THE CENTER MAGAZINE

A Publication of the Center for the Study of Democratic Institutions

Editor — John Cogley *Executive Editor* — Donald McDonald

In one way or another, almost every item in this issue, from William Pennell Rock's essay ("Alienation: Yes; Patriotism: Yes," page 2), to the letters from readers, is concerned with the effort to wrest a measure of satisfying meaning from life and to make the human condition more fully human. To that end, our authors have turned their attention to law and communication.

Mr. Rock uses the term law in a special sense. He finds that the "law" he rejected seven years ago when he left the United States has been wondrously transmuted. He can now speak buoyantly of his patriotism which, freed from the blinkered pride and insulated vanities of the old nationalist faith, rejoices in the rebellion and revelation that seem to him to be the bulwark of an authentic humanism and both cause and effect of the contemporary cultural ferment.

The contributors to the "New Man" symposium (page 13) sort out the ingredients of that ferment and analyze them from the perspective of history and in the light of what seem to some of them enduring principles.

Michael Tigar explains in an interview, (page 27) what he thinks he can contribute, as a lawyer, to the movement for social change, and what he thinks of the legal system in this country (he rejects the notion that it either serves or seeks justice).

Robert Hutchins undertakes to show the relevance of the classical concept of the natural law to contemporary social and political problems (page 36) in a reprise from an earlier Center study of the subject.

How the law and medicine abut most controversially and complicatedly is apparent in the report of a Center conference on medical malpractice (page 24).

Communication may be essential in man's quest for meaning and fulfillment, but it is ill served by the corporate proprietors of the mass media, according to Sander Vanocur (page 44), and it is ambushed by political authorities, as Harry Ashmore points out (page 52). Friedrich Heer suggests (page 66) that there will be little communication worthy of the name unless all of us can get beneath the words we use and penetrate to those second- and third-level "languages" which are "whole continents" of meaning.

Kenneth Tollett and Richard America (in Topics & Comment) tell what it is like when a black man looks at the human condition as it is and as it might otherwise be. And communication problems dominate our Aftermath department: communication between generations, as well as the communication of journalists and the possibility of objectivity.

— D.M.

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Design
Lauri Provencher

Cover
Jesus Perez

The Center Magazine is published bimonthly by the Fund for the Republic, Inc., 2056 Eucalyptus Hill Road, Santa Barbara, California 93108. an educational non-profit organization. It is a membership publication and is not sold on a subscription basis. Associate Membership annual dues are $15.00, of which $5.00 is set aside for six bimonthly issues of the Center Magazine. Printing by Los Angeles Lithograph Co., Inc., El Segundo, Calif. Second-class postage is paid at Santa Barbara, Calif. and at additional mailing offices.

An Interview with Michael Tigar

A Lawyer for Social Change

Michael Tigar is an attorney active in the legal defense of persons engaged in the movement for social change. He received his undergraduate and law degrees at the University of California, Berkeley, and taught in the U.C.L.A. Law School. Mr. Tigar was a Visiting Fellow at the Center last summer.

Q: Mr. Tigar, are you teaching at the present time?

TIGAR: Not in any formal sense. One of the reasons why I left U.C.L.A. is that from my experience in defending cases arising out of the movement for social change I came to the view that law students could get a much better legal education working on such cases than they could in the classrooms of a law school. In the Seattle conspiracy case, for example, there were a dozen or so law students working on all aspects of the defense. So I describe my leaving U.C.L.A. as getting into the field of legal education in a more serious way, working with and helping these students in actual cases.

Q: Would it be accurate to describe you as a "movement lawyer"?

TIGAR: Most of the cases in which I am involved are related to the movement for social change. Most are criminal cases in which the defendants are charged with some offense because of their activities in opposition to the way things are in this country. If that makes me a "movement lawyer," then that is what I am.

Q: What led you to your present concern, as a lawyer, for those engaged in the movement?

TIGAR: After I finished my undergraduate work at Berkeley in 1962, I took a year off and went to Europe and did some radio documentaries for the Pacifica Foundation. During that year I tried to come to some kind of decision about how one who had some concern for the way our society was going could most effectively express that concern. It was then that I decided to go to law school.

Q: What distinguishes a movement lawyer from the common garden-variety of lawyer who presumably is also interested in seeing that justice is done?

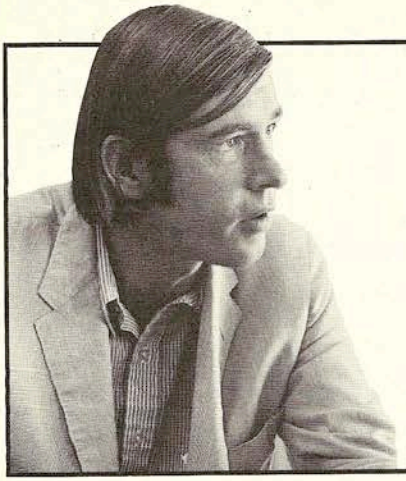
TIGAR: There is the traditional view of the criminal lawyer — the view put forward by Edward Bennett Williams in his book, *One Man's Freedom* — the view discussed at bar conventions, in which the lawyer is seen as the hired gun, one who represents, without fear or favor, every criminal defendant who comes to him for help through the legal process which by definition seeks justice. The lawyer's role as advocate in that process is only to insure that the defendant's side of the story gets told.

In reality, most of the American bar does not believe that at all. Most of the members of the bar associations — in particular, most of its leading members — are engaged in the systematic defense of privilege. Their clients have money and power, and these lawyers are paid quite handsomely to advise and litigate on behalf of the social concerns associated with money and power.

The movement lawyer begins by rejecting the notion that the legal system in and of itself serves justice, or seeks justice. I start from the postulate that the legal system, by and large, seeks to preserve the existing social and economic arrangement and that one of its goals is to put down those who are trying to change things. The movement lawyer starts not with a commitment to justice as an abstraction but with a commitment to change and a commitment to defend those people engaged in seeking change.

Q: I think you once said that many blacks and youth in general are convinced that the legal system has itself become an instrument of repression on behalf of privilege and power. You share that view then.

TIGAR: Yes. That is not to say that there are no open places in the legal



"On behalf of the poor, the dispossessed, and the dissident, the legal system does not work and does not listen."

system. I think many judges still have a commitment to the abstract principles of order, justice, and freedom set out in the Bill of Rights. Such judges still believe that law can be a kind of independent social force to get government off the backs of the people and to see that everyone in our society is dealt with fairly. But those judges are becoming increasingly rare. I do not want to paint a uniformly dark picture, but in general the commitment of the system is to the maintenance of things as they are.

Q: How did you come to that conviction?

TIGAR: When I got out of law school I went to work for Edward Bennett Williams in Washington, D.C. Ninety per cent of my practice during the three years I was there was defense work in criminal cases. So I was able to watch how the principles enunciated by the American Bar Association worked in practice.

I would be wrong if I said that I started from a neutral stance. I started from a kind of radical, critical stance. But I thought that the role of the trial lawyer as advocate in the adversary system had some independent vitality. I thought that, merely by taking the position of representing any criminal defendant without fear or favor, one could play a positive role in social change. I thought that it was not necessary, or even desirable, for a lawyer to go beyond that kind of ethically neutral stance which took for granted that the system was in the long run interested in justice. I thought that if a lawyer merely played an adversary role on behalf of certain people their claims would be heard. When I started to play that role, it was 1966 and these presuppositions had already begun to be eroded.

In the nineteen-fifties and early nineteen-sixties, those presuppositions about the vitality of the legal system and its commitment to justice dominated legal thinking with respect to social change. This was true particularly in cases involving black citizens. It was the style, and the content of the movement for black liberation to bring lawsuits, get things heard, bring questions up to a high enough court where one could get free of the racist overlay of the legal system in the South.

Q: But it didn't work that way?

TIGAR: My experience as a lawyer led me reluctantly to the view that on behalf of the poor and the dispossessed and the dissident, the legal system does not work and does not listen. There are really different standards of justice, one for the rich and the powerful and another for the poor and the weak.

The Court of General Sessions in Washington, D.C., is a dismal, dingy building in which the right to counsel is a mere formality. When I was there I saw defendants turned over to lawyers who were merely hacks. They entered fifty or sixty guilty pleas a day, often on behalf of people who had good defenses. I saw the arbitrary, high-handed way of judges when they dealt with poor people and black people and young people.

And you can go into the criminal court building in Manhattan, an ugly, squat building, dingy paneling on the walls, a desultory breeze rustling the dirty curtains, and a cracked plastic bag put over the American flag to keep it from getting as grimy as the rest of the place. And there you might be in front of a judge who had bought his way onto the bench and who, before that, as a lawyer had been known as a pay-off artist. This is the system that is supposed to administer justice. It does not work.

Q: When Judge Tim Murphy was here last spring, he complained bitterly about some of these conditions.

TIGAR: I used to practice in Tim Murphy's court in Washington. For a long time, he was almost the lone exception to the kind of judges and the spirit I have been describing. Despite the crushing burden of the cases assigned to him, Tim Murphy tried to see that justice was done. He was overwhelmed by the system of which he was a part.

Q: If justice isn't being done, may it be because in some cases the modality has not yet been found by which substantive political, moral, and social issues can be presented for proper adjudication in the courts? If the courts take a narrow, legal approach to cases involving, say, matters of conscience on war and military conscription, and refuse to consider anything but the overt acts of civil disobedience, can this at times be the fault of the defense attorneys because of the way they present their case?

TIGAR: The fault is in part that of the system, in part that of the lawyers. We do have in America a long and proud tradition that says it is proper to raise overriding social questions in a court of law in the presence of a jury, which always has the discretion to acquit. That tradition goes back at least as far as the jury's acquittal of William Penn in the latter part of the seventeenth century. The trial judge was so angered on that occasion that he sent the jury to jail because of its verdict. There was the John Peter Zenger case in the eighteenth century, and there have been a number of other cases of jury nullification. That was a proud time in the history of our country.

However, since the eighteen-nine-

ties the federal courts have taken the position that juries must follow the law as declared by the judge. But preventing juries from being the conscience of the community is a defect in our legal system. And if attorneys do not use all the wiles, techniques, and gambits to try to get jurors to look at the larger social questions in a case, that is a defect on their part.

Q: Even if the judge instructs the jurors that they must follow the law?

TIGAR: Yes, because despite such instruction the jurors will know, if the lawyer will tell them, that once they begin their deliberations nothing can be done about them or to them if they decide to acquit.

There is another part to this, and that is that with respect to many kinds of conduct — consensual sexual behavior between adults, use of narcotics, pornography, certain kinds of protest, certain issues of conscience — the response of an increasingly repressive legal system has been to criminalize deviant or dissenting behavior rather than to try getting at the causes of that behavior or devising noncriminal means to deal with it.

Q: How do you answer the argument that, short of radical social change, much can still be done by lawyers working for the poor within the present legal system? The argument is made that class-action suits brought by poverty lawyers in the California Rural Legal Assistance program, for example, can have enormous beneficial consequences for poor people who never before had access to the courts for relief. What is your view of such activity?

TIGAR: I don't put it down. It is certainly necessary. Lawyers have made some dents in the system on behalf of the poor. But one is left with lingering doubts. The first has to do with what Kenneth Davis calls "discretionary justice." I spent some years litigating with the Selective Service System. I am still doing it. The fact is that the Selective Service bureaucracy of more than four thousand local draft boards across the country, like every other bureaucracy, is largely immune from the impact of court decisions, even court decisions affecting that agency. Power is wielded on a discretionary basis on the local scene away from the place where central responsibility is lodged. So, an important precedent stemming from a court decision, even though it is supposed to apply to the actions of a large number of people, simply doesn't.

This has been pointed out with respect to the great Supreme Court decisions in the field of criminal procedure. The Georgetown Law Center made studies of the impact of the Miranda decision, which dealt with the rights of the accused in the police station house. The studies showed that *Miranda* had only minimal impact on the behavior of the policeman in the street. When the policeman comes on to his shift, he is given a gun, a club, a can of mace, and a car, and he is told to come back eight hours later. In the meantime he is not to do certain things that the courts have said are no-no's. But during that eight-hour period nobody is watching that policeman. When you do watch the police — as the Crime Commission did under Professor Reiss's three-cities police watch — you discover that all kinds of crimes are committed by policemen on the beat, away from the watchful eyes of judges and lawyers.

Secondly, even if a legal system does everything it can to insure that the state and its agencies do not discriminate in their treatment of people, even if it insures that people will have the right to speak and will be accorded procedural decencies — due process, free speech, equal protection — the structure of legal rules does not permit you to get at the real centers of power, the centers of economic power. California Rural Legal Assistance has done nothing to break the back of the economic power that dominates life in the central valley of California and makes the plight of the farm workers and their families so miserable.

If you look at economic progress, it is not lawsuits that have caused it, though lawsuits sometimes establish a favorable framework. People have improved their lives when they have organized. Organization is what gives them power. I just reject exclusive reliance on legal institutions to better the lives of people. I think that that is a very elitist liberal concept, one that distrusts what people can do.

Q: If the legal system is coming increasingly to be seen as an instrument of repression, what accounts for the unprecedentedly large numbers of young college graduates trying to get into law schools?

TIGAR: Many people are going to law school because they believe it is possible to make real social changes through the courts. Others are going because their parents have convinced them it is good to get a profession and that law is as good a profession as any. Others are going to law school because they have always sort of wanted to do that. Still others are going because they think it is necessary to have a lot of lawyers. You have to remember that dissidents usually don't land in the courts because they choose to, or because they want to test great constitutional principles. They land there because they get in motion on social issues, they organize, they are on the streets, and government comes down hard on them with a criminal prosecution and arrests them. So a lot of lawyers are necessary because that is the way the system works.

Q: But why have there been apparently record-breaking numbers of applicants to law schools this year?

TIGAR: Because, for one reason, a number of us have been saying, "Look, there are simply not enough lawyers committed to radical social goals to deal with the increased tempo of the oppression in this country."

Q: You mean that on tactical grounds alone, without regard to the quality of the legal system as such, more lawyers are needed?

TIGAR: We need help. John Mitchell has augmented the budget in the internal security division of the Justice Department. He has strike forces running around the country, convening grand juries in every major city. It is a frightening prospect. Only a relatively small number of lawyers are willing and equipped to deal with an onslaught of this kind against the left by the Nixon Administration.

Q: Do you think many of these young law students will be disenchanted about the kind and extent of social change that can be brought about through the law?

TIGAR: They are going to be disappointed. They may even be disenchanted by the law school itself. Legal education, as it is conducted in the majority of schools in this country, is a sterile and arid intellectual experience that turns off a lot of students.

Q: Are not some schools letting students get actively engaged in trial work as aides to licensed lawyers?

TIGAR: Some schools are letting students in their second and third years get involved in practical law work. Among the kinds of such work, there can be defense of people in the movement for change. That is an encouraging sign. But students are permitted to devote only a very small percentage of their total course load to work of this kind. The dominant method of legal education is still the large classroom conducted by the professor teaching out of a traditional case book in a traditional way. It is the lecture method with a lot of penetrating questions put to students, questions with little hidden traps in them which the professor can spring because of his superior knowledge of the subject. It is really a disgusting kind of performance, perhaps best dealt with, as one author did in the *Cleveland-Marshall Law Review* a few years ago, in psychoanalytic terms. He said it is an aggression committed on the students.

Q: If you believe that the legal and political system is inherently in the service of privilege and power, this must profoundly affect your notion of what constitutes civil disobedience. How do you handle the problem of civil disobedience?

TIGAR: You handle that problem tactically. Today's movement for change has come increasingly to believe that the legal system is an enemy. The best way to illustrate the point is to think of legal rules as made up by a state, by organs of power, and set down for people to follow. As a citizen, you have the option of saying, "O.K., if the state says I should do this, I will do it." Then if you are caught doing something the state disapproves of, you have recourse to law because one of the state's rules is that if you are caught the state must nevertheless prove you are guilty.

A second moral and intellectual option is for the citizen to say, "I will disobey certain rules even though I acknowledge the binding force of the state's regime in general. I will try to prevent the state from convicting me and sending me to jail. But I recognize that the odds are pretty good that I will have to take the punishment for what I do, and I am morally and ethically committed to taking that punishment if I am convicted, because I believe in the state in general even though I dissociate myself from the bad things it does."

A third way to deal with the matter is to say, "No, I do not regard the state's rules as binding because I did not have anything to do with making them. The state's claim of legitimacy is false. It is groundless. The state is my enemy and I am an outlaw." This has become increasingly the position of people in the movement for change. They see legal rules, therefore, as the basis for maxims of prudence. That is, if the law says that no person can speak in a certain way in a public square on pain of suffering imprisonment, the person who considers himself to be an outlaw says, with respect to that rule, "I don't think the state has a right to make it. However, since the state has the police, and the guns, and the power, if I do intend to speak in a certain way in the public square, then for prudential reasons I had better be prepared to get the hell out of there before the cops arrive. And if I am caught, then I will hold the state to giving me the kinds of procedural protections that are designed both for the law-abider and the person who says, 'to hell with the law,' because those laws were written for that purpose — they were written by people who were revolutionaries and who wanted to make sure that these protections would be provided for everyone."

This third position is the one I come closest to. It is the position that I think is shared by most of the people who are serious about social change.

Q: According to this view, actions which the state considers illegal the people in the movement would obviously consider to be highly moral.

TIGAR: Sure. But one gets taxed with this question then, "How do you distinguish yourself from George Wallace who also defies the law and disobeys it on matters of civil liberties and human rights?" We distinguish ourselves from George Wallace by saying that George Wallace is wrong by standards we can sit down and argue about. The movement people abandon the liberal notion that has dominated most of bourgeois philosophy in the West, the notion that normative judgments are insusceptible of argument and that you cannot resolve disputes about normative questions and so they should be excluded from the law-making or the law-considering function. The fact is that George Wallace represents a view of the role of black people that is barbaric and anti-historical and which, by a kind of common consent of mankind, is vicious and deserves to be discarded. What is implicit in the view that there is a difference between the disobedience of George Wallace and the disobedience of people in the movement for change is that values and norms do develop, that civilization, as it advances, really does begin to put a kind of imprimatur upon increasingly kindly and sensitive and loving ways of dealing with people.

Q: Are there characteristics of today's protest movements that make them quite different from anything we have had in the history of our country?

TIGAR: There are a number of parallels between what is happening now and what has happened before. There was a tumultuous, violent period in the history of American labor organizations. The workers' attempts to organize were met by the full force of the state and by all the instruments of power and privilege in the society. If you read Clarence Darrow's summation to the jury in the Oshkosh, Wisconsin, case (which is reprinted in Weinberg's book, *Attorney for the Damned*), it sounds as though it could be delivered in a political trial today. Darrow talked about the moral difference between taking up a stick and

hitting your neighbor with it (which is what the defendants were, in effect, charged with) and a corporate boss taking up the power of the state and smashing a labor movement (which is what he taxed the Oshkosh factory owners with doing). Now, of course, the labor movement has largely been absorbed into the mainstream of American politics. Maybe that will happen with today's protest movements.

In contrast, the abolitionist movement in the early part of the nineteenth century did not resolve the problem of slavery. The very deep contradictions that cleft American society led to the Civil War. I do not think we have resolved the problem yet.

So there are precedents, but the question is, which one will coincide most closely with what is happening today?

Q: I take it that one of the precedents is that the people in these earlier movements were, like many today, acting consciously and deliberately outside the law.

TIGAR: Absolutely. They regarded the law as the tool of those who sought to disband their movements. That was particularly true of the labor movement and the women's suffrage movement. Despite the array of repressive measures that the Wilson Administration brought against the suffragettes, the women persisted in open campaigns of civil disobedience. On one occasion they discovered an old law prohibiting the lighting of fires within the city of Washington, so they deliberately violated it with a symbolic protest of watchfires in every park in the District of Columbia.

Q: Perhaps if today's citizens were more conscious of that part of our history, they would be less alarmed about some of the civil disobedience in the current protest movement.

TIGAR: It would be helpful if people would have an historical perspective on dissent and disorder. But it is a little difficult to ask many people to take such an historical view because their personal privileges and prerogatives are affected by today's protests. The automobile worker in Detroit, who is asked to take an historical view toward black liberation, has a hard time getting beyond the fact that there is already a real squeeze on his job from automation. The double squeeze, from automation and the blacks, is a bit more than he feels comfortable with.

Q: One of the lessons that the history of protest movements might teach is that those engaged in the movements have no right to expect that they will be welcomed, or hailed as heroes, at the time. If they are vindicated at all, it is usually only in retrospect.

TIGAR: Yes. I cannot think of a single institution of power and privilege that has given up voluntarily and smilingly.

Q: Are the young people in the movement aware that they may be a part of an historical mainstream of protest?

TIGAR: Many of them are. But one of the criticisms validly directed at the movement for change is that it is not sufficiently introspective, that it is not sufficiently attentive to the lessons of history. I think too few young people involved in the commitment to change take seriously the obligation to read and to know about the role of their movement, not only historically in this society but as a part of a worldwide struggle for change. This disinclination to deal seriously with the lessons of history is one of the things that weakens the movement and fragments it, often gives it a sense of isolation.

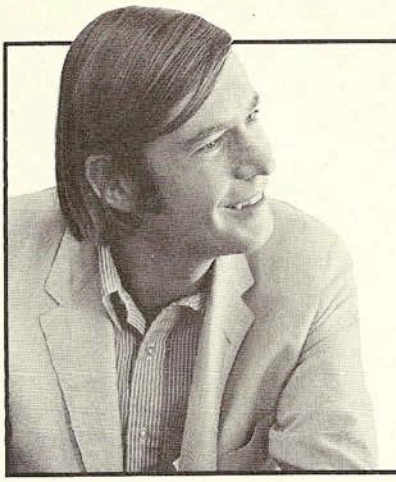
Q: You have written that people do not become revolutionaries overnight, and that a movement can very well be germinally or latently revolutionary even though at any given moment its members are not consciously and ideologically revolutionary or aware that they are becoming revolutionary. I suppose this is an interaction of the psychological and historical.

TIGAR: The point can be most clearly made with respect to the black movement. In the nineteen-fifties there was great faith on the part of the leaders of the black movement that through orderly, peaceable processes — invoking, first, judicial remedies, and then the successive legislative initiatives of the Civil Rights Acts of 1957, 1960, and 1964 — that change would come, that the position of blacks in America would be changed in significant, fundamental ways. Those hopes were successively disappointed. So the struggle of the black movement became intensified. There was the escalation to sit-ins and freedom rides. Then there was a movement back into the community by SNCC field workers in the years from 1961 to 1964. Then there was the attempt to solidify black political power in the South, and those hopes were cruelly disappointed by the sellout of the Mississippi Freedom Democratic Party at the Democratic National Convention in Atlantic City in 1964.

Then came the discovery of racism in the North and the growing realization throughout this period that the real centers of power, both in the little Southern towns and in the great Northern cities, were centers of economic power. There was growing realization that black liberation simply could not take place if one looked only to equality in education and in places of public accommodation, if one looked only to those formal, ritual kinds of equality. There was realization that real equality meant fundamental change in the system which would affect jobs and housing and all the rest. So there has been a growing revolutionary consciousness on the part of increasing numbers of black people.

Q: William Kunstler said at a recent meeting of the Lawyers Guild in Denver that he thinks of himself as a "double agent," that he wants to "bring down the system through the system" because he has "no faith in the ability of the system to produce a just result." Would you similarly describe yourself, or is that too strong?

TIGAR: It's not too strong, it's unintelligible. My own view is that by whatever standards you apply — whether the Hobbesian or Lockeian notions of social contract, or the constitutional view about the legitimacy of institutions of representative governments — our country flunks. It fails. It does not have a system responsive to the needs of people. The illustrations are abundant: the place of the



"We distinguish ourselves from George Wallace by saying he is wrong by standards we can argue about."

blacks and browns in the society, the disparities and extremes of wealth and poverty, the concentration of economic power largely unamenable to influence or suasion by those at whom the power is directed.

Now the lawyer's function is not at all affected by the kind of judgment he makes about the system. I think the system fails the test. Another lawyer may think it does not fail the test. But the function and role of the lawyer in the courtroom is defined by certain kinds of procedural rules.

The way to change the system is not to think about yourself as in it or out of it, or as a "double agent," or in any other such involuted and convoluted ways. If you think the system needs to be changed fundamentally, then as a human being you are committed to doing all the things you can do to change it. In the case of a lawyer, this means you do not think of yourself exclusively as a lawyer. You think about yourself as a political person who happens to have the right to go into court and defend people. In appearing and defending people, your revolutionary conscience expresses itself in terms of the clients you choose to represent, in the way you decide to represent them, and in the kinds of issues you choose to raise.

Always what you are looking for is not to bring down the system from within the system. The people who administer the system of justice are not so stupid as to permit lawyers to bring down the house in which Justice is supposed to dwell, although she has been absent lately. What will happen if the system of criminal justice disappoints the objectives of those who command power in the United States is that the system will be changed until it meets the needs of those who command power. As soon as lawyers' and defendants' strategies begin to succeed in making real challenges to power possible, almost irresistible pressures will be exerted to prevent these successes and to frustrate their implementation.

Right now, the lawyer's role is to get the system to recognize as many of the fundamental promises of the Bill of Rights and the Constitution as is possible under present circumstances in order to defend the liberty of those who are accused, in order to get them back out on the street so that they can be engaged in the process of making change. I do not regard that as "using the system to bring down the system." I regard that as a necessary job to get people out of the courts and into the streets or into some other arena where they can make change.

Q: With respect to concentrations of economic power, how do you evaluate the critical investigative work of Ralph Nader?

TIGAR: A lot of his work is in the real tradition of the muckraker. That tradition is at its best when it points out what is wrong, where the bodies are buried. People can have different opinions about what the remedies should be and whether there are any possibilities for making change within the system.

I would predict that a Nader-based movement with an emphasis on reform is destined to be disappointed. If one can get the regulatory agencies to behave in a more responsible way, that is a social good and I would not criticize that. I just think that there is a very limited sphere within which it is possible to make the changes that are necessary. For example, even when you have shoved the Federal Trade Commission all the way to the full extent of its statutory mandate in protecting the American public, you are still a long way from bringing American corporations to heel, making them deal responsibly with the people.

But let's take another Nader initiative that can really pay off. Nader is very friendly with Nicholas Johnson of the Federal Communications Commission. And then there is Al Kramer's broadcast law center in Washington, D.C., that has some litigative initiatives going. If it is possible to use the F.C.C. to force local stations to let all points of view be heard, or even to drive local stations into the hands of other community-conscious broadcasters, that will redound to the benefit of the movement for change. It will help make change possible, because the only way to gain adherents for any cause is through communication. The isolation of the movement from the mass-communications media is one of the reasons for its isolation from the mainstream of American politics. Nader understands that. He is quite willing to take the consequences. After all, that is nothing more than what the First Amendment is all about.

Q: You have said in a paper on the "jurisprudence of insurgency" that "law, considered as rules of conduct, represents in each age since the late Athenian a crystallization of power relationships in a given society at a particular moment." You also distinguish between "nature" and "norm" and seem to view norms as ad-hoc, artificial, if not arbitrary, conceptions of rules made by men out of self-interest. Does this not make law so relativist and positivist that it immediately invites one to recall the Nazi experience in which laws and rules of conduct were legitimated by power?

TIGAR: I made no normative judgment, I simply described what legal rules are. After you describe them, you can get about the work of evaluating them and determining what is

wrong and what is right with particular legal systems. My only point there was that a nation makes laws — constitutional law — at a moment in time.

Our own Constitution and Bill of Rights were crystallized out of the experience of the American Revolution and out of the kind of training and background of the Colonial lawyers who drafted it. An amazing number of provisions in our Constitution simply reflect what was regarded as common knowledge and common concerns of civilized people based on the evolution of the system of criminal justice in the seventeenth and eighteenth centuries in England. There were provisions about grand juries, and petit juries, and the right to counsel, the writ of habeas corpus, all kinds of legal rules thought to be important to the maintenance of civilized government. These views were held by men who, on the basis of their place in history and from where they stood, thought they were enunciating self-evident principles about how to run a society. So they wrote them down into the Constitution.

Q: Isn't it possible for some of these provisions to be both particular and universal? Some universal principles can correspond to the particular needs and circumstances of the moment.

TIGAR: Sure. The principle about free debate and discussion in the First Amendment is a great discovery. I am a real fan of the First Amendment. My point, though, is that, as time goes by, the men who drafted those principles die. Other men take their place. The society changes in fundamental ways that could not have been predicted at the time the rules were written. In particular, the constitutional protection of private property became the cloak behind which the great corporate enterprises developed and found legal protection. Corporations have tremendous political and economic power, and the basic founding document, the Constitution, permits them to have it and to exercise it largely untouched by the power of the state.

Take another example: the men who wrote the Constitution said all men are created equal and have certain rights, but they did not mean black men. And so in the Dred Scott case, Chief Justice Taney, who was a great man and a populist but who was blinded by his time, said that black men had no rights that the white men had to respect. Taney did interpret the Constitution rightly. The Dred Scott decision was, in terms of the Constitution, rightly decided, although it reflected a barbaric view of society.

What we have today, therefore, is a social system in which other men and women have come to fill the places of power. The Constitution is still there, but these rules, now nearly two hundred years later, are a kind of remembrance of things past. In Marxist terms, there is a kind of ideological superstructure of rules and principles bequeathed from generation to generation which is now devoid of the fervor and the historical content that informed the document in its initial building stages.

Today, the rules and principles in the Bill of Rights are quickly and almost carelessly disregarded by those who are in positions of power when that power is challenged. So we have Attorney General Mitchell coming into court and saying that the Fourth Amendment protecting privacy and circumscribing search and seizure and so on was a good thing then but that now as a nation we face new and terrible dangers to our national security, dangers which are so bad that the President cannot even tell you what they are. But take it from them, he tells us, we have to scrap the Fourth Amendment. And we have new and involuted interpretations of the meaning of free speech foisted off on the courts in the name of preserving the nation. The lawyer who is working on behalf of change finds himself increasingly saying, "Wait a minute, this is a contract. The Constitution is a deal. You cannot change the fundamental rules except in a certain prescribed way. We want government to stand by these rules and principles."

Q: Is it not possible, as the movement for change gets itself organized, that it will enter what might be called the competition of interpretations of the Constitution, and enter with a strong, possibly prevailing voice?

TIGAR: In our system the formal authoritative interpreters of the Constitution are the judges. One must make a factual judgment about what the judges are like. I am pessimistic on that point. But the real interpreters of the Constitution are the people with the guns and the power; that means the police and the administrators, and so on. You can have all the constitutional rules you want. You can have all the judges saying all the nice things about the Constitution, but you cannot stop ten thousand people from being rounded up by the police and put in prison camps in Washington, D.C., in a blatantly illegal way. Incidentally, that is what Patrick Henry thought was wrong with the strong executive. He asked what you could do if your President comes at the head of his army. Do you send the Chief Justice out in his robes to tell him the Constitution won't let him do that?

Q: If the movement for social change gets organized and grows powerful enough to seize, or win, political power, then by your definition or understanding of how rules of conduct are made, the movement will enforce its rules on all the other citizens. In that case, what is to restrain the movement — presumably now the new Establishment — from playing the same old power game against which it rebelled? Where is the guaranty of justice?

TIGAR: The kind of new society that you get is the kind that you build for. One of the heartening things about the movement for change today is the open kind of democratic way it believes things ought to be conducted.

Q: Do you mean the movement will curb the human drive or impulse for power?

TIGAR: The dissidents in this country have in general a strong commitment to certain fundamental guaranties about freedom and fairness. Take a look at the Constitution and the Bill of Rights. There was a victorious revolution which in the first stages following the victory visited a little terror against the Tories, but then the revolutionaries sat down and wrote these guaranties into the Constitution. Ten years later, the alien and sedition prosecutions occurred but everybody

apologized for that. Throughout the course of our history there has been a commitment, sometimes fitful, weak, and overpowered, but nonetheless a commitment to freedom and fairness. This commitment, though dishonored by the men of power, runs deep in the consciousness of ordinary men and women.

Q: You think, then, if the movement gains power and controls the society, that its ethos, its whole spirit and its values would be translated, in human and political terms, into a fair and just social order?

TIGAR: Based on what I have seen of the movement, I think that is true. This is not to say that at every stage in our history the guaranties of procedural fairness and freedom are automatically going to be respected. Those are always the results of human struggle and aspirations. How well those aspirations get translated into rules that really do protect people is always an open question. But I think that any fundamental change in this country initiated by the movement for social change will be in the direction of democratizing the country.

Q: Do you think that the movement will have a sequential kind of experience, putting into practice on only a limited scale at first — in neighborhoods, communities, whole towns, or areas — the principles you have been talking about: openness, fairness, justice?

TIGAR: The community's organization and control of institutions that affect the community is one of the mainstays of the movement for change. It involves people dealing with the decisions that affect their lives. But there cannot be, and I do not think there will be, any fundamental change in the way this country is governed until there have been more upheavals in the Third World. The American political and economic system is an international system; the weakening of the system of power and privilege at the edges is really a precondition to dealing with that system in this country. It is a terrible thing to have to say, but white revolutionaries must get used to the idea that, for now at least, they are heavily dependent upon the struggles and sacrifices of the Third World peoples.

Q: Where do you yourself draw the line when it comes to the things you would do in the interest of the movement for social change?

TIGAR: The question of means is a difficult one. I suppose that I have a commitment to nonviolence that takes the form of saying that the least possible use of power required to obtain a goal deeply believed to be right is what is appropriate. Also, if one says that change ought to come about through violent means, then one has the burden of justifying that position.

These questions today are largely academic. All one can say, first of all, is that one must distinguish sharply — and I certainly do — between violence done to property or to things and violence done to persons. A great deal of the violence committed by the left today is against buildings, places, things, objects. The reason for the violence is to try to show larger and larger numbers of people that it is possible in this country to take action against a state that is increasingly perceived as implacably hostile. The purpose of much of the demonstrative conduct in the streets is to say to people, "Look, you don't have to be alienated any more. You don't have to feel so isolated or paralyzed and unable to act." I think there is a substantial justification for that kind of behavior.

I certainly do not take the position that anything and everything goes. I think that we have learned very painfully over years and years of civilization that one must be very sparing in the use of force. I think that that ought to dominate our thinking. At the same time I think that if you believe seriously today in changing the American system, you are in for some violent days ahead. After all, ours is a system which thinks nothing of napalming whole sections of a country, spraying herbicides on it, and rendering literally millions of people homeless and starving. I mean, what kind of a country is this that thinks those things are reasonable and lawful and proper, prudent, and necessary? This is a country which regards the plight of black people and the destruction of their lives in our central cities as a kind of political plaything, as a budgetary question rather than a human question. This is a country which takes lightly, if one judges by the incidence of such activity and the sanctions applied to it, the brutality of its police in the streets. So I think the movement for change can expect to have to employ means that are designed to deal with an adversary like this, without adopting the same kind of brutality and inhuman disregard for the lives and safety and well-being of fellow creatures.

Q: How do you reconcile your view that law consists of more or less time-bound rules of conduct with another of your views, namely that men do learn over the centuries how to behave decently and that civilization is a kind of cumulative process of growth in the permanence of law?

TIGAR: I don't have to justify either view, I suppose. If I did, it would not be original with me. Cicero said that wherever there is community there is law, a thought that shocks positivists.

It is true, for instance, that certain rules of international conduct have changed enormously in the past seventy-five years. Why? Because international law that developed in the nineteenth and early twentieth centuries was a law of justification for imperialism and the economic and military domination of one country by another. Now with an end to the period of formal colonialism and with an awakening on the part of the Third World, the common consent of people about rules governing international behavior has changed. We have come to see that certain kinds of international conduct are deplorable and unlawful even though we cannot think of formal ways to get lawbreakers like the United States to stop breaking the law except by means of a just war or perhaps through some kinds of international institutions.

That is just an illustration of what I mean when I say that as people struggle, as they grapple with problems, they begin to appreciate how to deal with nature and how to deal with each other in ways that are productive and coöperative. They begin to see that some of the old rules need to be changed because they prevent one

from dealing with others in loving and human and caring ways.

What you must strive for, then, is a legal system which answers to the people, which decentralizes and disperses power, and which translates the lessons of one's experience and one's struggles into norms as rapidly as possible. At the same time we must keep in mind that formal, ritual kinds of rules, like constitutions, are time-bound. Maybe we should consider abandoning the notion of a constitution as the guardian of liberty in the new society. Maybe we should try to put the responsibility for that more squarely where it has always tended to be anyway, that is, in the lives of the people and with their experience, and at the same time diversify and disperse power as much as possible.

Q: Going back, for a moment, to something you said earlier about Attorney General Mitchell's attitude toward the guaranties in the Bill of Rights, it should be remarked perhaps that a number of judges have in fact rendered decisions unfavorable to Mr. Mitchell's interpretation of the Bill of Rights. So the Constitution may be an antique document, but it still . . .

TIGAR: That's right. It is an antique document and so were the considerations which informed it. I think I have argued the national-surveillance question in half a dozen courts around the country and have had five losses and one win so far, which just about shows you where it's at. And I have always argued in terms of history. When the government says that the Fourth Amendment guaranties do not extend to political dissidents, I argue that the government is going directly contrary to the history of the amendment. Because, as a matter of fact, the Fourth Amendment was drafted in connection with a sedition case; the leading precedent on which the amendment was based was a sedition case. So one does get a little information from history, and there are some judges who agree, but the pressures of the system are all in the opposite direction.

Q: You have said that the responsibility of a movement lawyer is to "politicize the trial" of his client. What do you mean by that?

TIGAR: Politicizing a trial means putting across to the judge and the jury the issues about social organization and the system of power that underlie the trial and are in back of it. It means in different tactical contexts different things. Sometimes it means arraigning the motives of the prosecutor. Sometimes it means arraigning the motives of the judge. Sometimes it means a vigorous attempt to communicate to the jury, through testimony and argument, what the real issues are. And always it must mean a fair opportunity to try the case on behalf of the defense of your client.

As soon as you go outside the narrow kind of sterile legal rules that govern most trials, you are in trouble. Most criminal defenses are sellouts anyway on the part of the lawyers. Ninety per cent of the cases in California are disposed of on guilty pleas to something, anything, to lesser charges in order to get out because the defendant knows that if he goes to trial with this hack lawyer who has been assigned to him he is liable to get stuck with more. So, once you step outside this usual lay-back-and-take-it attitude of defense lawyers, the judge begins to get a little angry with you. If you are an Edward Bennett Williams or a Joe Ball or a Simon Rifkind — all criminal-trial lawyers — and you are doing it on behalf of a client who is fairly respectable, you will get mildly admonished. But if you are a leftist and therefore poles apart from the judge temperamentally, politically, and socially, then you get more than simply admonished. You get dumped on. And as a matter of fact, a Rifkind or a Ball will even write a pamphlet which will say that it is good that you get dumped on because you should not be doing that sort of thing in the first place. So that is what happens when lawyers get effective: the court comes down hard, tension begins to build, and things get uneasy.

Q: When you say that "politicizing a trial" means raising the larger issues, can you be specific? How would you raise the "larger issue" in a case, say, where your client has been charged with trashing a building?

TIGAR: We had a trial like that in Seattle a year ago, in which eight young people were charged with conspiracy to trash the federal building in protest against the verdicts handed down in the Chicago conspiracy case, the so-called T.D.A., "the day after" demonstrations. The larger issue there was the whole conspiracy theory: the idea that seven or eight people could get together in meetings and cause violence to happen. Since none of our defendants was charged with having committed any act of violence the government's theory was that what they had done was get a lot of people down there and that they knew the people would be angry and they would make speeches to make them angrier and then the people would go and trash the federal building. This whole dupe theory, this conspiracy theory that criminal sanctions should attach to conduct which involves meeting and speaking and without any direct incitement to violence — that theory must be attacked.

Then, too, the question of whose fault it was had to be dealt with in that particular context. The trashing did not begin until the police descended on the crowd and started gassing people, beating them up, dragging them down the stairs and so on.

Finally it turned out during the course of the trial that the government's star witness was an informer who had infiltrated an organization at the direction of the Federal Bureau of Investigation. He had taught the young people how to fire rifles as snipers and then reported to the F.B.I. that he had trained them and who they were. He had taken money given to him by the F.B.I. and used it to buy spray paint in an attempt to incite further violence at the demonstration, again at the direction of the F.B.I. Then after admitting all this on cross-examination, plus admitting that he was in possession of and had given people various kinds of illegal weapons over a period of two years, he also admitted that he would lie in order to convict the defendants.

Q: What was the outcome of that case?

TIGAR: There was a mistrial on the eleventh day in the government's case and it has not yet been re-tried. The government's case broke down after this fellow staggered off the stand.