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In the Wake of Thoreau: Four Modern Legal Philosophers and the Theory of Nonviolent Civil Disobedience

*Stephen R. Alton**

I. INTRODUCTION

It has been well over a century since Henry David Thoreau's influential essay *On the Duty of Civil Disobedience*¹ first appeared in print. What philosophy of civil disobedience did Thoreau express in that essay, and how does it compare with the theories of modern legal philosophers on the subject? An exploration of these issues is the purpose of this Article.

This Article opens with a discussion of Thoreau's philosophy of civil disobedience and then examines the ideas of four modern legal philosophers, Joseph Raz, Kent Greenawalt, John Rawls, and Ronald Dworkin, on the subject. Next, the Article compares the respective thinking of all five men regarding the circumstances that would justify the use of civil disobedience. To facilitate the comparison as well as to make it more relevant to the reader, the Article examines five related contemporary illustrations involving situations in which the use of civil disobedience might arguably be morally justified. This Article concludes with some general thoughts on the circumstances justifying the use of nonviolent civil disobedience.

The scope of this essay should be clarified. It is not this author's intent here to treat all possible forms of civil disobedience. For example, except in passing, violence as a form of civil disobedience

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1. HENRY D. THOREAU, *On the Duty of Civil Disobedience*, reprinted in WALDEN 85 (Bantam Classic 1981) (1849).

and possible justifications for its use will not be considered.² Nor, except in passing, will conscientious objection or refusal to serve in war be discussed.³ While such issues are important and relevant to the topic addressed, their discussion is beyond the scope of this Article's more modest endeavor. Finally, the Article does not claim to assert a new theory of nonviolent civil disobedience. Instead, the primary intention is to survey the philosophy of some, but by no means all, influential thinkers on a matter that has long been an important topic of public debate in the United States.

II. FIVE PHILOSOPHERS ON NONVIOLENT CIVIL DISOBEDIENCE

Henry David Thoreau has significantly influenced American thinking on nonviolent civil disobedience. While he does not present a full-blown, scholarly theory of civil disobedience, his position as an early writer and thinker on the subject, as well as his role as an early civil disobedient, make Thoreau's views both important to examine and interesting in their own right.

Joseph Raz, Kent Greenawalt, John Rawls, and Ronald Dworkin, all of whom are important contemporary legal philosophers, have written about nonviolent civil disobedience, generally in connection with such matters as the role of law in society, the theory of a legal system, and the place of individual rights.⁴ An examination of each man's thinking regarding nonviolent civil disobedience will distinguish the four philosophers, as well as Thoreau, and provide the foundation for some general conclusions about the circumstances in which such disobedience may be morally justifiable.⁵

A. Henry David Thoreau

The catalyst for Henry David Thoreau's essay *On the Duty of Civil Disobedience* was the author's purposeful failure to pay his poll tax⁶ in his hometown of Concord, Massachusetts, resulting in

2. See *infra* notes 52-53, 145 and accompanying text.

3. See *infra* notes 41, 134.

4. See JOSEPH RAZ, *THE AUTHORITY OF LAW* 233 (1979); Kent Greenawalt, *A Contextual Approach to Disobedience*, 70 COLUM. L. REV. 48 (1970) [hereinafter Greenawalt, *Disobedience*]; KENT GREENAWALT, *CONFLICTS OF LAW AND MORALITY* (1987) [hereinafter GREENAWALT, *CONFLICTS*]; JOHN RAWLS, *A THEORY OF JUSTICE* (1971); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

5. See *infra* part III.

6. The poll tax was not a tax levied on the right to vote, as its name might imply in a more modern context, but was a per capita tax levied on all males between the ages of 20 and 70. WALTER HARDING, *THE DAYS OF HENRY THOREAU* 200 (1965).

a one-night stint in the local jail.⁷ Thoreau's omission was a self-styled act of civil disobedience aimed at protesting the United States government's support of slavery⁸ and the war between the United States and Mexico.⁹

As expressed in his essay, Thoreau's philosophy of civil disobedience toward government is highly individualistic and libertarian. A major recurring theme is Thoreau's desire to be left alone by the government. The essay begins with a nod to Thomas Jefferson: "I heartily accept the motto,—'That government is best which governs least;' and . . . 'That government is best which governs not at all;' and when men are prepared for it, that will be the kind of

7. *Id.* at 199.

8. Thoreau was not the first Concordian to refuse to pay his poll tax as a protest against slavery. Bronson Alcott had done so three years earlier and had also been arrested for his refusal. Despite Alcott's pleas, his wife's family paid the tax on his behalf, both in that year and in subsequent years, in order to spare the family the embarrassment of having one of their own serve time in jail. *See id.* at 200-02.

9. The story of Thoreau's night spent in jail is legendary. One July evening in 1846, Thoreau was approached by Sam Staples, the local constable, tax collector, and jailer, who asked Thoreau about his poll tax and reminded him that, as the tax was seriously delinquent, Thoreau might have to be arrested if he persisted in his failure to pay. Thoreau had not paid his poll tax for several years, but Staples, having given the writer several warnings, had overlooked these previous failures. This time, Staples offered to intervene with the town's selectmen in order to have the tax reduced if Thoreau thought it too high; Staples even offered to pay the tax for Thoreau. The latter declined, responding that his refusal to pay was a matter of principle and that if Staples were going to arrest him, he could do so now. Staples thereupon complied with Thoreau's request, and Thoreau spent the night in jail.

Thoreau had extracted a promise from his mother not to interfere with his protest by paying the poll tax on his behalf. A heavily veiled woman, thought to be his Aunt Maria, paid the tax in the middle of the night without Thoreau's knowledge or approval, most likely to save the family from the indignity of having a member jailed. Annually, thereafter, either Thoreau's Aunt Maria or another relative paid his poll tax so that he would not be arrested again.

When morning came, Staples came to Thoreau's cell to release him; the prisoner was angry at having had his tax paid, thus cutting short his protest against slavery and the government that supported that institution. Initially, Thoreau refused to leave his cell, but Staples was insistent. After his release, Thoreau immediately set about to complete the errand, a visit to the local shoemaker, in which he had been engaged at the time of his arrest on the previous night. *Id.* at 199-206.

According to Harding, so many of Thoreau's fellow Concordians wanted to know why he had been jailed that he explained his reasons in a lecture delivered on January 28, 1848, at the Concord Lyceum. The lecture was successful enough to merit repetition three weeks later. In 1849, Elizabeth Peabody asked for Thoreau's permission to publish the text of the lecture in her new periodical, *Aesthetic Papers*. In response, Thoreau sent her the manuscript of the lecture, which was published under the title *Resistance to Civil Government*. The essay received its present title, *On the Duty of Civil Disobedience*, only when it was collected and published along with some of his other works in 1866, four years after Thoreau's death. *Id.* at 206-07.

government which they will have.”¹⁰ Thoreau’s calls, almost anarchical, appear to be for the abolition of government. Thoreau distinguishes himself from “no-government men,” however, by demanding “*at once* a better government” rather than no government.¹¹

What constitutes “a better government”? Thoreau theorizes that a truly free and enlightened state would acknowledge the people as the source of its authority and treat them accordingly.¹² For Thoreau, a better government is one which would be more just and one which would be more likely to leave him alone. Citizens should live simply so that there would be less need for the state’s services and protection and, by extension, less need for government itself.¹³ Without the need for services and protection, people would be within their rights not to support the state.¹⁴ Thoreau’s constant refrain is the desire to be left alone.

Another major theme is justice. Thoreau’s improved state would “be just to all men” and “treat the individual with respect as a neighbor.”¹⁵ Unfortunately, “[l]aw never made men a whit more just; and, by means of their respect for it, even the well-disposed are daily made the agents of injustice.”¹⁶ Under an unjust government, “the true place for a just man is also a prison.”¹⁷

In Thoreau’s estimation, the government’s injustice stemmed primarily from its perpetration of an unjust foreign war and more

10. THOREAU, *supra* note 1, at 85.

11. *Id.* at 86. Thoreau goes on to call for “every man [to] make known what kind of government would command his respect, and that will be one step toward obtaining it.” *Id.* These “better government” views appear to contradict directly Thoreau’s “no government” statement noted immediately above. See *supra* text accompanying note 10.

12. THOREAU, *supra* note 1, at 104. Thoreau further states:

I please myself with imagining a State at last which can afford to be just to all men, and to treat the individual with respect as a neighbor; which even would not think it inconsistent with its own repose, if a few were to live aloof from it, not meddling with it, nor embraced by it, who fulfilled all the duties of neighbors and fellow-men.

Id.

13. *Id.* at 95-96.

14. *Id.* at 96.

15. *Id.* at 104.

16. *Id.* at 86. The “injustice” to which Thoreau refers is, presumably, the injustice of the then-existing government, which sustained the institution of slavery and which, at the time of Thoreau’s refusal to pay his poll tax, was fighting what Thoreau believed to be an unjust war in Mexico.

17. *Id.* at 94. “The proper place to-day, the only place which Massachusetts has provided for her freer and less desponding spirits, is in her prisons, to be put out and locked out of the State by her own act, as they have already put themselves out by their principles,” continues Thoreau. *Id.*

importantly, its support of slavery.¹⁸ The federal government thus had lost its legitimacy, not only because it would not leave Thoreau alone, but also because it engaged in an unjust foreign war and supported slavery. The Massachusetts state government had also lost its legitimacy because, as part of the federal system, it supported the federal government.¹⁹

What should be done about such injustice? According to Thoreau, unjust laws should be resisted²⁰ because people best serve an unjust government by resisting it.²¹ If they will not or cannot change the wrongs perpetrated by the state, people at least have the duty to avoid supporting the government through the payment of taxes.²²

Thoreau disdains voting as a means of effecting change and berates those who do nothing more than vote—who “*in opinion*” oppose slavery and war “yet in effect do nothing to put an end to them.”²³ Citizens should “break the law” if the injustice inherent in government requires its citizens to be agents of injustice to others.²⁴ The problem with the state’s method of remedying injustice (presumably the majoritarian political process, though Thoreau never makes that explicit) is that these methods “take too much time, and a man’s life will be gone.”²⁵ Citizens, then, should

18. THOREAU, *supra* note 1, at 88. Thoreau states:

I cannot for an instant recognize that political organization as *my* government which is the *slave’s* government also.

. . . [W]hen a sixth of the population of a nation which has undertaken to be the refuge of liberty are slaves, and a whole country is unjustly overrun and conquered by a foreign army, and subjected to military law, I think that it is not too soon for honest men to rebel and revolutionize.

Id.

19. Thoreau’s references in his essay to the “government” are often rather general and could apply equally to the federal as well as the state government. As a result, it is sometimes difficult to determine exactly how Thoreau intended to apportion his blame between the two governments. Perhaps Thoreau did not himself have a precise notion of how to apportion such blame.

Remember that the poll tax which Thoreau refused to pay was due and payable not to the federal government, but to the Commonwealth of Massachusetts. Thus, Thoreau’s protest affected the United States government only indirectly.

20. THOREAU, *supra* note 1, at 92.

21. *Id.* at 87.

22. *Id.* at 91-92.

23. *Id.* at 89.

24. *Id.* at 92. As Thoreau states, “[l]et your life be a counter friction to stop the machine [i.e., the government]. What I have to do is to see, at any rate, that I do not lend myself to the wrong which I condemn.” *Id.*

25. *Id.* Thoreau poses the issue as follows:

Unjust laws exist; shall we be content to obey them, or shall we endeavor to amend them, and obey them until we have succeeded, or shall we transgress

not wait for the political process to work but, instead, should resist their government, should refuse to support it through their taxes, and should encourage its officials to resign their offices in order to further the cause of civil disobedience.²⁶ Almost incredibly, Thoreau states that he would like to conform and to pay his taxes, but that he needs a reason to do so and has not, as yet, found one.²⁷

Throughout his essay, Thoreau appeals to a higher law.²⁸ An authority higher than the Constitution and higher even than the Bible exists for Thoreau. That authority is the Ultimate Source, the Supreme Being,²⁹ and Thoreau bemoans the fact that legislators do not consult that higher source for guidance in, and as a check on, their actions.³⁰

them at once? Men generally, under such a government as this, think that they ought to wait until they have persuaded the majority to alter them. They think that, if they should resist, the remedy would be worse than the evil. . . . Why is it [i.e., the state] not more apt to anticipate and provide for reform? Why does it not cherish its wise minority? Why does it cry and resist before it is hurt? Why does it not encourage its citizens to be on the alert to point out its fault, and *do* better than it would have them?

Id.

26. THOREAU, *supra* note 1, at 94. Typically, Thoreau makes the case in passionate prose:

If a thousand men were not to pay their tax-bills this year, that would not be a violent and bloody measure, as it would be to pay them, and enable the State to commit violence and shed innocent blood. This is, in fact, the definition of a peaceable revolution, if any such is possible. If the tax-gatherer, or any other public officer, asks me, as one has done, "But what shall I do?" my answer is, "If you really wish to do any thing, resign your office." When the subject has refused allegiance, and the officer has resigned his office, then the revolution is accomplished.

Id. The "tax-gatherer," whom he advises to resign, is presumably Sam Staples.

27. *Id.* at 101. Thoreau explains,

I seek rather, I may say, even an excuse for conforming to the laws of the land. I am but too ready to conform to them. Indeed, I have reason to suspect myself on this head; and each year, as the tax-gatherer comes round, I find myself disposed to review the acts and position of the general and State governments, and the spirit of the people, to discover a pretext for conformity.

Id.

28. For example, Thoreau appeals to this higher law regarding the slavery issue:

I do not hesitate to say, that those who call themselves Abolitionists should at once effectually withdraw their support, both in person and property, from the government of Massachusetts and not wait till they constitute a majority of one, before they suffer the right to prevail through them. I think that it is enough if they have God on their side, without waiting for that other one. Moreover, any man more right than his neighbors constitutes a majority of one already.

Id. at 93.

29. *Id.* at 103.

30. *Id.* In this regard, Thoreau notes that "[f]or eighteen hundred years, though perchance I have no right to say it, the New Testament has been written; yet where is the

Thoreau's essay contains contradictions and impracticalities. For example, Thoreau calls for resistance to government, yet also asks to be left alone by government and to be allowed to live apart from it. How can one resist or change government if one simply withdraws and lives apart from it? Thoreau never explains this apparent contradiction. Moreover, he appeals to a higher authority on those occasions when such appeals are convenient. Yet, he never fully develops or integrates a theory of higher or natural law with his call for civil disobedience.³¹ Furthermore, however appealing they might seem in theory, Thoreau's libertarian calls for the least quantum of government are simply impractical in today's complex society.³²

After languishing in relative obscurity for decades, Thoreau's political philosophy of civil disobedience, replete with its inherent inconsistencies and paradoxes, found new followers in this nation's civil rights movement of the 1950s and 1960s.³³ "It would be difficult to overemphasize how much Thoreau's 'Civil Disobedience'

legislator who has wisdom and practical talent enough to avail himself of the light which it sheds on the science of legislation?" *Id.* Assuming that God is the "Ultimate source" of the New Testament, Thoreau fails to explain the inconsistency apparent here—i.e., how can God and the Bible somehow be *different* sources? Nor does he suggest how one might know God's general wishes other than through the Bible.

31. Robert B. Downs notes that "higher moral law, [as interpreted by Thoreau, implies that] individual conscience . . . should prevail against the dictates of government." ROBERT B. DOWNS, *State Versus Individual: Henry David Thoreau's Resistance to Civil Government*, in *BOOKS THAT CHANGED AMERICA* 78, 80 (1970).

32. Downs, while admitting that Thoreau's "extreme liberalism . . . glorifies individual free will, isolates the citizen from society, and frees him from all social and civic duties," nonetheless defends Thoreau's extreme philosophy as containing fundamental truth. "It is the citizen's duty to fight injustice in society, to do his share to ensure that injustices [sic] are not perpetuated or created by the state." *Id.* at 84.

See also LEO STOLLER, *Civil Disobedience: Principle and Politics*, in *THOREAU IN OUR SEASON* 40 (John H. Hicks ed., 1966). By the time of the Civil War, notes Stoller, the changed (and, presumably, in Thoreau's view, better) government of Abraham Lincoln did command Thoreau's support. *Id.* at 41. Stoller considers Thoreau's resistance to the state, as embodied in Thoreau's refusal to pay his poll tax, to be "an act of desperation, chosen because political circumstances had not yet allowed him a more effective one." *Id.*

33. MICHAEL MEYER, *SEVERAL MORE LIVES TO LIVE: THOREAU'S POLITICAL REPUTATION IN AMERICA* 153-54 (1977). Meyer notes:

Henry David Thoreau had a friend in Rosa Parks, and, more directly, a disciple in Martin Luther King. . . .

King was one of the first members of the civil rights movement to cite Thoreau as an inspiration and an ally, and as King gradually gained prominence in the movement so did Thoreau. . . . [B]efore King there had never been a highly visible, popular movement to sustain the connection [between Thoreau and civil rights] so that "Civil Disobedience" would be perceived as relevant to a large number of contemporary Americans.

Id.

was in the air in the early sixties for those involved in protest groups or interested in them," observes one writer.³⁴ The individualist, libertarian nineteenth century philosopher found a new audience, over a century later, for his strongly felt, if often impractical and self-contradictory, views on civil disobedience.

B. Joseph Raz

By asserting, in *The Authority of the Law*, that "there is no obligation to obey the law even in a good society whose legal system is just,"³⁵ Joseph Raz arguably appears even more radical than Thoreau. While persons may have "moral"³⁶ or "prudential"³⁷ reasons to obey the law, there is, in Raz's view, no general moral obligation to obey the law.³⁸ If a person does "respect" the law (in spite of the absence of any general requirement that one, in fact, have such respect), then such respect in and of itself provides that person with a general reason for obeying the law.³⁹ Even those who have respect for the law or who possess some moral, pruden-

34. *Id.* at 157. Meyer points out that, while Thoreau's reputation is as a proponent of peaceful civil disobedience, he was later interested in violent resistance to slavery, as advocated by John Brown. According to Meyer, Thoreau's support of violent resistance to slavery has largely been overlooked, because nonviolent resistance is more socially acceptable. Meyer asserts that:

the image of Thoreau as a pacifist is more useful than his image as a reformer who is willing, at least on paper, not only to die but also to kill for a cause. Official sanction was awarded Thoreau as a pacifist, but his support of Brown's violence was officially ignored.

Id. at 160.

In the late 1960s, protests against the Vietnam war and in favor of increased equal opportunity became more violent. There was something of a backlash against Thoreau at that time, as some writers identified with the political establishment saw that the philosopher's views on civil disobedience could naturally lead to violent resistance to the law. *Id.* at 179-84. However, Meyer asserts that he is unaware of any academic literary critic "who in print either vigorously endorsed Thoreau's views on violence in the later essays or who insisted that they were relevant and useful for solving the problems faced by the civil rights or the antiwar movements of the sixties. . . ." *Id.* at 188.

35. RAZ, *supra* note 4, at 233. This view is in contrast to that of Rawls on the issue of the duty to obey the law in a reasonably just society. See *infra* notes 123-28 and accompanying text.

36. RAZ, *supra* note 4, at 237.

37. *Id.* at 242. These "prudential reasons" include the risk of incurring legal or social sanctions (or both). *Id.* at 242-43.

38. *Id.* at 242. For Raz, prudential reasons to obey the law "do not provide an adequate foundation for an obligation to obey the law"; they "do not in themselves give rise to moral obligations." *Id.* at 244.

39. *Id.* at 250. Raz summarizes his thoughts regarding the obligation to obey the law as follows:

There is no general moral obligation to obey it, not even in a good society. It is permissible to have no general moral attitude to the law, to reserve one's judgment and examine each situation as it arises. But in all but iniquitous societies

tial, or other reason for obeying it may, under some circumstances, have a moral right to break the law.⁴⁰

Raz defines civil disobedience as "a politically motivated breach of law designed either to contribute directly to a change of law or of a public policy or to express one's protest against, and dissociation [sic] from, a law or a public policy."⁴¹ Civil disobedience, then, is a public action intended to have a political effect.⁴² The definition does not require, however, that the civilly disobedient actor be willing to submit to punishment for his or her act.⁴³ According to Raz, while the civilly disobedient act itself must be public (i.e., the occurrence of the act and the motivation behind it must be made known to the public), the actor need not voluntarily submit to punishment or even make known his or her identity.⁴⁴

Raz distinguishes between his assertions that civil disobedience is sometimes "right" and that "one has, under certain conditions, a right to [engage in] civil disobedience."⁴⁵ The latter assertion means that given those certain conditions, one has a right to engage in civil disobedience "even though one should not do so" in some normative sense.⁴⁶ This semantic difference has been the source of some confusion regarding the propriety of engaging in civil disobedience in various circumstances.⁴⁷

it is equally permissible to have "practical" respect for the law. For one who thus respects the law his respect itself is a reason for obeying the law.

Id. at 260.

40. *Id.* at 262. Raz notes that he "assume[s] that if there is such a moral right then there is a presumption for giving it legal recognition." *Id.* Indeed, this is an important assumption.

41. RAZ, *supra* note 4, at 263. In so defining "civil disobedience," Raz distinguishes it from, on the one hand, what he terms "revolutionary disobedience" (disobedience aimed at changing the government) and, on the other hand, "conscientious objection" (breach of law resulting from a moral prohibition against the actor's obedience to the law). *Id.* Raz admits that these categories may overlap and that the definitions themselves, while being "useful classification[s] of certain cases of disobedience," are not exhaustive nor do they necessarily "represent the ordinary meaning of the defined terms." *Id.* at 264.

42. *Id.*

43. *Id.* at 265.

44. *Id.* Compare Greenawalt's views on this point, *infra* notes 90-91, 116-18 and accompanying text. Greenawalt, in citing an example of a disobedient flouting Nazi law in order to save Jews from extermination, notes that such an act's effectiveness requires secrecy. This difference may be largely definitional, though, for while Greenawalt may label such an act "civil disobedience", Raz would probably classify it as a private act of "conscientious objection." See RAZ, *supra* note 4, at 263.

45. RAZ, *supra* note 4, at 267.

46. *Id.*

47. Compare Dworkin's discussion on a civil disobedient "right" to break the law, *infra* notes 168-77 and accompanying text.

Raz believes that some writers on the subject of civil disobedience have invested great intellectual effort in their attempts to define permissible forms of civil disobedience.⁴⁸ Other writers, he says, have typically placed several limitations on permissible forms of civil disobedience: (1) it should only be employed after all other means have failed; (2) it must be nonviolent; (3) it must be undertaken openly; (4) the actor must be willing to submit to prosecution and punishment; (5) it must be aimed at making known the righteousness of one's claims; and (6) it should not be employed for coercive or intimidating reasons.⁴⁹ Raz rejects most of these limitations, as well as the claim that civil disobedience should only be used as a measure of last resort.⁵⁰ He believes that in certain situations, civil disobedience is even preferable to effective lawful action.⁵¹ He also expressly rejects the claim that civil disobedience must be nonviolent. He argues that while nonviolent disobedience is preferable to violent disobedience, the reasons often given⁵² do not justify excluding violence as a means of achieving political ends in all situations; where an evil is great and possibly involves violence against innocent persons, violent disobedience may be warranted to combat it.⁵³

A major thesis propounded by Raz is that all states ought to be what he terms "liberal states," and in a liberal state, citizens have no moral right to civil disobedience. On the other hand, in "illiberal states," citizens normally have such a right.⁵⁴ A liberal state is one in which the "liberal principle" is "adequately recognized and protected in law"; conversely, an illiberal state is one in which this principle is not so recognized and protected.⁵⁵ The liberal principle is the right of every person to political participation in his or her society.⁵⁶ The law, however, should set limits on the liberal

48. RAZ, *supra* note 4, at 269.

49. *Id.*

50. *Id.* at 269; *see also supra* notes 41-44 and accompanying text.

51. RAZ, *supra* note 4, at 269. As an example, Raz poses the question: "Which is worse: a miners' march in London which perpetrates various offenses such as obstruction to the highway, or a lawful lengthy miners' strike?" *Id.*

52. Raz lists three such reasons: first, violence causes direct harm; second, even in situations where the use of violence might otherwise be justified, its use might encourage others to resort to violence in situations where the use of violence is not justified; third, "the use of violence is a highly emotional and explosive issue . . . and in turning to violence one is likely to antagonize potential allies and confirm in their opposition many of one's opponents." *Id.* at 267.

53. *Id.*

54. *Id.* at 272.

55. *Id.*

56. *Id.* at 271. Raz says that "[t]he right [to political participation] means nothing if

principle. These limits should be arrived at through the political process and should not seriously infringe on the people's right to participate.⁵⁷ With this as background, Raz asserts that members of an illiberal state have a right to civil disobedience, which roughly acts as a substitute for their unrecognized right to political participation.⁵⁸ In the liberal state, however, where one's right to political participation is recognized, a right to civil disobedience does not exist.⁵⁹

Even though no right to engage in civil disobedience exists in a liberal state, civil disobedience in protest against bad laws or against bad public policies may sometimes be justified.⁶⁰ In a liberal state, however, civil disobedience is "an exceptional political action."⁶¹ For Raz, the strength of civil disobedience as a means of protest in a liberal state derives from its exceptional character as a type of political action to which a citizen of such a state has no right.⁶² Therefore, Raz rejects the claim that civil disobedience is justified only as a last resort. First, "it may be less harmful than certain kinds of lawful action (for example, a national strike, or a long strike in a key industry or service)."⁶³ In addition, relying on civil disobedience only as a last resort "make[s] it a *regular* form of political action to which *all have a right*."⁶⁴

it does not mean the right of every member of a society to try to get his society to endorse, at least to some degree, political objectives which he supports, be they what they may." *Id.* at 271-72.

57. *Raz, supra* note 4, at 272. According to Raz, the liberal principle must be limited "because of the need to respect the same right in others and because the right to political participation is neither the only nor an absolute value and it has to be limited in order to safeguard other values." *Id.* at 271.

58. *Id.* at 272.

59. *Id.* at 272-73.

60. *Id.* at 273. In deciding whether to engage in civil disobedience in a liberal state, the absence of a "right" to such action does, nevertheless, affect the actor's decision in two ways:

First, he may be less than certain that his action is justified and therefore, caution may advise desisting from an action to which one may not be entitled. Secondly, civil disobedience is a very divisive action. It is all the more so because of the absence of a right to it (in liberal states). In taking a civilly disobedient action, one steps outside the legitimate bounds of toleration and this in itself adds to its disadvantages and should make one very reluctant to engage in it.

Id. at 275.

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* (emphasis added). Raz goes on to argue that the "exceptional character [of civil disobedience] lies precisely in the reverse of this claim, in the fact that it is (in liberal states) one type of political action to which one has no right." *Id.*

In summary, Raz rejects a general moral obligation to obey the law, even in a good society. In an illiberal state, citizens have a general right to engage in civil disobedience to the extent that their right to political participation is not recognized by the state, but in a liberal state, citizens have no general right to engage in civil disobedience. This rule does not mean that civilly disobedient acts are never morally justifiable in a liberal state; in fact, such acts may be justified as protests against bad laws or policies, to which even the liberal state is prone. Civilly disobedient actors need not necessarily be willing to submit to punishment or make their identities publicly known; by definition, though, the occurrence of an act of civil disobedience and the motivation behind it must be made known to the public. Moreover, while civil disobedience need not be only a measure of last resort, in a liberal state its strength as a means of protest lies "precisely" in its "exceptional" nature.

C. *Kent Greenawalt*

Two decades ago, in *A Contextual Approach to Disobedience*,⁶⁵ Kent Greenawalt defined civil disobedience as follows: "an illegal act . . . committed to change a law or policy, and better society; the act must be nonviolent and public; and the actor must intend to accept punishment."⁶⁶

Greenawalt begins his essay by questioning whether individuals have a moral duty to obey the law which overrides their moral right to engage in civil disobedience.⁶⁷ For Greenawalt, the answer depends, first, on what the probable effects of the disobedience will be and second, on whether those probable effects will be desirable.⁶⁸ Ultimately, an act of civil disobedience, "an act with social consequences," is "morally justified if it will probably contribute to the social good."⁶⁹

Greenawalt goes on to define at length each component of this assertion. An act is "morally justified" if it is "done by someone who is well-intentioned and well-informed, and [who] can judge

65. Greenawalt, *Disobedience*, *supra* note 4, at 48.

66. *Id.* at 60. One notices that under this definition, there is no requirement that the act of disobedience be aimed directly at the law that the actor seeks to change. Under Greenawalt's definition, Thoreau's disobedient act, his refusal to pay the poll tax, would qualify as civil disobedience even though Thoreau did not seek to change or overturn the poll tax law but rather to protest governmental policy on slavery and the Mexican-American War. The issue of whether the disobedience must be aimed directly at the objectionable law or policy will be further discussed at various points throughout this essay.

67. *Id.* at 48.

68. *Id.* at 48-49.

69. *Id.* at 50-51.

objectively.”⁷⁰ “Social good” is “synonymous with ‘desirable social consequences.’”⁷¹ “Contributions” to the social good include not only acts that will affirmatively add to the social good but also acts that will “minimize impairment of the social good.”⁷² Something that will “probably” contribute to this good is something so judged by “a reflective, intelligent, and well-informed” actor, ideally on the basis of all facts and arguments available before he or she acts.⁷³

Essentially, Greenawalt concludes that the occasions for using civil disobedience as an impetus for social change in the United States are rare.⁷⁴ In assessing the appropriateness of civil disobedience, he stresses that the use of nonviolence and the willingness to submit to punishment are crucial.⁷⁵ Finally, Greenawalt urges that those moved to civil disobedience proceed with great restraint and consideration.⁷⁶

Along the way to this conclusion, Greenawalt examines and rejects “some possible alternatives and qualifications” concerning the use of civil disobedience.⁷⁷ First, he examines and rejects the social contracts notion that “citizens have an overriding moral obligation to obey the law, because they have consented to be bound by it.”⁷⁸ The basis for his rejection is simply that the citizen’s relationship with the state is not one of contractual agreement. Though the citizen may accept some of the benefits of society, the acceptance in no way constitutes a promise or an obligation to perform in conformity with all of society’s laws.⁷⁹ Second, he examines the notion that citizens ought to obey the law because it would be impossible to predict the social consequences of disobedience and because an individual’s judgment concerning disobedience is unreliable when compared with the government’s justification for certain laws.⁸⁰

70. *Id.* at 50.

71. Greenawalt, *Disobedience*, *supra* note 4, at 51.

72. *Id.* at 53.

73. *Id.* at 53-54.

74. *Id.* at 76. Greenawalt goes on to say that he would “refrain from trying to lay down absolute rules,” admitting that his “own views are based on arguable assumptions about complex social facts.” *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 54.

78. *Id.*

79. *Id.* Assuming, however, that one were to accept the social contracts rationale, Greenawalt suggests that his test for judging the moral justification of civil disobedience could be modified as follows: will the act probably “‘make a contribution to the social good large enough to outweigh the independent moral duty to obey’ the law”?” *Id.*

80. *Id.* at 57.

Greenawalt concludes that while "the fallibility of individual human judgment is highly relevant in determining the proper occasions for disobedience," this fact should not preclude the use of disobedience on every occasion.⁸¹

Greenawalt also engages in "four broad inquiries" regarding the "major kinds of distinctions drawn among illegal acts by those who discuss disobedience."⁸² These inquiries are as follows: (1) the damage that might result to the interests of others from the disobedient act, (2) the reason for the disobedience, (3) the actor's willingness to accept punishment, and (4) the form of government under which the disobedience takes place.⁸³

For Greenawalt, the first inquiry, the kind and degree of injury done to others, is an important factor in determining whether the disobedience is justified.⁸⁴ Greenawalt concludes that any disobedient act that significantly interferes with another's interest can only be justified if it is supported by compelling reasons.⁸⁵

Whatever the reason for disobedience, the disobedient act need not be directed exclusively at the law or policy that the actor seeks to change.⁸⁶ First, it is often difficult to determine the exact law or policy that the disobedient person seeks to protest; thus, the application of any rule permitting nonviolent disobedience which is directed only at the challenged law or policy might be "elusive."⁸⁷ More importantly, often the violation of another law may result in less harm than would the violation of the law that is the true target of the disobedience.⁸⁸ At most, says Greenawalt, one might need stronger grounds to justify a disobedient act that is not directed at the unjust law or policy than one would need to justify a disobedient act directed at the law or policy itself.⁸⁹

81. Greenawalt, *Disobedience*, *supra* note 4, at 58.

82. *Id.* at 61.

83. *Id.* at 61-75.

84. *Id.* at 63.

85. *Id.* at 66.

86. *Id.* at 67.

87. *Id.* For example, "[i]f someone who violates the draft law thinks the Vietnam war is immoral but accepts the need for a peacetime draft, is the draft law the focus or target of the protest?" *Id.*

88. *Id.* at 67-68. For example, "[i]f Negroes 'sit-in' at a voluntarily segregated restaurant, do they violate the general trespass law (to which they do not object) or the existence of legal principles that allow segregation?" *Id.* at 67.

89. *Id.* at 68. The notion that the disobedient act must actually violate the challenged law or policy is somewhat problematic when the challenge is to a public policy as opposed to a law. Assuming, *arguendo*, that in the process of committing a civilly disobedient act a person were morally required to violate only the law to which he or she objected, it is difficult to translate such a requirement into the situation in which a gov-

Greenawalt also asserts that a morally justifiable act of civil disobedience does not necessarily require that the actor be willing to accept punishment.⁹⁰ Nevertheless, Greenawalt cites four very persuasive reasons why a disobedient's willingness to accept punishment may contribute to a moral justification for his or her act. First, such a willingness may reduce the level of frustration, resentment, and insecurity felt by those whose interests have been injured by the act. Second, such a willingness serves to test the strength of the actor's convictions. Third, this willingness demonstrates to others the depth of the actor's convictions. Finally, the willingness reaffirms the fact that the actor is a member of the community, and it may make massive repression (which may cause great harm and undo the social good of the act) less likely.⁹¹

With respect to the fourth inquiry, the form of government under which the disobedience takes place, Greenawalt rejects the suggestion that civil disobedience is never justified in a democracy.⁹² He admits, however, that in a democracy few occasions may exist for morally justified civil disobedience because, where leaders are publicly elected and public policies are affected by open discussion and debate, it is more probable that laws will be in the public's interest.⁹³ Thus, in a democratic state, it may be more difficult, though by no means impossible, to justify individual acts of civil disobedience.

Greenawalt also raises the issue of when it might be morally jus-

ernment policy is being challenged. After all, how does a private citizen go about directly violating a *policy* as opposed to a *law*?

90. Greenawalt, *Disobedience*, *supra* note 4, at 70. For example, an individual helping Jews to escape from Nazi Germany could not have accepted punishment. For such an individual to have given himself or herself up would have made it impossible for such aid to continue; thus, it would have been "perfectly moral" for this individual to try to avoid punishment. *Id.* An example such as this one provides a strong counterargument to claims that the disobedient must always be willing to accept punishment for his or her acts in order for such acts to be morally justified.

91. *Id.* at 70-71.

92. *Id.* at 72. Greenawalt once again resorts to the example of Nazi Germany. If Hitler had been popularly elected in 1941 as the absolute ruler of Germany for a four-year term, or if a majority of Germans had approved the policy of genocide, there would still have been great need for civil disobedience; indeed, in Greenawalt's opinion, there would have been justification for *violent* action. A democratic majority may also simply be unjust: "Given the sad history of mankind, . . . I lack confidence that a democratic majority would never approve policies wicked enough to justify violent disobedience." *Id.*

93. *Id.* Compare the discussion of Raz's viewpoint on the justification of civil disobedience in a liberal state, *supra* notes 54-64 and accompanying text; Rawls's thoughts on this issue, *infra* notes 123-28 and accompanying text; and Dworkin's views on this point, *infra* notes 174-77 and accompanying text.

tifiable to disobey a statute that a citizen believes to be unconstitutional.⁹⁴ For Greenawalt, the more likely it is that a court will strike down the challenged law as unconstitutional, the more likely it is that the disobedient, in violating that law, will contribute to the social good and, hence, the more morally justifiable the act would be according to this particular criterion.⁹⁵ Moreover, Greenawalt makes it clear that he does not believe that efforts to change the challenged law through the legislative process must have first been unsuccessfully attempted before a person resorts to morally justifiable civil disobedience.⁹⁶

By the time *Conflicts of Law and Morality*⁹⁷ appeared in 1987, Greenawalt had refined and revised some of the assertions made in his earlier essay. In *Conflicts*, Greenawalt is more interested in working out a broader and more general theory of when one should follow the dictates of one's conscience rather than whether there exists any general duty to obey the law.⁹⁸ He also reexamines a number of issues raised in his earlier essay that bear on the moral justifiability of civilly disobedient acts.

First, he reexamines the justification for disobedience in instances in which one believes that a law is unconstitutional.⁹⁹ He considers three situations. In the first, the actor is reasonably certain that the claim of unconstitutionality will be upheld.¹⁰⁰ In this situation, not only does one have no obligation to obey the law, but one has an affirmative obligation to disobey it and bring it under

94. Greenawalt, *Disobedience*, *supra* note 4, at 77.

95. *Id.*

96. *Id.* According to Greenawalt, such efforts "are usually drawn out and uncertain of success, and repeal does not have the same effect on the law's development as the establishment of a constitutional principle." *Id.*

97. GREENAWALT, *CONFLICTS*, *supra* note 4.

98. In this regard, he states:

Morally acceptable reasons for disobedience include overriding obligations to others, conscientious objection to performing required acts, belief that disobedience will promote justice or welfare, and, occasionally, strong personal motivations. Arrayed against these sorts of reasons are nonconsequential duties and consequential reasons in favor of obeying laws and whatever independent moral reasons support doing the acts the law requires.

Id. at 226-27. Greenawalt devotes much of his book to the issue of whether there exists a general duty to obey the law. After reviewing a number of grounds that may create duties to obey the law, Greenawalt concludes that there is no "single ground of duty to obey all laws, or all just laws, on every occasion of their application," although there are "multiple grounds for obedience in various circumstances." *Id.* at 207. See generally *id.* chs. 1-8.

99. *Id.* at 227. Compare the thoughts of Dworkin, *infra* notes 181-90 and accompanying text. See also *supra* notes 94-96 and accompanying text.

100. GREENAWALT, *CONFLICTS*, *supra* note 4, at 227.

judicial review.¹⁰¹ In the second situation, disobedience to a challenged law is justified where the actor believes that the constitutionality of the law is doubtful, but understands that a legal challenge will probably fail.¹⁰² The rationale here is that serious, though probably losing, challenges are a "healthy part of the legal order."¹⁰³ In the third situation, however, the actor knows that the law is constitutional and will be upheld, but has a firm personal feeling about the law.¹⁰⁴ In this case, that strong personal feeling does not, in and of itself, justify the disobedient act.¹⁰⁵

Greenawalt appears to have changed his ideas on whether an effort to change the challenged law or policy through the political process is a prerequisite to justifiable disobedience. In his essay, Greenawalt expressed his belief that such efforts, while carrying some weight in the determination of the moral justification of a disobedient act, are not absolutely prerequisite to morally justifiable civil disobedience.¹⁰⁶ Greenawalt now believes that under most circumstances, a person should pursue lawful political remedies before turning to disobedience.¹⁰⁷

Greenawalt revisits his "four broad inquiries"¹⁰⁸ and reexamines the relationship between the effect of civil disobedience on the interests of others and the moral justification for such action.¹⁰⁹ According to Greenawalt, violations of law may affect third parties' interests in one or more of three ways: illegal acts may (1) cause inconvenience to others, (2) interfere with the property rights of others, or (3) cause physical harm to others.¹¹⁰ The more serious

101. *Id.* "Any reasonable view of an individual's duties in a political order providing judicial review must include the appropriateness of testing the validity of laws that appear invalid. No otherwise applicable deontological principle would require obedience when disobedience is the only avenue for testing validity." *Id.* Greenawalt continues that such a challenge serves the utilitarian objective of eliminating improper legal norms; moreover, "the existence of the legal claim will also affect perceptions of a violation, making it appear as something other than a challenge to the legal order." *Id.* at 227-28.

102. *Id.* at 228.

103. *Id.* Furthermore, such challenges sometimes *do* succeed. *Id.*

104. *Id.*

105. *Id.* Dworkin appears to differ from Greenawalt as to this third situation. See *infra* notes 189-90 and accompanying text.

106. Greenawalt, *Disobedience*, *supra* note 4, at 72. See also *supra* note 96 and accompanying text.

107. GREENAWALT, *CONFLICTS*, *supra* note 4, at 229. Greenawalt still rejects the need for "patently futile" pursuit of lawful alternatives. *Id.* He notes, however, that even if one is ultimately justified in disobedience, "one at least owes it to one's fellow [sic] to try to avoid that impasse by persuading them to change their minds." *Id.*

108. See *supra* notes 82-83 and accompanying text.

109. GREENAWALT, *CONFLICTS*, *supra* note 4, at 236.

110. *Id.* at 237.

the impact of the illegal acts is on the interests of others, the greater the moral reasons are to refrain from engaging in the illegal acts.¹¹¹ Moreover, the less probable it is that any good would be achieved as a result of the illegal acts, the greater that good would have to be to outweigh potential harm to third parties.¹¹²

Greenawalt rejects the notion that civil disobedience is never justified when the law being violated is not itself the target of protest.¹¹³ He admits that disobedience is more easily justified when a close nexus exists between the injustice being protested and the law being disobeyed.¹¹⁴ However, he repeats his point that it is sometimes difficult to decide whether the disobedient acts are actually aimed at the challenged law; the "perplexities" of applying any absolutist standard in this regard "highlight the basic indefensibility of a sharp distinction of this kind."¹¹⁵

Once again, Greenawalt rejects the notions that acts of civil disobedience must be open and that the actor must be willing to submit to punishment.¹¹⁶ He notes that because "applications of some laws are not reached by any obligation to obey," many violations of such laws will not be open. Furthermore, the effectiveness of certain justifiable forms of civil disobedience may depend upon secrecy.¹¹⁷ He notes, however, that the actor's willing acceptance of punishment may have a number of salutary effects.¹¹⁸

Finally, Greenawalt decides that nonviolent disobedience need

111. *Id.*

112. *Id.* at 238.

113. *Id.* at 235; *see also supra* notes 86-89 and accompanying text.

114. GREENAWALT, *CONFLICTS*, *supra* note 4, at 235. Greenawalt further states that "[t]he force of the example of disobedience will be more contained and the interests that are compromised by disobedience will be less likely to warrant protection" when a nexus exists between the law being protested and the law being violated. *Id.*

115. *Id.* at 235-36. Greenawalt continues:

If justifiable protests were limited in the way . . . suggested, some laws and policies—for example, a highly unjust definition of treason or an egregious use of military force abroad—might be entirely immune from law-violating protest, as would be any injustice that results from a failure to enact laws to prevent great wrongs.

Id. at 236. Rawls is in agreement on this point. *See infra* text accompanying notes 137-39.

116. *See supra* notes 90-91 and accompanying text.

117. GREENAWALT, *CONFLICTS*, *supra* note 4, at 238-39. As an example of the latter type of situation, Greenawalt asserts that "[r]elieving people from the bonds of slavery justifies secretive violation of law"; he admits, though, that slavery is "an extreme example." *Id.* at 239.

118. *Id.* at 238-40. These salutary effects include: the mitigation of the force of a violation of a deontological duty; the reduction of the level of frustration, resentment, and insecurity felt by those whose interests have been affected; the demonstration of the strength of the actor's convictions, both to himself or herself and to others; and the ac-

not be directed at the majority's sense of justice or be responsive to substantial injustice in order to be justified.¹¹⁹ Civil disobedience may be justified as a protest against present or potential harms that derive simply from erroneous judgments.¹²⁰ Greenawalt also argues that the appeal of civil disobedience to the majority's sense of justice "may be important to measuring the magnitude of claims to obey and disobey," but it does not mark "a critical dividing line between justifiable civil disobedience and other disobedience."¹²¹

For Greenawalt, then, an act of civil disobedience is morally justifiable if it will probably contribute to the social good. However, if the act would interfere with the interests of others, the reasons for the act must outweigh such interference. It is not necessary that the disobedient act be directed at a law or policy that the actor seeks to change. Furthermore, it is not necessary that it be committed openly or that the actor willingly submit to punishment. Moreover, Greenawalt rejects the notion that civil disobedience is never justified in a democratic state, but he has come to believe that the actor should pursue lawful alternatives before resorting to civilly disobedient acts.

D. John Rawls

John Rawls sets out his theory of civil disobedience in *A Theory of Justice*.¹²² He asserts that in a reasonably just society, the citizen has a general duty to comply with even unjust laws.¹²³ However, grossly unjust laws should not be obeyed. Gross injustice can arise either in a nearly just society when laws and policies vary from normative standards of justice, or in an unjust society when laws

knowledge of a commitment to the fundamentals of the existing legal order. *Id.* at 239-40. Compare *supra* text accompanying note 91.

119. GREENAWALT, *CONFLICTS*, *supra* note 4, at 230.

120. *Id.* at 234.

121. *Id.* at 235. Greenawalt admits that a "sensible approach to disobedience must calibrate the degree of injustice or likely harm to the magnitude of the disobedience. Much less is needed to justify minor localized disobedience than major illegal demonstrations." *Id.*

122. RAWLS, *supra* note 4.

123. *Id.* at 350-51. Rawls says:

The injustice of a law is not, in general, a sufficient reason for not adhering to it any more than the legal validity of legislation (as defined by the existing constitution) is a sufficient reason for going along with it. When the basic structure of society is reasonably just . . . , we are to recognize unjust laws as binding provided that they do not exceed certain limits of injustice.

Id. Compare with Raz's opposite view that there is no general moral obligation to obey the law even in a good society with a just legal system. See *supra* notes 36-40 and accompanying text.

and policies conform to that society's own unjust norms.¹²⁴

In a nearly just society, one normally has the duty to comply with even unjust laws.¹²⁵ This duty arises by virtue of the duty to support a just constitution.¹²⁶ However, there are certain limits to this duty. For example, there is no duty to comply with an unjust law when the burden is not distributed equally but instead falls inequitably on certain permanent minorities.¹²⁷ Similarly, one has no duty to comply with an unjust law that infringes on certain basic liberties guaranteed to the people.¹²⁸

Rawls submits that some form of majority rule is the best way to ensure that just legislation and policies will be enacted and followed in society.¹²⁹ Nevertheless, there is no guarantee that every law enacted by the majority will be just.¹³⁰ In fact, Rawls acknowledges the impossibility of characterizing an ideal legislative process that would always enact just laws.¹³¹ He posits that just laws and policies are those enacted by rational legislators following the principles of justice and acting under the authority and constraints of a just constitution.¹³² However, while it is possible (and even probable) that an unjust law or policy will be enacted in a society that is nearly just, and while a citizen may normally be duty-bound to comply with it, the citizen need not *believe* that the law is just.¹³³

124. RAWLS, *supra* note 4, at 352.

125. *See id.* at 353.

126. *Id.* at 354.

127. *Id.* at 355. Rawls further states:

[I]n the long run the burden of injustice should be more or less evenly distributed over different groups in society, and the hardship of unjust policies should not weigh too heavily in any particular case. . . . [W]e submit our conduct to democratic authority only to the extent necessary to share equitably in the inevitable imperfections of a constitutional system. Accepting these hardships is simply recognizing and being willing to work within the limits imposed by the circumstances of human life.

Id.

128. *Id.*

129. RAWLS, *supra* note 4, at 356.

130. *Id.*

131. *Id.* at 360.

132. *Id.* at 357.

133. *Id.* at 360. Rawls notes: "[I]f the law actually voted is, so far as one can ascertain, within the range of those that could reasonably be favored by rational legislators conscientiously trying to follow the principles of justice, then the decision of the majority is practically authoritative, though not definitive." *Id.* at 362.

Yet even in a "reasonably just society" a citizen may refuse to comply with "unjust laws" that "exceed certain limits of injustice." *Id.* at 351. For Rawls, "the principles of right . . . may justify noncompliance in certain situations, all things considered." *Id.* at 352. Justification for noncompliance "depends on the extent to which laws and institutions are unjust." *Id.* *See also supra* notes 123-28 and accompanying text.

With the above as background, Rawls proceeds to define 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."¹³⁴ Rawls's theory of civil disobedience is designed only for nearly just societies, ones that are generally well-ordered but where injustices nevertheless do occur.¹³⁵ Rawls admits that it is difficult to determine exactly when, in a nearly just society, one has a right to engage in civil disobedience.¹³⁶

Rawls discusses a number of what he calls "glosses" on his definition of civil disobedience. First, the civilly disobedient actor

134. RAWLS, *supra* note 4, at 364. By his own admission, Rawls's definition of civil disobedience does not include the concept of "conscientious refusal," which Rawls defines as the "noncompliance with a more or less direct legal injunction or administrative order." *Id.* at 368. For him, conscientious refusal, unlike civil disobedience, "is not a form of address appealing to the sense of justice of the majority." *Id.* at 369. Nor is conscientious refusal "necessarily based on political principles; it may be founded on religious or other principles at variance with the constitutional order. Civil disobedience is an appeal to a commonly shared conception of justice, whereas conscientious refusal may have other grounds." *Id.*

Rawls admits that "it is customary to think of civil disobedience in a broader sense as any noncompliance with law for conscientious reasons, at least when it is not covert and does not involve the use of force." *Id.* at 368. He notes that Thoreau's conception of civil disobedience, which includes what Rawls has termed "conscientious refusal," is "characteristic, if not definitive, of the traditional meaning" of civil disobedience. *Id.*

Rawls's definition of civil disobedience also excludes violence. For Rawls, "[c]ivil disobedience . . . is clearly distinct from militant action and obstruction; it is far removed from organized forcible resistance." *Id.* at 367. Civil disobedience, then,

falls between legal protest and the raising of test cases [which he distinguishes from civil disobedience] on the one side, and conscientious refusal and the various forms of resistance on the other. In this range of possibilities it stands for that form of dissent at the boundary of fidelity to law.

Id.

Rawls does not conclude, however, that violent disobedience is *never* justified. *See id.* at 366; *see also infra* note 145.

135. RAWLS, *supra* note 4, at 363. A state of near-justice requires, in his estimation, a democratic regime, and Rawls asks, "[a]t what point does the duty to comply with laws enacted by a legislative majority (or with executive acts supported by such a majority) cease to be binding in view of the right to defend one's liberties and the duty to oppose injustice?" *Id.*

Because, by hypothesis, Rawls's theory of disobedience applies only to democratic, nearly-just regimes, there is never a question of whether civil disobedience is justified in a corrupt or unjust regime. If any means are justified in attempts to transform or overturn such a regime, then certainly nonviolent opposition would be justified. *Id.*

136. Rawls notes:

Precise principles that straightway decide actual cases are clearly out of the question. Instead, a useful theory defines a perspective within which the problem of civil disobedience can be approached; it identifies the relevant considerations and helps us to assign them their correct weights in the more important instances.

Id. at 364.

need not breach the very law being protested.¹³⁷ It would be impossible, or at least impracticable, to breach a law to protest a government's foreign policy or to protest a harsh and vague statute against treason.¹³⁸ Moreover, in some situations it may be wiser to contravene a minor law (such as a traffic ordinance or a trespass law) as a means of protesting a perceived unjust major law.¹³⁹ Second, the actor must consider the civilly disobedient act to be in fact contrary to law.¹⁴⁰ The act that merely raises a test case does not fall within Rawls's definition of civil disobedience.¹⁴¹ Third, in seeking a moral justification for acts of civil disobedience, the actor is appealing not to principles of personal morality or religion (let alone self-interest), but rather to "the commonly shared conception of justice that underlies the political order."¹⁴² Finally, civil disobedience must be a public and nonviolent act.¹⁴³ To engage in violent acts likely to injure others is to obscure the righteous message sought to be communicated.¹⁴⁴ Rawls admits, however, that at times forceful resistance may be considered, but only after peaceful appeals have failed.¹⁴⁵

Having defined civil disobedience, Rawls discusses when acts of civil disobedience may be morally justified. He believes that civilly disobedient acts are justified only if the actor has targeted his or her acts to "instances of substantial and clear injustice"¹⁴⁶ and has

137. *Id.*

138. *Id.* at 365.

139. *Id.* On this point, Rawls is squarely in agreement with Greenawalt. *See supra* notes 86-89, 113-15 and accompanying text.

140. RAWLS, *supra* note 4, at 365.

141. *Id.* Dworkin would disagree, since he includes acts that raise test cases within his conception of civil disobedience. *See supra* notes 181-90 and accompanying text. Greenawalt is in line with Dworkin on this point. *See supra* notes 94-96 and accompanying text.

142. RAWLS, *supra* note 4, at 365. In this instance, Rawls particularly differs from Greenawalt. *See supra* notes 119-21.

143. RAWLS, *supra* note 4, at 366.

144. *Id.* He explains that "any interference with the civil liberties of others tends to obscure the civilly disobedient quality of one's act." *Id.*

145. *Id.* Another reason for his requirement that civil disobedience be nonviolent is that it

expresses disobedience to law within the limits of fidelity to law, although it is at the outer edge thereof. The law is broken, but fidelity to law is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one's conduct.

Id. On these points, Rawls would find himself at odds with Dworkin on the issue of fidelity to law (*see infra* notes 160-77 and accompanying text) and with Greenawalt on the issue of willingness to accept the legal consequences of the act (*see supra* notes 90-91, 116, and accompanying text).

146. RAWLS, *supra* note 4, at 371-72. As a qualifier, Rawls adds that these acts

unsuccessfully made a good-faith effort to redress the injustice through legal means.¹⁴⁷ Additionally, Rawls asserts that civil disobedience may fail when a number of groups engage in justifiable civil disobedience at the same time. In such a situation, serious disorder and a breakdown in respect for the law would result or the general public would cease to understand and handle the dissent.¹⁴⁸ Finally, Rawls lists two more conditions that may limit civilly disobedient acts. First, consideration should be given to the possibility of injury to third parties;¹⁴⁹ second, even if the conduct would otherwise be justified, wisdom or prudence might advise against resorting to civilly disobedient acts.¹⁵⁰

The role of civil disobedience in a nearly just society is an important one. According to Rawls, civil disobedience can be a stabilizing factor in a constitutional state. Reasoned and thoughtful resistance through civil disobedience can serve as a check on the system and thus prevent serious departures from justice.¹⁵¹ When a person engages in civil disobedience, he or she is appealing to the majority's sense of justice and is serving notice that he or she be-

should, preferably, be directed at those substantial and clear injustices that "obstruct the path to removing other injustices." *Id.* at 372.

147. *Id.* at 373. These appeals need not, however, have been exhausted, nor need they have been engaged in if they would clearly have been fruitless or if there had been certain "extreme" cases of injustice. *Id.* These qualifications serve to bring Rawls's views somewhat closer to those of Greenawalt on the requirement of appeal to the majority. See *supra* notes 106-07 and accompanying text.

148. RAWLS, *supra* note 4, at 373-74. Greenawalt expresses skepticism about this third principle. See GREENAWALT, CONFLICTS, *supra* note 4, at 233. This third principle will be referred to hereinafter as the "overload principle."

Of course, one might argue that if there were so many groups that were justified in engaging in civil disobedience but for conditions coinciding with this "overload principle," such a situation could be evidence that the society was not nearly so just as might originally have been believed.

Admittedly, one might conceive of a nearly-just society enacting legislation that is grossly unjust to a large number of groups so that each group would have the right to engage in civil disobedience without also imagining that such legislation in and of itself rendered the otherwise nearly-just society unjust.

Moreover, Rawls's call for coordination and cooperation among the groups entitled to engage in civil disobedience, so as to bring the level of dissent within that which would be tolerable under the "overload principle," seems overly optimistic. Rawls admits that, while he does not believe this task to be impossible, such cooperation and coordination would be difficult. See RAWLS, *supra* note 4, at 374-75.

149. RAWLS, *supra* note 4, at 375. Rawls does not say how much allowance should be made for the possibility of third party injury or exactly how this factor should weigh in the balance of justification. He admits that his theory does not deal with such "practical considerations." See *id.* at 376.

150. *Id.* at 376. With respect to the wisdom or prudence of engaging in civil disobedience, Rawls explains that "[w]e may be acting within our rights but nevertheless unwisely if our conduct only serves to provoke the harsh retaliation of the majority." *Id.*

151. *Id.* at 383.

lieves that "the conditions of free cooperation are being violated."¹⁵²

Civil disobedience is effective only in a nearly just society, for in an unjust society, where there is no sense of justice to appeal to, the majority may simply be compelled to crush any dissenting voices.¹⁵³ In a nearly just society, though, ruthless tactics aimed at quelling protesters would not be politically viable.¹⁵⁴ Thus, in a nearly just society, the majority may even abandon its position and adopt the proposals of the dissenters as it realizes the indefensibility of its unjust advantages.¹⁵⁵ This is how Rawls believes civil disobedience ought to function in a nearly just society.¹⁵⁶ Even in a nearly just society, however, the danger that civil disobedience will grow into widespread civic turmoil and divisive strife is ever-present. Yet, Rawls notes that ultimately, the responsibility for such division rests not on the protestors, but on those in authority who have maintained unjust institutions.¹⁵⁷

In summary, Rawls maintains that in a nearly just society, a general duty to comply, even with unjust laws, exists. In such a

152. *Id.* at 382-83. "We are appealing to others to reconsider, to put themselves in our position, and to recognize that they cannot expect us to acquiesce indefinitely in the terms they impose upon us." *Id.* at 383. "If after a decent period of time to allow for reasonable political appeals in the normal way, citizens were to dissent by civil disobedience when infractions of the basic liberties occurred, these liberties would, it seems, be more rather than less secure." *Id.* at 384.

153. *Id.* at 386-87.

154. RAWLS, *supra* note 4, at 387.

155. *Id.*

156. Rawls admits that his theory of civil disobedience is risky, for it fails to delineate exactly what circumstances would justify disobedient action. It might, he says, be argued that his theory

invites anarchy by encouraging everyone to decide for himself [when resort to civil disobedience is justified], and to abandon the public rendering of political principles. The reply to this is that each person must indeed make his own decision. . . . The citizen is autonomous yet he is held responsible for what he does. If we ordinarily think that we should comply with the law, this is because our political principles normally lead to this conclusion. . . .

But while each person must decide for himself whether circumstances justify civil disobedience, it does not follow that one is to decide as one pleases. It is not by looking to our personal interests, or to our political allegiances narrowly construed, that we should make up our minds. To act autonomously and responsibly a citizen must look to the political principles that underlie and guide the interpretation of the constitution. He must try to assess how these principles should be applied in the existing circumstances. If he comes to the conclusion after due consideration that civil disobedience is justified and conducts himself accordingly, he acts conscientiously. And though he may be mistaken, he has not done as he pleased.

Id. at 389 (citation omitted).

157. *Id.* at 390-91.

society, civil disobedience is a public, nonviolent, illegal act aimed at changing a law or government policy. While the disobedient act need not breach the law objected to, the actor must understand that his or her act is in fact contrary to law (that is, for Rawls, the purpose of the disobedient act must be more than the mere raising of a test case), and he or she must commit the act openly and be willing to accept resultant punishment. Furthermore, any civilly disobedient act must appeal to the majority's sense of justice and, as a general rule, may be resorted to only after appeals to the majority have met, or are deemed likely to meet, with failure. Finally, in Rawls's estimation, the possibility of injury to third parties and the dictates of prudence may make acts of civil disobedience improper.

E. Ronald Dworkin

Ronald Dworkin sets forth his views on civil disobedience in *Taking Rights Seriously*,¹⁵⁸ where he concludes that a citizen does have a "moral right to break a law."¹⁵⁹

Under what circumstances is a person justified in breaking the law? Dworkin begins his search for the answer by examining the views of those whom he respectively calls "conservatives" and "liberals."¹⁶⁰ Liberals view acts of civil disobedience more sympathetically than do conservatives, who, according to Dworkin, generally do not approve of any act of disobedience.¹⁶¹ Yet, both sides would agree that in a democracy citizens have a general moral duty to obey all laws, even if they believe that some laws are wrong and ought to be changed.¹⁶² This general moral duty, which citizens owe to one another is not, however, an absolute duty because even just societies may produce unjust laws that would conflict with a citizen's personal or religious philosophy.¹⁶³ In such instances, a citizen is entitled to do what he or she thinks is right; however, if his or her actions entail the transgression of a law, then he or she must submit to the punishment the state imposes. This is "in recognition of the fact that his duty to his fellow citizens was over-

158. DWORKIN, *supra* note 4.

159. *Id.* at 186.

160. *Id.* Dworkin ignores the beliefs of the two small minorities on either extreme, one of which would say that a person never has a moral duty to obey the law, and the other of which would say that a person never has a moral right to disobey the law. *Id.* at 186-87.

161. *Id.* at 186.

162. *Id.*

163. *Id.*

whelmed but not extinguished by his religious or moral obligation."¹⁶⁴ This position, which Dworkin argues is espoused by both liberals and conservatives, closely comports with Rawls' views on the moral duty to obey the law.¹⁶⁵

For Dworkin, the majority position, held by liberals and conservatives alike, raises a "monstrous contradiction": if "a man has a right to do what his conscience tells him he must, then how can the State be justified in discouraging him from doing it" via the medium of punishment?¹⁶⁶ The irony of this contradiction is heightened by the fact that liberals and conservatives, both having decided that a citizen must follow the dictates of his or her conscience, so often disagree over when the citizen's decision to disobey has moral validity.¹⁶⁷

Dworkin believes that the explanation for this contradiction can be found in the two different ways that the word *right* is used.¹⁶⁸ First, the word *right* may be used in what Dworkin terms its "strong" sense. In this case, if a person has a right, then it is wrong to interfere with the exercise of that right.¹⁶⁹ On the other hand, if one has a right in its "weaker" sense, one is not wrong to exercise it, but neither is it wrong for another to interfere with the action.¹⁷⁰

For Dworkin, then, the question of whether one ever has the right to break the law is inherently ambiguous.¹⁷¹ Does the answer to the question mean that one never has a right in the strong sense to break a law for which the government could prosecute him, or does it mean that one may be right in the weaker sense in breaking the law even though the government would prosecute him?¹⁷² When the word *right* is used in this weaker sense, liberals and conservatives run into disagreement. Both agree that sometimes a citizen does no wrong by breaking the law when his or her conscience

164. *Id.*

165. See *supra* notes 123-28 and accompanying text.

166. DWORKIN, *supra* note 4, at 187.

167. *Id.*

168. *Id.* at 188.

169. *Id.* As an example of this use of the word *right*, Dworkin notes that one has a right to spend one's money gambling. Thus it would be wrong if Dworkin or the state interfered with the gambler's right to gamble even though it might be "wrong" to gamble, in the sense that one *ought* to spend one's money in more worthwhile endeavors. *Id.*

170. *Id.* at 188-89. As an example of this sense of the word *right*, Dworkin talks of a captured soldier who has a right to attempt escape. The soldier does no wrong in trying to escape, but his or her captors do no wrong in trying to interfere with the captive's escape. *Id.* at 189.

171. *Id.*

172. *Id.* at 189-90.

so requires, but they differ over exactly when it is appropriate for the government to prosecute such a citizen.¹⁷³

Dworkin reframes the issue and asks whether a citizen has a right to break the law "in the strong sense," the sense in which it would be wrong for the state to interfere with his or her actions.¹⁷⁴ In answering this question, he determines that there are certain fundamental rights, in the strong sense, and that it would be wrong for the state to abridge these rights even if the state determined that the majority would be thereby better served.¹⁷⁵ If the state were to abridge these fundamental rights, a citizen would have the right, in the strong sense, to refuse to obey the laws abridging such rights, and the state would do further wrong in enforcing such laws.¹⁷⁶ Following Dworkin's approach, the general duty to obey the law, which is recognized by both liberals and conservatives, would be inapplicable in a society that does not recognize fundamental rights. This is because a person would be completely justified in breaking a law that infringed on his or her basic liberties.¹⁷⁷ Dworkin, thus, apparently denies the existence of any general duty to obey the law even in a reasonably just society.

However, even Dworkin recognizes certain practical limitations on acts of civil disobedience. If a citizen decides to engage in a disobedient act on the basis of a belief that he or she has a right (in the strong sense) to do so, he or she must still determine whether engaging in such an act would be "the right thing to do" (in the weaker sense).¹⁷⁸ Thus, one must consider that others may reasonably differ in their opinions regarding one's right to break the law.¹⁷⁹ Also, one should consider the consequences of breaking the law: Would the act involve violence? Would it violate the rights of others? Would the disobedient act also violate other laws that one does not have a good-faith claim to break?¹⁸⁰

How ought one to behave when faced with a law that he or she

173. DWORKIN, *supra* note 4, at 190. Presumably, "conservatives" will call for prosecution of the civil disobedient more often than will "liberals."

174. *Id.* Dworkin cites, as an example of a fundamental right in this strong sense, the right of free speech: the government would do wrong to attempt to repeal this right, even if the majority could be persuaded to do so. *Id.* at 192.

175. *Id.* Dworkin admits that, under certain exceptional circumstances, "when some compelling reason is presented," a government may abridge these fundamental rights. *See generally id.* at 200-01.

176. *Id.* at 190-92.

177. *Id.* at 192-93. Dworkin's discussion of how one might go about determining these fundamental rights is beyond the scope of this essay. *See id.* at 197-204.

178. *Id.* at 196.

179. *Id.*

180. *Id.*

believes is unconstitutional?¹⁸¹ Dworkin examines three possible models of citizen action in the face of such a law. One possibility is that the citizen should simply obey the law, assuming that the law does not permit what the citizen desires to do.¹⁸² Dworkin rejects this position, reasoning that if “no court has decided the issue . . . , most of our lawyers and critics think it perfectly proper” for the citizen to follow his or her own judgment in the matter.¹⁸³ Moreover, if citizens did not defy the laws they sought to challenge, society would lose an important means of testing the validity of such laws.¹⁸⁴

Another possibility is that if the citizen believes that the case for the constitutional permissibility of the action is stronger than the case against it, the citizen may follow his or her own judgment and do what he or she desires.¹⁸⁵ Under this second alternative, however, once a court has addressed the law at issue and has ruled that the law is constitutional, then the citizen contemplating disobedience is morally bound to obey that law.¹⁸⁶ Dworkin rejects this alternative because it fails to consider the possibility that the court will be overruled.¹⁸⁷ In light of this possibility, if citizens followed the course suggested by this second model of action, society would (as in the first model) lose an important means of testing the law’s validity.¹⁸⁸

Dworkin suggests and accepts as a model of action a third alternative. If the law is doubtful, the citizen may follow his or her own judgment about obeying the law even if a contrary decision has been reached by the highest court.¹⁸⁹ Of course, the citizen should consider the logic of any adverse judicial decision in order to determine whether his or her challenge to that decision through civil disobedience is honest and reasonable.¹⁹⁰

181. According to Dworkin, one could argue that if the law is invalid, the violator commits no crime, but if the law is valid, the violator commits a crime and must be punished. *Id.* at 207-08. Dworkin rejects this neat dichotomy. *Id.* at 210.

182. *Id.*

183. *Id.* at 212.

184. *Id.* Recall that Rawls’ definition of civil disobedience excludes testing the validity of challenged laws. *See supra* note 134, and text accompanying note 141.

185. DWORKIN, *supra* note 4, at 210.

186. *Id.*

187. *Id.* at 213.

188. *Id.* at 213-14.

189. *Id.* at 211.

190. *Id.* Dworkin explains his conclusion by noting:

A citizen’s allegiance is to the law, not to any particular person’s view of what the law is, and he does not behave unfairly so long as he proceeds on his own considered and reasonable view of what the law requires. . . . [T]his is not the

In arriving at a resolution of the issues raised by a citizen's disobedience to a challenged law, Dworkin does not discount the role of prudence in the citizen's decision-making process. Even though the individual may conclude that he or she would be acting *properly* in refusing to follow the law, it might not be *prudent* to do so because of attendant circumstances (e.g., the possibility of a jail sentence, financial hardship, or public opprobrium).¹⁹¹ With this admission, Dworkin approaches the positions of Raz¹⁹² and Rawls¹⁹³ regarding the role of prudence in civil disobedience, although Rawls' notion of "prudence" includes prudence both in this personal sense and in the sense of what would be prudent from the standpoint of society.¹⁹⁴ Thus, Dworkin, too, evinces a somewhat pragmatic side in his approach to civil disobedience.

To summarize, in a democratic state like the United States, an actor may have a right (in Dworkin's "strong" sense) to engage in civilly disobedient acts that violate the law, if the state abridges certain fundamental rights of the actor. In such instances, it would be morally wrong for the state to seek to punish the disobedient. Therefore, the actor need not be willing to submit to punishment. Civil disobedience serves the purpose of testing challenged laws. Moreover, no general duty to obey the law exists even in a reasonably just society. Nevertheless, Dworkin recognizes that the right to engage in civil disobedience has certain practical limitations, including the actor's own good faith, his or her personal prudence,

same as saying that an individual may disregard what the courts have said. The doctrine of precedent lies near the core of our legal system, and no one can make a reasonable effort to follow the law unless he grants the courts the general power to alter it by their decisions. But if the issue is one touching fundamental personal or political rights, and it is arguable that the Supreme Court has made a mistake, a man is within his social rights in refusing to accept that decision as conclusive.

Id. at 214-15. Dworkin reaches the following conclusion in this matter:

When the law is uncertain, in the sense that a plausible case can be made on both sides, then a citizen who follows his own judgment is not behaving unfairly. . . . For that reason, our government has a special responsibility to try to protect him, and soften his predicament, whenever it can do so without great damage to other policies. It does not follow that the government can guarantee him immunity—it cannot adopt the rule that it will prosecute no one who acts out of conscience, or convict no one who reasonably disagrees with the courts. . . . If the state never prosecuted, then the courts could not act on the experience and the arguments the dissent has generated.

Id. at 215.

191. *Id.* at 213.

192. *See supra* notes 37-38 and accompanying text.

193. *See supra* note 150 and accompanying text.

194. *See id.*

considerations of the rights of others, and ramifications of the use of violence.

III. CIVIL DISOBEDIENCE IN CONTEXT: FIVE CONTEMPORARY ILLUSTRATIONS

This section presents five related illustrations of situations in which resort to civil disobedience might arguably be morally justifiable. These illustrations will illuminate the theories of the five philosophers that have been discussed. This section begins with a basic fact pattern applicable to each illustration unless noted to the contrary.¹⁹⁵ Admittedly, even five illustrations cannot capture all of the nuances of the various theories of civil disobedience discussed in this essay. They should, however, serve to clarify some of the major points of agreement and disagreement among the five philosophers.

A. *Basic Fact Pattern*

An animal rights group called Save The Beasts (STB) opposes the use of live animals in testing for medical, cosmetic, and other similar purposes. The members of the group believe that such use violates important rights of animals.¹⁹⁶ STB decides to protest the use of live animals for medical testing by the Center for Disease Control (CDC), which is operated by the United States government. Before engaging in this protest, STB unsuccessfully sought to have CDC cease its use of live animals in medical testing; STB conducted an extensive letter-writing campaign to the United States Department of Health and Human Services and to members of Congress, and appealed directly to the CDC itself.

B. *First Illustration*

To effectuate their protest, STB members, carrying signs protesting the use of animals for medical testing, illegally block all entrances to the CDC's facility for one hour at lunchtime one business day. As a result, few people who desire to enter or exit the facilities are able to do so during this time; however, no one is significantly harmed by this action. Do the actions of the STB members constitute morally justifiable civil disobedience?

The STB actions are nonviolent and are aimed more or less di-

195. The facts used in the following illustrations are purely hypothetical.

196. The animals are obviously unable to raise for themselves the issue of their rights. For the purposes of the five illustrations, it should be assumed that STB has the moral standing to raise this issue on the animals' behalf.

rectly at the CDC, the party carrying out the government policy to which STB objects. Moreover, STB has first made reasonable, albeit unsuccessful, efforts to change the objectionable policy. The group's protest is public and open, and there is no indication that the members are unwilling to accept appropriate punishment as a result of their actions.

In this instance, it is difficult to see how the acts engaged in by STB would *not* qualify as morally justifiable civil disobedience under any of the theories of civil disobedience put forth by the five writers discussed in this essay. This first illustration presents a relatively easy case.

C. *Second Illustration*

The facts in this second illustration are the same as those in the basic fact pattern and the first illustration, except that prior to blocking all CDC entrances in protest, STB members made no efforts of any kind to appeal for a change in the CDC's policy of using animals for medical testing purposes.

The new variable is the fact that STB did not first make a legal attempt to secure a change in the challenged policy, before resorting to civilly disobedient protest. This fact raises the issue of whether the actor must make a reasonable attempt to change the challenged law or policy through political appeals as a precondition to his or her use of civil disobedience.

There would probably be no consensus among the five philosophers on the moral justifiability of STB's actions under the facts of this second illustration. Neither Thoreau nor Dworkin directly addresses this issue. One can infer from the actions and writings of Thoreau¹⁹⁷ and from the general tenor of the writings of Dworkin,¹⁹⁸ that neither man would condition the moral legitimacy of civil disobedience on reasonable attempts to change the challenged law or policy. Raz believes that such an attempt is not a prerequisite to morally legitimate civil disobedience.¹⁹⁹

Two of the legal philosophers discussed in this essay, however, would probably take a contrary view. Greenawalt believes that an

197. There is no indication that Thoreau made any attempts to change government policy on slavery or the Mexican War before engaging in his act of civil disobedience. One might respond, though, that any such attempts would almost certainly have been futile, thus absolving Thoreau from any duty to undertake them before committing any civilly disobedient acts. *See supra* note 9 and accompanying text.

198. Remember that Dworkin believes that citizens can test laws through disobedience. *See supra* notes 181-90 and accompanying text.

199. *See supra* note 50 and accompanying text.

attempt to change the objectionable law or policy *is* a prerequisite to the moral justification of civilly disobedient acts, unless such an attempt would be "patently futile."²⁰⁰ There is no indication in the facts of this second illustration that STB reasonably believed that any such attempt would be futile. Rawls agrees that a prior reasonable appeal for change is a necessary condition to morally justify civil disobedience unless such an appeal would be fruitless or unless the act were directed against an extreme case of injustice.²⁰¹ One may argue that from the animals' viewpoint, medical testing is in fact an extreme case of injustice, thus falling within Rawls' exception justifying the use of disobedient acts without any prior appeal for a change of law or policy.

D. Third Illustration

The facts here are the same as those in the basic fact pattern and the first illustration, except that the STB members who engage in the protest at the CDC headquarters have indicated that they consider their actions to be immune from prosecution by the state, and that they are therefore unwilling to accept any punishment that might result from their actions. The issue raised is whether the actors must willingly accept resultant punishment in order to justify their disobedient acts on moral grounds.²⁰²

For two of the five philosophers, namely, Thoreau and Rawls, a disobedient's willingness to accept resultant punishment would probably be a prerequisite to the moral justification of his or her act. Thoreau does not expressly deal with this issue in his essay, but one may reasonably infer from Thoreau's own actions that he considers the willing acceptance of punishment to be a prerequisite

200. See *supra* note 107 and accompanying text.

201. See *supra* note 147 and accompanying text.

202. The late United States Supreme Court Justice Abe Fortas believed that the actor had to be willing to accept the punishment legally resulting from his or her illegal act of nonviolent civil disobedience. Fortas wrote largely in response to the student protests of the late 1960s against the Vietnam War, and according to his literal, rather simplistic view, "[c]ivil disobedience is violation of law. Any violation of law must be punished, whatever its purpose. . . ." ABE FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 63 (1968). See also *id.* at 30.

Given his liberal judicial record on civil liberties, Fortas' views on civil disobedience are surprisingly conservative. Fortas rejects justification of disobedient acts that break the law, and he admits the moral justification of such acts only when they are aimed directly at laws that are "basically offensive to fundamental values of life or the Constitution." *Id.* at 63. See also Fortas' beliefs as further discussed *infra* note 211. In espousing such opinions on civil disobedience, Fortas fits the mold of those whom Dworkin identifies as "conservatives" regarding the use of civil disobedience. See *supra* text accompanying notes 160-67.

to morally justifiable civil disobedience.²⁰³ After all, Thoreau's personal act of disobedience (the failure to pay his poll tax) resulted in his punishment at the hands of the state, a punishment that Thoreau readily accepted and indeed invited as integral to his protest.²⁰⁴ Rawls would also be likely to mandate STB's willing submission to punishment as a condition precedent to the moral justification of the protesters' acts.²⁰⁵ Therefore, under the views of Thoreau and Rawls, STB's failure to submit to punishment may make their action less morally justifiable.

For Dworkin,²⁰⁶ Greenawalt,²⁰⁷ and Raz,²⁰⁸ the willingness to accept punishment is not an absolute prerequisite to the moral justification of civil disobedience. Thus, none of the three would require the STB protesters to acquiesce willingly in any resultant punishment, though for Greenawalt (particularly) such acquiescence could have significant prudential implications.

E. Fourth Illustration

In order to effectuate their protest, STB members secretly break into CDC facilities one night and destroy records obtained from, and equipment used in, animal testing. They leave an unsigned note explaining that their actions were undertaken to protest the use of live animals in the medical testing conducted by the CDC. No one is physically injured as a result of STB's actions. The destruction is discovered the next morning and reported to the police and the news media.

The two major variables introduced in this illustration are the use of violent acts (destruction of property) as a means of protest²⁰⁹ and the secret commission of the disobedient acts.²¹⁰ The issues

203. See *supra* note 9 and accompanying text.

204. See *id.* Recall that Thoreau viewed his punishment as so integral a part of his protest that he was upset when his imprisonment was cut short without his consent.

205. See *supra* note 143.

206. See *supra* text accompanying note 166.

207. See *supra* notes 90-91.

208. See *supra* notes 44, 50 and accompanying text.

209. One may argue that STB's act of breaking into CDC facilities at night and destroying property does not constitute violence *per se*, for the facts do not indicate that any injury to persons, as opposed to property, occurred as a result of this act. However, since an examination of the precise limits of the definition of violence is beyond the scope of this essay, it will be assumed for present purposes that STB's act in this fourth illustration does in fact constitute violent action.

210. This illustration may also raise questions about the actors' willingness to accept punishment. This issue has already been adequately addressed in the third illustration and will not be reexamined in either this or the fifth illustration. See *supra* notes 202-08 and accompanying text.

raised are whether the moral justification for civil disobedience is affected by a resort to violence²¹¹ and whether it is affected by the secrecy of the acts.²¹²

None of the five philosophers would hold that the use of violent tactics by STB members necessarily rendered their disobedient acts morally unjustified. Thoreau's thoughts regarding the use of violence are the most problematic for the simple reason that he does not discuss this issue in *On the Duty of Civil Disobedience*. Nor was his own act of protest reported in that essay considered a violent act.²¹³ It is therefore difficult to surmise his thoughts on the use of violence, based on that work alone. He may have believed, however, that the use of violence would not, in and of itself, render an act of protest morally unjustifiable.²¹⁴

Rawls²¹⁵ and Greenawalt²¹⁶ exclude violent acts from their definitions of civil disobedience; however both view this exclusion as definitional rather than conceptual. Neither Rawls²¹⁷ nor Greenawalt²¹⁸ states that violence is *never* justified in order to effectuate a change in a law or policy, but moral justification would depend on the gravity of the challenged injustice. Raz expressly rejects the view that a resort to violence necessarily disqualifies an act as morally justifiable.²¹⁹ Dworkin, too, probably shares this belief.²²⁰ Thus, under the beliefs of the five men treated in this essay, the use of violence would not necessarily prevent STB's action from qualifying as morally justifiable civil disobedience. If the harm that resulted from STB's actions (destruction of property) were less than the harm that STB sought to change (the use of animals in medical testing), perhaps discounted by the likelihood of such change actu-

211. Fortas found violent disobedience unjustifiable under any circumstances in a democratic society. For him, "damage to persons or property is intolerable." FORTAS, *supra* note 202, at 62. Under his view, the acts of the STB members in this fourth illustration would constitute violence and would not be morally, let alone legally, justified.

212. Despite the unsigned note, one might argue that the acts in this fourth illustration were, in effect, openly committed, thus eliminating the openness issue. Nevertheless, for purposes of this illustration, it is assumed that in leaving an unsigned note, STB was not openly acknowledging commission of its acts and that neither the authorities nor the public were in fact able to determine who engaged in this destruction of CDC property.

213. See *supra* notes 6-9 and accompanying text.

214. See *supra* note 34.

215. See *supra* notes 134, 143-44 and accompanying text.

216. See *supra* text accompanying note 75.

217. See *supra* note 145 and accompanying text.

218. See GREENAWALT, *CONFLICTS*, *supra* note 4, ch. 11 *passim*.

219. See *supra* notes 52-53 and accompanying text.

220. Dworkin does not discuss in any depth the use of violence in *Taking Rights Seriously*. The assertion that he does not find violence a disqualification is largely inferential from his book. See DWORKIN, *supra* note 4, at 196.

ally taking place, then it appears that STB's acts could be morally justifiable.

Much of what has been said about the willingness to accept punishment applies to the secrecy of STB's acts. Although Thoreau does not directly deal with the openness issue, one might reasonably infer that he would view the open commission of the civilly disobedient act as a prerequisite to morally justified civil disobedience.²²¹ Rawls is also likely to require openness as a prerequisite to the moral justification of STB's acts.²²²

Dworkin, Greenawalt, and Raz would probably not require STB to act openly or to acknowledge its acts in order to justify its disobedience. In *Taking Rights Seriously*, Dworkin does not expressly address this issue; however, in light of his rejection of the willing acceptance of punishment as an element of morally justifiable civil disobedience, it would seem somewhat illogical for him to insist on openness as such an element.²²³ Greenawalt acknowledges that, at times, the effectiveness of disobedience will depend on its secrecy; therefore, he rejects any categorical requirement of openness.²²⁴ For his part, Raz would require that the disobedient act be public, though the actor's identity itself need not necessarily be made known to the public at large.²²⁵ For Raz, STB's act would probably be justified, since the act, though originally committed in secret, was publicized by the press, and the unidentified actors did make their purpose clear.

F. Fifth Illustration

To dramatize their beliefs, STB members, carrying signs decrying the CDC's use of animals in medical testing, block one of the city's major traffic intersections during rush hour on a business day. As a result, traffic is delayed, and thousands of commuters are inconvenienced, although no one is injured either directly or indirectly.

The new issue raised is whether civilly disobedient acts must be directed solely at the laws or policies that the actors seek to overturn. None of the legal philosophers discussed in this essay appears to believe that civil disobedience must be directed exclusively

221. One could draw this inference on the basis, again, of the circumstances surrounding Thoreau's own act of protest. *See supra* note 9 and accompanying text.

222. *See supra* text accompanying note 143.

223. *See supra* text accompanying note 166.

224. *See supra* note 117 and accompanying text.

225. *See supra* note 44 and accompanying text.

at the challenged law or policy.²²⁶

Greenawalt believes that it may be easier to justify disobedient acts on moral grounds when a close nexus exists between the acts and the law or policy that is the ultimate target of the protest.²²⁷ Considering the nexus between STB's disobedient acts and the laws broken, the moral justification for the civil disobedience here is questionable. In the first three illustrations, STB's peaceful acts of protest were directed at the major target of the protest, the CDC, and bore a closer relationship to the challenged policy. There is much less of a nexus between the tying-up of traffic and the challenged CDC policy. Furthermore, less disruptive, more direct methods of protest exist. Therefore, Greenawalt would probably not find STB's roadblock to be a morally justified form of civil disobedience.²²⁸

IV. CONCLUSION

In a democratic and reasonably just society, what qualifies as

226. Thoreau does not directly address this issue in *On the Duty of Civil Disobedience*; however, it is clear from Thoreau's own actions, as discussed in his essay, that he does not believe in the necessity of directing civilly disobedient acts only at the challenged laws or policies. Thoreau's personal act of disobedience, his refusal to pay his poll tax, was not done in defiance of the poll tax itself but rather was undertaken in protest against the federal government's policies of supporting slavery and engaging in a war with Mexico (and against the Massachusetts government's support of the federal government). See *supra* notes 6-9 and accompanying text. Since the poll tax was collected for the benefit of the Commonwealth of Massachusetts and not for that of the federal government itself (whose policies Thoreau was protesting), it seems likely that Thoreau would reject any absolute requirement that the protest target only the laws or policies to which the protester objects. See *supra* notes 18-19 and accompanying text.

Raz's rejection of this requirement is implicit in his discussion of the common definition of *civil disobedience*. See RAZ, *supra* note 4, at 269; see also *supra* notes 41-44 and accompanying text.

For Rawls's explicit rejection of this condition, see RAWLS, *supra* note 4, at 364-65.

Fortas held a contrary view. He averred that "law violation directed not to the laws or practices that are the subject of dissent, but to unrelated laws which are disobeyed merely to dramatize dissent may be morally as well as politically unacceptable." FORTAS, *supra* note 202, at 63. Judging from the context of this comment, along with that of similar comments made by Fortas elsewhere in his pamphlet, it is reasonably certain that he believed that disobedient acts not directed at the challenged laws or policies were, virtually always, morally unjustifiable. See *id.* at 31-32.

For Greenawalt's rejection of Fortas's categorical position on this point, see *supra* notes 86-89 and 113-15 and accompanying text. Indeed, Greenawalt responds to Fortas by name, both in *A Contextual Approach to Civil Disobedience*, and in *Conflicts of Law and Morality*. Greenawalt, *Disobedience*, *supra* note 4, at 67-68, and GREENAWALT, *CONFLICTS*, *supra* note 4, at 235-36.

Dworkin does not specifically address this issue in *Taking Rights Seriously*.

227. See *supra* notes 86-89, 113-15 and accompanying text.

228. This would be true especially if other methods of protest were likely to be equally as effective as the traffic tie-up in securing a change in the objectionable policy.

morally justifiable, nonviolent civil disobedience? After examining the relevant thinking of five important writers, it is possible to arrive at a general definition of such disobedience, consisting of the elements expressed most commonly (though not necessarily held unanimously) by these individuals. By definition, the relevant act must be nonviolent. This is not to say that violence is never justified, but merely that it is excluded from the definition of the type of action examined in this Article. The act of disobedience must, of course, be contrary to law and undertaken for the purpose of challenging one or more laws or government policies; among its permissible purposes is the raising of a test case.

As noted earlier, civil disobedience is not the same as conscientious objection. Conscientious objection involves noncompliance with a law that the actor finds morally or religiously unacceptable; the actor's primary purpose is not to *change* the objectionable law. Yet, it is certainly possible that in any number of instances, the concepts of civil disobedience and conscientious objection will overlap.²²⁹

The civilly disobedient act need not be aimed at the challenged law or policy (this may even be virtually impossible in certain circumstances); however, a reasonably close nexus between the disobedience and the challenged law or policy furthers the moral justifiability of the act. The mere fact that the disobedience is undertaken in a democratic and relatively just society does not render it morally unjustifiable; yet, in such a society, disobedience should be undertaken only after reasonable efforts have been made to change the challenged law or policy through legal means.

The identity of the civil disobedient need not be made known to the public, although, as a general rule, the fact that a disobedient act has been committed should be disclosed so that the purpose of the protest might be clear to all. While the actor need not be willing to accept resulting punishment for the act, the actor's willingness to do so may have beneficial effects, such as demonstrating the actor's seriousness of purpose and limiting the scope of the act to that which is absolutely necessary.

Finally, the civil disobedient should take reasonable steps to minimize any physical harm to third parties and their property that might result from his or her act. Inconvenience to third parties, however, may often be a part of civil disobedience and may

229. Failure to register for the draft is one example of such an overlap: the person who fails to register may well desire both to challenge the draft law by refusing to comply and to avoid compliance on moral or religious grounds.

appropriately heighten its impact. However, if grave enough, the harm may render disobedience *violent*, thus removing it from the type of action discussed in this essay.

In a relatively just society, the judicious use of nonviolent civil disobedience can be an extremely effective and morally justified weapon in the arsenal of those who seek to change laws or government policies. In the United States, the civil rights movement of the 1950s and 1960s and the antiwar movement of the 1960s and 1970s are recent examples of its power. In the current political battles over such controversial issues as animal rights, abortion rights, and nuclear nonproliferation and disarmament, nonviolent civil disobedience has been—and will probably continue to be—a powerful tool.