

CIVIL DISOBEDIENCE AND THE RULE OF LAW:
PUNISHING “GOOD” LAWBREAKING IN A
NEW ERA OF PROTEST

*Michael Patrick Wilt, JD, LL.M.**

INTRODUCTION

Martin Luther King, Jr. stated, “Ordinarily, a person leaving a courtroom with a conviction behind him would wear a somber face. But I left with a smile. I knew that I was a convicted criminal, but I was proud of my crime.”¹ Should civil disobedience be a defense to a criminal charge? One of the main purposes of civil disobedience is to demonstrate the unjust nature of a law and to move a society toward changing that law, while accepting that punishment is a natural consequence of lawbreaking.² The civilly disobedient actor engages in a conscious choice to violate a law.³ When he does so, he is accepting certain consequences for his actions, such as a fine, jail, physical pain, monetary expense, economic retaliation, and social stigma.⁴ Typically, the actor does not believe that the legal or political system in general is unjust.⁵

In late 2013 and early 2014, the Black Lives Matter activist movement began in response to the deaths of Trayvon Martin, Michael Brown, and Eric Garner. Protests—including civil disobedience—caught the attention of the nation and garnered significant media attention.⁶ Black Lives Matter activists seek a variety of social and

* Author Michael Patrick Wilt is an attorney and public policy professional located in Arlington, VA. He holds a J.D. from the Ohio State University and an LL.M. from George Mason University.

¹ MARTIN LUTHER KING, JR., *THE MARTIN LUTHER KING, JR., COMPANION: QUOTATIONS FROM THE SPEECHES, ESSAYS, AND BOOKS OF MARTIN LUTHER KING, JR.* 97 (Coretta Scott King et al., 1997-1998 ed. Harper Collins Pub. 1998).

² Kevin H. Smith, Essay, *Therapeutic Civil Disobedience: A Preliminary Exploration*, 31 U. MEM. L. REV. 99, 102 (2000).

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 119-20.

⁶ See Todd Heisler, *Protests Continue in New York City on Friday*, N.Y. TIMES, (Dec. 5, 2014), <https://www.nytimes.com/2014/12/06/nyregion/eric-garner-protests-new-york-city.html>; see

political changes, and a key tactic of the movement has been to disrupt society in a way that provokes policymakers and voters to consider their arguments.⁷ Unlike activists of the past, these recent protestors often do believe that much of the legal and political system is unjust, or at least broken, rather than a single law or set of laws.⁸

Following the 2016 presidential election, protests were held in major cities nationwide in response to the split in the electoral college between Donald Trump, who had won the election, and Hillary Clinton, who won the popular vote.⁹ On January 20, 2017, Donald Trump assumed the Presidency, and on January 21, a women's march took place in Washington, D.C. Subsequently, protesters have organized events across the country and internationally in response to the incoming administration's policies and initiatives.¹⁰

Civil disobedience is a philosophical, moral, legal, political, and social dilemma¹¹ that raises deep questions regarding the rule of law. Roughly defined, civil disobedience is "the deliberate violation of law for a vital social purpose."¹² John Rawls, a legal philosopher, defines civil disobedience as "a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government."¹³ Black's Law Dictionary also defines civil disobedience as "[a] deliberate but nonviolent act of lawbreaking to call attention to a particular law or set of

also Matt Williams, *Trayvon Martin Protests Being Held in More Than 100 US Cities*, THE GUARDIAN, (Jul. 20, 2013, 10:35 AM), <https://www.theguardian.com/world/2013/jul/20/trayvon-martin-protests-us-cities>; Trymaine Lee, *Ferguson Turns Protest into Political Power*, MSNBC, (Aug. 30, 2013, 3:04 PM), <http://www.msnbc.com/msnbc/ferguson-the-long-road-forward>.

⁷ See Joseph P. Williams, *What Does the Black Lives Matter Movement Really Want?*, U.S. NEWS, (Aug. 24, 2015, 12:01 AM), <https://www.usnews.com/news/articles/2015/08/24/what-does-the-black-lives-matter-movement-really-want>.

⁸ *Id.*

⁹ See *Thousands of Anti-Trump Protesters Take to Streets of US Cities*, CNBC, (Nov. 9, 2016, 9:02 AM), <https://www.cnn.com/2016/11/09/thousands-protest-across-us-over-trumps-shock-election-win.html>.

¹⁰ See e.g., Jennifer Bendery, *White House Protesters Shame Donald Trump Over Paris Climate Deal*, HUFFINGTON POST, (last updated Jun. 3, 2017), http://www.huffingtonpost.com/entry/donald-trump-paris-climate-change-protest_us_59309f1de4b075bff01e514; see also Karma Allen, *Protests Erupt Nationwide Following Trump's Transgender Military Ban Announcement*, ABC NEWS, (Jul. 27, 2017, 1:22 AM), <http://abcnews.go.com/US/protesters-rally-trumps-transgender-military-ban/story?id=48876355>.

¹¹ See Smith, *supra* note 2, at 102.

¹² HOWARD ZINN, *DISOBEDIENCE AND DEMOCRACY: NINE FALLACIES ON LAW AND ORDER* 39 (South End Press 2002) (1968).

¹³ JOHN RAWLS, *A THEORY OF JUSTICE* 320 (Belknap Press 1999) (1971).

laws believed by the actor to be of questionable legitimacy or morality.”¹⁴

The current legal status of civil disobedience is rather clear regarding its use as a defense to any crime: it generally is not.¹⁵ This review of the law will be discussed in Part I of this Article. Part II entertains a brief discussion of whether civil disobedience would be considered a justification or an excuse,¹⁶ followed by an analysis of retributive and utilitarian theories of punishment that would apply to the desire (or lack thereof) to punish those who engage in acts of civil disobedience. Part II then makes a philosophical argument as to why civil disobedience should not be a defense to a crime and why those who engage in civil disobedience should be punished for their actions like every other member of the social contract. Part III provides a brief review of recent developments in protest activism spanning a wide range of social policy and political issues. This Article concludes by arguing that part of living in an orderly society involves obeying and adhering to the rule of law, while at the same time understanding that civil disobedience can play an important social and political role to effect desirable change in society. A law being unjust does not justify or excuse breaking it, but it may serve some utility in effecting social change.

I. CURRENT LEGAL STATUS OF CIVIL DISOBEDIENCE

Traditionally, defendants who engage in acts of civil disobedience, and are later prosecuted, have often attempted to use the common law defense of necessity at trial.¹⁷ Necessity is a common law defense and is also a “social policy that recognizes that individuals should at times be free from legal restraints in order to avoid immi-

¹⁴ *Civil Disobedience*, BLACK’S LAW DICTIONARY 262 (8th ed. 2004).

¹⁵ See Steven M. Bauer & Peter J. Eckerstrom, Note, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1173 (1987).

¹⁶ This Article will consider only acts of indirect civil disobedience, as opposed to direct civil disobedience. See *infra* note 61, § 22.03 (“Civil disobedience may be direct or indirect. Direct civil disobedience involves protesting a particular law by breaking it” while “indirect civil disobedience involves the violation of a law that is not the object of the protest.”). Direct civil disobedience rarely involves raising a defense of necessity, as the defendant usually wants the law declared unconstitutional. Thus, the scope of this Article must center on defendants who violate laws that are legitimate (such as trespass and disorderly conduct statutes) to protest laws or policies they find illegitimate.

¹⁷ See Bauer, *supra* note 15, at 1173.

ment, serious harms.”¹⁸ Essentially, the defense allows a jury to decide whether an act that was clearly in violation of the law serves some greater good, allowing the “individual moral actor some discretion to maximize social utility.”¹⁹ Furthermore, the defense of necessity *justifies* an action.²⁰

Civil disobedience traditionally required the actor to accept his acts’ legal consequences, but recently such actors have sought the necessity defense in court as a means of escaping punishment for their conduct while, at the same time, using the judicial forum to publicize and debate the political issues that motivated their civil disobedience.²¹ Courts have not categorically rejected the necessity defense in civil disobedience cases, but most courts have excluded the defense before trial.²² In fact, except for two New York trial court cases, courts have rejected the defense entirely.²³ A brief review of these two cases will put the overwhelming weight of current law against providing the defense in perspective.

Two civil disobedience cases permitting a necessity defense are an abortion-related case and a case involving the protest of a regulation that arguably created greater pollution.²⁴ In *People v. Archer*, New York state sought to convict defendants for staging a sit-in protest at a hospital to prevent abortions.²⁵ The defendants were charged with criminal trespass and resisting arrest.²⁶ The court found that the New York Legislature had adopted a different standard than that of the Model Penal Code, which had limiting language that precluded the necessity defense if the legislature had legalized the conduct over which the defense was being raised (such as abortion).²⁷

The New York Legislature instead adopted a less limiting standard, which allowed the jury to decide whether, “according to ordi-

¹⁸ *Id.* at 1174.

¹⁹ *Id.*

²⁰ See Dressler *infra* note 61, § 22.01.

²¹ Bauer, *supra* note 15, at 1176.

²² *Id.* at 1173.

²³ James O. Pearson, Jr., Annotation, “Choice of Evils,” *Necessity, Duress, or Similar Defense to State or Local Criminal Charges Based on Acts of Public Protest*, 3 A.L.R.5th 521, §2[a] (1992).

²⁴ See *People v. Gray*, 571 N.Y.S.2d 851, 855 (N.Y. Crim. Ct. 1991); see also *People v. Archer*, 537 N.Y.S.2d 726, 727 (Rochester City Ct. 1988).

²⁵ *Archer*, 537 N.Y.S.2d at 727.

²⁶ *Id.*

²⁷ *Id.* at 730.

nary standards of intelligence and morality,” the injury by the defendant was outweighed by the injury to be avoided.²⁸ In other words, it was left to the judgment of a jury as to whether conducting a sit-in protest, in violation of trespass laws, was a necessity to avoid an “evil” or “injury” such as abortion, even though abortion was legal in the state of New York.²⁹

In *People v. Gray*, the court held that the state had not disproved the elements of a necessity defense under New York law beyond a reasonable doubt and acquitted the defendants in a bench trial.³⁰ In this case, the defendants were charged with disorderly conduct for participating in a demonstration at a bridge in opposition to the opening of a lane for vehicular traffic during rush hour that usually was reserved for bicycles and pedestrians.³¹ Essentially, the defendants argued that they had acted to avoid the greater harm of polluting the environment and preventing the unnecessary death and serious illness of New Yorkers as a result of opening this lane of traffic.³² The defendants submitted studies and expert witnesses that confirmed “their belief that encouraging automobiles at a rush hour traffic ‘choke-point’ while discouraging walkers and cyclists produces a specific, grave harm that is not only imminent, but is occurring daily.”³³ Accordingly, the trial court found that the defendants had met the elements of the necessity defense and, as a result, were acquitted.³⁴

Despite these two cases, most courts have found that necessity is not an appropriate defense in civil disobedience cases. Courts in Alabama,³⁵ California,³⁶ Arkansas,³⁷ Alaska,³⁸ Connecticut,³⁹ Georgia,⁴⁰ Illinois,⁴¹ and federal courts,⁴² have held the necessity defense to be

²⁸ 537 N.Y.S.2d at 730 (quoting N.Y. PENAL LAW § 35.05 (McKinney 2010)).

²⁹ See *Archer*, 537 N.Y.S.2d at 730.

³⁰ 571 N.Y.S.2d 851, 861 (N.Y. Crim. Ct. 1991).

³¹ *Id.* at 852-53.

³² See *id.* at 857.

³³ *Id.* at 861.

³⁴ *Gray*, 571 N.Y.S.2d at 871.

³⁵ *Allison v. Birmingham*, 580 So.2d 1377, 1382 (Ala. Crim. App. 1991).

³⁶ *People v. Garziano*, 281 Cal. Rptr. 307, 308 (Cal. Ct. App. 1991).

³⁷ See *Pursley v. State*, 730 S.W.2d 250, 251 (Ark. Ct. App. 1987).

³⁸ *Cleveland v. Anchorage*, 631 P.2d 1073, 1081 (Alaska 1981).

³⁹ *State v. Anthony*, 588 A.2d 214, 221-22. (Conn. App. Ct. 1991).

⁴⁰ *Hoover v. State*, 402 S.E.2d 92, 93-94 (Ga. Ct. App. 1991).

⁴¹ *People v. Krizka*, 416 N.E.2d 36, 37 (Ill. App. Ct. 1980).

⁴² See, e.g., *Gaetano v. United States*, 406 A.2d 1291, 1295 (D.C. App. Ct. 1979).

unavailable in abortion protest cases.⁴³ For example, in *Gaetano v. United States*, a federal case involving abortion clinic protestors trespassing by staging a sit-in, the court held that the “bona fide belief” defense—namely that the defendant had a bona fide belief that they had a right to be on property they did not own—was not applicable.⁴⁴ The court ruled that the law does not “exonerate individuals who believe they have a right, or even a duty, to violate the law in order to effect a moral, social, or political purpose, regardless of the genuineness of the belief or the popularity of the purpose.”⁴⁵ The *Gaetano* court cited two other federal cases in support of its holding, including a case involving a protest at the White House and a protest over the Vietnam War at a Dow Chemical Company office.⁴⁶ In the latter case, the federal circuit court held that an instruction to the jury that the moral principles and concomitant motives of the defendants were irrelevant was proper.⁴⁷

The same rejection of the necessity defense has largely been held in other civil disobedience cases regarding nuclear weapons,⁴⁸ nuclear power,⁴⁹ animal rights,⁵⁰ and other causes.⁵¹ For example, in *State v. Kee*, the defendant was convicted of trespassing on the Maine Yankee nuclear power plant.⁵² In rejecting the “competing harms” necessity defense, which allows a harm perpetrated by the defendant to prevent a greater harm, the court ruled that the defendant had offered no evidence “to indicate that there was in fact imminent danger of physical harm to any person, whether the defendant or the workers at the ‘Maine Yankee’ nuclear power plant.”⁵³ The mere subjective belief that nuclear power was harmful was insufficient.⁵⁴

⁴³ See Pearson *supra* note 23, at § [I][2a] for more cases denying the availability of a necessity defense in civil disobedience cases.

⁴⁴ 406 A.2d at 1294.

⁴⁵ *Id.*

⁴⁶ *Gaetano*, 406 A.2d at 1294; see generally *United States v. Dougherty*, 473 F.2d 1113 (D.C. Cir. 1972); *Leiss v. United States*, 364 A.2d 803 (D.C. Ct. App. 1976).

⁴⁷ *Dougherty*, 473 F.2d at 1137-38.

⁴⁸ *In re Weller*, 210 Cal. Rptr. 130, 130 (Cal. Ct. App. 1985).

⁴⁹ See *State v. Kee*, 398 A.2d 384, 385 (Me. 1979).

⁵⁰ See *State v. Troen*, 786 P.2d 751, 753 (Or. Ct. App. 1990).

⁵¹ See, e.g., *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991) (holding that necessity defense was inapplicable for obstructing a federal officer while protesting United States government involvement in El Salvador).

⁵² *Kee*, 398 A.2d at 385.

⁵³ *Id.* at 386.

⁵⁴ *Id.* at 385-86.

The necessity defense is not the only one that has failed. The defenses of duress,⁵⁵ defense of others,⁵⁶ and self-defense,⁵⁷ have also been held to be unavailable in civil disobedience cases. In *Commonwealth v. Brugmann*, another nuclear power plant protest case, the court held that in addition to rejecting the competing harms necessity defense, defense of others, and self-defense were also not “meant to apply in a case involving civil disobedience of the sort in issue, particularly since other remedies were available to redress the present grievances.”⁵⁸

The law is quite clear on this issue: willingly violating a law as an act of civil disobedience is generally not covered by traditional defenses, as most acts of civil disobedience do not involve imminent harm.⁵⁹ In cases like the *Gray* pollution case, if an imminent harm can be shown, a defendant may have a chance of being acquitted under a necessity defense, but typically civil disobedience involves protest of some future harm such as a nuclear war.⁶⁰

II. CIVIL DISOBEDIENCE AS A DEFENSE

A. *Justification or Excuse?*

The defenses of necessity, defense of others, and self-defense are traditionally “justification” defenses.⁶¹ The defense of duress is traditionally an “excuse” defense.⁶² A justification defense

is one that defines conduct ‘otherwise criminal, which under the circumstances is socially acceptable and which deserves neither criminal liability nor even censure.’⁶³ Justified conduct is conduct that is “a good thing, or the right or sensible thing, or a permissible thing to do.” That is, a justified act is an act that is right or, at least, not wrong.⁶⁴

⁵⁵ *Allison v. Birmingham*, 580 So.2d 1377, 1384 (Ala. Crim. App. 1991).

⁵⁶ *State v. Clarke*, 590 A.2d 468, 468 (Conn. App. Ct. 1991).

⁵⁷ *Commonwealth v. Brugmann*, 433 N.E.2d 457, 463-64 (Mass. App. Ct. 1982).

⁵⁸ *Brugmann*, 433 N.E.2d at 464.

⁵⁹ *See supra*, notes 35-42.

⁶⁰ *People v. Gray*, 571 N.Y.S.2d 851, 871 (N.Y. Crim. Ct. 1991).

⁶¹ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW §§ 18.01[B], 22.01 (4th ed. 2006).

⁶² *Id.* § 23.01.

⁶³ *Id.* § 16.03 (quoting Peter D. W. Heberling, Note, *Justification: The Impact of the Model Penal Code on Statutory Reform*, 75 Colum. L. Rev. 914, 916 (1975)).

⁶⁴ *Id.* (quoting J.L. AUSTIN, A PLEA FOR EXCUSES, IN FREEDOM AND RESPONSIBILITY 6 (Herbert Morris ed. 1961)).

An excuse defense,

differs from a justification defense in a fundamental way. Whereas a justification claim generally focuses upon an act (i.e., *D*'s conduct), and seeks to show that the act was not wrongful, an excuse centers upon the *actor*, (i.e., *D*), and tries to show that the actor is not morally culpable for his wrongful conduct. Thus, an excuse defense "is in the nature of a claim that although the actor has harmed society, [he] should not be blamed or punished for causing that harm."⁶⁵

Essentially, as the above definition points out, the difference between a justification defense and an excuse defense is whether the law looks at the act or the actor.⁶⁶ When mounting a justification defense, the defendant attempts to show that the conduct was beneficial for society.⁶⁷ With an excuse defense, the common law says that although there was harm to society, and that is not good, the actor should not be blamed for their conduct for a certain reason personal to them.⁶⁸ In civil disobedience cases, typically the necessity defense is used, and usually only in indirect civil disobedience cases.⁶⁹

There are several explanatory theories for justification defenses such as necessity or self-defense: moral forfeiture, rights theory, lesser harm, and public benefit.⁷⁰ Moral forfeiture—that an aggressor forfeits rights by violating the rights of another to life or autonomy⁷¹—would not apply, as civil disobedience must be nonviolent and no person should be harmed because of her forfeiture of rights. A "rights" theory—that a person has an affirmative legal right to protect a moral interest of their own—could apply, however, in some cases such as the *Gray* pollution case.⁷² Protestors could arguably be acting to protect their own health by stopping the new pollution.

The lesser harm theory especially comes into play with a necessity defense, as the Model Penal Code's "choice of evils" defense reflects

⁶⁵ *Id.* § 16.04 (quoting JOSHUA DRESSLER, JUSTIFICATIONS AND EXCUSES: A BRIEF REVIEW OF THE CONCEPTS AND THE LITERATURE, 33 Wayne L. Rev. 1155, 1162-63 (1987)).

⁶⁶ See Dressler, *supra* note 61, §§ 16.03-04.

⁶⁷ *Id.* § 16.04.

⁶⁸ *Id.*

⁶⁹ See *id.* § 22.03.

⁷⁰ Dressler, *supra* note 65, at 1163-65.

⁷¹ JUSTIFICATION: SELF DEFENSE-THEORIES, <http://law.jrank.org/pages/1467/Justification-Self-Defense-Theories.html> (last visited Sept. 23, 2017).

⁷² See *id.*; see also *supra* Part I.

the idea that one chooses to break a law because the “interests of the defendant outweigh those that are protected by the criminal law.”⁷³ In other words, a person could violate the law as a civil disobedient because violating that law is a lesser harm than following it. But this theory centers on the interests of the defendant, and, as noted *infra* Part II.B, the point of civil disobedience is to awaken the conscience of the community for a political or social goal, not to serve the self-satisfying interests of the defendant.⁷⁴

The final explanation for justification defenses is the “public benefit” theory—by far the most compatible with civil disobedience. Under the public benefit theory, conduct is justified when performed to benefit the community.⁷⁵ A person who commits an act of civil disobedience could argue that by committing criminal trespass, for example, they are performing an act that benefits the public by bringing attention to the unjust law that they are protesting. However, criminal trespass does not directly benefit the public; the benefit is rather intangible and indirect as it only leads to awareness of the larger political issue. It would make sense, though, to combine several of these theories of justification defenses to arrive at a coherent justification defense for civil disobedience, because on their own, each theory is insufficient.

Excuse defenses are explained by three main theories: the causation theory, the character theory, and the personhood principle.⁷⁶ The causation theory is inapplicable: it argues that an excuse defense should be available when the person did not have control over the condition that caused them to act, such as mental illness.⁷⁷ The civil disobedient argues exactly the opposite: they knew what they were doing and deliberately chose to do so out of conscious desire.⁷⁸ The character theory is more applicable: it argues that a person should not be punished for a bad act unless they are a bad person.⁷⁹ For a person with mental illness, we “assume that the person’s moral nature is sub-

⁷³ Dressler, *supra* note 65, at 1164.

⁷⁴ *See id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 1166.

⁷⁷ *See id.*

⁷⁸ *See* Zinn, *supra* note 12, at 39; *see also* Rawls, *supra* note 13, at 364.

⁷⁹ *Id.*

stantially similar to our own,” but because of their illness, they acted out of character, in a sense.⁸⁰

What about a person who commits an act of civil disobedience? As Ronald Dworkin argues *infra* Part II.B.2,⁸¹ these people are not bad people; in fact, they are valuable to society and, in committing the crime, they are doing so out of a higher-minded concept than your typical criminal. The person who commits an act of civil disobedience, however, is intentionally breaking the law and knows that the law they are breaking, for example criminal trespass, is a “good” law; whether one can infer bad character from this (that they choose to break the law rather than work legally within the system, for instance), is subject to debate.

None of the rationales for justification or excuse defenses seem to fit civil disobedience. With criminal law defenses, though, fitting an action into a rigid category often does not work. Assuming that an act of civil disobedience meets the elements of a defense under statute, any of these rationales could be used to at least partially explain why the law would justify the person’s actions. They could even be combined, such as the public benefit theory with the lesser harm theory for a necessity defense, similar to the *Gray* case.⁸²

B. *Should Civil Disobedients Be Punished?*

Assuming, *arguendo*, that civil disobedience does not fall under any of the traditional common law defenses such as necessity, should those who commit acts of civil disobedience be punished? At least one commentator suggests a way out of this question: a new verdict for juries called “guilty but civilly disobedient.”⁸³ This verdict would arguably still result in the acceptance of punishment by the defendant while also recognizing the special contribution that civil disobedience plays in our society.⁸⁴

Matthew Hall writes that “[b]oth disobedients and scholars advocate the abolition of punishment for civilly disobedient acts. Freedom from punishment removes a crucial deterrent that restrains civil diso-

⁸⁰ Dressler, *supra* note 65, at 1166.

⁸¹ See *infra* note 109.

⁸² See *supra* Part I.

⁸³ Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 *CARDOZO L. REV.* 2083, 2083 (2007).

⁸⁴ See *id.* at 2084.

bedience. Acceptance of punishment establishes that civil disobedience respects the rule of law and ensures its weighty, rather than petty, character within the political debate.”⁸⁵ Without commenting on the merits of a “guilty but civilly disobedient verdict,” this Section contends that maintaining the acceptance of punishment is vital for the criminal law as well as for social contract theory.⁸⁶

Seeking to use a necessity defense does not inherently imply that a defendant primarily wishes to be acquitted.⁸⁷ Of course, most certainly would not mind it.⁸⁸ However, those critical of affording civil disobedience a defense in a court of law rightfully point out that it would “undesirably erode the principle of traditional civil disobedience, which is that people who are compelled by conscience to violate the law, but who also believe in a democratic system, should accept their punishment—as Gandhi and Martin Luther King did—as part of their protest.”⁸⁹

In light of this view, an analysis of civil disobedience under the two dominant theories of punishment—retributive theory and utilitarian theory—is necessary. This Section concludes with a philosophical argument for why civil disobedience is a necessary social tool, but should not be afforded a defense in the criminal law.

1. Theories of Punishment

Most of the time, justifying punishment—or arguing against it—is based on either utilitarian or retributive theories of punishment.⁹⁰ Utilitarianism holds, simply, that pain from punishment is only justified if it is “expected to result in a reduction in the pain of crime that

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 111 (2007) (“Protestors will seek to invoke the necessity defense not so much to gain acquittal from the relatively minor charges, but to advance the more important objective of publicly airing the moral and political issues that inspired their act of civil disobedience. *There is the hope of gaining notoriety for a cause by discussing it in court, and “educating” the jury about political grievances or other social harms.* The strategy is meant to appeal to a higher principle than the law being violated—the necessity of stopping objectionable government policies—and to let the jury have an opportunity to weigh their technically illegal actions on the scales of justice. Acquittal is of course hoped for in the end but may be quite low on the protestors’ list of priorities.”) (emphasis added).

⁸⁸ *See id.*

⁸⁹ Dressler, *supra* note 61, § 22.03 (citing Bauer, *supra* note 15, at 1194).

⁹⁰ *Id.* § 2.03[C].

would otherwise occur.”⁹¹ The goal is deterrence: there is both general and specific deterrence in utilitarianism.⁹²

General deterrence punishes the defendant so that the community is convinced to not commit a crime.⁹³ Specific deterrence focuses on the defendant, and intends to deter future misconduct by the defendant either through incapacitation—from being unable to commit crimes while in prison—or intimidation—after getting out of prison, causing defendants to think twice about committing the crime again.⁹⁴ Retributivism is different from utilitarianism. Essentially, it holds that punishment is justified when it is deserved, as the defendant freely chose to break the law.⁹⁵ Retributivism looks backward at the crime itself, while utilitarianism looks forward at preventing future crime either by the public or the defendant.⁹⁶

Under utilitarianism, civil disobedience should be punished under general deterrence schemes because permitting a civilly disobedient defendant to escape punishment merely because he disagrees with the law sends the wrong signal to society. It would encourage willful violations of the law, such as the evasion of taxes, based on the belief that the income tax is unconstitutional or that taxes are used to fund illegal wars.⁹⁷ Although these may be legitimate reasons to oppose filing taxes, the lack of punishment for committing crimes such as these would unnecessarily expand the number of people who are willing to violate the law.

There is an argument for specific deterrence as well. Like all lawbreakers, the civil disobedient will think twice about committing the same crime if the punishment is harsh enough.⁹⁸ Only the most committed of civil disobedients would continue on with their lawbreaking. In that sense, the promise of specific deterrence is in itself a general deterrence to the community. People will consider whether they can endure the punishment that would follow from their lawbreaking and decide whether they truly are committed to their cause enough to keep violating the law despite the consequences.

⁹¹ *Id.* § 2.03[A][1].

⁹² *Id.* § 2.03[A][2].

⁹³ *Id.*

⁹⁴ *Id.* § 2.03 [B][1].

⁹⁵ Dressler, *supra* note 61, § 2.03 [B][1].

⁹⁶ *See id.*

⁹⁷ *See, e.g.,* Kahn v. United States, 753 F.2d 1208, 1211-12 (3d Cir. 1985).

⁹⁸ *See* Dressler, *supra* note 61, § 2.03[A][1].

Of course, there are utilitarian arguments against punishment, especially with specific deterrence. As previously stated, the truly committed lawbreaker will be undeterred by the sanction of the law if it means getting their message out and proving that a law is unjust.⁹⁹ Under utilitarianism, if you cannot specifically deter someone, it may not make sense to punish them. However, there are plenty of laws that people break on a daily basis, such as speeding, that some punishment will not deter them from committing again.¹⁰⁰ Some are willing to accept the consequences of their actions while weighing the benefits of their lawbreaking. Simply because a lawbreaker will not stop breaking the law does not imply they should not be punished. There are other important goals in the criminal justice system, such as order in society and respect for the rule of law, which should be considered beyond simple specific deterrence.

Retributivism has arguments both for and against punishing those who commit acts of civil disobedience. Generally, the retributive theory would hold that a person who intentionally commits an act of lawbreaking deserves punishment, unless they are afforded a defense such as self-defense or necessity.¹⁰¹ Assuming that, like most civil disobedience cases, the “imminence” requirement cannot be met, these defenses would fail. Those who commit acts of civil disobedience do have other options, such as working through the democratic process, peacefully protesting within the confines of the law, or simply doing nothing. Those who act out of conscience to break the law are still breaking the law.

Looking at retributive theory from the various justifications for it, probably the strongest would be “protective retribution.”¹⁰² In society, we have rules and laws and “compliance with these rules burdens each member of the community that exercises self-restraint.”¹⁰³ Indeed, people who support this form of punishment believe that by punishing the wrongdoer, “society demonstrates its respect for him.”¹⁰⁴ In a sense, the defendant has a right to be punished for their

⁹⁹ See *id.* §§ 2.03[A][1], 22.03.

¹⁰⁰ See, e.g., Mark Fahey, *Wealthier Drivers Get More Tickets, But Don't Pay*, CNBC (Apr. 16, 2015, 11:11 AM), <https://www.cnbc.com/2015/04/15/wealthier-drivers-get-more-tickets-but-dont-pay.html>.

¹⁰¹ See Dressler, *supra* note 61, § 22.01.

¹⁰² *Id.* § 2.03[B][2].

¹⁰³ *Id.*

¹⁰⁴ *Id.*

conduct.¹⁰⁵ A person who acts out of civil disobedience will often agree with this sentiment.¹⁰⁶ Some, however, would argue that because the civilly disobedient person is acting on good intentions to better society, they are not a bad person, or certainly not as bad as other criminals in a moral sense.¹⁰⁷

2. Philosophical Views

Historical figures such as abolitionist Henry David Thoreau, women's suffragist Susan B. Anthony, and twentieth-century civil rights leader Martin Luther King, Jr., as well as Indian independence leader Mohandas Gandhi have practiced civil disobedience.¹⁰⁸ It has been said that civil disobedience has "a legitimate if informal place in the political culture of [the American] community."¹⁰⁹ There are primarily four criteria for an act of lawbreaking to be considered civil disobedience: illegal action, predominantly nonviolent, open and visible to alert the community, and those committing it must be willing to

¹⁰⁵ *Id.*

¹⁰⁶ See *infra* Part II.B.2 for further discussion on acceptance of punishment.

¹⁰⁷ See *infra* Part II.B.2; see also *infra* note 109.

¹⁰⁸ See CIVIL DISOBEDIENCE IN AMERICA: A DOCUMENTARY HISTORY 184-85 (David R. Weber ed., Cornell Univ. Press 1978); see also Greenawalt, *infra* note 123, at 121; Mark Edward DeForrest, *Civil Disobedience: Its Nature and Role in the American Legal Landscape*, 33 GONZ. L. REV. 653, 653-54 (1997-98); see generally HENRY DAVID THOREAU, CIVIL DISOBEDIENCE AND OTHER ESSAYS, 1 (Stanley Appelbaum et al. eds., Dover Publ'g, Inc. 1993).

¹⁰⁹ RONALD DWORKIN, A MATTER OF PRINCIPLE, 105 (Harvard Univ. Press 1985). There are some, however, who argue against its place in society. See MORRIS I. LIEBMAN, Second Lecture, in CIVIL DISOBEDIENCE: AID OR HINDRANCE TO JUSTICE 12-14 (Am. Enter. Inst. 1972) ("In democratic societies, any violation of the law is an uncivil act" and the requirements for civil disobedience "provide a superficial veneer of philosophic respectability [and] do not withstand analysis."); but see WILLIAM SLOANE COFFIN, JR., Rebuttal to Second Lecture, *in id.* at 31-32, for a discussion of why sometimes persuading irrational people with rational arguments does not always work ("the problem is not fundamentally one of rationally persuading people to be rational, but of getting them to care."). There are some who believe that civil disobedience, by itself, is not even a criminal act. See ROBERT T. HALL, THE MORALITY OF CIVIL DISOBEDIENCE 24 (Harper & Row 1971) ("It is because full consideration is given to the social nature of the act, and because the interests of others are fully acknowledged, that we can distinguish the act of civil disobedience from a criminal act."). Even Hall acknowledges that "[t]his point might well be contested. Acts of civil disobedience are criminal acts, it might be said, because the agent is arrested and prosecuted under the statues [sic] of the criminal code." *Id.* But, Hall concludes, "the fact that a moral justification of some sort is offered in its defense distinguished the act of civil disobedience from a criminal act." *Id.* at 26.

accept punishment.¹¹⁰ The actor must be committing a crime so that their conduct is distinguished from other political conduct.¹¹¹

a. *Requirements of Civil Disobedience*

The first requirement is that the action be illegal, but there is a question as to what type of illegal action is permissible.¹¹² As noted in the Introduction, there is a difference between direct and indirect civil disobedience.¹¹³ Whether indirect civil disobedience even qualifies as civil disobedience is subject to some dispute, but in many cases, it simply is not possible to directly disobey a law, such as with abortion-related lawbreaking.¹¹⁴

The second requirement is that civil disobedience be predominately nonviolent, unlike acts of terrorism or revolution.¹¹⁵ The goal of civil disobedience is to reform society, not to destroy the entire social order through violence.¹¹⁶ In the same way, to reform society, the action must be open and visible so as to “awaken the conscience of society by showing society that a law is unjust.”¹¹⁷

Finally, as is the subject of this Article, the actor must accept punishment, because the “protestor has a responsibility to society to uphold the fundamental integrity of the civic order,” even if the particular law he is protesting is unjust.¹¹⁸

b. *Arguments for Punishing Civil Disobedience*

Should a person who commits an act of civil disobedience accept his punishment? As philosophy professor Carl Cohen put it, “The civil disobedient fully understands that his unlawful act is properly subject to legal punishment.”¹¹⁹ The civil disobedient welcomes his punishment while personally fearing it.¹²⁰ In fact, accepting punish-

¹¹⁰ DeForrest, *supra* note 108, at 655.

¹¹¹ *Id.*

¹¹² See Dressler, *supra* note 61, § 22.03.

¹¹³ See *supra* Introduction.

¹¹⁴ See DeForrest, *supra* note 108, at 656.

¹¹⁵ *Id.* at 657.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 658.

¹¹⁸ *Id.* at 659.

¹¹⁹ CARL COHEN, CIVIL DISOBEDIENCE: CONSCIENCE, TACTICS, AND THE LAW 86 (Colom. Univ. Press 1971).

¹²⁰ *Id.* at 87.

ment for his or her actions may lead to even more visibility for their action and beliefs: “[e]ven refusing the option of a fine and deliberately going to jail for five or ten days, or more, may be one way to increase the publicity of his protest and, if his community is morally sensitive, to increase its effectiveness as well.”¹²¹ Cohen argues that it is “tactically unwise” and “inappropriate” to seek acquittal, as it would be inconsistent with the purpose of civil disobedience.¹²²

Legal philosopher Kent Greenawalt disagrees with this proposition, but does agree that the actor must be willing to submit to punishment if the state so chooses.¹²³ Greenawalt agrees that “those who commit civil disobedience must make themselves available for punishment,” and that they cannot hide from punishment or use coercive tactics to avoid it from the authorities.¹²⁴ However, Greenawalt departs from the “acceptance of punishment” in a noteworthy way: he says that those who commit acts of civil disobedience “do not have to submit to punishment in the sense of agreeing that they *should* be punished; they can be engaged in civil disobedience even if they think the government’s response should not include punishment.”¹²⁵ This would leave the door open to defendants pursuing affirmative defenses such as necessity, but it does not seem to imply that the state should permit them to move forward with such a defense even if they believe they should be able to do so. Believing you should not be punished and not being punished are two different things.

Countering against political historian Howard Zinn’s argument that accepting punishment accepts an unjust legal system, Cohen notes the distinction between direct and indirect civil disobedience.¹²⁶ In instances of direct civil disobedience, Cohen argues that the law is delivering an unjust punishment, but that the defendant should probably accept the punishment regardless because “no system can allow every man to sit as the judge in his own case.”¹²⁷ In instances of indirect civil disobedience, the protester knows that his action violates a good law, such as criminal trespass, and to “exhibit the depth and

¹²¹ *Id.* at 88.

¹²² *Id.*

¹²³ Kent Greenawalt, *Conscientious Objection, Civil Disobedience, and Resistance, in* CHRISTIANITY AND LAW 105, 108 (John Witte, Jr. & Frank S. Alexander eds., 2008).

¹²⁴ *Id.* at 108.

¹²⁵ *Id.*

¹²⁶ *Id.* at 88-90.

¹²⁷ *Id.* at 90.

intensity of the commitment of the protester,” they must accept punishment.¹²⁸ Accepting punishment is the moral thing to do.¹²⁹

Many others have held similar views, especially during the Civil Rights movement.¹³⁰ Some have referred to this as the “unqualified law-and-order position”; a citizen has a duty to obey the law and his or her departure from the rule of law, based upon their own moral judgment, does not relieve them from punishment.¹³¹ The concept of punishment for disobeying the law flows from the concept of the duty of fair play.¹³² Specifically, citizens owe a duty to each other to obey the law, and as long as there is a just constitution, there is a duty to obey an unjust law as it was created through a just constitutional process.¹³³ Some have held that “any act of civil disobedience is a violation of the terms of the social contract.”¹³⁴ John Locke, a social contract philosopher, agreed that it was important to bear the punishment for acts of civil disobedience.¹³⁵

¹²⁸ *Id.* at 91.

¹²⁹ *See id.*

¹³⁰ William L. Taylor, *Civil Disobedience: Observations on the Strategies of Protest*, in LEGAL ASPECTS OF THE CIVIL RIGHTS MOVEMENT 227-28 (Donald B. King & Charles W. Quick eds., 1965) (“One aspect of civil disobedience has already been alluded to—a willingness to accept the penalty . . . [which] is based upon a principle crucial to the philosophy of civil disobedience: that the violation of pernicious laws is justified by the fact that these laws themselves violate a higher law, which may be called moral law . . .”); *see also* Greenawalt, *supra* note 123, at 121.

¹³¹ MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 155 (Stanford Univ. Press 1973). The Kadish book also argues that this response to disobedience is “never actually given in the American legal system, though much judicial rhetoric and theory asserts or implies it.” *Id.*

¹³² John Rawls, *Legal Obligation and the Duty of Fair Play*, in CIVIL DISOBEDIENCE AND VIOLENCE 45 (Jeffrie G. Murphy ed., Wadsworth Pub. Co. 1971). *See infra* Part II.B.2[iv] for more discussion by John Rawls.

¹³³ *See id.* This, of course, ignores the fact that during the civil rights movement, many blacks were prevented from participating in the political process itself.

¹³⁴ Catherine Valcke, *Civil Disobedience and The Rule of Law—A Lockean Insight*, in THE RULE OF LAW 46 (Ian Shapiro ed., 1994) (*criticizing* Jean Hampton’s argument in the preceding article, Democracy and the Rule of Law). *Id.* at 13. Valcke argues that “the citizens’ duty to disobey those [laws] they believe are immoral is paramount, as this duty predates the social contract and cannot be renounced through it.” *Id.* at 53. However, on the concept of punishment, Valcke concludes that “[i]t is unclear how much citizens should be willing to give up for the sake of better laws,” noting that Socrates sacrificed his life for disobeying an immoral law. *Id.* at 54-55. Ultimately, “it seems likely that the citizens would agree to put a limit on the sacrifices they are expected to make.” *Id.* at 55. This acknowledges that some sanction is implicit in civil disobedience.

¹³⁵ *Id.* at 57, (quoting John Locke, *Second Treatise on Civil Government*, Sec. 94 (“[N]o man in civil society can be exempted from the laws of it: for if any man may do what he thinks fit, and there be no appeal on earth, for redress or security against any harm he shall do . . .”).

c. *Arguments Against Punishing Civil Disobedience*

A forceful argument against punishing civil disobedience has been made by both Ronald Dworkin and Howard Zinn.¹³⁶ Arguing that prosecutors should use their discretion to decline to prosecute people who act out of conscience in violating laws, Dworkin, answering the question of what the government should do to deal with these people, says that “[m]any people think the answer is obvious: the government must prosecute the dissenters, and if they are convicted it must punish them.”¹³⁷ He argues that those who support punishment recognize that disobedience may be morally justified, but is not legally justified.¹³⁸ Dworkin believes that prosecuting, and thus, punishing, civil disobedience would result in the jailing of people who act out of a better motive than other lawbreakers, and would remove from society some of the most intelligent and thoughtful citizens.¹³⁹

Dworkin makes a good point, but his solution—a default rule not to prosecute or to simply not punish those convicted of acts of civil disobedience—would be better for the rule of law if it were a policy choice rather than a rigid rule. If a prosecutor chooses to go forward with charges, and proves beyond a reasonable doubt that a person committed the elements of the crime, they should be convicted. A jury always has the ability to nullify,¹⁴⁰ but if they choose not to, they are showing their condemnation of the person’s actions, and the appropriate sanction as determined by the law should typically follow.

The prosecutor’s choice whether to press forward with charges is important, and ultimately, where the discretion should exist on cases involving civil disobedience. In the end, though, punishment for those who are ultimately convicted, despite acting out of conscience, is the appropriate remedy for violating the social contract, as Locke and others have concluded. Moreover, those who practice civil disobedience for a living recognize the value and utility of accepting punishment as a matter of principle as well as tactically valuable.

¹³⁶ See generally Ronald Dworkin, *On Not Prosecuting Civil Disobedience*, in *MORALITY, JUSTICE, AND THE LAW* 205 (M. Katherine B. Darmer & Robert M. Baird eds., 2007); see also Zinn, *supra* note 12.

¹³⁷ Dworkin, *supra* note 136.

¹³⁸ *Id.* at 205-06.

¹³⁹ See *id.* at 206.

¹⁴⁰ Dressler, *supra* note 61, § 1.02[C].

d. *King and Gandhi's Views*

In his letter from a Birmingham jail to fellow clergymen, Dr. Martin Luther King, Jr. wrote that

[w]e had no alternative except to prepare for direct action, whereby we would present our very bodies as a means of laying our case before the conscience of the local and the national community. Mindful of the difficulties involved, we decided to undertake a process of self-purification. We began a series of workshops on nonviolence, and we repeatedly asked ourselves: "Are you able to accept blows without retaliating?" "Are you able to endure the ordeal of jail?"¹⁴¹

King understood that the acceptance of punishment is a necessary principle of civil disobedience. King's concept of civil disobedience revolved around the idea of whether a law is just or unjust.¹⁴² King believed that a just law is

a man made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law. Any law that uplifts human personality is just. Any law that degrades human personality is unjust.¹⁴³

Unjust laws, according to King, were morally wrong and should be disobeyed with fervor.¹⁴⁴

Gandhi held similar views to King. He wrote that "[p]assive resistance is a method of securing rights by personal suffering" and that "[i]f I do not obey the law and accept the penalty for its breach, I use soul-force" as opposed to violence through what he termed "body-force."¹⁴⁵ Essentially, Gandhi believed that by accepting the blows of the British in nonviolent resistance to their occupation of India, he could effect change, which he inevitably did with Indian

¹⁴¹ Martin Luther King, Jr., *Letter from Birmingham Jail*, UNIV. OF PENN., (Apr. 16, 1963), http://www.africa.upenn.edu/Articles_Gen/Letter_Birmingham.html.

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *See id.*

¹⁴⁵ Mohandas K. Gandhi, *Non-Violent Resistance (Satyagraha)*, in *CIVIL DISOBEDIENCE: A CASEBOOK* 186, 189 (Curtis Crawford ed., 1973).

independence coming in 1947, a year before his death.¹⁴⁶ Gandhi was famous for leading a social movement of nonviolent civil disobedience, and he accepted that a person who disobeys the law out of conscience must accept the consequences.¹⁴⁷ This belief is clearly prevalent among the most famous of persons who engaged in civil disobedience.

e. Politics vs. Morality: Civil Disobedience is a Political Act

John Rawls provides the strongest argument for punishing those who commit acts of civil disobedience. He writes that

[C]ivil disobedience is a political act not only in the sense that it is addressed to the majority that holds political power, but also because it is an act guided and justified by political principles, that is, by the principles of justice which regulate the constitution and social institutions generally. In justifying civil disobedience one does not appeal to principles of personal morality or to religious doctrines¹⁴⁸

According to Rawls, although the actor has broken the law, their loyalty to the legal system itself “is expressed by the public and nonviolent nature of the act, by the willingness to accept the legal consequences of one’s conduct.”¹⁴⁹

This makes sense, and, given the nature of the judicial system, a trial based upon political views could become nothing more than a show trial, devaluing justice and ruining the process of meting out justice to those who deserve it.¹⁵⁰ If those who employed civil disobedience as part of their famous movements believed that those who engage in acts of civil disobedience must accept punishment, then the law should also continue to respect the need for accepting punishment as fidelity to the rule of law itself.

¹⁴⁶ See CIVIL DISOBEDIENCE: A CASEBOOK 180 (Curtis Crawford ed., 1973).

¹⁴⁷ See *id.*

¹⁴⁸ John Rawls, *A Theory of Civil Disobedience*, in CIVIL DISOBEDIENCE 125, 127 (Paul Harris, ed. 1989).

¹⁴⁹ *Id.* at 128. Interestingly, Rawls points out that some who justify civil disobedience, such as Howard Zinn, would disagree with this proposition. *Id.* at 148, n.4. (citing Zinn, *supra* note 12, at 27-31, 39).

¹⁵⁰ See Hall, *supra* note 109, at 2121 and accompanying text.

III. A NEW ERA OF PROTEST

Protest is not a new concept, but in recent years, it has captured the attention of the public for a variety of social and political reasons. Particularly, the Black Lives Matter movement has been called the civil rights movement of our time.¹⁵¹ One writer for *The New Yorker* urges that civil disobedience return to the streets as a response to President Donald Trump and his administration's policies.¹⁵² The Black Lives Matter movement has "merged the nonviolent civil disobedience of the civil rights movement with the radical structural critique of white supremacy and capitalist inequality articulated by Black Power activists."¹⁵³ The movement stands at a crossroads in figuring out how to turn its grassroots activism into a bona fide political movement, needing to determine whether it operates within the political status quo or from outside it.¹⁵⁴

In 2016, hundreds of protestors were arrested after video of the police shooting deaths of Philando Castile and Alton Sterling, two unarmed black men, enraged the public.¹⁵⁵ Protestors associating themselves with Black Lives Matter have even been arrested internationally, protesting the impact of air pollution on black people.¹⁵⁶ Multiple protestors were arrested in Virginia for blocking traffic, and were sentenced to five days in jail.¹⁵⁷

¹⁵¹ Goldie Taylor, *Black Lives Matter Is Our Civil Rights Movement*, THE DAILY BEAST, (Jul. 12, 2016, 1:00 AM), <http://www.thedailybeast.com/goldie-taylorblack-lives-matter-is-our-civil-rights-movement>.

¹⁵² See Jelani Cobb, Comment, *The Return of Civil Disobedience*, NEW YORKER, (Jan. 9, 2017), <http://www.newyorker.com/magazine/2017/01/09/the-return-of-civil-disobedience>.

¹⁵³ Peniel E. Joseph, *Why Black Lives Matter Still Matters*, THE NEW REPUBLIC, (Apr. 6, 2017), <https://newrepublic.com/article/141700/black-lives-matter-still-matters-new-form-civil-rights-activism>.

¹⁵⁴ Megan Garber, *The Revolutionary Aims of Black Lives Matter*, THE ATLANTIC, (Sept. 30, 2015), <https://www.theatlantic.com/politics/archive/2015/09/black-lives-matter-revolution/408160/>.

¹⁵⁵ See Inae Oh, *Hundreds of Black Lives Matter Protesters Arrested as Outrage Over Police Brutality Continues*, MOTHER JONES, (Jul. 11, 2016), <http://www.motherjones.com/politics/2016/07/black-lives-matter-protests-july-arrests/>.

¹⁵⁶ Jamie Grierson, et al., *Nine Black Lives Matter Protesters Arrested After City Airport Travel Chaos*, THE GUARDIAN, (Sept. 6, 2016), <https://www.theguardian.com/uk-news/2016/sep/06/nine-black-lives-matter-protesters-arrested-amid-city-airport-travel-chaos>.

¹⁵⁷ Brandon Shulleeta, *13 Black Lives Matter Protesters Sentenced to Five Days in Jail for Blocking Richmond Interstate*, RICHMOND TIMES-DISPATCH, (Nov. 28, 2016), http://www.richmond.com/news/local/crime/black-lives-matter-protesters-sentenced-to-five-days-in-jail/article_5406ad54-c3fa-541a-8c22-d3fc7689eea1.html.

Beyond the Black Lives Matter protests lies those who protest Donald Trump, the Republican Party, and conservative policies in general, all of which many protestors claim to be fascist, racist, and misogynistic.¹⁵⁸ Berkeley, California is one notable location for multiple protests and acts of civil disobedience, though many of these acts have not been quite the same non-violent activity envisioned by previous generations of civil disobedients.¹⁵⁹ During Trump's inauguration, hundreds of protestors were arrested, with some facing felony rioting charges that could land them in prison for decades, an extreme and, perhaps, unconstitutional punishment if it is eventually handed down.¹⁶⁰ Protestors arrested outside of Trump Hotel in New York City, on "A Day Without Women," were jailed for several hours.¹⁶¹ One protestor joked that the activists had "spent their time behind bars 'plotting the next big action' and said the detained activists were cold, hungry, and tired after their ordeal," yet did not complain about being arrested.¹⁶²

Activists have also been arrested for disrupting banks in protest of climate change,¹⁶³ and the construction of the Dakota Access Pipeline in North Dakota.¹⁶⁴ LGBTQ activists have been arrested in several large cities protesting the presence of corporate sponsors and police in Pride parades, calling themselves "No Justice, No Pride."¹⁶⁵

¹⁵⁸ See Hal Bernton, *Police Spar with Protesters of Pro-Trump Rally in Portland; 14 Arrested, Dozens of Weapons Seized*, THE SEATTLE TIMES, (Jun. 4, 2017, 11:41 AM), <http://www.seattletimes.com/seattle-news/northwest/tensions-high-in-portland-as-city-prepares-for-free-speech-rally-in-wake-of-transit-deaths/>.

¹⁵⁹ See Paige St. John, *21 Arrested as Hundreds of Trump Supporters and Counter-Protesters Clash at Berkeley Rally*, L.A. TIMES, (Apr. 15, 2017, 6:35 PM), <http://www.latimes.com/local/lanow/la-me-ln-berkeley-trump-rally-20170415-story.html>.

¹⁶⁰ See Patrick Strickland, *Anti-Trump Protester: 'Is This My Last Free Birthday?'*, AL JAZEERA, (Jun. 5, 2017), <http://www.aljazeera.com/indepth/features/2017/05/anti-trump-protesters-facing-decades-bars-170522063956218.html>.

¹⁶¹ Charlotte Alter, *Women's March Organizers Arrested at 'Day Without a Woman' Protest Outside Trump Hotel*, TIME, (Mar. 8, 2017, 7:59 PM), <http://time.com/4695840/womens-march-arrests-trump-hotel/>.

¹⁶² *Id.*

¹⁶³ Lynda V. Mapes, *Climate Activists Shut Down Chase Bank Branches in Seattle; Arrests Made*, THE SEATTLE TIMES, (May 8, 2017, 1:27 PM), <http://www.seattletimes.com/seattle-news/climate-activists-shut-down-chase-bank-branches-in-seattle/>.

¹⁶⁴ Mitch Smith & Alan Blinder, *North Dakota Arrests 10 as Pipeline Protest Camp Empties*, N.Y. TIMES, (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/a-deadline-looms-for-dakota-protesters-to-leave-campsite.html>.

¹⁶⁵ Mary Emily O'Hara, *12 Arrests as LGBTQ Activists Turn Pride March Into Protest*, NBC NEWS, (Jun. 26, 2017, 4:17 PM), <http://www.nbcnews.com/feature/nbc-out/twelve-arrests-lgbtq-activists-turn-pride-march-protest-n776726>.

One major protest since Trump's election—the Women's March on January 21—resulted in zero arrests, though one writer argues that white women wearing pink hats were never going to be arrested, unlike protests led by a large group of people of color.¹⁶⁶

These protests and arrests will likely continue for the foreseeable future. The social and political movements that inspire these protests are not openly arguing that they should not face punishment for acts of civil disobedience. If anything, the evidence reflects calculated actions by activists, that they know and understand will lead to some form of punishment, whether that is a fine or a few hours or days in jail. The purpose of the protest is to raise the profile of the issue that the activist is protesting. What better way to get the attention of the public than to induce the media to cover its protest days, weeks, or months after the protest? As the civil disobedients are brought before judges, explain their actions, and serve their time, the media will cover the events. Others may be inspired to join in on the protests in the future, recognizing that their actions may also lead to a minor punishment.

Therein lies the key concern for civil disobedients, however. If the time served for blocking traffic is a few days in jail, it is not unreasonable to believe that activists will sacrifice a few days of freedom to draw attention to their causes and concerns. If the government threatens decades in prison for an act of civil disobedience—or even an act of “rioting,” which is not considered civilly disobedient—many may be discouraged from protesting. Moreover, journalists may be reluctant to cover newsworthy protest events if they are caught up in the chaos.¹⁶⁷ Policymakers, including prosecutors, must take great care to balance the interests of peace and order with the potential chilling effect on protest of lengthy prison terms or hefty fines.

The new era of protest is likely not a temporary blip simply because a new president was elected. These protests and movements reflect an underlying concern with the treatment of minorities in the United States. This is true particularly for Black Lives Matter's concerns with the treatment of minorities by law enforcement. Moreover,

¹⁶⁶ Zeba Blay, *Before You Celebrate The Zero Arrests At the Women's March . . .*, HUFFINGTON POST, (Jan. 23, 2017, 5:08 PM), http://www.huffingtonpost.com/entry/before-you-celebrate-the-zero-arrests-at-the-womens-march_us_588617e4e4b0e3a7356a3ee4.

¹⁶⁷ Nick Visser, *Journalist Arrested During D.C. Protest Faces 75 Years In Prison*, HUFFINGTON POST, (Jun. 7, 2017, 1:03 AM), http://www.huffingtonpost.com/entry/aaron-cantu-reporter-prison_us_59377e9de4b01fc18d3eb210.

those concerned with global environmental policy will continue—as they have for many decades¹⁶⁸—to protest government actions inconsistent with their worldview. Civil disobedience will remain a key tool for activists to heighten the profile of their cause, inspired by previous generations of activists like King and Gandhi.

CONCLUSION

The current legal status of civil disobedience should remain the same as it currently is: civil disobedience should not be made a separate defense to a crime, nor should civil disobedience be placed under the umbrella of a necessity or duress defense. The political and social implications of civil disobedience are ultimately good for society because they can highlight ongoing, systemic problems and injustices, such as the civil rights movement in the 1950s and 1960s, the women's suffrage movement, and Gandhi's movement for independence in India. In recent years, protests over Black Lives Matter, climate change, and the Trump presidency have renewed the focus on activism and civil disobedience, with many arrested and serving time in jail for their actions.

However, the legal implications for decriminalizing—or softening the implications of—civil disobedience will lead to disrespect for the rule of law and show trials that are based less on fact and law and more on political views. Americans accept that civil disobedience has a role to play in our political culture,¹⁶⁹ but letting those who break the law escape without punishment violates both retributive and utilitarian theories of punishment, despite some arguments to the contrary.¹⁷⁰ On the other hand, threatening inefficient, excessive punishments, such as decades in prison for civil disobedience are a concerning development.

The “fathers” of civil disobedience would be shocked to learn that those who profess to use civil disobedience as a tool for social change could seek to escape the lawful punishment that they deserve for their conduct. Martin Luther King, Jr. exemplified the traditional view of civil disobedience in urging his colleagues and supporters to

¹⁶⁸ See Peter Dykstra, *History of Environmental Movement Full of Twists, Turns*, CNN, (Dec. 15, 2008), <http://www.cnn.com/2008/TECH/science/12/10/history.environmental.movement/index.html>.

¹⁶⁹ Dworkin, *supra* note 136.

¹⁷⁰ See *supra* Part II.B.

accept the dictates of the law, all the while understanding that the very punishment they would endure would serve a cause greater than temporary pain and suffering.¹⁷¹

If a civil disobedient is unwilling to accept the consequences of his actions without reservation or objection, by accepting the very system through which both just and unjust laws are created and enforced, then he should not break the law. If he does, he should be punished, as any other offender would be. As King put it,

One who breaks an unjust law must do so openly, lovingly, and with a willingness to accept the penalty. I submit that an individual who breaks a law that conscience tells him is unjust, and who willingly accepts the penalty of imprisonment in order to arouse the conscience of the community over its injustice, is in reality expressing the highest respect for law.¹⁷²

Those who willingly violate the law to serve a greater good should accept the consequences of their actions and in turn, express their respect for the rule of law. The government should seek to punish lawbreakers in a just, efficient, and effective manner, rather than chill future socially-necessary activism through excessive, draconian punishment and restrictions on protest.

¹⁷¹ See *supra* notes 1, 140-44.

¹⁷² King, *supra* note 141.

