

2019

Civil Disobedience: A Constitutional Alternative to Injustice

Samuel H.J. Schultz

Follow this and additional works at: <https://open.mitchellhamline.edu/mhlr>

 Part of the [Constitutional Law Commons](#), [Criminal Law Commons](#), [First Amendment Commons](#), and the [Public Law and Legal Theory Commons](#)

Recommended Citation

Schultz, Samuel H.J. (2019) "Civil Disobedience: A Constitutional Alternative to Injustice," *Mitchell Hamline Law Review*: Vol. 45 : Iss. 2 , Article 9.

Available at: <https://open.mitchellhamline.edu/mhlr/vol45/iss2/9>

This Article is brought to you for free and open access by the Law Reviews and Journals at Mitchell Hamline Open Access. It has been accepted for inclusion in Mitchell Hamline Law Review by an authorized administrator of Mitchell Hamline Open Access. For more information, please contact sean.felhofer@mitchellhamline.edu.

© Mitchell Hamline School of Law

CIVIL DISOBEDIENCE: A CONSTITUTIONAL ALTERNATIVE TO INJUSTICE

Samuel H.J. Schultz[†]

I.	INTRODUCTION.....	647
II.	THEORETICAL CONSTITUENT ELEMENTS OF CIVIL DISOBEDIENCE	649
	<i>A. An Act of Government</i>	<i>651</i>
	<i>B. That is Unjust.....</i>	<i>654</i>
	<i>C. That Necessitates Active Disobedience</i>	<i>658</i>
	<i>D. The Constituent Elements of Civil Disobedience</i>	<i>663</i>
III.	CIVIL DISOBEDIENCE AND THE SUPREME COURT.....	663
	<i>A. The First Amendment and Expressing Dissent.....</i>	<i>664</i>
	<i>B. The Supreme Court and Disobedience.....</i>	<i>668</i>
	<i>C. Conclusion</i>	<i>672</i>
IV.	CIVIL DISOBEDIENCE APPLIED TO AMERICAN JURISPRUDENTIAL PRINCIPLES	672
	<i>A. Civil Disobedience and Criminal Intent</i>	<i>673</i>
	<i>B. Civil Disobedience and Necessity.....</i>	<i>674</i>
	<i>C. Conclusion</i>	<i>676</i>
V.	CIVIL DISOBEDIENCE DEFENSE APPLIED TO <i>STATE V.</i> <i>KLAPSTEIN</i>	677
	<i>A. The Clearwater County Defendants and the Necessity</i> <i>Defense.....</i>	<i>677</i>
	<i>B. Civil Disobedience Instead of Necessity.....</i>	<i>678</i>
	1. <i>An Act of Government</i>	<i>678</i>
	2. <i>That is Unjust.....</i>	<i>679</i>
	3. <i>That Necessitates Active Disobedience</i>	<i>681</i>
	4. <i>The Decision.....</i>	<i>682</i>
VI.	CONCLUSION	683

[†] I offer my sincerest gratitude to Professor Steve Aggergaard of Mitchell Hamline School of Law and Attorney Tim Phillips of the Law Office of Joshua R. Williams, PLLC. This article would not have been possible without their sage guidance and ready assistance.

I. INTRODUCTION

On October 11, 2016, four individuals shut down the Enbridge oil pipelines running through Clearwater County.¹ These four individuals traveled to the small town of Leonard, Minnesota, and cut their way into the valve station.² Two of them accessed the shut-off valve, while one videotaped.³ The last individual contacted Enbridge, so the company had the opportunity to remotely shut down the pipelines.⁴ All four individuals were ultimately arrested and charged with felonies.⁵

However, these four defendants did not enter the valve station and force the shutdown of the pipelines for their own benefit. Instead, they were engaged in an act of civil disobedience—they broke the law for a greater good⁶ by seeking to prevent the global harm caused by fossil fuels.⁷ One of the defendants, Annette Klapstein explained, civil disobedience is “the only thing we have left as ordinary citizens when our political system will not respond to a crisis that is actually threatening the very existence of our grandchildren.”⁸ Despite this sincere belief, there are slim protections for people like Annette Klapstein who act on their convictions.⁹

The Clearwater County defendants resorted to the protections afforded by the necessity defense.¹⁰ In Minnesota, the necessity defense is generally unavailable where there are alternative legal remedies, including access to the political system.¹¹ The four Clearwater County defendants

1. State v. Klapstein, No. 15-CR-16-413, 2018 WL 1902473, at *1 (Minn. Ct. App. Apr. 23, 2018), *cert. denied* (July 17, 2018).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Dan Kraker, *Trial Starts for Climate Protesters in Trump, Pipeline Country*, MPR NEWS (Oct. 8, 2018), <https://www.mprnews.org/story/2018/10/08/trial-starts-for-climate-protesters-in-trump-pipeline-country> [<https://perma.cc/E3Z2-Q8RM>] [hereinafter Kraker, *Pipeline Country*].

7. *Klapstein*, 2018 WL 1902473, at *1.

8. Elizabeth Dunbar, *Minn. Court Sides with Climate Change Activists in Pipeline Case*, MPR NEWS (Apr. 23, 2018), <https://www.mprnews.org/story/2018/04/23/appeals-court-ruling-pipeline-protest-necessity-defense> [<https://perma.cc/L8Q6-KXUC>].

9. See *The Right to Protest*, ACLU MINN. <https://www.aclu-mn.org/en/know-your-rights/right-protest> [<https://perma.cc/W7P4-PDGT>] (discussing the scope and boundaries of civil disobedience).

10. *Klapstein*, 2018 WL 1902473, at *1.

11. State v. Rein, 477 N.W.2d 716, 718 (Minn. Ct. App. 1991) (holding that the necessity defense was unavailable where defendants “had access to the state legislature, courts, and law enforcement organizations”).

were fortunate in that the Minnesota Court of Appeals allowed them the opportunity to present their necessity defense, although the trial judge ultimately granted their motion for a judgment of acquittal before they had the opportunity to present the necessity defense in court.¹² Nonetheless, the opportunity to present a necessity defense is exceedingly rare for acts of civil disobedience.¹³

Those who commit genuine acts of civil disobedience deserve more protection than the meager options currently available. Civil disobedience must be recognized as an appropriate means of engaging in the constitutionally protected expression of political dissent. Individuals who engage in valid acts of disobedience must be permitted to assert civil disobedience as a defense to reduce the punishment they receive for expressing political dissent through communicative acts. Embracing such a use of civil disobedience would not eliminate a criminal conviction, but would instead reduce a convicted defendant's punishment.¹⁴ This method thus demonstrates respect not only for the rule of law, but also for the important place civil disobedience holds in society.

In Part II, this note provide the theoretical basis for a judicially manageable definition of civil disobedience: namely, that a valid act of civil disobedience exists where there is an unjust government act that necessitates active disobedience.¹⁵ Part III provides support for the protection of active political dissent from Supreme Court decisions regarding the First Amendment, draft evasion, and the civil rights movement.¹⁶ Part IV describes how civil disobedience, as a means to reduce sentencing, does not run afoul of established notions of criminal

12. See *Klapstein*, 2018 WL 1902473, at *1; see also Dunbar, *supra* note 8; Dan Kraker, *Surprise Acquittal in Enbridge Pipeline Protesters' Case*, MPR NEWS (Oct. 9, 2018), <https://www.mprnews.org/story/2018/10/09/judge-acquits-enbridge-pipeline-protesters> [https://perma.cc/8G2D-SUX9].

13. See Dunbar, *supra* note 8 (noting that this was not the first time a judge allowed the necessity defense for climate change protests, but only providing two other examples of such a result); see also William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 3, 27-37 (2003) (reviewing the application of the necessity defense in civil disobedience cases and finding twenty-three examples of juries in state courts acquitting defendants asserting the necessity defense for acts of civil disobedience).

14. See Daniel M. Farrell, *Paying the Penalty: Justifiable Civil Disobedience and the Problem of Punishment*, 6 PHIL. & PUB. AFF. 165, 166 (1977) (“[T]he case for punishing justifiable civil disobedience is not as strong as is often thought.”).

15. See *infra* Part II.

16. See *infra* Part III.

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 649

intent.¹⁷ It also discusses civil disobedience as a viable alternative to the necessity defense.¹⁸ Lastly, Part V uses the Clearwater County case as a practical example of how civil disobedience may be asserted.¹⁹ In sum, this note provides support for the notion that a person who violated a government act—one that a reasonable person would find to be unjust and that necessitated direct action to end that injustice—should be allowed to present a defense arguing for reduced or nominal punishment.

II. THEORETICAL CONSTITUENT ELEMENTS OF CIVIL DISOBEDIENCE

Civil disobedience is an active means of resisting the government through disobeying or impeding some kind of government action.²⁰ Some commentators have posited that its “distinguishing characteristic” is resistance, through disobedience, “against a specific law or act of the State having the effect of law.”²¹ Throughout the nation’s history, additional attempts to define civil disobedience have resulted in several unwieldy factors and characteristics.²² A review of the theoretical underpinnings of

17. See *infra* Part IV.

18. See *infra* Part IV.

19. See *infra* Part V.

20. See Quigley, *supra* note 13, at 14–15 (“Civil disobedience is the intentional violation of a law for reasons of principle, conscience or social change.”).

21. Harrop A. Freeman, *The Right of Protest and Civil Disobedience*, 41 IND. L.J. 228, 231 (1966).

22. See *id.* Freeman posits seven additional defining characteristics of civil disobedience:

- (1) “Civil” is not used in contradistinction to “criminal” (for some civil disobedience is indicted as criminal), but it is used as “against the state, the civil, the civitas;”
- (2) it is an “intentional” act, a chosen course, not occasioned by accident;
- (3) it is used for an external purpose (to call attention to injustice, to change conditions);
- (4) it is non-violent, at least in origin;
- (5) it is a form of communication and asserts that it is within the theory of the first amendment;
- (6) it is used by those who are in fact barred from otherwise exerting power;
- (7) it may be legal or illegal.

Id. at 231–32; see also Matthew R. Hall, *Guilty but Civilly Disobedient: Reconciling Civil Disobedience and the Rule of Law*, 28 CARDOZO L. REV. 2083, 2087–92 (positing that the elements of civil disobedience are that it is (1) political, (2) conscientious, (3) nonviolent and respectful, (4) requires acceptance of punishment, and (5) must “take place publicly or openly”); Quigley, *supra* note 13, at 14 (“Civil disobedience is an act of protest, deliberately unlawful, conscientiously and publicly performed. It may have as its object the laws or policies of some governmental body, or those of some private corporate body whose decisions have serious public consequences; but in either case the disobedient protest is almost invariably nonviolent in character.”).

civil disobedience, however, reveals a simpler test for determining what is, and what is not, civil disobedience.

Theorists have given civil disobedience and related concepts substantial consideration throughout human history.²³ There are, however, several theorists who are particularly important to this discussion. The first is Saint Thomas Aquinas, as his work, *Summa Theologica*, is one of the earliest instances of advocating for the justified and principled refusal to follow the laws.²⁴ The second is Henry David Thoreau, whose essay *Civil Disobedience* was among the first to discuss civil disobedience in the American context.²⁵ The third theorist is Dr. Martin Luther King, Jr., whose *Letter from Birmingham Jail* is a uniquely forceful endorsement of civil disobedience in the context of segregation and the Civil Rights Era.²⁶ These three works reveal a manageable and concise test for determining what is a valid act of civil disobedience: actions taken in the face of a government act that is unjust and necessitates active disobedience.

23. Freeman, *supra* note 21, at 237–38. Freeman notes that historically, the theory of civil disobedience has been couched in ideas of natural or divine law:

When Antigone insisted upon burying her brother despite the king's edict that his body be cast to the dogs; when Christians refused to pay homage to Caesar's image with incense and wine; when Aquinas insisted that "human law does not bind a man in conscience . . . [and if they conflict] human law should not be obeyed;" when the American colonies declared their independence of England because "all men are created equal, [that they are] endowed by their Creator with certain inalienable Rights, that among these are Life, Liberty and the pursuit of Happiness;" . . . they relied upon a higher law, a natural justice, a code of man's fundamental rights which no political power can eliminate.

Id.

24. See *Summa Theologica*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Summa-theologiae> [https://perma.cc/2AAP-HHDD] (noting that *Summa Theologica* was written between 1265 and 1273 AD); see also Ryan Reeves, *The Significance of Thomas Aquinas*, LIGONIER MINISTRIES (Sept. 1, 2013), <https://www.ligonier.org/learn/articles/significance-thomas-aquinas/> [https://perma.cc/M8NH-AYFA] (describing the *Summa Theologica* as "a work that is unrivaled in its scope, covering a staggering number of subjects" including "the function of civil government").

25. See Thoreau and "Civil Disobedience," CONSTITUTIONAL RIGHTS FOUND., <http://www.crf-usa.org/black-history-month/thoreau-and-civil-disobedience> [https://perma.cc/387S-B7JH].

26. See Jack Brymer, *MLK's 'Letter from Birmingham Jail' Called Most Important Document of Civil Rights Era*, SAMFORD UNIV. (Apr. 17, 2014), <https://www.samford.edu/news/2013/MLKs-Letter-from-Birmingham-Jail-Called-Most-important-Documents-of-Civil-Rights-Era> [https://perma.cc/7RKY-5TGQ] (noting that the "basic themes of Dr. King's letter" were "justification, non-violence, timing, breaking laws and extremism").

Accordingly, the constituent elements of civil disobedience should be (1) a government act,²⁷ (2) that is unjust,²⁸ and (3) that *necessitates* active disobedience.²⁹

A. *An Act of Government*

The first requirement of civil disobedience is that there be a governmental act to disobey. In *Summa Theologica*, Saint Thomas Aquinas is concerned with governmental acts constituting what he calls “human law.”³⁰ According to Aquinas, proper human law must be derived from natural or divine law.³¹ A purely human law, however, is a “determination of certain generalities” from the natural law.³² By way of example, Aquinas offers that if the “law of nature has it that the evil-doer should be punished,” the purely human law derived from this generality would be how the evil-doer is punished “in this or that way.”³³ Aquinas further notes that “those things which are” derived from generalities “have no other force than that of human law.”³⁴ In short, human law constitutes a governmental act when it is drawn solely from human reasoning and not implemented directly from religious doctrine.³⁵

27. *See infra* Section II.A.

28. *See infra* Section II.B.

29. *See infra* Section II.C.

30. SAINT THOMAS AQUINAS, THE SUMMA THEOLOGICA 1356 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1947) <https://www.basilica.ca/documents/2016/10/St.%20Thomas%20Aquinas-Summa%20Theologica.pdf> [<https://perma.cc/7X5D-8JMP>].

31. *Id.* at 1358.

32. *Id.* This is opposed to a human law that also has the force of natural law. Aquinas notes that human laws may be derived by “demonstrated conclusions” that “are drawn from the principles.” Aquinas expounds on this notion by noting that “[s]ome things are therefore derived from the general principles of the natural law, by way of conclusions; e.g. that ‘one must not kill’ may be derived as a conclusion from the principle that ‘one should do harm to no man.’” *Id.* Aquinas concludes that “those things which are derived” from conclusions “are contained in human law not as emanating therefrom exclusively, but have some force from the natural law also.” *Id.* Because Aquinas’s theory on what makes a law just includes the force of natural law, I am not further concerned with laws Aquinas determines to be created from conclusions. *See id.*

33. *Id.*

34. *Id.*

35. *See id.* This references the distinction, as Aquinas would see it, between directly implementing the Ten Commandments and implementing laws that have the effect of advancing the precepts in the Ten Commandments. Instead of directly borrowing the commandment not to kill, a “human law” would be the distinctions in homicide society is familiar with, such as differentiating between manslaughter and first-degree murder.

Thoreau expands this concept of the governmental act beyond simply the laws humans make, and he takes issue with the functions of the government beyond its legislative power. The two main actions Thoreau condemns are the large topics of his day: tolerance of slavery and the Mexican-American War.³⁶

Thoreau condemns no single legislative act. Instead, he condemns government actions which are beyond the reach of the average voter or legislator, namely the “character and measures of a government” on the most divisive issues of one’s time.³⁷ Thoreau’s condemnation of overarching government stances is exemplified by his general disdain for democratic means of change, as he declares that “[e]ven voting . . . is *doing* nothing.”³⁸ This concept is further reinforced by how he describes his yearly process of evaluating the government: “[E]ach year . . . 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.”³⁹ Thoreau’s analysis of the governmental act therefore considers not only the “acts” of the government, but also the general “position” of those governments and even the “spirit of the people.” His conception of the governmental act is clearly a much broader analysis than the laws that humans create, including the stances the government takes on the seminal issues of its time.

The concept of the governmental act, as formulated by Dr. King, is the culmination of Aquinas’s focus on law itself and Thoreau’s expanded inquiry. Dr. King is dedicated to opposing and ending laws that create and enforce segregation.⁴⁰ However, Dr. King also decries the democratic system that allowed those laws to be created:

36. HENRY DAVID THOREAU, WALDEN AND “CIVIL DISOBEDIENCE” 264–65 (Signet Classics ed., New American Library 2012) (1849). Thoreau’s frustration with the country on both of these issues is evident:

In other words, when 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.

What makes this duty the more urgent is the fact that the country so overrun is not our own, but ours is the invading army.

Id.

37. *See id.* at 268.

38. *Id.* at 266.

39. *Id.* at 279.

40. *Martin Luther King Jr.’s ‘Letter from Birmingham Jail’*, ATLANTIC, <https://www.theatlantic.com/magazine/archive/2018/02/letter-from-birmingham-jail/552461/> [<https://perma.cc/6VP6-ZW6Q>] [hereinafter *Letter from Birmingham Jail*].

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 653

Who can say that the legislature of Alabama which set up that state's segregation laws was democratically elected? Throughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered. Can any law enacted under such circumstances be considered democratically structured?⁴¹

Dr. King also denounces the police forces that enforce the laws created by a broken democratic system:

I doubt that you would so quickly commend the policemen if you were to observe their ugly and inhumane treatment of Negroes here in the city jail; if you were to watch them push and curse old Negro women and young Negro girls; if you were to see them slap and kick old Negro men and young boys; if you were to observe them, as they did on two occasions, refuse to give us food because we wanted to sing our grace together. I cannot join you in your praise of the Birmingham police department.⁴²

Dr. King is, therefore, not merely concerned with the laws, nor even with the stances of the general government—he is concerned with the dysfunctional democratic process that creates the laws and government's enforcement of those laws. Dr. King's conception of the government action, as it relates to civil disobedience, is thus focused on the laws, the system from which the laws are created, and how those laws are enforced.

The first element of civil disobedience may therefore be defined as follows: a government act may include the laws, the system by which those laws are created, how those laws are enforced, and the general stances of the government enforcing those laws.⁴³

41. *Id.*

42. *Id.* This passage is in response to the white church leaders from the South who wrote a letter condemning Martin Luther King, Jr.'s "extremism" while praising the Birmingham police for keeping order.

43. Examples of this definition in action include positions the government takes on certain stances (such as slavery or segregation), the constitution by which the government is organized (which originally allowed slavery), the common law that perpetuates unjust government actions (decisions that advance unjust aspects of the Constitution), and the system that enforces statutes or the common law derived from the Constitution (such as the police or the democratic system that may perpetuate unjust aspects of the Constitution).

B. That is Unjust

The second element of civil disobedience is that the government act is unjust. The main issue that Aquinas, Thoreau, and Dr. King consider in this context is how to determine when a government action is unjust.

Aquinas acknowledges that human law has the capacity to be unjust. According to him, “a thing is said to be just . . . according to the rule of reason.”⁴⁴ However, “the first rule of reason is the law of nature.”⁴⁵ Thus, just laws must not obstruct natural law, for if “in any point [human law] deflects from the law of nature, it is no longer a law but a perversion of law.”⁴⁶

Aquinas further postulates that laws are just if “they have the power of binding in conscience.”⁴⁷ For a law to have the power to bind one’s conscience, it must be “ordained to the common good,” which has two constituent parts: (1) the law does not exceed the power of the law-giver to create it, and (2) it is proportional to the “good” sought to be achieved.⁴⁸ A just law is thus one that is based in natural law and has the power of conscience; namely, that it is made in the common good and its burdens are proportional to that interest.

Aquinas more clearly delineates this principle by noting that laws may be unjust: unjust laws are contrary to the “human good” or to the “Divine good.”⁴⁹ Most importantly, Aquinas notes that laws inimical to the human good are those that are “burdensome” and “not to the common good,” exceed the lawgiver’s authority, or “are imposed unequally on the

44. AQUINAS, *supra* note 30, at 1358.

45. *Id.*

46. *Id.*

47. *Id.* at 1365.

48. *Id.* Aquinas more fully expounds on the notion of the common good in saying that:

[L]aws are said to be just, both from the end, when, to wit, they are ordained to the common good—and from their author, that is to say, when the law that is made does not exceed the power of the lawgiver—and from their form, when, to wit, burdens are laid on the subjects, according to an equality of proportion and with a view to the common good. For, since one man is a part of the community, each man in all that he is and has, belongs to the community; just as a part, in all that it is, belongs to the whole; wherefore nature inflicts a loss on the part, in order to save the whole: so that on this account, such laws as these, which impose proportionate burdens, are just and binding in conscience, and are legal laws.

Id.

49. *Id.* at 1365–66.

community.”⁵⁰ He calls such laws “acts of violence rather than laws.”⁵¹ Therefore, according to Aquinas, laws are just when they have the support of conscience; that is to say, when they are properly enacted by the authority and proportional to the needs of the common good, with their burdens equally borne by the community under the authority’s jurisdiction.

Thoreau’s conception of a “just” government action has a similar focus on conscience. Thoreau rejects the notion that majority rule in a democratic system inherently creates a just government.⁵² Instead, Thoreau posits that “we should be men first, and subjects afterward.”⁵³ This means we should not “cultivate a respect for the law, so much as for the right.”⁵⁴ Thoreau thus declares that “[t]he only obligation which I have a right to assume, is to do at any time what I think right.”⁵⁵ Thoreau’s concept of a “just” government action, therefore, springs from an intrinsic notion of what is right and what is wrong.

Thoreau’s views of punishment support this notion of individual, conscientious determinations of what is just. As he was resting in prison for his own act of civil disobedience,⁵⁶ he observed that the state had “resolved to punish my body” because “they could not reach *me*.”⁵⁷ Because the state could not punish his conscience, it resorted to punishing his body. He emphasizes this point when he posits that “the State never intentionally confronts a man’s sense, intellectual or moral, but only his body, his senses.”⁵⁸ Thoreau’s conception of what makes a government act unjust thus involves a person’s “intellectual” and “moral” conception of what is right and wrong.⁵⁹

50. *Id.* at 1365.

51. *Id.* Aquinas observes that laws are contrary to the “Divine good” when they are “the laws of tyrants inducing to idolatry, or to anything else contrary to the Divine law.” *Id.* at 1366.

52. THOREAU, *supra* note 36, at 262. Thoreau observes that “a government in which the majority rule in all cases cannot be based on justice.” *Id.*

53. *Id.*

54. *Id.* at 263.

55. *Id.*

56. Thoreau did not pay his poll tax for six years and spent one night in jail because of it. *Id.* at 274.

57. *Id.* (emphasis added).

58. *Id.*

59. Thoreau’s concept of individual conscience as an element of what makes a law unjust is prevalent as much in the government actions that he doesn’t oppose as from those he does. Thoreau did not pay his poll tax because he did not support the government’s stances on slavery and the Mexican-American War. *See id.* at 274. However, Thoreau also

According to Thoreau, what makes a government act unjust, however, is not limited to an individual belief as to what is right. It also includes the notion that a government action is unjust if it causes a person to violate what they believe is right. Thoreau declares that if a government edict “is of such a nature that it requires [a person] to be the agent of injustice to another, then, I say, break the law.”⁶⁰ A government act must work injustice on another in order to be unjust, in addition to being contrary to a person’s intrinsic sense of right and wrong. In other words, Thoreau’s criteria for what makes a law unjust is that it is contrary to an intrinsic sense of right and wrong (and thus violates a person’s conscience), and that it serves to work injustice on another.

Dr. King’s criteria for what makes a government act unjust follows in the steps of both Aquinas and Thoreau in two ways: first, it involves one’s conscience, and second, the injustice is imposed on another by operation of the act. Dr. King acknowledges the aspect of conscience when he notes that “one has a moral responsibility to disobey unjust laws.”⁶¹ Dr. King explains, “[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.”⁶²

But Dr. King goes beyond a mere moral requirement for a government act to be just; a just government action also must respect the personhood of those it affects.⁶³ Dr. King states that “[a]ny law that uplifts

notes that he has “never declined paying the highway tax” because he is “as desirous of being a good neighbor” as he is “of being a bad subject.” *Id.* at 278. Thoreau also supports the schools, because he is “doing [his] part to educate [his] fellow-countrymen.” *Id.* As these taxes do not violate Thoreau’s conscience, or at least do not as directly support the government and its initiatives, Thoreau does not find them to be unjust.

60. *Id.* at 269.

61. *Letter from Birmingham Jail, supra* note 40.

62. *Id.* Dr. King also directly cites Aquinas as his inspiration for this moral element of just laws: “[t]o 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.” *Id.*

63. Dr. King is perhaps aware that a mere moral justification for his actions is insufficient to justify those actions to the American public; sections of the American public regarded Dr. King as a hypocrite, picking and choosing the laws he implored Americans to follow. Dr. King responds to this criticism directly, not only with his principled approach to determining what makes a law unjust, but also with the following passage:

You express a great deal of anxiety over our willingness to break laws. This is certainly a legitimate concern. Since we so diligently urge people to obey the Supreme Court’s decision of 1954 outlawing segregation in the public schools, at first glance it may seem rather paradoxical for us consciously to break laws. One may well ask: “How can you advocate breaking some laws and obeying

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 657

human personality is just. Any law that degrades human personality is unjust.”⁶⁴ Dr. King uses the word “personality” to describe the notion that unjust government actions reduce the personhood of those they affect.⁶⁵ This is evident by Dr. King’s further determination that segregation laws give “the segregator a false sense of superiority and the segregated a false sense of inferiority,” and that segregation laws end up “relegating persons to the status of things.”⁶⁶ Dr. King, therefore requires that unjust government actions must not only be morally reprehensible, but must also negatively impact the personhood of those the actions are targeted toward.⁶⁷

Dr. King provides several examples of this definition in action. First, he applies this definition to laws themselves when he offers that “[a]n unjust law is a code that a numerical or power majority group compels a minority group to obey but does not make binding on itself. This is *difference* made legal.”⁶⁸ Next, Dr. King applies this definition to his notion that a system of government itself may be considered a governmental act in observing that “[a] law is unjust if it is inflicted on a minority that, as a result of being denied the right to vote, had no part in enacting or devising the law.”⁶⁹ Thus, the system of creating laws is unjust if it accepts and endorses hierarchies among the constituency. Therefore, a democratic society is unjust when it does not allow a portion of its members access to the democratic process.

others?” The answer lies in the fact that there are two types of laws: just and unjust. I would be the first to advocate obeying just laws.

Id.

64. *Id.*

65. *Id.*

66. *Id.* Dr. King also seems to be drawing on Chief Justice Earl Warren’s theory of inferiority-as-harm in and of itself: “[t]o separate [children in grade and high school] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.” *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954) (invalidating the doctrine of separate but equal as it applies to segregated schools).

67. This comports with Aquinas’s observation that unjust laws will be “imposed unequally on the community,” for if laws are imposed unequally, they inherently differentiate between those who are superior to the law and so inferior as to be under its heel. *See* AQUINAS, *supra* note 30, at 1365. This also comports with Thoreau’s concept of a government action being unjust when it causes an injustice on another, as he recognizes the government actions he complains of as wronging entire races. *See* THOREAU, *supra* note 36, at 271 (stating that prisons are where “the fugitive slave, and the Mexican prisoner on parole, and the Indian come to plead the wrongs of his race”).

68. *Letter from Birmingham Jail, supra* note 40.

69. *Id.*

Lastly, Dr. King applies his definition of “unjust” to his notion of enforcement of laws as government actions. He states that a law may be “just on its face and unjust in its application.”⁷⁰ Dr. King illustrates this concept by presenting an example from his personal life when he was arrested for “parading without a permit.”⁷¹ An ordinance requiring a permit for a parade is acceptable on its face, but “becomes unjust when it is used to maintain segregation and to deny citizens the First-Amendment privilege of peaceful assembly and protest.”⁷² Thus, enforcing facially neutral laws becomes unjust when done to reinforce a system that accepts inferiority among its citizens.

Accordingly, the second element of civil disobedience may be defined as follows: a government act is unjust when (1) it violates the conscience of an individual, and (2) it has the effect of harming those it is applied against.

C. *That Necessitates Active Disobedience*

The third element of civil disobedience is that the unjust government act makes active disobedience necessary. This element has two subparts: (1) the disobedience must be active,⁷³ and (2) the disobedience must be necessary.

Aquinas contemplates the issue of necessity by observing that “it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful.”⁷⁴ In these instances, a person is justified in acting “contrary to the letter of the law, in order to maintain the common weal.”⁷⁵ The “common

70. *Id.*

71. *Id.*

72. *Id.*

73. “Active” disobedience, as opposed to “passive” disobedience, is not to be confused with the distinction often made between “direct” and “indirect” disobedience. See Quigley, *supra* note 13, at 17 (“Direct civil disobedience can be defined as the intentional violation of the specific law targeted for challenge . . . [i]ndirect civil disobedience can be defined as the violation of a law which itself is not sought to be changed.”). Instead, as outlined more fully below, “active” disobedience means any act through which one disobeys the unjust government act, with no distinction made for whether that act itself is “direct” or “indirect.”

74. AQUINAS, *supra* note 30, at 1368. This mirrors Dr. King’s observation that a law may be just on its face but unjust in its application. See *Letter from Birmingham Jail*, *supra* note 40.

75. AQUINAS, *supra* note 30, at 1368.

weal” is simply another term for the common good.⁷⁶ Aquinas is thus embracing the principle that even if a law is in the common interest, disobedience is valid when it becomes harmful.⁷⁷

Aquinas further embraces the principle that disobeying laws may be necessary. He notes that if “the peril be so sudden as not to allow of the delay involved by referring the matter to authority, the mere *necessity* brings with it a dispensation, since *necessity* knows no law.”⁷⁸ This is in contrast to instances that do “not involve any sudden risk needing instant remedy,” where the ordinary citizen is “not competent” to “expound what is useful and what is not useful to the state.”⁷⁹ According to Aquinas, therefore, disobedience is necessary when an ordinarily useful law is harmful to others and petition to the law-making authority to change the law is useless or unavailable.

Thoreau contemplates that disobedience must take the form of active disobedience. He is contemptuous of the notion that effective change will come through the democratic process.⁸⁰ Instead, Thoreau states that “[u]njust laws exist,” and asks, “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 them at once?”⁸¹ Thoreau is clearly on the side of immediate and active transgression.

76. *The Common Weal*, COLLINS ENGLISH DICTIONARY, <https://www.collinsdictionary.com/us/dictionary/english/the-common-weal> [<https://perma.cc/2YHC-M5AZ>] (defining “the common weal” as “the good of society”).

77. See AQUINAS, *supra* note 30, at 1368. The example of such an instance that Aquinas offers is that of a city under siege:

For instance, suppose that in a besieged city it be an established law that the gates of the city are to be kept closed, this is good for public welfare as a general rule: but, it were to happen that the enemy are in pursuit of certain citizens, who are defenders of the city, it would be a great loss to the city, if the gates were not opened to them: and so in that case the gates ought to be opened, contrary to the letter of the law, in order to maintain the common weal.

Id. Note particularly that Aquinas does not contemplate that the lawgiver must approve opening the gates; the citizens should do so of their own volition. See *id.*

78. *Id.* (emphasis added).

79. *Id.*

80. THOREAU, *supra* note 36, at 261 (stating that “[t]he government itself, which is only the mode which the people have chosen to execute their will, is equally liable to be abused and perverted before the people can act through it”). Thoreau also condemns the “thousands who are *in opinion* opposed to slavery and to the war, who yet in effect do nothing to put an end to them,” saying that “[a] wise man will not leave the right to the mercy of chance, nor wish it to prevail through the power of the majority.” *Id.* at 266.

81. *Id.* at 269.

Thoreau declares that “[a]ction from principle . . . changes things and relations.”⁸² This stems from “the right to refuse allegiance to and to resist, the government, when its tyranny or its inefficiency are great and unendurable.”⁸³ In these circumstances, “a people, as well as an individual, must *do justice*, cost what it may.”⁸⁴ To do justice, Thoreau states that a person must “cast [their] whole vote, not a strip of paper merely, but [their] whole influence,” noting that even a minority “is irresistible” when every member casts their “whole weight.”⁸⁵ This is further reinforced by Thoreau’s proclamation that

I know this well, that if one thousand, if one hundred, if ten men whom I could name, if ten *honest* men only, ay, if *one HONEST* man, in this State of Massachusetts, *ceasing to hold slaves*, were actually to withdraw from this copartnership, and be locked up in the county jail therefor, it would be the abolition of slavery in America. For it matters not how small the beginning may seem to be: what is once well done is done for ever.⁸⁶

Thoreau therefore advocates for active disobedience based on a person’s conscience.

Thoreau also believes that this sort of active disobedience is necessary when the government’s actions threaten the status of its people. His main complaints are that his government’s support of slavery and of the war in Mexico is unjust, which threatens the status of not only those who are slaves but, also the status of America in the eyes of the world. Thoreau notes, “If we were left solely to the wordy wit of legislators in Congress for our guidance . . . America would not long retain her rank

82. *Id.* at 268.

83. *Id.* at 264.

84. *Id.* at 265 (emphasis added). Doing justice for Thoreau meant that “[t]his people must cease to hold slaves, and to make war on Mexico, though it cost them their existence as a people.” *Id.*

85. *Id.* at 271.

86. *Id.* at 270–71. Thoreau is perhaps even more forceful in advocating for direct action from the community of abolitionists:

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 270.

among the nations.”⁸⁷ The means to correct these injustices are in the form of “the seasonable experience and the effectual complaints of the people.”⁸⁸ For Thoreau active disobedience is necessary to overcome the complacent majoritarian will that creates unjust government actions.

Dr. King’s conception of active disobedience is similarly rooted in notions of injustice and systemic change. He is acutely aware that “it is all historical fact that privileged groups seldom give up their privileges voluntarily.”⁸⁹ Dr. King notes that, while individual persons are more likely to “see the moral light and voluntarily give up their unjust posture . . . , groups tend to be more immoral than individuals.”⁹⁰ This is to say that the systems in which we live are less amenable to change than the people that live in these systems. It is also a reflection of Dr. King’s notion that governmental systems themselves may be the governmental act that civil disobedience seeks to remedy. To affect these systems, “freedom . . . must be demanded by the oppressed.”⁹¹

Dr. King’s means of demanding freedom is what he calls “nonviolent direct action.”⁹² In Dr. King’s day, this included “sit-ins, marches[,] and so forth.”⁹³ The purpose of “direct action” is to force the governing powers into negotiation.⁹⁴ Dr. King says that “[n]onviolent direct action seeks to create such a crisis and foster such a tension that a community which has constantly refused to negotiate is forced to confront the issue.”⁹⁵ He thus removes the act of disobedience from the context of the specific law it is directed against, and he places it in the context of actively seeking systemic change.⁹⁶ This is clear from his admonition that “an individual who breaks

87. *Id.* at 282.

88. *Id.*

89. *Letter from Birmingham Jail, supra* note 40.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* Dr. King responds to his critics by saying “[y]ou are quite right in calling for negotiation. Indeed, this is the very purpose of direct action.” *Id.*

95. *Id.* Instead of avoiding tension, Dr. King advocates that “a type of constructive, nonviolent tension,” that is “necessary for growth.” *Id.*

96. *Id.* Dr. King notes that this conception of civil disobedience is firmly rooted in the traditions of history, faith, and our nation:

Of course, there is nothing new about this kind of civil disobedience. It was evidenced sublimely in the refusal of Shadrach, Meshach and Abednego to obey the laws of Nebuchadnezzar, on the ground that a higher moral law was at stake. It was practiced superbly by the early Christians, who were willing to face hungry lions and the excruciating pain of chopping blocks rather than

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.”⁹⁷ For Dr. King, therefore, active disobedience is proper when it is aimed at correcting systemic injustices.

Furthermore, Dr. King asserts that active disobedience is necessary because governmental and social systems do not change on their own. He is frustrated by constant admonitions that all he needs to do is wait for the injustice to correct itself.⁹⁸ In Dr. King’s experience, “[w]ait’ has almost always meant ‘[n]ever.’”⁹⁹ For this reason, he chafes at the inactivity of the “white moderate, who is more devoted to ‘order’ than to justice,” who agrees with “the goal,” but does not agree with the “methods of direct action.”¹⁰⁰ Dr. King, understanding that “law and order exist for the

submit to certain unjust laws of the Roman Empire. To a degree, academic freedom is a reality today because Socrates practiced civil disobedience. In our own nation, the Boston Tea Party represented a massive act of civil disobedience.

Id.

97. *Id.*

98. *Id.* Dr. King responds to this argument forcefully and eloquently:

We have waited for more than 340 years for our constitutional and God-given rights. The nations of Asia and Africa are moving with jetlike speed toward gaining political independence, but we still creep at horse-and-buggy pace toward gaining a cup of coffee at a lunch counter. Perhaps it is easy for those who have never felt the stinging darts of segregation to say, “Wait.” But when you have seen vicious mobs lynch your mothers and fathers at will and drown your sisters and brothers at whim; when you have seen hate-filled policemen curse, kick and even kill your black brothers and sisters; when you see the vast majority of your twenty million Negro brothers smothering in an airtight cage of poverty in the midst of an affluent society . . . when you are forever fighting a degenerating sense of “nobodiness”—then you will understand why we find it difficult to wait. There comes a time when the cup of endurance runs over, and men are no longer willing to be plunged into the abyss of despair. I hope, sirs, you can understand our legitimate and unavoidable impatience.

Id.

99. *Id.* Dr. King also notes the halting progress made by voluntary promises to change. In the September before Dr. King wrote his letter, he spoke with “leaders of Birmingham’s economic community,” who promised “to remove the stores’ humiliating racial signs,” among other measures. *Id.* Dr. King observes that “[a]s the weeks and months went by, we realized that we were the victims of a broken promise. A few signs, briefly removed, returned; the others remained.” *Id.*

100. *Id.* Thoreau raises a similar complaint with the complacency of his countrymen, noting that “[t]hose who, while they disapprove of the character and measures of a government, yield to it their allegiance and support, are undoubtedly its most conscientious

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 663

purpose of establishing justice,” declares that those who fail to correct law and order when it is unjust “become the dangerously structured dams that block the flow of social progress.”¹⁰¹ Active disobedience is necessary, therefore, to create the tension that forces the intransigent to participate in reform.

Thus, the third element of civil disobedience is: the unjust government act makes active disobedience necessary. Civil disobedience is necessary when the governmental acts cause harm and formal redress is unavailable, often because the system that created the injustice may not be trusted to effect change of its own volition.

D. The Constituent Elements of Civil Disobedience

Civil disobedience is justified when (1) there is a government action,¹⁰² (2) that is unjust,¹⁰³ and (3) that *necessitates* active disobedience.¹⁰⁴ “Government action” may include the laws, the system by which those laws are created, how those laws are enforced, and the general stances of the government enforcing the laws. Government acts are unjust when (1) they violate the individual’s conscience, and (2) harm those they are applied against. Government acts necessitate active disobedience to cause change when the governmental acts cause harm and formal redress is unavailable, usually because the system that created the harmful governmental act will not make the change on its own.

This is the formation of civil disobedience that will guide the rest of this analysis and will be used as basis for a constitutionally protected defense. However, it is pertinent to reiterate that this definition of civil disobedience would not allow a criminal defendant to argue for acquittal, but instead it would only allow a criminal defendant to argue for a reduced sentence.

III. CIVIL DISOBEDIENCE AND THE SUPREME COURT

The Supreme Court has not recognized civil disobedience as a stand-alone, constitutionally recognized right or as an independent criminal defense. Nonetheless, the Supreme Court has recognized that individuals

supporters, and so frequently the most serious obstacles to reform.” THOREAU, *supra* note 36, at 268.

101. *Letter from Birmingham Jail, supra* note 40.

102. *See supra* Part II.A.

103. *See supra* Part II.B.

104. *See supra* Part II.C.

do have a right to express their dissent and the government may not tell them how they are allowed to do so. Perhaps unsurprisingly, these principles are recognized through First Amendment jurisprudence and come from cases arising out of draft evasion and the civil rights movement.

A. *The First Amendment and Expressing Dissent*

The Supreme Court has a long history of recognizing that freedom of speech is essential for an ordered system of government.¹⁰⁵ This history arises from the idea that the founders of the nation “believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”¹⁰⁶ In 1927, Justice Brandeis espoused that freedom of speech and expression is essential for our system of government to succeed because it is the most reliable means of reaching political truth, and that this freedom is essential to prevent “the occasional tyrannies of governing majorities.”¹⁰⁷ Civil disobedience, as

105. While this concept arose earlier, it received its most notable exposition in Justice Brandeis’s concurring opinion in *Whitney v. California*, 274 U.S. 357, 372 (1927). One of the most famous recent cases that reaffirms this concept is *Citizens United v. FEC*, 558 U.S. 310 (2010) (affirming freedom of political expression for corporate entities).

106. *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

107. *See id.* at 375–76. The full quote from Justice Brandeis’s opinion is even more forceful:

Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to [be] the secret of happiness and courage to be the secret of liberty. *They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth*, that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. *Recognizing the occasional tyrannies of governing*

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 665

formulated here, arises out of these “occasional tyrannies” and is an alternative means to act against them.¹⁰⁸

Since Justice Brandeis articulated this principle, the Supreme Court has consistently recognized that a function of the First Amendment is to protect political dissent.¹⁰⁹ In 1949, the Supreme Court stated that “a function of free speech under our system of government is to invite dispute,” and that free speech may “best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.”¹¹⁰ For speech to serve this purpose, “there is no room under our Constitution for a more restrictive view” of speech restrictions than when the speech is “likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.”¹¹¹ Any other standard for restricting speech “would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.”¹¹² The Supreme Court later abandoned the “clear and present danger” test in favor of a test that asks whether the speech was “directed to inciting or producing

majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Id. at 375 (emphasis added). Political dissent is therefore an essential part of the process of reaching political truth and preventing tyranny by majorities acting on an imperfect formulation of political truth.

108. See THOREAU, *supra* note 36, at 261 (stating that “[t]he government itself, which is only the mode which the people have chosen to execute their will, is equally liable to be abused and perverted before the people can act through it,” Thoreau is recognizing that the majoritarian system of government is susceptible to tyranny through abuse and perversion); see also *Letter from Birmingham Jail*, *supra* note 40 (stating that “[t]hroughout Alabama all sorts of devious methods are used to prevent Negroes from becoming registered voters, and there are some counties in which, even though Negroes constitute a majority of the population, not a single Negro is registered,” Dr. King is recognizing that the government not only has the capacity for tyranny, but also the capacity for systematically perpetuating that tyranny).

109. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949); *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

110. *Terminiello*, 337 U.S. at 4. While the *Terminiello* Court did not deal directly with the issue of whether the First Amendment can be the basis of a defense against criminal charges, its observations on the purpose of the First Amendment comport with Dr. King’s views on creating tension, namely that tension is necessary for growth. See *Letter from Birmingham Jail*, *supra* note 40.

111. *Terminiello*, 337 U.S. at 4 (citing *Bridges v. California*, 314 U.S. 252, 262 (1941); *Craig v. Harney*, 331 U.S. 367, 373 (1947)).

112. *Terminiello*, 337 U.S. at 4-5.

imminent lawless action and is likely to incite or produce such action.”¹¹³ Nonetheless, the Supreme Court has espoused principles mandating that to protect dissent and prevent “standardization of ideas,” speech must be given great protections that prevent the government from imposing its views on the unwilling.¹¹⁴

In 1976, the Supreme Court stated that “[t]he First Amendment affords the broadest protection to . . . political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”¹¹⁵ This stance reflected the “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹¹⁶ In 1989, the Supreme Court recognized that an individual’s “dissatisfaction with the policies of this country” is an “expression situated at the core of our First Amendment values.”¹¹⁷ In 2010, the Supreme Court reaffirmed that “[t]he First Amendment underwrites the freedom to experiment and to create in the realm of thought The civic discourse belongs to the people, and the Government may not prescribe the means used to conduct it.”¹¹⁸ Thus, the Supreme Court clearly upholds the notion that the First Amendment exists, at least in part, to protect political dissent from certain governmental actions, including a general dissatisfaction with the government’s policies.

113. *Brandenburg*, 395 U.S. at 447.

114. *See Terminiello*, 337 U.S. at 4–5.

115. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976) (per curiam) (alteration in original) (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

116. *Id.* at 14 (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)). The *Buckley* Court goes on to note that freedom of speech extends to “vigorous advocacy.” *Id.* at 48 (quoting *N.Y. Times*, 376 U.S. at 269). The *Buckley* Court also states:

But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment, which was designed “to secure ‘the widest possible dissemination of information from diverse and antagonistic sources’”

Id. at 48–49 (quoting *N.Y. Times*, 376 U.S. at 266).

117. *Texas v. Johnson*, 491 U.S. 397, 411 (1989) (citing *Boos v. Barry*, 485 U.S. 312, 318 (1988); *Frisby v. Schultz*, 487 U.S. 474, 479 (1988)) (holding that burning the American flag in a public place is protected expression). Note how this conception of protected expression—one’s distaste for the general policies of the country—comports with Thoreau’s conception of a government act. Thoreau condemns “character and measures of a government.” THOREAU, *supra* note 36, at 268.

118. *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 372 (2010) (Kennedy, J., concurring in part and dissenting in part) (quoting *McConnell v. FEC*, 540 U.S. 93, 341 (2003)) (recognizing that even though *Citizens United* overturned the central holding of *McConnell*, Justice Kennedy’s observations on the First Amendment from *McConnell* that he quotes and incorporates into the majority opinion of *Citizen’s United* are good law).

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 667

In addition, and perhaps more importantly, the Supreme Court recognizes that political dissent need not be purely speech. The Supreme Court has stated that the protection of the First Amendment “extends to more than abstract discussion, unrelated to action.”¹¹⁹ The Supreme Court has further declared that “[f]ree trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”¹²⁰ The Supreme Court also has declared that the “freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances” are not “confined to verbal expression.”¹²¹ Indeed, the Court affirmatively noted that these rights “embrace appropriate types of action.”¹²² Accordingly, political dissent is not limited to speech alone, but may necessarily include appropriate action to enhance its impact.

However, the Supreme Court is reluctant to expressly declare that such actions always consist of constitutionally protected expression. In 1968, the Supreme Court stated that “[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”¹²³ Nonetheless, approximately twenty years later in *Clark v. Community for Creative Non-Violence*, the Supreme Court assumed, but did not expressly decide, that “overnight sleeping” in Lafayette Park (in connection with a demonstration calling attention to the issue of homelessness) was “expressive conduct protected to some extent by the

119. *Thomas v. Collins*, 323 U.S. 516, 537 (1945).

120. *Id.* (citing *Gitlow v. New York*, 268 U.S. 652, 672 (1925) (Holmes, J., dissenting); *Abrams v. United States*, 250 U.S. 616, 624 (1919)). The *Collins* Court states that “[w]hen to this persuasion other things are added which bring about coercion, or give it that character, the limit of the right has been passed.” *Id.* at 537-38. This is not incompatible with the principles of civil disobedience outlined here because while active disobedience may be geared toward persuasion to action, only in rare circumstances may it be considered *coercive*. Coercion implies the absence of choice. *See Coercion*, BLACK’S LAW DICTIONARY (10th ed. 2014) (defining “coercion” as “[c]ompulsion of a free agent by physical, moral, or economic force or threat of physical force”). Civil disobedience is inherently used by a minority against a government act. Only in extreme circumstances would an entire government be compelled to act by the “physical, moral, or economic force or threat” by an individual or minority group. *See id.*

121. *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

122. *Id.* at 142. The Court noted that in the circumstances of the case, “appropriate types of action” included “the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be” to protest “the unconstitutional segregation of public facilities.” *Id.*

123. *United States v. O’Brien*, 391 U.S. 367, 376 (1968).

First Amendment.”¹²⁴ In addition, the *Clark* Court stated that “a message may be delivered by conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative.”¹²⁵ Therefore, for an act of civil disobedience to be protected expressive conduct, it must reasonably be understood to be communicative in its context.¹²⁶

B. The Supreme Court and Disobedience

Alongside its recognition that political dissent merits protection, and that this dissent may necessarily include action, the Supreme Court has, at times, embraced acts of disobedience as a means to express political dissent. The Supreme Court has recognized that in a purely technical sense, disobedience may be necessary to challenge the constitutionality of a government action. In a draft-evasion case from 1953, the applicable draft statute made the classification orders by selective service authorities final, with no opportunity for judicial review.¹²⁷ The Court recognized that under such a scheme, the only opportunity to review the constitutionality of any decision is after indictment for refusing to “submit to induction.”¹²⁸ This active disobedience is precisely what the plaintiff in the case resorted to so he could challenge his classification, and the Court accepted it as a necessary part of the process.¹²⁹

In another draft-evasion case from 1945, the Court went beyond technical recognition of active disobedience. It noted that actually evading the draft is criminal, but “to counsel merely refusal [to serve] is not made criminal” by the draft provisions.¹³⁰ Later on, the Court emphatically declared:

124. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

125. *Id.* at 294 (citing *Spence v. Washington*, 418 U.S. 405 (1974); *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 505 (1969)).

126. *See Spence*, 418 U.S. at 410-11. For the purposes of the discussion presented below, the Clearwater County defendants are presumed to have met this additional requirement.

127. *Dickinson v. United States*, 346 U.S. 389, 394 (1953) (holding that the courts may review draft-status classifications if there are insufficient facts from which to draw an inference that the classification was reasonable).

128. *Id.*

129. *See id.*

130. *Keegan v. United States*, 325 U.S. 478, 487 (1945). Counseling against draft service may properly be construed as active disobedience against the draft, something the Supreme Court recognized is not criminal or at least is not as criminally culpable as actual draft evasion. *Id.*

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 669

One with innocent motives, who honestly believes a law is unconstitutional and, therefore, not obligatory, may well counsel that the law shall not be obeyed; that its command shall be resisted until a court shall have held it valid, but this is not knowingly counselling, stealthily and by guile, to evade its command.¹³¹

Such a conception of active disobedience is necessary to avoid criminal prosecutions where defendants with “innocent motives” are placed in front of a jury who could not “reach any other than a verdict of guilty” because of the statutory scheme.¹³² Thus, the Supreme Court recognized that people taking action (counseling against draft service) against a government act (draft service provisions) that they honestly believed was unjust (“with innocent motives”) may not be given a jury instruction that prohibits the jury from taking those innocent motives into account.

A 1965 civil rights case, where the Court considered a challenge to a conviction for breach of the peace in connection with a protest against segregated lunch counters, followed the same line of reasoning.¹³³ The plaintiff, Cox, was the leader of a group of about two thousand students who gathered to protest the arrest of twenty-three students who previously protested against segregated lunch counters in Baton Rouge.¹³⁴ Cox stated the protests were against “the evil of discrimination.”¹³⁵ Cox was arrested for the following speech he gave at the end of the protest:

All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State.¹³⁶

131. *Id.* at 493-94. Note how this comports with the means of determining if a governmental act is unjust, particularly Aquinas's belief that individuals are not obligated to abide by unjust laws. *See* AQUINAS, *supra* note 30, at 1368.

132. *Keegan*, 325 U.S. at 494.

133. *Cox v. Louisiana*, 379 U.S. 536, 552 (1965) (holding that the breach of the peace statute was unconstitutionally overbroad because “[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy”).

134. *Id.* at 538-44.

135. *Id.* at 540.

136. *Id.* at 542-43.

According to the arresting officer, the conduct of the protesters became objectionable only when Cox “urged the students to go uptown and sit in at lunch counters.”¹³⁷ The trial court convicted Cox of “an inherent breach of the peace” for the act of bringing the protesters into the city and encouraging them to sit at lunch counters.¹³⁸

In response to Cox’s conviction, the Supreme Court stated that “constitutional rights may not be denied simply because of hostility to their assertion or exercise.”¹³⁹ Even more significant, the Court stated that the government may not “require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminate[d].”¹⁴⁰ Thus, the Court recognized that one who takes action

137. *Id.* at 546.

138. *Id.* at 550. The full reasoning of the trial court is as follows:

[I]t must be recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE national anthem carrying lines such as “black and white together” and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute 14:103.1 has made it so.

Id. at 549–50. In the context of 1960s Baton Rouge, these actions may fairly be characterized as active disobedience.

139. *Id.* at 551 (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

140. *Cox v. Louisiana*, 379 U.S. 536, 557 (1965) (alteration in original) (quoting *Schneider v. New Jersey*, 308 U.S. 147, 164 (1939)); see *Kunz v. New York*, 340 U.S. 290, 293–94 (1951); *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951); *Saia v. New York*, 334 U.S. 558, 559–60 (1948); *Largent v. Texas*, 318 U.S. 418, 422 (1943); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515–16 (1939); *Lovell v. City of Griffin*, 303 U.S. 444, 450–51 (1938).

There are, of course, contrary viewpoints regarding the government’s ability to dictate time, place, and manner of political expression. Even the *Cox* Court recognized, in the context of blocking sidewalks, that:

The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances,

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 671

(organizing a protest of Black Americans in Jim Crow-era Baton Rouge and advocating sit-ins at lunch counters) against an unjust government act (de jure segregation) should not be punished simply because the authorities are hostile to his message, and indeed, that one does not need to seek the permission of the authorities to engage in this active disobedience.¹⁴¹

In a more recent case affirming the right to burn the United States flag, the Court provided further justification for distinguishing valid disobedient conduct. In *Texas v. Johnson*, the Court provided for a means of determining when conduct is deemed expressive, stating that “[i]n deciding whether particular conduct possesses sufficient communicative elements to” implicate the First Amendment, the Court must consider whether there is “an intent to convey a particularized message” and whether “the likelihood was great that the message would be understood by those who viewed it.”¹⁴²

Restrictions on expressive conduct are subject to strict scrutiny,¹⁴³ which requires that the restriction is “necessary to serve a compelling state

would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly.

Id. at 554–55. In addition, other opinions have stated that “[w]hen protest takes the form of mass demonstrations, parades, or picketing on public streets and sidewalks, the free passage of traffic and the prevention of public disorder and violence become important objects of legitimate state concern.” *Walker v. Birmingham*, 388 U.S. 307, 316 (1967). The Supreme Court has also noted that “[c]ivil liberties . . . imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses,” and that regulations to ensure the “safety and convenience” of the public is “one of the means of safeguarding the good order upon which” the exercise of civil liberties depends. *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941). However, these holdings are not inconsistent with the concept of civil disobedience as an appropriate criminal defense. Civil disobedience does not challenge the constitutionality of the regulation under which a person may be arrested for his or her active disobedience. Rather, civil disobedience, as properly applied, asserts that the person is constitutionally justified in their active disobedience. This is not asserting that time, place, and manner restrictions on speech are unconstitutional. Civil disobedience merely allows a decisionmaker to find that a person who is taking action against an unjust government act should only be nominally punished under those very regulations, if indeed the person is charged with violating them.

141. *Cox*, 379 U.S. at 557.

142. *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quoting *Spence v. Washington*, 418 U.S. 405, 410–11 (1974)).

143. *Id.* at 412 (quoting *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

interest and that it is narrowly drawn to achieve that end.”¹⁴⁴ By requiring a strict scrutiny standard, the Supreme Court acknowledges that conduct may be sufficiently expressive to implicate the First Amendment, and furthermore, that this conduct merits greater protection than other forms of conduct. However, the government is given greater leeway for content-neutral restrictions on expressive conduct as long as the restrictions are unrelated to suppressing expression.¹⁴⁵ Nonetheless, if active disobedience takes the form of particularly expressive conduct, such as flag burning protected by *Johnson*, the Supreme Court has stated such disobedience deserves greater protection.¹⁴⁶

C. Conclusion

The First Amendment protects political dissent. Expressing displeasure with the general stances of the government is included under this protection. In addition, the Supreme Court recognizes that expressing political dissent does not require pure speech alone, but may include direct action.¹⁴⁷ Furthermore, the Supreme Court has recognized that direct disobedience in protest of government actions may not be the basis of a criminal conviction.¹⁴⁸ The Supreme Court also holds that content-based restrictions on expressive conduct must pass greater constitutional scrutiny.¹⁴⁹ Accordingly, there is ample support from Supreme Court jurisprudence for a principle that allows nominal punishment for actions in the vein of civil disobedience.

IV. CIVIL DISOBEDIENCE APPLIED TO AMERICAN JURISPRUDENTIAL PRINCIPLES

Civil disobedience intersects most intimately with two established concepts of American law: criminal intent and the necessity defense .

144. *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

145. *See Johnson*, 491 U.S. at 406-07.

146. *See id.* at 404; *Perry Educ. Ass’n*, 460 U.S. at 45.

147. *See Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966).

148. *Keegan v. United States*, 325 U.S. 478, 487 (1945).

149. *Johnson*, 491 U.S. at 412.

A. *Civil Disobedience and Criminal Intent*

Punishment is based on principles of criminal liability.¹⁵⁰ This includes both *actus reus* and *mens rea*.¹⁵¹ There are instances where a person may have committed the act without the intent to commit a crime.¹⁵² In these instances, no crime generally has been committed.¹⁵³

Defining criminal intent, however, is a difficult venture.¹⁵⁴ It necessarily includes an element of “blameworthy or culpable conduct” accompanied by the “mental state necessary for the imposition of criminal liability.”¹⁵⁵ Often, intent is defined by statute.¹⁵⁶ New York, for example, defines criminal intent as follows: “[a] person acts intentionally with respect to a result or to conduct described by statute defining an offense when his *conscious objective* is to *cause such result or to engage in such conduct*.”¹⁵⁷ Criminal intent thus relies on the objective to engage in the act itself, and if the act is defined as criminal, then the offender has committed a crime.

Minnesota’s conception of criminal liability, as applied to the Clearwater County events, follows this line of reasoning. In Minnesota, “the legislature may forbid the doing of an act and make its commission criminal without regard to the intention, knowledge, or motive of the doer.”¹⁵⁸ With regard to intent, “[i]t is not essential that the wrongdoer should intend to commit the crime to which his act amounts, but it is essential that he should intend to do the act which constitutes the crime.”¹⁵⁹ To find criminal intent in Minnesota, therefore, there must only be the

150. “In order to prove that a person is guilty of a crime, the prosecution must prove each and every element of the crime charged beyond a reasonable doubt.” 1 MCCLOSKEY, SCHOENBERG & SHAPIRO, CRIMINAL LAW DESKBOOK § 14.07 (Matthew Bender rev. ed. 2018).

151. *Id.* (“Generally, the prosecution must prove both a guilty act (*actus reus*) and a guilty state of mind (*mens rea*) in order to prove the crime.”).

152. *Id.* (“If injury is caused by accident, there is no crime because the actor lacks the requisite state of mental culpability.”).

153. *See id.*

154. 1 WITKIN ET AL., WITKIN CALIFORNIA CRIMINAL LAW ELEMENTS § 2 (2018) (“Despite the universal acceptance of the principle that general criminal intent is required, it is impossible to frame an accurate and useful definition of the term ‘*mens rea*.’”).

155. *Id.* (noting that criminal intent “appears to refer not to a single, definite kind of intent, but rather to a number of different mental states, all of them involving some blameworthy element”).

156. *See* MCCLOSKEY, SCHOENBERG & SHAPIRO, *supra* note 150.

157. *Id.* (emphasis added) (quoting N.Y. PENAL LAW § 15.05(1)).

158. *State v. Kremer*, 262 Minn. 190, 191, 114 N.W.2d 88, 89 (1962).

159. *Id.*

intent to commit an act that constitutes a crime. This intent to commit an act that is deemed criminal, combined with the completion of the criminal act, results in criminal liability.¹⁶⁰

The civil disobedience conception described in this note is consistent with the notion of criminal intent. A person committing an act of civil disobedience is engaging in an intentional act. If this intentional act also is a crime, the basic element of criminal intent is satisfied.¹⁶¹ However, the intent underlying civil disobedience is more akin to where the injury is “caused by accident,” which would obviate criminal liability.¹⁶² The intent of civil disobedience is not to cause harm, but to draw attention to an unjust government act. While an act may be defined as criminal, the lack of intent to cause harm merits a defendant the opportunity to argue for decreased or nominal punishment. It also is important to stress that civil disobedience would not be used as a basis for acquittal, and thus would accept the necessity for punishment of acts committed with criminal intent. Therefore, civil disobedience is not inconsistent with the rule of law, because it would not completely obviate criminal liability, but would instead allow the punishment for criminal intent to be reduced in accordance with the lack of intent to cause harm.

B. Civil Disobedience and Necessity

The defense of necessity is available to mitigate the consequences of unlawful conduct, but is generally not available to mitigate the consequences of civil disobedience.¹⁶³ Generally, there are three essential elements for the necessity defense, including: (1) the commission of an act “to prevent a significant and immediate evil” that arose without fault or causation by the actor, (2) there is no “reasonable or adequate legal alternative” for the act, and (3) the harm caused was not “disproportionate to the harm avoided.”¹⁶⁴ The necessity defense thus “requires evidence of

160. *See id.*

161. *See id.*

162. *See* McCLOSKEY, SCHOENBERG & SHAPIRO, *supra* note 150.

163. *See* 21 AM. JUR. 2D *Criminal Law* § 135 (2019).

164. *Id.*; accord *State v. Garrison*, 171 P.3d 91, 94 (Alaska 2007) (reciting the elements of the necessity defense as: “(1) [defendant] committed the charged offense to prevent a significant evil; (2) there was no adequate alternative to the charged offense; and (3) the harm caused was not disproportionate to the harm [defendant] avoided by breaking the law”); *see also* *U.S. v. Bailey*, 444 U.S. 394, 410–11 (1980) (stating that the defendant must demonstrate that “given the imminence of the threat, violation of [the statute criminalizing escape from federal custody] was his only reasonable alternative” to be entitled to a “defense of duress or necessity”).

both immediate necessity and imminent harm”¹⁶⁵ and that the defendant “acted out of necessity at all times that he or she engaged in the unlawful conduct.”¹⁶⁶

The main point of conflict between acts of civil disobedience and the necessity defense is that the necessity defense is generally unavailable “as an instrument for juror nullification of unpopular laws.”¹⁶⁷ More specifically, necessity is generally unavailable “to excuse criminal activity by those who disagree with policies of the government.”¹⁶⁸ The Court has noted that necessity, “[u]nder any definition,” has one constant principle: “if there was a reasonable, legal alternative to violating the law,” the defense will fail if the actor does not use that legal alternative.¹⁶⁹ Therefore, acts of civil disobedience often do not fall under the protective province of the necessity defense.

State courts have incorporated the Court’s holding and followed the rule that “if a reasonable legal alternative was available . . . as a means to avoid the threatened injury, [defendants] properly may be foreclosed from asserting a choice of evils defense.”¹⁷⁰ Courts have explicitly said: “The necessity defense was never intended to excuse criminal activity by those who disagree with the decisions and policies of the lawmaking branches of government.”¹⁷¹ This conflicts with acts of civil disobedience because

165. 21 AM. JUR. 2D *Criminal Law* § 135 (2019); *see also* *Planned Parenthood of Mid-Iowa v. Maki*, 478 N.W.2d 637, 640 (Iowa 1991) (citation omitted) (the necessity defense applies “only in emergency situations where the threatened harm is immediate and the threatened disaster imminent.”); *People v. Brandyberry*, 812 P.2d 674, 677–79 (Colo. App. 1990) (citations omitted) (holding that “[e]vidence of a generalized fear of future injury is not sufficient to warrant the invocation of a choice of evils defense,” and that the evidence “must affirmatively demonstrate the existence of a specific threat or likelihood of an imminent injury necessitating the actor’s conduct”).

166. 21 AM. JUR. 2D *Criminal Law* § 135.

167. *Brandyberry*, 812 P.2d at 677.

168. *Planned Parenthood of Mid-Iowa*, 478 N.W.2d at 640 (citing *U.S. v. Kabat*, 797 F.2d 580, 591 (8th Cir. 1986)).

169. *U.S. v. Bailey*, 444 U.S. 394, 410 (1980).

170. *Brandyberry*, 812 P.2d at 679 (citing *Bailey*, 444 U.S. at 410; *People v. Hocquard*, 236 N.W.2d 72 (Mich. Ct. App. 1975)).

171. *Kabat*, 797 F.2d at 591; *accord* *U.S. v. Dorrell*, 758 F.2d 427, 432 (9th Cir. 1985) (stating that the availability of “recourse to the political process” to address the defendant’s concerns on the country’s nuclear policy made the necessity defense unavailable). The *Kabat* court also indicated that if a court were to allow the necessity defense, it would essentially be saying “the ‘greater harm’ sought to be prevented” is the “course of action chosen by elected representatives.” 797 F.2d at 591. Negative policy judgments implying that the elected representatives are incorrect “are not the province of judge (or jury) under the separation of powers established by our Constitution.” *Id.* at 591–92.

disobedience against a government action does not necessarily require that all other political avenues to express displeasure with the government action be exhausted.¹⁷² The necessity defense is thus unavailable in most instances where civil disobedience would be necessary. This leaves individuals who meet the criteria for civil disobedience with the prospect of not voicing their political dissent at all for fear of punishment—a prospect that has been deemed unconstitutional.¹⁷³

C. Conclusion

Civil disobedience is compatible with two areas of American jurisprudence with which it could be construed to be in conflict. First, civil disobedience is in accord with notions of criminal intent because it merely provides an opportunity for *lessened* punishment, not a means to completely avoid punishment for acts that may be defined as criminal. Second, civil disobedience is necessary to fill the gaps left by the necessity defense. It will allow necessary protection for instances of persons acting on their genuinely held political dissent where the only inference to be drawn by a jury is that they are guilty simply because there is no other defense available.¹⁷⁴ This would be an unconstitutional restriction on political expression, a restriction that civil disobedience helps alleviate.

Under the doctrine of civil disobedience outlined herein, there is no danger of reaching such a negative policy judgment. The court allowing the defense is recognizing that the individual believes that the government act is wrong and is merely giving that individual the opportunity to be heard. If the objective criteria are met, the judge allows the defense to be presented. The only judgments the court need make are those relating to the individual's objective belief that the government was unjust and active disobedience was necessary. This involves no policy judgment by the judge regarding that government act.

172. Aquinas notes that refusal to obey an unjust law may be done without prior attempts to change that law. AQUINAS, *supra* note 30, at 1368 (of course, in Aquinas's day, the ordinary citizen had little recourse to the political process to effect such change, and so an ordinary necessity defense might have sufficed). Thoreau explicitly disavows the political process. THOREAU, *supra* note 36, at 266 (noting that even voting for what one thinks is right is "*doing* nothing" to advance what is right). Dr. King similarly believes that the political process is insufficient. *Letter from Birmingham Jail*, *supra* note 40.

173. See Keegan v. United States, 325 U.S. 478, 494 (1945).

174. See *id.*

V. CIVIL DISOBEDIENCE DEFENSE APPLIED TO *STATE V. KLAPSTEIN*

A. *The Clearwater County Defendants and the Necessity Defense*

Minnesota does not recognize civil disobedience as an independent defense. It follows the rest of the nation in allowing necessity as a defense, but not when the political system is ostensibly available to redress the grievance.¹⁷⁵ The necessity defense in Minnesota consists of three elements: “(1) there is no legal alternative to breaking the law, (2) the harm to be prevented is imminent, and (3) there is a direct, causal connection between breaking the law and preventing the harm.”¹⁷⁶

Nonetheless, the Clearwater County defendants prepared a necessity defense for their arguments to the district court, which the Minnesota Court of Appeals concluded they should be afforded an opportunity to present at trial.¹⁷⁷ Defendants argued on appeal that they met the prima facie elements of the defense, and refusal of the opportunity to assert a necessity defense would deprive them of their constitutional right to make a defense.¹⁷⁸ The Minnesota Court of Appeals refused to reverse the district court’s order because the state failed to demonstrate that presentation of a necessity defense would have a “critical impact” on the case.¹⁷⁹ However, on October 5, 2018, the district court excluded the Defendants’ proffered expert testimony regarding climate change and the need for civil disobedience from trial.¹⁸⁰

Ultimately, the Clearwater County defendants won their case without the necessity defense because the district court granted their motion for a

175. *State v. Rein*, 477 N.W.2d 716, 718 (Minn. Ct. App. 1991) (citing *U.S. v. Schoon*, 939 F.2d 826, 829 (9th Cir. 1991)) (noting that the necessity defense is unavailable where legal remedies are present, and citing with approval a Ninth Circuit decision holding as a matter of law “the necessity defense is unavailable regarding acts of indirect civil disobedience”).

176. *Id.* at 717 (citing *U.S. v. Seward*, 687 F.2d 1270, 1270 (10th Cir. 1982)).

177. *See State v. Klapstein*, No. 15-CR-16-413, 2018 WL 1902473, at *1 (Minn. Ct. App. Apr. 23, 2018), *cert. denied* (July 17, 2018).

178. Respondents’ Pretrial Appeal Brief and Addendum at 7–8, *State v. Klapstein*, No. 15-CR-16-414 (Minn. Ct. App. Apr. 23, 2018) [hereinafter Respondents’ Brief].

179. *State v. Klapstein*, No. 15-CR-16-413, 2018 WL 1902473, at *3. This decision also produced a vehement dissent advocating that under *Rein*, there is no necessity defense available for defendants such as the Clearwater County defendants, because they had legal alternatives, the harm was not imminent, and there was no direct causal connection between their actions and the harm sought to be averted. *Id.* at *3–5 (Connolly, J., dissenting).

180. Defendants’ Memorandum at 1, *State v. Klapstein*, No. 15-CR-16-413, 2018 WL 1902473, at *1 (Minn. Ct. App. Apr. 23, 2018), *review denied* (July 17, 2018).

directed judgment of acquittal on the grounds that the state had not proven that they had “caused criminal damage to the pipelines.”¹⁸¹ Nevertheless, the arguments that the Clearwater County defendants provided and intended to provide in support of the necessity defense are useful vehicles for evaluating how the proposed civil disobedience defense could be applied.

B. Civil Disobedience Instead of Necessity

While necessity is an affirmative defense to criminal liability, civil disobedience is a defense made to reduce or nullify sentencing. Therefore, a properly asserted defense of civil disobedience would essentially admit criminal liability to focus on the sentencing. This may result in a criminal proceeding focused solely on the issue of sentencing, such as a guilty plea followed by an evidentiary sentencing hearing. With this procedural framework in mind, it is apparent that the Clearwater County defendants could make a sufficient showing of each element of civil disobedience to significantly reduce or even receive nominal punishment.

1. An Act of Government

The government act at issue in *Klapstein* was the government’s stance on climate change and the lack of effective action taken to prevent it or mitigate its effects.¹⁸² A government act may include the laws, the system by which those laws are created, how those laws are enforced, and the general stances of the government enforcing the laws.¹⁸³

The Clearwater County defendants asserted that “years of political engagement by themselves and their allies” had failed to provoke effective action.¹⁸⁴ They clearly expressed a frustration with the current political system that was perpetuating inaction on the issue of climate change, if not with the general stance of the current government on climate change. This comports with both Thoreau’s and Dr. King’s conceptions of the government act. Thoreau took issue with the general stances of the American government on the issues of slavery and the war in Mexico.¹⁸⁵ Dr. King took issue with a system of government that was being manipulated to prevent change, as well as the means of enforcement that

181. Kraker, *Pipeline Country*, *supra* note 6.

182. *Klapstein*, 2018 WL 1902473, at *1.

183. *See supra* Part II.A.

184. Respondents’ Brief, *supra* note 178, at 6.

185. THOREAU, *supra* note 36.

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 679

helped to perpetuate injustice.¹⁸⁶ The existing political system that perpetuates a policy of relative inaction on the issue of climate change could fairly be characterized as the government act for purposes of establishing the first element of civil disobedience as outlined herein.

2. *That is Unjust*

To show that this political system is unjust requires that (1) it violates the conscience of the individual defendants, and (2) it has the effect of harming those it is applied against.¹⁸⁷

The Clearwater County defendants made a showing that government intractability on climate change violates their personal and collective consciences. They detailed their extensive and documented opposition to climate change.¹⁸⁸ This evidence, both testamentary and documentary in the form of court filings, letters to legislators, and petitions, could have satisfied the burden of proving that inaction on climate change violates the consciences of all the Clearwater County defendants.

The issue of proving harm as it relates to climate change could have proven less manageable. Harm, as applied in the civil disobedience context, is distinct from harm as applied in the necessity defense context

186. *Letter from Birmingham Jail*, *supra* note 40.

187. *See supra* Part II.B.

188. The brief reports:

Annette Klapstein, a retired attorney, noted that she has “testified at dozens of hearings,” that she and fellow activists “systematically wrote to every single legislative representative we had at the city level, at the county level, at the state level, at the federal level and asked them to meet with us to discuss what they were going to do to resolve the climate change issue,” and that she has signed hundreds of petitions and participated in dozens of marches and rallies. (Tr. at 12-14). Emily Johnston described co-founding an environmental group that did “everything from education to lobbying to protests, and occasionally direct action,” as well as “actual research and . . . turning people out to hearings, helping people figure out what to say at hearings.” (Tr. at 31-33). Ben Joldersma testified that he has attended many marches and protests, and that his activism has involved “organizing actions, . . . helping plan . . . affinity groups, . . . working with media, social media trying to help amplify the effect of the actions.” (Tr. at 54). Steven Liptay noted that he has worked as a videographer and support worker with environmental organizations in order to inspire people to take action. (Tr. at 63-65).

Respondents’ Brief, *supra* note 178, at 19.

(which generally requires that harm be imminent).¹⁸⁹ For civil disobedience, it may be sufficient to demonstrate that harm either has already occurred as a result of the government act, or that harm is likely to occur in the future if the government act continues unabated.¹⁹⁰

The Clearwater County defendants made an ample and credible showing of the harm that will result if government inaction on climate change is allowed to continue unchallenged. They asserted multiple times the “enormous and long-lasting harms of global climate change.”¹⁹¹ Emily Johnston testified that “[i]f these pipelines are not shut off, it is absolutely the end of a stable climate and the world as we know it.”¹⁹² The Clearwater County defendants also presented expert testimony from the “Director of the Climate Science, Awareness, and Solutions program at the Earth Institute” at Columbia University, who was also previously the Director of the NASA Goddard Institute for Space Studies:

[G]lobal warming from persistent high fossil fuel emissions is in the danger zone, that CO₂ [carbon dioxide] emissions from all such sources must be reduced with all deliberate speed, that the situation is becoming worse with each passing day, and that we are likely approaching climate tipping points from which there is no reasonable prospect of return.¹⁹³

In addition, the Clearwater County defendants cited evidence of detrimental effects on shorelines, the economy, wildlife, human populations, and agriculture.¹⁹⁴ The Clearwater County defendants planned to introduce evidence at trial demonstrating the detrimental health impacts of climate change, including “cancer, heart diseases, lung diseases, neurological disorders including stroke and cognitive decline, infectious diseases, developmental disorders, allergies, malnutrition, and mental illness.”¹⁹⁵ While most likely sufficient on its own, this evidence could have been supplemented by further studies that demonstrated more

189. Necessity applies where the harm is “instant, overwhelming, and leaves no alternative but the conduct in question.” *State v. Johnson*, 289 Minn. 196, 198, 183 N.W.2d 541, 543 (1971).

190. Consider Dr. King’s use of the threat of continued feelings of inferiority coupled with the demonstrated physical harm to civil rights protesters as part of his argument why segregation is unjust. *Letter from Birmingham Jail*, *supra* note 40.

191. Respondents’ Brief, *supra* note 178, at 16.

192. *Id.* at 26 (alteration in original).

193. *Id.* at 17.

194. *Id.* at 17–18.

195. Declaration of Bruce Snyder, MD, at 3, *State v. Klapstein*, No. 15-CR-16-414 (Sept. 3, 2018).

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 681

particularized impacts on human health.¹⁹⁶ With this evidence on hand, it is more than likely that the Clearwater County defendants could have carried the burden of establishing the requisite harm to show that the government act was unjust. This, coupled with the clear evidence of how the government act violates the conscience of these individuals, would have been enough to establish the second element of civil disobedience.

3. That Necessitates Active Disobedience

Active disobedience is necessary when the governmental acts cause harm and formal redress is unavailable. As previously noted, the Clearwater County defendants made an adequate showing of harm. The Clearwater County defendants also made an adequate showing of the lack of formal redress. However, the third element of civil disobedience is not automatically satisfied upon an adequate showing of the first two elements. In this case, in order to show that the government act was a lack of action about a certain issue, the defendants needed to affirmatively demonstrate that lack of governmental action. If this were not necessary, that evidence would be presented with the third element to prove lack of formal redress.¹⁹⁷

In addition, while the Clearwater County defendants demonstrated sufficient harm to establish that the government act is unjust, it may have taken additional evidence relating to harm to prove that civil disobedience was necessary. This may have included evidence that time was running out to alleviate the threatened harm from global climate change. The Clearwater County defendants alleged that the Supreme Court has recognized that harm relating to climate change is imminent.¹⁹⁸ They also

196. See generally NAT'L INST. OF ENVTL. HEALTH SCI'S, CLIMATE CHANGE AND HUMAN HEALTH (Apr. 2016) https://www.niehs.nih.gov/health/materials/climate_change_and_human_health_508.pdf [<https://perma.cc/49BU-RV3K>]; A.J. MCMICHAEL ET AL., WORLD HEALTH ORGANIZATION, CLIMATE CHANGE AND HUMAN HEALTH: RISKS AND RESPONSES (2003) <http://www.who.int/globalchange/publications/climchange.pdf> [<https://perma.cc/Y22D-AWTN>].

197. The evidence provided by the Clearwater County defendants relating to the lack of formal redress includes delineating the efforts they each have made in opposition to climate change. Respondents' Brief, *supra* note 178, at 19. Additionally, their evidence showed that "legal remedies ha[d] proven" to be ineffective due to outsized influence of business interests and especially the fossil fuel industry. *Id.* at 20.

198. *Id.* at 22 (citing *Massachusetts v. E.P.A.*, 549 U.S. 497, 521 (2007) (for the proposition that the refusal to regulate greenhouse gas emissions was "an 'imminent' harm

cited extensive testimony from their expert that time is of the essence when it comes to action on climate change.¹⁹⁹ This evidence could have been supplemented with reports stating that there are less than a dozen years left before humans can no longer reverse climate change to show that active disobedience was necessary, because soon it would be too late to act at all.²⁰⁰

Evidence of a lack of formal redress for the injury of the type the Clearwater County defendants needed to show for the first element also will satisfy the third element of civil disobedience. In addition, evidence of harm coupled with evidence of urgency will satisfy the burden of proving that civil disobedience was necessary. If both of these are shown by sufficient evidence, then the third and final element of civil disobedience has been demonstrated.

4. *The Decision*

Once sufficient evidence has been shown to support all three elements of civil disobedience, whether in the form of a defense at trial or an argument at a hearing, it is up to the decisionmaker to determine if the proffered evidence outweighs the criminal liability.²⁰¹ There may indeed be

to Massachusetts in light of the wealth of negative effects, including sea level rise, that result from climate change”).

199. *Id.* at 23–24.

200. *See, e.g.*, Christopher Joyce, *Climate Report Warns of Extreme Weather, Displacement of Millions Without Action*, NPR NEWS (Oct. 8, 2018), <https://www.npr.org/2018/10/08/655360909/grim-forecast-from-u-n-on-global-climate-change> [https://perma.cc/3LVF-44EF]; Chris Mooney & Brady Dennis, *The World Has Just Over a Decade to Get Climate Change Under Control, U.N. Scientists Say*, WASH. POST (Oct. 7, 2018), <https://www.washingtonpost.com/energy-environment/2018/10/08/world-has-only-years-get-climate-change-under-control-un-scientists-say> [https://perma.cc/65UQ-FTH7]; Jonathan Watts, *We Have 12 Years to Limit Climate Change Catastrophe, Warns UN*, GUARDIAN (Oct. 8, 2018), <https://www.theguardian.com/environment/2018/oct/08/global-warming-must-not-exceed-15c-warns-landmark-un-report> [https://perma.cc/2VKW-9KA5]).

201. It is at this point that an affirmative defense of civil disobedience may run afoul of presumptive or mandated sentences pursuant to a jurisdiction’s sentencing guidelines. By way of example, the State of Minnesota’s sentencing guidelines govern the sentencing of felonies but allow departures from the guidelines if there exist “identifiable, substantial, and compelling circumstances to support a departure.” MINN. SENTENCING GUIDELINES COMM’N, MINNESOTA SENTENCING GUIDELINES AND COMMENTARY 38 (2018), <https://mn.gov/sentencing-guidelines/guidelines/currentguidelines.jsp> [https://perma.cc/6TEN-T5WQ]. However, these factors are “advisory,” and departures are constrained where “otherwise established by case law” and statute. *Id.* at 39. If not otherwise prohibited by statute or case law in the State of Minnesota, a judge departing

2019] NOTE: CONSTITUTIONAL ALTERNATIVE TO INJUSTICE 683

instances where the chosen method of active disobedience carries such connotations of criminality that criminal liability may overcome the proffered defense.²⁰²

If, however, the proffered defense outweighs the criminal connotations of one's conduct, then the decisionmaker may decide to reduce the severity of punishment. This can take many forms, depending on the weight of the evidence. For example, a decisionmaker could reduce a felony to a misdemeanor, or reduce jail time to probation. However, civil disobedience is fundamentally not a means to obviate criminal liability altogether. Therefore, in extreme circumstances of a great injustice, the decisionmaker will find the defendant guilty, but may simply refuse to mete out punishment. Whatever the result, it must be concomitant with the credibility of the evidence, and must not be based on whether the decisionmaker agrees or disagrees with the defendant's personal views.

VI. CONCLUSION

The Constitution respects a citizen's right to disagree with the government. The First Amendment serves as a means to protect and encourage political dissent. This extends beyond pure speech. The Supreme Court also has recognized that disobedience is sometimes necessary as a means of expressing political dissent, and that in these instances, the disobedient actor must be protected.

The current means of protecting those who take disobedient action to express their political dissent are inadequate. The defense of necessity is more often than not unavailable to those who at least ostensibly have access to legal and political courses of action. This leaves a significant gap where those who have either attempted to evoke change through the political process and have been thwarted, or who objectively believe in the futility of the political process, unprotected if they try to exercise their

from the guidelines by reason of civil disobedience must "disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." *Id.* Therefore, before defendants seek to assert a defense of civil disobedience, they must determine whether the crime they are charged with is governed by sentencing guidelines, whether departures to those guidelines are permitted, and what must be done to secure a departure from the guidelines, if necessary. An alternative option for proponents of civil disobedience as a recognized defense is to petition the legislature or the responsible agency in their jurisdiction to directly create an exception for civil disobedience.

202. An example would be if an individual resorts to violence or wanton destruction of property as their method of active disobedience.

constitutional right to express their political dissent. This is why civil disobedience as a basis to reduce sentencing for crimes is necessary.

The elements of such a defense are that (1) there is a government action, (2) that is unjust, and (3) that *necessitates* active disobedience. “Government action” may include the laws, the system by which those laws are created, how those laws are enforced, and the general stances of the government enforcing the laws. Government acts are unjust when (1) they violate the individual’s conscience, and (2) harm those they are applied against. Government acts necessitate active disobedience to cause change when the governmental acts are causing harm and formal redress is unavailable.

The case from Clearwater County is an example of how this defense may be asserted. Even though the defendants were presented the opportunity to make an argument for necessity, they also could have asserted a civil disobedience defense. This would have allowed them greater protection for expressing their political dissent, for if the necessity defense fails, then civil disobedience is available to reduce sentencing once criminal liability has been established.

Civil disobedience as a defense that may be asserted to reduce or eliminate sentencing is not only constitutionally mandated, but is judicially manageable as well. It is inexcusable to continue to suppress expressions of political dissent when such a defense may be implemented.

Mitchell Hamline Law Review

The Mitchell Hamline Law Review is a student-edited journal. Founded in 1974, the Law Review publishes timely articles of regional, national and international interest for legal practitioners, scholars, and lawmakers. Judges throughout the United States regularly cite the Law Review in their opinions. Academic journals, textbooks, and treatises frequently cite the Law Review as well. It can be found in nearly all U.S. law school libraries and online.

mitchellhamline.edu/lawreview

MH

MITCHELL | HAMLINE

School of Law

© Mitchell Hamline School of Law
875 Summit Avenue, Saint Paul, MN 55105
mitchellhamline.edu