

Civil Disobedience: A Threat to Our Society Under Law
by Morris I. Leibman

This article, which originally appeared in *The Freeman* in December 1964, is an adaptation of Mr. Leibman's address before the American Bar Association Meeting, Criminal Law Section, in the summer of that year. Morris I. Leibman (1911-1992), was a partner in the law firm Sidley and Austin. He was awarded the Presidential Medal of Freedom in 1981 by President Ronald Reagan.

Woodrow Wilson once said: "A nation which does not remember what it was yesterday, does not know what it is today, nor what it is trying to do. We are trying to do a futile thing if we do not know where we came from or what we have been about." In seeking to improve tomorrow, it is our duty to remember where we have been and reflect on where we are.

We live in that instant of time when it can be said that never before have the people in this country enjoyed so many material goods, however "imperfect" their distribution. Never before have we had as much mechanical, electronic, and scientific equipment with which to subdue the natural obstacles of the universe. But the multiplication of consumer wealth is subordinate to our greatest accomplishment—the fashioning of the law society [one that operates under the rule of law].

Never in the history of mankind have so many lived so freely, so rightfully, so humanely. This open democratic republic is man's highest achievement—not only for what it has already accomplished, but more importantly because it affords the greatest opportunity for orderly change and the realization of man's self-renewing aspirations. Our goals, as set forth in the Declaration, have been buttressed by a Constitution, a system of checks and balances, a mechanism judicial, legislative, and executive which permits the continuation of Western civilization's spirited dialogue. This unhampered dialogue makes possible the opportunity to continuously approximate, through our legislative and judicial system, our moral and spiritual goals.

The long history of man is one of pain and suffering, blood and tears, to create these parameters for progress. This noble and unique experiment of ours over a hundred years ago, lived through the cruelty of a massive civil war to test whether such a unique system could endure. It did. It has. It will. Let us always remember that the law society is the pinnacle of man's struggle to date—the foundation for his future hope.

There is an obligation to that law society. It was stated by Abraham Lincoln in these passionate words: "Let every American, every lover of liberty, every well-wisher to his posterity swear by the blood of the Revolution never to violate in the least particular the laws of the country.... Let every man remember that to violate the law is to trample on the blood of his father, and to tear the charter of his own and his children's liberty. Let reverence for the laws be breathed by every American mother to the lisping babe that prattles on her lap; let it be taught in schools, in seminaries, and in colleges; let it be written in primers, spelling books, and in almanacs; let it be preached from the pulpit,

proclaimed in legislative halls and enforced in courts of justice. And in short, let it become the political religion of the nation; and let the old and the young, the rich and the poor, the grave and the gay of all sexes and tongues and colors and conditions, sacrifice unceasingly upon its altars."

No society whether free or tyrannical can give its citizens the "right" to break the law. There can be no law to which obedience is optional, no command to which the state attaches an "if you please."

What has happened to us? Why is it necessary, at this moment, in this forum to repeat what should be axiomatic and accepted? Many, many words more eloquent than mine have examined from every angle the genesis, the roots, the grievances, the despair, the bitterness, the emotion, the frustration that have resulted in the tragedies of these

Responsible Citizenship

Now what is the responsibility of a citizen—the majestic title bestowed on those of us who create and share in the values of the law society? Let there be no question of where we stand on human rights and our rejection of discrimination. Surely the continuing social task for the morally sensitive citizen is to impart reality to the yet unachieved ideal of full and equal participation by all and in all our values and opportunities.

Yet we must remember that there are no easy solutions for man's inhumanity to man. Justice Frankfurter once said: "Only those lacking responsible humility will have a confident solution to problems as intractable as the frictions attributable to differences of color, race, or religion."

Let's not forget there is nothing new in violence. Violence has throughout mankind's history been too often a way of life. Whole continents have been involved in riot, rebellion, and revolution. Human rights problems exist in India, in Asia, in the Middle East, and in Africa. We cannot sanction terror in our cities. Retaliation is not justified by bitterness or past disillusionment. No individual or group at any time, for any reason, has a right to exact self-determined retribution. All too often, retaliation injures the innocent at random and provokes counterretaliation against those equally innocent.

Our imperfections do not justify tearing down the structures which have given us our progress. The only solution is the free and open law society. In times when man's progress seems painfully slow on any one issue, we might also consider how well we are doing on all issues compared to most areas of the world over most of the world's history. In this frame of reference let us identify certain current forces whose aim is to destroy the law society.

Ethnological warfare, the inciting of dissension and conflicts between nationalities and races, has been a widely exploited revolutionary tactic. Communists were long instructed to change passive attitudes to "activist" attitudes, to intensify the struggle at all levels at all times. Communists have had their imitators, who mimic, under many "theories" and

many labels, doctrines which reject law and order. The Nazis, the Malcolm X's, the Ku Klux Klanners have repeatedly and directly challenged our principles and insisted on taking "law" in their own hands.

The jungle lawlessness of the frontier demonstrated to the pioneers that law was essential to the establishment of civilization. It was not the destruction of the buffalo, or the rise of fences, or fast-draw gunmen that tamed the wilderness. It was the installation of American juridical proceedings that enabled our people to weld together the disparate territories destined to become an organic nation.

Semantic Traps

I am also deeply troubled by certain concepts which have sought acceptability: the idea of "Freedom Now" and the idea of "Righteous Civil Disobedience." In my opinion both terms are semantic traps and only add heat to the problems of freedom and justice for all. It is a further semantic trap to divide the discourse on civil disobedience into a stereotype of liberalism vs. conservatism.

"Freedom Now" is an illusion. The desire for self-expression can be satisfied only in an atmosphere of freedom, and freedom is not absolute. It exists only within the necessary restraining measures of society.

I wish it were possible to have heaven on earth. I wish it were possible to have the ideals of justice and freedom in all their perfect form at this moment. The cry for immediacy is the cry for impossibility. It is a cry without memory or perspective. Immediacy is impossible in a society of human beings. What is possible is to continue patiently to build the structures that permit the development of better justice.

Let us also beware of pat phrases such as "justice delayed is justice denied." Justice delayed is no excuse for antijustice or the destruction of the law system. The fact that particular reforms have not been completely achieved does not justify rejecting legal means-the only hope for lasting achievement.

The demand for equality cannot be converted into a fight for superiority. We must be for equality under the rule of law. We are for freedom under law, not freedom against the law.

Let us also avoid unreal questions such as whether justice is more important than order or vice versa. Order is the sine qua non of the constitutional system if there is to be any possibility for long-term justice based on public consensus.

Flouting the Law

What about the concept of "righteous civil disobedience" ? I take it that all men now accept the fact that there can be no justification for violent disobedience under our

constitutional system. Is the concept validated when the disobedience is nonviolent? In my opinion this idea has no place in our law society.

Parenthetically, I would suggest that you experts in criminal law consider whether there can be "civil" disobedience where there is a specific intent to disobey the law. Such a specific state of mind is ordinarily treated as the essence of criminality, hence not "civil." Therefore, it seems to me that there is an inherent contradiction in the concept of premeditated, "righteous" civil disobedience.

Yet I prefer to base the case on broader grounds. The concept of righteous civil disobedience, I think, is incompatible with the concept of the American legal system. This is particularly axiomatic where this society provides more than any other for orderly change; where every minority-including the minority of one-has been protected by a system of law which provides for orderly process for development and change. I cannot accept the right to disobey where, as here, the law is not static and where, if it is claimed to be oppressive or coercive, many effective channels for change are constantly available. Our courts do not have to apologize for their continued dedication to the liberty of all men. Our legislatures have regularly met the changing times and changing needs of the society with consideration for the unalienable rights of all. Even the Federal and state constitutions have been amended. Our law has not only been a guardian of freedom, but the affirmative agent for freedom.

While the idea of civil disobedience may evoke sympathy where the claim is made that the cause is just, once we accept such a doubtful doctrine we legitimize it for other causes which we might reject. We must be even more careful in the sympathetic case because, in effect, that sets the standard of conduct which then becomes acceptable for cases not as appealing or for groups not as responsible. Thus, we substitute pressure for persuasion and squander the carefully nurtured value of self-restraint and jeopardize the system of law.

The plain fact of human nature is that the organized disobedience of masses stirs up the primitive. This has been true of a soccer crowd and a lynch mob. Psychologically and psychiatrically it is very clear that no man-no matter how wellintentioned -can keep group passions in control.

Disobedience Breeds Disrespect

Civil disobedience is an ad hoc device at best, and ad hoc measures in a law society are dangerous. Civil disobedience under these circumstances is at best deplorable and at worst destructive.

Specific disobedience breeds disrespect and promotes general disobedience. Our grievances must be settled in the courts and not in the streets. Muscle is no substitute for morality. Civil disobedience is negative, where we require affirmative processes. We must insist that men use their minds and not their biceps. But, while the emphasis must be on the three R's of reason, responsibility, and respect, we cannot accept selfrighteousness,

complacency, and noninvolvement. We reject hypocritical tokenism. We have an affirmative and daily duty to eliminate discrimination and provide opportunity-full opportunity and meaningful equal justice for all our people.

In an era of social, political, and scientific revolutions -and at a time of accelerating and complex change-we of the law must particularly renew our understanding and improve our articulation of the basic issue of freedom under law and the continuing need to strive for equality and meaningful liberty and justice for all.

Freedom is not some easy gift of nature. The plant of liberty has not grown in profusion in the wilderness of human history. Liberty under law is a fragile flower. It must be nurtured anew by each generation of responsible citizenry. Let but a year of neglect be sanctioned, even celebrated, and the jungle of force threatens to recapture the untended garden.