Civil Disobedience Today: Some Basic Problems and Possibilities

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I. INTRODUCTION

Questions of the meaning and justifiability of civil disobedience are longstanding. Classically, the tragic character of Antigone faced a choice between complying with an official order and adhering to a

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more fundamental sort of law.[1] Socrates condemned an illegal mass trial,[2] violated an order to arrest an innocent person,[3] and would have rejected a hypothetical order to cease philosophizing.[4] The passage of time, however, has brought us no nearer to any consensus on some basic issues raised by cases of civil disobedience.

Lending special importance to this unsettled state of affairs are our own political and legal circumstances. Today, the morally binding authority of particular laws, and even the legitimacy of the legal system itself, is not universally assumed.[5] Trust in our legal and political institutions has been eroding for decades.[6] Civil disobedience as a form of resistance, as a means of social change, or as a public statement is likely to take on greater prominence under such circumstances.[7]

This Article addresses the most important—and apparently unresolvable—questions of the definition and justification of civil disobedience. Part II explores these questions, which focus on, respectively, openness and publicity; the role of violence; acceptance of legal punishment; *direct* versus *indirect* civil disobedience; civil disobedience as a moral right or as a moral duty; and the relations between civil

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1. *See* SOPHOCLES, ANTIGONE 73 (Reginald Gibbons & Charles Segal trans., Oxford Univ. Press 2003) (c. 440 BCE).

2. PLATO, *The Apology*, *in* EUTHYPHRO, APOLOGY, AND CRITO 21, 38 n.7 (Oskar Piest ed., F.J. Church trans., The Liberal Arts Press, 2d ed. 1956) (c. 399 BCE).

3. *Id.* at 39 (referring to an order by the "Thirty Tyrants" to arrest Leon of Salamis).

4. *Id.* at 36, 45.

5. *See generally* NOLAN MCCARTHY, POLARIZATION: WHAT EVERYONE NEEDS TO KNOW (2019) (discussing the increasingly severe political division and fragmentation); KEVIN VALLIER, MUST POLITICS BE WAR? RESTORING OUR TRUST IN THE OPEN SOCIETY 1 (2019); Jonathan Rauch, *Rethinking Polarization*, 41 NAT'L AFFS. 86, 89 (2019) ("We are seeing a hardening of *incoherent* ideological difference."). One way out of an increasingly risky Prisoner's Dilemma involves acquiring new information that leads to a change in our valuations.

6. *See, e.g.*, *Public Trust in Government: 1958–2019*, PEW RSCH. CTR. (Apr. 11, 2019), www.people-press.org/2019/04/11/public-trust-in-government-1958-2019; Uri Friedman, *Trust Is Collapsing in America*, ATLANTIC (Jan. 21, 2018), https://www.theatlantic.com/international/archive/2018/01/trust-trump-america-world/550964/; see also Robin Wright, *Is America Headed for a New Kind of Civil War?*, NEW YORKER (Aug. 14, 2017), https://www.newyorker.com/news/news-desk/is-america-headed-for-a-new-kind-of-civil-war, for a balanced assessment of the likelihood of some sort of civil war.

7. Civil disobedience itself takes on a wide range of forms. *See infra* Part II.

disobedience and the democratic rule of law.[8] However we attempt to resolve these questions, more crucially, we should next consider how civil disobedience cases might be judicially tried. Specifically, in many cases of civil disobedience, there is no current consensus even on the consequences of actual and proposed trial policies. In Part III, this Article posits that we should be alert to the possibility of adapting the way in which civil disobedience cases are ordinarily tried to our evolving political and cultural circumstances.[9] Part IV concludes that rethinking the way civil disobedience cases are tried may well promote the interests of conscientious, civilly disobedient actors, responsible government policymakers, and certainly of the public in general.[10]

II. THE CURRENT STATUS OF THE CLASSICAL CIVIL DISOBEDIENCE DEBATES

Debates over many aspects of the definition and justifiability of civil disobedience overlap. These debates over the idea of civil disobedience have focused on several issues that we might call the classic areas of contention. Importantly, these classical issues are, in many ways, mutually interwoven and inseparable from one another. Many of these classical issues can be muted—if not overcome—by reenvisioning the ways in which civil disobedience trials are conducted.

These classic issues can be easily reduced to six questions, despite their many complications. Section A addresses the debate over whether civil disobedience—or perhaps only morally justified civil disobedience—must be open and public, and not secretive or covert, at least until the act of civil disobedience has actually been performed.[11] Section B addresses the debate over whether civil disobedience, by definition or otherwise, must avoid violence of one sort or another.[12] Is avoiding violence part of the very idea of civil disobedience, or is

8. *See infra* Part II.

9. *See infra* Part III.

10. *See infra* Part IV.

11. *See infra* Section II.A. Some acts of civil disobedience for which no responsibility is ever claimed or admitted, at least until arrest, may also involve an unwillingness to accept the legal penalty for the acts in question.

12. *See infra* Section II.B. We might thus ask whether the nonviolence of actors such as Thoreau, Gandhi, and King is definitive of civil disobedience more broadly. *See infra* Section II.B.

avoiding violence in the course of civil disobedience instead a matter of debatable morality, effectiveness, strategy and tactics, pragmatism, or public image? Inseparable from these issues is that of a civilly disobedient actor's willingness to accept a legal penalty. Must a civilly disobedient actor be willing, at one stage or another, to somehow *accept* some measure of legal punishment?[13] This seemingly simple question involves multiple ambiguities, as explained in Section C.[14]

Closely related, the classic literature also discusses a distinction between *direct* and *indirect* civil disobedience, which is confronted in Part D.[15] These categories actually involve something more like a continuum than a clear binary opposition. But the basic idea contrasts violating a law to which the civilly disobedient actor specifically and primarily objects, and violating instead some closely or only very loosely related law.[16] There may be—in the latter cases—some moral, tactical, or other practical reason for not violating the specific law that motivates the civil disobedience in the first place.[17] Civil disobedience thus, quite understandably, does not often involve violating an unjustly severe treason statute.

Related as well[18] is the complex question of whether we should think of legitimate civil disobedience as the exercise of a moral right, or else, much more bindingly, a moral duty or obligation on the particular actor in question, and perhaps that of others as well.[19] This debate is explained in Section E. Finally, and similarly inseparable,[20] there are issues as to whether an act of civil disobedience can, to one degree

13. *See infra* Section II.C. This question is ambiguous in multiple ways and is also linkable to the issues of the public openness of the civil disobedience and to the question of *direct* versus *indirect* civil disobedience.

14. *See infra* Section II.C.

15. *See infra* Section II.D. People may be more willing to accept the legal penalty if they are allowed to indirectly challenge, say, a treason statute by symbolic trespass rather than directly violate a severe and broad treason statute.

16. *See infra* Section II.D.

17. *See infra* Section II.D.

18. We may be more or less willing to think of civil disobedience as a moral duty, rather than as merely a moral right or a morally permissible option, depending upon whether the civilly disobedient actor has the option of indirect civil disobedience.

19. *See infra* Section II.E.

20. Merely for example, someone might contend that public civil disobedience that avoids violence and involves accepting immediate arrest and trial shows a greater respect for law and democracy than other forms of civil disobedience.

or another, manifest the actor's respect either for law or for the more or less democratic law-making process.[21] Among the lurking problems here, as one might imagine, are questions of how *respect* is to be defined and manifested[22] and of contrasting understandings of the idea of *democracy*, which is expounded upon in Section F.[23]

In all of these contexts, some writers may be most concerned with what can count, definitionally, as civil disobedience, while others may be more concerned with what counts as morally justifiable civil disobedience. Some writers may ignore or deny any such distinction. Through analysis of the debated questions, however, it becomes evident that debate alone may not ever resolve them.

A. Must Acts of Civil Disobedience Be Open and Public?

First then, following the ordering above, are issues bearing upon openness versus covertness in civil disobedience. The idea that civil disobedience must, or at least should, be open and public—and in that sense *civil*—has an impressive pedigree. Mahatma Gandhi argued in 1921 that "[d]isobedience to be civil has to be open and non-violent."[24] Covert or clandestine acts are thereby ruled out, at least in Gandhi's context and for Gandhi's purposes. Influenced in this respect by Gandhi, Dr. Martin Luther King, Jr., declared that "[o]ne who breaks an unjust law must do it *openly*, *lovingly*, . . . and with a willingness to accept the penalty."[25]

More elaborately, Hannah Arendt distinguished between the ordinary criminal's desire for anonymity and the civil disobedient actor's "open defiance,"[26] and argued that:

> [t]his distinction between an open violation of the law, performed in public, and a clandestine one is so glaringly obvious that it can be neglected only by prejudice or ill-

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21. *See infra* notes 84–102 and accompanying text.

22. *See infra* notes 84–102 and accompanying text.

23. *See infra* notes 84–102 and accompanying text.

24. M.K. GANDHI, NON- IOLENT RESISTANCE (SATYAGRAHA) 172 (Schocken Books ed., 1961) (1922).

25. Martin Luther King, Jr., *Letter from Birmingham City Jail*, *in* CIVIL DISOBEDIENCE IN FOCUS 72, 74 (Hugo Adam Bedau ed., 1969) (emphasis added).

26. HANNAH ARENDT, *Civil Disobedience*, *in* CRISES OF THE REPUBLIC 51, 75 (1972).

> will. It is now recognized by all serious writers on the subject and clearly is the primary condition for all attempts that argue for the compatibility of civil disobedience with law and with the American institutions of government.[27]

Similarly, John Rawls, speaking of a "nearly just" and mostly "well-ordered"[28] society, defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."[29] As a political act addressed to the public, civil disobedience "is necessarily public."[30] Clandestine acts, by contrast, either impair any law-reforming aim of the civil disobedience,[31] or else "simply will not qualify as civil disobedience."[32]

This mainstream sense that civil disobedience, by definition or otherwise, should be open and public has come under critical scrutiny, however.[33] There seems to be no reason why civic acts, whether legal; illegal; or legally indeterminate, must not be anonymous, with no

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27. *Id.*

28. JOHN RAWLS, A THEORY OF JUSTICE 319 (Oxford Univ. Press rev. ed. 1999) (1971).

29. *Id.* at 320.

30. Hugo A. Bedau, *On Civil Disobedience*, 58 J. PHIL. 653, 656 (1961).

31. *See* Rex Martin, *Civil Disobedience*, 80 ETHICS 123, 132 (1970) (specifying, as well, requirements of nonviolence and being "willing to take the consequences as regards punishment").

32. Carl Cohen, *Civil Disobedience and the Law*, 21 RUTGERS L. REV. 1, 2 (1966); *see also* KURT SCHOCK, CIVIL RESISTANCE TODAY 3 (2015) ("[c]ivil disobedience . . . involves open, deliberate and nonviolent violation of laws and policies perceived as unjust.").

33. *See, e.g.*, KIMBERLY BROWNLEE, CONSCIENCE AND CONVICTION: THE CASE FOR CIVIL DISOBEDIENCE 23 (2012) (discussed in WILLIAM E. SCHEUERMAN, CIVIL DISOBEDIENCE 146 (2018)); *see also* MICHAEL J. PERRY, MORALITY, POLITICS, AND LAW 117 (1988); JOSEPH RAZ, THE AUTHORITY OF LAW 265 (1979) (recognizing the value of anonymous civil disobedience, as well as of limited violence, and avoidance of legal system punishment, in some cases); Derek Edyvane & Enes Kulenovic, *Disruptive Disobedience*, 79 J. POLITICS 1359, 1360 (2017) (challenging "the suppositions that legitimate civic resistance must be nonanonymous and public and that those involved must be ready to accept the legal consequences of their actions"); Bill Ong Hing, *Beyond DACA: Defying Employer Sanctions Through Civil Disobedience*, 52 CAL. DAVIS L. REV. 299, 339 (2018).

public disclosure of the authors of such acts. After all, for whatever reason, even the authors of the quintessentially civic *The Federalist Papers* insisted on their own anonymity.[34] As the Court classically observed in the anonymous hand billing case of *Talley v. California*,[35] "[p]ersecuted groups and sects from time to time . . . have been able to criticize oppressive practices and laws either anonymously or not at all."[36]

More dramatically though, consider some forms of resistance to Fugitive Slave laws in particular.[37] Or consider some forms of law violation under a broadly reprehensible regime, such as the Third Reich.[38] Suppose that one calculatedly and deliberately lies, in violation of law, to a "slave catcher" or to a Gestapo officer, and never publicizes that clear, positive law violation; it is at least plausible that some such instances could count as civil disobedience and, indeed, as justified civil disobedience.[39]

Clearly, certain instances of civil disobedience would be inherently self-defeating if publicly announced in advance, as distinct from at the time of the act in question. Consider, in this context, an announcement of one's future intention to release particular laboratory

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34. *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 360–61 (1995) (Thomas, J., concurring); Hynes v. Mayor & Council of Oradell, 425 U.S. 610, 625 (1976) (Brennan J., concurring in part); Talley v. California, 362 U.S. 60, 64–65 (1960) (holding unconstitutional a prohibition of anonymous hand billing).

35. 362 U.S. 60 (1960).

36. *Id.* at 64.

37. *See generally* R.J.M. BLACKETT, THE CAPTIVE'S QUEST FOR FREEDOM: FUGITIVE SLAVES, THE 1850 FUGITIVE SLAVE LAW, AND THE POLITICS OF SLAVERY (2018).

38. *See* Kent Greenawalt*, A Contextual Approach to Disobedience*, *in* POLITICAL AND LEGAL OBLIGATION 361 (J. Roland Pennock & John W. Chapman eds., 1970) (noting the scenario of "helping Jews escape from Nazi Germany"). It may be impossible, on some theories, to engage in mere civil disobedience against a regime that one judges to be broadly and deeply illegitimate or as lacking in any semblance of moral authority. We herein set aside possible relationships among civil disobedience, conscientious objection, rebellion, insurrection, insurgency, resistance, revolution, and the mere testing of a constitutionally dubious law or policy.

39. Such cases are discussed in the context of non-public civil disobedience, as well as of civil disobedience for which one might reasonably not accept the penalty. *See* PERRY, *supra* note 33, at 117–18. On the question of the moral justifiability of deliberate lying, as distinct from mere evasiveness, in such cases, see R. George Wright, *Lying and Freedom of Speech*, 2011 UTAH L. REV. 1131, 1159–60 (2011).

animals otherwise subject to commercial testing,[40] or one's future plan to symbolically damage equipment associated with nuclear weapons at a particular military base,[41] or one's future intention to illegally download and disseminate certain public-interest-related computer files.[42] Any such announcement would, in effect, preclude the act of civil disobedience itself.

B. Must Civil Disobedience Be Nonviolent?

The relationship between civil disobedience and the use of violence, as well, is hopelessly unclear. Certainly, historically prominent practitioners of civil disobedience including Gandhi,[43] King,[44] and Bertrand Russell[45] rejected the use of violence for a variety of reasons. But today, whether nonviolence is "an essential feature of civil disobedience is a matter of dispute."[46]

The complications begin with divisions among those who exclude violence from acts of civil disobedience by definition,[47] those who recognize the option of violent civil disobedience but deem violent civil disobedience to be morally unjustified,[48] and those who

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40. See United States v. Fullmer, 584 F.3d 132, 154–58 (3d Cir. 2009), for a consideration of the wide range of legal and illegal protest techniques.

41. *See, e.g.*, United States v. Kabat, 797 F.2d 580, 595 (8th Cir. 1986) (Bright J., dissenting); United States v. Dorrell, 758 F.2d 427, 429 (9th Cir. 1985).

42. *See, e.g.*, JULIAN ASSANGE, WHEN GOOGLE MET WIKILEAKS 7 (2014); EDWARD SNOWDEN, PERMANENT RECORD 11, 13–15 (2019). For a review of the latter, see Christian Lorentzen, *I Wasn't Just a Brain in a Jar*, LONDON REV. OF BOOKS (Sept. 26, 2019), https://www.lrb.co.uk/the-paper/v41/n18/christian-lorentzen/i-wasn-t-just-a-brain-in-a-jar (reviewing EDWARD SNOWDEN, PERMANENT RECORD (2019)).

43. *See* GANDHI, *supra* note 24 and accompanying text.

44. *See* King, *supra* note 25 and accompanying text; *see also* Martin Luther King, Jr., *Non-Violence and Racial Justice*, CHRISTIAN CENTURY (Feb. 6, 1957), http://www.religion-online.org/article/non-violence-and-racial-justice/.

45. *See* Bertrand Russell, *From the Archive: Bertrand Russell on Civil Disobedience*, NEWSTATESMAN (Nov. 14, 2013), https://www.newstatesman.com/2013/11/civil-disobedience; *see also* Bedau, *supra* note 30, at 658.

46. Cohen, *supra* note 32, at 3.

47. *See* John Morreall, *The Justifiability of Violent Civil Disobedience*, 6 CAN. J. PHIL. 35, 35 (1976).

48. *See* Brian Smart, *Defining Civil Disobedience*, *in* CIVIL DISOBEDIENCE IN FOCUS, 189, 193 (Hugo A. Bedau ed., 1991) (explaining Robert T. Hall's definition

acknowledge the possible justifiability of some instances of violent civil disobedience.[49] Despite the historical associations between civil disobedience and nonviolence,[50] any such linkage is now plainly contested.[51]

The relationship between civil disobedience and violence reflects in part the contested nature of the idea of violence itself.[52] These disputes may, in turn, reflect the favorable connotations of nonviolence as opposed to violence. But there are a number of possible forms of violence,[53] any one of which might be thought to apply to the broad

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of civil disobedience as "an act in violation of a law (or a specific group of laws) which is undertaken for moral reasons").

49. *See, e.g.*, Greenawalt, *supra* note 38, at 334 (arguing against begging the question of the justifiability of violent civil disobedience merely by definition); RAZ, *supra* note 33, at 265–75; Smart, *supra* note 48, at 211 (civil disobedience as encompassing some acts of both violence and coercion); Michael Bayles, *The Justifiability of Civil Disobedience*, 24 REV. METAPHYSICS 3, 5 (1970) (again cautioning against begging the question of the justifiability of violent civil disobedience merely by definition); *see also* TONY MILLIGAN, CIVIL DISOBEDIENCE: PROTEST, JUSTIFICATION, AND THE LAW 14 (2013) (distinguishing between rigorous and aspirational nonviolence); David Lefkowitz, *On a Moral Right to Civil Disobedience*, 117 ETHICS 202, 216 (2007) (on violent but not coercive civil disobedience).

50. *See* ARENDT, *supra* note 26, at 76–77; RAWLS, *supra* note 28, at 322; SCHOCK, *supra* note 32; JUDITH N. SHKLAR, *Civil Disobedience in the Twentieth Century*, *in* ON POLITICAL OBLIGATION 176, 181 (Samantha Ashenden & Andreas Hess eds., 2019) ("nonviolence is . . . one feature of civil disobedience"); Bedau, *supra* note 30, at 656 ("only nonviolent acts . . . can qualify"); Martin, *supra* note 31, at 132 (referring to "the condition of nonviolence"); *see also supra* notes 43–45 and accompanying text. The classic United States case law addressing civil disobedience tended to assume, now incorrectly, that the philosophers agreed on a requirement that civil disobedience be nonviolent. See, for example, the draft card burning case of United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969). *See also* United States v. Kroncke, 459 F.2d 697, 703 (8th Cir. 1972) (quoting *Moylan*, 417 F.2d at 1008).

51. *See supra* note 49; Gerald C. MacCallum, *Some Truths and Untruths About Civil Disobedience*, *in* POLITICAL AND LEGAL OBLIGATION 370, 371–77 (J. Roland Pennock & John W. Chapman eds., 1970).

52. *See* Willem de Haan, *Violence as an Essentially Contested Concept*, *in* VIOLENCE IN EUROPE: HISTORICAL AND CONTEMPORARY PERSPECTIVES 27 (Sophie Body-Gendrot & Pieter Spierenburg eds., 2008).

53. *See, e.g.*, Hannah Arendt, *Reflections on Violence*, 23 J. INT'L AFFS. 1 (1969) (distinguishing violence from power, force, might, authority, and strength); RICHARD J. BERNSTEIN, VIOLENCE: THINKING WITHOUT BANISTERS 176–77 (2013) (distinguishing legal, symbolic, structural, totalitarian, and symbolic violence).

political circumstances, to the act of civil disobedience in question, and to the law's response thereto.[54]

Violence may thus take multiple, if contestable, forms. And what amounts to violence may, in civil disobedience cases, also be sensitive to context. Throwing rocks through the windows of a parked car in the course of civil disobedience may well count as a form of violence, but throwing rocks through the windows of a junked or abandoned car at an environmentally unsound landfill may not.[55] An illegal strike by workers in general might be thought of as nonviolent.[56] But it has also been claimed that a strike by physicians in particular may count as a "violent omission."[57]

It is also possible that what counts as *violence* in the context of civil disobedience on residential college campus communities may also be sensitive to the peculiarities of that particular context.[58] One might think of an act of civil disobedience in such a space as nonviolent to the extent that the college campus is conceived of as the locus for robust, open, and uninhibited debate.[59] But one also might think of the same civilly disobedient act as violent, to the extent that the campus is thought of as a sustained, genuine community of mutually supportive inquirers and scholars.[60]

Ultimately, the idea of violence in civil disobedience cases is no clearer in its application than it is in legal contexts more generally.[61]

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54. *See* BERNSTEIN, *supra* note 53 (note in particular the possible roles of the structural and symbolic violence referred to by the author); s*ee also* Giuliano Pontara, *The Concept of Violence*, 15 J. PEACE RES. 19, 24–25 (1978) (on passively inflicting mental suffering on another person as sometimes amounting to violence).

55. *See* Morreall, *supra* note 47, at 38.

56. *See* ARENDT, *supra* note 26.

57. WALTER BENJAMIN, *Critique of Violence*, *in* REFLECTIONS: ESSAYS, APHORISMS, AUTOBIOGRAPHICAL WRITINGS 277, 292 (Peter Demetz ed., Edmund Jephcott trans., 1986).

58. *See generally* Jade Schiff, *Violence Requires Multiple Definitions*, OBERLIN REV. (May 1, 2015), https://oberlinreview.org/8174/opinions/violence-requires-multiple-definitions.

59. *See generally* R. George Wright, *Campus Speech and the Functions of the University*, 43 J. C. & UNIV. L. 1 (2017).

60. *See id.*

61. Justice Sotomayor has observed that "[o]ne judge may conduct a statistical analysis to decide that a defendant's crime . . . is not a crime of violence. Another may rely on gut instinct to conclude that it is. Still a third may 'throw [our] opinions

There is, in sum, nothing approaching a consensus on the conceptual relations between civil disobedience and violence, or even on the justifiability, in one or more civil disobedience contexts, of some forms of violence.

C. Must the Civilly Disobedient Actor Accept Legal Responsibility for the Act?

For somewhat different reasons, the classic question of whether, by definition or by normative argument, the civilly disobedient actor should accept the legal penalty associated with that act is also without meaningful resolution. Again, there is an established tradition of Thoreau,[62] Gandhi,[63] King,[64] and some more recent writers[65] endorsing some form of the idea of penalty acceptance. Courts tend, unsurprisingly, in this direction as well.[66] But again, there has been a proliferation of arguments seeking, in various ways, to de-link civil disobedience, and indeed justifiable civil disobedience, from one or more

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into the air in frustration . . . .'" Beckles v. United States, 137 S. Ct. 886, 898, 901 (2017) (Sotomayor, J., concurring) (quoting Derby. v. United States, 564 U.S. 1047, 1049 (2011) (Scalia, J., dissenting from denial of certiorari)).

62. *See* Henry David Thoreau, *Civil Disobedience*, *in* CIVIL DISOBEDIENCE: THEORY AND PRACTICE 27, 28 (Hugo A. Bedau ed., 1969).

63. *See* GANDHI, *supra* note 24, at 172.

64. *See* King, *supra* note 25, at 74 ("One who breaks an unjust law must do it . . . with a willingness to accept the penalty.").

65. Again, John Rawls is the most conspicuous of the recent writers taking this tack. *See* RAWLS, *supra* note 28, at 322 ("[t]he law is broken, but fidelity to the law is expressed by the public and nonviolent nature of the act, and by the willingness to accept the legal consequences of one's conduct"); s*ee also, e.g.*, Carl Cohen, *Law, Speech, and Disobedience*, *in* CIVIL DISOBEDIENCE: THEORY AND PRACTICE 165, 176 (Hugo A. Bedau ed., 1969) ("[a] willingness to accept public punishment . . . strongly reinforces the general belief in [the actor's conscientious commitment]"); Irving Kristol, *Civil Disobedience Is Not Justified by Vietnam*, *in* CIVIL DISOBEDIENCE: THEORY AND PRACTICE 208, 208 (Hugo A. Bedau ed., 1969); Bayles, *supra* note 49, at 19 ("a civil disobedient should accept legal punishment for his action"); Martin, *supra* note 31, at 132 (referring to the condition of willingness to accept punishment).

66. *See* City of Chicago v. King, 230 N.E.2d 41, 49 (Ill. App. Ct. 1967) (with respect Dr. King's campaign); *see also* United States v. Kroncke, 459 F.2d 697, 703 (8th Cir. 1972) (explaining that civil disobedience is widely thought to "not carry with it legal justification or immunity from punishment for breach of the law" (quoting United States v. Moylan, 417 F.2d 1002, 1008–09 (4th Cir. 1969))).

understandings of *accepting* some sort of legal penalty for acts of civil disobedience.[67]

The main problem here is not, however, the moral merits of accepting or not accepting the punishment for one's civil disobedience. Rather, it is the preliminary and largely unresolvable problem of clarifying the key terms at issue in such a question. The idea of "accepting the punishment" for one's act is almost endlessly indeterminate, in potentially significant ways.

At one extreme, "accepting the punishment" might require that the civilly disobedient actor wait at the site of the act for arrest, submit cooperatively to the arrest process, plead guilty to any relevant charge, enter no defense or claim of justification, and promptly accept any sentence within statutory and constitutional bounds. At another extreme, "accepting the punishment" might refer only to not further contesting a legal sentence that has been upheld on appeal by the court of last resort. But on this latter interpretation, the actor might have actively sought to evade detection and arrest; have gone underground or into exile; have exhausted the full range of litigation options at all stages, from arrest through trial and appeal, including arguable disruption and judicial contempt;[68] and have publicly rejected, on moral or political

67. *See, e.g.*, MILLIGAN, *supra* note 49, at 21–26; PERRY, *supra* note 33, at 117; RAZ, *supra* note 33, at 265–75; Edyvane & Kulenovic, *supra* note 33, at 1360 (challenging the belief that those engaged in civic resistance "must be ready to accept the legal consequences of their actions"); Greenawalt, *supra* note 38, at 335 (considering the multiple consequences of civil disobedience); *id.* at 361 (noting the scenario of "helping Jews escape from Nazi Germany"); Lefkowitz, *supra* note 49, at 218 (seeking to distinguish *penalizing* from legally *punishing* the civilly disobedient actor); Piero Moraro, *On (Not) Accepting the Punishment for Civil Disobedience*, 68 PHIL. Q. 503, 509–13 (2018) (distinguishing *answerability* or *responsibility* from criminal punishability, and *respect* for law from *obedience* to law, thereby minimizing any moral obligation to accept typical legal punishments); William E. Scheuerman, *Recent Theories of Civil Disobedience: An Anti-Legal Turn?*, 23 J. POL. PHIL. 427, 441 (2015) ("the . . . intuition that disobedients should be expected to accept punishment for their acts has . . . come under attack"); Daniel Weltman, *Must I Accept Prosecution for Civil Disobedience?*, 70 PHIL. Q. 410, 410 (2019) (arguing that civil disobedients need not appear for trial if they adequately explain and justify their civil disobedience in some other appropriate fashion); A.D. Woozley, *Civil Disobedience and Punishment*, 86 ETHICS 323, 328 (1976).

68. See, classically, CONSPIRACY IN THE STREETS: THE EXTRAORDINARY TRIAL OF THE CHICAGO EIGHT (Jon Wiener ed., 2006) for a recounting of the Vietnam War

grounds, legal guilt and any judicially imposed sentence, at any and all stages. And, of course, a civilly disobedient actor might ultimately "accept the punishment," morally, or legally, while adopting any combination of the above options at any stage of the overall process.[69]

As a further complication, the degree to which the actor is willing to accept *the* punishment may itself affect the leniency or severity of the punishment then imposed, which could logically feed back, in a circular loop, into the actor's degree of willingness to accept the punishment in question.[70] Any judge who is willing to take a civilly disobedient actor's attitude toward punishment into account in sentencing contributes to this paradox.[71]

D. Are All Acts of Civil Disobedience Clearly Direct or Indirect?

In general, a civilly disobedient actor's willingness to accept a legal punishment is also inseparable from the attempt to distinguish between what is referred to as *direct* as opposed to *indirect* civil disobedience.[72] Some writers mistakenly assume that all acts of civil disobedience must involve the violation of some law thought by that actor to itself be unjust.[73] However, where the distinction is recognized, the basic idea is that civil disobedience can take the apparently binary form of either directly violating a law or policy to which one specifically

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era trial; *see also* ABBIE HOFFMAN ET AL., CHICAGO SEVEN: TESTIMONY FROM THE 1968 CONSPIRACY TRIAL (2008).

69. While the idea of "accepting the punishment" is normally left unexamined as supposedly intuitively clear, unequivocal, and unproblematic, a number of writers have recognized many alternative scenarios prior to some ultimate judicial sentencing. *See, e.g.*, Woozley, *supra* note 67, at 328 (discussing punishment, "there is more than one way of seeking to avoid it"); MILLIGAN, *supra* note 49, at 22 ("[t]here is a significant distinction between refusing to accept and refusing to speed up the process or to make matters simple for the authorities").

70. See Joel Feinberg, *The Right to Disobey*, 87 MICH. L. REV. 1690, 1700, 1700 n.12 (1989), for a related problem.

71. As distinct from a defendant's contrition or repentance, which is presumably unusual among conscientious civilly disobedient actors.

72. *See generally* RAWLS, *supra* note 28, at 320; Bedau, *supra* note 30, at 657; Woozley, *supra* note 67, at 323.

73. *See* SCHOCK, *supra* note 32.

objects, or else indirectly violating some other law to which the actor has no conscientious objection.[74]

The viability of a distinction between direct and indirect civil disobedience matters practically because the legal defense of necessity is not available in cases of indirect civil disobedience.[75] And the direct-versus-indirect civil disobedience distinction has indeed typically been treated as an uncomplicated binary.[76]

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74. *See, e.g.*, Bedau, *supra* note 30, at 657 (citing a refusal to register for the draft as *direct* civil disobedience and withholding a portion of a tax associated with objectionable militarism as *indirect* civil disobedience); *see also* United States v. Schoon, 971 F.2d 193, 196 (9th Cir. 1992) ("Indirect civil disobedience involves violating a law or interfering with a government policy that is not, itself, the object of protest.").

75. *See, e.g.*, *Schoon*, 971 F.2d at 197; United States v. Santana, 184 F. Supp. 2d 131, 140–41 (D.P.R. 2001). For the typical failure of a necessity defense in civil disobedience cases, see United States v. Maxwell, 254 F.3d 21, 28–29 (1st Cir. 2001) (entrance onto a military base); United States v. Aguilar, 883 F.2d 662, 693 (9th Cir. 1989) (superseded by immigration statute amendment); United States v. Kabat, 797 F.2d 580, 591 (8th Cir. 1986) (nuclear weapons policy civil disobedience); United States v. Dorrell, 758 F.2d 427, 431–32 (9th Cir. 1985) (same); United States v. Quilty, 741 F.2d 1031, 1033–34 (7th Cir. 1984) (per curiam) (anti-military protest); United States v. Simpson, 460 F.2d 515, 517–18 (9th Cir. 1972) (military draft records) ("An essential element of the so-called justification defenses is that a direct causal relationship be reasonably anticipated . . . between the defender's action and the avoidance of harm."); United States v. Kelly, No. 218-cr-22, 2019 WL 5106374 at *9 (S.D. Ga. Oct. 11, 2019) (rejecting a necessity defense in a nuclear weapons-equipped submarine trespass and destruction of property case); State v. Marley, 509 P.2d 1095, 1109–11 (Haw. 1973) (trespass at a major defense contractor); State v. Kee, 398 A.2d 384, 385–86 (Me. 1979) (trespass at a commercial nuclear power plant); Commonwealth v. Averill, 423 N.E.2d 6, 6–7 (Mass. App. Ct. 1981) (same); People v. Cromwell, 104 N.Y.S.3d 825, 830 (N.Y. App. Div. 2019) (adverse environmental effects of a power plant under construction). But see the fascinating case of State v. Ward, 438 P.3d 588, 591–97 (Wash. Ct. App. 2019) (reversing conviction in an oil pipeline valve shut-off case, based on global climate change fears, on the grounds that the question of the effectiveness and necessity of the act in averting the imminent harm was for the jury). *See also* Mike Wright, *Extinction Rebellion Protester Cleared of Criminal Damage After Arguing Her Home Was Under Threat from Climate Change*, Telegraph (Nov. 1, 2019), https://news.yahoo.com/extinction-rebellion-protester-cleared-criminal-201342276.html (Angela Ditchfield case).

76. *See, e.g.*, Cohen, *supra* note 32, at 4 ("All acts of civil disobedience fall into one of two categories which I call direct disobedience and indirect disobedience.") (emphasis omitted).

This treatment of direct and indirect civil disobedience as an exhaustive binary is misleading, however. For example, consider an actor who fears catastrophic climate change, nuclear conflict, mass deportations of migrants, or extinction of animal species. No single act of protest is likely to prevent, or even to meaningfully reduce the likelihood of, any of these events.[77] In such cases, the civilly disobedient actor may choose from a wide range of perhaps symbolic or expressive acts, which may be more or less closely related to any aspect of the feared harm in question. Even a software hacker who miraculously and temporarily immobilizes all nuclear weapons, major oil pipelines, or immigration records has not thereby likely prevented the feared harm. But there is a difference in degree between that sort of civil disobedience and temporarily impairing the usability of only a single nuclear weapon, or cutting a fence at a nuclear weapons facility, or merely trespassing on the outskirts of such a facility.[78]

What we might think of as relatively direct civil disobedience may actually be indirect, and indeed several degrees removed, from the harm in question as well. Consider a civilly disobedient protestor at a racially segregated downtown lunch counter. The real target of the protest in such a case is, of course, racial segregation at some level of generality rather than trespass laws, discriminatory or otherwise. But the segregation law in question need not at all criminalize the attempt by African Americans to obtain service in any section of any lunch counter. The law might instead criminalize only the act by lunch counter owners of serving African Americans.[79] What might thus seem a relatively *direct* act of civil disobedience may well turn out to be more *indirect* than expected, or even not a violation of the law at all.

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77. There can be more and less coordinated ongoing campaigns of civil disobedience. A campaign of civil disobedience might turn out, in combination with legal protests and debates, to be successful. But even in such a case, the actual causal necessity of any single criminally prosecuted act of civil disobedience may be doubtful.

78. How the civilly disobedient actor characterizes the harm to be prevented may make a difference. One can more *directly* prevent harm to the cosmetic testing of animals one has released specifically than to all cosmetic testing animals generally. The legal cost of conceiving one's goal in such narrow, more *direct* terms, however, may be some loss in the significance or moral gravity of the harm at stake.

79. Further, whether those African Americans were criminally or civilly liable even for trespass itself would depend on the consent, or lack thereof, of the lunch counter owner.

This is not to suggest that attempts to distinguish relatively direct from relatively indirect forms of civil disobedience have no value. Imagine a severe treason statute that lacks due process or rule of law protections or a murder statute that grossly violates basic conceptions of equal treatment, or that has been applied in deeply objectionable ways. Plainly, civil disobedience in the form of deliberately violating a treason or murder statute itself, rather than some more or less related law, would be typically unattractive.[80]

E. Is Civil Disobedience a Right or a Duty?

In turn, questions of the severity of any legal penalty for civil disobedience are inseparable from the traditional question of whether justifiable civil disobedience should be thought of as either morally permissible—perhaps a matter of an actor's waivable moral right or privilege—or else instead as an actor's binding moral duty or obligation. Thus, some writers have referred to a moral right to engage in civil disobedience under appropriate circumstances,[81] while other writers have referred in addition, or instead, to something like a moral duty of civil disobedience.[82]

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80. Again, the severity of any likely criminal sentence may feed back into the question of the moral permissibility of resisting the imposition of the sentence in one way or another.

81. For a sophisticated example of such a statement, see Vinit Haksar, *The Right to Civil Disobedience*, 41 OSGOODE HALL L.J. 407, 408 (2003) ("The way Gandhi understands the right to civil disobedience is fundamentally different from the way that modern liberals such as John Rawls, Ronald Dworkin, and Joseph Raz understand the term.").

82. The circumstances and moral logic of a binding moral duty or obligation to disobey is the central theme of CANDICE DELMAS, A DUTY TO RESIST: WHEN DISOBEDIENCE SHOULD BE UNCIVIL (2018), https://oxford.universitypressscholarship.com/view/10.1093/oso/9780190872199.001.0001/oso-9780190872199; *see id.* at 8–11 ("the very grounds supporting a duty to obey also impose duties to disobey under conditions of injustice") (developing separate arguments for a duty to disobey based on a natural duty of justice, fairness, Samaritanism, and on the moral logic of political association); *see also* MICHAEL WALZER, OBLIGATIONS: ESSAYS ON DISOBEDIENCE, WAR, AND CITIZENSHIP 3 (1970) (referring to the historical claim that some persons are not merely "free to disobey, but that they are obligated to do so"); Richard Wasserstrom, *Disobeying the Law*, 58 J. PHIL. 641, 653 (1961) (citing, without endorsing, the possibility of a moral duty or even a broad-based legal duty to disobey a particular law or regime); Woozley, *supra* note 67, at 323 (restricting acts of

A sense of a duty or obligation to disobey an unjust law in some appropriate circumstances has motivated some historical[83] and contemporary[84] actors. Henry David Thoreau, for example, clearly thought in these terms:

> It is not a man's duty, as a matter of course, to devote himself to the eradication of any, even the most enormous wrong; . . . but it is his duty, at least, to wash his hands of it, and . . . not to give it practically his support. If I devote myself to other pursuits and contemplations, I must first see, at least, that I do not pursue them sitting upon another man's shoulders.[85]

Sometimes, a civilly disobedient actor may speak of both a duty and a right to engage in civil disobedience,[86] perhaps in the belief that having a genuinely-binding moral duty implies having some sort of a moral right to engage in the activity in question. But the relations

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civil disobedience, by definition, to those performed from a sense of duty). For a condensed version of some related themes of Professor Delmas, see generally Candice Delmas, *Civil Disobedience*, 11 PHIL. COMPASS 681 (2016).

83. *See, e.g.*, Thoreau, *supra* note 62, at 33.

84. See, for example, the court's account of the civilly disobedient actors' expressed motivations in *United States v. Kroncke*, 459 F.2d 697, 699 (8th Cir. 1972).

85. Thoreau, *supra* note 62, at 33. Based on a more elaborated metaphysics, Thomas Aquinas also recognizes the possibility of a binding moral duty to disobey a positive legal command. Aquinas argues that there may be positive laws that are unjust because of their failure to aim at or pursue the common good; because they transgress the proper limits of legislative jurisdiction; or because they do not reflect fairness or proportional equality in the burdens they impose. *See* THOMAS J. BUDZISZEWSKI, COMMENTARY ON THOMAS AQUINAS'S TREATISE ON LAW 379–93 (2016). Whether one should comply with such laws, where they are not otherwise objectionable, must take into account the relevant harms of the disobedience, including sowing moral confusion or promoting disorder or disturbance. *See id.* But there are also positive laws that would require violation of divinely promulgated precepts, as in cases mandating idolatry or violation of the Ten Commandments. In these latter cases, refusal to comply is an overriding duty or obligation, regardless of any unintended consequences of that disobedience. *See id.*

86. Gandhi argues both that "civil disobedience is the inherent right of a citizen" and that "[c]ivil disobedience therefore becomes a sacred duty when the State has become lawless, or which is the same thing, corrupt." GANDHI, *supra* note 24, at 174; *see also* Lefkowitz, *supra* note 49, at 202 (referring both to a moral right to civil disobedience and to an apparent obligation to disobey in some circumstances).

between purported duties and rights of civil disobedience are actually much more complex than is typically acknowledged. Some of the complications are suggested by Christopher Wellman, who argues both that civil disobedience is "easy to justify"[87] and that "it is also seldom obligatory because it is in many cases too costly to the civil disobedient."[88]

As we have seen, it may be possible to reduce the personal costs of civil disobedience by engaging in some form of *indirect* civil disobedience.[89] A problem, though, is that those with the clearest moral right to engage in civil disobedience may, precisely as the relevantly oppressed and subordinated groups, face the highest practical costs in engaging in such civil disobedience.[90] A local African American lunch counter trespasser may face not only legal expenses but also an arrest record, local controversiality, and possible employment costs. An out-of-town ally, however, who joins in the same act of civil disobedience may more readily bear any related costs and may even be able to treat his or her arrest in such a cause as a valued credential.[91]

Generally, the degree of any violence with which officials respond to nonviolent civil disobedience may tend to reflect the socioeconomic class status of the protestors in a given case.[92] Thus, all else equal, we may be less willing to find a duty, as distinct from a right, to engage in civil disobedience as the personal costs of disobedience increase.[93]

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87. CHRISTOPHER HEATH WELLMAN & A. J. SIMMONS, IS THERE A DUTY TO OBEY THE LAW? 85 (2005) (defending opposing answers to the question).

88. *Id.*

89. *See supra* Section II.D.

90. Alternatively, any oppressed and subordinated groups may be in no position to engage in broad-scale rebellion, insurrection, or revolutionary activity in any form with any meaningful chance of success.

91. This commonly occurs in some cases of activist work in preparation for a political career.

92. While the use of clubs, police dogs, or fire hoses against civilly disobedient protestors may be largely a reflection of cultural time and place, elements of hierarchy are clearly present as well.

93. Of course, not all will invariably be equal, as in cases in which civil disobedience is apparently necessary to protect the basic interests of close family members.

F. Is Civil Disobedience an Expression of Respect or Disrespect for the Rule of Law?

Finally, writers have hopelessly debated the relationships between civil disobedience and respect for the democratic rule of law. Acceptance of a legal penalty will often, but not always, be inseparable from respect for the rule of law issues. Civil disobedience may take the form of violating a law that was recently adopted by an overwhelming majority following a reasonably well-informed, open, more or less egalitarian, and procedurally-sound process. Civil disobedience in such a case can be described as, in some sense, impeaching democratic values and the rule of law.[94] More simply, in some cases, the point of civil disobedience is to contest what is, at least in some sense, a democratic-majoritarian outcome of rule of law processes.[95]

But in other cases, the civilly disobedient actors may claim that their actions are consistent with—and indeed may optimally promote—democracy and the rule of law in their deepest and most valuable senses.[96] Thus, "acts of civil disobedience are often presented—even by those performing them—as expressions of loyalty to the state and to its (roughly) democratic aspirations."[97] Some writers therefore seek to

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94. We assume here that the law in question is objected to solely on moral, political, or religious grounds, with no claim that the law is unconstitutional and thus itself contrary to the rule of law. Given that assumption, see, for example, Bernard E. Harcourt, *Political Disobedience*, 39 CRITICAL INQUIRY 33–34 (2012) (rejecting the idea of political disobedience as "the idea of honoring or expressing 'the highest respect' for law").

95. This is especially clear in some cases of *indirect* civil disobedience, where the law that is itself violated—perhaps a trespass statute—is not itself contested. *See* Russell, *supra* note 45 (on the capacity of even democratic regimes to "command atrocious actions").

96. For an extended argument to this effect, see BROWNLEE, *supra* note 33. *But cf.* Daniel Weinstock, *How Democratic Is Civil Disobedience?*, 10 CRIM. L. & PHIL. 707, 708 (2016) (critiquing Professor Brownlee's argument and contrasting *permanent* or structural minorities with (temporary) numerical voting minorities). *See* Edyvane & Kulenovic, *supra* note 33, at 1363 (*disruptive* as distinct from narrowly defined *civil* disobedience as "justified by the undemocratic exclusion of citizens from equal access to a variety of basic resources, . . . public services[,] . . . or public spaces and institutions").

97. David Enoch, *Some Arguments Against Conscientious Objection and Civil Disobedience Refuted*, 36 ISR. L. REV. 227, 251 (2014).

distinguish between "democracy-limiting disobedience"[98] and "democracy-enhancing disobedience."[99]

Doubtless, these claims and distinctions can be useful for some purposes. But disputes over the relations between civil disobedience, of whatever sort, and democracy are not merely persistent, but in principle largely unresolvable. The idea of democracy has rightly been recognized as among the most central and most important of the essentially-contested concepts.[100] In some measure, politics at every level, from local to global, has involved the multi-factional, multi-dimensional struggle over what loosely amounts to intellectual property rights to the idea of democracy.[101] Barring a miraculous consensus on the meaning of democracy and its relationship to majority voting, equality, basic liberties, and various sorts of rights, the relations between civil disobedience and democracy must remain contested and indeterminate.[102]

Thus, the relationships between civil disobedience and the democratic rule of law display complications akin to those of the overlapping debates over openness and publicity,[103] the role of violence,[104] *acceptance* of a legal penalty,[105] direct versus indirect civil

98. Daniel Markovits, Essay, *Democratic Disobedience*, 114 YALE L.J. 1897, 1902 (2005) (noting democratic disobedience as "an unavoidable, integral, part of a well-functioning democratic process").

99. *Id.* (distinguishing genuine democracy from mere preference-aggregating majoritarian rule).

100. *See* Haan, *supra* note 52, at 35 (noting philosopher W.B. Gallie's view of the offensive and defensive use of the generally favorably connoted term *democracy*, based upon vague and conflicting criteria for the use of the term and the idea of *democracy* as an essentially contested concept).

101. *See* Gallie, *supra* note 52, at 183–87 (referring to the "continuous competition for acknowledgement between rival uses of the popular concept of democracy").

102. For a sense of some important dimensions of these conflicts, see, for example, BENJAMIN R. BARBER, STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE (1984); DAVID HELD, MODELS OF DEMOCRACY (Stanford Univ. Press, 3d ed. 2006); THE DEMOCRACY SOURCEBOOK (Robert A. Dahl et al. eds., 2003); FREDERICK G. WHALEN, DEMOCRACY IN THEORY AND PRACTICE (2018); LIBERAL DEMOCRACY (J. Roland Pennock & John W. Chapman eds., 1983).

103. *See supra* Section II.A.

104. *See supra* Section II.B.

105. *See supra* Section II.C.

disobedience,[106] and civil disobedience as a right or a duty,[107] given their shared murky status. Rather than continue to press these largely unresolvable debates, we should, more usefully focus instead on how to upgrade judicial responses to instances of civil disobedience. Upgrading our judicial responses is necessary to fully address the issues behind the civilly disobedient actor's conduct and may even dampen the significance of these ongoing debates.

III. THE POSSIBILITY OF A CIVIL DISOBEDIENCE TRIAL AS A BROADLY MEANINGFUL CONVERSATION

At least since the time of Henry David Thoreau,[108] civilly disobedient actors have criticized the superficiality and the narrow, blinkered focus of trials in cases of civil disobedience. Thoreau himself argues, in the context of his poll tax refusal case,[109] that the State undermines respect for itself in such instances.[110] Thoreau specifically argues that "the State never intentionally confronts a man's sense, intellectual or moral, but only his body, his senses. It is not armed with superior wit or honesty, but with superior physical strength."[111]

Here, Thoreau doubtless overstates his claim. A trial of a civilly disobedient actor may involve the contested weighing of evidence on legal elements, defenses, and sentencing considerations. But Thoreau is also, unmistakably, onto something. A trial of a civil disobedience case may well leave us with a sense of dissatisfaction or frustration, in that the trial has largely or entirely missed the point and has thus amounted to a missed opportunity. Crucial to this sense of frustration is the narrowness, superficiality, and question-begging nature of such trials.

Consider, merely for example, this representative portion of a transcript from a Vietnam War-era military draft case:

> I now . . . strike all of the testimony offered by both defendants except for their own personal testimony, and I

106. *See supra* Section II.D.
107. *See supra* Section II.E.
108. *See* Thoreau, *supr*a note 62.
109. *See id.* at 40.
110. *See id.*
111. *Id.*

> strike that part which attempts to rely on a justification on account of the Vietnam War or religious oriented reasons. Consequently, all that you have before you for consideration [as jurors] are the facts concerning what occurred at Little Falls, Minnesota on the late evening of July 10, 1970.[112]

This judicial approach to the appropriate scope of a civil disobedience trial is both entirely typical and, as argued below, realistically improvable within the bounds of legitimate adjudicative theory and practice.

A. The Need for and Feasibility of a Dialogic Approach to Civil Disobedience Trials

The gist of our recommendation involves a downsized reconstruction and repurposing of discourse ethics themes popularly associated with the work of Jurgen Habermas.[113] Habermas, as adapted for our purposes herein, works within a model of genuinely dialogic, as opposed to monologic, structurally unequal and dominated discourse. The distinction between dialogue and monologue has been familiar in the civil disobedience context. Dr. King famously held that "[t]oo long

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112. United States v. Kroncke, 459 F.2d 697, 700 (8th Cir. 1972). For similar, and quite typical, narrow evidentiary relevance determinations, see, for example, State v. Marley, 509 P.2d 1095, 1099 (Haw. 1973) (discussing corporate participation, legal or otherwise, in the Vietnam War). *But see* State v. Ward, 438 P.3d 588, 592 (Wash. Ct. App. 2019) (noting a defendant's tender of scientific evidence and expert witness testimony regarding climate change and its effects).

113. Habermas develops the underlying themes, for much broader purposes, in numerous works. *See* JURGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., First MIT Press, 1996) (1992); JURGEN HABERMAS, BETWEEN NATURALISM AND RELIGION: PHILOSOPHICAL ESSAYS (Ciaran Cronin trans., 2008); JURGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS (Ciaran Cronin trans., 1994); JURGEN HABERMAS, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION (Christian Lenhardt & Shierry Weber Nicholsen trans., 1990); Jurgen Habermas, *Discourse Ethics: Notes on a Program of Philosophical Justification*, *in* THE COMMUNICATIVE ETHICS CONTROVERSY 60 (Seyla Benhabib & Fred Dallmayr eds., 1990); Jurgen Habermas, *Civil Disobedience: Litmus Test for the Democratic Constitutional State*, 30 BERKELEY J. SOCIO. 95 (1985); Jurgen Habermas, *Religious Tolerance—The Pacemaker for Cultural Rights*, 79 PHIL. 5 (2004).

has our beloved Southland been bogged down in the tragic attempt to live in monologue rather than dialogue."[114] The broad theme of dialogue versus monologue has recurred ever since.[115]

Habermas's approach, however, does not seek to begin with controversial substantive political premises, and then, on the basis of those premises, infer or otherwise validate the justice of some ultimate political outcome. Rather, Habermas's emphasis is on what is already latent, or implied, in any sincere personal attempt to engage in dialogue. Sincere political conversations necessarily involve an attempt to seek out some sort of interpersonal, if not objective, truth and to jointly approach as closely as possible thereto. Perhaps apart from Habermas's discourse theory, our accumulated experience may already recommend that we avoid conversational dominance by even the best credentialed persons and instead allow all those who hold even unpopular views to articulate and defend those views in their own voice.[116] Habermas, however, reaches a similar conclusion by focusing on what is already in a sense implied, practically, by our sincerely seeking political truth through conversation.[117]

Thus, at a bare minimum, a speaker who oddly declared that she was not speaking, was not capable of speaking, or was not socially

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114. King, *supra* note 25, at 71.

115. *See, e.g.*, DELMAS, *supra* note 82, at 66 (illegal activity as potentially involving speech that is otherwise unheard by the broader audience); WALZER, *supra* note 82, at 22–23 (distinguishing *monologue* from *fraternal discussion*); Sandra Laugier, *Disobedience as Resistance to Intellectual Conformity*, 45 CRITICAL INQUIRY 420, 422 (Daniela Ginsburg trans., 2019) (power that is "deaf to contestation" as disdaining "the rules of dialogue"); *id.* at 432 (referring to the absence of "the conditions for a conversation that would allow one to reasonably express one's difference of opinion; when one is dispossessed of one's voice"). In a different sense, Habermas's unconstrained discourse theory is sometimes thought of as dialogic by contrast with John Rawls's supposedly more monologic approach from Rawls's "original position." *But see* Christopher McMahon, *Discourse and Morality*, 110 ETHICS 514 (2000) (downplaying the significance and viability of any stark contrast between Habermas and Rawls in this respect); Christopher McMahon, *Why There Are No Issues Between Rawls and Habermas*, 99 J. PHIL. 111, 111 (2002).

116. *See* JOHN STUART MILL, ON LIBERTY 98–99 (Gertrude Himmelfarb ed., 1974) (1859) (dissident views should be heard from their actual proponents, above and beyond presentations from disinterested or unsympathetic experts).

117. Gandhi's civil disobedience campaigns explicitly distinguished the search for truth from "obstinately persisting in one's cause, without a commitment to search for the truth." Haksar, *supra* note 81, at 417.

interacting would be engaging in what Habermas refers to as a performative contradiction.[118] A bit more controversially, a speaker, in search of intersubjective truth, who announced her support of a substantive moral or political rule that the speaker knew could not be rationally accepted would, on Habermas's view, be engaging in a more subtle form of performative contradiction.

The central idea here is that even a hypothetical public discussion of what to do inescapably involves certain presuppositions about discourse. Crucially, the logic of those presuppositions by themselves may affect not just the process, but the substance and possible outcomes of the conversation. Ironically put, an unconstrained political conversation inherently involves constraints on how the conversation unfolds, procedurally and in substance.

On Habermas's view, for anyone to articulate and defend in good faith any political position, implies that person's belief that their position could be freely and rationally accepted by any other person, whatever their personal interests, who similarly seeks the truth.[119] In this sense, to make a political claim is necessarily to assert its universal acceptability to all free and rational persons concerned.

But, crucially, to conduct the conversation on any basis other than universal inclusion, freedom, and equality is to prevent any political position that is being advanced from passing precisely that test of universal acceptability. Summarily, then, to sincerely seek an intersubjective, potentially universally-acknowledged political truth requires an openness to an inclusive conversation on the basis of equality of opportunity for free, undominated, uncoerced, and uncoercive interaction.[120] This conversational freedom and equality requires that everyone be allowed to introduce any assertation into the conversation;[121] to

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118. *See, e.g.*, Habermas, THE COMMUNICATIVE ETHICS CONTROVERSY, *supra* note 113, at 86. For commentary, see J. Donald Moon, *Practical Discourse and Communicative Ethics*, *in* THE CAMBRIDGE COMPANION TO HABERMAS 143, 144 (Stephen K. White ed., 1995).

119. *See* R. GEORGE WRIGHT, LEGAL AND POLITICAL OBLIGATION: CLASSIC AND CONTEMPORARY TEXTS AND COMMENTARY 36 (1992).

120. *See* Habermas, THE COMMUNICATIVE ETHICS CONTROVERSY, *supra* note 113, at 86.

121. *See* Habermas, BETWEEN FACTS AND NORMS, *supra* note 113, at 170; Habermas, BETWEEN NATURALISM AND RELIGION, *supra* note 113, at 92; Habermas, JUSTIFICATION AND APPLICATION, *supra* note 113, at 56; Habermas, MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION, *supra* note 113, at 89; Habermas, THE

question or challenge any assertion, however popular;[122] and to express their own needs and interests as they perceive them.[123]

However successful or unsuccessful[124] Habermas's approach may be for his own much broader moral and political purposes, something like his idealized framework for seeking intersubjective political truth can be adapted, in scaled down fashion, for the purpose herein of reforming the adjudication of civil disobedience cases.[125]

COMMUNICATIVE ETHICS CONTROVERSY, *supra* note 113, at 86. For commentary, see THOMAS MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 306–07 (1996 ed.); Erin Kelly, *Habermas on Moral Justification*, 26 SOC. THEORY & PRAC. 223, 223–24, 229–30 (2000); William Rehg, *Against Subordination: Morality, Discourse, and Decision in the Legal Theory of Jurgen Habermas*, 17 CARDOZO L. REV. 1147, 1160–61 (1996). Habermas credits the influence in this context of the work of Karl-Otto Apel and Robert Alexy. *See* Karl-Otto Apel, *Discourse Ethics as a Response to the Novel Challenges of Today's Reality to Coresponsibility*, 73 J. RELIG. 496, 509 (1993); Robert Alexy, *A Theory of Practical Discourse*, *in* THE COMMUNICATIVE ETHICS CONTROVERSY 151 (Seyla Benhabib & Fred Dallmayr eds., 1990). The resemblance between the discourse-ethic or truth-seeking values of inclusiveness, freedom, and equality and the ultimately endorsed constitutional democratic regime values of inclusiveness, freedom, and equality need hardly be deemed coincidental.

122. *See* Habermas, THE COMMUNICATIVE ETHICS CONTROVERSY, *supra* note 113, at 86.

123. *See id.* Note that Habermas does not seek to blind persons to supposedly morally arbitrary aspects of their actual circumstances. *See* RAWLS, *supra* note 28, at 118–23 (describing the "veil of ignorance" in the Rawlsian "original position").

124. For a critique, see, for example, Kelly, *supra* note 121 (on the difficulty of drawing meaningful substantive moral and political conclusions from applying the principles of discourse ethics).

125. Habermas has addressed some aspects of the broader question of civil disobedience and its justifiability. *See* Habermas, *Civil Disobedience: Litmus Test For the Democratic Constitutional State*, *supra* note 113, at 105 ("The disobedient must . . . examine whether the adoption of extraordinary means is really appropriate to the situation, and does not in fact originate in an elitist attitude or a narcissistic impulse and therefore remains sheer preten[s]e."); Habermas, *Religious Tolerance*, *supra* note 113, at 9 (democratic states should provide civil disobedients with an "opportunity contrary to their image to prove themselves to actually be the true patriotic champions of a constitution that is dynamically understood as an ongoing *project*—the project to exhaust and implement basic rights in changing historical contexts"). For commentary, see Cigdem Cidam, *Radical Democracy Without Risks? Habermas on Constitutional Patriotism and Civil Disobedience*, 44 NEW GERMAN CRITIQUE 131 (2017); William Smith, *Civil Disobedience and the Public Sphere*, 19 J. POL. PHIL. 145 (2011); Stephen K. White & Evan Robert Farr, *"No-Saying" in Habermas*, 40 POL. THEORY 32, 35 (2012).

B. Implementation and Benefits of a Dialogic Method to Civil Disobedience Trials

As an opening to this adaptation, consider that some civilly disobedient actors may have a desire, a moral right, or even a moral duty[126] to meaningfully explain and to attempt to broadly justify their civil disobedience in a legal forum. But as the adjudicatory system is currently structured, civil disobedience defendants are normally denied, on legal evidentiary relevance grounds, any such opportunity.[127] As civil disobedience trials are currently structured, the prosecution and defense generally speak, [128] sentencing issues aside, only to the legal elements of any offenses, and to the currently legally recognized defenses thereto.[129] It is tempting to assume the broader appropriateness of this arrangement, almost by definition. But this means that Thoreau's critique —that the State never meaningfully confronts the civilly disobedient actor[130]— remains unaddressed.

Opening up the option of genuinely meaningful dialogue in the course of a civil disobedience trial would, in proper cases, benefit not merely the defendants, but also the prosecuting government, as well as present and future conscientious citizens. Unavoidably, though, there would be some inherent and unpredictable risks for both governments

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126. *See* Moraro, *supra* note 67, at 505 (arguing that "the duty to answer (during prosecution) is, at least in some cases, more stringent than the duty to later submit to the punishment (at the moment of sentence)"); *see also* BROWNLEE, *supra* note 33, at 1, 29–30 (noting communicative civil disobedience as requiring dialogue).

127. *See, e.g.*, cases cited *supra* note 112.

128. But see some of the spontaneous utterances associated with the Chicago Eight trial, as reported in CONSPIRACY IN THE STREETS, *supra* note 68. More illustrative of the ordinary limits of issue exploration in civil disobedience cases, however, is this question and colloquy between counsel in that case:

> LEONARD WEINGLASS: Do you consider it an obscenity for the United States government to use napalm in the bombing of civilians in North Vietnam?
>
> RICHARD SCHULTZ: Mr. Weinglass can't be serious in contending that these questions are proper on this recross-examination.
>
> LEONARD WEINGLASS: That is perhaps my most serious question in this trial.

Id. at 127.

129. *See* sources cited *supra* note 121.

130. *See supra* notes 109–112 and accompanying text.

and defendants in a more meaningful trial dialogue. As Professor Brownlee observes, "to intend sincerely to engage in a dialogue, we cannot immunize ourselves from the communicative efforts of our would-be dialogue partners. We must be open to hearing them. We must try to understand what they say."[131]

As is suggested by Habermas's model,[132] a broader and deeper civil disobedience trial could involve "more sustained and extensive interaction" than is typical.[133] In greater measure, a revised form of civil disobedience trial could be oriented toward attempts at reasonable persuasion not just of the trial adversary[134] but of a broader, political audience as well. The sense of what is relevant could be much broader, with a greater degree of open and equality-based interactive dialogue and a reduced imperative to restrict one's trial antagonist from telling their story. In this way, the inseparability of law and politics in cases of civil disobedience would be better recognized.

In this expanded format, defendants would thus have the option, entirely in their discretion, of focusing not only on the technical legal elements and defenses but also on the more fundamental merits, or the broader justifiability, of their acts of civil disobedience. In taking that course of action, the defendants would of course be authorizing and inviting a similarly broad critical response by the prosecution. It is certainly possible that some civil disobedience defendants would even want to talk partly in terms of their metaphysical or religious motivations.[135] It is also possible that the State might wish to contest the legitimacy of any trial outcomes or of changes in public policy on the basis of metaphysical or religious beliefs that cannot be translated, without residue, into secular or pragmatic terms.[136]

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131. BROWNLEE, *supra* note 33, at 9.

132. *See supra* notes 118–125 and accompanying text.

133. BROWNLEE, *supra* note 33, at 218.

134. *See id.*

135. See, for example, United States v. Kroncke, 459 F.2d 697, 700 (8th Cir. 1972) as well as the religious defendants in United States v. Moylan, 417 F.2d 1002, 1008 (4th Cir. 1969), along with, to one degree or another, Gandhi and King as examples of actors motivated by metaphysical or religious beliefs.

136. *See* JOHN RAWLS, POLITICAL LIBERALISM 212–54 (expanded ed. 2005); Jurgen Habermas, *Reconciliation Through the Public Use of Reason: Remarks on John Rawls's Political Liberalism*, 92 J. PHIL. 109 (1995). The state or federal government, as prosecutor, might wish, for various possible reasons, to refuse even a subsidized opportunity to respond to a defendant's broad critique of the policy provoking

The legitimate scope of metaphysical and religious reasons in legal and political contexts is, of course, currently contested.[137] We need take no position herein on any such broader question. Whether metaphysical arguments should more narrowly have some role in free and equal open interactive exchanges between the government and civil disobedience defendants is itself a question that should be open to unconstrained discussion. In practice, actual civilly disobedient parties may wish to focus instead on other, more substantive points of contention.

In particular, civil disobedience defendants who choose to pursue the option of a broader inquiry into the merits of a targeted government policy may well be interested primarily in the testimony of expert witnesses, including that of experts called by the government. Crucially, we do not have anything like a current consensus on the likely or actual consequences of many policies that provoke civil disobedience. Part of the value of such testimony would lie in meaningfully exploring merits of the targeted policy and the strengths and weaknesses of the assumptions, logic, and empirical evidence underlying such policies. Similarly, the strengths and weaknesses of any alternative policy endorsed by the defendants could also be conversationally scrutinized.

The idea, in part, would be to offer to defendants, the State, and the broader public an opportunity to move beyond unexamined assumptions, fallacies, memes, slogans, tweetstorms, demagogy, confirmation biases, and generally evanescent chatter into genuinely interactive and reciprocally responsive argumentation.

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the civil disobedience in question. Such a refusal, and the grounds therefor, could be taken into consideration by the court in fixing the sentence for a defendant who was willing to address the broader policy issues raised by their civil disobedience.

137. For background on this ongoing controversy, see generally, SAMUEL FREEMAN, RAWLS 381–415 (2007); LENN E. GOODMAN, RELIGIOUS PLURALISM AND VALUES IN THE PUBLIC SPHERE 54–101 (2014); STEVEN D. SMITH, THE DISENCHANTMENT OF SECULAR DISCOURSE (2010); Charles Larmore, *Public Reason*, *in* THE CAMBRIDGE COMPANION TO RAWLS 368–92 (Samuel Freeman ed., 2002); Jonathan Quong, *On the Idea of Public Reason*, *in* A COMPANION TO RAWLS 265–280 (Jon Mandle & David A. Reidy eds., 2015); Jean Hampton, *Should Political Philosophy Be Done Without Metaphysics?*, 99 ETHICS 791 (1989); Peter de Marneffe, *Rawls's Idea of Public Reason*, 75 PAC. PHIL. Q. 232 (1994); Joseph Raz, *Disagreement in Politics*, 43 AM. J. JURIS. 25 (1998).

If there would be public value in at least some such broad-ranging trial encounters, their production could be subsidized, to one degree or another, in appropriate cases. As one possibility, the reasonable costs of producing and presenting documents, exhibits, and appearances by subject matter experts could be publicly subsidized, as opposed to being borne by either party. The permanent availability to the broader public of these materials could then be subsidized as well.

It is fair to assume that some civil disobedience defendants would wish to avail themselves of this expanded discussion option even if doing so had absolutely no impact on the legal judgment of the jury or trial court. Some governments would be correspondingly eager to defend the relevant policy, from either a local or some broader perspective. But again, if there is a public interest in such sustained conversations, the incentives of the parties could be adjusted. One obvious possibility would be for the court to take into account the defendant's good faith[138] exertions in this regard for purposes of sentencing,[139] including the possibility of a suspended sentence or a community service-based sentence, if not also for acquittal on the merits.[140]

Some civilly disobedient actors may decline the option of a Habermasian dialogue on the grounds that, at least in their own case, not even a minimal approach to such an ideal is possible. Or perhaps some such actors may see even the Habermasian ideal as normatively

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138. It seems abstractly possible that a garden-variety liquor store holdup could, in retrospect, be claimed to be an act of civil disobedience. But there is, at a minimum, no reason to subsidize any expenses incurred by the defendant in such a case. Less egregiously, larding the record with thick documents that no party to the judicial case meaningfully refers to should not be subsidized.

139. Sentencing already may take into account factors such as contrition and acceptance of responsibility. *See, e.g.*, Jeffrey J. Rachlinski et al., *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189 (2013). It would hardly be much of a stretch to treat the defendant's sustained conscientious interaction with (and responsiveness to) State witnesses and their evidence as a favorable consideration in sentencing.

140. Thoroughly exploring a major issue of the day—or bringing such an issue to the public's attention in a constructive way—may also be judged to be, in itself, a public service bearing upon the possibility of pardon or commutation of sentence by an appropriate federal or state official. For more information on the government's pardoning power, see U.S. CONST. art. II, § 2, cl. 1 (at the federal level) and *State Clemency Guide*, CRIM. JUST. POL'Y FOUND., https://www.cjpf.org/state-clemency (last visited Sept. 13, 2020) (at the state level).

defective. Some actors may view the regime, or the broader culture, as profoundly deficient, yet wish as well to go no further than acts of isolated civil disobedience. After all, even a dystopian regime could merely verbally endorse openness, inclusion, freedom, and equality in public discourse.[141] A civilly disobedient actor may consider any attempt at issue-focused communication on any terms to be futile.[142] All such beliefs should, on our approach, be respected.

But such beliefs, by themselves, do not establish that it would also be futile or otherwise inadvisable for a defendant to attempt to publicly explain why that defendant believes in such futility or inadvisability. Perhaps such a belief can itself be validated or improved through dialogue. Cogently explaining to a public audience why one cannot be understood on some distinct public issue itself verges, ironically, on a performative contradiction.[143] But even radical critics may at least be able to make themselves better understood in some respects. Many persons who are reasonably skeptical of any general moral obligation to obey the law[144] may have no objection to sharing their reasoning in dialogue with the state or federal government.

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141. The text of a national constitution is not invariably an accurate indication of the fulfillment of any textually acknowledged right in practice.

142. Consider the circumstances of the fictional Dr. Miles J. Bennell at the conclusion of the classic 1956 movie version of *Invasion of the Bodysnatchers*, wherein Miles attempts to flag down motorists to tell them about the pod people, but they ignore him, thinking that he is crazy. INVASION OF THE BODY SNATCHERS (Walter Wanger Productions 1956). More theoretically, consider Herbert Marcuse, *Repressive Tolerance*, *in* A CRITIQUE OF PURE TOLERANCE 95 (1969).

143. *See supra* note 118 and accompanying text.

144. There is a vast and diverse body of literature on the idea of a prima facie moral obligation generally to obey a law or legal system merely because of its status as established law. *See, e.g.*, RICHARD E. FLATHMAN, POLITICAL OBLIGATION (1972); JOHN HORTON, POLITICAL OBLIGATION 121–33 (2d ed. 2010) (discussing the philosophical anarchism of A. John Simmons and Robert Paul Wolff); GEORGE KLOSKO, POLITICAL OBLIGATIONS 244 (2005) ("Combining empirical facts concerning our needs and how they must be satisfied, and moral claims concerning equality and fair distribution, yields political obligations based on the principle of fairness."); DUDLEY KNOWLES, POLITICAL OBLIGATION: A CRITICAL INTRODUCTION 90–93 (2009) (discussing Simmons and Wolff); MICHAEL WALZER, OBLIGATIONS 16 (1970) (noting the idea of a prima facie obligation to obey the laws as "not unreasonable, so long as the state provides equally to all its members certain essential services"); ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 18 (1970) ("Insofar as a man fulfills his obligation to make himself the [autonomous] author of his decisions, . . . he will deny that he has

IV. CONCLUSION

As it turns out, the traditional basic questions regarding civil disobedience, whether definitional or more openly substantive, have no widely accepted answers. We should not expect this to change. We should instead direct our attention toward practical reform of the trial of civil disobedience cases. Our culture of alienation and distrust undersupplies opportunities for meaningful dialogue on complex issues of public policy. Civil disobedience trials should be reconceived and then restructured precisely to encourage such dialogue. This change would ultimately benefit civilly disobedient actors, policy-enforcing governments, and the broader public.

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a duty to obey the laws of the state *simply because they are the laws*."); Greenawalt, *supra* note 38, at 341 ("[V]irtually everyone would acknowledge that it is sometimes good to break a promise."); A.J. Simmons, *The Duty to Obey and Our Natural Moral Duties*, *in* IS THERE A DUTY TO OBEY THE LAW? 93, 195 (2005) (referring to "the illusion that we are bound by a nonvoluntary, general moral duty to obey the law"); Wellman, *supra* note 87, at 85 ("[C]ivil disobedience is . . . easy to justify."); *Id.* at 4 ("[T]he truth is that widespread political consent is a fiction."); Richard Dagger & David Lefkowitz, *Political Obligation*, STAN. ENCYCLOPEDIA PHIL., https://plato.stanford.edu/entries/political-obligation (rev. ed. Aug. 7, 2014) (discussing arguments "from consent, gratitude, fair play, membership, [and] natural duty"); William A. Edmundson, *State of the Art: The Duty to Obey the Law*, 10 LEGAL THEORY 215 (2004); Feinberg, *supra* note 70, at 1695 (discussing the work of Kent Greenawalt) (referring to fair play, promise or contractual, gratitude, natural duty, and utilitarian theories of a moral obligation to obey); David Lefkowitz, *The Duty to Obey the Law,* 1 PHIL. COMPASS 571 (2006) (discussing relational-role, consent, fair play, natural duty, instrumental, and philosophical anarchist approaches); David Lyons, *Moral Judgment, Historical Reality, and Civil Disobedience*, 27 PHIL. & PUB. AFF. 31, 32 (1996) ("Political obligation has recently received close philosophical scrutiny, which reveals that various arguments for it are exceedingly problematic."); Moraro, *supra* note 67, at 513 ("[I]t seems plausible to argue that there is nothing *per se* admirable in mere obedience to the law, nor anything *per se* reprehensible in mere disobedience."); M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973) (adopting a skeptical approach).

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