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## Defense of the Civilly Disobedient

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## DEFENSE OF THE CIVILLY DISOBEDIENT

DEBORAH GREENBLATT\*

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### INTRODUCTION

This essay is written for lawyers undertaking the representation of people who have committed civil disobedience. There is no attempt here to cover basic trial or criminal defense skills, but rather to guide the lawyer in a specific set of cases—those involving civil disobedience.

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The civilly disobedient client is distinctive from other clients facing criminal charges in many ways. This defendant does not deny violating the law. Rather, the violation is not only admitted, but frequently planned in advance, discussed, and publicized. What can a lawyer do for such a client? How does defense of civil disobedience differ from other criminal cases? How is it similar? Does civil disobedience imply a plea of guilty and willing acceptance of punishment? These are among the questions which will be addressed with a view toward aiding the lawyer in understanding civil disobedience, facilitating lawyer/client communication and decision-making, and providing thorough, competent representation.

## I. WHAT IS CIVIL DISOBEDIENCE?

### A. *Toward a Definition*

Effective representation, and effective use of some of the strategies discussed in this article must begin with a basic understanding of what civil disobedience is, its justification, and its historical role in Anglo-American jurisprudence.

Civil disobedience is defined by philosopher John Rawls as "[a] public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."<sup>1</sup>

This broad definition encompasses a wide range of activity. It is not limited to direct civil disobedience—that is, action in which the law being violated is the very subject of the protest. It also includes violations of laws to focus public attention on other injustices in society that may or may not be related to the laws violated—indirect civil disobedience.<sup>2</sup>

Examples of direct civil disobedience include refusing to report for induction into the armed services,<sup>3</sup> burning selective service cards<sup>4</sup> or refusing to carry them,<sup>5</sup> destroying records,<sup>6</sup> refusing to pay war tax,<sup>7</sup> and violating restrictive parade ordinances.<sup>8</sup> Direct civil disobedience may be personal or political. For example, an act could be entirely

1. J. RAWLS, A THEORY OF JUSTICE 364 (1971).

2. M. SIBLEY, THE OBLIGATION TO DISOBEY: CONSCIENCE AND THE LAW 80-81 (1970).

3. See, e.g., *United States v. Seeger*, 380 U.S. 163 (1965).

4. See, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968).

5. See, e.g., *United States v. Eppinette*, 488 F.2d 365 (4th Cir. 1973).

6. See, e.g., *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

7. See, e.g., *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974). In *Snider*, defendant claimed three billion dependents on his tax withholding as a form of protest against the Vietnam War. He also failed to rise for the entrance and departure of the presiding judge and was cited for contempt of court. *Id.* at 648.

8. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965).

conscientious, such as the refusal of a Jehovah's Witness to report for military duty on personal moral and religious grounds. In such a case, the disobedient's motivation is to conform to the commands of Jehovah, with little regard for the political or social consequences of his act. Since refusal to report will have political consequences nonetheless, it can be classified as political for purposes of definition. Direct civil disobedience also includes acts that are, though conscientious, primarily motivated to change public opinion and official policy.

Examples of indirect civil disobedience include sitting-in at segregated lunch counters to protest racial discrimination,<sup>9</sup> blocking traffic to call attention to a municipality's discriminatory hiring practices,<sup>10</sup> or sitting in at the headquarters of a public utility to protest nuclear power.<sup>11</sup> In each of these cases the law violated is not the subject of the protest. To the extent that draft resistance, including destruction of selective service records, protested the Vietnam War as well as the draft, it contained elements of both direct and indirect civil disobedience. In practice, there is often overlap between personal/political motivations and between direct/indirect methods. These distinctions have been the subject of debate—some writers urging that indirect civil disobedience cannot be classified as civil disobedience at all.<sup>12</sup> According to the more generally accepted view,<sup>13</sup> adopted for purposes of this discussion, the definition of civil disobedience includes personal and political acts, direct and indirect violations.

Civil disobedience can be solitary, as that of Henry David Thoreau, or it can involve mass resistance according to common design, such as that led by Gandhi in South Africa and India or Martin Luther King and others during the American civil rights movements of the nineteen sixties. It is generally public, but there are exceptions. For example, resistance to fugitive slave laws or harboring Jews in Europe, by the nature of the activity, required secrecy. It is generally nonviolent, but the line between nonviolence and violence can be thin. For example, is nonviolent activity that provokes violence by others still nonviolent? At least one writer has defined civil disobedience as "the deliberate violation of law for a vital social purpose,"<sup>14</sup> thus leaving that question open. It can include destroying property and records or causing public inconvenience by such means as blocking the entrance to a building.

9. See, e.g., *State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961).

10. See, e.g., *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

11. See, e.g., *State v. Birkhead*, 48 N.C. App. 575, 269 S.E.2d 314, cert. denied, 301 N.C. 528, 273 S.E.2d 455 (1980).

12. See, e.g., A. FORTAS, CONCERNING DISSSENT AND CIVIL DISOBEDIENCE (1968).

13. See, e.g., A. BICKEL, THE MORALITY OF CONSENT (1975); J. RAWLS, *supra* note 1; M. SIBLEY, *supra* note 2.

14. H. ZINN, DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER 39 (1968).

In this discussion, civil disobedience is defined as nonviolent, and based on an underlying commitment to human life and dignity. Solitary and group action are both included in this definition.

When someone violates a law they believe to be unconstitutional or otherwise unlawful, as well as morally wrong, the question arises whether this is civil disobedience. Some writers exclude acts that violate a law for the purpose of creating a test case.<sup>15</sup> Others take the view that violation of an unjust law is no legal violation at all.<sup>16</sup> To the extent that an action might challenge the constitutionality or validity of a law, and at the same time protest its general unjustness, it is within the umbrella of civil disobedience. Conduct is defined as civil disobedience where those who commit it are prepared to go forward even if the law is upheld. As with the previous distinctions, in practice there is much overlap.

The question also arises whether someone who commits civil disobedience must, by definition, willingly accept whatever punishment is meted out.<sup>17</sup> However, civil disobedience does not preclude raising defenses. Such legal challenges can play an important role in focusing public attention on the underlying subject of protest, and legal proceedings can function as a means of legitimizing the cause protested. Civil disobedience pressures the society toward consistency between law and morality. This pressure actually imposes a stabilizing force on the legal system.<sup>18</sup>

What makes civil disobedience civil is the context in which it takes place. It falls far short of revolution, which Thomas Jefferson prescribed as a regular medicine.<sup>19</sup> Civil disobedience is not a means of overturning a thoroughly unjust and corrupt system, for it presupposes a duty to obey. It presupposes that the laws and policies protested deviate from the public conscience and that appeal can be made to that public sense of justice. It expresses disobedience to law within the limits of fidelity to law but at its outer edge.<sup>20</sup>

Finally, civil disobedience is conscientious. It is not merely an instance of doing as one pleases. It presumes that the general obligation to obey is outweighed by a greater obligation to justice, righteousness, or human life. The decision to disobey is made in full awareness of the possible consequences; it is based on factual background; and it is seldom made without serious misgivings and doubts. Who is to say when

15. J. RAWLS, *supra* note 1.

16. This is the position espoused by St. Thomas Aquinas and Lon Fuller according to M. SIBLEY, *supra* note 2, at 60-65.

17. Compare A. FORTAS, *supra* note 12, at 10 with H. ZINN, *supra* note 14, at 27-32.

18. For a convincing explanation of this concept, see J. RAWLS, *supra* note 1, at 383-84.

19. M. SIBLEY, *supra* note 2, at 77.

20. J. RAWLS, *supra* note 1, at 367.

the circumstances justify civil disobedience? The individual must decide for herself. The idea of conscientiousness embodies rationality, concern for others, a need for consistency in conduct, and recognition of both the ends to be met and the intermediate consequences.<sup>21</sup>

Civil disobedience has many faces. For some it may be obligatory simply to preserve one's personal integrity. For others it may be used as a device for social reform. It may be public and nonviolent. It may be individual or mass, direct or indirect. It is, Gandhi declared in 1922, "the inherent right of a citizen."<sup>22</sup>

### B. *History of Civil Disobedience*

Civil disobedience has existed since antiquity. So long as there have been governments, there has been disobedience to government authority based on conscience. Incidents of civil disobedience are recorded in the Old and New Testaments and in the literature of ancient Greece and Rome. The midwives in the second book of Moses refused to follow the command of Pharaoh to kill all male children born to Hebrews.<sup>23</sup> The disobedience of Socrates is well known. Convicted of impiety, he willingly accepted the punishment of death, even though not everyone tried and convicted of this act met such an end.<sup>24</sup>

Reports of disobedience to civil authority in the English common law include the celebrated case of Quaker William Penn, who was tried, along with William Mead, in 1670 for preaching unlawful assembly. The case is important not only for documenting the disobedience of Penn and Mead but primarily because the jury refused to convict them despite strong evidence of guilt. As a result, the jury was imprisoned by the judge for two nights without food and fined for their verdict of not guilty. The jurymen's case was reviewed on writ of habeas corpus, and Chief Justice Vaughn delivered the opinion for the Court in *Bushell's Case*,<sup>25</sup> establishing the right of juries to give their verdict according to their convictions.<sup>26</sup>

In colonial America, similar cases occurred, one being that of John Peter Zenger in 1735. Zenger was charged with printing and publishing seditious libels, but, with an eloquent defense by Andrew Hamil-

21. For guidance in making the decision see the discussion in M. SIBLEY, *supra* note 2, at 115. See also King, *Letter from the Birmingham Jail*, in NONVIOLENCE IN AMERICA: A DOCUMENTARY HISTORY 461 (1966).

22. M. GHANDI, NON-VIOLENT RESISTANCE 174 (1972).

23. *Exodus* 1:15.

24. D. DAUBE, CIVIL DISOBEDIENCE IN ANTIQUITY 72-75 (1972).

25. 124 Eng. Rep. 1006 (1670). See M. KADISH & S. KADISH, DISCRETION TO DISOBEY 46 (1973).

26. See Schefflin, *Jury Nullification: The Right to Say No*, 45 S. CAL. L. REV. 168 (1972).

ton, he too was acquitted.<sup>27</sup> Meanwhile, in England, the violation of seditious libel laws was so prevalent that debate over the jury's power to acquit resulted in the enactment in 1792 of Fox's Libel Act. The Act specifically provided that in seditious libel cases, as in all other criminal cases, "the jury . . . may give a general verdict of guilty or not guilty upon the whole matter put in issue."<sup>28</sup> That people were willing to risk criminal prosecution in order to further the cause of freedom of the press undoubtedly led to the incorporation of that ideal in the first amendment of the United States Constitution.

Henry David Thoreau served a night in jail in 1846 for refusing to pay his poll tax. His essay, "Civil Disobedience," made his position clear: "How does it become a man to behave toward this American government today? I answer that he cannot without disgrace be associated with it. I cannot for an instant recognize that political organization as *my* government which is the *slave's* government also."<sup>29</sup> Such was his faith in the power of civil disobedience, that he added: "If the alternative is to keep all just men in prison, or give up war and slavery, the State will not hesitate which to choose."<sup>30</sup>

Disobedience to the fugitive slave act of 1850 was so widespread that a meeting in Highland County, Ohio, led by Senator Salmon P. Chase, resolved that "disobedience to the enactment is obedience to God." In Chicago, the Common Council adopted a resolution denouncing the Act and forbidding city policemen to render assistance in its enforcement.<sup>31</sup>

Of course, not all civilly disobedient defendants have been acquitted; nor have many governments forbade their police to enforce unjust laws. Most have been convicted and many have been sentenced to prison. Suffragists were imprisoned in England and in the United States as a result of their struggle for women's voting rights. In the United States, Susan B. Anthony was prosecuted with fourteen others for voting in the election of 1872.<sup>32</sup> Decades later, women like Rose Winslow and Alice Paul were sentenced to seven months in prison for blocking traffic during a suffrage protest. In prison, they embarrassed the national leadership with their hunger strike and the forced feedings that accompanied it. Eventually, the nineteenth amendment was ratified, giving women the right to vote.<sup>33</sup>

27. See M. KUNSTLER, *THE CASE FOR COURAGE* 17-45 (1962).

28. See M. KADISH & S. KADISH, *supra* note 25, at 47.

29. Thoreau, *Civil Disobedience*, in *THE PACIFIST CONSCIENCE* 140, 143 (1967) (emphasis in original).

30. *Id.* at 150.

31. Sax, *Conscience and Anarchy: The Prosecution of War Resisters*, LVII *THE YALE REVIEW* 481, 482 (1968).

32. See D. WEBER, *CIVIL DISOBEDIENCE IN AMERICA* 184 (1978).

33. U.S. CONST. amend. XIX. See D. WEBER, *supra* note 32, at 184.

Later, hundreds of black civil rights protesters went to jail for sitting-in at lunch counters throughout the south. The courts initially refused to acknowledge their fourteenth amendment rights of equal protection,<sup>34</sup> but their courage and the justice of their cause finally touched the public conscience. The Civil Rights Act of 1964 was enacted, prohibiting racial discrimination in public accommodations. Then, belatedly, the United States Supreme Court held that, by virtue of the supremacy clause, the Civil Rights Act of 1964 abated all pending state prosecutions for trespass and similar minor offenses related to the sit-ins.<sup>35</sup>

In 1967, nearly a thousand men were incarcerated for violating the selective service laws. In December of 1969, Assistant Attorney General Will R. Wilson announced that the Nixon administration was prosecuting Vietnam War resisters at twelve times the rate of its predecessor.<sup>36</sup> With new prosecutions being initiated at the rate of 300 per month, he noted that convictions were on the rise and that judges were getting tougher. The average prison term for refusing induction was then more than thirty-seven months.<sup>37</sup> By January of 1973, the President declared an end to the draft, and, by the end of March of that year, the government withdrew all United States military troops from Vietnam. In 1977 President Carter granted conditional amnesty to Vietnam era draft resisters.

### C. *Justification of Civil Disobedience*

"The wise fools who sit in the high place of justice fail to see that in revolutionary times vital issues are settled not by statutes, decrees and authorities, but in spite of them."

Helen Keller

The debate over whether and when civil disobedience is justified has raged among philosophers and statesmen so long as there has been civil disobedience. It has also been played out in many courtrooms. The arguments against civil disobedience are that it tears at the fabric of our society and injures it unnecessarily; that it fosters general lawlessness; that it encourages people to think that they can choose which laws to obey and which to break; that it provokes violence; that it undermines the proposition that we are a government of laws and not of men; that there are alternative means to accomplish the goals sought; and that

34. See, e.g., *State v. Avent*, 253 N.C. 580, 118 S.E.2d 47 (1961).

35. *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964).

36. J. MITFORD, *Preface* to *THE TRIAL OF DR. SPOCK* (1970); U.S. DEPT. OF COMMERCE, 93 STATISTICAL ABSTRACT OF THE UNITED STATES 140-49 (1972).

37. STATISTICAL ABSTRACT, *supra* note 36.



civil disobedience leads to revolution, chaos, and anarchy.<sup>38</sup> Essays justifying civil disobedience have been written by its most reknowned practitioners, among them Henry David Thoreau, Mohandas K. Gandhi, and Martin Luther King, Jr.<sup>39</sup> The subject has also been addressed by philosophers, political scientists, and legal scholars.<sup>40</sup>

It is important for the lawyer who represents a civilly disobedient defendant to understand the justifications of civil disobedience. Two principles are basic: the government exists by the consent of the governed; and the law does not contain moral or divine force of its own. Given these principles, it is easy to see that there is opportunity for law and morality to contradict each other. Slavery presents an obvious example. Laws upholding or requiring participation in racial discrimination, war, military conscription, capital punishment, and nuclear arms production have equal potential. Hitler's rise to power and extermination of the Jews in Germany was totally legal. Yet even Abe Fortas, in his attack on civil disobedience, acknowledges that he hopes, had he lived in Hitler's Germany, that he would have refused to wear an armband.<sup>41</sup>

Where morally offensive conduct is protected by law, a dilemma is cast before he who opposes it. Is it sufficient to protest legally by petitioning the government to change its ways? History has shown that it often is not. In virtually every case of justified civil disobedience, normal appeals to political forums have already been made and failed, and legal means of redress have proved to no avail. However, it is not necessary that such legal means be exhausted in order to justify civil disobedience when a reasonable decision has been made that further attempts would be fruitless. There is a time when society needs not only to be addressed by reason but also touched by emotion. Thus, Martin Luther King in his "Letter from the Birmingham Jail" responded to the question of why he chose direct action rather than negotiation. "You are exactly right in your call for negotiation. Indeed, this is the very purpose of direct action. Nonviolent direct action seeks to create such a crisis and establish such creative tension that a community that has constantly refused to negotiate is forced to confront the issue. It seeks so to dramatize the issue that it can no longer be ignored."<sup>42</sup>

For the religious disobedient, the distinction is clear-cut. If the law

38. See, e.g., A. FORTAS, *supra* note 12; Storing, *The Case Against Civil Disobedience*, in *ON CIVIL DISOBEDIENCE* (1969).

39. See M. GANDHI, *supra* note 22; King, *supra* note 21; Thoreau, *supra* note 29.

40. E.g., A. BICKEL, *supra* note 13; J. RAWLS, *supra* note 1; Sax, *supra* note 31. See also C. COHEN, *CIVIL DISOBEDIENCE* (1971).

41. A. FORTAS, *supra* note 12, at 18.

42. King, *supra* note 21, at 465.

of the state contradicts the dictate of God, obedience to God supersedes civil law. But disobedience need not be religious to be conscientious, so long as it appeals to the moral basis of civil life and the community's sense of justice.

As for concern that civil disobedience is harmful to the society and the legal system, surely one would not advocate a society in which acquiescence to injustice prevails. As Mulford Sibley has stated:

We disobey because we have concluded that disobedience will enhance righteousness; but a part of the righteousness we endeavor to preserve is respect for the law. Although it has been maintained by some that the civilly disobedient do not have this respect, it can plausibly be argued that they demonstrate greater veneration for law than those who obey mechanically and without thought; for the latter, in grounding their conformity on uncriticized habit, appear to take the purposes and means of law with less seriousness than the conscientiously disobedient. It is somewhat like automatically agreeing with everything a certain person may say: we show far less respect for his mind and soul under such circumstances than if we listen carefully, weigh his words, and, when conscientiously compelled to do so, express vigorous dissent.<sup>43</sup>

Passive acquiescence and apathetic obedience could well be greater sources of violence and disturbance in the long run than either active obedience or civil disobedience. A society that aspires to freedom and democracy requires an active, participating citizenry. Civil disobedience creates an opportunity for dialogue between the controlling authority and citizens. It raises questions concerning the effectiveness, utility, and rightness of laws and institutions. It teaches.<sup>44</sup> Through civil disobedience, one can say "No" to the inherent question posed by the unjust law, while continuing efforts toward mutual understanding.

As for the proposition that we must preserve a government of law rather than of men, lawyers need only be reminded that in the criminal justice system we are very much a government of men. Discretion exists at every step of the process. It occurs at the arrest level when a state official, stopped for speeding, is given a warning, while others are ticketed. Discretion is found in the office of the magistrate who refuses to issue an assault warrant in a domestic dispute or when an arrestee complains of police brutality on the part of an arresting officer. Prosecutorial discretion is recognized as essential to the flow of criminal dockets. We rely on the judgment of prosecutors and welcome their restraint where strict enforcement of the laws might produce unjust results. Plea-bargaining is accepted as part of our legal system. It is acknowledged that acquittal often depends more on the quality of legal counsel (and the pocketbook of the accused) than on the state of

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43. M. SIBLEY, *supra* note 2, at 94.

44. A. BICKEL, *supra* note 13, at 94.

the law. That we are indeed a government of men with all the frailties and weaknesses of mankind was one of the lessons of Watergate.

In the words of philosopher John Rawls, "if justified civil disobedience seems to threaten civic concord, the responsibility falls not upon those who protest but upon those whose abuse of authority and power justifies such opposition. For to employ the coercive apparatus of the state in order to maintain manifestly unjust institutions is itself a form of illegitimate force that men in due course have a right to resist."<sup>45</sup> That law and morality can diverge was recognized by the Supreme Court in *United States v. Seeger*<sup>46</sup> where the Court quoted with approval the statement of Chief Justice Hughes that, "[i]n the forum of conscience, duty to a moral power higher than the State has always been maintained."<sup>47</sup>

## II. TAKING THE CASE

Said Alice, "Would you tell me please which way I ought to go from here?"

"That depends a good deal on where you want to get to," said the cat.<sup>48</sup>

### A. Defining Goals

In the usual criminal defense case, the lawyer is either appointed or retained, and there is generally no doubt that a verdict of not guilty is the primary goal of both lawyer and client. If acquittal cannot be achieved, the secondary goals of lesser offense and lighter sentence are sought through available means. Where the defendant has committed civil disobedience, however, the goal of acquittal is not always primary and may be far down the defendant's list of priorities. This departure from the general goals of criminal cases can cause grave misunderstandings between lawyer and client and problems at every stage of the defense. It is therefore essential that the lawyer and client reach a mutual understanding from the beginning about the goals and purposes of the defense. These goals should be clearly articulated and ranked according to priority. They can then serve as the basis for decisions throughout the case.

### B. Interviewing

Interviewing skills are always important for the litigating attorney.

45. J. RAWLS, *supra* note 1, at 391.

46. 380 U.S. 163 (1964).

47. *Id.* at 169 (quoting *United States v. Macintosh*, 283 U.S. 605, 633 (1931)).

48. L. CARROLL, *ALICE'S ADVENTURES IN WONDERLAND* 89.

The client-centered approach advocated by Binder and Price<sup>49</sup> is readily applicable to interviewing and counseling civilly disobedient clients. The interviewing skills suggested by Binder and Price are designed to facilitate communication and to gather information through questioning. A civilly disobedient client may tend to view the lawyer as a parental or authority figure, thus expecting the lawyer to be judgmental towards her. This role expectation would obviously interfere with good lawyer-client communication. Binder and Price label the psychological factors that may cause a client to be less communicative with his attorney "inhibitors."<sup>50</sup> Inhibitors may include the client's belief or training about authority, human nature, and appropriate behavior or values. Factors that tend to motivate full participation in attorney-client communications are called "facilitators." Positive, non-judgmental listening and feedback to the client operate as facilitators, indicating that the lawyer understands what the client is saying and wants to hear more.<sup>51</sup> This can be particularly helpful in overcoming perceived irrelevance where the client, preoccupied with the underlying social issue, undervalues the importance of factual details related to the elements of the crime.

Listening skills are helpful "not simply to insure that the lawyer hears and understands what has occurred, but also to provide the client with the motivation for full and complete communication."<sup>52</sup> Listening techniques include silence, open-ended questions, non-committal acknowledgments and observation of nonverbal expression by the client. The interviewer should generally ask open-ended as opposed to leading questions followed by narrower questions to elicit detail.<sup>53</sup>

Listening and communication skills can be especially helpful in the civil disobedience context where clients tend to be skeptical of authority. The civilly disobedient defendant is likely to have studied and discussed not only the underlying issue giving rise to the action (*e.g.*, nuclear power, the draft, the arms race), but also will have read and thought about the subject of civil disobedience itself. The conventional idea that the lawyer plays the dominant role with a "trust me" approach to the client simply will not work in this context. Most civilly disobedient defendants expect to know everything possible about the law, the courts, and the prospects for the case. The lawyer who accepts a case involving civil disobedience thus takes on the task of education

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49. D. BINDER & S. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT CENTERED APPROACH* (1977).

50. *Id.* at 10-13.

51. *Id.* at 14-17.

52. *Id.* at 21.

53. See *id.* at 40-47 for a full discussion of the advantages and disadvantages of various forms of questioning.

as well and should be prepared to explain legal issues articulately. This two-way communication between lawyer and client will be fueled by mutual respect and the good listening and counseling skills of the lawyer.

The format of the interview is another important factor. Binder and Price suggest a three-stage interviewing process: preliminary problem identification; chronological overview; and theory development and verification.<sup>54</sup> This three-staged interview will serve to avoid the pitfall of jumping into a theory of the case without having all the necessary information. It is not uncommon for lawyers to analyze or diagnose a case prematurely. Initial facts related by the client are reminiscent of a similar case, a theory comes to mind and lawyers assume that they know what relief the client desires. The problems of this approach are evident. In making a premature analysis, the lawyer may not only jump to a faulty conclusion, but relevant information and alternate theories are lost in the shuffle. The three-staged interview avoids this problem by providing that the lawyer gets *all* of the relevant information before pursuing a theory of the case.

### C. Choosing a Lawyer

It is quite likely that at the initial interview, the client will not have decided whether to defend her case *pro se*<sup>55</sup> or to be represented by a lawyer. One court guide for the civilly disobedient suggests four options: "1) get a traditional lawyer, 2) be formally represented by a movement lawyer, 3) find a sympathetic, movement lawyer who will advise you informally, or 4) try your own case."<sup>56</sup> Another possibility is that the defendant may defend herself *pro se* but retain an attorney for advice and guidance at trial.<sup>57</sup>

Depending on the circumstances, these options exist from the lawyer's perspective as well. The lawyer can formally represent the client, informally advise her, or help the client reach a decision to appear *pro se*. There are advantages and disadvantages to any choice, and the decision is naturally related to the initial decision about goals. One writer has suggested that *pro se* representation is preferable where the defendant desires to de-emphasize the goal of avoiding conviction in

54. *Id.* at 53-54.

55. The sixth amendment guarantees defendants a constitutional right to defend *pro se*. *Faretta v. California*, 422 U.S. 806 (1975). See also *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972).

56. W. DURLAND, CONSCIENCE AND THE LAW: A COURT GUIDE FOR THE CIVILLY DISOBEDIENT 49 (1980).

57. See *infra* note 62 and accompanying text.

favor of using the trial as an occasion for fully political purposes.<sup>58</sup> If the lawyer and client cannot agree on a defense strategy or the client adopts a position of non-cooperation toward the court, *pro se* representation would clearly be appropriate. Of course, defendants and their lawyers can choose to wage a political/legal defense designed to both refute the charges and introduce political or moral issues. Advantages of lawyer representation in such cases have been recognized. Steven Barkan, who prefers the *pro se* approach, has said:

Defense attorneys possess knowledge and skills which will often be useful in either kind of defense. They may make effective legal and political points through adept questioning of witnesses and in opening and closing statements to the jury, even though the judge gives them restricted freedom in doing so. They are often especially helpful in selecting a jury, in filing motions before and during the trial, and in requesting that the judge include certain instructions in his charge to the jury.<sup>59</sup>

Where lawyer and client agree to a political/legal defense, the presence of the lawyer can have a depoliticizing effect. As an officer of the court, the lawyer is expected to conform to the institutional routine of the courtroom and tends to do so automatically. The training and skills of the lawyer reinforce traditionally defined ways of conducting a defense and the attorney's power to deviate from procedure is much more limited than that of a *pro se* defendant.<sup>60</sup> Conversely, advantages to *pro se* representation are that the defendant may address the jury directly, not only during the testimony but also in the voir dire, opening statement, and closing argument. The professional ignorance of the *pro se* defendant can become an asset resulting in far greater latitude on evidentiary matters than is granted to an attorney. This posture by a trial judge may be accompanied by sympathy of the lay jury for the defendant and may result in the prosecutor pursuing procedural and evidentiary arguments less vigorously for fear of alienating the jury.<sup>61</sup>

The pros and cons of lawyer representation should be discussed openly with the client before a final decision is made regarding the level of representation, if any, the lawyer will provide. Facilitation of a client's decision to appear *pro se* will serve both the attorney and the defendant where that is in fact the most appropriate strategy.

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58. Barkan, *Political Trials and the Pro Se Defendant in the Adversary System*, 24 SOC. PROBS. 324, 324 (1977).

59. *Id.* at 326.

60. *Id.* at 327.

61. For a fuller discussion of these points, see *id.* at 326 and W. DURLAND, *supra* note 56, at 51.

### D. *A Word About Money*

Lawyers accept civil disobedience cases for many reasons. Sometimes it is because they are committed to the cause underlying the civil disobedience. It may be the challenge of this type of legal defense that attracts one lawyer, while for another it may be a routine criminal defense case. Where the lawyer is sympathetic to the underlying issue or is friends with the defendant, the issue of money is difficult to confront. The lawyer may be asked or may wish to contribute her expertise to the cause by providing free representation. Before undertaking such a project for the first time, an assessment should be made of the time needed, the out-of-pocket costs anticipated, and the effects of the case on partners, associates, and workflow in the office. The lawyer may desire to contribute her services to the case but find she is unable to do so as a practical matter. Before taking the case, the lawyer must decide what, if any, fee will be charged. Clear communication and agreement about the fee arrangement should be made with the client and with third-party supporters if they will be responsible for a part of the fee. In civil disobedience cases, it is not unusual for defendants to have a legal defense fund or committee raising money for legal fees and expenses. Sometimes parents or other third parties will be responsible. There may be an arrangement where the client will be responsible for the difference between what is raised and what is owed. The lawyer should set a realistic fee from the beginning. The lawyer who sympathetically sets a low fee at the beginning but later has to change the terms mid-way because of time spent on the case or pressure from associates, is doing a disservice to the client, the cause, and the lawyer-client relationship. If, because of independent means, law school employment, or a firm which can absorb *pro bono* work, the lawyer is able to take the case without a fee, costs must still be anticipated.

### E. *Alternative Roles*

Where the defendant does not wish to have an attorney formally represent her at trial, alternative roles can be considered. For example, the lawyer may act as "back up" counsel to informally advise a client who will appear *pro se*. An indigent defendant who wishes to defend *pro se* may be entitled to have "back up" counsel appointed by the court.<sup>62</sup> If the defendant decides to retain back up counsel, an assessment should be made of the time and energy the case will require. There are many tasks the lawyer may be called upon to do; among them giving pre-arrest or pre-incident advice, discussed in the next section.

Other tasks a lawyer can do in advising *pro se* defendants are: to

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62. See *Faretta v. California*, 422 U.S. 806, 834 n.46 (1975).

acquaint them with the nature of local courts and informal procedures; to introduce them to the criminal procedure statutes; to provide information about judges, district attorneys, and other courtroom personnel; to introduce them to the law of evidence and recommend a handbook or treatise on evidence in the jurisdiction; and to inform the client of the maximum, as well as the prevailing, punishment for the crime charged. It may be helpful to the *pro se* defendant to visit the courthouse to watch a trial in progress, so she will become familiar with court proceedings.

#### F. *Pre-Arrest Advice*

Persons who intend to commit an act of civil disobedience will often want to know about the law that is to be violated in advance of the illegal action and may ask the lawyer to give pre-arrest or pre-incident advice regarding the legal system, arrest procedures, bond and personal recognizance, and jail. This kind of information can be important in group situations where there may be some peer pressure to participate but very little hard information about what to expect. In this situation, the lawyer should give an overview of what the law is, how the local courts operate, what the maximum possible punishment is, and what the varying degrees or lesser included offenses of the crime are. The lawyer should advise the client to be particularly observant of times and places of the illegal action and arrest, names and badge numbers of arresting officers, and who said what to whom. She should also explain arrest and booking procedures including fingerprinting and photographs. The lawyer should be prepared to respond to inquiries about constitutional defenses<sup>63</sup> and some legal defenses such as "necessity" or "competing harms."<sup>64</sup> It is not unusual for people who are contemplating civil disobedience (particularly when part of a group) to have an unrealistic view of their rights. The pre-arrest meeting is an opportunity for the lawyer to dispel these misconceptions and enable the client to make an informed decision whether or not to participate. The client should also be advised about the possibility of facing additional charges such as resisting arrest (particularly if "going limp" is planned), disorderly conduct, and assault on an officer.

There is a tendency among people planning civil disobedience to underestimate the time and energy that legal proceedings consume. Often, events prior to the arrest are carefully planned with little thought for what will follow. The client should be informed regarding how long legal proceedings are likely to last, how many court appearances may be required, and how much time is necessary to plan and

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63. See *infra* notes 112-38 and accompanying text.

64. See *infra* notes 92-107 and accompanying text.



carry out a defense. On the other hand, the lawyer should avoid predicting specific consequences and should not answer questions to which she does not know the answer. One of the most forgotten phrases in a lawyer's vocabulary is "I don't know."

If the lawyer is involved with pre-arrest planning, there may be an opportunity to attend a non-violence training session. Such a session can educate the lawyer about non-violence theory and tactics and provide greater insight and understanding of the client than is usually possible in the lawyer-client relationship. This in turn will enable the lawyer to better articulate the theory of non-violence at trial.

### G. Groups

As indicated in Part I, some civil disobedience is by nature individual. Other cases almost always involve groups that can range from moderately-sized to mass demonstrations. While the suggestions in this article have been addressed to the lawyer with a single client, most apply to group situations as well. If the lawyer is representing one individual who was arrested as part of a group and the others are also represented, the situation is similar to representing a single client—the primary distinction being the need to coordinate the clients' defenses. Civilly disobedient defendants are likely to be more cooperative than other criminal co-defendants. The nature of the conduct at issue and the defenses available are also conducive to cooperative defense planning. While the lawyer always owes ultimate allegiance to her client, working closely with the counsel for co-defendants can result in benefits for all concerned. With the consent of the individual client, the lawyer should meet with counsel for co-defendants to share ideas, theories, and facts. Each lawyer must determine in consultation with her client whether there is any conflict or potential conflict of interest among the defendants. If not, the lawyers may work together to prepare the defense, dividing tasks such as pre-trial motions and briefs and sharing work products. If the defendants are to be tried together, this coordination will prepare the lawyers to act as a team. If the defendants are to be tried separately, each client's case will benefit from team preparation. Of course, a good working relationship among the lawyers and clients is necessary for the success of this approach, and the lawyer should anticipate the possibility of a future conflict. If conflicts do arise, the lawyer should return to individual representation.

In cases where the lawyer is asked to represent an entire group or several members of a group, different questions arise. Can the lawyer effectively represent more than one client? Is there a conflict between group dynamics and individual rights? *The Code of Professional Responsibility* permits a lawyer to represent several clients whose interests

are not actually or potentially differing. In such a case, the lawyer should explain the implications of common representation to each client and proceed only if all clients consent.<sup>65</sup> If, after a full and candid discussion with the group, potential conflicts are ruled out, the lawyer may agree to represent the entire group.

The lawyer must be aware of her responsibility to represent each individual member of the group, and must be aware of group decision-making dynamics. The group may operate by consensus, a process which affords individuals a veto and assures a decision that is acceptable to all members of the group. Or the group may allow each individual to make his or her own decision about the case: whether to plead guilty, not guilty, or *nolo contendere*, and whether to have a jury or a bench trial. But effective individual representation requires the lawyer to ascertain that each client is afforded a sense of autonomy and self responsibility which allows members to make different choices.

When a lawyer agrees to represent a group, she should present the options and have the same full discussion about goals, objectives, and defense strategies as she would with a single client. Even where there is no conflict among the members and the group process works well, the lawyer can expect to receive questions from individual defendants.

The lawyer should ask the group to appoint a liaison who will be primarily responsible for communicating with the lawyer and relaying information to the members of the group. If the lawyer is involved with the group in a pre-arrest or pre-incident meeting, she and the liaison should prepare a checklist for each person in the group which contains the following information: name; home address and phone number; work address and phone number; age; sex; the name of a relative or friend; special needs; and so on.<sup>66</sup> A similar checklist might be valuable for defense planning and trial preparation as well.

#### H. *Deciding on a Defense Approach*

Once the decision has been made to formally represent a defendant, attention can be turned to defense strategy. Some civilly disobedient defendants choose not to contest the charges. While these defendants are less likely to seek out an attorney in the first instance, they sometimes do. There are usually two reasons for the decision not to contest the charges. For some, the commission of civil disobedience includes submission to the penalty without contest.<sup>67</sup> For others, the decision is motivated by the need or desire not to cooperate with the judicial pro-

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65. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 16 (as amended August, 1978).

66. Some sample checklists for nuclear station occupiers are found in THE NATIONAL NUKES HANDBOOK 45-49.

67. W. DURLAND, *supra* note 56, at 48.

cess at all. Still others have espoused a hybrid of these two positions.<sup>68</sup> Some civilly disobedient defendants believe their defense should be limited to raising the political or moral issues which were the basis of the action. These clients are likely to prefer defenses such as necessity or those derived from the first amendment to technical defenses involving identification or the elements of the crime. The line between technical and issue-related defenses is not always clear, however, and most defendants are willing to intermingle technical and issue defenses so long as they maintain the opportunity to address the reasons for their actions.

Given that any defense of civil disobedience will include the moral basis underlying the defendant's action, there are many reasons for including technical defenses as well. The first is simply to put the burden on the state to prove its case. If there are multiple defendants, each seeking a jury trial, the prosecution may drop the charges rather than try each case. Another reason for using all available defenses to contest the charges is that the government will sometimes "overcharge" in cases of civil disobedience. Most criminal codes have several degrees of each crime. Prosecutorial or police discretion may be used to "up the ante" by charging the defendant with a more serious degree of the crime than the facts will support.<sup>69</sup> Adverse special treatment is not unusual in cases of civil disobedience. Still another reason for presenting technical defenses is to give the jury a hook on which to hang their hat. There may not be the opportunity to present a justification or necessity defense to the jury. Though they may be very impressed by the moral force of the defendant's action, juries are reluctant to disregard the judge's instruction.<sup>70</sup> In this circumstance the technical defense becomes a means by which the jury can justify an acquittal which may actually be based on the jury's response to extralegal arguments.

As with every stage of lawyer-client planning, there should be frank discussions about legal strategy. The goals and objectives originally identified can be guideposts for strategy decisions. The defendant may desire both acquittal and use of a trial as an educational and political

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68. *Id.*

69. See, e.g., *State v. Birkhead*, 48 N.C. App. 575, 269 S.E.2d 314, cert. denied 301 N.C. 528, 273 S.E.2d 455 (1980). In *Birkhead*, defendant and others entered the offices of Carolina Power and Light Co. to protest construction of the Shearon Harris Nuclear Power Plant. They were stopped at the eleventh floor of the office building. After being asked to go to a conference room, defendants formed a circle with interlocking arms in the hall and refused to leave until all construction was stopped at the Shearon Harris plant. Defendants were arrested and charged with forcible entry and detainer, a violation of N.C. GEN. STAT. § 14-126, rather than another offense for which they could have been charged. E.g., N.C. GEN. STAT. § 14-134 (1981) (trespass on land after being forbidden).

70. But see *infra* text accompanying notes 144-63 (discussion of the jury's right of nullification).

forum. Conflicts may arise where both these goals cannot be achieved. Both lawyer and client must be prepared to make either/or decisions when necessary. By maintaining a flexible strategy, this is possible without disrupting the trial plan or the lawyer-client relationship.

### *I. Planning for Trial*

Early in the planning stages, the lawyer should have the defendant write out a complete explanation of her reasons for committing civil disobedience. The statement may be used in the opening or closing arguments or as a part of her testimony at trial. This exercise will help the client to focus and articulate her beliefs. It will also help the lawyer to understand the defendant's action. The lawyer should inform the client about the substantive law, the law of evidence, the custom in local courtrooms, and the various options available to the client. The attorney may prepare a checklist of possible trial options for the client to consider, including: plea of guilty as charged; plea bargain; jury trial; bench trial; trial toward acquittal, political trial, or both; possible sentencing; and possible contempt charges.

The lawyer should keep in mind that a case involving civil disobedience may differ from previous cases. Where, for example, custom generally results in a defendant being granted a first request for continuance, it may be denied in a civil disobedience case. Where a conviction of trespass customarily brings a fine of \$25.00, a civilly disobedient defendant may receive an active sentence. At each juncture, the lawyer should explain the various options and probabilities to the client, keeping in mind that there are always unforeseen events. There is a fine line between predicting probable consequences and promising results. The lawyer should be aware of that line and not cross it.

At some point, the district attorney may offer the client an attractive plea bargain. Like other trial and pretrial decisions, this should be explained to the client and evaluated in light of the client's goals and objectives.<sup>71</sup> The client should be allowed to make the final decision. Even if she has previously rejected a plea bargain, she should be allowed to consider the offer if it is remade. Depending on the stage of preparation, the defendant may decide that the energy required to prepare for trial could be better spent in another way. The lawyer should also explain the plea of *nolo contendere*<sup>72</sup> as it may be particularly appropriate in civil disobedience cases where the actions themselves are not disputed, but their culpable nature is. The client may want to enter

71. A thorough discussion of the uses and mechanics of plea bargaining in political cases is found in J. SINK, *POLITICAL TRIALS, HOW TO DEFEND THEM* 119-39 (1974).

72. Literally translated, this Latin phrase means "I will not contest it," and is largely equivalent to a guilty plea. A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT* 5 (1976).

a creative plea other than guilty, not guilty, or *nolo contendere*. Such a plea could take the form of "I plead for humankind." This kind of plea would generally be entered by the judge as a plea of not guilty.

The defendant or other defense witnesses may not wish to be sworn in court. The lawyer should inquire about this before trial and explain the alternative of affirmation. If any witness decides to be affirmed rather than sworn, the lawyer should notify the court clerk in advance of trial.

The situation may also arise where the client or witnesses and supporters will refuse to stand for the judge at the opening and closing of court. There is a religious basis for this refusal among some Quakers who believe that no man stands above others and a person should show deference only to God. If the lawyer knows in advance that this is going to happen, it may be possible to arrange with court personnel for the defendant to enter the courtroom after the judge is seated. Some judges may not care about this ritual and avoid any confrontation about it. However, where the judge is offended, there is some risk of a contempt of court charge. There are cases, however, that hold that a religiously based or conscientious refusal to stand for a judge cannot be the basis for criminal contempt.<sup>73</sup>

### J. *Dealing with the Press*

The lawyer should prepare for the possibility that the trial may be highly publicized. The defendant or her supporters may publicize it by calling press conferences or demonstrations or by circulating literature. Expert witnesses brought in for the trial may also make press appearances or public speeches. The media may launch an assault on its own. Lawyer and client should decide in advance who will be responsible for comments to the press. The lawyer should avoid contact with the press,<sup>74</sup> and, if approached by reporters, she should direct them to a press spokesperson. Lawyers and clients should remember that anything said to a reporter is on the record unless specifically excluded. The lawyer should warn the client and her supporters about possible

73. See, e.g., *United States v. Snider*, 502 F.2d 646 (4th Cir. 1974).

74. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 7-33 (as amended August, 1978), provides:

A goal of our legal system is that each party shall have his case, criminal or civil, adjudicated by an impartial tribunal. The attainment of this goal may be defeated by dissemination of news or comments which tend to influence judge or jury. Such news or comments may prevent prospective jurors from being impartial at the outset of the trial and may also interfere with the obligation of jurors to base their verdict solely upon the evidence admitted in the trial. The release by a lawyer of out-of-court statements regarding an anticipated or pending trial may improperly affect the impartiality of the tribunal. For these reasons, standards for permissible and prohibited conduct of a lawyer with respect to trial publicity have been established.

See ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 7-107 (as amended August, 1978).

consequences of their press statements such as contempt of court, risk of mistrial, and use of the statements by the prosecution for impeachment on cross-examination.

### III. DEFENSES

#### A. *Technical and Traditional Defenses*

A wide range of defenses can be explored in a civil disobedience case. These will vary, of course, according to the nature of the crime charged and the jurisdiction. While most civilly disobedient defendants do not deny the act which led to their arrest, the act itself may not actually constitute the crime charged. This is particularly true where a case has received publicity and has political implications since such a situation often fosters overzealousness by the prosecution. Where the defendant can show selective prosecution for political reasons such as that designed to chill his first amendment rights, abuse of prosecutorial discretion can serve as a defense to the charge.<sup>75</sup>

As in any criminal case, the lawyer should carefully scrutinize the indictment or other charging document. Whether the charges are filed by citation, warrant, indictment, information, or otherwise, they must conform to the requirements of the jurisdiction. For example, if the defendant is charged with trespass on property owned by a public utility, it may be required that the warrant identify the company by its full corporate name in order to withstand challenge. Where there is an error of this type, the timing of an objection becomes an important consideration. If the warrant is challenged before trial or before the state closes its case in chief, the prosecution can move to amend the warrant. Where the state fails to allege or prove a required element with the necessary specificity before resting its case, however, the defendant's motion to dismiss can result in the charges being dismissed.<sup>76</sup>

Another possible challenge is that of identification. Before trial, the lawyer should move for a non-testimonial identification of the defendant in a line-up. If such a procedure is unavailable, the lawyer should move for leave for the defendant to remain seated when the case is

75. See *United States v. Falk*, 479 F.2d 616 (7th Cir. 1973). See also *United States v. Epipinette*, 488 F.2d 365, 370 n.11 (4th Cir. 1973); *United States v. Steele*, 461 F.2d 1148 (9th Cir. 1972).

76. In two North Carolina anti-nuclear sit-in cases, *State v. Kehrer*, 79 CR 2183 (N.C. Dist. Ct., 10th J. Dist., dismissed May 15, 1979) and *State v. Kaimi*, 79 CR 21805 (N.C. Dist. Ct., 10th J. Dist., dismissed May 15, 1979), the charging documents each alleged that the defendant had trespassed on the property of "CP & L." The cases were dismissed at the close of the state's evidence for the prosecution's failure to charge or prove that "CP & L" was Carolinal Power and Light Co., a duly registered North Carolina corporation. The district attorney then brought new charges with corrected warrants, but these were dismissed on double jeopardy grounds. *State v. Kehrer*, 79 CR 29717 (N.C. Dist. Ct., 10th J. Dist., dismissed July 10, 1979).

called, so that the state's witness must identify her from all those present in the courtroom. This challenge is likely to be more effective where there have been multiple arrests.

While these defenses may seem far removed from the original purpose of the civil disobedience, they can prove extremely valuable. This is illustrated by the 1980 Women's Pentagon Action in which several hundred women blocked entrances to the Pentagon. Women stationed at two of the three entrances were arrested, while others at a third entrance, engaged in the same activity, were not. A total of 143 people were arrested and charged with obstruction of an entrance, a federal regulation violation.<sup>77</sup> Of those arrested, thirty-four pleaded guilty before federal magistrates immediately after their arrests. Of these, twenty-nine were sentenced to ten days imprisonment and five, who had prior convictions, received thirty days, the maximum possible sentence. All were sent in leg irons to the women's federal penitentiary at Alderson, West Virginia.<sup>78</sup> Of the 110 who went to trial, several were acquitted because they could not be identified, others were found not guilty because of various defenses.<sup>79</sup> Many were found guilty and sentenced to incarceration for ten days, but by December 15, 1980, slightly less than one month after the arrests, the United States Attorney's office dropped all remaining charges. Approximately one-half of the 110 women who pleaded not guilty never went to trial. No reason other than prosecutorial discretion was given for this change.<sup>80</sup>

Defenses arising from the nature of the charge, criminal procedure statutes, and the elements of the offense vary according to the jurisdiction and the particular crime charged. The opportunity for legal ingenuity and diligence in this area is unlimited. Statutory-based defenses such as failure of the prosecuting witness to give the proper required warning in a trespass case are often useful. Attacks can also be made on the constitutionality of a statute or on its penal intent. In *United States v. Eppinette*,<sup>81</sup> a 1973 draft case, the United States Court of Appeals for the Fourth Circuit held that failure to have one's selective service registration and classification certificates in one's possession was not a crime. The case arose from the defendant's action during the Vietnam war in returning his selective service cards to his draft board with a statement protesting the war. The court's decision that the statu-

77. 41 C.F.R. § 101-20.305 (1980).

78. Accounts of the civil disobedience action and some of the cases can be found in *THE NEW YORKER*, 43-46 (Dec. 9, 1980) and *Ms. MAGAZINE*, 17 (Sept. 1981).

79. See, e.g., *United States v. King*, 650 F.2d 534 (4th Cir. 1981).

80. The account of these events was related to the author in personal conversations with attorney Nina Kraut of Washington, D.C., who defended several of the Women's Pentagon Action defendants.

81. 488 F.2d 365 (4th Cir. 1973).

tory requirement of possession was not penal was based on a legislative history of the statute.<sup>82</sup> This defense had been raised and rejected by at least two prior courts,<sup>83</sup> but the fourth circuit was undeterred.

There are some statutory-based defenses relating to the defendant's state of mind that can serve the dual purposes of winning acquittal and educating the jury. In many jurisdictions, one element of trespass is the defendant's specific intent to violate the property rights of the prosecuting party.<sup>84</sup> In some states, the defendant's bona fide, reasonable belief that she has a right to be on the property is a defense to criminal trespass.<sup>85</sup> Under either provision, the defendant may present her reasons for being on the premises and the facts which underlie her bona fide belief that she had a right to be there. In one of the companion North Carolina sit-in cases,<sup>86</sup> the fact that the defendant owned stock in the public utility which was the subject of the trespass resulted in her acquittal on the theory that she had a bona fide belief in her right to be on the premises for that reason.<sup>87</sup>

The issue of intent was central to the reversal of a conviction for tax fraud where the defendants were prosecuted for claiming three billion dependents on their W-4 form in protest of the Vietnam war.<sup>88</sup> The fourth circuit court of appeals held that it was not reasonable for the Internal Revenue Service to believe the defendants intended to defraud the government by that statement. Rather, the statement was found to be symbolic speech protected by the first amendment.<sup>89</sup> While the trial judge may limit the extent of this type of evidence, at least some testimony, particularly that of the defendant, is likely to be admitted where specific intent is an element of the crime charged.<sup>90</sup>

Finally, the concept of reasonable doubt is always a defense. From voir dire through closing argument, the idea that the jury should not

82. *Id.* at 368-69. See, e.g., S. Rep. No. 1268, 80th Cong., 2d Sess., 2 U.S. CONG. SERV. 1989, 2008 (1948). The Court stated: "[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication." 488 F.2d at 369 (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952)).

83. *E.g.*, *United States v. Demangone*, 456 F.2d 807 (3d Cir. 1972); *United States v. Coum- ing*, 445 F.2d 555 (1st Cir.), *cert. denied*, 404 U.S. 949 (1971).

84. *E.g.*, FLA. STAT. ANN. §§ 810.08 - .09 (West 1976 & Supp. 1980) (willfulness is an element of the crime of trespass).

85. *E.g.*, N.C. GEN. STAT. § 14-134 (1981). See *State v. Cobb*, 262 N.C. 262, 136 S.E.2d 674 (1964).

86. See note 76 *supra*.

87. *State v. Anderson*, 79 CR 20375 (N.C. Dist. Ct., 10th J. Dist., May 11, 1979).

88. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974).

89. *Id.*

90. In some states, trespass is a general intent crime and testimony regarding the defendant's intent would probably be inadmissible. See, e.g., CAL. PENAL CODE § 602(n) (1970 & Supp. 1981).



convict unless they are convinced of a defendant's guilt beyond a reasonable doubt should be utilized by the defense for every element of the crime and at every opportunity.

### B. *The Necessity Defense*

The justification or necessity defense is generally the most attractive to clients since it directly relates to the issues that compelled the defendant to commit civil disobedience and opens the courtroom for explanation of those issues. It provides an opportunity for the defendant to educate the jury and judge about the subject of her protest; for example, the dangers of nuclear power or the evils of war. The defense of necessity can serve three purposes: political education; acquittal; and mitigation in sentencing.

Arnolds and Garland define the defense of necessity as "the assertion that conduct promotes some higher value than the value of literal compliance with the law."<sup>91</sup> Justification is distinguished from necessity as being a generic term which encompasses not only necessity but also self-defense or defense of others. As a defense to criminal charges, necessity existed at common law and is recognized in modern English cases.<sup>92</sup> Necessity as a defense appeared in the *Final Report* of the National Commission on Reform of Federal Criminal Laws that simply stated: "Except as otherwise provided, justification or excuse under this chapter is a defense."<sup>93</sup> This statement reflects some widespread confusion between the justification defense of necessity and the excuse defense of duress. This confusion has resulted in some courts putting improper limitations on the defense of necessity, such as fear of serious bodily injury or death.<sup>94</sup> Arnolds and Garland point out the distinction between justification and excuse: "[J]ustification is a circumstance which actually exists and which makes harmful conduct proper and non-criminal, while excuse is a circumstance which excuses the actor from criminal liability even though the actor was technically not justified in doing what he did."<sup>95</sup> A recent Supreme Court decision involving the defense of duress explains the distinction as follows:

Common law historically distinguished between the defenses of duress and necessity. Duress was said to excuse criminal conduct where

91. Arnolds & Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 J. CRIM. L. & CRIMINOLOGY 289, 289 (1974).

92. *E.g.*, Moore v. Hussey, 80 Eng. Rep. 243 (1609) where Hobart, J., stated: "[A]ll laws admit certain cases of just excuse, when they are offended in letter, and where the offender is under necessity, either of compulsion or inconvenience." See also, Mouse's Case, 12 Co. Rep. 63 (1608); Regina v. Bourne, 1 K.B. 687 (1939).

93. NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS, FINAL REPORT § 601(1) (1971).

94. See Arnolds & Garland, *supra* note 92, at 290 n.18.

95. *Id.* at 289-90.

the actor was under an unlawful threat of imminent death or serious bodily injury, which threat caused the actor to engage in conduct violating the literal terms of the criminal law. While the defense of duress covered the situation where the coercion had its source in the actions of other human beings, the defense of necessity, or choice of evils, traditionally covered the situation where physical forces beyond the actor's control rendered illegal conduct the lesser of two evils. Thus, where A destroyed a dike because B threatened to kill him if he did not, A would argue that he acted under duress, whereas if A destroyed the dike in order to protect more valuable property from flooding, A could claim a defense of necessity.<sup>96</sup>

It is generally recognized that there are three elements to the necessity defense. One listing defines them as: (1) the act charged was done to avoid a significant evil; (2) there were no other adequate means of escape; and (3) the remedy was not disproportionate to the evil to be avoided.<sup>97</sup> The cases and literature defining the elements in this way have turned on the substantive law of necessity. More recently, however, courts have raised the issue of whether the defendant was entitled to present evidence of the necessity defense to the jury. These cases have defined the elements of the defense more stringently. For example, in *United States v. Cassidy*,<sup>98</sup> the fourth circuit court of appeals stated: "[E]ssential elements of the defense are that defendants must have reasonably believed that their action was necessary to avoid an imminent threatened harm, that there are no other adequate means except those which were employed to avoid the threatened harm, and that a direct causal relationship may be reasonably anticipated between the action and the avoidance of the harm."<sup>99</sup> *Cassidy* and other recent cases have upheld the trial court's refusal to permit the defendants to offer proof to the jury on the necessity defense.<sup>100</sup>

Some courts have expressed open hostility to the justification defense in cases of civil disobedience. In *United States v. Berrigan*,<sup>101</sup> the trial court denied the existence of any precedent for the defense and added:

No civilized nation can endure where a citizen can select what law he would obey because of his moral or religious belief. It matters not how worthy his motives may be. It is axiomatic that chaos would exist if an individual were permitted to impose his beliefs upon others and invoke justification in a court to excuse his transgression of a duly enacted law.<sup>102</sup>

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96. *United States v. Bailey*, 444 U.S. 394, 409-11 (1980).

97. *Arnolds & Garland*, *supra* note 92, at 294.

98. 616 F.2d 101 (4th Cir. 1979).

99. *Id.* at 102.

100. *E.g.*, *United States v. Mowat*, 582 F.2d 1194 (9th Cir. 1978); *United States v. Simpson*, 460 F.2d 515 (9th Cir. 1972); *United States v. Moylan*, 417 F.2d 1002 (4th Cir. 1969).

101. 283 F. Supp. 336 (D. Md. 1968).

102. *Id.* at 339.

Other courts, although kinder, have reached the same result. However, there have been some incidents of success in state trial courts in anti-nuclear cases. For example, in Lake County, Illinois, a group of protesters who had blockaded the Commonwealth Edison Zion Nuclear Power Station were charged with criminal trespass. Relying on the statutory affirmative defense of necessity,<sup>103</sup> the defendants argued: they were without blame in occasioning or developing the situation; they reasonably believed that their conduct was necessary to avoid a public or private injury; and the danger of public injury was greater than the injury resulting from their conduct.<sup>104</sup> Among the defense witnesses was Dr. Rosalie Bertell, who testified about the effects of low-level radiation. The defendants were all acquitted. According to Durland, "The jury of six men and six women were convinced by the defense argument that the Zion plant constituted a grave danger to the surrounding community due to poor management, irresponsibility in the area of waste disposal, and the threat of a core melt-down."<sup>105</sup>

In Elk Grove, California, a jury acquitted one of eleven defendants for blocking an entrance to the Rancho Seco Nuclear Plant near Sacramento. One defendant was convicted; the jury was unable to reach a verdict on the other nine. The judge instructed the jury that it could find the defendants not guilty on the ground of necessity only if the defense proved that: (1) the defendants acted to preserve life or property; (2) a reasonable person under similar circumstances would have reasonably believed that the defendant's actions were necessary to protect life or property; (3) the defendants believed their actions were necessary; and (4) the danger to life and property was substantial and imminent. The jury found that the defendant who was acquitted had exhausted every reasonable avenue of protest before engaging in the illegal act.<sup>106</sup>

103. ILL. REV. STAT. ch. 38, § 7-13 (Smith-Hurd 1961).

104. *People v. Brown*, 78 Cm 2522 (19th Dist., Lake County, Ill., discharged Feb. 1977) (Defendant's Memorandum in Support of the Defense of Necessity).

105. W. DURLAND, *supra* note 56, at 86.

106. Ogulnik, *Necessity Defense Gaining Ground*, N.C. ANVIL, Nov. 23, 1979, at 2.

Copies of defense memoranda and briefs from this and other cases as well as a variety of other related legal memoranda are available for the cost of printing through the ANTI-NUKE LITIGATION CLEARINGHOUSE CATALOG. The catalog lists briefs, motions, memoranda, jury instructions, and court rulings from at least twenty-one different cases. It is available from the People's Energy Project, 678 Massachusetts Avenue, 8th Floor, P.O. Box 125, Cambridge, Mass. 02139.

The lawyer should check local statutes and case law to determine if there is precedent for the defense of necessity. If so, with the aid of the Clearinghouse materials, a convincing case for use of the defense can be made.

*C. The International Law Defense*

The international law defense<sup>107</sup> can be used in cases of opposition to nuclear weaponry or other situations in which the defendant's civil disobedience is directed against military combat. It is based on the proposition that federal courts acknowledge international law as providing rules for decision.<sup>108</sup> The Nuremburg Charter declares planning, preparation, initiation, or waging of a war of aggression to be international crimes against peace.<sup>109</sup> Similarly, in the United Nations Charter, the United States, as well as other members of the United Nations, agreed to refrain from the threat of or use of force in their international relations.<sup>110</sup>

Arguably, nuclear weaponry is aggressive rather than defensive. The manufacture of atomic weapons and other nuclear preparedness activities would thus constitute preparation for a war of aggression in violation of the Nuremburg Charter and international law. As such, the defendant's interference with weapons production is not criminally culpable but clearly excusable as preventing a more serious legal violation. While this defense has not met with much success to date, it is worth raising and is the type of defense that civilly disobedient defendants find attractive.

*D. First Amendment Defenses*

The first amendment<sup>111</sup> guarantees of freedom of speech and religion have provided only limited protection in civil disobedience cases. Statutes which are designed to promote law and order, regulate traffic, safeguard property, and protect the administration of essential government functions are permissible even where they have the effect of restricting speech.<sup>112</sup> Regulations restricting time, place, and manner of speech as opposed to its contents have been regarded as a reasonable exercise of the government's police power.<sup>113</sup> Conspiracy statutes have also withstood first amendment challenges in a variety of political cases.<sup>114</sup> On

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107. The author is indebted to attorney Nina Kraut of Washington, D.C., whose unpublished memorandum on the international law defense forms the basis for this section.

108. See, e.g., *Ex Parte Quirin*, 317 U.S. 1 (1942); *The Paquete Habana*, 175 U.S. 677, 700 (1900).

109. INT'L MIL. TRIB. CHARTER art. 2.

110. U.N. CHARTER art. 2.

111. The first amendment provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance." U.S. CONST. amend I.

112. *Feiner v. New York*, 340 U.S. 315 (1951).

113. *Grayned v. Rockford*, 408 U.S. 104 (1972); *Cox v. New Hampshire*, 312 U.S. 569 (1941).

114. *Schenck v. United States*, 249 U.S. 47 (1919). But see *United States v. Spock*, 416 F.2d 165 (1st Cir. 1969).

the other hand, where a statute is arbitrarily applied or enforced, its application to a particular case may be declared unconstitutional.<sup>115</sup>

In situations in which criminal violations are not at issue, symbolic speech such as the right of high school students to wear black arm bands<sup>116</sup> or to refuse to salute the flag<sup>117</sup> has been held to be protected by the first amendment. Where conduct contains elements of both speech and non-speech, however, the Supreme Court has held that a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on first amendment freedoms.<sup>118</sup> In *United States v. O'Brien*,<sup>119</sup> the defendant publicly burned his draft card to protest the Vietnam War. O'Brien was charged with knowing destruction or mutilation of his selective service registration certificate in violation of section 462(b)(3) of the Universal Military Training and Service Act of 1948, as amended in 1965.<sup>120</sup> The United States Court of Appeals for the First Circuit declared the statute unconstitutional<sup>121</sup> but the Supreme Court reversed, holding that all laws necessary to the government's power to raise armies under the 1965 amendment furthered sufficiently important governmental interests. The Court stated the test in such cases as follows:

[We] think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.<sup>122</sup>

Under *O'Brien*, it is likely that most governmental regulations of speech-conduct will be held to further governmental interests unrelated

115. 379 U.S. 536.

116. *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

117. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). The language of the Court in this case is especially eloquent. The Court stated:

There is no doubt that in connection with the pledges, the flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas . . . . The state announces rank function and authority through crowns and maces, uniforms and black robes; the church speaks through the Cross, the Crucifix, the altar and the shrine . . . . A person gets from a symbol the meaning he puts into it, and what is one man's comfort and inspiration is another's jest and scorn.

*Id.* at 632-33. The Court addressed the purpose of the first amendment: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

118. *United States v. O'Brien*, 391 U.S. 367 (1968).

119. *Id.*

120. At the time O'Brien burned his draft card, an offense was committed by any person "who forges, alters, knowingly mutilates, or in any manner changes any such certificate." 50 U.S.C. § 462(b)(3) (1964) (amended 1965).

121. *O'Brien v. United States*, 376 F.2d 538 (1st Cir. 1967).

122. 391 U.S. at 377.

to the suppression of free speech.<sup>123</sup>

The "free exercise of religion" clause of the first amendment has traditionally been limited to protecting religious beliefs as distinguished from religious practices.<sup>124</sup> However, the burden is on the state to prove that a restriction of religious practices is justified by a compelling state interest.<sup>125</sup> In recent criminal prosecutions, the issue has primarily surfaced in draft cases and cases involving criminal contempt of court. One leading case is *United States v. Seeger*<sup>126</sup> in which the defendant challenged the constitutionality of section 6(j) of the Selective Service Act<sup>127</sup> and its definition of "religious training and belief". Seeger had claimed conscientious objection to war in any form by reason of his religious belief but was denied conscientious objector status because he would not answer "yes" or "no" to a question about his belief in a supreme being. The court held that Seeger was entitled to an exemption as a conscientious objector stating:

We have concluded that Congress, in using the expression "Supreme Being" rather than the designation "God", was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views. We believe that under this construction, the test of belief "in a relation to a Supreme Being" is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor *parallel to that* filled by the orthodox belief in God of one who clearly qualifies for the exemption.<sup>128</sup>

A few years later in *Welsh v. United States*,<sup>129</sup> the Court extended the conscientious objector exemption to a defendant who objected to war in any form but labeled his beliefs moral and ethical rather than religious. Section 6(j) barred from the conscientious objector exemption all persons with "essentially political, sociological, or philosophical views or a merely personal moral code." Justice Black's plurality opin-

123. *But see* *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974).

124. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1875).

125. *Sherbert v. Verner*, 374 U.S. 398 (1963); *West Virginia Bd. of Educ.*, 319 U.S. 624 (1943).

126. 380 U.S. 163 (1965).

127. Section 456(j) of the Universal Military Training and Service Act of 1948 provided, in part:

Nothing contained in this title shall be construed to require any person to be subject to combatant training and service . . . who, by reason of religious training and belief, is conscientiously opposed to war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being . . . .

50 U.S.C. § 456(j) (1964).

128. 380 U.S. at 165-66. In a concurring opinion, Justice Douglas stated he would have difficulties if the statute were read differently, "[f]or then those who embraced one religious faith rather than another would be subject to penalties; and that kind of discrimination, as we [have held] would violate the Free Exercise Clause [and] would also result in a denial of equal protection by preferring some religions over others." *Id.* at 188 (citations omitted).

129. 398 U.S. 333 (1970).

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ion held that the language of 6(j) should not be read "to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy."<sup>130</sup> The Court held that defendant Welsh was entitled to the exemption even though he had struck the word "religious" on his application. Justice Black added that section 6(j) *would* bar those persons "whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests *solely* upon considerations of policy, pragmatism, or expediency."<sup>131</sup>

In *Gillette v. United States*,<sup>132</sup> the Court refused to extend the free exercise clause to prohibit Congress from conscripting someone who opposed a particular war, rather than all wars, on moral and religious grounds.

Constitutional issues must also be answered at the pre-incident stage where the defendant intends to challenge a law by breaking it. The question of whether a person may ignore an allegedly unconstitutional statutory scheme and still challenge the law on constitutional grounds has repeatedly arisen in the area of permits designed to control public demonstrations and marches. In *Lovell v. Griffin*,<sup>133</sup> a Jehovah's Witness was prosecuted for disobeying a city ordinance that forbade the distribution of circulars and advertising matter unless one secured a permit from the city manager. Lovell had not applied for a license, and the city argued that she was therefore not in the "position of having suffered from the exercise of the arbitrary and unlimited power of which she complains."<sup>134</sup> The Supreme Court was unpersuaded by the city's argument and held the ordinance was invalid on its face as a prior restraint on freedom of speech. The Court held that since the statute was constitutionally void, it was not necessary for the defendant to apply for a permit under the statute before contesting it on constitutional grounds.<sup>135</sup>

In *Poulos v. New Hampshire*,<sup>136</sup> decided fifteen years after *Lovell*, defendant applied for and was denied a permit to conduct religious services in a public park. The denial of the permit was not appealed and the defendant was arrested when the services were held without a permit. The Court upheld defendant's conviction and held that since the

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130. *Id.* at 342.

131. *Id.* at 342-43 (emphasis added).

132. 410 U.S. 437 (1971).

133. 303 U.S. 444 (1938).

134. *Id.* at 446.

135. *Id.* at 452.

136. 345 U.S. 395 (1953).

ordinance was valid on its face, the proper remedy was a writ of certiorari to review the unlawful refusal of the city to grant the permit. Justice Reed, speaking for the Court, stated: "Delay is unfortunate, but the expense and annoyance of litigation is a price citizens must pay for life in an orderly society where the rights of the First Amendment have a real and abiding meaning."<sup>137</sup>

The basic distinction between these cases appears to be that if the defendant intends to challenge a statutory scheme as unconstitutional on its face, she may go ahead with the conduct without applying for a permit. Of course, she takes the risk that the statute will be held constitutionally valid. On the other hand, where the defendant acknowledges that the statute is constitutional, but intends to challenge it as being unconstitutionally applied, she must apply for a permit before she can go forward with the action. If the permit is denied, defendant can seek a determination of the constitutionality of the application of the statute. If that is not done, and the defendant nevertheless engages in the action, she will be deemed to have waived her constitutional objections.

#### E. *Contempt of Court*

It is not unusual for civilly disobedient defendants to engage in activity for which they may be subject to contempt of court charges. For example, a Quaker's refusal to stand for the trial judge may result in a citation for contempt. Depending on the activity and the judge, contempt can sometimes be avoided by a prior agreement with the court.<sup>138</sup> When no advance agreement is possible, the first amendment may provide a defense to contempt. The circuit courts of appeal, however, have split on the validity of the first amendment as a defense to contempt charges. The seventh circuit has upheld contempt charges, stating:

It is a general principle that contempt power is to be limited to the least possible power adequate to the end proposed.

Appellate courts have here a special responsibility for determining that the power is not abused, to be exercised if necessary by revising themselves the sentences imposed. . . . The answer to those who see in the contempt power a potential instrument of oppression lies in assurance of its careful use and supervision, not in imposition of artificial limitations on the power.<sup>139</sup>

The fourth circuit, on the other hand, has held that the conscientious

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137. *Id.* at 409.

138. See *supra* text accompanying note 73.

139. *In re Chase*, 468 F.2d 128 (7th Cir. 1972); *Robson v. Malone*, 412 F.2d 848 (7th Cir. 1969).



refusal to take an oath<sup>140</sup> or to stand for the judge<sup>141</sup> are protected from punishment. That court reasoned that so long as no essential element of the judicial process is impaired by failure to comply with courtroom formality, a defendant should not be required to violate his religious convictions.<sup>142</sup>

#### IV. OF JURIES AND LAWYERS

##### A. Jury Nullification: The Law and the Controversy

The concept of jury nullification—the jury's right to disregard the judge's instruction on the law and acquit a defendant in the face of compelling evidence of guilt—has been the subject of recent debate among judges and scholars.<sup>143</sup> The idea of nullification is particularly applicable to cases involving civil disobedience where appeal to the conscience of the jury is appropriate. The Supreme Court has not addressed the issue since 1895. In *Sparf & Hansen v. United States*,<sup>144</sup> the Court attempted to answer the question of whether and to what extent juries have the right to adjudicate the law as well as the facts. The case involved a charge of murder on the high seas. The defendants requested an instruction on the lesser included offense of manslaughter. The trial court denied the request on the grounds that the law and evidence in the case did not permit a verdict on the lesser offense. The Supreme Court affirmed, holding that "in the courts of the United States it is the duty of juries in criminal cases to take the law from the court and apply that law to the facts as they find them to be from the evidence."<sup>145</sup> This language has found its way into the jury instructions of many jurisdictions.<sup>146</sup> Although the *Sparf* case did not directly address the question of jury departures from the law as given, it has been regarded by some courts as precluding nullification.<sup>147</sup>

140. *United States v. Looper*, 419 F.2d 1405 (4th Cir. 1969).

141. *United States v. Snider*, 502 F.2d 645 (4th Cir. 1974).

142. *Id.* at 659.

143. See Christie, *Lawful Departure from Legal Rules: Jury Nullification and Legitimized Disobedience*, 62 CAL. L. REV. 1289 (1974); Schefflin & Van Dyke, *Jury Nullification: The Contours of a Controversy*, 43 L. & CONTEMP. PROBS. 51 (1980).

144. 156 U.S. 51 (1895).

145. *Id.* at 102.

146. E.g., THE NORTH CAROLINA PATTERN JURY INSTRUCTION FOR CRIMINAL CASES § 101.05 entitled *Function of the Jury* reads as follows:

Members of the jury: All of the evidence has been presented. It is now your duty to decide from this evidence what the facts are. You must then apply the law which I am about to give you to those facts. It is absolutely necessary that you understand and apply the law as I give it to you, and not as you think it is, or as you might like it to be. This is important because justice requires that everyone tried for the same crime be treated in the same way; and have the same law applied to him.

147. An analysis of *Sparf*, distinguishing that decision from the specific issue of jury nullification is made by Schefflin & Van Dyke, *supra* note 144 at 15-17.

In *United States v. Moylan*,<sup>148</sup> the fourth circuit acknowledged the power of the jury to acquit even though its verdict is contrary to the law as given by the judge. Relying on *Sparf*, however, the court declined to overrule the trial judge's refusal to instruct the jury about that power. The same result was reached by the first circuit in *United States v. Boardman*.<sup>149</sup> A thorough discussion of jury nullification is found in the majority and dissenting opinions of *United States v. Dougherty*.<sup>150</sup> In *Dougherty*, after the history of jury nullification and acknowledging its value to the polity, Judge Leventhal, writing for the majority, nonetheless adopted the view that jury nullification is better left to occur spontaneously and informally, rather than as the result of incorporation in the judge's instructions.<sup>151</sup>

A convincing justification for jury nullification is made by Schefflin and Van Dyke in their paper, "Jury Nullification: Contours of a Controversy."<sup>152</sup> The authors examine the arguments against nullification and effectively dispel each of them.<sup>153</sup> They point to the history of the practice in Maryland and Indiana which both have constitutional provisions that, in criminal cases, the jury is judge of both the law and the facts. The courts in both of these jurisdictions have fashioned rules governing the operation of the constitutional provision and have devised jury instructions that incorporate the rule but safeguard against abuse. For example, jurors do not have the right to declare a statute unconstitutional and the trial judge decides all questions concerning the admissibility of evidence. The lawyers are permitted to argue an interpretation of the law and the judge presents an advisory instruction.<sup>154</sup>

The criminal defendant's right to a general verdict, a verdict of guilty or not guilty, without further explanation, also provides support for the jury's right to nullify the judge's instructions on the law. The relationship between the general verdict and the jury's right to vote their conscience contrary to the letter of the law is illustrated by the cases and debate that preceded the enactment of Fox's Libel Act in England in 1792.<sup>155</sup> More recently, in the case of *United States v. Spock*,<sup>156</sup> the first

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148. 417 F.2d 1002 (4th Cir. 1969).

149. 419 F.2d 110 (1st Cir. 1969).

150. 473 F.2d 1113 (D.C. Cir. 1972).

151. *Id.* at 1137.

152. Schefflin & Van Dyke, *supra* note 144.

153. The arguments are divided into four main categories: the "anti-anarchy" position; the "nullification is unnecessary" position; the "nullification is unwise" position; and the "damn good in reason" position. Schefflin & Van Dyke, *supra* note 144, at 85-111.

154. *E.g.*, *Sumpter v. State*, 261 Ind. 471, 480, 306 N.E.2d 95, 102 (1974), *cert. denied*, 425 U.S. 952 (1976); *Lewis v. State*, 2 Md. App. 678, 686-87, 237 A.2d 73, 78 (Ct. Spec. App. 1968); *Size-more v. State*, 5 Md. App. 507, 518-19, 248 A.2d 417, 424 (Ct. Spec. App. 1968).

155. *See* M. KADISH & S. KADISH *supra* note 25, at 47. *See also* Schefflin & Van Dyke, *supra* note 144.

circuit court of appeals overruled the convictions of pediatrician Benjamin Spock and others for conspiracy to aid and abet draft resisters and for conspiracy to hinder the administration of the Universal Military Training and Service Act.<sup>157</sup> Acting *sua sponte*, and over the objection of the defendants, the trial court put ten special questions to the jury in addition to the general issue of guilt. The court of appeals reversed on the grounds that the submission of any special questions, regardless of their content, constituted prejudicial error. Commenting on the role of the jury in a criminal case, the court stated:

Uppermost of these considerations is the principle that the jury, as the conscience of the community, must be permitted to look at more than logic. Indeed, this is the principle upon which we began our discussion. If it were otherwise there would be no more reason why a verdict should not be directed against a defendant in a criminal case than in a civil one. The constitutional guarantees of due process and trial by jury require that a criminal defendant be afforded the full protection of a jury unfettered, directly or indirectly.<sup>158</sup>

Thus, the argument goes, if the jury has the power to nullify, they have the right to do so. And, having that right, they are entitled to be informed of it.<sup>159</sup>

The fear that allowing a jury nullification instruction would result in mass jury lawlessness and acquittals was addressed by Judge Bazelon in his dissent in *United States v. Dougherty*.<sup>160</sup> The defendants in that case faced charges resulting from their interference with Dow Chemical Company to protest Dow's manufacture of napalm used in the Vietnam War. Judge Bazelon distinguished the case from what he called the "classic, exalted cases where juries historically invoked the power to nullify."<sup>161</sup> He pointed out that the defendants had no quarrel with the general validity of the law under which they were charged. Suggesting that this distinction could and should have been explored in argument before the jury, Judge Bazelon reflected:

If revulsion against the war in Southeast Asia has reached a point where a jury would be unwilling to convict a defendant for commission of the acts alleged here, we would be far better advised to ponder the implications of that result than to spend our time devising stratagems which let us pretend that the power of nullification does not even exist.<sup>162</sup>

156. 416 F.2d 165 (1st Cir. 1969). An excellent account of Dr. Spock's trial is found in J. MITFORD, *THE TRIAL OF DR. SPOCK* (1969).

157. 50 U.S.C. § 462(a) (1970).

158. 416 F.2d at 182.

159. See Kunstler, *Dissent and the Jury*, in *DELIVERED INTO RESISTANCE* 51 (1969).

160. 473 F.2d 1113 (D.C. Cir. 1972).

161. *Id.* at 1144.

162. *Id.*

B. *Jury Nullification: What to do*

For the lawyer who is interested in arguing nullification to the jury, there are basically two approaches. The first is to submit a formal request for jury instructions with a proposed nullification instruction and supporting brief to the trial judge. In the 1973 trial of the "Camden Twenty-eight", the defendants, who were religiously motivated anti-war activists, had destroyed records at their local draft boards. There was no dispute that they had destroyed the records, but evidence later revealed that FBI informants had been aware of the plan from an early stage and had assisted in carrying out the act. At their trial in federal court on charges of destroying selective service records, the trial judge permitted the defense attorney to argue to the jury in closing, their right to acquit if they thought the law was oppressive under the circumstances of the case. The judge also instructed the jury that if they thought the participation of government agents or informers was offensive to basic standards of decency and shocking to the universal sense of justice, they could acquit any defendant to whom the defense applied. All of the defendants were acquitted.<sup>163</sup>

There is very little case law on the subject in state courts,<sup>164</sup> so in most cases the decision whether to instruct the jury on nullification will be in the discretion of the trial judge. The options of this approach will vary according to the jurisdiction, and the law on this question is unclear. It appears that in the *Moylan* and *Dougherty* cases,<sup>165</sup> counsel sought permission to argue in favor of nullification as well as instructions from the judge. The court opinions, however, do not address that issue. Thus, while there may be no right to argue nullification to the

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163. Schefflin & Van Dyke, *supra* note 144, at 52-53. Although the trial judge originally instructed the jury that they did not have the power to nullify, he later changed his mind. In his final instructions to the jury the judge stated:

[I]f you find that overreaching participation by Government agents or informers in the activities as you have heard them was so *fundamentally* unfair to be offensive to the basic standards of decency, and shocking to the universal sense of justice, then you may acquit any defendant to whom the defense applies.

Transcript at 8729, *United States v. Anderson*, Crim. No. 602-71 (D.N.J. 1973), quoted in Schefflin & Van Dyke, *supra* note 144, at 53 (emphasis added).

Portions of the defense attorney's closing argument on nullification from the trial transcript is included in Schefflin & Van Dyke, *id.* at 53 n.2. In addition, the brief on jury nullification in that case is available through the *Anti-Nuke Litigation Clearinghouse Catalogue*. See note 107 *supra*.

164. Indiana and Maryland are the only states which have constitutional provisions permitting nullification. For example, in a recent Massachusetts case, the state supreme court reversed the conviction of a defendant where one of the jurors, on being polled, acknowledged that the evidence was against the defendant but said that she could not convict as a matter of conscience. *Commonwealth v. Hebert*, 379 Mass. 752, 400 N.E.2d 851 (1980).

165. *United States v. Moylan*, 417 F.2d 1002 (1st Cir. 1969); *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972). See *supra* text accompanying notes 149-52 & 161-63 for discussion of these cases.

jury in federal cases, neither is there a prohibition. The practice in many state courts and federal districts is to allow counsel wide latitude in closing argument so long as the evidence is not misstated. In some jurisdictions the lawyer may read to the jury from relevant case law even if it contradicts the law as later given by the judge.<sup>166</sup>

The second approach is for the lawyer to informally educate the jury about their actual power to acquit. This approach would seem to be consistent with Judge Leventhal's majority opinion in *Dougherty*.<sup>167</sup> There are several ways the lawyer can do this. One is simply to remind the jury about their power to acquit. The lawyer can inform the jury that the government has no appeal from a verdict of not guilty; that the secrecy of their deliberations is inviolable; that they are not accountable to the judge or anyone else for their verdict. This is why, they can be told, the right to a trial by jury has been so important in our society, why no one can be convicted of a crime without a finding of guilt by the jury, and why the jury reflects the conscience of the community in a way that officials cannot. The lawyer may also use history to educate the jury about their heritage, telling in an anecdotal way about the trial of William Penn and the jury in *Bushell's Case*.<sup>168</sup> The history of the trial of John Peter Zenger or the trials under the Fugitive Slave Act may be recounted.<sup>169</sup> The anecdotal approach is less likely to raise objections by the prosecution or to cause the trial judge to sustain an objection than where the lawyer attempts to tell the jury directly that they should nullify.

### CONCLUSION

The law and the practice surrounding civil disobedience issues are dynamic. Where criminal cases involving civil disobedience are tried,

166. This is the practice in North Carolina notwithstanding the jury instructions. See *supra* note 147.

167. 473 F.2d 1113. See *supra* note 142 and accompanying text.

168. 124 Eng. Rep. 1006 (1670). See *supra* text accompanying notes 25-26.

169. See *supra* note 27 and accompanying text.

At the trial of Bruce Baechler in federal district court North Wilkesboro, North Carolina in 1974, the evidence was uncontested that on his eighteenth birthday, the defendant walked into his draft board and announced that he would not register. Prosecuted for failure to register, his defense consisted of testimony about his Quaker background and lifetime of peace witness, as well as some statements about his opposition to the Vietnam war. During closing argument, Baechler's lawyer told the jury about the *Penn* and *Zenger* cases. The prosecuting attorney protested that counsel was arguing nullification, but the trial judge overruled the objection, even though he expressed open hostility toward the defendant. The only basis for the ruling seemed to be the customary latitude for storytelling afforded counsel in closing argument. After deliberating for nine hours, the jury found the defendant guilty. His conviction was affirmed on appeal. *United States v. Baechler*, 509 F.2d 13 (4th Cir. 1974).

they present a challenge to lawyers, judges, and prosecutors. The options for lawyers and clients in their relationships and for strategies of defense are unlimited and the lawyer should be careful not to overlook any possible defenses.