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With the conviction and sentencing of four of the five defendants, the first phase in the Boston conspiracy trial has ended and a good moment has come for some consideration of the significance of the so-called "Spock case," of what it means for the "peace movement," and what it tells us about the state of American democracy.

Among anti-war activists there has been much discontent with respect to the conduct of the defense. Many had expected a far-reaching indictment of the government for its criminal behavior in Vietnam. Those who had been hoping for a "confrontation with illegal and immoral authority" are naturally disappointed, since no such confrontation took place. In fact, the defendants themselves did make strong statements about the illegality and barbarism of the American war in Vietnam. With the exception of Michael Ferber, a resister himself, the defendants took their stand, without qualifications, on the "Call to Resist Illegitimate Authority" (see this journal, October 12, 1967), which announced the intention of the signers to support

resistance to the Vietnam war, and which insisted that actions taken in support of resistance "are as legal as is the war resistance of the young men themselves." However, this aspect of the trial was barely reported in the press. Within the framework defined by the government, adopted by the Court, and accepted by the press, the issue of the legality of the war was not pertinent, nor was the question of the right, or even the duty, of resistance to American aggression.

Why should reasonable people have believed that a federal court might serve as an impartial referee in a dispute between the government and its critics, or even as a forum that might contribute to general understanding of the war? Recent history is probably responsible, in part, for the misplaced optimism and current disappointment. Since Brown vs. Board of Education in 1954, a series of decisions favoring civil rights activists and extending civil liberties has accustomed us to think of the federal courts as a branch of government devoted to the defense of human rights and social justice. A broader historical perspective, however, would reveal that only rarely are they willing to assume that responsibility. On the contrary, the courts are more likely to confirm a political consensus set elsewhere, and, in the process, to avoid intruding upon the prerogatives of the other branches of government, particularly with respect to the power to make war. The idea that the courts might uphold or even seriously entertain an argument on the illegality of the war or the abuse of executive power in waging war seems, therefore, rhetorical or naïve. In fact, the case was pursued by the government on grounds so narrow that the war was effectively excluded from consideration.

As in any draft case, the government sought to limit discussion to the violation of a particular section of the Military Selective Service Act. When draft resisters come before the court for refusing induction, they are not permitted to explain their opposition to the war. Or when, occasionally, an extraordinary or curious judge permits an explanation, it is ruled irrelevant

to the question of guilt or innocence and is admitted only to assess character or motivation, primarily for purposes of sentencing. Several draft refusers, including David Mitchell and Donald Weatherall, have attempted to defend themselves by citing Nuremberg Principle VII, that "complicity in the commission of a crime against peace, a war crime, or a crime against humanity…is a crime under international law." But the federal judges in Connecticut, Illinois, and elsewhere have excluded such considerations from the court, and to win a guilty verdict, the prosecution has had only to show that the defendants had, in fact, refused induction.

Similarly, Judge Francis J. W. Ford of the Federal District Court in Boston limited discussion to the question of whether the five defendants had conspired to violate the Selective Service Act. Though the defendants individually were able to state their position against the war, there was no serious discussion of what they correctly regarded as the major issue: whether the government has conspired — to use the wording of the Nuremberg Principles — in the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances"; or whether it is engaged in "violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory…, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity"; or whether it is engaged in such crimes against humanity as "murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population…."

Nor was the jury permitted to consider testimony concerning a possible conspiracy by the government to deceive a naïve and uninformed Congress, so that it would accept what the former Attorney General regards as a "functional equivalent" of a declaration of war, nor could it consider whether the gov-

ernment's systematic resort to lies and deceit to rally popular support for criminal acts is not evidence of conspiracy to commit crimes against peace.

Such questions would be raised in a tribunal concerned with fundamental issues of legality and justice, with the limits of a government's legitimate authority and the character of a citizen's responsibilities. Though the American courts cannot seriously be expected to deal with these questions, they are, nevertheless, the questions that must be considered by anyone who takes seriously his responsibility as a citizen. Had these issues been admitted in the Boston conspiracy case, the defendant would, in effect, have been the government; the five "conspirators" could have introduced evidence on the nature of the war and argued that resistance is justified by the Nuremberg Principles. If these Principles are accepted as valid (a question to which we return below), then one must conclude either that our system of law is ridiculous, or else that it guarantees immunity both to those who seek to avoid the complicity that these Principles specify as criminal and to those who aid them. Similarly, those responsible for true criminal acts would have to be restrained and perhaps brought to justice.

But the aim of the government in prosecution is to ensure obedience to its orders by punishing those who refuse to obey and threatening others who might be tempted to do so. It will not voluntarily open the door to an inquiry into its right to enforce these demands on the citizenry. This is as true of the Boston conspiracy trial as it was of the trial of Sinyavsky and Daniel and their supporters. It is characteristic of political trials that there are sharply conflicting interpretations of the fundamental issue at stake. Not surprisingly, the court accepted the interpretation defined by the prosecution. For those who take the view that the real issue is the abuse of executive authority and the criminal violence of the government, the court proceedings will therefore border on farce. Since the government is not held accountable for its acts and is permitted to

prison terms, without publicity and with no hope of appeal. Thousands more have expressed publicly their refusal to take part in the war. These men are making the maximum contribution to bringing the war to an end. For this they deserve admiration and gratitude, but more important, the fullest measure of continued support.

model is inappropriate. It is surely proper for citizens to join in a concerted effort of resistance to the illegitimate exercise of authority if there is reason to suppose that this effort will contribute to restricting the abuse of power. At this point entirely new considerations arise, considerations of tactics and effectiveness. These we cannot try to discuss here, except to say that we believe that properly conducted non-violent resistance can contribute, perhaps more significantly than any other course of action open to us, to ending American aggression in Vietnam and forceable intervention in the internal affairs of other societies.

The "Call to Resist Illegitimate Authority" figured prominently in the Boston conspiracy trial. This document expresses the view of the signers that "every free man has a legal right and a moral duty to exert every effort to end this war, to avoid collusion with it, and to encourage others to do the same." To define the extent of this legal right and moral duty is a task of fundamental importance for the citizen of a state that sees itself as an international judge and executioner.

In the Boston Trial, the prosecution cited only acts that expressed a definite conviction about the extent of this legal right and moral duty. These acts were quite public; in fact, they were carried out in an effort to gain publicity for certain views. The defendants were not permitted to develop their case against the government or to introduce detailed testimony in support of their interpretation of their legal rights and moral duties. A conspiracy charge is a vague one; it can be a dangerous weapon in the hands of a government that is pressed to carry out political persecution when the legitimacy of its use of authority is challenged. For these reasons, the Boston trial can hardly fail to be an important one.

Far more important, the defendants would of course agree, is the fate of the hundreds of young men who are exercising what they see as the legal right and moral duty of resistance to the American war. These men are being sentenced to heavy

determine the nature of the court proceedings, the question is no longer whether justice will be done, but rather whether persecution will succeed.

The indictment charged that the defendants conspired (1) to counsel, aid and abet Selective Service registrants to evade military service and to refuse to carry "draft cards,"[1] and (2) to interfere with the administration of the Selective Service Act. The factual basis for the government's case reduces to the following. On October 2, 1967, Raskin, Spock, Coffin, and Goodman, along with a number of others, appeared at a press conference called to announce the "Call to Resist Illegitimate Authority." The Government made no attempt to show, what was in fact false, that the defendants had organized the press conference or had agreed on its substance, except to the extent that they agreed that the press conference would make public the "Call to Resist." Each participant in the press conference stated his beliefs with respect to the war and his reasons for associating himself with the "Call to Resist."

The second factual item in the Government's charge was that on October 16, Reverend Coffin and Michael Ferber spoke at the Arlington Street Church in Boston and received draft cards, in a ceremony that was organized by others who were not defendants, as was brought out in testimony that was not contested. Thirdly, on October 20 a group of some 500 people assembled at the Justice Department to transmit to representatives of the Attorney General draft cards collected around the country on October 16 (including some turned over on October 20). Mitchell Goodman and Reverend Coffin were among those who planned this action. All five of the defendants were present. All except Ferber entered the Justice Department

[1] One of the ironies in the Government's prosecution is that the Justice Department seems to have decided not to take men to court for non-possession itself, but to wait until they refuse induction and prosecute for that violation. In effect, then, the men in Boston were being tried for being accessories to a "crime" the Government has felt it best not to prosecute.

with the various documents that had been collected. Of the eight men who entered the Justice Department four were indicted. These eight men were selected at the last minute, in the rather haphazard fashion that will be familiar to everyone who has been involved in anti-war activities, and they made statements, as individuals, to the representative of the Justice Department. Fourth, Dr. Spock and Mitchell Goodman took part in a demonstration at the Whitehall Induction Center in New York, a demonstration that was planned by others, as was brought out in uncontested testimony by David McReynolds and Mayor Lindsay. This is the substance of the Government's argument that the five were involved in a conspiracy.

It was against such vague charges that the defendants chose to defend themselves in court. The legal and political difficulties any defense would have encountered were compounded further because the defense itself seemed to contradict the rhetoric used widely in the anti-war movement. Such rhetoric encouraged the view that many people, including the defendants, were simply defying the government and its laws. After the indictments, for example, thousands signed what they called statements of "complicity"; hundreds, in public ceremonies that were often televised, "aided" and "abetted" draft resisters by handing them money or accepting their draft cards. The impression created was that many people were willing to break the law — indeed, that they were already breaking it — in order to bring the war to an end. In truth many of those who joined in the militant rhetoric and symbolic acts assumed that the threat of filling the jails with prominent Americans would help to "bring the Administration to its senses"; if that threat were to remain credible, prominent opponents of the war could not appear to be trying to avoid jail.

Such strategy leads directly to the argument that the defendants should have pleaded guilty, taking the position that the indictment was correct, but that they were right to commit the alleged "crime." There are a number of reasons why this course

argument, and is subject to all of the difficulties of evaluating confused and only partially understood facts of contemporary history. Nevertheless, the evidence in favor of it seems overwhelming. Whoever agrees with this conclusion will not limit his attention to the actual judgments at Nuremberg and Tokyo.

The point is an important one. The War Crimes Tribunals can be criticized as a judgment of victors. It is difficult to see why the use of atomic weapons, for example, was less a war crime than the acts of those condemned at Tokyo. In fact, this was the position of Justice Pal of India, in his dissenting opinion at the Tokyo Tribunal. The Japanese courts as well have held that the use of the atom bomb was a war crime,[5] hence punishable under international law if any such crime is punishable. On such grounds, one may question the significance of the Nuremberg and Tokyo Tribunals. But the validity of the Nuremberg Principles as a guide to conduct is not brought into question by the inequities of the Tribunals. Even if one holds that the Tribunals exacted vengeance instead of seeking justice one can consistently argue that the Nuremberg Principles are a step forward toward more civilized norms.

The most serious limitation in the Thomas More analogy is that it does not bear on the problem of the man who is not merely concerned to protect himself from committing an immoral act, but who feels that he must work to bring such acts to an end. Indeed, the organization of resistance to the draft grew out of a more traditional, and finally narrow, concern that religiously motivated "conscientious objectors" have some protection against being forced to commit acts they regard as immoral. Where autocratic rule is too powerful to challenge, an individual may be forced to the position of Thomas More. But precisely because we do not live under despotic tyranny this

[5] For a report and analysis of the case in question, see Richard Falk, "The Shimoda case: a legal appraisal of the atomic attacks upon Hiroshima and Nagasaki," *American Journal of International Law*, vol. 59, 1965, pp. 759–793.

ment — though the fate of Thomas More suggests what lies ahead for a person who will not act politically to combat the violence of the state. Judge Wyzanski is surely right in holding that this is not a dishonorable course. Notice, however, that the advice to wait until personally "faced with an order requiring him as an individual to do a wrongful act" is not relevant to the taxpayer or the Congressman voting appropriations, for he is faced precisely with such a demand. Nor is it realistic to urge a young man to await a specific illegal order. A person in combat cannot be expected to make fine judgments about where to aim his rifle. Furthermore, there is evidence that men have been forced against their will to go to Vietnam. In fact, only a person of heroic character can make choices once he has subjected himself to military control, and the penalties for free choice are then incomparably more severe than in civilian life. We have no idea whether the law has anything to say about the matter, but surely reason would suggest that a person has a right to avoid circumstances under which he is likely to be compelled to carry out an illegal or immoral act. If so, refusal of induction is well-motivated.

Judge Wyzanski's reference to Nuremberg seems too narrow. True, the Nuremberg judgments were limited to leaders and direct participants in war crimes, and for the person who is concerned only with avoiding punishment by a (purely hypothetical) international tribunal this would be a relevant consideration. But a person seeking reasonable standards of behavior will look not to the judgments themselves but rather to the principles on which they were based, as a citizen seeking to obey the law will ask what the law is, not merely how it is enforced. If the Nuremberg Principles are regarded as having the status of law, or even as formulating reasonable standards of conduct, then it does not matter whether they were applied only in a limited way. It seems to us that the plain meaning of these Principles forbids any manner of complicity in the American war in Vietnam. This is not a legal but primarily a historical

of action would have been a mistake—questions of the validity of such a political strategy aside. First of all, the defendants refused to admit that the government's charges were correct. They could not honestly plead guilty to conspiracy when they did not view themselves as involved in any conspiracy. Furthermore, a plea of guilty would imply that they regarded their actions as "illegal," though justified on other grounds, in short as a form of "civil disobedience." For many in the peace movement, this remains a reasonable characterization: they believe that the most honorable and effective strategy for a moral man is to break an unjust law and, like Socrates, accept the penalty meted out for that act, however unjust. But most of the defendants regarded their acts as an attempt to uphold the law. Their position is that formulated in the "Call to Resist" to which we have already referred. To quote more fully, the "Call" states: "We firmly believe that our statement is the sort of speech that under the First Amendment must be free, and that the actions we will undertake are as legal as is the war resistance of the young men themselves."

The Government made much of statements by some of the defendants and others during the events at the Justice Department that officials were "derelict in their duty" because they had not prosecuted those who aided young men in the alleged crime of turning in draft cards. Such statements were by no means confessions of guilt, but challenges — however misplaced or ill-considered — to the Government to take the issues of the war and resistance into the courts. The criminal acts relevant to the case of the Boston five are those of the Government, which seeks to involve American citizens in its violation of domestic and international law. So the defendants held, and with warrant.

Furthermore, it would have been a tactical error to permit the Government to win this case by default. In fact, if the conviction is not overturned on appeal, the precedent that is set will be a calamity. This is clear when one reviews the content

of the indictment. If such acts as are alleged constitute criminal conspiracy in the eyes of the courts, then individual liberties will be dealt a severe blow. For all these reasons, a plea of guilty would have been a serious mistake.

One can imagine circumstances under which a total rejection of the judicial process would be justified. For example, this would be a proper position if the courts were, literally, nothing more than an instrument of criminal repression, or if the institutions of society were crumbling, and contempt would contribute to their collapse and their replacement by some new and more humane social order. But no one can seriously propose such a characterization of American society. Surely the defendants do not accept this view, any more than do most black militants who are subjected to far more intense police and judicial persecution than adult supporters of draft resistance. To base the defense on nonsensical judgments as to the state of American society would surely have been inappropriate.

It was, therefore, quite proper for the defendants to undertake to refute the Government's charges. Having made this decision, they were forced to deal with the particular issues, however inconsequential and ambiguous, raised by the prosecution, and to keep within the limits of defense imposed by the court. Five separate attorneys argued the defense on grounds appropriate to their individual clients. They argued that they were not involved in a criminal conspiracy. They believed their acts to be legal, for reasons which were sketched in the "Call to Resist," and which would have been elaborated in further testimony had the court not ruled further factual and legal arguments of this sort inadmissible. The defendants emphasized that they were trying to find a way of demonstrating their opposition to the war and their support for the young men who, rightly in their opinion, had decided to refuse induction or even to dissociate themselves from the Selective Service System so long as the war continued. Not only were the relations among

selves which laws to obey? But by the same argument obedience to immoral demands encourages others in the same obedience, and, what is worse, weakens still further the much too feeble restraints on the use of power by an aggressive state. We must ask, then, what the lesson of modern history teaches. Which has proven the greater danger, the refusal of citizens to obey edicts that they regard as unjust, or the use of state power to destroy and oppress while obedient masses do their duty in silence? It is clear where this argument leads.

Finally, consider the advisability of caution and restraint. In essence, Judge Wyzanski's remarks seem well taken, but overstated. The resister should seriously consider his true motives and the probable consequences of his actions for himself, for American society, and for the victims of American force. *A fortiori*, one who takes part in acts of violence and aggression, whether by payment of war taxes, military service, professional work, or merely silent acquiescence should ask whether this complicity will help to bring a just peace or lead to despotism, and whether such passivity is motivated by fear or willingness to tolerate evil so long as it is remote. If only one with "invincible insight" should contemplate resistance, then what of those who contemplate an active or passive participation in acts of war? In fact, no reasonable person will wait for certainty before he decides on action or inaction; he will rather try to determine the situation as well as he can with necessarily partial information, assess the probable outcome of his action or inaction, and take the course that seems most likely to achieve desired ends. There is no reason to urge caution only on the man who seeks to bring an end to violence. It is difficult to see why there should be any disagreement about this.

The model of Thomas More may be appropriate for the person whose concern is only to make sure that he himself will not act in violation of conscience. For him the wisest course may be to refrain from contesting authority until the last mo-

as comparable to "the gangster state operated by the Nazis" so far as its domestic character is concerned. But this is not the issue. The issue, rather, is our involvement in Vietnam, and unpleasant as this may be to recognize, a substantial segment of informed world opinion does hold that in this respect we are "in a posture comparable with that of the Nazi regime."[4] Comparisons with Nazi Germany evoke such ghastly memories that rational discussion becomes impossible, but surely we cannot descend to the stage of barbarism that finds tolerable anything short of the Nazi final solution. It is well to recall that Japanese leaders too were convicted of "war crimes," and a strong case can be made that American aggression in Asia today is at least as reprehensible as that of fascist Japan. Those who feel that domestic resistance to Japanese aggression would have been justified can quite properly come to the same conclusion with respect to the United States today.

What of the argument that civil disobedience, even when undertaken with the most honorable of motives, "weakens the fabric of society" by encouraging others to decide for them-

[4] Even the references to legal issues are surprising. Thus Justice Fortas seems to believe that the state has a right to go to war "to prevent the spread of attempts to conquer other nations of the world by outside-inspired and -aided subversion." It is difficult to see how this belief can be squared with the supreme law of the land, as formulated, for example, in the UN Charter. But Justice Fortas does make one statement of crucial importance, that "our form of life depends upon the government's subordination to law under the Constitution." Had he concerned himself with the implications of this remark, he might have written a useful essay. 4 It should also be no secret that world opinion strongly favors American withdrawal from Vietnam. The press has failed to bring this significant fact to public attention. For example, an international Gallup Poll released on Nov. 6, 1967, showed that outside the English-speaking countries an overwhelming majority in each country polled favored American withdrawal from Vietnam, but the poll barely received mention in the press. A reference appeared in *The New York Times* in a column headed "Johnson gains in Gallup Poll." The figures were not given, and to our knowledge, the poll has not been reported elsewhere, though the press features prominently every minor fluctuation in domestic opinion.

the defendants casual, the defense suggested, but, far from being conspiratorial and planned, their enterprises were disorganized and not remarkably successful. Separately each defendant explained his presence or absence at the particular press conference or public meeting described in the Government's indictment.

Unfortunately, it must be said that the defendants' honest efforts to clarify the facts were used by the prosecutor to discredit their motives. Because the defendants could not truthfully claim responsibility for "conspiring" to arrange all, and in some cases any, of the events in the indictment, they appeared to be denying their effectiveness as resisters to the war.

A similar problem arose in the defendants' attempts to make a distinction between urging young men to resist induction or to return their draft cards, on the one hand, and, on the other, encouraging or supporting those who had made this decision. According to Judge Ford's charge to the jury, the distinction is immaterial to the present case. However this may be, the distinction is surely a meaningful one which raises painful questions for any person of conscience. Does one have the moral right to urge men to resist induction and to face the heavy penalties for this act? On the other hand, is it proper to refrain from the effort to encourage young men not to kill their fellows and face death themselves in a senseless war? Some of the defendants chose to define their moral positions according to these questions. Some of them argued further, as we would, that these questions are misplaced. Most young men do not await the urging of their elders before undertaking resistance. Once again, however, the prosecutor used against the defendants their' own honest and reasonable doubts. If their support for resisters really did encourage men to refuse the draft, then they were guilty of inciting young men to violate the law and go to prison; or, if their statements were ineffective in extending resistance, then their whole enterprise was a public relations gambit and a sham. While the distinction was finally

ruled immaterial by the court, it was largely lost on the press, who treated the defendants as though they were trying to "cop out" of their responsibility for draft resistance.

In fact, it should be obvious that if anyone wanted to persuade young men to resist, he would not urge them to do so, for only the mentally unbalanced would respond to such a plea. He would, rather, present to them an account of what he took to be the objective situation. He would describe the origins and the nature of the war. What has led young men to resist is unquestionably the information presented in the press and on television, in books, lectures, teach-ins, and discussions on and off campus during the past three years. Those who have "persuaded" young men to resist — whether intentionally or not — are those who have brought forth evidence regarding the history and character of the American war in Vietnam. If the government wishes to put a stop to the substantive act of "persuading young men to resist," it has only one recourse: it must block the flow of information and prevent discussion of such information as reaches the public. This is at the heart of the issue of "encouraging resistance." It is impossible to conduct a brutal war of aggression in the name of an enlightened and informed citizenry; either the war must be terminated, or democratic rights, including the right to information and free discussion, must be restricted. This is true not only of the war in Vietnam, but also of the use of American force to intervene in the internal affairs of other countries. This is one fundamental aspect of the contemporary American crisis. It will persist no matter what the courts decide in the Boston conspiracy case or in the cases of the hundreds of resisters who are receiving heavy sentences for their conscientious refusal to become involved in what they regard as war crimes and other illegitimate acts of a government bent on global repression.

Judge Ford's careful explanation of the indictment in his charge to the jury illustrates very clearly how dangerous a threat to civil liberties the concept of "conspiracy" can be, if

of the Court, should it be maintained, is hardly relevant to the issue at hand. It is not questions of law that constrain the Court "during the continuation of hostilities" but rather political factors, considerations that relate ultimately to the distribution of force in the society. It is almost unimaginable that the Court would declare illegal the dispatch of half a million troops to Vietnam while those troops are engaged in combat, no matter what a legal argument would show, just as it is unimaginable that Congress would withhold military appropriations under such circumstances, whatever the convictions of its members might be with regard to the war. Such decisions might very well lead to the "despotic tyranny" that Judge Wyzanski, along with every other rational person, rightly fears.

For just these reasons a citizen cannot rely on the decision of the courts to determine whether resistance is a "breach of a legal duty." Rather, he might reasonably conclude that the notion "legal duty" has lost its meaning when the Government violates the law and demands complicity and obedience, when the executive possesses and uses the power to construct situations in which Congress and the courts can no longer function in a certain domain. In short, it does not follow, it seems, that "one who continues willfully to disobey is engaged in civil disobedience" — i.e., in "a deliberate and punishable breach of a legal duty" — however the courts may rule under the constraints that limit their action. It is not at all clear, then, that the issue is one of a conflict between legal duty and felt moral obligation. Rather, the problem is the illegitimate exercise of authority, which a citizen has both a legal right and a moral duty to resist, though he must realize that the justice of his position will be of little avail.

However, even if we were to grant that the conflict is one of legal duty and moral obligation, the argument against resistance is not compelling. Consider first the analogy to Nazi Germany that Judge Wyzanski rejects as unthinkable. Let us grant that no unprejudiced observer would regard the United States

even though "There are situations when it seems plainly moral for a man to disobey an evil law promulgated by a government which is entirely lacking in ethical character." A case in point is "The gangster state operated by the Nazis." "But no unprejudiced observer is likely to see the American government in its involvement in Vietnam as in a posture comparable with that of the Nazi regime."

A further argument of Judge Wyzanski's is that civil disobedience, even with a solely ethical motive, "weakens the fabric of society" by the example that it sets. What is more, no one can be certain that resistance will accomplish its aims of bringing the war to an end. It might, rather, encourage the growth of despotism. The voice of reason urges the resister to consider whether his "fierce passion…[is not]…dangerously mixed with vanity, self-righteousness, and blindness to possible, nay probable, consequences far different from those sought." Only one with "invincible insight" should contemplate the course of resistance. Anyone who believes he may possibly be mistaken should refrain from confronting authority "until he personally is faced with an order requiring him as an individual to do a wrongful act," following the example of Thomas More. "Such restraint will in no way run counter to the rules applied in the judgment of the Nuremberg Tribunal," which punished only those personally involved in crimes, not those who were mere participants in an aggressive war.

These arguments are directed to the man who has not entirely "lost confidence in the integrity of his society" but whose deepest convictions are offended by the nature and conduct of the war, the man who recognizes the ambiguities described above. It seems to us, however, that Judge Wyzanski's arguments fall short of meeting the problems faced by such a person. Let us grant that the Supreme Court is unlikely to deal with the question of the legality of the war and the propriety of resistance to it "at least during the continuation of hostilities." But the cited qualification suggests at once why this position

the government chooses to make use of it. Judge Ford charged the jury to determine whether it had been proven "that the defendants had actual knowledge of the alleged conspiracy and its illegal purpose," and joined the conspiracy "with knowledge it was prohibited by law and with a specific intent to violate the law." At the same time he instructed the jury that the beliefs of the defendants with regard to the legality of the war or the constitutionality of the Selective Service Act "must not be considered by you in determining the guilt or non-guilt of the defendants." Hence without considering their beliefs as to the legality of their actions, the jury was to determine whether the defendants were knowingly violating the law. The assumption is that the defendants knew they were violating the Selective Service Statute; it is immaterial that the defendants felt they were legally justified in doing so, when legal obligations are considered in a broader context which accommodates the issue of the war's legality.[2]

[2] During the American Revolutionary War it was argued in British courts that the jury should overrule the judge's instructions and "recognize the propriety of what we would call civil disobedience" on the part of British opponents to the war (Joseph L. Sax, *The Yale Review*, Summer, 1968). As Sax points out, the principle that the jury should have this right was written into law shortly after. He quotes Lord John Russell, who states in his *History of the English Government and Constitution* that the effect was to permit "the verdict of juries to check the execution of a cruel or oppressive law." The right of jury nullification was also advocated by John Adams, who said of the juror that "it is not only his right, but his duty…to find the verdict according to his own best understanding, judgment, and conscience, though in direct opposition to the direction of the court." As Sax correctly observes, it is particularly important that this right be established in connection with political trials, which characteristically raise the distinction "between the citizen's obligation to the demands of the individuals who hold public office at a particular time, and to the principles upon which his nation was founded." Sax concludes: "That distinction was openly recognized and debated in England at a time and in circumstances to which we now look back as representative of a great moment in the development of individual liberty. The current prosecutions against war resisters pose a similar challenge to us."

Judge Ford went on to explain "specific intent" as follows: "A person ordinarily intends, until outweighed by evidence to the contrary, the natural and probable consequences of acts knowingly done by him. He intends the consequences which one possessing his knowledge knew or had reason to know would result from his acts knowingly done." Consider the implications of this instruction if we construe it literally. Suppose that we were to write a joint article presenting factual and legal grounds for opposing the war. A natural and probable consequence is that readers of the article, were it forceful and persuasive, would decide to refuse complicity in the war effort, would in particular refuse to serve in the armed forces while the war is in progress. Presumably, then, we could be charged with criminal conspiracy, under the terms of Judge Ford's charge. In any event, it is clear that a citizen who is concerned to avoid prosecution would do well to keep silent and remain isolated.

In fact, the arbitrariness of the jury's verdict illustrates clearly the sense in which civil liberties are threatened by the Government's action. In what respect was Dr. Spock, for example, more involved in a "criminal conspiracy" than Marcus Raskin, the sole defendant acquitted? Both men had expressed their views on various public occasions, and had participated in public actions undertaken to demonstrate opposition to the war and support for resistance. Their involvement was different, but not in ways that give the concerned citizen any guide as to what actions on his part will be viewed by the courts as criminal. The citizen who uses this trial as a guide to conduct will simply have to avoid all public acts undertaken jointly with others who share his views if he does not wish to risk prosecution. This is surely the lesson that follows from the weakness of the Government's case and the arbitrariness of the verdict; if we rely on Judge Ford's instructions cited above, we can conclude that it was the "specific intent" of the Government to establish this point, since it is a "natural and probable consequence" of the decision to prosecute. It

tice Fortas.[3] Unfortunately, neither Mr. Griswold nor Justice Fortas — nor the Boston conspiracy trial itself — provides a guide to conduct for a person who takes the responsibilities of citizenship seriously.

The limits of these perspectives are illustrated in a thoughtful article on civil disobedience by Charles Wyzanski, US District Judge for Massachusetts, in *The Atlantic Monthly*, February 1968. Judge Wyzanski is concerned with the dilemma of those who regard American actions in Vietnam as deeply immoral but who are required to contribute to these actions through payment of war taxes or military service. If a person were to refuse such complicity, he would be guilty of civil disobedience, which, "by definition, involves a deliberate and punishable breach of a legal duty," unless, of course, the Supreme Court should hold that he was not legally obligated. In this case, he "would not have been guilty of civil disobedience" but "would merely have been vindicating his constitutional rights."

However, as Judge Wyzanski points out, it is unreasonable to expect that the Supreme Court would so rule "at least during the continuation of hostilities." Therefore, "one who continues willfully to disobey is engaged in civil disobedience," as just defined. The only issue, then, is the conflict between legal duty and a felt moral obligation. In such a conflict, Judge Wyzanski argues, the presumption should be that the law is to be obeyed,

[3] "Concerning Dissent and Civil Disobedience" (Signet Broadside Series, 1968). This essay is not serious enough for extended discussion. An indication of the level of social commentary is Justice Fortas's assertion that "Negroes and the youth generation…have triggered a social revolution which has projected this nation, and perhaps the world, to a new plateau in the human adventure." He believes that this "vast revolution…even as of today…is the most profound and pervasive revolution ever achieved by substantially peaceful means. We have confessed that about twenty million people — Negroes — have been denied the rights and opportunities to which they are entitled. This national acknowledgment — typically American — is in itself a revolutionary achievement."

the hundreds of American men who are denied due process by the unwillingness of the courts to explore in a serious way the legal basis for their resistance. Considerations of law are not the only ones that should guide the conduct of those who seek to restrict the exercise of American power, but they should not be abandoned or disregarded. It is important to demonstrate that the behavior of the American government is illegitimate within the constitutional terms that it formally accepts. If the courts cannot deal with these issues, then other forums must be developed that are not so limited by political constraints, that would in this sense be more legitimate than the courts, even though they would not command the kind of force that is at the call of the Government.

In retrospect it seems to us, as suggested, such a forum might have been established outside the Boston courtroom. The problems of complicity in war crimes, of resistance and civil disobedience, of law and conscience, must be faced by the citizen, whether or not the courts can contribute to this discussion. These are bound to be persisting issues for Americans, whether or not there are additional prosecutions. In the future, it would be natural for American universities to provide a forum in which these questions can be considered.

The importance of this task is underlined not only by the Boston trial, but by a series of statements critical of the protest movements in this country. During the period in which pretrial motions were being argued in court, the Solicitor-General of the United States, Erwin Griswold, and the President of the American Bar Association, Earl F. Morris, suggested a connection between rioting and looting in the ghettos and the "indiscriminate" civil disobedience of men like Dr. Spock. Mr. Griswold's remarks in particular received favorable editorial comment, especially in *The New York Times* and the Washington *Post*. During the sentencing in the Boston trial, Judge Ford quoted a recent political broadside on civil disobedience by Jus-

is, therefore, a sound conclusion that the initial indictment and the willingness of the court to hear the case themselves constitute a severe attack on freedom of speech and assembly. It should be no surprise that a government engaged in aggressive war should be impelled to attack the civil liberties of its own citizens. We emphasize again what appears to us to be a central issue in this case: it is impossible to conduct a brutal war of aggression in the name of an enlightened and informed citizenry. Whatever happens in Vietnam, a national commitment to global repression carries with it the necessity for drastic limitations on the rights of American citizens as well. The Boston trial is one further step in this very natural development.

In other and still more important respects the Boston trial illustrates the failure of our institutions to function properly. No one has found a way to restrain American power, which threatens world peace and the right of small nations to be free from externally directed subversion or imperial domination. In particular, the courts refuse to undertake this risk, for understandable reasons, thus withholding the protection of the law from those who resist. It is true that opposition to the Vietnam war has grown enormously in recent months, but we must face the fact that this is primarily a response to the cost of the war and the obvious failure of American arms. Typical is the reaction of the Louisiana chapter of the American Legion, which describes itself as "fed up" with the Vietnam war because "there no longer seems to be anything to be gained by this war" (*Christian Science Monitor*, July 1). Evidently, opposition to the war on such grounds shows only the failure of our institutions to encourage common decency. When American aggression is successful, as in the Dominican Republic in 1965, protest is quickly stilled despite the evident violation of our "solemn commitments." Who today is disturbed by the fact that the OAS charter forbids any state "to intervene, directly or

indirectly, for any reason whatsoever, in the internal or external affairs of any other state"?

If it is idle and dangerous to talk of a "pre-revolutionary situation" in the United States or to act as though social institutions were collapsing, it is no less a distortion to maintain, as some do, that our democratic system has "shown its health" by recent political events, specifically, by the President's announcement that he will not seek reelection. The facts are that the Johnson administration was faced with the virtual collapse of its war policy; the Têt offensive, in particular, exposed government propaganda as illusion or deceit. Furthermore, the country is threatened with a severe financial crisis of international dimensions, and with great unrest and dissension, much of it taking the form of personal animosity toward the President. As Alain Clement pointed out recently in *Le Monde*, the country was becoming ungovernable. Under these circumstances, the President announced that he would not seek reelection. If this decision demonstrates the health and viability of our democratic system, then consider how much more healthy was the political system of fascist Japan thirty years ago, when cabinet after cabinet fell under not dissimilar conditions. In fact, parliamentary institutions are facing a serious crisis in the United States, as in Western Europe, and any standards by which they can be described as healthy are seriously defective.

If, as appears likely, the political conventions refuse to give more than token expression to the desire for an end to the war that is revealed by the polls and the primaries, then this will merely illustrate, once again, the crisis of parliamentary institutions. But the real crisis is far deeper. Even if the problems of war and peace were presented to the electorate — as in 1964 — there is no reason to assume that the verdict of the polls would have a significant effect upon policy. The Government will act, as heretofore, on the basis of political, economic, and ideological considerations that have little relation to the electoral process. Furthermore, it should be stressed again that the

opposed to the war, there is considerable diversity of opinion with respect to resistance as a political strategy and the forms that it should take to be effective. Such questions arise at many levels. They require serious thought.

In general, the problems of resistance are particularly complex for those who do not find it possible to adopt a position of revolutionary disdain for American social institutions, but who see basic and perhaps fatal flaws in our uncertain democracy. The problems thus arise for those who see no realistic alternative, for the moment, to the present social order, but who feel that submission to the instruments of war and repression would be grotesque, and obedience to government dictates detestable. If the war should be continue in full intensity, or even if it should be gradually phased out during the coming years, many of these people will follow to the courtroom and to prison the hundreds of young men already sentenced. They will discover how limiting and frustrating the courtroom's elaborate and threatening decorum can be. They may discover, too, a certain incompatibility between the effort to win acquittal, which must often be pursued along avenues of legal triviality, and the need to press unceasingly for an end to the war.

The evolution of law in the twentieth century makes it possible for such people to take their stand in part on legal grounds, and there is every reason for them to do so. The United Nations Charter, the Nuremberg Principles, and the Constitution itself, however ineffective they may be in curbing a powerful and expansionist state, do provide a fairly reasonable framework within which the citizen can seek to determine his own proper role and responsibility. And so long as there is no realistic alternative to the present international system, it is important to act in such a way as to contribute to the evolution of more effective institutions and more decent principles of international behavior, despite the fact that they do not guide the conduct of powerful states. The illegality of the American war may be small comfort to the Vietnamese, or, for that matter, to

so heavily controlled. The objective circumstances do not warrant a refusal to take part in the judicial or political process; nor do they justify a willingness to accept as meaningful the verdict of the courts or of the ballot. The situation is ambiguous and the problems of acting responsibly are frustrating. Moreover, the movements for social change do not yet provide guidelines for individual decision or action.

These difficulties no doubt bore heavily on the defendants in the Boston case, particularly in their relationship to the anti-war movement. It has been argued, for example, that the defendants should have presented a "collective defense" and should not have stressed so heavily the individual nature of their acts. This is to say, in effect, that they should have viewed themselves as part of a "movement," with responsibilities extending beyond their individual roles, and seen their trial as an event in the development of that movement. To some extent, to be sure, they did: during the months between the indictment and the trial, most of the defendants continued to speak publicly in their usual manner. But to some extent, as we have suggested, the relationship between the defendants and the "movement" was inhibited by the problem of defense against a charge of conspiracy. Nevertheless, it is unfortunate that the defense did not do more to meet the political needs of the movement against the war, perhaps by holding public "forums" each day of the trial, so that those witnesses introduced to and dismissed by the court could have been heard, and so that the defendants could speak freely about the issues as they saw them.

But surely the primary lessons to be drawn from these difficulties concern the present state and future needs of the peace movement. The peace movement is, needless to say, extraordinarily diverse. The defendants themselves, though united in their general commitment to resistance, were in fact associated with quite different organizations and, very likely, disagree among themselves on many fundamental political and moral issues relating to the war and the draft. Among those

main sources of popular opposition to the war — its cost and the obvious failure of American arms — demonstrate with brutal clarity that the crisis of American institutions and cultural values is severe.

It is also irrelevant to argue that the slow workings of the democratic process permit the exposure of Government deceit, as in the case of the Tonkin Bay incident. No doubt Congress now realizes that it was hoodwinked when it passed the Tonkin Bay resolution, but this recognition will not restore the devastated cities and countryside of Vietnam or return the millions of refugees to their homes, nor will it give back the lives of the thousands of victims of the American killing-machine that was turned loose in Vietnam with Congressional authorization. Furthermore, with half a million American troops serving as a virtual army of occupation in Vietnam, Congress cannot "withdraw" its authorization to conduct the war any more than the courts can condemn the war as illegal, because of the domestic consequences.

Similarly, it would be absurd to argue that American democracy is healthy and functioning because the American people, in principle, are free to vote an end to American military action in Latin America. Not one person in a million is aware of the operations of the American military in that area. It is virtually impossible to discover the facts. Even what seeps through to the world press is often suppressed in the United States. To illustrate, let us give one rather striking example. According to the distinguished Latin American correspondent of *Le Monde*, Marcel Niedergang, Vice President Marroquin Rojas of Guatemala stated that "American planes based in Panama take part in military operations in Guatemala and return directly to their bases without landing.... Napalm is frequently used in areas suspected of serving as refuge to rebels" (*Le Monde hebdomadaire*, January 18–24, 1968). Obviously this news is "fit to print" — in fact, sensational — even if the statement could be shown to be inaccurate, which there is not the slightest rea-

son to suspect. This news has been brought to the attention of major American newspapers, but we have yet to see it in print. Many similar examples could be cited. Under these conditions, it is meaningless to talk of "democratic rights."

The density of news coverage of Vietnam has been so great that few can be unaware of the sickening reality in a general way. Nevertheless, the press gives nothing like an accurate picture of ongoing events. The public is constantly misled and is in no position to react intelligently to crucial decisions as they are announced or implemented. Thus few Americans are aware that the American bombing of North Vietnam has increased substantially since the President's announcement of "unilateral restraint" on March 31, as few are aware of the American escalation of the war in the South. News coverage of critical areas and issues is slight and misleading. For example, Marc Riboud reported on April 13 in *Le Monde* that in ten days that he spent in Hué, he met only two reporters—both Japanese — out of the 495 correspondents in Vietnam, at a period when events in Hué were highly newsworthy. Readers of this journal now know of the US napalm and rocket attacks on Saigon suburbs that have driven 10,000 people to take refuge in the Buddhist School of Youth for Social Service (see "Letters," *New York Review*, August 1), but it can hardly be claimed that this counts as "access to information." In the reports of the Vietnam Education Project of the Methodist Church (staffed by returned workers of the International Voluntary Services), one can read of the attacks by American aircraft and tank-supported ARVN soldiers on undefended villages near Danang just before Easter — ninety percent of the houses were destroyed in a village of 3000 people, in which not one NLF soldier was killed or captured (vol. 1, no. 2, June 1968; the report is from an IVS worker in the field). Again, this news is not available to the American public. Even where the facts are revealed, their form is such as to deceive the careless reader. For example, Gene Roberts reports from Baotri, South Vietnam, in *The New York Times*, June 25

that "each time the enemy terrorizes Saigon with a ground attack, he must terrorize Haunghia twice — once when he moves toward the capital and again when he retreats from it." The dispatch is headlined: "EACH ATTACK ON SAIGON BRINGS DOUBLE TERROR TO A NEARBY AREA." Reading on, we discover how "the enemy terrorizes Haunghia":

> As one flies into the province…vast expanses of desolation are seen. Only a few months ago, the soil produced bumper rice crops. Now, craters are everywhere, United States Air Force B-52 bombers have dropped as many as one-and-a-half-million pounds of bombs on the province in a single night in an attempt to keep the enemy out of Saigon. Artillery is heard around the clock from several allied "fire-support areas."

The conclusion can only be that the American public is in no position to exercise a meaningful vote, even where the political system permits issues to be publicly raised. What is more, so narrow and perverse is the system of belief in which Americans have been indoctrinated that even the most objective and accurate reporting is unlikely to elicit a civilized response. It is senseless, under these conditions, to speak of the "democratic process," as it is senseless to speak of "a government of laws" when in fact the government is not accountable before the law.

In short, we are forced to consider the problems of legality and resistance in the context of a "democratic system" that is highly flawed. It is not true that the political institutions are facing collapse or that the courts are merely serving as an instrument of tyranny and repression. At the same time, these institutions are not functioning in an acceptable fashion, just as the mass media are not fulfilling their function when the range of opinion they express is so narrow and information is