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On Not Prosecuting Civil Disobedience

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How should the government deal with those who disobey the draft laws out of conscience? Many people think the answer is obvious: the government must prosecute the dissenters, and if they are convicted it must punish them. Some people reach this conclusion easily, because they hold the mindless view that conscientious disobedience is the same as lawlessness. They think that the dissenters are anarchists who must be punished before their corruption spreads. Many lawyers and intellectuals come to the same conclusion, however, on what looks like a more sophisticated argument. They recognize that disobedience to law may be *morally* justified, but they insist that it cannot be *legally* justified, and they think that it follows from this truism that the law must be enforced. Erwin Griswold, the Solicitor General of the United States, and the former dean of the Harvard Law School, appears to have adopted this view in a recent statement. “[It] is of the essence of law,” he said, “that it is equally applied to all, that it binds all alike, irrespective of personal motive. For this reason, one who contemplates civil disobedience out of moral conviction should not be surprised and must not be bitter if a criminal conviction ensues. And he must accept the fact that organized society cannot endure on any other basis.”

The New York Times applauded that statement. A thousand faculty members of several universities had signed a *Times* advertisement calling on the Justice Department to quash the indictments of the Rev. William Sloane Coffin, Dr. Benjamin Spock, Marcus Raskin, Mitchell Goodman, and Michael Ferber, for conspiring to counsel various draft offenses. The *Times* said that the request to quash the indictments “confused moral rights with legal responsibilities.”

But the argument that, because the government believes a man has committed a crime, it must prosecute him is much weaker than it seems. Society “cannot endure” if it tolerates all disobedience; it does not follow, however, nor is there evidence, that it will collapse if it tolerates some. In the United States prosecutors have discretion whether to enforce criminal laws in particular cases. A prosecutor may properly decide not to press charges if the lawbreaker is young, or inexperienced, or the sole support of a family, or is repentant, or turns state’s evidence, or if the law is unpopular or unworkable or generally disobeyed, or if the courts are clogged with more important cases, or for dozens of other reasons. This

discretion is not license—we expect prosecutors to have good reasons for exercising it—but there are, at least *prima facie*, some good reasons for not prosecuting those who disobey the draft laws out of conscience. One is the obvious reason that they act out of better motives than those who break the law out of greed or a desire to subvert government. Another is the practical reason that our society suffers a loss if it punishes a group that includes—as the group of draft dissenters does—some of its most thoughtful and loyal citizens. Jailing such men solidifies their alienation from society, and alienates many like them who are deterred by the threat.

THOSE WHO THINK that conscientious draft offenders should always be punished must show that these are not good reasons for exercising discretion, or they must find contrary reasons that outweigh them. What arguments might they produce? There are practical reasons for enforcing the draft laws, and I shall consider some of these later. But Dean Griswold and those who agree with him seem to rely on a fundamental moral argument that it would be unfair, not merely impractical, to let the dissenters go unpunished. They think it would be unfair, I gather, because society could not function if everyone disobeyed laws he disapproved of or found disadvantageous. If the government tolerates those few who will not “play the game,” it allows them to secure the benefits of everyone else’s deference to law, without shouldering the burdens, such as the burden of the draft.

This argument is a serious one. It cannot be answered simply by saying that the dissenters would allow everyone else the privilege of disobeying a law he believed immoral. In fact, few draft dissenters would accept a changed society in which sincere segregationists were free to break civil rights laws they hated. The majority want no such change, in any event, because they think that society would be worse off for it; until they are shown this is wrong, they will expect their officials to punish anyone who assumes a privilege which they, for the general benefit, do not assume.

There is, however, a flaw in the argument. The reasoning contains a hidden assumption that makes it almost entirely irrelevant to the draft cases, and indeed to any serious case of civil disobedience in the United States. The argument assumes that the dissenters know that they are breaking a valid law, and that the privilege they assert is the privilege to do that. Of course, almost everyone who discusses civil disobedience recognizes that in America a law may be invalid because it is unconstitutional. But the critics handle this complexity by arguing on separate hypotheses: If the law is invalid, then no crime is committed, and society may not punish. If the law is valid, then no crime has been committed, and society must punish. This reasoning hides the crucial fact that the validity of the law may be doubtful. The officials and judges may believe that the law is valid, the dissenters may disagree, and both sides may have plausible arguments for their positions. If so, then the issues are different from what they would be if the law were clearly valid or clearly invalid, and the argument of fairness, designed for these alternatives, is irrelevant.

DOUBTFUL LAW is by no means special or exotic in cases of civil disobedience. On the contrary. In the United States, at least, almost any law which a significant number of people would be tempted to disobey on moral grounds would be doubtful—if not clearly invalid—on constitutional grounds as well. The constitution makes our conventional political morality relevant to the question of validity; any statute that appears to compromise that morality raises constitutional questions, and if the compromise is serious, the constitutional doubts are serious also.

The connection between moral and legal issues is especially clear in the current draft cases. Dissent has largely been based on the following moral objections: (a) The United States is using immoral weapons and tactics in Vietnam. (b) The war has never been endorsed by deliberate, considered, and open vote of the peoples' representatives. (c) The United States has no interest at stake in Vietnam remotely strong enough to justify forcing a segment of its citizens to risk death there. (d) If an army is to be raised to fight that war, it is immoral to raise it by a draft that defers or exempts college students, and thus discriminates against the economically underprivileged. (e) The draft exempts those who object to all wars on religious grounds, but not those who object to particular wars on moral grounds; there is no relevant difference between these positions, and so the draft, by making the distinction, implies that the second group is less worthy of the nation's respect than the first. (f) The law that makes it a crime to counsel draft resistance stifles those who oppose the war, because it is morally impossible to argue that the war is profoundly immoral, without encouraging and assisting those who refuse to fight it.

Lawyers will recognize that these moral positions, if we accept them, provide the basis for the following constitutional arguments: (a) The constitution makes treaties part of the law of the land, and the United States is a party to international conventions and covenants that make illegal the acts of war the dissenters charge the nation with committing. (b) The constitution provides that Congress must declare war; the legal issue of whether our action in Vietnam is a "war" and whether the Tonkin Bay Resolution was a "declaration" is the heart of the moral issue of whether the government has made a deliberate and open decision. (c) Both the due process clause of the Fifth and Fourteenth Amendments and the equal protection clause of the Fourteenth Amendment condemn special burdens placed on a selected class of citizens when the burden or the classification is not reasonable; the burden is unreasonable when it patently does not serve the public interest, or when it is vastly disproportionate to the interest served. If our military action in Vietnam is frivolous or perverse, as the dissenters claim, then the burden we place on men of draft age is unreasonable and unconstitutional. (d) In any event, the discrimination in favor of college students denies to the poor the equal protection of the law that is guaranteed by the constitution. (e) If there is no pertinent difference between religious objection to all wars and moral objection to some wars, then the classification the draft makes is arbitrary and unreasonable, and unconstitutional on that ground. The "establishment of religion" clause

of the First Amendment forbids governmental pressure in favor of organized religion; if the draft's distinction coerces men in this direction, it is invalid on that count also. (f) The First Amendment also condemns invasions of freedom of speech. If the draft law's prohibition on counseling does inhibit expression of a range of views on the war, it abridges free speech.

The principal counterargument, supporting the view that the courts ought not to hold the draft unconstitutional, also involves moral issues. Under the so-called "political question" doctrine, the courts deny their own jurisdiction to pass on matters—such as foreign or military policy—whose resolution is best assigned to other branches of the government. The Boston court trying the Coffin, Spock case has already declared, on the basis of this doctrine, that it will not hear arguments about the legality of the war. But the Supreme Court has shown itself (in the reapportionment cases, for example) reluctant to refuse jurisdiction when it believed that the gravest issues of political morality were at stake and that no remedy was available through the political process. If the dissenters are right, and the war and the draft are state crimes of profound injustice to a group of citizens, then the argument that the courts must refuse jurisdiction is considerably weakened.

WE CANNOT CONCLUDE from these arguments that the draft (or any part of it) is unconstitutional. If the Supreme Court is called upon to rule on the question, it will probably reject some of them, and refuse to consider the others on grounds that they are political. The majority of lawyers would probably agree with this result. But the arguments of unconstitutionality are at least plausible, and a reasonable and competent lawyer might well think that they present a stronger case, on balance, than the counterarguments. If he does, he will consider that the draft is not constitutional, and there will be no way of proving that he is wrong.

Therefore we cannot assume, in judging what to do with the draft dissenters, that they are asserting a privilege to disobey valid laws. We cannot decide that fairness demands their punishment until we try to answer the further question: What should a citizen do when the law is unclear, and when he thinks it allows what others think it does not? I do not mean to ask, of course, what it is *legally* proper for him to do, or what his *legal* rights are—that would be begging the question, because it depends upon whether he is right or they are right. I mean to ask what his proper course is as a citizen, what in other words, we would consider to be "playing the game." That is a crucial question, because it cannot be wrong not to punish him if he is acting as, given his opinions, we think he should.¹

There is no obvious answer on which most citizens would readily agree, and that is itself significant. If we examine our legal institutions and practices, however, we shall discover some relevant underlying principles and policies. I shall set out three possible answers to the question, and then try to show which of these best fits our practices and expectations.

The three possibilities I want to consider are these:

(1) If the law is doubtful, and it is therefore unclear whether it permits someone to do what he wants, he should assume the worst, and act on the assumption that it does not. He should obey the executive authorities who command him, even though he thinks they are wrong, while using the political process, if he can, to change the law.

(2) If the law is doubtful, he may follow his own judgment, that is, he may do what he wants if he believes that the case that the law permits this is stronger than the case that it does not. But he may follow his own judgment only until an authoritative institution, like a court, decides the other way in a case involving him or someone else. Once an institutional decision has been reached, he must abide by that decision, even though he thinks that it was wrong. (There are, in theory many subdivisions of this second possibility. We may say that the individual's choice is foreclosed by the contrary decision of any court, including the lowest court in the system if the case is not appealed. Or we may require a decision of some particular court or institution. I shall discuss this second possibility in its most liberal form, namely that the individual may properly follow his own judgment until a contrary decision of the highest court competent to pass on the issue, which, in the case of the draft, is the United States Supreme Court.)

(3) If the law is doubtful, he may follow his own judgment, even after a contrary decision by the highest competent court. Of course, he must take the contrary decision of any court into account in making his judgment of what the law requires. Otherwise the judgment would not be an honest or reasonable one, because the doctrine of precedent, which is an established part of our legal system, has the effect of allowing the decision of the courts to *change* the law. Suppose, for example, that a taxpayer believes that he is not required to pay tax on certain forms of income. If the Supreme Court decides to the contrary, he should, taking into account the practice of according great weight to the decisions of the Supreme Court on tax matters, decide that the Court's decision has itself tipped the balance, and that the law now requires him to pay the tax.

Someone might think that this qualification erases the difference between the third and the second models, but it does not. The doctrine of precedent gives different weights to the decisions of different courts, and greatest weight to the decisions of the Supreme Court, but it does not make the decision of any court conclusive. Sometimes, even after a contrary Supreme Court decision, an individual may still reasonably believe that the law is on his side; such cases are rare, but they are most likely in disputes over constitutional law when civil disobedience is involved. The Court has shown itself more likely to overrule its past decisions if these have limited important personal or political rights, and it is just these decisions that a dissenter might want to challenge.

We cannot assume, in other words, that the Constitution is always what the Supreme Court

says it is. Oliver Wendell Holmes, for example, did not follow such a rule in his famous dissent in the *Gitlow* case. A few years before, in *Abrams*, he had lost his battle to persuade the court that the First Amendment protected an anarchist who had been urging general strikes against the government. A similar issue was presented in *Gitlow*, and Holmes once again dissented. “It is true,” he said, “that in my opinion this criterion was departed from in [Abrams] but the convictions that I expressed in that case are too deep for it to be possible for me as yet to believe that it...settled the law.” Holmes voted for acquitting Gitlow, on the ground that what Gitlow had done was no crime, even though the Supreme Court had recently held that it was.

HERE THEN are three possible models for the behavior of dissenters who disagree with the executive authorities when the law is doubtful. Which of them best fits our legal and social practices?

I think it plain that we do not follow the first of these models, that is, that we do not expect citizens to assume the worst. If no court has decided the issue, and a man thinks, on balance, that the law is on his side, most of our lawyers and critics think it perfectly proper for him to follow his own judgment. Even when many disapprove of what he does—such as peddling pornography—they do not think he must desist just because its legality is subject to doubt.

It is worth pausing a moment to consider what society would lose if it did follow the first model or, to put the matter the other way, what society gains when people follow their own judgment in cases like this. When the law is uncertain, in the sense that lawyers can reasonably disagree on what a court ought to decide, the reason usually is that different legal principles and policies have collided, and it is unclear how best to accommodate these conflicting principles and policies.

Our practice, in which different parties are encouraged to pursue their own understanding, provides a means of testing relevant hypotheses. If the question is whether a particular rule would have certain undesirable consequences, or whether these consequences would have limited or broad ramifications, then, before the issue is decided, it is useful to know what does in fact take place when some people proceed on that rule. (Much anti-trust and business regulation law has developed through this kind of testing.) If the question is whether and to what degree a particular solution would offend principles of justice or fair play deeply respected by the community, it is useful, again, to experiment by testing the community’s response. The extent of community indifference to anti-contraception laws, for example, would never have become established had not some organizations deliberately flouted those laws in Connecticut.

If the first model were followed, we would lose the advantages of these tests. The law would suffer, particularly if this model were applied to constitutional issues. When the

validity of a criminal statute is in doubt, the statute will almost always strike some people as being unfair or unjust, because it will infringe some principle of liberty or justice or fairness which they take to be built into the Constitution. If our practice were that whenever a law is doubtful on these grounds, one must act as if it were valid, then the chief vehicle we have for challenging the law on moral grounds would be lost, and over time the law we obeyed would certainly become less fair and just, and the liberty of our citizens would certainly be diminished.

We would lose almost as much if we used a variation of the first model, that a citizen must assume the worst unless he can anticipate that the courts will agree with his view of the law. If everyone deferred to his guess of what the courts would do, society and its law would be poorer. Our assumption in rejecting the first model was that the record a citizen makes in following his own judgment, together with the arguments he makes supporting that judgment when he has the opportunity, are helpful in creating the best judicial decision possible. This remains true even when, at the time the citizen acts, the odds are against his success in court. We must remember, too, that the value of the citizen's example is not exhausted once the decision has been made. Our practices require that the decision be criticized, by the legal profession and the law schools, and the record of dissent may be invaluable here.

Of course a man must consider what the courts will do when he decides whether it would be *prudent* to follow his own judgment. He may have to face jail, bankruptcy, or opprobrium if he does. But it is essential that we separate the calculation of prudence from the question of what, as a good citizen, he may properly do. We are investigating how society ought to treat him when its courts believe that he judged wrong; therefore we must ask what he is justified in doing when his judgment differs from others. We beg the question if we assume that what he may properly do depends on his guess as to how society will treat him.

WE MUST ALSO REJECT the second model, that if the law is unclear a citizen may properly follow his own judgment until the highest court has ruled that he is wrong. This fails to take into account the fact that any court, including the Supreme Court, may overrule itself. In 1940 the Court decided that a West Virginia law requiring students to salute the Flag was constitutional. In 1943 it reversed itself, and decided that such a statute was unconstitutional after all. What was the duty, as citizens, of those people who in 1941 and 1942 objected to saluting the Flag on grounds of conscience, and thought that the Court's 1940 decision was wrong? We can hardly say that their duty was to follow the first decision. They believed that saluting the Flag was unconscionable, and they believed, reasonably, that no valid law required them to do so. The Supreme Court later decided that in this they were right. The Court did not simply hold that after the second decision failing to salute would not be a crime; it held (as in a case like this it almost always would) that it

was no crime after the first decision either.

Some will say that the flag-salute dissenters should have obeyed the Court's first decision, while they worked in the legislatures to have the law repealed, and tried in the courts to find some way to challenge the law again without actually violating it. That would be, perhaps, a plausible recommendation if conscience were not involved, because it would then be arguable that the gain in orderly procedure was worth the personal sacrifice of patience. But conscience was involved, and if the dissenters had obeyed the law while biding their time, they would have suffered the irreparable injury of having done what their conscience forbade them to do. It is one thing to say that an individual must sometimes violate his conscience when he knows that the law commands him to do it. It is quite another to say that he must violate his conscience even when he reasonably believes that the law does not require it, because it would inconvenience his fellow citizens if he took the most direct, and perhaps the only, method of attempting to show that he is right and they are wrong.

Since a court may overrule itself, the same reasons we listed for rejecting the first model count against the second as well. If we did not have the pressure of dissent, we would not have a dramatic statement of the degree to which a court decision against the dissenter is felt to be wrong, a demonstration that is surely pertinent to the question of whether it was right. We would increase the chance of being governed by rules that offend the principles we claim to serve.

These considerations force us, I think, from the second model, but some will want to substitute a variation of it. They will argue that once the Supreme Court has decided that a criminal law is valid, then citizens have a duty to abide by that decision until they have a reasonable belief, not merely that the decision is bad law, but that the Supreme Court is likely to overrule it. Under this view the West Virginia dissenters who refused to salute the Flag in 1942 were acting properly, because they might reasonably have anticipated that the Court would change its mind. But if the Court were to hold the draft laws constitutional, it would be improper to continue to challenge these laws, because there would be no great likelihood that the Court would soon change its mind. This suggestion must also be rejected, however. For once we say that a citizen may properly follow his own judgment of the law, in spite of his judgment that the courts will probably find against him, there is no plausible reason why he should act differently because a contrary decision is already on the books.

THUS THE THIRD MODEL, or something close to it, seems to be the fairest statement of a man's social duty in our community. A citizen's allegiance is to the law, not to any particular person's view of what the law is, and he does not behave improperly or unfairly so long as he proceeds on his own considered and reasonable view of what the law

requires. Let me repeat (because it is crucial) that this is not the same as saying that an individual may disregard what the courts have said. The doctrine of precedent lies near the core of our legal system, and no one can make a reasonable effort to follow the law unless he grants the courts the general power to alter it by their decisions. But if the issue is one touching fundamental personal or political rights, and it is arguable that the Supreme Court has made a mistake, a man is within his social rights in refusing to accept that decision as conclusive.

One large question remains before we can apply these observations to the problems of draft resistance. I have been talking about the case of a man who believes that the law is not what other people think, or what the courts have held. This description may fit some of those who disobey the draft laws out of conscience, but it does not fit most of them. Most of the dissenters are not lawyers or political philosophers; they believe that the laws on the books are immoral, and inconsistent with their country's legal ideals, but they have not considered the question of whether they may be invalid as well. Of what relevance to their situation, then, is the proposition that one may properly follow one's own view of the law?

To answer this, I shall have to return to the point I made earlier. The Constitution, through the due process clause, the equal protection clause, the First Amendment, and the other provisions I mentioned, injects an extraordinary amount of our political morality into the issue of whether a law is valid. The statement that most draft dissenters are unaware that the law is invalid therefore needs qualification. They hold beliefs that, if true, strongly support the view that the law is on their side; the fact that they have not reached that further conclusion can be traced, in at least most cases, to their lack of legal sophistication. If we believe that when the law is doubtful people who follow their own judgment of the law may be acting properly, it would seem wrong not to extend that view to those dissenters whose judgments come to the same thing. No part of the case that I made for the third model would entitle us to distinguish them from their more knowledgeable colleagues.

We can draw several tentative conclusions from the argument so far: When the law is uncertain, in the sense that a plausible case can be made on both sides, then a citizen who follows his own judgment is not behaving unfairly. Our practices permit and encourage him to follow his own judgment in such cases. For that reason, our government has a special responsibility to try to protect him, and soften his predicament, whenever it can do so without great damage to other policies. It does not follow that the government can guarantee him immunity—it cannot adopt the rule that it will prosecute no one who acts out of conscience, or convict no one who reasonably disagrees with the courts. That would paralyze the government's ability to carry out its policies; it would, moreover, throw away the most important benefit of following the third model. If the state never prosecuted, then the courts could not act on the experience and the arguments the dissent has generated. But it does follow from the government's responsibility that when the practical reasons for

prosecuting are relatively weak in a particular case, or can be met in other ways, the path of fairness may lie in tolerance. The popular view that the law is the law and must always be enforced refuses to distinguish the man who acts on his own judgment of a doubtful law, and thus behaves as our practices provide, from the common criminal. I know of no reason, short of moral blindness, for not drawing a distinction in principle between the two cases.

I ANTICIPATE a philosophical objection to these conclusions: that I am treating law as a “brooding omnipresence in the sky.” I have spoken of people making judgments about what the law requires, even in cases in which the law is unclear and undemonstrable. I have spoken of cases in which a man might think that the law requires one thing, even though the Supreme Court has said that it requires another, and even when it was not likely that the Supreme Court would soon change its mind. I will therefore be charged with the view that there is always a “right answer” to a legal problem to be found in natural law or locked up in some transcendental strongbox.

The strongbox theory of law is, of course, nonsense. When I say that people hold views on the law when the law is doubtful, and that these views are not merely predictions of what the courts will hold, I intend no such metaphysics. I mean only to summarize as accurately as I can many of the practices that are part of our legal process.

Lawyers and judges make statements of legal right and duty, even when they know these are not demonstrable, and support them with arguments even when they know that these arguments will not appeal to everyone. They make these arguments to one another, in the professional journals, in the classroom, and in the courts. They respond to these arguments, when others make them, by judging them good or bad or mediocre. In so doing they assume that some arguments for a given doubtful position are better than others. They also assume that the case on one side of a doubtful proposition may be stronger than the case on the other, which is what I take a claim of law in a doubtful case to mean. They distinguish, without too much difficulty, these arguments from predictions of what the courts will decide.

These practices are poorly represented by the theory that judgments of law on doubtful issues are nonsense, or are merely predictions of what the courts will do. Those who hold such theories cannot deny the fact of these practices; perhaps these theorists mean that the practices are not sensible, because they are based on suppositions that do not hold, or for some other reason. But this makes their objection mysterious, because they never specify what they take the purposes underlying these practices to be; and unless these goals are specified, one cannot decide whether the practices are sensible. I understand these underlying purposes to be those I described earlier: the development and testing of the law through experimentation by citizens and through the adversary process.

Our legal system pursues these goals by inviting citizens to decide the strengths and weaknesses of legal arguments for themselves, or through their own counsel, and to act on these judgments, although that permission is qualified by the limited threat that they may suffer if the courts do not agree. Success in this strategy depends on whether there is sufficient agreement within the community on what counts as a good or bad argument, so that, although different people will reach different judgments, these differences will be neither so profound nor so frequent as to make the system unworkable, or dangerous for those who act by their own lights. I believe there is sufficient agreement on the criteria of the argument to avoid these traps, although one of the main tasks of legal philosophy is to exhibit and clarify these criteria. In any event, the practices I have described have not yet been shown to be misguided; they therefore must count in determining whether it is just and fair to be lenient to those who break what others think is the law.

I HAVE SAID THAT the government has a special responsibility to those who act on a reasonable judgment that a law is invalid. It should make accommodation for them as far as possible, when this is consistent with other policies. It may be difficult to decide what the government ought to do, in the name of that responsibility, in particular cases. The decision will be a matter of balance, and flat rules will not help. Still, some principles can be set out.

I shall start with the prosecutor's decision whether to press charges. He must balance both his responsibility to be lenient and the risk that convictions will rend the society, against the damage to the law's policy that may follow if he leaves the dissenters alone. In making his calculation he must consider not only the extent to which others will be harmed, but also how the law evaluates that harm; and he must therefore make the following distinction. Every rule of law is supported, and presumably justified, by a set of policies it is supposed to advance and principles it is supposed to respect. Some rules (the laws prohibiting murder and theft, for example) are supported by the proposition that the individuals protected have a moral right to be free from the harm proscribed. Other rules (the more technical anti-trust rules, for example) are not supported by any supposition of an underlying right; their support comes chiefly from the alleged utility of the economic and social policies they promote. These may be supplemented with moral principles (like the view that it is a harsh business practice to undercut a weak competitor's prices) but these fall short of recognizing a moral right against the harm in question.

The point of the distinction here is this: The judgment that someone has a moral right to be free from certain injuries is a very strong form of moral judgment, because a moral right, once acknowledged, outweighs competing claims of utility or virtue. When a law rests on such a judgment, that is a powerful argument against tolerating violations which inflict those injuries—for example, violations that involve personal injury or the destruction of property. The prosecutor may respect the dissenter's view that the law is invalid, but unless

he agrees, he must honor the law's judgment that others have an overriding claim of right.

IT MAY BE controversial, of course, whether a law rests on the assumption of a right. One must study the background and administration of the law, and reflect on whether any social practices of right and obligation support it. We may take one example in which the judgment is relatively easy. There are many sincere and ardent segregationists who believe that the civil rights laws and decisions are unconstitutional, because they compromise principles of local government and of freedom of association. This is an arguable, though not a persuasive, view. But the constitutional provisions that support these laws clearly embody the view that Negroes, as individuals, have a right not to be segregated. They do not rest simply on the judgment that national policies are best pursued by preventing their segregation. If we take no action against the man who blocks the school house door, therefore, we violate the rights, confirmed by law, of the schoolgirl he blocks. The responsibility of leniency cannot go this far.

The schoolgirl's position is different, however, from that of the draftee who may be called up sooner or given a more dangerous post if draft offenders are not punished. The draft laws do not reflect a judgment that a man has a social or moral right to be drafted only after certain other men or groups have been called. The draft classifications, and the order-of-call according to age within classifications, are arranged for social and administrative convenience. They also reflect considerations of fairness, like the proposition that a mother who has lost one of two sons in war ought not to be made to risk losing the other. But they presuppose no fixed rights. The draft boards are given considerable discretion in the classification process, and the army, of course, has almost complete discretion in assigning dangerous posts. If the prosecutor tolerates draft offenders, he makes small shifts in the law's calculations of fairness and utility. These may cause disadvantage to others in the pool of draftees but that is a different matter from contradicting their social or moral rights.

It is wrong therefore to analyze draft cases and segregation cases in the same way, as many critics do when considering whether tolerance is justified. I do not mean that fairness to others is irrelevant in draft cases; it must be taken into account, and balanced against fairness to dissenters and the long-term benefit to society. But it does not play the commanding role here that it does in segregation cases, and in other cases when rights are at stake.

Where, then, does the balance of fairness and utility lie in the case of those who counsel draft resistance? If these men had encouraged violence or otherwise trespassed on the rights of others, then there would be a strong case for prosecution. But in the absence of such actions, the balance of fairness and utility seems to me to lie the other way, and I therefore think that the decision to prosecute Coffin, Spock, Raskin, Goodman, and Ferber was wrong. It may be argued that if those who counsel draft resistance are free from

prosecution, the number who resist induction will increase; but it will not, I think, increase much beyond the number of those who would resist in any event.

If I am wrong, and there is much greater resistance, then a sense of this residual discontent is of importance to policy makers, and it ought not to be hidden under a ban on speech. Conscience is deeply involved—it is hard to believe that many who counsel resistance do so on any other grounds. The case is strong that the laws making counseling a crime are unconstitutional; even those who do not find the case persuasive will admit that its arguments have substance. The harm to potential draftees, both those who may be persuaded to resist and those who may be called earlier because others have been persuaded, is remote and speculative.

The cases of men who refuse induction when drafted are more complicated. The crucial question is whether a failure to prosecute will lead to wholesale refusals to serve. It may not—there are social pressures, including the threat of career disadvantages, that would force many young Americans to serve if drafted, even if they knew they would not go to jail if they refused. If the number would not much increase, then the state should leave the dissenters alone, and I see no great harm in delaying any prosecution until the effect of that policy becomes clearer. If the number of those who refuse induction turns out to be large, this would argue for prosecution. But it would also make the problem academic, because if there were sufficient dissent to bring us to that pass, it would be most difficult to pursue the war in any event, except under a near-totalitarian regime.

THERE MAY SEEM to be a paradox in these conclusions. I argued earlier that when the law is unclear citizens have the right to follow their own judgment, partly on the grounds that this practice helps to shape issues for adjudication; now I propose a course that eliminates or postpones adjudication. But the contradiction is only apparent. It does not follow from the fact that our practice facilitates adjudication, and renders it more useful in developing the law, that a trial should follow whenever citizens do act by their own lights. The question arises in each case whether the issues are ripe for adjudication, and whether adjudication would settle these issues in a manner that would decrease the chance of, or remove the grounds for, further dissent.

In the draft cases, the answer to both these questions is negative: There is much ambivalence about the war just now, and uncertainty and ignorance about the scope of the moral issues involved in the draft. It is far from the best time for a court to pass on these issues, and tolerating dissent for a time is one way of allowing the debate to continue until it has produced something clearer. Moreover, it is plain that an adjudication of the constitutional issues now will not settle the law. Those who have doubts whether the draft is constitutional will have the same doubts even if the Supreme Court says that it is. This is one of those cases, touching fundamental rights, in which our practices of precedent will

encourage these doubts. Certainly this will be so if, as seems likely, the Supreme Court appeals to the political question doctrine, and refuses to pass on the more serious constitutional issues.

Even if the prosecutor does not act, however, the underlying problem will be only temporarily relieved. So long as the law appears to make acts of dissent criminal, a man of conscience will face danger. What can Congress, which shares the responsibility of leniency, do to lessen this danger?

Congress can review the laws in question to see how much accommodation can be given the dissenters. Every program a legislature adopts is a mixture of policies and restraining principles. We accept loss of efficiency in crime detection and urban renewal, for example, so that we can respect the rights of accused criminals and compensate property owners for their damages. Congress may properly defer to its responsibility toward the dissenters by adjusting or compromising other policies. The relevant questions are these: What means can be found for allowing the greatest possible tolerance of conscientious dissent while minimizing its impact on policy? How strong is the government's responsibility for leniency in this case—how deeply is conscience involved, and how strong is the case that the law is invalid after all? How important is the policy in question—is interference with that policy too great a price to pay? These questions are no doubt too simple, but they suggest the heart of the choices that must be made.

For the same reasons that those who counsel resistance should not be prosecuted, I think that the law that makes this a crime should be repealed. The case is strong that this law abridges free speech. It certainly coerces conscience, and it probably serves no beneficial effect. If counseling would persuade only a few to resist who otherwise would not, the value of the restraint is small; if counseling would persuade many, that is an important political fact that should be known.

The issues are more complex, again, in the case of draft resistance itself. Those who believe that the war in Vietnam is itself a grotesque blunder will favor any change in the law that makes peace more likely. But if we take the position of those who think the war is necessary, then we must admit that a policy that continues the draft but wholly exempts dissenters would be unwise. Two less drastic alternatives might be considered, however: a volunteer army, and an expanded conscientious objector category that includes those who find this war immoral. There is much to be said against both proposals, but once the requirement of respect for dissent is recognized, the balance of principle may be tipped in their favor.

SO THE CASE for not prosecuting conscientious draft offenders, and for changing the laws in their favor, is a strong one. It would be unrealistic to expect this policy to prevail, however, for political pressures now oppose it. Relatively few of those who have refused

induction have been indicted so far, but the pace of prosecution is quickening, and many more indictments are expected if the resistance many college seniors have pledged does in fact develop. The Coffin, Spock trial continues, although when the present steps toward peace negotiation were announced, many lawyers had hoped it would be dropped or delayed. There is no sign of any movement to amend the draft laws in the way I have suggested.

We must consider, therefore, what the courts can and should now do. A court might, of course, uphold the arguments that the draft laws are in some way unconstitutional, in general or as applied to the defendants in the case at hand. Or it may acquit the defendants because the facts necessary for conviction are not proved. I shall not argue the constitutional issues, or the facts of any particular case. I want instead to suggest that a court ought not to convict, at least in some circumstances, even if it sustains the statutes and finds the facts as charged. The Supreme Court has not ruled on the chief arguments that the present draft is unconstitutional, nor has it held that these arguments raise political questions that are not relevant to its jurisdiction. If the alleged violations take place before the Supreme Court has decided these issues, and the case reaches that Court, there are strong reasons why the Court should acquit even if it does then sustain the draft. It ought to acquit on the ground that before its decision the validity of the draft was doubtful, and it is unfair to punish men for disobeying a doubtful law.

There would be precedent for a decision along these lines. The Court has several times reversed criminal convictions, on due process grounds, because the law in question was too vague. (It has overturned convictions, for example, under laws that made it a crime to charge “unreasonable prices” or to be a member of a “gang.”) Conviction under a vague criminal law offends the moral and political ideals of due process in two ways. First, it places a citizen in the unfair position of either acting at his peril or accepting a more stringent restriction on his life than the legislature may have authorized: As I argued earlier, it is not acceptable, as a model of social behavior, that in such cases he ought to assume the worst. Second, it gives power to the prosecutor and the courts to make criminal law, by opting for one or the other possible interpretations after the event. This would be a delegation of authority by the legislature that is inconsistent with our scheme of separation of powers.

Conviction under a criminal law whose terms are not vague, but whose constitutional validity is doubtful, offends due process in the first of these ways. It forces a citizen to assume the worst, or act at his peril. It offends due process in something like the second way as well. Most citizens would be deterred by a doubtful statute if they were to risk jail by violating it. Congress, and not the courts, would then be the effective voice in deciding the constitutionality of criminal enactments, and this also violates the separation of powers.

IF ACTS OF DISSENT continue to occur after the Supreme Court has ruled that the laws are valid, or that the political question doctrine applies, then acquittal on the grounds I have described is no longer appropriate. The Court's decision will not have finally settled the law, for the reasons given earlier, but the Court will have done all that can be done to settle it. The courts may still exercise their sentencing discretion, however, and impose minimal or suspended sentences as a mark of respect for the dissenters' position.

Some lawyers will be shocked by my general conclusion that we have a responsibility toward those who disobey the draft laws out of conscience, and that we may be required not to prosecute them, but rather to change our laws or adjust our sentencing procedures to accommodate them. The simple Draconian propositions, that crime must be punished, and that he who misjudges the law must take the consequences, have an extraordinary hold on the professional as well as the popular imagination. But the rule of law is more complex and more intelligent than that and it is important that it survive.

¹ I do not mean to imply that the government should always punish a man who deliberately breaks a law he knows is valid. There may be reasons of fairness or practicality, like those I listed in the third paragraph, for not prosecuting such men. But cases like the draft cases present special arguments for tolerance; I want to concentrate on these arguments and therefore have isolated these cases. ↩