit; it is likely, for example, that the lady whose refusal to move back in the bus set the Montgomery movement going was consciously motivated rather by a realization that the request was an affront to her humanity than by an apprehension that her legal rights were being violated. But even this, the extremest case, the case of the person protesting injustice without thought to law, but under circumstances which do in fact found a tenable (and in her case a valid) legal claim, is very far indeed from the case of pure civil disobedience, of considered disobedience to what is known to be valid law under the applicable legal system.

Now I am reminding you, first, that very little in the last years' protest against racial injustice, that no major component in that protest up to now, bears the character of disobedience to law. Secondly, it seems plain, as to the future, that there is an enormous scope for the same sort of protest within the framework of law. Two over-arching guarantees are precisely applicable and vast in extension. The equal protection clause of the fourteenth amendment makes unlawful any racial discrimination that has in it a component of state power. And the federal guarantees of free expression throw the sanction of law around expressions of protest where these are unaccompanied by physical threat.

We now have, as well, the Civil Rights Act of 1964. It enlarges and clarifies the right to equality in many areas. Most important of all, in view of the vote by which it passed, in view of the circumstances surrounding its passage, and in view of other recent happenings, it may be taken to have fixed the national policy, stated the national consensus, as clearly and as firmly and through as many political organs as the Constitution makes possible. Courts do, because they should, take account of such a firm and
broad fixing of policy in those tasks of interpretation and in those judgments of remedial wisdom which are necessarily committed to the judicial process. Segregation, for example, is now out of bounds in the view of a unanimous Supreme Court, of overwhelming majorities in both Houses of Congress, and of the Presidency; nothing that could happen to fix this stone in place has failed to happen. The condemnation of apartheid is now among the most amply validated equities of federal law.

Why then does the aura of "civil disobedience" continue to surround assertions of the right to equality? Multiple reasons can be suggested. First, the historical sources of the movement lie in Thoreau and Gandhi, each of whom actually faced the ultimate problem of resistance to law. Besides defying law, these two men acted nonviolently—Thoreau in a few single acts, Gandhi in carefully thought out and tested ways. It is this nonviolence, as a technique of struggle, that has actually been brought down and applied to the American racial conflict. But the engaged and busy men who have effected this have not always been careful to note, when their living of nonviolent resistance left them a little leisure for the statement of its theory, that their methods were not being employed in disobedience to law, but in the assertion and vindication of law under the federal constitution and the supremacy clause that makes that Constitution a law controlling the laws of the states.

In the phrase "laws of the states" lies a clue to another source of misunderstanding. In most of the racial protests and resistances, something which looks like law, which has passed through the legislature, which is printed where laws are printed, is being violated. It is easy to forget the supremacy clause and the underlying claim of federal legal right.

Thirdly, sometimes the person exercising civil disobedience elects not to appeal to the federal norm, but rather to acquiesce in the legality of the state rule and to take his punishment under that rule, so as to concentrate attention on the wickedness of the rule without any distracting considerations of federal law and so as to emphasize publicly his feeling of membership in the local community and his desire to seek conciliation at that level.

These three points are no more than explanations of a mistake, an important mistake to be sure, for it seems to confront the observer of racial protest with a philosophic and political problem he actually need not face, but a clear mistake none the less. A fourth explanation goes deeper. There is after all, it can be asserted, some functional similarity between true disobedience to law and disobedience to what was long thought to be law, to what is taken to be law still by many of the people concerned, to what is enforced as law by duly constituted authorities, even to customs so
widespread as to be in some sense tantamount to law. To take Mr. Bayard Rustin's phrase, "social dislocation" on a very great scale is being brought about, and the dislocation in many communities is as great as any that would be brought about by some sheer disobediences to valid law. To undertake such dislocation is itself a grave matter. If every man and every group used all the room the federal law gave it to clash with local custom and local authority, the resulting dislocation would jar our states and our towns to the point of virtual fragmentation. Most of us are content to go along with local customs and local authority in most cases, insisting neither on our full federal constitutional rights nor on our own conceptions of propriety. The case for refraining in general from producing social dislocation reproduces in low relief the case for obedience to law. One must look, I should think, for a special moral urgency before deciding to insist on one's rights against strong community feeling, and the means adopted, it could be hoped, would be means apt to move the conflict toward a consensus, toward a new and better relocation, instead of widening it, insofar as such choice of means can consist with maintenance of principle. The structural similarity of these two considerations to those that might govern, respectively, the solemn decision whether law is to be disobeyed and what the mode of such disobedience is to be tends to result in confusion as to the nature of the norm disobeyed. Where the contemplation of social dislocation even in aid of law sends the mind to considerations so much like those raised by civil disobedience properly so called, it is perhaps natural that the two things, though so different in their ultimate placing in respect to the legal order, should be thought of as much the same.

So much for that part of civil disobedience which is not disobedience to law at all, but which is a solemn assertion of the nation's law against the law of some state, and which, far from being incompatible with our institutions, actually asserts and implements our law itself.

My second line of reflection on what I may call civil disobedience in a federal union takes me onto much steeper and rockier ground. I think of the possibility, and I am sure it is a definite possibility, though I have no distinct information, that a massive and general campaign of civil disobedience, going far beyond individual acts particularly validated and protected by specific federal norms, may be mounted against the whole power structure of some state with the aim of producing a total change from the use of all the state's power to perpetuate a racist regime. We may hope this ultimate confrontation will be averted, but it is now in sight, and we must ready ourselves to face it with firmness.

Disobedience to particular invalid laws can test those laws and at last
bring them to nothing. But what is to happen when the grievance goes not to any particular disposition of the state law, but goes rather to the total misuse of all the state's machinery to keep a race in oppression? Let us suppose first a state containing a large Negro population in which Negroes do not now vote and hence have no political power; change by political means on the state level is hopeless, and the ingenuity of state officials seems adequate to the task of thwarting indefinitely any normal federal attempts at forcing the franchise open. All the officials are white, and all are in what amounts to a conspiracy to keep the Negroes disenfranchised and segregated. When Negroes try to register to vote, they are cheated out of registration by manipulation of purportedly neutral qualifications for the franchise and are commonly insulted and visited with violence as punishment for their audacity. Indeed, any assertion on their part of even the most clearly declared federal constitutional rights is often the signal for aggression against them. Most fundamentally, violence so motivated and indeed much other violence by whites against Negroes is left unpunished or punished so inadequately that the punishment simply publicizes the whites' virtual immunity. People are shot in the back, churches are bombed, and nothing much happens. I have painted my state rather abstractly, sparing you the gruesomeness of pathologists' reports, and even the details of a poverty made virtually inescapable by the political system and the thuggery it smiles on, for I have said enough to ask my first question.

Which of us here, you or I, would feel any moral obligation of loyalty to the legal system of a state that so used us, our children, our wives, and our parents? Does not my description paint a state of things quite definitely past the point where absolution from any such obligation is entirely plain? If we had to do not with a state but with a country, would we have any doubt that people so treated were morally justified in treating their obligation of obedience to the government as ended? Would we not, in fact, despise them if they did not? Neither we in 1776, nor the Indians in 1946, had anything like this to complain of.

Under a federal system, where the governmental unit so desperately sick is one of the component states, the situation is one of much greater intricacy. It is hard to know just where to lay hold of it, but I will start from familiar ground by pointing out that such a state is itself grossly in contempt of national law in hundreds of ways. The most important way, doubtless, is in the denial of the most fundamental of the law's protections, the protection against aggression. The complaint is not against state law simply, or against the state legal system simply, but specifically against state laws and a state legal system on the ground that, besides their gross
injustice, they are in defiance of federal law, though so resolutely and so complexly and so furtively in defiance that that law's machinery cannot deal with them.

Now I am a lawyer, and my instinct is to say that the lawful power of the federal government ought to be employed by all its three branches to put an end to this situation, that force ought to be measured to force until submission is attained, and this at no great remove in time. But I am given pause by several factors. First, the application of nonmilitary federal power presupposes some orderliness and good faith, some inner legal quality, in the machinery even of the state that is out of line. I like to tell my classes in Connecticut, rightly I think, that many of the old voting discrimination cases came from Texas, not because Texas was especially bad about Negro voting, but because Texans respected law. A Negro could get to the courthouse alive; he could find a lawyer not afraid to take his case; the court's decree would at last be obeyed. Where judges are openly prejudicial in their remarks from the bench, where juries will not listen to proof, where police conceive their chief function to be that of supporting the corrupt order, no measure of federal civil force can do the whole job.

Secondly, federal military force, while badly needed, cannot by itself produce a new order of things.

Thirdly, and reluctantly, I find all too general a lack of will to make even an appropriately measured use of the power the federal government does possess and could appropriately bring to bear. Too many people still proffer clichés about "delicate federal-state relations," where one party to that relation has long ago abrogated it by denying in word and deed its essential obligation. In my view, these people are fiddling along in a key unrelated to the ominous chords of reality—and the danger is more than aesthetic. A great miracle occurred at the funeral of Medgar Evers; the crowd sang "My Country 'Tis of Thee." That they could pronounce the first word is the miracle with which we trifle from day to day. Someday, while we dream about the implications we erroneously deduce from federalism, they may forget how to pronounce that word, and we will find out what it is like to live in today's world in a country where twenty million people, used to hardship, and unnumbered millions besides have lost faith in the justice of the United States. I wish I had words to make everyone feel a sense of urgency for what is so urgent. But I acknowledge as fact the reluctance I see, the endlessly adaptable, the protean reluctance, and I ask what other sources of strength may exist. When I do, I realize that one day the Negroes in the state I have described might be led to act in their own interest in a manner incompatible with the acknowledgement

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of any loyalty or duty of obedience to the state government as constituted.

Let me say I have not departed from my subject; I am still talking about civil disobedience and not about violence, though I must say that few if any of us here would feel any obligation to abstain from violence if we were so positioned. I assume that what might happen is that the Negroes in the state might try some form of massive peaceful resistance with the aim of attaining recognition of their federal legal rights. And I ask, what ought to be the position of the rest of the country, if that should occur?

I think it well, first, to state my view that the question is one of pure policy, that nothing in our Constitution forces on us any action or inaction.

My first point here is constitutional in the most important sense, in the sense that it has to do with the manner in which this federal union is composed and with definition of the loyalties which a union so composed demands. When true civil disobedience occurs in a simple, unitary nation, each citizen’s loyalty is put to a severe test. He cannot dissociate himself from those who are enforcing the law except by a radical break with his political allegiance. He cannot pay part of the sheriff’s salary, part of the judge’s salary and wash his hands of the matter. More important, he cannot ask the sheriff and the judge to stand unsupported in protecting the order in which he acquiesces and from which he takes the benefits of civilization. He may hedge and evade, as almost all of us so often do, but, if he would be consistent and fair, he must either join the disobedient or support the keepers of the law.

Our federalism radically changes this. I need not dwell on the purely technical aspects of the distinction. In most cases of mere massive defiance of law without relation to any warranted national goals, most of us, while aware that we are not members of the body politic of a sister state, would wish as a matter of policy to see the national power employed to assist in restoring the rule of law. But I submit that it makes all the difference that a campaign of civil disobedience is mounted in the sister state against a misuse of the power of that state to resist and thwart the law of the nation. On that matter, no American citizen, certainly none outside the state affected, is inconstant to his political allegiance in wishing well to the disobedient. What a paradox it would be if the nation as a whole thought itself obliged to support a state regime against civil disobedience aimed at nothing in the world but making the national law prevail!

A people wholly denied its federal rights by the state in which it is resident and at the same time treated in a manner which morally wipes out its political obligation to that state’s legal system may act on its recognition of the latter fact without being thought to have severed its ties of loyalty to or in any manner to have betrayed the national government. The whole theory
of our federalism is that the national and the state governments are separate and distinct. We have carried this down to some pretty bizarre results, from the standpoint of substantial justice, in the realm of double jeopardy, to state only one example. Why should we hesitate to infer from the same principle a result clearly in accord with the facts of the matter? The civilly disobedient Negro community in the state shows no flaw in its federal allegiance; its very grievance is that Negroes are not allowed to function as federal citizens. What an absurdity it would be to see in this a denial of national loyalty! The Negroes' dedication to a civil disobedience incompatible with their state's legal system is entirely compatible, in theory as it surely is in fact, with their remaining bound with us within the national allegiance and its obligation of obedience to national law, which we all have in common.

Secondly, no specific provision in the Constitution binds us to take any simple predetermined stance toward such a civil disobedience movement. The United States is obligated to guarantee to every state a "republican form of government." But that form of government is not threatened by a passive campaign aimed at bringing state elective machinery, criminal procedures, and standards of equality into line with federal guarantees, even though state law might be violated in such a campaign. Congress and the President might legitimately judge in the given case that it was the opposition, the simulacrum of republican government, that threatened the essence of such government. The United States is also obligated, on application from a state, to protect it from "domestic violence." But (aside from the fact that I speak of nonviolence) the application of the formal state government could only invoke and could hardly control the form of the federal intervention.

On the whole, the rest of us through our national government would be constitutionally free to act as we thought just and wise, if it should happen that a Negro population, treated as I have described, embarked on a course of true civil disobedience against the offending state. Any notion that we must disapprove of or aid in suppressing such a movement, or even that we are forbidden to use the federal power to aid it, is founded only on custom-thought, 1877 model, and not on the Constitution. It is my earnest submission that, if the case should occur, we ought to use a prudently measured federal power to assist and protect. In the absence of valid constitutional objection, how could we choose otherwise?

You may think I am talking fantasy. If you do, you may be right in the particular case. No one can see into the future. But I still suggest that your underlying assumption may be wrong. For that assumption, if it accords with the commonest one—one, like most of the commonest assumptions, in-
explicit and even unconscious in many minds—is that nothing much is going
to happen, that things are going on in pretty much the same way, that every
decade or so we’re going to look about and take note of a progress definite
though slow, whitewashing over those enclaves of resistance where things
have stayed the same or even gotten worse. I ask you to reconsider that
assumption, to consider not only the bitter injustice it continually fathers
to men no more immortal than we whites are, but also its implausibility
and its danger.

After protracted struggle, the Civil Rights Act was passed. It would be
utterly unrealistic not to add that the President who saw it through with an
energy and devotion the civil rights cause has not, on the level of deeds, seen in
any President before, a President proudly identified with the act, shortly
afterwards defeated, by the greatest margin in history, a Senator who had
voted against the act and denounced it. Great events occur, and things are
changed. The Negroes of this country with the national policy so declared
and fixed expect something to happen. So, I may add, do many of the white
people; we, too, having children, are interested in this subject, for we do not
desire to make them the heirs of an excuseless national failure to do justice,
believing as we do that such a failure must somehow bear its bitter fruit.

So I speak again hypothetically. If a great civil disobedience movement
should soon be mounted, challenging the very structure of state power where
that structure has proven to Euclidean demonstration that it cannot and
will not fulfill its basic obligations to federal law and human justice, I hope
we will not be led by pseudo-constitutional considerations that crumble at
the touch of analysis to think we are bound to hold up the wax hand of the
effigy of state law. I hope we will not think we are bound—for it would be
hard to say just what it is that binds us—to hold back from giving such
support and protection as we can to such a movement. A radical catharsis
through drastic civil disobedience may be the only alternative in some places
to solutions infinitely more dreadful. Nothing in our Constitution makes such
action incompatible with federal allegiance. If the occasion should come, I
hope we will welcome the seeking of a new order through peaceful means
and rejoice in the flexibility of our Constitution, which does not in this, any
more than elsewhere, force us into other ways than those of the national
welfare and of justice.

In the event of such a movement’s being mounted, the President, by
federalizing all the troops he can, ought to make impossible their use to
club the movement down. By executive and congressional action, we ought
to see to it that the federal rights of free communication remain open to
the Negro community and that federally imposed procedural guarantees,
including trial by properly selected juries, be strictly applied to all proceed-ings in which demonstrators are sought to be punished; in this connection, I may add that the sparing use of federal habeas corpus, now commanded by the judicial code and the cases, is based neither on constitutional necessity nor on eternal wisdom, but on a prudence which ought to stand ready to change its judgment where conditions change, and that if more federal judges are needed very little if any change in law is required for their assignment from districts and even circuits having less urgent press of business that goes to the nation's life. The maintenance of open channels for interstate movement of goods and people for the sustaining and counseling of the civil disobedience movement is a legitimate federal concern.

I cannot say at all what form would be taken, what techniques used by a civil disobedience movement aimed at changing the whole structure of a state’s law. I have read just enough to know that civil disobedience has a subtle range of tactics, and I learn from the greatest master of these that one must live it to understand it. I have not lived it. I cannot, therefore, do more than give examples of possibility when it comes to the form that federal protection might take. But I do insist that a will can find a way and that our will ought to be to support and to uphold those who would, in the situation I have imagined, be struggling to save all of us in the mode best calculated to produce final conciliation even in the state whose power they would be contesting.

The fact that we are a federal union gives all our problems a special form, and the civil disobedience problem is no exception. The fact that we are a federal union changes much that would be civil disobedience into a mere claim of legal right, asserted against what only seems to be law. And our federal character makes it possible for true civil disobedience to be mounted against a state government without any loss of national allegiance, without any surrender of the right to national guarantees, and, indeed, in the interest of preserving the soul of the nation. I exhort you to think about this last problem in terms of the twentieth and twenty-first centuries, to separate the constitutional from what is merely conventional, and to ask yourselves whether the merely conventional modes of our thought can be allowed to keep this nation from doing what it can to sustain and protect any civil disobedience movement that is aimed in the end only at making effective the guarantees we have all written and kept in our Constitution. Our customary thought about the federal obligation, where state power is massively and wrongfully incident on the Negro race, has not so proud a record as to make it inappropriate for us to reexamine its deepest foundations.